

ARTICLES

RICO, Merger, and Double Jeopardy

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I. INTRODUCTION

In recent years, convictions under the Racketeer Influenced and Corrupt Organizations Act (RICO)¹ have been frequently challenged based on the common law doctrine of merger² and the Fifth Amendment protection against double jeopardy.³ These challenges have generally failed. They illustrate that current law does not provide sufficient merger and double jeopardy protection to a RICO defendant who is facing prosecution for conduct for which he was previously tried or that forms the basis for prosecution for multiple offenses.

Underlying these failed challenges is a disturbing suggestion by recent Supreme Court decisions that double jeopardy no longer imposes constitutional limitations on legislative power to impose multiple punishments. Instead, the Court has deferred to legislatures the right to decide what punishments are constitutionally permissible. However, a recent Supreme

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1. 18 U.S.C. §§ 1961-68 (1988).

2. The common law doctrine of merger applies when a defendant has committed a crime that includes a lesser defined offense. For instance, robbery is a theft accomplished with threat or use of force or fear. Thus theft is a lesser included offense of robbery and merges for purposes of conviction, not merely sentencing and punishment, into the crime of robbery. *United States v. Woodward*, 726 F.2d 1320, 1327 (9th Cir. 1983), *rev'd in part on other grounds*, 469 U.S. 105 (1985); *Coates v. State of Maryland*, 436 F. Supp. 226, 230 (D. Md. 1977).

3. ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . ." U.S. CONST. amend. V.

Court decision, *Grady v. Corbin*,⁴ has changed the traditional double jeopardy analysis, expanding double jeopardy protection for defendants in cases of subsequent single act criminal prosecutions. Unfortunately, the United States Courts of Appeals have split on whether *Grady's* protection extends to RICO defendants confronted with multiple prosecutions, and the Supreme Court did not address whether *Grady* would extend to multiple punishments. Only by extending *Grady's* double jeopardy protection to RICO and other complex statutory schemes will courts finally afford adequate constitutional protection for RICO defendants against successive prosecutions and multiple punishments.

This Article will examine RICO as it has been interpreted by the United States Courts of Appeals and the Supreme Court of the United States in an effort to determine the effects that merger and double jeopardy have had in the past, and should have in the future, upon RICO prosecutions. Because the doctrines of merger and double jeopardy are criminal law principles, only the criminal aspects of RICO will be examined.

Initially, this Article will explore the purpose and history of RICO and examine the doctrines of merger and double jeopardy and their application to RICO indictments and convictions. Additionally, the impact of double jeopardy on other complex statutory schemes will be reviewed both in conjunction with RICO indictments and as a predictor of possible RICO double jeopardy analysis. This Article will then focus on the disturbing trend of the Supreme Court to limit double jeopardy protection when Congress has approved multiple punishments and convictions. Finally, this Article will examine *Grady v. Corbin*, focusing on its dramatic expansion of double jeopardy protection and its potential to provide additional constitutional protection for RICO defendants.

II. RICO ACT

The purpose of RICO is to target organized crime. The legislative history of RICO reveals that in enacting the Organized Crime Control Act of 1970, of which RICO is a part, Congress found that:

It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal

4. 110 S. Ct. 2084 (1990).

tools in the evidence gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.⁵

This Act further provides that “. . . the provisions of this title shall be liberally construed to effectuate its remedial purposes” and that “[n]othing in this title shall supersede any provision of Federal . . . law imposing criminal penalties . . . in addition to those provided for in this title.”⁶

These provisions have been construed

. . . to permit, perhaps even to encourage, courts to impose cumulative sentences for RICO offenses and the underlying crimes. Cumulative sentences are the “enhanced sanctions” which Congress deemed necessary to treat the spreading disease of organized crime. In fact, if cumulative convictions and sentences were disallowed by courts, Congress’ purposes to eradicate organized crime would be thwarted because the RICO penalties are in many cases lighter than penalties for underlying offenses.⁷

Congressional intent to permit cumulative punishment is by no means clear, however, and nothing in the legislative history of RICO expressly indicates a Congressional intent to permit successive prosecutions for the same conduct, whether one or more of the prosecutions are brought under RICO.⁸

A RICO defendant must commit two predicate acts in order to be convicted under the RICO act. Section 1961 of RICO defines key terms and a number of state and federal crimes that are “predicate acts.”⁹ Any two predicate acts

5. Organized Crime Control Act of 1970, Statement of Findings and Purpose, Pub. L. No. 91-452, 1970 U.S.C.C.A.N. (84 Stat. 922-923) 1073.

6. Organized Crime Control Act of 1970 § 904, Pub. L. No. 91-452, 1970 U.S.C.C.A.N. (84 Stat. 947) 1104.

7. *United States v. Sutton*, 700 F.2d 1078, 1081 (6th Cir. 1983). However, in view of Congressional intent that the criminal forfeiture provision of § 1963 would be the central weapon in the RICO arsenal against organized crime, this interpretation may be questionable. See Linda Koenig & Doris Godinez-Taylor, Comment, *The Need for Greater Double Jeopardy and Due Process Safeguards in RICO Criminal and Civil Actions*, 70 CAL. L. REV. 724, 747 (1982).

8. See George C. Thomas III, *RICO Prosecutions and the Double Jeopardy/Multiple Punishment Problem*, 78 NW. U. L. REV. 1359, 1417 (1984); see also Koenig & Godinez-Taylor, *supra* note 7, at 746-47.

9. § 1961 provides in part:

As used in this chapter [18 U.S.C. §§ 1961 *et seq.*]

(1) “racketeering activity” means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene

matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic); (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds); (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States; or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act.

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter [enacted Oct. 15, 1970] and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.

become a "pattern of racketeering activity."¹⁰ A RICO defendant must have committed at least two of these predicate acts within 10 years. The defendant must also be guilty of additional conduct proscribed under § 1962.

RICO creates four separate criminal offenses under § 1962. Section 1962(a)¹¹ prohibits the establishment, acquisition, or control of illegitimate or legitimate businesses with illegally derived funds. Illegally derived funds are defined as any income derived directly or indirectly from a pattern of racketeering or any loan sharking activities in which the particular defendant participated as a principal.¹² Section 1962(b)¹³ prohibits the illegal acquisition, maintenance of an interest in, or control of any enterprise affecting interstate or foreign commerce. Problems of proof have made § 1962(a) prosecutions extremely rare, and § 1962(b) prosecutions are infrequent.¹⁴

The key provision is § 1962(c),¹⁵ which prohibits any

10. 18 U.S.C. § 1961(5) (1988).

11. § 1962(a) provides:

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or [sic] racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

18 U.S.C. § 1962(a) (1988).

12. *Id.*

13. § 1962(b) provides:

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect interstate or foreign commerce.

18 U.S.C. § 1962(b) (1988).

14. David E. Morris, *Comment, An Introductory Examination of the Racketeer Influenced and Corrupt Organizations Act*, 15 AKRON L. REV. 771, 775-78 (1982). This Comment sets forth a concise overview of §§ 1962(a) and (b). *Id.*

15. § 1962(c) provides:

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of

employee or person associated with an enterprise from conducting or participating directly or indirectly in the conduct of the enterprise through a pattern of racketeering or collection of unlawful debt. The statute defines "racketeering activity" and "enterprise" broadly; as a result, § 1962(c) encompasses a wide variety of crimes, including white collar crime.¹⁶

Section 1962(d)¹⁷ provides that a conspiracy to violate §§ 1962(a), (b), or (c) is a separate substantive offense. The majority of reported prosecutions have been brought under §§ 1962(c) and (d); however, the double jeopardy issues raised by § 1962(c) apply with equal force to §§ 1962(a) and (b). Thus, discussions of cases prosecuted under § 1962(c) apply equally to § 1962(a) and § 1962(b) prosecutions.

Frequently, RICO prosecutions for predicate acts of racketeering activity are alleged as separate counts (one act per count) in the indictment when those predicate acts are themselves separate federal crimes. When predicate acts are not alleged as separate counts, prosecutors use a special verdict to allow the jury to determine whether the predicate acts alone were committed.¹⁸ The latter case does not present merger or double jeopardy issues because the defendant is not subjected to multiple prosecutions or punishments. Likewise, prior state prosecutions for predicate acts that are prosecuted under RICO do not present double jeopardy issues, regardless of whether the prior state prosecutions resulted in conviction¹⁹ or acquittal.²⁰ Double jeopardy does not apply because the dual sover-

such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c) (1988).

16. See *supra* note 9.

17. § 1962 (d) provides, "(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." 18 U.S.C.A. § 1962(d) (West Supp. 1991).

18. *United States v. Sheeran*, 699 F.2d 112, 115-16 (3rd Cir.), *cert. denied*, 461 U.S. 931 (1983); *United States v. Rone*, 598 F.2d 564, 566 (9th Cir. 1979), *cert. denied sub nom. Little v. United States*, 445 U.S. 946 (1980).

19. *United States v. Russotti*, 717 F.2d 27, 30-32 (2nd Cir. 1983), *cert. denied sub nom. Piccarreto v. United States*, 465 U.S. 1022, *cert. denied sub nom. Marino v. United States*, 465 U.S. 1022 (1984).

20. *United States v. Malatesta*, 583 F.2d 748, 757 (5th Cir. 1978), *modified on other grounds en banc*, 590 F.2d 1379 (5th Cir.), *cert. denied*, 444 U.S. 846 (1979), *cert. denied sub nom. Bertolotti v. United States*, 440 U.S. 962 (1979), *cert. denied sub nom. Dodaro v. United States*, 444 U.S. 846 (1979), *cert. denied sub nom. Lynch v. United States*, 444 U.S. 846 (1979), *cert. denied sub nom. Bertolotti v. United States*, 444 U.S. 846 (1979); *United States v. Frumento*, 563 F.2d 1083, 1086-1089 (3rd Cir. 1977), *cert. denied sub nom. Millhouse v. United States*, 434 U.S. 1072 (1978), *cert. denied sub nom. Sills v.*

eignty doctrine as set forth by the United States Supreme Court in *Abate v. United States*,²¹ precludes any finding of double jeopardy when successive prosecutions are by different sovereigns.²² The *Abate* court recognized that state and federal governments are separate sovereignties, each deriving its power from a different source. Therefore, a crime defined by both sovereignties offends the peace of each sovereignty separately and may be punished separately by each.²³

Consequently, double jeopardy and merger problems arise only in the context of (1) prior or simultaneous federal predicate act prosecutions and § 1962(a), (b), and/or (c) RICO prosecutions, or (2) successive federal conspiracy prosecutions, at least one of which is a § 1962(d) RICO conspiracy prosecution.

In a typical RICO case, multiple defendants are charged with one count of violating 18 U.S.C. § 1962(c), one count of violating 18 U.S.C. § 1962(d), and multiple "predicate act" counts. All of these counts are generally charged in one indictment or divided in virtually any fashion between successive indictments. Typically, the RICO defendants then move to dismiss either the § 1962(c) and § 1962(d) counts or the predicate act counts on the ground of double jeopardy. The substantive RICO counts and the predicate act counts may be considered to be the same offense, thereby invoking the constitutional protection against double jeopardy.²⁴

Although RICO has been viewed purely as a unique kind of recidivist or penalty enhancement statute,²⁵ the prevalent view is that RICO is not a recidivist statute²⁶ for the following reasons: (1) A RICO conviction requires more than the commission of two or more predicate acts; it also requires proof of

United States, 434 U.S. 1072 (1978). See Barry Tarlow, *RICO Revisited*, 17 GA. L. REV. 291, 406-408 (1983).

21. 359 U.S. 187 (1959).

22. *United States v. Solano*, 605 F.2d 1141, 1143 (9th Cir. 1979), *cert. denied*, 444 U.S. 1020 (1980), *cert. denied sub nom.* *England v. United States*, 444 U.S. 1020 (1980). The dual sovereignty doctrine not only permits successive state and federal prosecutions and convictions for the same offense, but also permits two different states to prosecute and convict for the same crime. *Heath v. Alabama*, 474 U.S. 82 (1985).

23. *Heath*, *supra* note 22, at 88 (quoting *United States v. Lanza*, 260 U.S. 377, 382 (1922)).

24. See *infra* text accompanying note 49.

25. *United States v. Starnes*, 644 F.2d 673, 677-679 (7th Cir.), *cert. denied*, 454 U.S. 826 (1981), *cert. denied sub nom.* *Roland v. United States*, 454 U.S. 826 (1981).

26. *United States v. Bledsoe*, 674 F.2d 647, 659 (8th Cir.), *cert. denied sub nom.* *Phillips v. United States*, 459 U.S. 1040 (1982), and *appeal after remand*, 726 F.2d 417 (8th Cir. 1984).

an association with an enterprise, and (2) the Organized Crime Control Act of 1970 deals with recidivism in a separate title, Title X (RICO is Title IX).²⁷ The Supreme Court has supported this prevalent view when interpreting the Continuing Criminal Enterprise (CCE) statute²⁸ (dealing with drug trafficking), a statute very similar in language and intent to RICO. The Supreme Court found that the CCE statute is not a recidivist statute but a statute creating an offense separate from the required predicate act offense.²⁹

III. INCLUDED OFFENSES AND MERGER

The doctrine of merger and the concept of included offenses are closely related to the doctrine of double jeopardy as applied to RICO prosecutions. At common law, one could not be convicted of both (1) a principal offense that was a fel-

27. *United States v. Anderson*, 626 F.2d 1358, 1367-68 n.17 (9th Cir. 1980), *cert. denied sub nom. Elkins v. United States*, 453 U.S. 912 (1981), *cert. denied sub nom. Sutton v. United States*, 453 U.S. 912 (1981), *cert. denied sub nom. Adams v. United States*, 453 U.S. 912 (1981), *cert. denied sub nom. Cravens v. United States*, 453 U.S. 912 (1981), *cert. denied sub nom. Harris v. United States*, 453 U.S. 912 (1981), *cert. denied sub nom. Hensley v. United States*, 453 U.S. 912 (1981), *cert. denied sub nom. Holmes v. United States*, 453 U.S. 912 (1981).

28. 21 U.S.C. § 848 provides in part:

(a) Penalties; forfeiture. Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or \$2,000,000 if the defendant is an individual or \$5,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this title; except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 30 years and which may be up to life imprisonment, to a fine not to exceed the greater of twice the amount authorized in accordance with the provisions of Title 18, or \$4,000,000 if the defendant is an individual or \$10,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this title.

(c) "Continuing criminal enterprise" defined. For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—

(1) he violates any provision of this subchapter or subchapter II the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

21 U.S.C. § 848(a), (c) (1988).

29. *Garrett v. United States*, 471 U.S. 773, 779-86, *reh'g denied*, 473 U.S. 927 (1985).

ony and (2) a necessarily included offense that was a misdemeanor. Under the doctrine of merger, the necessarily included offense merged into the principal offense for purposes of conviction.³⁰ This distinction between felony and misdemeanor offenses in merger no longer exists. The doctrine of merger applies if one offense, even a felony, is necessarily included in another. However, application of the doctrine is subject to the intent of the legislature.³¹

Rule 31(c) of the Federal Rules of Criminal Procedure provides that "[t]he defendant may be found guilty of an offense necessarily included in the offense charged. . . ." Under Rule 31(c), which merely restated a common law rule,³² a defendant charged in one count with an offense such as robbery is, *ipso jure*, charged as well with every necessarily included offense of the principal charge such as theft. This rule is most clearly applied in cases where an appellate court, after reviewing a conviction on a charged offense, finds that the charged offense was not proved but directs the entry of conviction of an included offense that was proved.³³

Rule 31(c) speaks in terms of an offense "necessarily included." At common law, a distinction was made between a necessarily included offense and a lesser included offense. A necessarily included offense is always included in the principal offense, regardless of the facts. For instance, the crime of theft is necessarily included in the principal offense of robbery. In contrast, whether an offense is a lesser included offense of the principal offense is dependent upon the facts of the case.³⁴ An

30. *Purdum v. United States*, 249 F.2d 822, 826 (10th Cir. 1957), *cert. denied*, 355 U.S. 913 (1958). For an example of merger in the context of the Continuing Criminal Enterprise statute, 21 U.S.C. § 848 (1988), see *United States v. Rosenthal*, 793 F.2d 1214, 1246, *modified*, 801 F.2d 378 (11th Cir. 1986), *cert. denied*, 480 U.S. 919 (1987), *cert. denied sub nom.* *Stewart v. United States*, 480 U.S. 919 (1987), *cert. denied sub nom.* *Junker v. United States*, 480 U.S. 919 (1987). In *Rosenthal*, the Court held that a conviction for importing cocaine under 21 U.S.C. § 963 merged with a CCE conviction.

31. *Prince v. United States*, 352 U.S. 322 (1957); *United States v. Cedar*, 437 F.2d 1033, 1036 (9th Cir. 1971) (here again the challenge is only to multiple sentencing); 21 AM. JUR. 2D *Criminal Law* § 21 (1981). The cases speak almost always of merger for the purposes of punishment, and the defendants apparently only complain of multiple sentencing (such as in *Cedar*, 437 F.2d at 1033). Obviously, one would not find discussion of the multiple conviction problem if merger were held to apply *only* to punishment, thereby leaving the multiple convictions unaffected.

32. *Beck v. Alabama*, 447 U.S. 625, 633 (1980).

33. *Government of the Virgin Is. v. Josiah*, 641 F.2d 1103, 1108 (3rd Cir. 1981); *United States v. Cobb*, 558 F.2d 486, 488 (8th Cir. 1977.).

34. *Olais-Castro v. United States*, 416 F.2d 1155, 1157, 11 A.L.R. Fed. 165, 168-69 (9th Cir. 1969); see also Walter W. Jones, Jr., Annotation, *What Constitutes Lesser*

example would be a felony murder statute that recognized several different felonies as included within the principal felony murder offense. To avoid confusion, this Article will use the term included offense to encompass both necessarily included offenses and lesser included offenses.

Rule 31(c) does not require charging a principal offense and each necessarily included offense in separate counts.³⁵ However, the courts have construed such charging to be proper,³⁶ and it usually occurs when uncertainty exists as to whether an offense is included.³⁷ Challenges to this form of charging usually arise in the context of multiple sentencing and virtually never in the context of multiple charging.³⁸ The absence of challenges to multiple charging is peculiar because the separate charging of principal and included offenses results in multiple charging of each included offense. Thus, a defendant is charged once with a necessarily included offense in the principal charge count and again with the same offense in the separate included offense count.

RICO is essentially a greater offense statute. RICO contemplates convicting and sentencing defendants for principal offenses under § 1962(c) in addition to convicting and sentencing for predicate offenses under § 1961. The predicate offenses are necessarily included offenses within the meaning of Rule 31(c).³⁹ Although legislative intent is dispositive and overrides

Offenses "Necessarily Included" in Offenses Charged, Under Rule 31(c) of Federal Rules of Criminal Procedure, 11 A.L.R. FED. 173 (1972).

35. *United States v. McCue*, 160 F. Supp. 595, 603 (D. Conn. 1958).

36. *Gaunt v. United States*, 184 F.2d 284, 290 (1st Cir. 1950), *cert. denied*, 340 U.S. 917, *reh'g denied*, 340 U.S. 939 (1951); *Ekberg v. United States*, 167 F.2d 380, 385 (1st Cir. 1948).

37. *Rutkowski v. United States*, 149 F.2d 481 (6th Cir. 1945); *Wilson v. United States*, 149 F.2d 814 (9th Cir. 1945), *cert. denied*, 326 U.S. 788 (1946), *reh'g denied*, 327 U.S. 813 (1946).

38. *Miller v. United States*, 147 F.2d 372 (2d Cir. 1945); *Costner v. United States*, 139 F.2d 429 (4th Cir. 1943); *but see United States v. Isaacs*, 347 F. Supp. 743, 757 (N.D. Ill. 1972), where one defendant unsuccessfully sought the inappropriate relief of having the government elect between two principal offenses and twelve offenses apparently included in one or the other principal offense. The appropriate relief would have been a motion to strike the counts containing the twelve included offenses on the ground that the defendant was already charged with the included offenses in the principal offenses counts.

39. *United States v. Hartley*, 678 F.2d 961, 991-92, *reh'g denied*, 688 F.2d 852 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170, *cert. denied sub nom. Treasure Isle, Inc. v. United States*, 459 U.S. 1183 (1983). The test to determine what is an included offense is discussed *infra*: the reversal of the convictions on predicate counts requires reversal of the conviction on the § 1962(b) count, as well as the conviction on the § 1962(d) count. *United States v. Brown*, 583 F.2d 659, 669 (3rd Cir. 1978), *cert. denied*, 440 U.S.

the application of the doctrine of merger in RICO cases,⁴⁰ the question of included offenses raises the issue of double jeopardy.⁴¹

IV. THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall be "subject for the same offense to be twice put in jeopardy of life and limb."⁴²

The Supreme Court has recognized that the underlying idea behind the Double Jeopardy Clause, deeply ingrained in Anglo-American Jurisprudence, is that

. . . the State with its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.⁴³

The Double Jeopardy Clause provides three prong protection against: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.⁴⁴ The collateral estoppel issue of double jeopardy may also act as a bar to the introduction of evidence at a subsequent

909 (1979), *cert. denied sub nom.* Greenblatt v. U.S., 440 U.S. 909 (1979), *reh'g denied*, 441 U.S. 917 (1979). As previously noted, the rule would be the same if the RICO count were brought under § 1962(a) or (c). See Linda Koenig & Doris Godinez-Taylor, Note, *The Need for Greater Double Jeopardy and Due Process Safeguards in RICO Criminal and Civil Actions*, 70 CAL. L. REV. 724, 744-46 (1982).

40. See *supra* note 31 and accompanying text.

41. Many commentators have recognized this double jeopardy issue. See George C. Thomas III, *RICO Prosecutions and the Double Jeopardy/Multiple Punishment Problem*, 78 NW. U. L. REV. 1359 (1984); Gary E. Becker, *Multiple Prosecutions and Punishment Under RICO: A Chip off the Old "Blockburger,"* 52 U. CIN. L. REV. 467, 469 (1983); Barry Tarlow, *RICO: The New Darling in the Prosecutor's Nursery*, 49 FORDHAM L. REV. 165, 263 (1980). But see Barry Tarlow, *RICO Revisited*, 17 GA. L. REV. 291, 401-06 (1983), where the author concluded that double jeopardy protection is far more limited where the predicate and principal offenses are tried simultaneously instead of successively. As we shall see, that should not be true.

42. U.S. CONST. amend. V.

43. *Green v. United States*, 355 U.S. 184, 187-88 (1957).

44. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). For a general discussion of double jeopardy, see Ernest H. Schopler, Annotation, *Supreme Court's Views of Fifth Amendment's Double Jeopardy Clause Pertinent to or Applied in Federal Criminal Cases*, 50 L.Ed.2d 830 (1978).

trial.⁴⁵

The United States Supreme Court in *Blockburger v. United States*⁴⁶ set forth the basic test for double jeopardy analysis: "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is *whether each provision requires proof of a fact which the other does not . . .*"⁴⁷

In the case of included offenses, application of the *Blockburger* test clearly establishes only one offense. The included offense does not require proof of a fact not contained in the principal offense. Under *Blockburger*, greater and included offenses are considered to be the same offense. Accordingly, prosecution for an included offense following prosecution for the greater offense,⁴⁸ or prosecution for a greater offense following prosecution for an included offense,⁴⁹ would be barred by double jeopardy.

V. DOUBLE JEOPARDY AND RICO

A. *The Blockburger Test*

A straightforward application of the *Blockburger* test to RICO counts and separate predicate act counts would bar multiple prosecutions of RICO. A RICO violation is a greater offense with the minimum requirement of two predicate acts as the lesser included offense. However, two different situations must be distinguished: prosecutions of defendants under, first, § 1962(a), (b) and/or (c) counts and predicate act counts cases and, second, RICO counts and non-predicate act counts arising out of the same transaction (although nothing prevents these latter counts from being alleged as RICO predicate act counts). The federal courts of appeals have inconsistently applied the *Blockburger* test in RICO cases, reflecting the uncertainty of its proper application to a complex statutory scheme.⁵⁰

45. See Tarlow, *supra* note 20, at 414-16. This aspect of double jeopardy is beyond the scope of this Article.

46. 284 U.S. 299 (1932).

47. *Id.* at 304 (emphasis supplied).

48. *Harris v. Oklahoma*, 433 U.S. 682 (1977); *Payne v. Virginia*, 468 U.S. 1062, *reh'g denied*, 468 U.S. 1250 (1984).

49. *Brown v. Ohio*, 432 U.S. 161 (1977).

50. Some courts have called the *Blockburger* test the "same evidence test." This label is erroneous because the *Blockburger* test has nothing to do with the evidence

The Ninth Circuit in *United States v. Rone*⁵¹ perceived a potential double jeopardy issue in a RICO prosecution. In that case, the defendant was charged with a § 1962(c) substantive count and charged separately with the minimum two predicate act counts. Under the *Blockburger* test, the predicate acts were necessarily included in the § 1962(c) substantive count because the § 1962(c) count required proof of all the elements of the two predicate offenses.⁵² Therefore, although the § 1962(c) count required proof of a fact (criminal enterprise) that the predicate offenses did not, the predicate offenses did not require proof of any facts not required by the § 1962(c) count.⁵³

While application of the *Blockburger* test is seemingly straightforward, other circuits have found that a predicate act count in an indictment is not the same offense for double jeopardy purposes as the § 1962(c) substantive count because the latter count has an element that the predicate act counts do not have.⁵⁴ This application of the *Blockburger* test is clearly incomplete because only one-half of the test is applied. Such an application causes an erroneous result, as noted by the Sixth Circuit.⁵⁵

The Second Circuit, in *United States v. Boylan*⁵⁶ applied the *Blockburger* test to a § 1962(c) substantive count and a predicate act count alleging illegal payments by union officials. The court found different offenses because the same act or transaction was not proscribed by the two statutes in question.⁵⁷ The court found that § 1962(c) proscribed a "pattern" of illegal activities, while the predicate act count proscribed illegal payments. Thus, the court reasoned that the two offenses implemented different congressional purposes. The court overlooked the fact that illegal payments are necessarily included

presented at trial, but is concerned solely with the statutory elements of the offenses charged. *Grady v. Corbin*, 110 S. Ct. 2084, 2093 n.12 (1990).

51. 598 F.2d 564 (9th Cir. 1979), *cert. denied sub nom.* Little v. United States, 445 U.S. 946 (1980).

52. *Id.* at 571.

53. However, the court concluded that congressional intent authorizing cumulative punishment was controlling; therefore, cumulative conviction and sentencing would not violate the double jeopardy clause. *Id.* at 571-72.

54. *United States v. Grande*, 620 F.2d 1026, 1030 (4th Cir. 1980), *cert. denied sub nom.* Castagna v. United States, 449 U.S. 830 (1980), *cert. denied sub nom.* Berg v. United States, 449 U.S. 919 (1980); *United States v. Peacock*, 654 F.2d 339, 349 (5th Cir. 1981), *on reh'g*, 686 F.2d 356 (5th Cir. 1982), *cert. denied*, 464 U.S. 965 (1983).

55. *United States v. Sutton*, 700 F.2d 1078, 1081 n.2 (6th Cir. 1983).

56. 620 F.2d 359 (2d Cir. 1980), *cert. denied*, 449 U.S. 833 (1981).

57. *Id.* at 361.

in the illegal activities. The Ninth Circuit subsequently denied a similar double jeopardy challenge on the authority of this Second Circuit case.⁵⁸

The Seventh Circuit in *United States v. Aleman*⁵⁹ came to the same conclusion as the Second Circuit without mentioning the *Blockburger* test.⁶⁰ The defendants were charged with a § 1962(c) substantive count, a § 1962(d) conspiracy count, and a predicate act count. However, the court overlooked the fact that the predicate act was an included offense of the substantive § 1962(c) violation.⁶¹ As a result of this oversight, the court erroneously compared each count to the other counts and concluded that no "multiplicity" problem was presented!⁶²

In these cases, the Second, Fourth, Fifth, and Seventh Circuits were struggling to give effect to the perceived legislative intent behind RICO to permit multiple convictions and punishments. In doing so, however, the courts ignored or emasculated the *Blockburger* test. These judicial efforts to avoid the preclusive effect of the *Blockburger* test were in fact unnecessary in light of the recent Supreme Court trend expanding legislative authority to override double jeopardy protection.⁶³

In *Whalen v. United States*,⁶⁴ the Supreme Court held that the *Blockburger* test is only a rule of statutory construction that must give way in the face of clear legislative intent.⁶⁵ This view that the legislature may override the Double Jeopardy Clause departs from the usual rule that the Constitution cannot be altered by ordinary legislative enactment and is quite recent in origin.⁶⁶

Following the direction of the Supreme Court, numerous courts have refused to apply the *Blockburger* test to double jeopardy claims in simultaneous prosecutions of § 1962(c) substantive counts and separate predicate act counts. These courts

58. *United States v. DeRosa*, 670 F.2d 889, 895 (9th Cir. 1982), *cert. denied sub nom. Bertman v. United States*, 459 U.S. 993 (1982), *cert. denied sub nom. DeSantis v. United States*, 459 U.S. 1014 (1982).

59. 609 F.2d 298 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980).

60. *Id.* at 306-07.

61. *Id.* at 307.

62. *Id.*

63. See *Whalen v. United States*, 445 U.S. 684, 691-92 (1980); *Albernaz v. United States*, 450 U.S. 333, 340 (1981); *Missouri v. Hunter*, 459 U.S. 359, 366-69 (1983). See also *infra* text accompanying notes 142-160.

64. 445 U.S. 684 (1980).

65. *Id.* at 689 n.3. The defendant, Whalen, was convicted of rape and felony-murder, the felony being the rape for which he had also been convicted.

66. See *infra* text accompanying notes 142-160.

reason clear evidence exists of Congressional intent to authorize multiple punishments and convictions. Consequently, these courts have found no double jeopardy violations.⁶⁷

The Second Circuit, however, did rely on the *Blockburger* test in *United States v. Biasucci*⁶⁸ to find that a § 1962(b) offense is a different offense from a § 1962(c) offense based on the same acts or transactions.⁶⁹ Even in cases of successive RICO prosecutions, where the *Blockburger* test is not applied, the double jeopardy issue remains. The test then appears to be whether the RICO offense, "in a literal sense," is the same offense as one or more of its predicate acts.⁷⁰ This test provides little comfort to RICO defendants because a RICO offense is not literally the same offense as one of its predicate acts.⁷¹

Courts also apply the *Blockburger* test in RICO prosecutions when RICO substantive or conspiracy counts and non-predicate act counts are charged.⁷² The prosecution of the nonpredicate act counts usually precedes the RICO counts prosecution and results in separate indictments. In such situations, courts apply the *Blockburger* test and compare the elements of the two counts.⁷³ In an abstract comparison, the statutory elements of the offense determine if the offenses are the same, not the evidence or specific facts of the individual

67. *United States v. Boffa*, 688 F.2d 919, 938 (3rd Cir. 1982), *on remand*, 557 F. Supp. 306, *aff'd*, 723 F.2d 889, *cert. denied*, 460 U.S. 1022, *cert. denied sub nom.* Kalmar v. *United States*, 460 U.S. 1028, *cert. denied*, 465 U.S. 1066 (1984); *United States v. Truglio*, 731 F.2d 1123, 1129 (4th Cir.), *cert. denied*, 469 U.S. 862 (1984); *United States v. Hawkins*, 658 F.2d 279, 286-87 (5th Cir. 1981); *United States v. Sutton*, 700 F.2d 1078, 1080-81 (6th Cir. 1983); *United States v. Hampton*, 786 F.2d 977, 979-80 (10th Cir. 1986).

68. 786 F.2d 504 (2d Cir. 1986), *cert. denied*, 479 U.S. 827 (1986), *cert. denied sub nom.* Capo v. *United States*, 479 U.S. 827 (1986).

69. *Id.* at 515-16.

70. *United States v. Grayson*, 795 F.2d 278, 283 (3rd Cir. 1986), *cert. denied sub nom.* Robinson v. *United States*, 479 U.S. 1054 (1987), *cert. denied*, 481 U.S. 1018 (1987) (noting as well that the substantive RICO provision is intended to deter racketeering, a different activity from that at which the predicate provision is directed). In *United States v. Johnson*, 911 F.2d 1394, 1397-98 (10th Cir. 1990), the court upheld separate convictions for a RICO conspiracy and a drug conspiracy arising from the same conduct, relying on *Grayson*, 795 F.2d at 278, and *United States v. Kragnes*, 830 F.2d 842 (8th Cir. 1987).

71. *Grayson*, 795 F.2d at 283.

72. *United States v. Boldin*, 772 F.2d 719, 726 (11th Cir. 1985), *modified on reh'g*, 779 F.2d 618 (11th Cir. 1985), *cert. denied sub nom.* Crump v. *United States*, 475 U.S. 1048 (1986), *cert. denied sub nom.* Scarborough v. *United States*, 475 U.S. 1098 (1986), *cert. denied sub nom.* Luck v. *United States*, 475 U.S. 1110 (1986).

73. *Boldin*, 772 F.2d at 726.

case.⁷⁴

Applying this abstract comparison, the Ninth Circuit in *United States v. Solano*⁷⁵ held that because RICO racketeering activity in the abstract does not necessarily involve drug related activity, a RICO conspiracy count predicated on drug related activity is not the same offense as a prior drug conspiracy count.⁷⁶ Therefore, application of the *Blockburger* test results in no double jeopardy violation.⁷⁷ This result may be the product of the pretrial nature of many double jeopardy appeals.⁷⁸ Frequently, the appellate court does not know what the evidence will show at trial and is unwilling to prejudge the case in an interlocutory appeal.⁷⁹ However, the Supreme Court has also adopted this comparison of statutory elements in the abstract in determining whether one offense is included under Rule 31(c) of the Federal Rules of Criminal Procedure.⁸⁰

This application of the *Blockburger* test in the abstract is questionable in the case of a complex statute. Complex statutes permit violation in a number of alternative ways; however, only one of the alternatives may be in fact charged. The Supreme Court held in *Whalen v. United States*⁸¹ that when applying the *Blockburger* test to a complex statute (felony-murder by any one of six felonies), one must look at the alternative that is in fact charged rather than the entire statute in the abstract.⁸² Whalen had been convicted of rape and felony murder, the felony being the rape for which he had also been convicted. However, the majority did not follow its own rule in *Whalen*. Instead, the Court reasoned that application of *Blockburger* was not necessary in light of the clear congressional intent to include rape committed in the course of felony-mur-

74. *Id.* at 726, 727.

75. 605 F.2d 1141 (9th Cir. 1979), *cert. denied*, 444 U.S. 1020 (1980), *cert. denied sub nom.* England v. United States, 444 U.S. 1020 (1980).

76. *Id.* at 1145.

77. *Id.*

78. Pretrial appeals from motions to dismiss for double jeopardy are permitted under the rule in *Abney v. United States*, 431 U.S. 651, 662 (1977). However, the Second Circuit has held that where a double jeopardy challenge is only made to a portion of a RICO count, an *Abney* appeal will not lie. *United States v. Tom*, 787 F.2d 65, 67-68 (2d Cir. 1986).

79. *United States v. Solano*, 605 F.2d 1141, 1144 (9th Cir. 1979), *cert. denied*, 444 U.S. 1020 (1980), *cert. denied sub nom.* England v. United States, 444 U.S. 1020 (1980).

80. *Schmuck v. United States*, 489 U.S. 705, 716 (1989), *reh'g denied*, 490 U.S. 1076 (1989).

81. 445 U.S. 684 (1980).

82. *Id.* at 694.

der as a lesser included offense of the felony murder.⁸³

However, in *Illinois v. Vitale*,⁸⁴ the Supreme Court later retreated to applying the *Blockburger* rule to a statute in the abstract. The *Vitale* case involved a charge of manslaughter by automobile. The defendant had previously been convicted for his failure to reduce speed in the same incident. The *Vitale* court reasoned that the manslaughter offense could be proved by facts other than the failure to reduce speed; thus, the prior conviction was not a necessarily included offense.⁸⁵ The court acknowledged the possibility that facts presented at trial may present double jeopardy concerns if the speeding conviction was utilized as proof of the manslaughter charge.⁸⁶

Because § 1962(c) is a complex statute, application of the *Blockburger* test in the abstract will often eliminate double jeopardy protection. The statute allows alternative means of committing the principal offense that do not encompass the elements of the lesser offense charged. Thus, applying *Blockburger* in the abstract will allow the prosecutor the flexibility to avoid double jeopardy violations in the case of a complex statute such as RICO.

B. The Totality of Circumstances Test

Some courts have expressed concern over the ease with which a prosecutor can evade double jeopardy problems, especially in conspiracy cases, by selectively choosing among a host of co-conspirators and multiple overt or proscribed acts.⁸⁷ By choosing among different co-conspirators and acts, a prosecutor can create multiple offenses, which under the *Blockburger* test would not be the same offense. In order to prevent such prosecutorial abuse, some courts have refused to apply the *Blockburger* test.⁸⁸ Instead, these courts apply a totality of circumstances test.⁸⁹ This test considers: (1) the time of the various activities, (2) the identity of the persons involved, (3) the statutory offense charged in the separate counts or indict-

83. *Id.* at 694 n.8. This "distinction" escapes this Author as it did the dissent. *Id.* at 711-12 n.6 (Rehnquist, J., dissenting).

84. 447 U.S. 410 (1980).

85. *Id.* at 419.

86. *Id.* at 420.

87. See, e.g., *United States v. Sinito*, 723 F.2d 1250, 1256 (6th Cir. 1983), cert. denied, 469 U.S. 817 (1984).

88. *Sinito*, 723 F.2d at 1256; *United States v. Kienzle*, 896 F.2d 326, 328 (8th Cir. 1990).

89. See *supra* note 88.

ments, (4) the nature and scope of the activity sought to be punished, and (5) the places where the activity in question took place.⁹⁰ This test is applied not only in conspiracy cases but also in cases where the defendant claims that the two different § 1962(c) counts charged are the same offense.⁹¹

In a non-RICO conspiracy case, however, the Supreme Court in *Albernaz v. United States*⁹² chose to apply the *Blockburger* test rather than the totality of circumstances test to a double jeopardy claim. The defendants had been convicted of both conspiracy to import marijuana and conspiracy to distribute marijuana when in fact, they had engaged in only one conspiracy to both import and distribute marijuana. Applying the *Blockburger* test, the Supreme Court noted that the two conspiracy statutes in question were directed toward different evils; as a result, the Court found separate offenses.⁹³ Prior to this decision some authorities had argued that it was not permissible to charge multiple conspiracies merely because one agreement contemplates the violation of several statutes.⁹⁴

The Eleventh Circuit in *United States v. Watchmaker*⁹⁵ interpreted *Albernaz* as modifying the *Blockburger* test in conspiracy and other complex cases by including an additional requirement that the two statutes be directed toward a different objective.⁹⁶ This interpretation of *Albernaz* is questionable. The *Blockburger* test need not be modified unless, after first applying it, the two offenses are found to be the same. More importantly, the *Blockburger* test, whether modified or not, is not an ideal test in complex cases because of the potential for prosecutorial abuse.

The *Blockburger* test also creates difficulties in determining what is the same offense in successive § 1962 prosecutions. The *Blockburger* test, especially as applied in the abstract to statutory elements, is unsatisfactory because a prosecutor may easily create different elements by carefully drafting the sec-

90. *Id.*

91. *United States v. Dean*, 647 F.2d 779, 788 (8th Cir. 1981), *rev'd on other grounds en banc*, 667 F.2d 729 (8th Cir. 1982), *cert. denied*, 456 U.S. 1006 (1982).

92. 450 U.S. 333 (1981).

93. *Id.* at 343-44.

94. Barry Tarlow, *RICO: The New Darling in the Prosecutor's Nursery*, 49 *FORDHAM L. REV.* 165, 258 (1980) (discussing *Braverman v. United States*, 317 U.S. 49 (1942)).

95. 761 F.2d 1459, *reh'g denied*, 766 F.2d 1493 (11th Cir. 1985), *cert. denied sub nom. Harrell et al. v. United States*, 474 U.S. 1100-01 (1986).

96. *Id.* at 1467.

ond indictment. Some federal courts of appeal have reasoned that double jeopardy is not invoked unless both the "enterprise" and "pattern of racketeering activity" are the same in both indictments.⁹⁷ That determination is more accurately made by applying the totality of circumstances test, and thus the potential for prosecutorial abuse is greatly diminished.

C. Conspiracy

RICO conspiracy prosecutions also present potential for prosecutorial abuse. Certain issues are unique to conspiracy cases, such as a RICO § 1962(d) conspiracy. Conspiracy to commit a crime has long been held to be a separate offense from the substantive offense that is its goal.⁹⁸ Thus, separate conviction and punishment for both conspiracy and its substantive crime are permitted without offending double jeopardy.⁹⁹ Application of the *Blockburger* test to a conspiracy and the substantive offense that is its goal confirms that they are separate offenses. Conspiracy requires proof of a fact (intent to conspire) that the substantive act does not, and the substantive act requires proof of a fact (commission of a crime) that the conspiracy does not.

However, common law has recognized an exception to this view that conspiracy is a separate offense from the substantive offense. Under Wharton's Rule,¹⁰⁰ the conspiracy merges into the substantive offense if the substantive offense necessarily requires the participation of two persons for its commission. The classic examples are adultery, incest, bigamy,¹⁰¹ and dueling.¹⁰² Wharton's Rule, like the *Blockburger* test, is only a rule of statutory interpretation and is applied in the absence of contrary legislative intent.¹⁰³

97. *United States v. Russotti*, 717 F.2d 27, 33 (2d Cir. 1983), *cert. denied sub nom. Picarreto v. United States*, 465 U.S. 1022 (1984), *cert. denied sub nom. Marino v. United States*, 465 U.S. 1022 (1984).

98. *Pinkerton v. United States*, 328 U.S. 640, 644 (1946), *reh'g denied*, 329 U.S. 818 (1946).

99. *Id.*

100. "An agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of two persons for its commission." *Iannelli v. United States*, 420 U.S. 770, 773-74 n.5 (1974) (quoting 1 R. ANDERSON, *WHARTON'S CRIMINAL LAW AND PROCEDURE* § 589, 191 (1957)).

101. *Iannelli v. United States*, 420 U.S. 770, 773-76 (1975).

102. *Id.* at 781.

103. *Id.* at 786.

RICO defendants have yet to invoke successfully Wharton's Rule. In *United States v. Rone*,¹⁰⁴ the Ninth Circuit refused to apply Wharton's Rule when two defendants sought to bar conviction on both § 1962(c) substantive and § 1962(d) conspiracy counts.¹⁰⁵ The defendants argued the § 1962(c) enterprise consisted of the two defendants associated together to engage in illegal activity, and thus the offense merged under 1962(d). The Ninth Circuit held Wharton's Rule inapplicable because (1) the legislative intent of RICO was to the contrary, and (2) only one person is required in the abstract to violate § 1962(c).¹⁰⁶ Conversely, on essentially identical facts in *United States v. Sutton*,¹⁰⁷ the Sixth Circuit held that while separate convictions are appropriate if the proofs as to the § 1962(c) and § 1962(d) counts are identical, merger exists for the purpose of sentencing.¹⁰⁸ This position stands alone among the Circuits and has been rejected by the Fourth Circuit¹⁰⁹ and by the Eleventh Circuit, which relied on the plain application of the *Blockburger* test.¹¹⁰ From a logical standpoint, double jeopardy should bar separate convictions under Wharton's Rule. If double jeopardy does not apply, then cumulative punishments are permissible because of legislative intent.

The Sixth Circuit position is still unsettled, however, as evidenced by *United States v. Callahan*.¹¹¹ In that case, the court applied the *Blockburger* test to conspiracy and substantive charges under RICO and held that the two charges required different proofs.¹¹² Therefore, no merger was required for the purpose of sentencing, and concurrent sentences were appropriate.¹¹³ The court also considered the legislative history and congressional intent, concluding that

104. 598 F.2d 564 (9th Cir. 1979), *cert. denied sub nom.* Little v. United States, 445 U.S. 946 (1980).

105. *Id.* at 569-70.

106. *Id.*; see also *United States v. Ohlson*, 552 F.2d 1347, 1349 (9th Cir. 1977).

107. 642 F.2d 1001 (6th Cir. 1980) (en banc).

108. *United States v. Sutton*, 642 F.2d 1001, 1040 (6th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981).

109. *United States v. West*, 877 F.2d 281, 292 (4th Cir.), *cert. denied*, 110 S. Ct. 377 (1989), *cert. denied sub nom.* Mills v. United States, 110 S. Ct. 195 (1989), *cert. denied sub nom.* Thomas v. United States, 110 S. Ct. 1113 (1990).

110. *United States v. Watchmaker*, 761 F.2d 1459, 1477, *reh'g denied*, 766 F.2d 1493 (11th Cir. 1985), *cert. denied sub nom.* Harrell et al. v. United States, 474 U.S. 1100 (1986).

111. 810 F.2d 544 (6th Cir.), *cert. denied*, 484 U.S. 832 (1987).

112. *Id.* at 548.

113. *Id.*

§§ 1962(c) and 1962(d) were directed at separate evils. This holding is at odds with the earlier Sixth Circuit case of *Sutton*.¹¹⁴

The Ninth Circuit in *United States v. Brooklier*¹¹⁵ had no difficulty in rejecting a double jeopardy challenge to successive § 1962(d) and (c) prosecutions when both prosecutions were predicated on the same extortion. After finding that under *Blockburger* these offenses are not the same, the Ninth Circuit noted that the application of *Blockburger* to successive prosecutions arising out of the same transaction has drawn criticism. Nonetheless, the court relied on prior Ninth Circuit cases and concluded that *Blockburger* is the appropriate test for successive prosecution double jeopardy challenges, not the same transaction test.¹¹⁶

These conflicting decisions among the courts of appeal reflect the uncertainty and confusion surrounding double jeopardy analysis in a complex statutory scheme such as RICO. Moreover, this confusion also extends to other compound complex statutes.

D. RICO and CCE

The RICO and the Continuing Criminal Enterprise (CCE) statutes are both complex statutes, similar in language and intent. Because of this similarity, the double jeopardy analysis utilized in CCE cases may be predictive of how courts will analyze RICO cases. Of course, important differences between these statutes do exist and should be noted. Nonetheless, because of the potential overlap of RICO and CCE, prosecutors are able to charge under both statutes together in ways that should invoke double jeopardy concerns.

In drug cases, prosecutors utilize not only RICO but also the CCE statutes (§ 848).¹¹⁷ Under § 848, engaging in a CCE is a crime.¹¹⁸ A person engages in a CCE if any one of certain proscribed felonies are committed as part of a continuing series of violations. The statute requires that the defendant be a manager, organizer, or supervisor of the enterprise and that

114. *United States v. Sutton*, 642 F.2d 1001, 1040 (6th Cir. 1980) (en banc), cert. denied sub nom. *Elkins v. United States*, 453 U.S. 912 (1981) (where proofs for the 1962(c) and 1962(d) claims are identical, sentences must be concurrent).

115. 637 F.2d 620 (9th Cir. 1980), cert. denied, 450 U.S. 980 (1981).

116. *Id.* at 622-24.

117. 21 U.S.C. § 848 (1988).

118. 21 U.S.C. § 848(a) (1988).

he act in concert with a minimum of five other persons. The defendant must also derive substantial income from the enterprise.¹¹⁹

Prosecutors may charge the defendant under the corresponding conspiracy statute (§ 846), which makes it a crime to conspire to commit a CCE.¹²⁰ Under the doctrine of double jeopardy, a § 846 conspiracy conviction should bar a subsequent prosecution under § 1962(d) arising out of the same facts, provided that the *Blockburger* test is satisfied.¹²¹ Unlike the RICO statute, a § 846 conspiracy is an included offense of a § 848 offense for purposes of double jeopardy because § 848 requires proof of every element necessary to show a violation under § 846, as well as proof of several additional elements.¹²² Thus, clearly § 848 is itself a conspiracy statute, unlike §§ 1962(a), (b), and (c). Congress did not intend to impose cumulative punishment under both § 846 and § 848,¹²³ unlike RICO §§ 1962(c) and (d).¹²⁴ However, a prosecutor can still achieve multiple convictions by charging under both § 848 and § 1962(d) because, unlike § 846 and § 848, neither offense is necessarily included in the other. In this manner, a prosecutor achieves what he cannot achieve by charging under both § 846 and § 848.

Defendants have not successfully challenged prosecutions under both § 848 and § 1962(d) under the doctrine of double jeopardy. Several circuits have determined that a RICO violation is not the same offense as a CCE violation, and therefore, the prohibition against double jeopardy does not apply.¹²⁵

119. The continuing series of violations must be: "(A) . . . undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and (B) from which such person obtains substantial income or resources." 21 U.S.C. § 848(c)(2) (1988).

120. *Jeffers v. United States*, 432 U.S. 137, 147-50 (1977), *reh'g denied*, 434 U.S. 880 (1977). See also Philip H. Cherney, *Thrice in Jeopardy: The CCE Prosecution of Felix Mitchell*, 27 SANTA CLARA L. REV. 515 (1987).

121. *Jeffers*, 432 U.S. at 150.

122. *Id.*

123. *Id.* at 157.

124. § 1962(a), (b), and (c) are *not* conspiracy offenses, but substantive offenses. § 1962(d) expressly creates a separate conspiracy offense.

125. *United States v. Sinito*, 723 F.2d 1250, 1259-62 (6th Cir. 1983), *cert. denied*, 469 U.S. 817 (1984); *accord*, *United States v. Love*, 767 F.2d 1052, 1061 (4th Cir. 1985), *cert. denied*, 474 U.S. 1081 (1986), *cert. denied sub nom.* *Lee v. United States*, 474 U.S. 1081 (1986); *United States v. Phillips*, 664 F.2d 971, 1013-14 (5th Cir. 1981), *cert. denied sub nom.* *Meinster v. United States*, 457 U.S. 1136 (1982), *cert. denied sub nom.* *Myers v.*

The Sixth Circuit in *United States v. Sinito*¹²⁶ closely compared the RICO and CCE conspiracy statutes. The *Sinito* court noted that § 1962(d) violation must establish, "(1) the existence of an enterprise which affects interstate or foreign commerce; (2) that the defendant associated with the enterprise; (3) that the defendant participated in the conduct of the enterprise's affairs; and (4) that the participation was through a pattern of racketeering activity."¹²⁷ Additionally, the conspiracy provision requires that the government establish the existence of an illicit agreement to violate § 1962(a), (b), or (c) substantive RICO.¹²⁸

According to *Sinito*, the gravamen of the conspiracy charge is that each member of the conspiracy agreed to participate in the affairs of the enterprise by committing two or more predicate acts, which constitute the "racketeering activity."¹²⁹ If the underlying predicate acts are connected to the affairs of the enterprise, they need not be interrelated.¹³⁰ Moreover, a defendant may participate in the enterprise by committing various unrelated crimes as long as the crimes are intended to further the enterprise's affairs.¹³¹

The *Sinito* court then compared the requirements of a CCE § 848 violation. Under a CCE, the government must show that the defendant, "(1) engaged in a continuing series of federal drug felony violations, (2) that were undertaken in concert with five or more persons, (3) with respect to whom he occupied a position of organizer, supervisor or some other managerial status, and (4) from which defendant had obtained substantial income or resources."¹³²

The continuing series element is satisfied with evidence of three or more related narcotics violations. Section 848, however, differs from typical conspiracy statutes because it also requires proof of substantive violations rather than an inchoate offense.¹³³

The relationship requirement in a § 848 violation is flexi-

United States, 457 U.S. 1136 (1982), *cert. denied sub nom.* Platshorn v. United States, 459 U.S. 906 (1982).

126. *Sinito*, 723 F.2d at 1250.

127. *Id.* at 1260.

128. *Id.*

129. *Id.* at 1261.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

ble. The defendant's relationship to the five other individuals may be separate and individual, and need not exist at the same moment in time. Nor must the five persons act at the same time.¹³⁴

Thus, as the *Sinito* court points out, the following differences between the conspiracy provisions of RICO and CCE are clear: RICO § 1962(d) encompasses any pattern of racketeering activity proscribed by § 1961 while CCE § 848 is limited solely to narcotics trafficking.¹³⁵ RICO does not require any minimum number of participants while CCE expressly requires the involvement of at least five individuals.¹³⁶ Also, RICO does not target any specific level of organized crime figure.¹³⁷ In fact, RICO encompasses both criminal enterprises and legitimate businesses that conduct a pattern of racketeering activity.¹³⁸ In contrast, § 848 more narrowly targets the upper level crime figures of the narcotics "netherworld."¹³⁹

Note that the existence of a RICO "enterprise" is not a required element of § 848. Section 848 does not require that the objective of the CCE be to further the group. The commission of the series of violations in and of themselves is sufficient. Thus, a § 846 conspiracy has been held to be a separate offense from (1) a § 1962(d) conspiracy arising out of the same series of transactions¹⁴⁰ and (2) a 21 U.S.C. § 963¹⁴¹ conspiracy to import illegal drugs likewise arising out of the same series of transactions.¹⁴²

134. *Id.* at 1260-61.

135. *Id.* at 1261.

136. *Id.*

137. *Id.*

138. *Id.* at 1262.

139. *Id.*

140. *United States v. Boldin*, 772 F.2d 719, 727 (11th Cir.), *modified on reh'g*, 779 F.2d 618 (11th Cir. 1985), *cert. denied sub nom.* *Crump v. United States*, 475 U.S. 1048 (1986), *cert. denied sub nom.* *Scarborough v. United States*, 475 U.S. 1098 (1986), *cert. denied sub nom.* *Luck v. United States*, 475 U.S. 1110 (1986); *United States v. Smith*, 574 F.2d 308 (5th Cir.), *cert. denied*, 439 U.S. 931 (1978); *United States v. Rosenthal*, 793 F.2d 1214, 1234-35 (11th Cir.), *modified*, 801 F.2d 378 (11th Cir. 1986), *cert. denied*, 480 U.S. 919 (1987), *cert. denied sub nom.* *Stewart v. United States*, 480 U.S. 919 (1987), *cert. denied sub nom.* *Gusher v. United States*, 480 U.S. 919 (1987); *United States v. Smith*, 574 F.2d 308, 310-11 (5th Cir.), *cert. denied*, 439 U.S. 931 (1978).

141. 21 U.S.C. § 963 (1988) makes a conspiracy or attempt to violate any offense defined in Title 21 a separate offense.

142. *United States v. Boldin*, 772 F.2d 719, 726-28 (11th Cir.), *modified on reh'g*, 779 F.2d 618 (11th Cir. 1985), *cert. denied sub nom.* *Crump v. United States*, 475 U.S. 1048 (1986), *cert. denied sub nom.* *Scarborough v. United States*, 475 U.S. 1098 (1986), *cert. denied sub nom.* *Luck v. United States*, 475 U.S. 1110 (1986); *United States v. Rosenthal*, 793 F.2d 1214, 1234-35 (11th Cir.), *modified*, 801 F.2d 378 (11th Cir. 1986).

These court decisions interpret the functions of RICO and CCE differently, yet the two statutory schemes still overlap sufficiently to raise double jeopardy concerns. Conceivably, a defendant could be prosecuted for the same behavior under both statutes and then subjected to multiple convictions and punishments. As a consequence, the potential for prosecutorial abuse increases, and defendants are confronted with the erosion of double jeopardy protection.

VI. DOUBLE JEOPARDY AND LEGISLATIVE INTENT

The courts have repeatedly found that Congress clearly intended multiple convictions and punishment for criminal violations of RICO.¹⁴³ Such congressional intent clearly affects the constitutional protection against double jeopardy, as interpreted in recent Supreme Court decisions. The Supreme Court is split on this point.

As previously discussed, the Supreme Court in *Whalen v. United States*¹⁴⁴ held that in order to determine whether a court has imposed unconstitutionally multiple punishments, the court must *first* look at what punishments the legislature authorized.¹⁴⁵ In an opinion by Justice Stewart, the Court expressly noted that this legislative power to define punishments has constitutional limitations.¹⁴⁶ Therefore, the *Whalen* court was implicitly resolving only the issue of when a court has overstepped its constitutional limits in imposing multiple punishments. The Court left open the additional issue of when a legislature has overstepped its constitutional limits in imposing multiple punishments.

The Court next addressed the issue of legislative intent and double jeopardy in *Albernaz v. United States*.¹⁴⁷ In that case, the Supreme Court upheld multiple convictions and punishment for one count of conspiracy to import marijuana and one count of conspiracy to distribute marijuana despite the existence of only one conspiracy agreement. The Court applied the *Blockburger* test and found no double jeopardy

143. See *supra* notes 64-65.

144. 445 U.S. 683 (1980).

145. *Id.* at 688.

146. The court cited as authority for this proposition *Coker v. Georgia*, 433 U.S. 584 (1977); *Roe v. Wade*, 410 U.S. 113 (1973); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Loving v. Virginia*, 388 U.S. 1 (1967); *Robinson v. California*, 370 U.S. 660 (1962). *Whalen*, 445 U.S. at 689 n.3.

147. 450 U.S. 333 (1981).

because each conspiracy statute required proof of a fact that the other did not.¹⁴⁸ The majority held that the *Blockburger* test is not a constitutional measure of double jeopardy protection but rather a rule of statutory construction with inherent limitations.¹⁴⁹ Therefore, if two crimes require different elements of proof, legislative intent to impose multiple punishment is inferred.¹⁵⁰

The Court went on to discuss the question of when the legislature may constitutionally authorize multiple punishments. The Court concluded that ". . . the question of what punishments are constitutionally permissible is not different from the question of what punishments the legislative branch intended to be imposed."¹⁵¹ In other words, if Congress wishes to define multiple punishments, the imposition of multiple consecutive sentences for the same offense does not violate the Constitution. As a result, the legislature's power to define punishment is no longer constrained by *any constitutional limits*. Congress is free to define what is constitutionally permissible.

Speaking for three concurring justices, Justice Stewart challenged the reasoning of the majority. The concurring justices argued that "these statements are supported by neither precedent nor reasoning and are unnecessary to reach the Court's conclusion."¹⁵² Justice Stewart noted that constitutional limitations on Congressional power did exist and that Congress could not constitutionally provide for multiple punishments unless, under *Blockburger*, each statutory offense required proof of a fact that the other did not.¹⁵³ For these justices, the *Blockburger* test remained a constitutional test.

Subsequently, in *Missouri v. Hunter*,¹⁵⁴ the Supreme Court examined legislative intent to find no double jeopardy violation. The state legislature had passed legislation making punishment for two offenses arising out of one criminal act cumulative, despite the fact that one offense was included in the other under the *Blockburger* test.¹⁵⁵ The Supreme Court

148. *Id.* at 339.

149. *Id.* at 340.

150. *Id.* at 341-43.

151. *Id.* at 344.

152. *Id.* at 345 (Stewart, J., concurring) (Justices Marshall and Stevens joining).

153. *Id.* at 345.

154. 459 U.S. 359 (1983).

155. The Missouri statute provided that a person convicted of 1st degree armed robbery with a deadly weapon was subject to imprisonment for five years. Another Missouri statute provided that a person convicted of committing a felony with a deadly

held that where the legislature clearly intends the same conduct to constitute two offenses, one of which is included in the other and is thus the same offense (applying the *Blockburger* test), both offenses may be cumulatively punished.¹⁵⁶ Under this decision, double jeopardy does not bar multiple convictions and punishments in a single trial.¹⁵⁷ The court did not address the issue of double jeopardy in successive prosecutions.

The dissent of Justice Marshall, joined by Justice Stevens, challenged the majority view that the Double Jeopardy Clause imposes no restriction on the legislature's power to authorize multiple convictions and punishments.¹⁵⁸ Justice Marshall stressed the fact that if a legislature has no double jeopardy restrictions, the number of possible convictions based upon the same act, state of mind, and result could be unlimited.¹⁵⁹ Justice Marshall noted that "... the Double Jeopardy Clause limits the power of all branches of government, including the legislature."¹⁶⁰ The dissenters were rightfully concerned with the leap the majority made from approving multiple punishments to approving multiple convictions. To the dissenters, the prohibition against multiple convictions is at the heart of the constitutional protection that double jeopardy provides.

This march of the Supreme Court toward limiting the protection of the Double Jeopardy Clause continued with *Garrett v. United States*.¹⁶¹ In *Garrett*, the defendant challenged his CCE convictions on grounds of double jeopardy. According to the defendant, his federal Washington State conviction for the importation of marijuana barred his *subsequent* federal Florida conviction of a CCE count under § 848 because the Washington conviction was a predicate act of the Florida CCE charge.¹⁶²

The Supreme Court noted that this case presented two prongs of the double jeopardy protection: (1) protection

weapon is additionally guilty of "armed criminal action" and subject to imprisonment for three years. *Id.* at 361-62.

156. *Id.* at 368.

157. *Id.* at 368-69. Where such legislative intent was lacking, however, the Supreme Court reached a contrary result. *United States v. Simpson*, 435 U.S. 6, 12-16 (1978).

158. *Hunter*, 459 U.S. at 369 (Marshall, J., dissenting).

159. *Id.* at 371 (Marshall, J., dissenting).

160. *Id.* at 374 (Marshall, J., dissenting).

161. 471 U.S. 773 (1985). See also Richard Finacom, Comment, *Successive Prosecutions and the Continuing Criminal Enterprise: The Double Jeopardy Analysis in Garrett v. United States*, 13 HASTINGS CONST. L.Q. 785 (1986).

162. *Garrett*, 471 U.S. at 775.

against a second prosecution following conviction and (2) protection against multiple punishments.¹⁶³ The Supreme Court relied on a rule from a 1927 case quoted in *Blockburger* that stated, "There is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which has power to prohibit and punishing also the completed transaction."¹⁶⁴

The Court determined that Congress clearly intended to create the CCE offense separate from its predicate act offenses.¹⁶⁵ The Court went on to say that "[t]he critical inquiry is whether a CCE offense is considered the 'same offense' as one or more of its predicate offenses within the meaning of the Double Jeopardy Clause."¹⁶⁶ The Court noted that the CCE offense is not, in the literal sense, the "same" offense as one of its predicates.¹⁶⁷

The Court then examined the particular facts of *Garrett*¹⁶⁸ and concluded that they differed substantially from the classic relation of the lesser included offense to the greater offense presented in *Brown v. Ohio*.¹⁶⁹ In *Brown*, the defendant stole a car and used it over a nine day period. The Supreme Court held that Brown's conviction for both the theft of the car on one day of the nine day period and joyriding on another day during that period violated double jeopardy because the joyriding was an included offense of the car theft.¹⁷⁰

Garrett's charges in the Florida indictment, when compared with his charges in the Washington indictment, did not lend itself to the simple analogy of a single course of conduct such as the felony car theft charged in *Brown*, which included the lesser misdemeanor offense of joyriding.¹⁷¹ Furthermore, the Florida continuing criminal enterprise continued past the date of Garrett's Washington conviction. Therefore, the Court found the CCE to be a different offense for the purposes of double jeopardy.¹⁷² The Court proceeded to find congressional intent for cumulative sentencing, thereby disposing of all of

163. *Id.* at 777.

164. *Id.* at 779 (quoting *Albrecht v. United States*, 273 U.S. 1, 11 (1927)).

165. *Id.* at 779.

166. *Id.* at 786.

167. *Id.* at 787.

168. *Id.* at 787-88.

169. 432 U.S. 161 (1977).

170. *Id.* at 168.

171. *Garrett*, 471 U.S. at 788-89.

172. *Id.* at 791-93.

the defendant's claims.¹⁷³ Justices Stevens, Brennan, and Marshall dissented on the ground that under *Brown*, the predicate offense was the same as the CCE offense for the purposes of double jeopardy.¹⁷⁴

Given the Supreme Court decision in *Garrett* and the similarity between CCE and RICO, little doubt existed that the same rule would be applied by the Supreme Court to § 1962(a), (b), or (c) counts and their predicates. Since *Garrett*, however, a recent Supreme Court decision has altered the traditional *Blockburger* double jeopardy analysis and expanded double jeopardy protection for criminal defendants. This new analysis may finally give protection to RICO defendants against multiple prosecutions and punishments.

VII. *GRADY V. CORBIN*

The Supreme Court, in a recent double jeopardy case, *Grady v. Corbin*,¹⁷⁵ held that "a subsequent prosecution must do more than merely survive the *Blockburger* test" to determine whether a subsequent prosecution is barred by the Double Jeopardy Clause.¹⁷⁶ The Court held that "the Double Jeopardy Clause bars any subsequent prosecution in which the government, if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted."¹⁷⁷

In *Grady*, a motorist killed the driver of another vehicle and seriously injured the passenger. The motorist pleaded guilty to traffic tickets charging him with (1) driving while intoxicated and (2) failing to keep right of the median. Two months later, a grand jury indicted the motorist for reckless manslaughter, criminal negligent homicide, and reckless assault. To prove these charges, the prosecution indicated that it would prove the conduct for which the motorist was previously convicted (driving while intoxicated and failing to keep

173. *Id.* at 793-95.

174. *Id.* at 803-807 (Stevens, J., dissenting).

175. 110 S. Ct. 2084 (1990).

176. *Id.* at 2093.

177. *Id.* at 2093. Apparently this test, which is in addition to the *Blockburger* test, only applies to successive prosecutions. See *United States v. McKinney*, 919 F.2d 405, 417 n.13 (7th Cir. 1990). Additionally, *Grady* did not disturb the primacy of the *Blockburger* test in multiple punishment cases. *United States v. Ortiz-Alaron*, 917 F.2d 651, 654 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 2035 (1991).

right of the median) to establish essential elements of the homicide and assault charges.¹⁷⁸

Justice Brennan, writing for the majority, expressly adopted the suggestion from *Illinois v. Vitale*¹⁷⁹ ten years earlier ". . . that even if two successive prosecutions were not barred by the *Blockburger* test, the second prosecution would be barred if the prosecution sought to establish an essential element of the second crime by proving the conduct for which the defendant was convicted in the first prosecution."¹⁸⁰

According to the court, the first step in a double jeopardy analysis is to apply the *Blockburger* test to determine if the offenses have identical statutory elements or if one is a lesser included offense of the other. If either situation is established, the subsequent prosecution is barred.¹⁸¹ If neither is established, however, one must go to the next step and determine whether the government is proving the *same conduct* as in the first prosecution. This second step is necessary because the individual needs protection from the prosecution, with all its resources and power, repeatedly attempting to convict an individual for one course of conduct.¹⁸² Repeated prosecutions for one course of conduct allow the prosecution to rehearse its presentation of proof, thus increasing the risk of erroneous convictions. Moreover, the defendant has the burden of facing multiple charges in separate proceedings. The Court concluded that, because of these concerns, it has not relied exclusively in past cases on the *Blockburger* test to vindicate the double jeopardy protection against multiple prosecutions.¹⁸³

The *Grady* opinion expressly stated that the *Blockburger* test is a rule of statutory construction to be used as a guide to determine whether the legislature has authorized multiple punishments.¹⁸⁴ The Court emphasized that additional policy concerns underlie multiple prosecutions, giving rise to the need for an additional protection beyond *Blockburger*.¹⁸⁵

The Court recognized that *Blockburger's* technical comparison of the elements of two offenses does not afford criminal

178. *Grady*, 110 S. Ct. at 2094.

179. 447 U.S. 410 (1980).

180. *Grady*, 110 S. Ct. at 2087.

181. *Id.* at 2090.

182. *Id.* at 2091.

183. *Id.* 2091-92.

184. *Id.* at 2091.

185. *Id.* at 2091.

defendants sufficient protection for multiple trials. Therefore, the limitations of the *Blockburger* analysis require that subsequent prosecutions must survive the second step, which relates to the critical inquiry of what conduct the state will prove.¹⁸⁶ The Court noted that the State could have either prosecuted the motorist for all charges in a single proceeding or in a second proceeding for vehicular manslaughter if the proof involved other conduct for which Corbin had not already been convicted, such as driving too fast in the heavy rain.¹⁸⁷ Having failed to do either, the motorist's second prosecution was barred by the Double Jeopardy Clause.

The *Grady* court did not directly address whether this new double jeopardy test would apply to multiple punishments or multiple prosecutions in the same proceeding. If *Grady* is merely applied to successive prosecutions, however, as opposed to multiple prosecutions in the same proceeding or multiple punishments, the standard of double jeopardy will continue to be eroded. Courts will be left with three different standards to apply to the three-prong protection¹⁸⁸ supposedly provided by the Double Jeopardy Clause: (1) the standard for multiple subsequent prosecutions includes the extra protection of the *Grady* "same conduct" test; (2) the standard for multiple prosecutions in the same proceeding remains unclear, even in light of *Grady*; and (3) in the case of multiple punishments, the standard is set by the legislature, which, in effect, no longer has any constitutional double jeopardy limits on its power to define punishments.

The courts of appeal have split as to the effect of *Grady v. Corbin* in successive RICO or CCE prosecutions. In a CCE conspiracy case demonstrating a good example of prosecutorial abuse, the Second Circuit in *United States v. Calderone*¹⁸⁹ applied the *Grady* "same conduct" test. Application of the test barred prosecution for a heroin conspiracy where a prior broader CCE drug (heroin, cocaine, and marijuana) conspiracy involving the same conduct resulted in an acquittal.¹⁹⁰ The subsequent conspiracy prosecutions had in common four overt

186. *Id.* at 2093.

187. *Id.* at 2094.

188. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). See *supra* text accompanying note 44.

189. 917 F.2d 717 (2d Cir. 1990).

190. The court assumed that application of the *Blockburger* test alone did not bar the second prosecution. *Id.* at 720.

acts charged in both indictments.¹⁹¹

The *Calderone* court had to face the issue of whether the "same conduct" test applies to "compound-complex crimes" of a continuing nature such as RICO. The court noted that Justice Rehnquist, in *Garrett v. United States*,¹⁹² indicated that different double jeopardy principles might apply to single occurrence offenses than to continuing conduct offenses. The court rejected this concern because, unlike *Garrett*, none of the conduct alleged in the second prosecution occurred after the first prosecution.¹⁹³ The court was unwilling to apply a less rigorous double jeopardy analysis "simply because Congress has defined more complicated crimes."¹⁹⁴

The concurring opinion in *Calderone* relied on another post-*Grady* Second Circuit case, *United States v. Russo*.¹⁹⁵ The *Calderone* concurrence noted that the *Russo* court barred prosecution for an obstruction of justice charge where a prior RICO conspiracy acquittal was based upon the identical obstruction of justice.¹⁹⁶ The concurring opinion also noted that when defining conduct for the application of the "same conduct" test, the conduct in the subsequent prosecution must be (1) the entirety of a previously prosecuted offense, (2) the entirety of an element of a previously prosecuted offense, or (3) the entirety of a distinct component of such an offense, such as a RICO predicate act.¹⁹⁷ The Tenth Circuit is in accord that *Grady* is not limited in application to single act crimes.¹⁹⁸

In contrast, the Third Circuit rejected the Second Circuit approach in *United States v. Pungitore*.¹⁹⁹ The *Pungitore* court

191. *Id.* at 725-26. The court rejected the government's argument that it should look to the agreements alleged rather than to the conduct that constitutes the offenses because the government's approach would be only an application of the *Blockburger* test without going to the second step, the "same conduct" test. *Id.* at 721-22.

192. 471 U.S. 773 (1985).

193. *Calderone*, 917 F.2d at 722-23 (Newman, J., concurring).

194. *Id.* at 723 (Newman, J., concurring).

195. 906 F.2d 77 (2d Cir. 1990).

196. *Calderone*, 917 F.2d at 723 (Newman, J., concurring) (relying on *United States v. Russo*, 906 F.2d 77 (2d Cir. 1990), a case in which the government conceded that the "same conduct" test barred the second prosecution).

197. *Calderone*, 917 F.2d at 725 (Newman, J., concurring). The court noted that the element in question with a RICO offense is the pattern of racketeering activity for which the predicate act forms part of the pattern. *Id.*

198. *United States v. Felix*, 926 F.2d 1522, 1527 n.5 (10th Cir. 1991). The court expressly approved of the Second Circuit view that the "agreement" in a conspiracy is proved by inference from the defendant's conduct—what they said and did—rather than by direct evidence of an agreement. *Id.* at 1528.

199. 910 F.2d 1084 (3d Cir. 1990).

was faced with a §§ 1962(c) and (d) prosecution following an acquittal in a CCE (§ 848) prosecution involving identical conduct in both cases.²⁰⁰ The *Pungitore* court followed Justice Rehnquist's suggestion in *Garrett* and held that double jeopardy principles applicable in single course of conduct cases such as *Brown v. Ohio* and *Grady v. Corbin* have no application in compound complex statutory proceedings such as RICO cases.²⁰¹ Further, the Third Circuit reasoned that *Grady* only "bars a subsequent prosecution where, to prove an essential element of the offense charged in that prosecution, the government will relitigate conduct *amounting to* an offense subject to a previous conviction of the defendant."²⁰²

The Eleventh Circuit in *United States v. Link*²⁰³ followed the Third Circuit. The *Link* court also adopted the rule that *Grady* does not apply to successive prosecutions involving compound-complex cases. In that case, the second prosecution was for a RICO charge using as the requisite predicate acts crimes for which the defendant had been convicted in a previous prosecution.²⁰⁴

The Eleventh Circuit expressly rejected in *United States v. Gonzalez*²⁰⁵ the rule adopted by the Second Circuit, holding that *Grady* is limited to single act crimes. The court further held that in a RICO conspiracy prosecution, the conduct in question is the defendant's agreement, while for a predicate act the conduct is the defendant's role in the crime. Consequently, the "same conduct" test is not met.²⁰⁶ The court rejected the Second Circuit view that in most conspiracy cases the "agreement" and the "conduct" are all but synonymous.²⁰⁷

The Third Circuit view that *Garrett* limits the *Grady* "same conduct" test to single act crimes amounts to an invita-

200. *Id.*

201. *Id.* at 1110-11. While recognizing that successive prosecutions may work a hardship on a defendant, the court held that such prosecutions do not violate due process in the absence of the defendant affirmatively establishing vindictiveness on the part of the prosecution. *Id.* at 1111-12.

202. *Id.* at 1114 (emphasis added). The court also noted that successive prosecutions are not barred where the only common element of the two prosecutions is the enterprise because the enterprise, in itself, is not conduct constituting an offense for which the defendant already has been prosecuted. *Id.*

203. 921 F.2d 1523 (11th Cir. 1991), *cert. denied sub nom. D'Amico v. United States*, 111 S. Ct. 2273 (1991).

204. *Id.* at 1529-30.

205. 921 F.2d 1530 (11th Cir. 1991).

206. *Id.* at 1538.

207. *Id.*

tion to prosecutors to charge compound-complex crimes whenever possible and then bring successive prosecutions until a conviction is obtained. The prohibition against double jeopardy is intended to prevent the evil of successive prosecutions for the same offense, yet the Third Circuit rule sanctions just such prosecutions.²⁰⁸

Of course, if a court finds that Congress intended successive prosecutions to be utilized in RICO and CCE cases, then such prosecutions could be justified by the Supreme Court's adherence in *Grady* to the rule that legislative intent can override the Double Jeopardy Clause.²⁰⁹ And if the prohibitions against double jeopardy no longer impose any constitutional limitations on legislative power as recent Supreme Court opinions suggest, what will prevent the legislature from abolishing double jeopardy prohibitions in successive single act crime prosecutions?

VIII. CONCLUSION

The foregoing analysis clearly indicates that the Double Jeopardy Clause affords little protection to RICO defendants and that the common law doctrine of merger gives even less protection. Whether *Grady* will afford meaningful protection against successive prosecutions for the RICO defendant is yet to be determined. The Supreme Court has permitted Congress and the states to override the Double Jeopardy Clause where the legislature has found what the Court perceives as a legitimate goal and the legislature expressly so states. One has diffi-

208. Where other predicate acts have not yet occurred so that prosecuting the more serious charges is impossible (RICO), double jeopardy does not bar the subsequent prosecution. *United States v. Scarpa*, 913 F.2d 993, 1013-14 (2d Cir. 1990); *United States v. Gambino*, 920 F.2d 1108, 1112-13 (2d Cir. 1990). Does this mean that the opposite is true: that a prosecution for a predicate act may follow a prior RICO prosecution? Extraordinarily, the Third Circuit stated that *Grady* would not bar such a prosecution. *United States v. Esposito*, 912 F.2d 60, 62-67 (3d Cir. 1990), *reh'g denied*, No. 89-5971, U.S. App. LEXIS 23197 (3d Cir. 1990), *cert. dismissed*, 112 L.Ed.2d (1991). This view cannot be reconciled with *Grady*.

209. *Grady v. Corbin*, 110 S. Ct. 2084, 2091 (1990). However, such a view seems questionable in light of the *Grady* court's concern that successive prosecutions "raise concerns that extend beyond merely the possibility of an enhanced sentence," such as, subjecting the accused to embarrassment, exposé, ordeal, anxiety, and insecurity while permitting the government the opportunity to rehearse its case, thus increasing the risk of an erroneous conviction. *Id.* at 2091-92. The *Grady* court appears to limit the legislative override to multiple punishments only. The Court seems to shift to a different analysis when discussing multiple prosecutions. *Id.* at 2091. It remains to be seen if legislative intent is allowed to override these serious concerns.

culty believing that the drafters of the Bill of Rights intended that this important protection should be subject to what is, in effect, a legislative override. The *Grady* decision, however, seems to acknowledge the inadequate double jeopardy protection provided under previous law and may finally afford constitutional protection for RICO defendants against successive prosecutions. In light of the strong policy concerns underlying the Double Jeopardy Clause, the application of *Grady* to RICO prosecutions and other complex statutory schemes is necessary to protect the constitutional rights of all defendants.