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Matching Tests for Double Jeopardy Violations with Constitutional Interests

Eli J. Richardson

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Matching Tests for Double Jeopardy Violations with Constitutional Interests

I. INTRODUCTION 274
II. LEGAL BACKGROUND 276
A. *The Prohibition of Multiple Punishments for the Same Offense* 277
B. *The Prohibition of Successive Prosecutions for the Same Offense* 279
III. RECENT DEVELOPMENTS 280
A. Dowling v. United States 280
1. Majority Opinion 280
2. Dissenting Opinion 282
B. Grady v. Corbin 283
1. Majority Opinion 283
2. Dissenting Opinions 286
IV. ANALYSIS 289
A. Grady*: A Definition of "Same Offense" or a Component of the Double Jeopardy Concept?* 289
B. Grady*'s Break with Precedent* 293
1. The Inapplicability of *Harris* and *Brown* 293
2. *Grady*'s Tension with *Dowling* 296
C. *Redefining Double Jeopardy Rights in the Context of Successive Prosecutions* 298
1. Adopting the *Vitale* Dictum 298
2. Protecting Against the Burdens of Successive Prosecutions 299
D. *The Aftermath of* Grady 300
1. The Application of the *Grady* Rule to Evidence Already Introduced 300
2. The Impact of *Grady* on Federal Rule of Evidence 404(b) 303
V. SUGGESTED REFORM: DISCONTINUED USE OF THE *BLOCKBURGER* TEST IN THE CONTEXT OF MULTIPLE PUNISHMENTS IMPOSED IN STATE CRIMINAL PROCEEDINGS 306
A. *Identifying the Constitutional Basis for the* Blockburger *Test in the Context of Multiple Punishments* 307

B. Blockburger *Should Not Apply to Multiple Punishments Imposed in State Criminal Proceedings*. 309
VI. CONCLUSION 311

I. INTRODUCTION

Familiar to most Americans, the double jeopardy clause (the clause) of the Fifth Amendment[1] to the United States Constitution represents an idea so basic that the average person probably would feel comfortable attempting to explain it.[2] Courts confronted with the task of fixing the meaning of the clause and the scope of its protection, however, have found the task to be far from simple. The United States Supreme Court has been no exception.[3]

During the 1989 Term, the Supreme Court continued its ongoing efforts to define double jeopardy protection.[4] In *Dowling v. United States*[5] the Court held that the collateral estoppel component of the double jeopardy clause[6] does not bar the admission of all evidence relating to a prior alleged crime of which the defendant had been acquitted.[7] Less than five months later, however, in *Grady v. Corbin*,[8] the Court held that the double jeopardy clause bars subsequent prosecutions in which the government, in order to establish an essential element of the crime charged in the latter prosecution, will prove conduct constituting an offense for which the defendant already has been prosecuted.[9]

Grady represents the culmination of a gradual movement by the Court toward increasing defendants' protection against the burdens of

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1. The double jeopardy clause provides: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V.

2. *See, e.g.*, Benton v. Maryland, 395 U.S. 784, 795 (1969) (noting that every state recognizes some prohibition against double jeopardy); Green v. United States, 355 U.S. 184, 187 (1957) (recognizing that the prohibition against double jeopardy "is deeply ingrained in at least the Anglo-American system of jurisprudence"); George C. Thomas III, *The Prohibition of Successive Prosecutions for the Same Offense: In Search of a Definition*, 71 IOWA L. REV. 323, 325 (1986) (noting that the law of double jeopardy dates back to ancient Greek, Hebrew, and Roman law and exists today in European and Asian nations).

3. The Supreme Court has noted that "the decisional law in the [double jeopardy] area is a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator." Albernaz v. United States, 450 U.S. 333, 343 (1981) (Rehnquist, J.).

4. This Recent Development is an examination of the Court's efforts to define double jeopardy protection rather than an examination of the Court's tests for what constitutes the same offense. Determining what rights do or do not exist under the double jeopardy clause goes considerably beyond the task of defining what constitutes a same offense under the clause. *See infra* text accompanying note 123.

5. 110 S. Ct. 668 (1990).

6. For a discussion of collateral estoppel in the context of double jeopardy analysis, see *infra* notes 37-39 and accompanying text.

7. *Dowling*, 110 S. Ct. at 672.

8. 110 S. Ct. 2084 (1990).

9. *Id.* at 2093.

successive prosecutions.[10] *Grady*, however, seems to conflict with much of the Court's prior double jeopardy jurisprudence. Unresolved inconsistencies between *Grady* and the Court's prior rulings have left the state and lower federal courts with a confusing mixture of standards to apply in double jeopardy inquiries.[11]

The *Grady* decision poses other difficulties as well. Although the application of the *Grady* rule in a pretrial setting, prior to the admission of evidence, seems fairly clear and manageable, its application after the admission of evidence at trial, and during the postconviction appeals process, is a more complex matter and one the majority in *Grady* failed to address.[12] Furthermore, although *Grady* apparently leaves intact Federal Rule of Evidence 404(b), the scope of the Rule is far less clear after *Grady*.[13]

Despite the inadequacies in its opinion, however, the *Grady* majority rightly recognized that, in some situations, strict adherence to the Court's prior double jeopardy jurisprudence, and particularly to the test enunciated in *Blockburger v. United States*,[14] failed to provide defendants with protection that reflected the values embodied in the clause.[15] Although in *Grady* this recognition led the majority to expand defendants' rights in the context of successive prosecutions,[16] the majority has laid the groundwork for a further reevaluation of double jeopardy protections. Thus, the Court now is free to tailor double jeopardy protection to correspond more closely with the constitutional interests implicated in a given case.[17] In the context of multiple punishments in state court, this well may mean a long-overdue reconsideration of the protection currently afforded defendants.[18]

This Recent Development examines the implications of the Supreme Court's latest efforts to define double jeopardy protection. Part II outlines the interests that the double jeopardy clause protects and reviews some of the Court's past efforts to identify and define violations of the clause. Part III focuses on the *Dowling* and *Grady* decisions and discusses their impact on each other and on prior double jeopardy case

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10. *See infra* part IV.C.1.
11. *See infra* part IV.B.2.
12. *See infra* part IV.D.1.
13. *See infra* part IV.D.2.
14. 284 U.S. 299 (1932). For a discussion of *Blockburger*, see *infra* text accompanying notes 27-32.
15. 110 S. Ct. at 2093 (observing that "a technical comparison of the elements of the two offenses as required by *Blockburger* does not protect defendants sufficiently from the burdens of multiple trials").
16. *See id.*
17. *See infra* text accompanying notes 234-41.
18. *See infra* part V.B.

law. Part IV argues that *Grady* represents a view of double jeopardy protection only remotely concerned with the language in the clause. To this end, Part IV compares *Grady* with prior case law, including *Dowling*. Part IV also analyzes the impact of *Grady* in the state and lower federal courts, as well as its possible effect on Federal Rule of Evidence 404(b). Part V proposes a change in double jeopardy analysis in the context of state prosecutions. This Recent Development concludes that the Court should continue to reevaluate its tests for double jeopardy violations in order to effectuate better both the language and the values of the double jeopardy clause.

II. Legal Background

The double jeopardy clause provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb."[19] The clause protects criminal defendants against multiple punishments for the same offense and against further prosecutions for the same offense after either conviction or acquittal.[20] The Supreme Court's cases make clear that a finding vel non of a double jeopardy violation in a given case depends, in part, upon which of the double jeopardy protections the defendant invokes.[21]

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19. U.S. Const. amend. V. The Fourteenth Amendment incorporates the double jeopardy clause and, thus, the prohibitions of the clause apply to state prosecutions. Benton v. Maryland, 395 U.S. 784, 794 (1969).

20. North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

21. *See* Ohio v. Johnson, 467 U.S. 493, 500 (1984) (recognizing that the double jeopardy clause might prohibit multiple prosecutions for the same offense even when it does not prohibit multiple punishments for the same offense); Brown v. Ohio, 432 U.S. 161, 166-67 n.6 (1977) (noting that "[e]ven if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first"); Thomas, *supra* note 2, at 342 (arguing that the Supreme Court has formulated a broader definition of "same offense" in the context of successive prosecutions). Generally, the Court has treated the protections against postconviction and postacquittal prosecutions for the same offense almost identically for purposes of double jeopardy inquiries. In either case, further prosecution poses equivalent threats to criminal defendants, threats not dependent on a finding of guilt or innocence. *See, e.g.*, Missouri v. Hunter, 459 U.S. 359, 369 n.1 (1983) (Marshall, J., dissenting) (recognizing that the existence of a double jeopardy violation does not depend upon whether the first trial ended in acquittal or conviction). For a discussion of the interests served by the prohibition of successive prosecutions for the same offense, see also *infra* text accompanying notes 23 and 24. In Ashe v. Swenson, 397 U.S. 436 (1970), the Court held that the double jeopardy clause embodies the doctrine of collateral estoppel, which is the only protection against retrial after acquittal that does not exist for retrial after conviction. *See supra* notes 37-39 and accompanying text. This exception aside, botb situations have been treated identically in double jeopardy analysis.

A. The Prohibition of Multiple Punishments for the Same Offense

The Supreme Court has been quite successful in formulating a consensus definition of double jeopardy violations in the context of multiple punishments for the same offense in the same prosecution.[22] This success probably stems from the fact that the prohibition against multiple punishments serves fewer important purposes than the prohibition against multiple prosecutions. Barring successive prosecutions prevents the government both from harassing defendants with repeated prosecutions and from rehearsing its presentation of proof at one trial in preparation for a subsequent trial.[23] Barring successive prosecutions also protects the integrity of a prior acquittal and, in the case of a prior conviction, prevents a second punishment when the law authorizes only one.[24]

In contrast, prohibiting the imposition of multiple punishments in a single proceeding implicates only the last concern. When the government seeks to impose multiple punishments in the same prosecution, no repetitious litigation occurs, nor does a prior acquittal exist whose integrity the multiple punishments may imperil.[25] Furthermore, some of the Court's decisions suggest that the clause primarily reflects the Framers' concern with second prosecutions rather than second punishments.[26] Thus, the imposition of multiple punishments in the same proceedings implicates fewer constitutional concerns than does subjecting a defendant to successive prosecutions.

As a result, the Court consistently has adhered to a single test, enunciated in *Blockburger v. United States*,[27] for determining the exis-

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22. *See* Grady v. Corbin, 110 S. Ct. at 2091 n.8. Generally, the issue of multiple punishments for the same offense arises only when multiple charges are brought in one prosecution. The double jeopardy clause bars multiple punishments for the same offense imposed in different prosecutions to the same extent that it would if the punishments were imposed in the same proceeding. As a practical matter, however, the defendant has no incentive to invoke the protection against multiple punishments for the same offense when the punishments are imposed in different proceedings. In that situation, the defendant instead can invoke the double jeopardy prohibition of a second prosecution, which offers defendants broader protection and a much better chance of winning their double jeopardy argument. *See infra* part II.B.

23. *See Grady*, 110 S. Ct. at 2091-92.

24. *See* Garrett v. United States, 471 U.S. 773, 778 (1985) (recognizing that, after conviction and sentencing in a prior prosecution, punishment pursuant to a second prosecution risks being unauthorized); MARTIN L. FRIEDLAND, DOUBLE JEOPARDY 96 (1969); Thomas, *supra* note 2, at 341.

25. *See* Thomas, *supra* note 2, at 342. Moreover, to the extent the Constitution allows multiple punishments, a defendant might prefer to have all punishments imposed in one proceeding. *Id.*

26. "The prohibition is not against being twice punished, but against being twice put in jeopardy." United States v. Ball, 163 U.S. 662, 669 (1896). *See also* Ashe v. Swenson, 397 U.S. 436, 451-54 (1970) (Brennan, J., concurring) (arguing that "same offense" most accurately reflects the ancient prohibition against double jeopardy when applied to successive prosecutions); Kepner v. United States, 195 U.S. 100 (1904); Respublica v. Shaffer, 1 U.S. (1 Dall.) 236, 237 (1788).

27. 284 U.S. 299 (1932). As the *Blockburger* Court noted, *id.* at 304, the test actually had

tence of double jeopardy violations in the context of multiple punishments. According to the *Blockburger* test, when the same act or transaction constitutes a violation of two different statutory provisions under which a person may be punished, the offenses are not the same—and the imposition of multiple punishment does not violate the double jeopardy clause—only if each provision requires proof of a fact that the other does not.[28] Perhaps the clearest illustration of the *Blockburger* test is its application to punishments for greater and lesser included offenses. By definition, conviction for the lesser offense requires no proof beyond that which is necessary for conviction for the greater offense.[29] Thus, under *Blockburger*, the imposition of multiple punishments for greater and lesser included offenses would violate the double jeopardy clause.

The *Blockburger* test ensures that a court does not impose punishment for a single offense under more than one statute when Congress intended punishment under only one statute.[30] The test is based on the assumption that legislatures generally do not intend to impose punishment for the same offense under two separate statutes.[31] If, however, the prosecution can demonstrate that the legislature intended that multiple punishments be available, a court may impose multiple punishments even if, under *Blockburger*, they are punishments for the same offense.[32] Thus, the Court has treated the prohibition against punishments for the same offense more as a measure of legislative intent than as a strict constitutional prohibition against any imposition of multiple punishments for the same offense.[33]

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been adopted in Gavieres v. United States, 220 U.S. 338, 342 (1911). It is, however, the *Blockburger* court that is credited with establishing the test, and thus the test derives its name from that case. *See* Missouri v. Hunter, 459 U.S. 359, 366-67 (1983). The *Blockburger* test is unquestionably the only standard for determining double jeopardy violations in the context of multiple punishments. *Grady*, 110 S. Ct. at 2091 n.8.

28. *Blockburger*, 284 U.S. at 304.

29. Whalen v. United States, 445 U.S. 684, 708-09 (1980).

30. Garrett v. United States, 471 U.S. 773, 778 (1985). *See* Missouri v. Hunter, 459 U.S. 359, 366-68 (1983). *Blockburger* was developed as a rule of federal law. Nevertheless, the Court has applied *Blockburger* in the context of multiple punishments imposed by a state court, presumably as a rule of statutory construction that is applicable to state, as well as federal, legislation. *See Hunter*, 459 U.S. at 368.

31. *See Whalen*, 445 U.S. at 691-92.

32. *See id.* at 692; *Garrett*, 471 U.S. at 778-79; *Hunter*, 459 U.S. at 368-69; *cf.* George C. Thomas III, *Multiple Punishments for the Same Offense: The Analysis after* Missouri v. Hunter, 62 WASH. U. L.Q. 79, 98 (1984) (suggesting that punishments are not multiple for the purposes of double jeopardy analysis if authorized by the legislature, and that, therefore, it is irrelevant if the punishments are for the same offense).

33. In the context of multiple punishments, *Blockburger* has been referred to as a mere rule of statutory construction. *Grady*, 110 S. Ct. at 2091. Nevertheless, *Blockburger* is also a rule of constitutional dimension because the Constitution requires an accurate assessment of congressional intent regarding multiple punishments. *See Whalen*, 445 U.S. at 689. To the extent that

B. The Prohibition of Successive Prosecutions for the Same Offense

The Court has adopted a broader view of the prohibition against successive prosecutions. The *Blockburger* test is certainly a part of the double jeopardy analysis in the context of successive prosecutions; if two offenses are the same under the *Blockburger* test, then the government may not, under any circumstances, prosecute a defendant for one of the offenses after a separate prosecution for the other offense.[34] *Blockburger*, however, does not provide the exclusive test for determining whether successive prosecutions violate the double jeopardy clause.[35] Prior to the *Grady* decision, the Supreme Court found double jeopardy violations in two cases involving successive prosecutions, even though a strict application of the *Blockburger* test would not have barred the second prosecutions.[36] In *Ashe v. Swenson*[37] the Court held that the double jeopardy clause embodies the doctrine of collateral estoppel.[38] Thus, once an issue of ultimate fact has been decided by a valid and final judgment, the issue cannot be relitigated between the same parties.[39] In *Harris v. Oklahoma*[40] the Court held that if a statu-

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Blockburger provides an accurate assessment of congressional intent regarding multiple punishments, the Constitution requires that the rule he applied. *Id.* at 692.

34. Brown v. Ohio, 432 U.S. 161, 166 (1977).

35. *Id.* at 166-67 n.6. In *Brown* the Court held that prosecution and punishment for auto theft, following prosecution and punishment for the lesser included offense of joyriding, violated the double jeopardy clause. *Id.* at 169. The Court based its holding on a simple application of the *Blockburger* test. *See id.* at 168.

36. *See Grady*, 110 S. Ct. at 2092. *See also id.* at 2097 (Scalia, J., dissenting).

37. 397 U.S. 436 (1970).

38. In United States v. Oppenheimer, 242 U.S. 85 (1916), the Court established collateral estoppel as a rule of federal criminal law. The Court, however, previously had refused to invoke the due process clause of the Fourteenth Amendment to require states to adopt criminal collateral estoppel. Hoag v. New Jersey, 356 U.S. 464 (1958). Explaining why criminal collateral estoppel is embodied in the double jeopardy clause, the Court merely said, "[f]or whatever else that constitutional guarantee [i.e. the double jeopardy clause] may embrace . . . it surely protects a man who has been acquitted from having to 'run the gauntlet' a second time." *Id.* at 445-46. The Court failed to explain both the precise meaning of "run the gauntlet" and why the clause protects defendants from having to do so twice. In his concurring opinion, Justice Breman explained that, because the Fifth Amendment applies to states, the Court's test for the same offense would apply to state proceedings as well as federal proceedings; thus, the federal standard of criminal collateral estoppel applies to states. *Id.* at 450 (Brennan, J., concurring). Until *Ashe v. Swenson*, however, collateral estoppel had never been held to be constitutionally required. *See id.* at 445 n.10. In fact, the Court originally instituted the federal rule of criminal collateral estoppel as an addition to, rather than a part of, the rights guaranteed under the Fifth Amendment. *See Oppenheimer*, 242 U.S. at 88. Therefore, the federal standard of criminal collateral estoppel was never a constitutional standard, and thus provides no justification for incorporating criminal collateral estoppel into the Fourteenth Amendment's double jeopardy protection. Nevertheless, the doctrine is now an established component of double jeopardy protection.

39. *Ashe*, 397 U.S. at 443. For a discussion of the Court's treatment of the term "issue of ultimate fact," see *infra* note 58.

40. 433 U.S. 682 (1977).

tory offense incorporates a different statutory offense without specifying the latter's elements, the government may not prosecute a defendant for each crime at different trials.[41]

By the 1980s, the Court clearly had recognized a distinction between multiple punishments and successive prosecutions for the purpose of determining double jeopardy violations. As the Court entered the 1989 Term, however, the extent to which the Court would emphasize this distinction remained unclear. The Court soon would decide two cases that would clarify the distinction between the analyses in the two contexts.

III. Recent Developments

A. Dowling v. United States

1. Majority Opinion

Dowling v. United States[42] was a setback for criminal defendants because it limited defendants' ability to use the double jeopardy clause to bar the admission of evidence of past crimes.[43] Dowling was charged with the federal crimes of bank robbery and armed robbery.[44] At trial, the government, relying on Federal Rule of Evidence 404(b),[45] offered the testimony of a witness regarding a burglary of her home that had taken place two weeks after the bank robbery at issue.[46] The witness identified Dowling as one of the culprits involved in the burglary.[47] The government offered this evidence to support its identification of Dow-

41. In *Harris* the defendant was convicted of felony murder based on a homicide that occurred during an armed robbery. The state subsequently sought to prosecute the defendant for that armed robbery. The second prosecution would have been permitted by *Blockburger* because the Oklahoma felony murder statute did not require proof of armed robbery. Any felony could be used to prove felony murder. Thus, felony murder required proof of something—a killing—that armed robbery did not, and armed robbery required proof of something—an armed robbery—that felony murder did not. Therefore, *Harris* does not follow from a rigid application of *Blockburger*. *See Grady*, 110 S. Ct. at 2092.

42. 110 S. Ct. 668 (1990). Five Justices, Chief Justice Rehnquist and Justices Blackmun, O'Connor, Scalia, and Kennedy, joined Justice White's majority opinion. Justices Marshall and Stevens joined in Justice Brennan's dissent.

43. *See id.* at 680 (Brennan, J., dissenting).

44. Dowling was charged under the federal bank robbery statute, 18 U.S.C. § 2113(a) (1988), and the federal armed robbery statute, 18 U.S.C. § 2113(d) (1988). Dowling also was charged with crimes under the laws of the Virgin Islands, where the robbery occurred.

45. Federal Rule of Evidence 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, or accident.

Fed. R. Evid. 404(b).

46. 110 S. Ct. at 670.

47. *Id.*

ling as the bank robber.[48] A jury previously had acquitted Dowling of charges arising out of the burglary, and Dowling objected to the witness's testimony, claiming that the double jeopardy clause barred its admission.[49] The district court, however, allowed the testimony.[50]

On appeal, the United States Court of Appeals for the Third Circuit held that the collateral estoppel component of the double jeopardy clause barred the government from introducing evidence of Dowling's participation in a crime of which he had been acquitted.[51] The Third Circuit also ruled that the evidence was inadmissible under the Federal Rules of Evidence.[52] Invoking the Supreme Court's recent decision in *Huddleston v. United States*,[53] the Third Circuit noted that, under Rule 404(b), evidence of a defendant's past crimes is admissible only if the jury reasonably can conclude, by a preponderance of the evidence, that the past crime occurred and that the defendant committed it.[54] The Third Circuit reasoned that a second jury should not be allowed to conclude that Dowling had committed the burglary when a previous jury had acquitted him of that crime.[55]

The Supreme Court disagreed with the Third Circuit's reasoning on the admissibility of the testimony.[56] In an opinion by Justice White, the majority held that the admission of the testimony did not violate the collateral estoppel component of the double jeopardy clause,[57] be-

48. The Government believed that the witness's description of the gun and mask possessed by the burglar indicated that these items might be the same as those possessed by the bank robber. *Id.* Also, a second man involved in the burglary allegedly was involved in the bank robbery as well. Thus, tying Dowling to the burglary would help implicate him in the bank robbery. *Id.*

49. *Id.* at 671. Dowling agreed that the acquittal in the case involving the burglary did not bar prosecution for the bank robbery. The only issue was whether the admission of the witness's testimony violated the double jeopardy clause. *Id.*

50. *Id.* at 670-71.

51. United States v. Dowling, 855 F.2d 114, 120-22 (3d Cir. 1988), *aff'd on other grounds*, 110 S. Ct. 668 (1990).

52. 855 F.2d at 122.

53. 485 U.S. 681 (1988).

54. *See id.* at 689. The *Huddleston* holding rested on the rationale that unless a jury could find that the defendant had committed the past crimes, evidence about them was not relevant and, thus, not admissible. *See id.* The Court also noted that if the introduction of past-crimes evidence was unduly prejudicial, a court could invoke Rule 403 to exclude the evidence even when the evidence was admissible under Rule 404(b). *Id.* at 691. The *Huddleston* Court, however, did not consider any possible constitutional ramifications of its decision.

55. *See* 855 F.2d at 122. The Third Circuit noted that even if the evidence were admissible under *Huddleston*, it should have been excluded under Rule 403. *Id.*

56. The Supreme Court disagreed with the Third Circuit's holding that the witness's testimony was inadmissible. Its ultimate disposition in the case, however, was to affirm the Third Circuit. Although the Third Circuit found the evidence inadmissible, it had affirmed Dowling's conviction because it found that the admission of the evidence was harmless error. 855 F.2d at 122-24.

57. 110 S. Ct. at 672. The Court also rejected Dowling's argument that the introduction of the past-crimes evidence violated the due process guarantee of fundamental fairness. *Id.* at 674-75.

cause Dowling's earlier acquittal on the burglary charge was not dispositive of the ultimate issue in the case at bar.[58] The majority began its analysis of the collateral estoppel issue by assuming arguendo that the jury which had acquitted Dowling on the burglary charge had determined that a reasonable doubt existed as to whether Dowling was the burglar.[59] In determining the admissibility of the testimony, however, the issue was whether a jury could find by a preponderance of the evidence that Dowling had committed the earlier crime.[60] Because the two situations called for different standards of proof in determining Dowling's culpability in the burglary, the issues were different for the purpose of double jeopardy analysis.[61] The majority thus found the collateral estoppel doctrine inapplicable.[62] The majority also concluded that, even if it were to apply the collateral estoppel doctrine, Dowling had failed to meet the burden of showing that the issue he sought to avoid relitigating was, in fact, decided in his favor in the first proceeding.[63]

2. Dissenting Opinion

Justice Brennan, in a dissenting opinion joined by Justices Marshall and Stevens, disagreed with each holding of the Court.[64] Justice

58. 110 S. Ct. at 672. Much confusion exists in the federal courts over the kinds of issues that trigger collateral estoppel. Some courts hold that collateral estoppel bars only "ultimate" issues, while others hold that it bars "necessary" or "essential" issues. *See* Synanon Church v. United States, 820 F.2d 421, 426-27 (D.C. Cir. 1987). An "ultimate" issue involves the facts that necessarily must be found in order for the court to impose obligations or sanctions. *See* The Evergreens v. Nunan, 141 F.2d 927, 928 (2d Cir.), *cert. denied sub nom.* Evergreens v. Commissioner, 323 U.S. 720 (1944). For example, the only ultimate issues in a criminal trial are the existence or nonexistence of each statutory element of the crime. "Necessary" or "essential" issues are those issues "actually recognized by the parties as important and by the trier of fact as necessary to the first judgment." *Synanon Church*, 820 F.2d at 427 (citing RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. j (1973)). For example, if the key issue in a criminal trial is the veracity of the defendant's alibi, that issue would be "necessary" even though it is not "ultimate." Although the *Ashe* court used language indicating that collateral estoppel applies only to ultimate issues, it is far from clear that the Court actually adheres to that view. *See Synanon Church*, 820 F.2d at 426. In fact, since *Ashe*, the Court has stated that collateral estoppel applies to issues "necessary" to the judgment. *See* United States v. Mendoza, 464 U.S. 154, 158 (1984).

59. It is unclear whether the jury found reasonable doubt that Dowling committed the burglary or whether the acquittal was based on some other ground. The Court assumed, for the sake of Dowling's argument, that there was a reasonable doubt. *Id.* at 672 n.2.

60. *See supra* note 54 and accompanying text.

61. *See* 110 S. Ct. at 673.

62. *See* 110 S. Ct. at 672-73; *cf.* United States v. One Assortment of 89 Firearms, 465 U.S. 354, 362 (1984) (holding that "the difference in the relative burdens of proof in the criminal and civil actions precludes the application of the doctrine of collateral estoppel").

63. *See* 110 S. Ct. at 673. Dowling did not satisfy the requirements of collateral estoppel because he failed to show that the jury in the first trial decided that he was not present at the witness's house during the burglary. *Id.*

64. *Id.* at 675-80 (Brennan, J., dissenting).

Brennan argued that the purpose of the double jeopardy clause—protecting criminal defendants against harassment by an overzealous government—mandated that the government bears the burden of showing that an issue it seeks to relitigate was not decided in favor of the defendant in the previous trial.[65] More significantly, Justice Brennan concluded that collateral estoppel always should apply when facts found in a defendant's favor at one trial are introduced as evidence of a second offense at a later trial.[66] In Justice Brennan's view, the lesser standard of proof required at the second trial should not be relevant to the application of the criminal collateral estoppel doctrine.[67] He argued that a retrial of issues places at least the same risks on the defendant under either standard.[68] In fact, allowing the lower standard of proof at the second trial actually increases some of the risks the double jeopardy clause was meant to prevent.[69] Therefore, prohibiting, on double jeopardy grounds, evidence of previously tried crimes on which a defendant won acquittal would be particularly appropriate.[70]

B. Grady v. Corbin

1. Majority Opinion

Grady v. Corbin[71] clearly marked a new development in double jeopardy jurisprudence. In contrast to *Dowling*, *Grady* significantly increased the protection criminal defendants may receive under the

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65. *Id.* at 677. Justice Brennan believed that Dowling had met the burden of showing that the jury in the first case decided that he was not involved in the burglary. *Id.* at 677-78. He stated that the jury must have based its acquittal on the belief that Dowling was not a culprit in the burglary. *Id.* The trial judge commented that Dowling had not seriously challenged the issue of identity, and, according to the prosecutor, Dowling had admitted being present in the burglarized house. However, because Dowling was acquitted of all of a wide array of charges in that case, Justice Brennan concluded that the acquittals must have been for lack of identification because no other grounds would have sufficed to clear him of all charges. *Id.*

66. *Id.* at 676-77.

67. *Id.* at 678.

68. Justice Brennan identified the following risks against which the double jeopardy clause was meant to protect criminal defendants: an erroneous jury determination that the defendant committed the first crime, the jury's tendency to conclude that a defendant who has committed a certain crime is likely to repeat it or a similar crime, and the burden of mounting a second defense against the charges for which he was acquitted. *Id.* at 679-80.

69. *See id.* If past-crimes evidence can be introduced under a lower standard of proof, it is easier for the prosecution to raise the issue of whether the defendant committed those past crimes. Therefore, the defendant is more likely to have to mount a second defense against accusations that he committed past crimes than if a higher standard of proof were required. This result would defeat the clause's objective of preventing the relitigation of charges for which the defendant has been acquitted.

70. *See id.*

71. 110 S. Ct. 2084 (1990). Justices White, Marshall, Blackmun, and Stevens joined in Justice Brennan's majority opinion. Chief Justice Rehnquist and Justice Kennedy joined in Justice Scalia's dissenting opinion. Justice O'Connor filed a separate dissenting opinion.

double jeopardy clause.[72] Furthermore, despite its proximity to the *Dowling* decision,[73] the *Grady* decision casts doubt on the continued validity of *Dowling*.

Corbin was charged in a New York state court with driving while intoxicated and failing to keep to the right of the median.[74] The presiding judge accepted guilty pleas for both of these misdemeanors, unaware that the automobile accident that prompted the charges against Corbin had resulted in the death of a passenger in the vehicle Corbin's car had struck and that a homicide investigation was pending against Corbin at the time he entered his pleas.[75] The investigation later led to an indictment against Corbin for reckless manslaughter, criminally negligent homicide, and third-degree reckless assault. Corbin moved to dismiss this indictment on double jeopardy grounds.[76] The county court denied Corbin's motion and the appellate division denied Corbin a writ of prohibition.[77] Relying on dictum in a 1980 Supreme Court decision, *Illinois v. Vitale*,[78] the New York Court of Appeals reversed, holding that the subsequent prosecution would violate the double jeopardy clause.[79]

The Supreme Court affirmed the decision of the New York Court of Appeals.[80] Justice Brennan's majority opinion began by acknowledging that, even in the context of successive prosecutions, double jeopardy analysis must include an application of the *Blockburger* test.[81] Thus, if an offense charged in a subsequent prosecution included the same statutory elements as a previously tried offense, or if one of the offenses under evaluation was a lesser included offense of the other, *Blockburger*

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72. *See* Gianiny v. State, 577 A.2d 795, 797 (Md. Ct. Spec. App. 1990).

73. *Dowling* was decided on January 10, 1990. *Grady* was decided on May 29, 1990.

74. 110 S. Ct. at 2088.

75. *Id.*

76. *Id.* at 2089.

77. *Id.*

78. 447 U.S. 410 (1980).

79. In *Vitale* Justice White, in an opinion joined by Chief Justice Burger and by Justices Blackmun, Powell, and Rehnquist, rejected the defendant's argument that the double jeopardy clause necessarily barred his prosecution for involuntary manslaughter after an earlier conviction for failing to reduce speed to avoid the accident that resulted in the homicide. In remanding to the Illinois Supreme Court, however, the Court noted that, depending on the nature of the Illinois manslaughter statute, the prosecution once again might have to prove failure to reduce speed in order to sustain the manslaughter case. *Id.* at 420. "In that case, because Vitale has already been convicted for conduct that is a necessary element of the more serious crime for which he has been charged, his claim for double jeopardy would be substantial under *Brown* and our later decision in *Harris v. Oklahoma*, 433 U.S. 682 (1977)." *Id.* at 420 (dictum). For a discussion of *Harris* and *Brown*, and their applicability to these facts, see *infra* part IV.C.1.

80. 110 S. Ct. at 2090.

81. *Id.*

automatically would bar the latter prosecution.[82]

The majority, however, then deviated from much of the Court's prior double jeopardy jurisprudence and held that the *Blockburger* test was only the first step in the evaluation of double jeopardy violations in successive prosecutions.[83] Embracing the expansion of double jeopardy protection suggested in *Vitale*,[84] the Court held that, even when a subsequent prosecution survives a double jeopardy challenge under *Blockburger*, "the Double Jeopardy Clause bars a subsequent prosecution 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 already has been prosecuted."[85] The majority noted that the evaluation of double jeopardy violations in the context of successive prosecutions raises concerns not sufficiently addressed by the *Blockburger* test.[86] In particular, successive prosecutions give the government opportunities to hone its presentation of evidence and to harass defendants.[87] The majority stated that its newly enunciated rule would prevent these undesirable occurrences in many situations that a simple application of the *Blockburger* test could not.[88] In adopting this new rule, the majority purported not to overrule *Dowling*.[89]

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82. *Id.*

83. The *Grady* rule is the second step of a two-step inquiry into whether successive prosecutions are permissible under the clause. *See* United States v. Felix, 926 F.2d 1522, 1526-27 (10th Cir.), *cert. granted*, 59 U.S.L.W. 3726 (U.S. Oct. 7, 1991) (No. 90-1599). In this sense, the *Grady* rule is different from the *Ashe* and *Harris* rules. Although all three rules are protections against successive prosecutions that supplement *Blockburger*, *Ashe* and *Harris* are considered to be protections tbat defendants might invoke in unusual cases, rather than separate steps that must be analyzed in every double jeopardy inquiry in the context of successive prosecutions. *See* 110 S. Ct. at 2097 (Scalia, J., dissenting) (noting that *Ashe* and *Harris* are exceptions to the general rule and that *Blockburger* constitutes the sole double jeopardy inquiry).

84. *Id.* at 2093. In his dissent in *Grady*, Justice Scalia emphasized that the Court's position in *Vitale*, *see supra* note 79, was a mere suggestion: "We did not decide in Vitale that the second prosecution would constitute double jeopardy if it required proof of the conduct for which Vitale had already been convicted. We could not possibly have decided that, since the issue was not presented on the facts before us." 110 S. Ct. at 2101 (Scalia, J., dissenting).

85. *Id.* at 2087. The Court's justification for this particular rule was expressed in a single sentence: "We believe that this analysis [the Vitale dictum] is correct and governs this case." *Id.* at 2090. The rest of the Court's opinion was not concerned with explaining why the clause required this particular test. Rather, the opinion merely argued that *Blockburger* is not, and should not be, the only double jeopardy test in the context of successive prosecutions. *See id.* at 2090-93. This Recent Development refers to this quoted test as "the *Grady* rule." The term, therefore, refers only to the second step of the two-step double jeopardy analysis; the *Blockburger* test is not part of the *Grady* rule.

86. Although *Blockburger* is part of the double jeopardy protection against multiple prosecutions, *see id.* at 2090, the test originally was developed in the context of multiple punishments imposed in a single prosecution. *Id.* at 2090-91.

87. *Id.* at 2091-92, 2093.

88. *Id.* at 2093.

89. Referring to *Dowling*, the majority noted: "As we have held, the presentation of specific

2. Dissenting Opinions

Justices O'Connor and Scalia filed separate dissenting opinions.[90] Justice O'Connor's dissent emphasized that the majority's ruling contradicts *Dowling* in many circumstances. She noted that in *Dowling* the government had offered past-crimes evidence to prove identity, an essential element of bank robbery, armed robbery, and, indeed, every crime.[91] Thus, she reasoned that, under the *Grady* rule, the facts in *Dowling* presented a double jeopardy violation.[92] Justice O'Connor also expressed concern that the *Grady* rule called into question the continued validity of Federal Rule of Evidence 404(b), predicting that the majority's new rule is likely to exclude much probative evidence otherwise admissible under Rule 404(b).[93]

Justice Scalia's dissent, joined by Chief Justice Rehnquist and Justice Kennedy,[94] argued that *Blockburger* generally provides the only appropriate test for determining whether successive prosecutions based on the same conduct violate the double jeopardy clause.[95] Justice Scalia noted that the Court's prior double jeopardy jurisprudence had established only two situations in which the Court should not rely exclusively on *Blockburger*—cases raising issues of criminal collateral estoppel[96] and cases involving the incorporation of one statutory crime into another that failed to specify the former's elements.[97] He argued that, aside from these two limited exceptions, *Blockburger* should remain the exclusive test for double jeopardy violations.[98]

In support of his argument, Justice Scalia first claimed that the *Blockburger* test best effectuates the language of the double jeopardy clause.[99] He then stressed that, under a proper interpretation of the

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evidence in one trial does not forever prevent the government from introducing that same evidence in a subsequent proceeding." *Id.* at 2093.

90. *Id.* at 2095-96 (O'Connor, J., dissenting); *id.* at 2096-2105 (Scalia, J., dissenting).

91. *Id.* at 2095 (O'Connor, J., dissenting).

92. *Id.* at 2095-96.

93. *See id.* at 2096. Justice O'Connor noted that the *Dowling* Court expressed a desire to limit double jeopardy protection so that evidence helpful to the fact finder might be admitted. *See Dowling*, 110 S. Ct. at 673.

94. Justice O'Connor approved of much of Justice Scalia's dissent. *Grady*, 110 S. Ct. at 2095 (O'Connor, J., dissenting).

95. *Id.* at 2097 (Scalia, J., dissenting).

96. *See id.* at 2097 (citing Ashe v. Swenson, 397 U.S. 436 (1970)).

97. *See id.* at 2097 (citing Harris v. Oklahoma, 433 U.S. 682 (1977)).

98. *Id.* at 2097.

99. Justice Scalia argued that at the time the Fifth Amendment was ratified, "offence" meant the breaking of a law. *Id.* at 2097. Therefore, a defendant is not being prosecuted for the same offense unless the defendant is being prosecuted for breaking the same law. Laws are not the same if each law, *i.e.*, criminal statute, contains an element that the other does not. It follows that a defendant is not being prosecuted for the same offense if each criminal statute includes an element that the other does not. *See id.*

clause, all violations should be determinable before the onset of the second trial.[100] The *Blockburger* test, Justice Scalia noted, focused on the charges leveled against the defendant and provided a consistent and reliable means of making such pretrial determinations.[101] In contrast, the new *Grady* rule, which focuses on the conduct to be proved at the second trial, often would be difficult to implement at the pretrial stage.[102] Finally, Justice Scalia argued that the history of double jeopardy jurisprudence supported the notion that *Blockburger* generally should be the exclusive measure of protection under the clause.[103]

Justice Scalia attacked the *Grady* rule as a de facto abandonment of the long-accepted views and precedent embodied in *Blockburger*. He noted the lack of precedent for the *Grady* rule[104] and what Justice Scalia perceived as the new rule's inconsistency with the *Dowling* decision.[105] In addition, Justice Scalia criticized what he predicted would be the rule's practical effect. He surmised that, when multiple charges arise from a single criminal act, the *Grady* rule effectively would require the government to bring all charges related to that act in a single proceeding.[106]

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100. Justice Scalia rejects the notion that "jeopardy" refers to convictions or sentences. He believes that it refers to standing trial. Thus, being "twice put in jeopardy" can refer only to standing trial a second time. *Id.* Support exists for this view. *See supra* note 26 and accompanying text. Violations of a rule that prohibits the very act of a second trial cannot be identified or caused by what occurs at the second trial, but rather should be apparent before that trial. 110 S.Ct. at 2097-98 (Scalia, J., dissenting).

101. 110 S. Ct. at 2097-98 (Scalia, J., dissenting). Determining whether *Blockburger* has been violated requires no more than a comparison of the elements of statutes under which the defendant has been prosecuted. *Id.* at 2093.

102. For a discussion of the applicability of *Grady* after the pretrial stage, see *infra* part IV.D.1.

103. Justice Scalia argued that the clause had its roots in two English common-law pleas, *auterfoits acquit* and *auterfoits convict*, which were substantial only against successive prosecutions for crimes with identical elements, even if based on the same act. Thus, the origins of Anglo-American law indicate that *Blockburger* should be the exclusive definition of "same offense" in the context of successive prosecutions. *See id.* at 2098-2101.

104. Justice Scalia pointed to the majority's admission that Illinois v. Vitale, 447 U.S. 410 (1980), did not rule on the issue that the *Grady* court confronted. *See supra* note 84. Justice Scalia further argued that the *Vitale* court, even in dictum, did not necessarily endorse the rule adopted by the *Grady* court:

> [W]e did not even *say* in Vitale, by way of *dictum*, that such a prosecution would violate the Double Jeopardy Clause. We said only that a claim to that effect would be "substantial," deferring to another day the question whether it would be *successful*. That day is today, and we should answer the question no.

110 S. Ct. at 2101 (citations omitted). Justice Scalia then refuted the idea that the cases cited in *Vitale* might, as the majority claimed, make the argument in question "substantial." *See id.* at 2101-02. For an argument that Justice Scalia was correct on this point, see *infra* part IV.C.1.

105. 110 S. Ct. at 2102. *See also infra* part IV.C.2.

106. *See* 110 S. Ct. at 2102-03. The Court specifically has rejected such a requirement in Garrett v. United States, 471 U.S. 773, 790 (1985). *Accord Grady*, 110 S. Ct. at 2094 n.15. Justice Brennan, however, has advocated the use of a "same transaction" test since 1970. *See* Ashe v.

Justice Scalia concluded his dissent by criticizing the majority for placing illusory limitations on its new rule.[107] He acknowledged that the majority had attempted to phrase the rule in a way that would allow courts to exclude some, but not all, evidence of prior offenses for which defendant had been prosecuted previously.[108] Nevertheless, Justice Scalia argued, because the rule prohibited all evidence introduced for the purpose of proving an essential element of a crime charged in a second prosecution, and because all relevant evidence at a criminal trial is aimed at establishing an essential element of a crime charged,[109] the rule actually would exclude all relevant evidence of past crimes for which a defendant had been prosecuted previously.[110] Thus, the majority's apparent limitation on the exclusionary force of its rule through the essential element requirement created, in fact, no limitation at all. Evidence not excluded under the essential element language should be excluded on relevancy grounds anyway.[111]

Justice Scalia also criticized the other limiting principle found in the language of the rule—that only evidence that proves conduct *constituting an offense* for which the defendant has been prosecuted violates the double jeopardy clause.[112] He argued that this language might allow prosecutors to use some of the facts relevant to the prior crime, as long as those facts fall short of proving the entire prior offense.[113] If the *Grady* rule permits the prosecution to manipulate its proof in this fashion, however, then the rule fails to serve its two purposes—to avoid placing the burden of a second prosecution on defendants and to prevent the prosecution from rehearsing its case in the first prosecution.[114]

Swenson, 397 U.S 436, 453-54 (1970) (Brennan, J., concurring). *See also* Jones v. Thomas, 491 U.S. 376, 387-88 (1989) (Brennan, J., dissenting). Justice Scalia believed that the *Grady* rule is a disguised form of the same transaction test, but Justice Brennan denied this accusation. *See Grady*, 110 S. Ct. at 2094 & n.15. Although *Grady* increases the possibility that a double jeopardy violation will occur if crimes arising out of the same transaction are not prosecuted in one proceeding, *Grady* does permit, in some instances, multiple prosecutions for crimes arising out of a single transaction. *See id.* at 2094.

107. 110 S. Ct. at 2102-05 (Scalia, J., dissenting).

108. Under the *Grady* rule, repetitive proof violates the clause only if that proof will be introduced "to establish an essential element of an offense charged in [the subsequent] prosecution." *Id.* at 2093.

109. Evidence in a criminal trial is irrelevant and, thus, inadmissible unless it pertains to guilt. *See* 110 S. Ct. at 2103. All evidence pertaining to guilt is aimed at establishing an essential element of the crime charged. *See* Jackson v. Virginia, 443 U.S. 307, 320 (1979); United States v. Hall, 653 F.2d 1002 (5th Cir. Unit A Aug. 1981). Thus, all relevant evidence tends to establish an essential element of a crime charged.

110. 110 S. Ct. at 2103 (Scalia, J., dissenting).

111. *See id.* at 2103.

112. *Id.*

113. *Id.* at 2104. For a discussion of the accuracy of this interpretation of the *Grady* rule, see *infra* text accompanying notes 172-73.

114. 110 S. Ct. at 2103 (Scalia, J., dissenting).

In addition, Justice Scalia suggested that the *Grady* rule might provide an incentive to defense counsel to introduce evidence of prior conduct for which their clients had been prosecuted, in a manner sufficient to create a double jeopardy violation.[115] Finally, Justice Scalia criticized the potential of the *Grady* rule to disrupt the trial process. Not only might the rule force trial judges to make periodic double jeopardy evaluations throughout a trial, but it also would force judges to terminate a trial as soon as a *Grady* violation became apparent.[116]

IV. ANALYSIS

A. Grady: *A Definition of "Same Offense" or a Component of the Double Jeopardy Concept?*

In analyzing *Grady* one must first identify exactly what the *Grady* rule is, and what it is not. Contrary to the way some commentators have characterized the rule,[117] it is not merely a means of defining the "same offense" language found in the double jeopardy clause. Rather, the *Grady* rule is a test for determining whether a double jeopardy violation exists.[118] This distinction is significant because it indicates the revitalization of an expansive view of double jeopardy rights, which this Recent Development refers to as the "double jeopardy concept."[119]

Although the majority could have included a "same offense" definition somewhere within the *Grady* rule, it did not do so, either explicitly or implicitly. Nowhere in its opinion did the *Grady* majority refer to its rule as a definition of "same offense," nor did the majority point to any part of its rule intended to determine whether the prosecutions in question involved the same offense.[120] Instead, the majority merely declared that the rule was an appropriate test for when successive prosecutions violate the double jeopardy clause.[121] By its terms, the rule is a complete description of double jeopardy violations in this context.[122] The

115. *Id.* at 2104.

116. *Id. See also infra* text accompanying notes 214-16.

117. *See, e.g.*, James M. Herrick, Note, *Double Jeopardy Analysis Comes Home: The "Same Conduct" Standard in* Grady v. Corbin, 79 KY. L.J. 847 (1991); Sara Barton, Case Comment, Grady v. Corbin, *An Unsuccessful Effort to Define "Same Offense,"* 25 GA. L. REV. 143 (1990).

118. *See Grady*, 110 S. Ct. at 2093. *See also infra* note 122 and accompanying text.

119. The Author coined this term to facilitate discussion. For a further explanation of the double jeopardy concept, see *infra* note 133.

120. The Court did state that *Blockburger* is not the exclusive definition of "same offense" in the context of successive prosecutions. 110 S. Ct. at 2091 n.8. The Court did not explain, however, how its rule affected the definition of "same offense." Thus, while the first part of the two-step double jeopardy inquiry—the *Blockburger* test—is a definition of "same offense," *see Grady*, 110 S. Ct. at 2096 (Scalia, J., dissenting), the second step—the *Grady* rule—is not.

121. 110 S. Ct. at 2093.

122. The *Grady* rule begins, "the Double Jeopardy Clause bars . . . ." *Id.* Even one commentator who described *Grady* as a definition of "same offense" acknowledged that the rule actu-

Grady rule, therefore, is more than a mere definition of "same offense" because the existence of a double jeopardy violation depends on more than a "same offense" finding.[123]

Some commentators apparently have assumed that the *Grady* Court implicitly indicated that "same offense" means "same conduct."[124] It is, however, simply inaccurate to say that *Grady* substitutes the word "conduct" for the word "offense" in the double jeopardy clause. *Grady* does not prohibit the introduction of the same conduct in all successive prosecutions; nor does it prohibit successive prosecutions for the same illegal conduct in all situations.[125] Furthermore, the rule provides no mechanism for determining whether successive prosecutions were for the same offense.[126] Therefore, the *Grady* rule apparently requires no threshold finding of a same offense before finding a double jeopardy violation.

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ally "defined the standard for determining what constitutes double jeopardy." Note, *supra* note 117, at 847.

123. Double jeopardy also depends upon the existence of "jeopardy," *see, e.g.*, United States v. Pitts, 569 F.2d 343, 346 (5th Cir.), *cert. denied*, 436 U.S. 959 (1978), "same offense," *see, e.g.*, Fain v. Duff, 488 F.2d 218, 225-26 (5th Cir. 1973), *cert. denied*, 421 U.S. 999 (1975), and "twice," *see, e.g.*, People *ex rel.* Fernandez v. Kaiser, 230 A.D. 646, 648, 246 N.Y.S. 309, 311 (3d Dep't 1930). A double jeopardy determination also conceivably could depend upon defining "life or limb." *See* George C. Thomas III, *A Modest Proposal to Save the Double Jeopardy Clause*, 69 WASH. U. L.Q. 195 (1991).

124. *See* sources cited *supra* note 117.

125. *Grady* prohibits the use of some prior culpable conduct, but not the use of any prior innocent conduct. *See* Thomas, *supra* note 123, at 195. Nevertheless, a substantial amount of prior culpable conduct still may be admissible under *Grady*. *See infra* text accompanying note 173; United States v. Felix, 926 F.2d 1522, 1533 (10th Cir.) (Anderson, J., dissenting), *cert. granted*, 59 U.S.L.W. 3726 (U.S. Oct. 7, 1991) (No. 90-1599).

126. Such a determination would require identifying a set of facts in the first proceeding that matches a set of facts in the second prosecution. If a set of identical facts can be categorized as an offense under any reasonable definition of the term, then both prosecutions involved the same offense. For example, *Blockburger* requires that the court identify a set of statutory elements for the crime charged in the first prosecution that are identical to a set of statutory elements for the crime charged in the second prosecution. A set of criminal statutory elements comports with a reasonable definition of offense, so a court properly may find that the successive prosecutions were for the same offense.

For the *Grady* rule to apply, however, the only set of facts that must be the same in both prosecutions is certain culpable conduct. Although culpable conduct easily fits within a sensible definition of offense, the *Grady* rule complicates the evaluation process. Even if the culpable conduct present in both prosecutions is the same, the rule does not apply unless two other conditions are met. First, the conduct introduced in the second prosecution must have constituted an offense charged in the first prosecution. Second, the conduct must be offered to establish an essential element of a crime charged in the second prosecution. The failure of either of these conditions means that there is no violation of the *Grady* rule. Presumably, then, failure of a condition means that the sameness of the conduct has vanished, because nothing else has occurred to take the situation out of the ambit of the double jeopardy clause. The odd requirements of the *Grady* rule work to divest offenses of their sameness for reasons totally unrelated to why the offenses are called the same in the first place. *Grady*, therefore, does not indicate any reliable means of identifying a set of identical facts that properly may be called same offenses.

The *Grady* Court's failure to require a same offense finding marks a changing view of the nature of double jeopardy protection. Although historically the Court never appeared certain about the clause's exact requirements, it at least assumed that the answer should be based on the words of the clause.[127] Although the Justices disputed about how strictly the constitutional text should be construed,[128] they generally agreed that the applicable rule was that no one could be put twice in jeopardy for the same offense, whatever that meant.[129]

In *Ashe v. Swenson*,[130] however, the Court replaced the language of the double jeopardy clause with the double jeopardy concept.[131] The double jeopardy clause contains language for the Court to interpret, whether or not in a sincere or skillful manner,[132] in order to define double jeopardy rights. In contrast, the double jeopardy concept comprises general premises about what the government should and should

127. *See* Green v. United States, 355 U.S. 184, 185 (1957) (stating that "this case presents a serious question concerning the meaning and application of that provision of the Fifth Amendment to the Constitution which declares that no person shall '. . . be subject for the same offence to be twice put in jeopardy of life or limb' "); Gavieres v. United States, 220 U.S. 338, 341-42 (1911) (holding that "[i]t is to be observed that the protection intended and specifically given is against second jeopardy for the *same* offense"). This focus on the words of the clause was completely absent in Ashe v. Swenson, 397 U.S. 436 (1970), and *Grady*. *See Ashe* (incorporating criminal collateral estoppel into the clause without quoting the words of the clause even a single time); *Grady* (creating another double jeopardy test, but mentioning the language of the clause only in a single footnote).

128. In Green v. United States, 355 U.S. 184 (1957), for example, a defendant was charged with first degree murder and convicted of the lesser included offense of second degree murder. He subsequently appealed that conviction, which was overturned. Although a new trial for second degree murder would not have violated the double jeopardy clause, the Court held that a new trial for first degree murder would violate the clause because the conviction of a lesser included offense is an implied acquittal of the greater offense. *Id.* at 190. Although the Court and the dissent disagreed about how strictly the language of the clause should be construed and about what historical references supported either construction, the language of the clause was always at the forefront of the debate. *See id.* (holding that the "second trial for first degree murder placed [the defendant] in jeopardy twice for the same offense in violation of the Constitution"); *id.* at 198 (observing that "[t]he right not to be placed in jeopardy more than once for the same offense is a vital safeguard in our society"); *id.* at 206 (Frankfurter, J., dissenting) (noting that statutory language, which had failed to support a double jeopardy claim in a previous case having facts similar to *Green*, was "substantially identical with that in the Fifth Amendment to the Constitution, upon which the petitioner" relied).

129. *See supra* note 128. *See also* United States v. Ball, 163 U.S. 662, 669 (1896) (stating that "the prohibition is not against being twice punished, but against being twice put in jeopardy"); *In re* Nielsen, 131 U.S. 176, 188 (1889) (holding that "the test is not, whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offence") (quoting Morey v. Commonwealth, 108 Mass. 433, 434 (1871)).

130. 397 U.S. 436 (1970).

131. *See infra* notes 135-38 and accompanying text.

132. The Author does not claim that the Court shows a lesser inclination to cloak judicial fiat in the guise of textual interpretation when confronted with a double jeopardy issue than when confronted with any other issue.

not be able do to persons.[133] When the Court justifies rules based on these premises, it generally cites the double jeopardy clause but fails to demonstrate any concrete relationship between these premises and any specific language in the clause.[134] When acting in furtherance of the double jeopardy concept, the Court decides that the double jeopardy clause has been violated without specifically identifying how a person has been put twice in jeopardy for the same offense.

In *Ashe*, for example, the Court held that no matter what issue a criminal defendant would have to litigate, the clause embodies the doctrine of collateral estoppel,[135] not because the absence of collateral estoppel would put defendants twice in jeopardy for the same offense, but because it would force the defendants to "run the gauntlet" a second time.[136] In fact, no reasonable construction of the language of the clause indicates that the Constitution requires the application of collateral estoppel in every case.[137] The Court, however, did not consult the lan-

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133. The double jeopardy concept is a general belief that defendants have certain rights that ensure that the government is not able to do certain things to them more than once. The concept relies upon the double jeopardy clause as a basis for making such rights constitutionally required. The reason for invoking the double jeopardy clause, rather than some other constitutional provision, is that the clause also refers to the government not being able to do certain things to a defendant more than once. Therefore, it appears much more appropriate to argue that the rights are inherent in the double jeopardy clause than in some other constitutional provision. *Compare Ashe* (holding that criminal collateral estoppel is embodied in the double jeopardy clause) *with* Hoag v. New Jersey, 356 U.S. 464 (1958) (holding that criminal collateral estoppel is not embodied in the due process clause). A closer examination of the clause might indicate that no conceivable interpretation of its language supports finding such a right. If, however, the Court cites the double jeopardy clause, but not its specific language, the Court hides this fallacy, and the double jeopardy protection henceforth includes that right.

The concept is much broader than the clause. Whereas the clause only prevents the government from putting a defendant twice in jeopardy for the same offense, the concept prevents the government from doing a wide range of things to defendant more than once. To the extent that the government might do things to a person that cannot reasonably be categorized as putting that person in jeopardy, the concept creates rights that simply should not be found in the clause.

134. *See infra* notes 135-38 and accompanying text.

135. 397 U.S. at 445.

136. 397 U.S. at 446. Collateral estoppel remains a component of double jeopardy protection. Dowling v. United States, 110 S. Ct. 668 (1990), did not change this rule. In fact, the *Dowling* Court reaffirmed *Ashe*, but held that collateral estoppel did not apply under the facts of *Dowling*. *Id.* at 672-73.

137. Criminal collateral estoppel prevents the government from forcing a defendant to relitigate an ultimate issue on which he was successful at a previous trial. When such an issue involves anything that reasonably could be called an offense, such as defendant's prior bad conduct, collateral estoppel might protect a defendant from twice heing put in jeopardy for the same offense, as that term might reasonably be defined. For example, suppose a defendant was acquitted of a committing a bizarre signature crime. Subsequently, the same defendant is tried for committing another crime with the same bizarre signature—a crime that occurred 100 miles away and 5 hours after the first crime. Collateral estoppel would not permit the prosecution to force the defendant to relitigate the issue of whether he perpetrated the prior crime. What is the same in the first and second prosecutions is the issue: whether defendant committed the first offense. A "yes" answer to that question in the second trial after acquittal in the first certainly jeopardizes the defendant by

guage of the clause, but instead chose to rely on the "run the gauntlet" language to delineate the scope of double jeopardy rights. Under *Ashe*, then, the double jeopardy clause clearly became more than a guarantee against being put twice in jeopardy for the same offense.[138]

Grady also is grounded in the double jeopardy concept. The majority failed to consider whether the clause required the formulation of a new rule to prevent persons from being put twice in jeopardy for the same offense.[139] Instead, the Court justified the rule on the basis that it supposedly honors the values embodied in the double jeopardy clause.[140] The majority demonstrated little concern about whether the language of the clause is reasonably susceptible to such an interpretation.

B. Grady's *Break with Precedent*

1. The Inapplicability of *Harris* and *Brown*

The *Grady* majority characterized its rule[141] as an application of *Brown v. Ohio*[142] and *Harris v. Oklahoma*.[143] These decisions, however, fail to justify the result in *Grady v. Brown*, which invalidated a prosecution for a greater offense after a conviction for the lesser offense,[144]

making his conviction at the second trial more likely. Thus, collateral estoppel in this case arguably prohibits defendant from being "put twice in jeopardy for the same offense."

Suppose, however, that the only contested issue in the first trial was identity, and the defendant's defense was alibi, for example, that he was in New Zealand at the time. Suppose further that it is clear that the jury acquitted the defendant because it believed his alibi. Under the "essential" or "necessary" formulation, collateral estoppel prevents the prosecution from relitigating the narrow issue of whether defendant was in New Zealand on that day. *See supra* note 58 (discussing the various formulations of the collateral estoppel inquiry). If the defendant had been forced to relitigate the issue, however, it simply cannot be said that he is being put in jeopardy for the same offense. There might be jeopardy at the second trial, and issues that are the same, but there is no offense common to both trial—unless being in New Zealand is a crime.

138. *Ashe* is siguificant in the development of the double jeopardy concept because it showed the Court's willinguess to ignore the language of the clause when formulating double jeopardy law. The doctrine of collateral estoppel itself, however, is not a very significant addition to the double jeopardy protection available under *Blockburger*, because it will fail in many cases to bar a second prosecution even when it bars relitigation of a certain issue. *See* Thomas, *supra* note 2, at 374 n.318.

139. The Court discussed the need for more protection against successive prosecutions, but neglected to state why its particular test effectuated the language of the double jeopardy clause. *See supra* note 85. Interestingly, the Court mentioned the language of the clause only once, in a footnote. *See Grady*, 110 S. Ct. at 2087 n.1.

140. *See* 110 S. Ct. at 2090-93.

141. *See* 110 S. Ct. at 2090 (quoting Illinois v. Vitale, 447 U.S. 410, 420 (1980)).

142. 432 U.S. 161 (1977). In December 1973 defendant Brown was charged with joyriding. He pleaded guilty to the charge and served 30 days in jail. *Id.* at 162. In February of 1974, Brown was charged with auto theft arising out of the same events that led to his joyriding conviction. *Id.* at 162-63. Joyriding was a lesser included offense of auto theft under Ohio law. *Id.* at 168.

143. 433 U.S. 682 (1977). For a discussion of the facts of *Harris*, see *supra* note 41.

144. *Brown*, 432 U.S. at 169.

depended only on a straightforward application of *Blockburger*,[145] and the Court has emphasized that *Brown* was not meant to bar a second prosecution in any other situation.[146] *Brown* is simply a convenient illustration of the *Blockburger* test and provides defendants no further protection. In contrast, the *Grady* majority freely admitted that, under *Blockburger*, the second prosecution in *Grady* did not violate the double jeopardy clause.[147] *Harris* also fails to justify the result in *Grady*. *Harris*, like *Brown*, was decided in the context of successive prosecutions for greater and lesser crimes—felony murder and the underlying felony.[148] Unlike *Brown*, however, *Harris* did not follow directly from *Blockburger*.

The felony murder statute at issue in *Harris* did not require proof of any particular felony; the state had proved robbery with a firearm, but proof of any felony would have sufficed.[149] Thus, *Blockburger* technically would not have barred the subsequent prosecution.[150] Suppose, however, that the legislature had chosen to define felony murder in a series of statutes, each of which required proof of a particular felony. *Blockburger* then would bar prosecution for the underlying felony after prosecution for felony murder. Therefore, had the Court not acknowledged an exception, the *Blockburger* rule would have allowed an evisceration of Harris's constitutional protection merely because the legislature decided to include all underlying felonies in a single felony murder statute. *Harris* prevents this absurd result and, therefore, blocks legislative shortcuts around the dictates of *Blockburger* in the context of successive prosecutions.[151]

To reach this result, the *Harris* Court relied solely on Ex parte

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145. *See id.* at 168.

146. *See* Garrett v. United States, 471 U.S. 773, 787 (1985) (observing that Brown involved the "classically simple" situation of prosecutions for greater and lesser offenses). The *Grady* Court cited a footnote from the *Brown* opinion in order to show that *Brown* supported the *Grady* rule. *See Grady*, 110 S. Ct. at 2092 (quoting *Brown*, 432 U.S. at 166-67 n.6 (1977)). The footnote, however, does not support the adoption of the *Grady* rule. Not only is the footnote merely dictum, it does not recommend the creation of any additional double jeopardy protection beyond tbat already available at the time. Instead, the footnote simply discussed *Ashe* and *Nielsen* and recognizes tbat both are settled double jeopardy law. Far from suggesting tbat the Court sbould create additional protection, tbe footnote concedes that the Court "need not decide whetber the repetition of proof required by the successive prosecutions against Brown would otherwise entitle him to the additional protection offered by *Ashe* and *Nielsen*." *Brown*, 432 U.S. at 167 n.6.

147. Tbe defendant conceded tbis point. 110 S. Ct. at 2094.

148. *Harris*, 433 U.S. at 682.

149. *See* Grady v. Corbin, 110 S. Ct. 2084, 2097 (1990) (Scalia, J., dissenting).

150. *See supra* note 41.

151. Although legislatures may evade *Blockburger*'s prohibition against multiple punishments if they so intend, see *supra* text accompanying notes 30-32, legislatures cannot impinge similarly upon double jeopardy rights in the context of successive prosecutions. *See* Thomas, *supra* note 32, at 107.

Nielsen,[152] which held that a person convicted for a crime containing various elements cannot be tried again for one of those elements.[153] *Harris*, relying on *Nielsen*, accomplished essentially the same result as had *Brown*, relying on *Blockburger*—a prohibition of successive prosecutions for greater and lesser offenses.[154] Thus, although *Harris* does not follow from a rigid application of *Blockburger*, it is closely related to *Blockburger* because *Harris* focuses directly on the elements of the crimes charged in each prosecution.[155] In contrast, the *Grady* rule purposefully avoids focusing on the elements of the prior prosecution.[156] Therefore, the *Grady* and *Harris* tests are dissimilar, and *Harris* does not support the result in *Grady*.[157]

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152. 131 U.S. 176 (1889).

153. *Id.* at 188-89 (using the term "incident" as a synonym of "statutory element"). In *Nielsen* the defendant first was convicted of cohabiting with two wives over a two-and-one-half-year period. Subsequently, he was prosecuted and convicted for committing adultery with one of the wives one day after the period of cohabitation ended. The Court held that the double jeopardy clause barred the second prosecution. *Id.* at 187.

154. *Harris*, 433 U.S. at 682. *Nielsen* and *Blockburger* both prohibit successive prosecutions for greater and lesser included offenses. *See Brown*, 432 U.S. at 168. The difference in the two cases is the manner in which the Court was willing to classify offenses as "greater" and "lesser included." A lesser included offense is one that requires no proof beyond that necessary for conviction of another offense—the greater offense. *Id.* Therefore, whether offenses constitute greater and lesser included offenses depends upon the proof required for conviction under each offense. The *Blockburger* test requires the court to examine the statutery elements of an offense to determine what proof it requires. *Id.* at 166. In *Nielsen*, however, the Court showed a willingness to look beyond the statutory language defining the offenses to determine what proof the statutes actually required for conviction. *See Nielsen*, 131 U.S. at 189.

155. *Harris* ensures that a prosecution under a statute that incorporates a lesser offense cannot avoid the dictates of *Blockburger* merely because of peculiarities in the way the statute defining the greater offense refers to the lesser offense. *See supra* text accompanying notes 149-51. A lesser included offense is one whose elements are a subset of the elements of the greater offense. Schmuck v. United States, 489 U.S. 705 (1989) (decided in the context of jury instructions); *see also* United States v. Schmuck, 840 F.2d 384, 388 (7th Cir. 1988), *aff'd*, 489 U.S. 705 (1989) (noting that the definition is the same for the purposes of double jeopardy analysis). Whether one offense is proved by the evidence adduced in proof of another offense has nothing to do with whether the former is a lesser included offense of the latter. *See Schmuck*, 840 F.2d at 388. Lesser included offense refers to elements of crimes charged, not conduct used to prove them. *Id.*

Thomas, *supra* note 2, argues that *Nielsen* was concerned with the conduct used to prove the prior offense. *Id.* at 344. It is, in fact, difficult to determine the exact basis for *Nielsen*. *See id.* *Harris*, however, relied only on those portions of the Nielsen opinion that proscribed successive prosecutions for greater and lesser offenses. *Harris*, 433 U.S. at 682-83. In *Harris* the Court determined the existence of greater and lesser offenses by examining the elements of the statutes involved. *Id.* Therefore, even if Nielsen was concerned with what conduct was proved at the previous prosecution, *Harris* was concerned with the statutory elements of the two prosecutions.

156. *See Grady*, 110 S. Ct. at 2093.

157. The *Grady* Court declared that its rnle was necessary because "a technical comparison of the elements of the two offenses as required by *Blockburger* does not protect defendants sufficiently from the burdeus of multiple trials." 110 S. Ct. at 2093.

2. *Grady*'s Tension with *Dowling*

Not only is *Grady* unsupported by the Court's earlier double jeopardy jurisprudence; it also is difficult to reconcile with *Dowling v. United States*,[158] which the Court decided less than five months before *Grady*. The *Grady* Court, however, refused to overrule *Dowling* overtly.[159] Nevertheless, either *Grady* overrules *Dowling* de facto, or *Dowling*, if it remains intact, places significant limitations on *Grady*.

Simple juxtaposition of the two cases reveals the uneasiness of their coexistence. *Dowling* held that the double jeopardy clause did not bar the admission of evidence of a defendant's participation in past crimes for which defendant previously had been acquitted, as long as the jury in the second trial could find by a preponderance of the evidence that the past crimes had occurred and that the defendant was the culprit.[160] *Grady* held that the double jeopardy clause bars a subsequent prosecution in which the government, to prove an essential element of an offense charged in the subsequent prosecution, will prove conduct that constitutes an offense for which the defendant has previously been prosecuted.[161] One might rephrase the *Grady* rule as follows: the introduction of evidence of conduct that constitutes an offense for which the defendant has previously been prosecuted violates the double jeopardy clause when that evidence is intended to establish an essential element of a crime charged in a subsequent prosecution.[162] In *Dowling* the government introduced the burglary victim's testimony to prove identity,[163] an essential element of any crime. Thus, it appears that, under the *Grady* rule, the introduction of the testimony at issue violated the clause if the testimony proved conduct constituting an offense for which Dowling had previously been prosecuted.[164]

The *Grady* majority attempted to distinguish *Dowling* by portraying this testimony as evidence comprising something less than evidence proving conduct constituting an offense for which Dowling previously had been prosecuted.[165] An examination of *Dowling*, however, does not reveal such a clear distinction. First, the prosecution may have proved[166] conduct by Dowling sufficient to satisfy each element of bur-

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158. 110 S. Ct. 668 (1990).

159. *See supra* note 89 and accompanying text.

160. 110 S. Ct. at 672.

161. 110 S. Ct. at 2093.

162. *Grady* operates as a restriction on the evidence that the prosecution can introduce at a trial rather than as a prohibition against having the trial at all. *See* 110 S. Ct. at 2094. *See also infra* notes 222-23 and accompanying text.

163. *See* 110 S. Ct. at 670.

164. This follows from a straightforward application of *Grady*.

165. *See* 110 S. Ct. at 2093.

166. For a discussion of the problems presented in defining "prove" for the purposes of

glary, a crime for which Dowling was prosecuted in the earlier trial.[167] Admittedly, the *Dowling* Court referred to the testimony in question as evidence relating to prior conduct that the prosecution failed to prove beyond a reasonable doubt in the earlier trial.[168] The essence of *Dowling*, however, is the difference between proving conduct beyond a reasonable doubt and proving it under a lower standard of proof.[169] The *Dowling* Court easily might have concluded that, under the lower standard,[170] the witness's testimony did prove conduct constituting the entire burglary offense. Therefore, *Grady* distinguished *Dowling* by making unsupported assumptions about what the *Dowling* Court decided. *Dowling* prescribed what evidence may be introduced at trial, without considering whether that evidence proved conduct.[171]

If the *Grady* Court correctly distinguished *Dowling* because the prosecution in *Dowling* did not prove all of the conduct necessary to constitute an offense, *Grady*'s impact would be limited significantly. The prosecution easily could avoid the dictates of *Grady* by omitting just enough evidence to avoid proving some of the conduct necessary to constitute the entirety of an offense.[172] Apparently, such tactics can succeed. Several courts already have held that, although the prosecution introduced evidence of a past crime, it did not prove all of the conduct constituting the crime and, therefore, did not violate the *Grady* rule.[173]

Grady, see *id.* at 2104 (Scalia, J., dissenting).

167. The Virgin Islands burglary statute requires proof of breaking and entering a dwelling in which there is, at that time, a human being. V.I. CODE ANN. tit. 14, § 442 (1964). The witness, Ms. Henry, specifically testified that this occurred. 110 S. Ct. at 670. In addition, the statute requires that defendant be armed with a dangerous weapon or be assisted by a confederate actually present. V.I. CODE ANN. tit. 14, § 442. Henry testified that Dowling carried a handgun and entered her home with an accomplice. 110 S. Ct. at 670. Ms. Henry, however, may not have testified to the final element of burglary, intent to commit an offense in the dwelling, V.I. CODE ANN. tit. 14, § 442. Nevertheless, a jury easily could have inferred such intent. *See, e.g.*, Frazier v. State, 567 So. 2d 879, 880 (Ala. 1990).

168. *See Dowling*, 110 S. Ct. at 673.

169. *See id.* at 672.

170. As Justice Scalia pointed out, the *Grady* rule fails to specify what threshold of proof is necessary to trigger a *Grady* violation. *See Grady*, 110 S. Ct. at 2104 (Scalia, J., dissenting). Therefore, proving conduct under a lower standard of proof well may constitute a *Grady* violation.

171. No basis exists for believing that the *Dowling* Court even thought about whether evidence otherwise acceptable would become unconstitutional if it proved certain conduct. The Court held that evidence of the prior burglary was admissible and did not even discuss the possibility that its admissibility might depend upon the conduct that the evidence was intended to prove.

172. 110 S. Ct. at 2103 (Scalia, J., dissenting).

173. *See* United States v. White, 936 F.2d 1326, 1330 (D.C. Cir. 1991), *cert. denied*, 60 U.S.L.W. 3342 (U.S. Nov. 5, 1991) (No. 91-516); United States v. Rivera-Feliciano, 930 F.2d 951, 954 (1st Cir. 1991). Although lower appellate courts have reversed numerous convictions under *Grady*, the trials in these cases occurred before the Court decided *Grady*, when prosecutors could not anticipate the requirements *Grady* would soon impose. *E.g.*, United States v. Felix, 926 F.2d 1522 (10th Cir.), *cert. granted*, 59 U.S.L.W. 3726 (U.S. Oct. 7, 1991) (No. 90-1599); Anderson v.

In sum, the *Grady* Court committed one of two errors in its attempt to distinguish *Dowling*. Either the Court left *Grady* in direct conflict with *Dowling*,[174] or it failed to bar much evidence of past crimes for which defendant has already been prosecuted, thereby frustrating its own attempts to increase double jeopardy rights.[175]

C. *Redefining Double Jeopardy Rights in the Context of Successive Prosecutions*

Although *Grady* is cast in the form of a very specific holding, the rule in fact reflects a general view of defendants' rights with respect to successive prosecutions.[176] With *Grady*, the Court purportedly has settled two crucial and previously uncertain issues concerning the double jeopardy clause. First, the Court has decided that, in some situations, a defendant cannot be put twice in jeopardy for the same conduct.[177] Second, the Court clearly has decided that *Blockburger* inadequately protects defendants from the burdens of multiple prosecutions.[178]

1. Adopting the *Vitale* Dictum

Since 1970 the Supreme Court has become more receptive to expanding defendants' guarantee against successive prosecutions.[179] By the time the Court decided *Vitale v. Illinois*,[180] it already had embarked on a discernable trend toward developing bars to successive prosecutions in addition to *Blockburger*.[181] The dictum in *Vitale*[182] clearly indicated that some members of the Court would consider expanding the prohibition against successive prosecutions.[183] These members proposed limiting the government's ability to use evidence of the same illicit conduct in successive trials.[184] They reasoned that the government should not be able to use conduct for which the defendant had

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State, 570 So. 2d 1101 (Fla. 1990); State v. Hoskinson, 559 N.E.2d 11 (Ill. 1990); Harrelson v. State, 569 So. 2d 295 (Miss. 1990); State v. Harrington, 461 N.W.2d 752 (Neb. 1990).

174. *See* 110 S. Ct. at 2095-96 (O'Connor, J., dissenting). *But see Felix*, 926 F.2d at 1528 (proposing that "*Dowling* and *Grady* are not contradictory and we can, and must, give full application to both holdings").

175. *See* 110 S. Ct. at 2103 (Scalia, J., dissenting). The *Grady* Court intended its rule to protect defendants from forced relitigation concerning the same conduct. *See id.*

176. *See supra* notes 139-40 and accompanying text.

177. 110 S. Ct. at 2087.

178. *Id.* at 2093.

179. *See* Harris v. Oklahoma, 432 U.S. 682 (1977); Ashe v. Swenson, 397 U.S. 436 (1970).

180. 447 U.S. 410 (1980).

181. *See Harris*, 433 U.S. 682; *Ashe*, 397 U.S. 436.

182. *See supra* note 79.

183. *Vitale*, 447 U.S. at 420.

184. This is a noticeable departure from *Blockburger*, which focuses not on conduct, but on statutory elements. *See Grady*, 110 S. Ct. at 2097 (Scalia, J., dissenting).

already been convicted to prove an essential element of a crime charged in a subsequent prosecution.[185] Although the rule had yet to be accepted by a majority of the Supreme Court, several federal and state courts adopted the extra safeguard suggested in *Vitale*.[186] In addition, the Court vacated a judgment of the Georgia Supreme Court that denied a defendant's double jeopardy claim and remanded the case in light of *Vitale*.[187] Nevertheless, despite at least two opportunities to adopt the *Vitale* dictum in the 1980s, the Court elected not to resolve the issue.[188]

In sum, although the *Grady* rule did not follow directly from the Court's prior holdings, it was not completely unexpected,[189] particularly given the Court's growing recognition of the different interests implicated in multiple prosecutions and multiple punishments.[190] Presented with facts that enabled it to adopt the *Vitale* dictum,[191] the *Grady* majority resolved, or attempted to resolve, an issue that had been troubling the Court for years.[192]

2. Protecting Against the Burdens of Successive Prosecutions

In *Ashe*[193] and *Harris*[194] the Court recognized distinctions between successive prosecutions and multiple punishments for the purposes of the double jeopardy analysis.[195] In neither case, however, did the Court

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185. 447 U.S. at 420. This is basically the rule adopted in *Grady*.

186. *See, e.g.*, Roberts v. Thigpen, 693 F.2d 132 (5th Cir. 1982), *aff'd*, 468 U.S. 27 (1984); People v. Lowe, 660 P.2d 1261, 1267 (Colo. 1983) (stating that the *Blockburger* test is not dispositive in light of the new approach offered by *Vitale*).

187. Burroughs v. Georgia, 448 U.S. 903 (1980). In *Burroughs* the defendant was convicted for disorderly conduct arising out of an attack on a police officer. Subsequently, the state sought to prosecute defendant for battery arising out of the same incident. Citing *Brown*, the Georgia Supreme Court applied the *Blockburger* test, found no double jeopardy violation, and denied the defendant's claim. State v. Burroughs, 260 S.E.2d 5, 7-8 (Ga. 1979). On remand from the United States Supreme Court, the Georgia court held that, under *Vitale*, the double jeopardy clause bars a successive prosecution if one crime proves an element of the other crime. State v. Burroughs, 271 S.E.2d 629, 630 (Ga. 1980).

188. The *Grady* majority noted that "[t]his issue has been raised before us twice in recent years without resolution." *Grady*, 110 S. Ct. at 2087 n.2 (citing Fugate v. New Mexico, 470 U.S. 904 (1985) and Thigpen v. Roberts, 468 U.S. 27 (1984)).

189. *See* Thomas, *supra* note 2, at 382-83 (noting that, as of 1986, the Supreme Court had been moving steadily towards embracing the *Vitale* dictum).

190. *See, e.g.*, Brown v. Ohio, 432 U.S. 161, 166-67 n.6 (1977).

191. *See Grady*, 110 S. Ct. at 2090.

192. *See* Note, *supra* note 117, at 852-54 (discussing the Court's indecision regarding successive prosecutions during this period).

193. Ashe v. Swenson, 397 U.S. 436 (1970).

194. Harris v. Oklahoma, 433 U.S. 682 (1977).

195. *See supra* notes 37-41 and accompanying text. Clearly, these cases acknowledged rights that exist only in the context of successive prosecutions. By its terms, criminal collateral estoppel applies only to multiple prosecutions. *Harris* acknowledged the prohibition against successive prosecutions for a greater and a lesser offense.

find it necessary to expand double jeopardy protection beyond that provided by *Blockburger* in order to relieve defendants of the burdens of successive prosecutions. The Court's incorporation of the criminal collateral estoppel doctrine into the clause helps defendants only when the prosecution seeks to relitigate an issue decided in a defendant's favor during an earlier prosecution.[196] Thus, *Ashe* focused primarily on allowing defendants to rely upon prior acquittals, not on shielding defendants from the onus of a subsequent prosecution.[197] Nor did *Harris* represent a significant expansion of *Blockburger*. *Harris* merely prevents legislatures from evading *Blockburger*'s prohibition against successive prosecutions by drafting general felony murder statutes rather than felony murder statutes that refer to specific felonies.[198]

Prior to *Grady*, therefore, the Court found it unnecessary to provide defendants with protection against the burdens of multiple prosecutions beyond that provided by a fair reading of *Blockburger*.[199] The *Grady* majority found otherwise. Under *Grady* the double jeopardy clause now offers criminal defendants more protection from the burdens of successive prosecutions.

D. *The Aftermath of* Grady

1. The Application of the *Grady* Rule to Evidence Already Introduced

One of the most important developments in the lower courts' efforts to implement the *Grady* rule is the courts' assumption that the rule applies to evidence already introduced at the second trial. This is an important assumption because, by its terms, the *Grady* rule applies only preemptively.[200] The rule itself refers only to pretrial situations

196. *Ashe*, 397 U.S. at 446. Under collateral estoppel, a prior adjudication on an issue during a valid proceeding is binding in the future between the same parties. *Id.* at 443. Obviously, defendants would not invoke collateral estoppel unless the court in the first proceeding found the issue in their favor, because otherwise they would not wish to be bound by that determination.

197. *See Ashe*, 397 U.S. at 446 (holding that collateral estoppel only protects those who are acquitted); Brown v. Ohio, 432 U.S. 161, 165 (1977) (noting that defendants have a double jeopardy interest in finality).

198. *See supra* text accompanying notes 149-51.

199. The application of *Blockburger* in the context of successive prosecutions is based mainly on shielding defendants from these burdens. *See* Brown v. Ohio, 432 U.S. at 165-66. *Blockburger* serves different constitutional values in the context of successive prosecutions than it does in the context of multiple punishments. Until *Grady*, however, no constitutional inquiries beyond *Blockburger* were inspired specifically by this same concern.

200. If applicable to evidence that has already been admitted, *Grady* benefits defendants in two ways that it could not were it applicable only in the pretrial context. First, in many jurisdictions and in the federal courts, defendants do not waive double jeopardy objections by failing to raise them before trial. *See, e.g.*, United States v. Blocker, 802 F.2d 1102, 1103 (9th Cir. 1986); Johnson v. State, 460 So. 2d 954, 958 (Fla. Dist. Ct. App. 1984); *Ex parte* Stephens, 753 S.W.2d

specifying only when an impending trial implicates double jeopardy concerns.[201] For this reason, the applicability of *Grady* is uncertain when a defendant claims a double jeopardy violation on appeal. Although *Grady* is relatively clear about when anticipated prosecutorial proof violates the double jeopardy clause, the rule is silent about how a court should evaluate the double jeopardy implications of evidence actually offered or admitted at trial. Lower courts, however, have assumed that *Grady* applies to conduct that already has been proved in addition to conduct that will be proved.[202]

Although perhaps unsurprising,[203] this development is significant for two reasons. First, it makes double jeopardy relief under the *Grady* rule available to defendants throughout the judicial process. Thus, even if a *Grady* violation was not discovered at the pretrial stage, an appellate court still might overrule a conviction on double jeopardy grounds. Second, the *Grady* rule is far more difficult to apply to completed trials than pending ones. The inquiry into whether a pending prosecution violates the double jeopardy clause is relatively easy in many cases. The defendant simply can use any available procedural devices to determine

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208, 210 (Tex. Ct. App. 1988). *But see* State v. Lee, 502 A.2d 332, 334 (R.I. 1985). In those jurisdictions, a double jeopardy claim may be raised for the first time on appeal. *See Blocker*, 802 F.2d at 1103; *Johnson*, 460 So. 2d at 958. Therefore, in those jurisdictions, a defendant can claim a *Grady* violation on appeal based on evidence that was admitted at trial, whether or not he or she made a pretrial claim. In addition, many jurisdictions allow a double jeopardy claim to be raised, for the first time on habeas corpus proceedings or similar forms of collateral attack. *See, e.g.*, Adamson v. Ricketts, 789 F.2d 722, 735 n.1 (9th Cir. 1986), *rev'd on other grounds*, 483 U.S. 1 (1987); *Johnson*, 460 So. 2d at 958. As a result, the prosecution would be unable to bar relief under *Grady* by hiding their intention to prove conduct that violates *Grady* until such time as the defendant has waived his right to object.

Second, the ability to raise a double jeopardy claim based on the events at trial is particularly important, given the fact that an appeal of a pretrial double jeopardy claim may not be available to the defendant. In the federal system, interlocutory appeals are usually available for double jeopardy claims. *See* Abney v. United States, 431 U.S. 651, 662 & n.8 (stating that a federal statute requires interlocutory appeals for all but "frivolous" double jeopardy claims). Most state courts hold that a defendant usually has a right to an interlocutory appeal. *See* Nalbandian v. Superior Court, 786 P.2d 977, 981 (Ariz. Ct. App. 1989) (discussing the approach of courts in other jurisdictions). Where the jurisdiction does not provide an interlocutory appeal, however, the application of *Grady* beyond the pretrial stage ensures appellate review of *Grady* claims.

201. The *Grady* Court did not discuss the applicability of its rule to conduct that has already been proved at trial. This doubtlessly is due in part to the procedural context of the case. Corbin's case had not yet reached trial; the case was before the United States Supreme Court on appeal from an order by the New York Court of Appeals to dismiss the case. *Grady*, 110 S. Ct. at 2089. The Court phrased the rule in terms of what the prosecution will do at trial, not what the prosecution has done. *See id.* at 2093.

202. For instance, appellate courts have applied *Grady* to invalidate jury convictions on double jeopardy grounds. *See, e.g.*, McIntyre v. Trickey, 938 F.2d 899 (8th Cir. 1991); Harrelson v. State, 569 So. 2d 295 (Miss. 1990); State v. Urban, 796 S.W.2d 599 (Mo. 1990).

203. Justice Scalia simply assumed that *Grady* did apply to evidence already introduced at trial. *See* 110 S. Ct. at 2104 (Scalia, J., dissenting).

what conduct the prosecution intends to prove.[204] In short, the defendant determines what conduct the prosecutors will prove by asking them.[205] Furthermore, if the defendant can make a colorable showing that a *Grady* violation might occur, the defendant apparently is entitled to a pretrial hearing in which the government must show that it will not prove conduct in violation of *Grady*.[206]

In the postconviction context, however, a court presumably must apply *Grady* based on what occurred at trial. This process is more difficult than a pretrial evaluation for two reasons. First, *Grady* does not indicate, in a postconviction situation, whether a court should consider the conduct that the prosecution intended to prove or the conduct that was actually proved.[207] Lower courts implicitly have adopted the latter proposition and have focused entirely on what occurred at the trial itself.[208] Furthermore, if the proper inquiry involves an evaluation of the conduct actually proved, the rule fails to address situations in which the defendant was responsible for the introduction of some of the proof.[209] Even without this added complication, postconviction review remains a complex task. For instance, in contrast to merely reading a prosecution's bill of particulars, which enumerates what conduct the prosecution intends to prove, postconviction review requires the court to determine what conduct the prosecution actually proved.[210] The latter undertaking is considerably more difficult.[211] Second, the *Grady* Court

204. *See* 110 S. Ct. at 2094 & n.14. The Court discounted the possibility that, in a given jurisdiction, adequate procedures might not exist for the defendant to determine what conduct the prosecution would prove, which a defendant must know to a certain degree in order to make any colorable *Grady* claim. *Id. But see id.* at 2098 (Scalia, J., dissenting) (arguing that implementation of *Grady* depends upon the existence of adequate criminal discovery devices, which may or may not exist under the state procedural rules).

205. The Court failed to address the effect of state laws that do not bind the prosecution to its answers because New York law, conveniently, did so bind the prosecution. 110 S. Ct. at 2094.

206. *See id.* at 2094 n.14; Taylor v. Whitley, 933 F.2d 325, 329 (5th Cir. 1991).

207. Justice Scalia apparently assumed that applying *Grady* to trials already begun would implicate the conduct that actually had been proved. *See* 110 S. Ct. at 2104 (Scalia, J., dissenting). The other reading, however, is certainly a reasonable construction of *Grady* as applied to trials already begun.

208. *E.g.*, McIntyre v. Trickey, 938 F.2d 899, 906 (8th Cir. 1991); State v. Magazine, 393 S.E.2d 385, 387 (S.C. 1990).

209. *See Grady*, 110 S. Ct. at 2104 (Scalia, J., dissenting).

210. *See id.*

211. An appellate court would have to make a determination, from the whole record, as to what had or had not been proved. Obviously, the record available to the appellate court could be extremely unclear in this regard.

Justice Brennan might have more confidence than Justice Scalia that a court would be able to identify a *Grady* violation without the help of generous procedural devices. He noted that a court should hold a pretrial hearing to determine whether a *Grady* violation exists, during which the court presumably could consider factors not revealed by the bill of particulars or other procedural devices. *See id.* at 2094. An appellate court, however, might be bomd by the record whereas a trial court is not limited to examining procedural devices. *See* United States v. Broce, 488 U.S. 563, 575

failed to define the term "prove" or to identify the standard of proof necessary to trigger a double jeopardy violation.[212]

The application of the *Grady* rule to conduct that already has been proved also poses particular problems for trial courts. The role of trial courts is clear with respect to applying *Grady* before trial.[213] Their role with respect to conduct that already has been admitted at trial is far less clear. Before a given trial, for example, it might appear that the prosecution does not intend to prove conduct in violation of *Grady*. During the trial, however, either side unexpectedly might prove such conduct for a variety of reasons.[214] *Grady* left unanswered whether the introduction of unforeseen proof should be sufficient reason for taking the extreme measure of halting the trial immediately on double jeopardy grounds.[215] Thus, the relatively neat pretrial inquiry envisioned by the Court is far more complicated once the trial begins.

2. The Impact of *Grady* on Federal Rule of Evidence 404(b)

Grady also jeopardizes the manner in which prosecutors may use one of their most powerful weapons, Federal Rule of Evidence 404(b)[216] and its state equivalents.[217] Rule 404(b) allows the admission of evidence of other crimes to prove, among other things, motive, intent, identity, knowledge, or lack of mistake or accident.[218] The Rule allows trial courts to use their discretion in admitting such evidence for any relevant purpose other than to show a defendant's propensity to commit crimes.[219] The admission of evidence under Rule 404(b), however, is

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(1989) (stating that double jeopardy claims usually should be resolved by appellate courts without venturing beyond the record); Hedgebeth v. North Carolina, 334 U.S. 806, 807 (1948) (holding that in reviewing state court judgments, the Supreme Court is bound by the record of that court). *But see* United States v. Atkins, 834 F.2d 426, 439 (5th Cir. 1987) (stating that evidence outside the record is permissible in making a double jeopardy claim). If the appellate court must decide solely on the record, determining what conduct had been proved at trial could be very difficult.

212. The Court failed to identify whether the appropriate standard of proof was (1) enough evidence to go to the jury, (2) more likely than not, or (3) proof beyond a reasonable doubt. 110 S. Ct. at 2104 (Scalia, J., dissenting).

213. The trial court merely needs to determine from the prosecution's disclosures the conduct that it intends to prove. Such an inquiry ordinarily should be easy in jurisdictions that provide adequate discovery because the defendant can use discovery devices to force the prosecution to disclose this information in explicit terms. *See supra* notes 205-07 and accompanying text.

214. The defendant might prove conduct that violates *Grady* in an attempt to cause a "self-inflicted" double jeopardy violation that, in turn, would entitle the defendant to relief. *See* 110 S. Ct. at 2104 (Scalia, J., dissenting).

215. *Id.*

216. The text of Rule 404(b) appears *supra* at note 45.

217. A majority of states have adopted Federal Rule of Evidence 404 either verbatim or in some modified form. *See* JACK WEINSTEIN, WEINSTEIN'S EVIDENCE ¶ 404(21).

218. FED. R. EVID. 404(b).

219. *E.g.*, United States v. Johnson, 934 F.2d 936, 939 (8th Cir. 1991); United States v. Fosher, 568 F.2d 207, 212 (1st Cir. 1978).

subject to constitutional restraints. Thus, the Court's adoption of the *Grady* rule has generated concern over the extent to which this new constitutional standard will prohibit the use of evidence otherwise admissible under Rule 404(b).[220]

On its face, *Grady* does not appear concerned with the constitutionality of other-crimes evidence. The rule is phrased to bar prosecutions, not evidence.[221] In addition, the procedural posture of *Grady* was not conducive to framing an evidentiary rule. *Grady* reached the Supreme Court before any trial or the admission of any evidence had occurred.[222] Nevertheless, *Grady*'s practical effect is clear. The prosecution cannot introduce evidence of conduct constituting an offense for which the defendant already has been prosecuted in order to prove an essential element of a crime for which the defendant is on trial.[223]

In one respect, *Grady* will not impair the continued vitality of Rule 404(b). Because *Grady* does not apply to past crimes or other bad acts for which a defendant has not been prosecuted, Rule 404(b) still will allow the prosecution to introduce such evidence. Certainly, this is no small advantage to prosecutors.[224]

Grady, however, undoubtedly will have some effect on the prosecution's ability to use evidence of past crimes for which the defendant has been prosecuted previously. The magnitude of that effect will depend on the outcome of two issues left unsettled in *Grady*. First, the Court gave little indication of where it will draw the line between conduct that constitutes an offense and conduct that does not.[225] Although some lower courts have shown little reluctance to hold evidence inadmissible under *Grady*, a narrow reading of the *Grady* rule may allow the intro-

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220. Grady v. Corbin, 110 S. Ct. 2084, 2096 (O'Connor, J., dissenting). *See also* United States v. Clark, 928 F.2d 639, 642 (4th Cir. 1991), *petition for cert. filed*, 49 U.S.L.W. 3704 (U.S. Apr. 16 1991) (No. 90-1527).

221. *See* State v. Nunez, 806 P.2d 861, 865 (Ariz. 1991). The precise wording of the rule actually may stem from the majority's desire to distinguish *Grady* from *Dowling*. In *Dowling* the defendant complained about evidence that had been admitted against him in a trial that led to his conviction. In *Grady* the defendant claimed that the imminent prosecution itself was unconstitutional and should be prohibited. At least one court has recognized that the distinction between challenging a prosecution and challenging evidence is sufficient to distinguish *Dowling* and *Grady*. United States v. Felix, 926 F.2d 1522, 1528 (10th Cir.), *cert. granted*, 59 U.S.L.W. 3726 (U.S. Oct. 7, 1991) (No. 90-1599).

222. In *Grady*, since no trial ever occurred, no evidence could have been introduced.

223. The *Grady* Court itself suggested that its rule prescribes what evidence of conduct may be introduced, rather than what prosecutions may be made. *See* 110 S. Ct. at 2094.

224. *See, e.g.*, Abraham P. Ordover, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b), and 609(a)*, 38 EMORY L.J. 135 (observing that allowing the introduction of past-acts evidence always creates a risk of unfair advantage for the prosecution).

225. *See Grady*, 110 S. Ct. at 2103-04 (Scalia, J., dissenting). *See also supra* text accompanying note 173.

duction of much evidence of prior bad acts.[226] Second, the scope of the Court's limitation of the *Grady* rule to only evidence directed at an essential element of a crime charged remains unclear. How the Court will read this limitation is difficult to forecast.

Grady bars only evidence used to establish an essential element of a crime charged.[227] Unless evidence bears on one or more essential elements of a crime, however, it is irrelevant and, thus, inadmissible.[228] From this perspective, the *Grady* rule might be rephrased as follows: even if otherwise admissible, the prosecution may not introduce evidence of past crimes that constitutes an offense for which defendant already has been prosecuted.

At least one court, however, has adopted a different interpretation of the essential elements requirement.[229] Proof that can be characterized as bearing on an essential element for the purposes of determining relevancy[230] need not be so characterized for the purposes of *Grady*.[231] Under this alternative construction, proof is introduced to establish an essential element only if that proof constitutes the entirety of that element.[232] Thus, a more attenuated relationship between evidence and an essential element might render the evidence relevant without bringing that evidence within the *Grady* rule. The Court might prefer this narrow interpretation of *Grady* because it gives meaning to otherwise nugatory language.[233] Furthermore, should the Court choose to read *Grady* narrowly, it will prevent the dilution of Rule 404(b).

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226. *See supra* text accompanying notes 172-73.

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

228. *See* Jackson v. Virginia, 443 U.S. 307, 320 (1979); United States v. Hall, 653 F.2d 1002, 1005 (5th Cir. 1981).

229. United States v. Clark, 928 F.2d 639, 642 (4th Cir. 1991), *petition for cert. filed*, 59 U.S.L.W. 3704 (U.S. Apr. 16, 1991) (No. 90-1527).

230. Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401. Courts should construe this term broadly. United States v. Hollister, 746 F.2d 420, 422 (8th Cir. 1984).

231. *See Clark*, 928 F.2d at 642.

232. *Clark*, 928 F.2d at 642 (quoting United States v. Calderone, 917 F.2d 717, 724 (2d Cir. 1990) (Newman, J., concurring)). This approach means that *Grady* is not triggered merely because the prosecution introduces evidence that tends to prove an essential element. Under this formulation, evidence might be relevant and not barred by *Grady*.

233. *Calderone*, 917 F.2d at 724 (opining that the courts "are obliged to apply *Grady* in a way that gives the 'element' component significance") (Newman, J., concurring); Unwin v. Campbell, 863 F.2d 124 (1st Cir. 1988) (suggesting that Supreme Court opinions should not be construed in a way that makes some of the Court's language nugatory). *Cf.* Boone v. Lightner, 319 U.S. 561 (1943) (stating that statutes should not be construed in a manner that relegates certain language to the status of mere surplusage).

V. Suggested Reform: Discontinued Use of the *Blockburger* Test in the Context of Multiple Punishments Imposed in State Criminal Proceedings

The crux of the disagreement between the majority and the dissent[234] in *Grady* concerned the role of the *Blockburger* test in determining when successive prosecutions violate the double jeopardy clause. The dissent noted that, outside the narrow exceptions prescribed by *Ashe*[235] and *Harris*,[236] the *Blockburger* test had been, and should remain, the exclusive test for whether successive prosecutions violated the double jeopardy clause.[237] The majority, however, concluded that the *Blockburger* test alone could not adequately protect defendants from the burdens of multiple prosecutions.[238] The majority, therefore, added an extra double jeopardy test—the *Grady* rule.[239]

Grady demonstrated the Court's willingness to recognize those situations in which the double jeopardy clause demands protection beyond that offered under the *Blockburger* test. If, however, the purpose of the Court's inquiry is, as the majority states, to honor the values embodied in the clause,[240] it is equally reasonable for the Court to recognize situations in which applying the *Blockburger* test fails to serve any double jeopardy interests. In other words, if the *Grady* Court was correct that *Blockburger*'s role in double jeopardy law is shaped by the interests it serves, then the rule should be applied only when it serves those interests.

Although the *Blockburger* test may provide insufficient protection in the context of successive prosecutions, it well may overprotect defendants in the context of multiple punishments.[241] Thus, if the Court is willing to reconsider *Blockburger* in order to increase double jeopardy protection when necessary, it should be equally willing to discontinue applications of *Blockburger* that are not mandated by the clause, even if the result is a decrease in protection for defendants.

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234. There were actually two dissenting opinions. Justice O'Connor wrote a separate dissenting opinion, but she agreed with much of Justice Scalia's dissent. *Grady*, 110 S. Ct. at 2095 (O'Connor, J., dissenting).

235. Ashe v. Swenson, 397 U.S. 436 (1970). *See supra* text accompanying notes 87-88.

236. Harris v. Oklahoma, 433 U.S. 682 (1977). *See supra* text accompanying notes 84-85.

237. 110 S. Ct. at 2097 (Scalia, J., dissenting).

238. 110 S. Ct. at 2093; *see also id.* at 2091 n.8 (suggesting that *Blockburger* by itself protects criminal defendants sufficiently only when the issue is whether cumulative punishments are permissible).

239. *See id.* at 2093.

240. *See id.* at 2093-94.

241. *See* Thomas, *supra* note 2, at 341 (arguing that a test for double jeopardy violations can provide too much protection against multiple punishments and too little protection against successive prosecutions).

In light of the Court's reevaluation of *Blockburger* in *Grady*, this Recent Development proposes an overdue reform: the discontinuation of the *Blockburger* test in the context of multiple punishments imposed in state criminal proceedings.

A. *Identifying the Constitutional Basis for the* Blockburger *Test in the Context of Multiple Punishments*

Much of the confusion regarding *Blockburger* is attributable to the Supreme Court's strange characterization of the rule. In the context of multiple punishments, but not successive prosecutions,[242] the *Blockburger* test has a dual nature: it is both a rule of statutory construction[243] and a constitutional rule[244] providing the exclusive definition of the clause's same offense language.[245] The Court, however, consistently has ignored its own avowed rationale for incorporating the rule of statutory construction into the double jeopardy clause.[246] By failing to consider carefully the interplay between the statutory and constitutional natures of *Blockburger*, the Court has neglected the constitutional basis for the test. As a result, the Court has applied the test to situations in which it cannot possibly serve its stated purpose.[247]

Although the *Blockburger* Court never mentioned the double jeopardy clause, or any other reason for evaluating the sameness of the two offenses involved in the case, the Court decided *Blockburger* on double jeopardy grounds. The *Blockburger* Court extracted its test expressly from *Gavieres v. United States*,[248] which clearly adopted its test for multiple offenses as a matter of double jeopardy law.[249] Subsequent courts have characterized *Blockburger* as a rule of statutory construction, written to prevent courts and prosecutors from defeating legislative intent by imposing multiple punishments when Congress intended to impose only one.[250] Therefore, *Blockburger* did not establish a statu-

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242. *See* Missouri v. Hunter, 459 U.S. 359, 374 (1983) (Marshall, J., dissenting).

243. *Grady*, 110 S. Ct. at 2091.

244. The Court has declared that the Constitution requires the application of the *Blockburger* test in the context of multiple punishments as a part of the doctrine of separation of powers. *See infra* notes 255-57 and accompanying text.

245. *See id.* at 2091 n.8.

246. *See supra* note 244.

247. *See, e.g., Hunter*, 459 U.S. 359 (applying *Blockburger* to the imposition of multiple punishments under state law).

248. 220 U.S. 338 (1911).

249. *See id.* at 341-42. The *Gavieres* court, in turn, borrowed its test from Morey v. Commonwealth, 108 Mass. 433 (1871).

250. *See* Missouri v. Hunter, 459 U.S. 359, 368-69 (1983); Gore v. United States, 357 U.S. 386, 392-93 (1958). *See also* United States v. Woodward, 469 U.S. 105, 108 (1985) (stating that *Blockburger* is a rule for determining whether Congress intended to allow cumulative punishment); Albernaz v. United States, 450 U.S. 333, 337 (1981) (noting that "this court has looked to the

tory rule subsequently incorporated by the Court into the Constitution, but rather a constitutional rule, which the Court later began to treat as a rule of statutory construction.[251]

In the context of multiple punishments, *Blockburger*'s sole purpose is not to prevent Congress from purposefully imposing multiple punishments, but rather to help determine what punishments Congress intended.[252] In fact, even if a court has imposed multiple punishments for what *Blockburger* indicates is the same offense, no constitutional violation exists if Congress intended that multiple punishments be available.[253] Thus, the double jeopardy clause, in all situations, does not require the prohibition of multiple punishments for what *Blockburger* labels the same offense.[254] Instead, it requires an accurate assessment of congressional intent regarding multiple punishments. If two offenses constitute the same offense under *Blockburger*, the court presumes that Congress did not intend the imposition of more than one punishment. The prosecution, however, may rebut that finding with evidence of contrary legislative intent.[255] In *Whalen v. United States*[256] the Court explained why the Constitution requires effectuation of congressional intent regarding multiple punishments. The double jeopardy clause embodies the separation of powers mandate that only Congress may prescribe punishment for federal criminal offenses.[257] Thus, *Blockburger* may be characterized as both a constitutional mandate and as a rule of statutory construction.[258]

Blockburger rule to determine whether Congress intended that two statutory offenses be punished cumulatively"); Whalen v. United States, 445 U.S. 684, 691 (1980) (commenting that the *Blockburger* test is intended to determine whether Congress, in a given situation, has provided for cumulative punishments for two statutory offenses).

251. The development of the current view of *Blockburger* as a rule of statutory construction probably was completed in Albernaz v. United States, 450 U.S. 333 (1981).

252. *See* sources cited *supra* note 32; State v. Haggard, 619 S.W.2d 44, 51 (Mo. 1981), *vacated*, 459 U.S. 1192 (1983). *Contra* Missouri v. Hunter, 459 U.S. 359, 373-74 (1983) (Marshall, J., dissenting) (arguing that the double jeopardy clause must protect defendants from legislatures because it is a constitutional right). *But cf.* Thomas, *supra* note 32, at 107 (pointing out that legislatures are checked by the application of the double jeopardy clause in the context of successive prosecutions).

253. Garrett v. United States, 471 U.S. 773, 779 (1985).

254. *Hunter*, 459 U.S. at 368. *Cf. Albernaz*, 450 U.S. at 340 (finding that the reverse is also true—*i.e.*, that the *Blockburger* test also is not controlling if it indicates that Congress intended multiple punishment when it actually did not).

255. *See Hunter*, 459 U.S. at 368.

256. 445 U.S. 684 (1980).

257. *See id.* at 695.

258. In determining whether the court may impose multiple punishments for the same offense, "the petitioner's claim under the double jeopardy clause cannot be separated entirely from a resolution of the question of statutory construction." *Id.* at 688.

B. *Blockburger* Should Not Apply to Multiple Punishments Imposed in State Criminal Proceedings

Clearly, the Court has decided that a limited purpose—respecting and effectuating congressional intent—exists for *Blockburger*'s inquiry into the constitutionality of multiple punishments.[259] As a result, courts should limit the application of *Blockburger* in that context. When the constitutional interest that *Blockburger* protects is not implicated, evaluating the imposition of multiple punishments under the *Blockburger* test is, at best, a waste of effort and, at worst, a violation of the principle of federalism embodied in the Constitution.[260]

Applying *Blockburger* to multiple punishments imposed in state criminal prosecutions presents such a situation. Although a state court might impose a punishment not authorized by the state legislature, the imposition of penalties under state statutes does not violate *Blockburger*'s mandate that federal courts not impose punishments unauthorized by Congress. Nevertheless, both the Supreme Court and state courts have applied *Blockburger* in order to ensure that state courts adhere to the intent of their legislatures.[261]

The application of *Blockburger* to state prosecutions seems unrelated to the separation of powers principle that *Blockburger* protects. First, the separation of powers doctrine is not mandatory on the states;[262] thus, no constitutional dilemma exists if a state court, rather

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259. *See supra* text accompanying notes 251-58.

260. When the Supreme Court applies the *Blockburger* test to state court proceedings, it necessarily interprets state law and the intent of state legislatures, rather than federal law and federal legislative intent. Because the state courts, in the course of deciding whether or nor to impose multiple punishments, already have interpreted the state statutes in question, they have decided, either explicitly or implicitly, whether their respective legislatures intended the imposition of multiple punishments. Thus, the Court's review may run afoul of the adequate and independent state ground doctrine, which states that, in most cases, a state court judgment on a matter of state law is binding on a federal court that cannot decide a question of federal law without first deciding a question of state law. *See* Fox Film Corp. v. Muller, 296 U.S. 207, 210 91935). *But cf.* Indiana ex rel. Anderson v. Brand, 303 U.S. 95, 100 (1938) (noting that the Court must grant deference to a state court's construction of state law but that the Court itself must construe state statutes to ensure the vindication of federal constitutional rights). In addition, under Article III of the Constitution, the Court lacks jurisdiction to review a state court's interpretation of state statutes. Whalen v. United States, 445 U.S. 684, 687 (1980). *See also infra* text accompanying notes 265-66.

261. *See, e.g.*, Missouri v. Hunter, 459 U.S. 359 (1983); People v. Robideau, 355 N.W.2d 592, 596 (Mich. 1984).

262. "Whether the legislative, executive, and judicial powers of a State shall be kept altogether distinct and separate, or whether persons . . . belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the state." Dreyer v. Illinois, 187 U.S. 71, 84 (1902). *See also Whalen*, 445 U.S. at 689 n.4. The Court clearly has forgotten this precept. Referring to the Missouri legislature, the Court in *Hunter*, 459 U.S. at 368, said, "[l]egislatures, not courts, prescribe the scope of punishments."

than the state legislature, is the body authorizing punishment.[263] The *Blockburger* inquiry into legislative intent regarding multiple punishments is required under the double jeopardy clause only if Congress is that legislature.[264] As a result, courts have no justification for applying *Blockburger* to state criminal proceedings. Second, the Supreme Court may be overstepping its jurisdiction when it undertakes the task of interpreting state statutes to determine what punishment the state legislature intended.[265] If not, the Supreme Court nevertheless should be hesitant to construe state legislation because it lacks expertise comparable to that of the state courts in this area.[266]

If the Court wishes to pursue its apparent goal of conforming tests for double jeopardy violations with the various constitutional interests at stake, it should discontinue the use of *Blockburger*—or any rule of statutory construction—in state court proceedings. The Court, of course, could recognize a new constitutional interest.[267] Nevertheless, to the extent that imposing multiple punishments for the same offense is

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263. The Supreme Court has acknowledged that the double jeopardy clause may not limit the state courts' power to authorize punishment. *Whalen*, 445 U.S. at 689-90 n.4. The Court answered this contention, however, by suggesting that no harm is done by the improper application of *Blockburger* to state prosecutions. Even if a state constitution permitted state courts to authorize punishment, "[t]he Due Process Clause of the Fourteenth Amendment . . . would presumably prohibit state courts from depriving persons of liberty or property . . . except to the extent authorized by state law." *Id.* at 690 n.4. This due process argument, however, would require the difficult determination of whether state courts who have authorized punishment have authorized it in accordance with state law. At any rate, the existence of a theoretical due process argument fails to cure any defects in the double jeopardy analysis.

264. *See id.* at 689.

265. *See, e.g., id.* at 687; Brown v. Ohio, 432 U.S. 161, 167 (1977); United States v. Thirty-seven Photographs, 402 U.S. 363, 369 (1971). Of course, the Supreme Court has jurisdiction to review state statutes and to determine if they are unconstitutional. Evans v. Abney, 396 U.S. 435, 443-44 (1970). *See also* Thomas, *supra* note 32, at 119-20 (arguing that the Supreme Court's deferral to state court interpretations of the intent of state legislatures would show respect for the independent status of state courts). In applying *Blockburger* to multiple punishments imposed in a single state prosecution, however, the Court takes an extra step. First, it interprets the state statutes and then it determines whether, under that interpretation, the statute passes constitutional muster. Of course, this approach differs completely from mere review for constitutional infirmities.

The Court might argue that, in these cases, it does accept state court interpretations of state statutes. *See Hunter*, 459 U.S. at 368. *Cf. Brown*, 432 U.S. at 167 (decided in the context of successive prosecutions). Such an argument is unpersuasive because, if that were the case, the Court would never hear a case on appeal from a conviction where multiple punishments were imposed in the course of a single state proceeding. The simple fact that the conviction still stands evidences that the state courts felt that multiple punishments were authorized by the legislature (unless the Court makes the erroneous assumption that state courts prefer to ignore legislative intent). Therefore, the very fact that the Court hears the case represents a challenge to the state court's interpretation.

266. *See, e.g.*, Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 484 (1981); Thomas, *supra* note 32, at 120.

267. This option has particular appeal because it simply is hard to believe that the double jeopardy clause has anything to do with the doctrine of separation of powers.

not nearly as unfair as multiple prosecutions for the same offense, defendants probably do not have another liberty interest on which a constitutional prohibition of multiple punishments for the same offense could be based.[268]

VI. CONCLUSION

The Supreme Court has been aware for many years that criminal defendants have a special interest in avoiding successive prosecutions. In adopting the *Grady* rule, the Court has held for the first time that the *Blockburger* test does not offer criminal defendants sufficient safeguards against the particular onus of successive prosecutions. As a result, *Grady* has expanded double jeopardy rights significantly. Some lower courts have carried this expansion even further by applying the *Grady* rule to evidence already introduced at trial.

Grady embraces a view of double jeopardy rights uncircumscribed by the language of the double jeopardy clause. Furthermore, the *Grady* rule itself lacks any effective definition of its scope. Read broadly, the *Grady* rule may operate to exclude much evidence of prior conduct for which a defendant previously has been prosecuted. Such a reading, however, brings the rule in direct conflict with *Dowling*, an unsurprising result when one considers the lack of precedent for the *Grady* decision. *Grady* thus may protect criminal defendants in a manner previously considered unnecessary. A narrow reading of *Grady* is more consistent with the Court's prior double jeopardy jurisprudence and will prevent the evisceration of Federal Rule of Evidence 404(b). Because the *Grady* majority left important issues unsettled, the Court should take its earliest opportunity to clarify and define the scope of the *Grady* rule.

Despite the inadequacies of the majority's opinion in *Grady*, however, its recognition that strict adherence to the *Blockburger* test fails to link adequately the protections afforded defendants to the values embodied in the double jeopardy clause lays the groundwork for further evaluations of the efficacy of the *Blockburger* test. Thus, the Supreme Court should discontinue using the *Blockburger* test in evaluating the propriety of multiple punishments imposed in the course of a single

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268. The defendant's fairness interest in avoiding multiple punishments is limited to avoiding unauthorized punishments. *See supra* text accompanying note 25. Grave constitutional concerns do not occur merely because a defendant is sentenced to cumulative punishments. Often no constitutional infirmity arises with the imposition of the combined punishment under one statute. For example, if a state can impose a 15-year sentence, then it may impose, consistent with the Constitution, a 25-year sentence. *See* Solem v. Helm, 463 U.S. 277, 294 (1983). Therefore, constitutional concerns should not exist if that 25-year sentence is composed of 15- and 10-year segments.

state prosecution. This reform would contribute to the *Grady* Court's goal of providing double jeopardy protection that corresponds more closely to the specific constitutional interests at stake.

Eli J. Richardson