Continuing Financial Crimes Enterprise and Its Predicate Offenses: A Prosecutor's Two Bites at the Apple, The

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The Continuing Financial Crimes Enterprise and Its Predicate Offenses: A Prosecutor’s Two Bites at the Apple

William Jue*

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I. INTRODUCTION

In the wake of the savings and loan scandals of the 1980s, Congress responded by enacting the Bank and Thrift Fraud Prosecution Act of 1990. The Act contains the Continuing Financial Crimes Enterprise statute (CFCE), which will be the focus of this Comment. In essence, Congress created a new crime when it enacted the CFCE, ostensibly a white-collar analogue to the Continuing Criminal Enterprise (CCE) drug law. The similarities between the two crimes are primarily in their structure: both the CFCE and the CCE are "modern compound..."
Continuing Financial Crimes Enterprise

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crimes" in that they require the commission of a series of specified predicate offenses, and the establishment of a "criminal enterprise."

Apparently, the purpose of the CFCE is to punish those responsible for causing the rash of savings and loan failures in the 1980s. This is evidenced by the retributive tenor of many comments made by members of Congress. To effectuate its objective, Congress passed the CFCE, which some called in official records the "Financial Crime Kingpin Statute."

After chronicling the legislative history and background of the CFCE in Part II, Part III of this Comment will scrutinize this rarely used statute in light of the Double Jeopardy Clause of the United States Constitution. The United States Supreme Court has determined that traditional double jeopardy analysis is not helpful to courts when dealing with modern compound crimes. This Comment

4. To facilitate efficiency, throughout the remainder of this Comment the term "modern compound crime" will be used to describe offenses like the CFCE, Racketeer Influenced and Corrupt Organizations (RICO), and the CCE, where the commission of a series of underlying predicate offenses is required to convict a defendant. In contrast, traditional composite offenses such as felony-murder will be described simply as "compound crimes." See Schad v. Arizona, 501 U.S. 624, 661-62 (1991) (White, J., dissenting) (using the term compound crime to describe felony-murder).

5. See supra note 2 (disclosing the text of the CFCE statute); see also supra note 3 (providing a partial text of the CCE statute).

6. See, e.g., S & L Investigation: Hearing of the Financial Institutions Supervision, Regulation and Insurance Subcommittee of the House Banking Committee, 101st Cong., 2d Sess. 1 (1990) (hereinafter S&L Investigations) (statement of Rep. Annunzio, Chair) (stating that "these crooks are responsible for one-third, one-half or maybe even more of the savings and loan cost. The American taxpayer will be forced to pay $500 billion or more over the next 40 years, largely because of these crooks"); see also infra, note 15 (containing further quotes from members of Congress).


8. See Peter Mantius, Insurance Fraud Artist to Aid Investigators, ATLANTA CONST., Dec. 2, 1993, at D3 (stating the CFCE was "rarely used"). In the five years since the passage of the CFCE, there has only been one incident listed in a case reporter in which prosecutors have obtained a conviction under the CFCE. United States v. Harris, 805 F. Supp. 166 (S.D.N.Y. 1992). In an unreported case, Gary Lefkowitz was convicted under the CFCE as the mastermind of a real estate fraud scheme. David Phelps, Lefkowitz Guilty on 47 Charges, STAR TRIB., July 22, 1995, at A1.

Additionally, the author of this Comment has culled newspapers throughout the nation, and only two other cases in which a defendant has been charged with the CFCE have been found. Recently, Steven Rosen and Ann Denise Huffman were indicted under the CFCE for their participation in a credit card fraud scheme. Richard Green, Jr., 16 Defendants Indicted in Fraud, POST & COURIER, Aug. 11, 1995, at A1. In the second case, Alan Tesle pleaded guilty to the CFCE charge based on his involvement in an insurance fraud scheme. Mantius, supra at D3.

9. See U.S. CONST. amend. V (reading that "no... person [shall] be subject for the same offen[se] to be twice put in jeopardy of life or limb").

10. See United States v. Felix, 503 U.S. 378, 390-92 (1992) (stating that the lesser included offense analysis is not very helpful when dealing with modern compound crimes); United States v. Garrett, 471 U.S. 773, 787-89 (1985) (distinguishing simple crimes from modern compound crimes, and cautioning against using lesser included offense principles of double jeopardy to crimes which occur in different places over a long period of time); United States v. Crosby, 20 F.3d 480, 485 (1994) (stating "multi layered conduct offenses, such as CCE and RICO violations, are generically distinct in the double jeopardy arena"); see also infra notes 141-76, and accompanying text (discussing the Supreme Court's reluctance to extend accepted double jeopardy analysis to modern compound crimes).
argues that the Court’s traditional double jeopardy test should be available to defendants, regardless of the crime charged.11

Further, this Comment addresses double jeopardy issues arising from the use of modern compound crimes not yet decided by the Supreme Court. Currently, there is no formulation accepted by the Supreme Court that guards against fragmenting one criminal enterprise into several charges of the CFCE. Another issue left unresolved is whether collateral estoppel should apply to modern compound crimes and their predicates. Parts III.G. and III.H. examine these matters.

Lastly, while Department of Justice guidelines limit the scope of prosecutions that may implicate double jeopardy issues, this particular policy confers no substantive right upon defendants. Therefore, this policy offers defendants no real protection. This is addressed in Part III.I.

II. BACKGROUND OF THE CONTINUING FINANCIAL CRIMES ENTERPRISE

The rash of failed and crippled financial institutions known as the Savings and Loan Crisis of the 1980s was perhaps “the biggest disaster in public finance since the Depression.”12 Estimates of the amount it will take to pay off the obligations of the failed Federal Savings and Loan Insurance Corporation (FSLIC) and the wounded Federal Deposit Insurance Corporation (FDIC) are as high as $500 billion.13

Numerous commentators believe that factors such as rising interest rates and a slumping real estate market led to the collapse of most failed institutions.14 However, many members of Congress perceived that criminal activity within savings and loan institutions, and not market forces, caused the crisis.15 Despite

11. See infra notes 177-248 and accompanying text (describing traditional double jeopardy jurisprudence and its application to the CFCE).
13. Id.; see S&L Investigations, supra note 6 (indicating that the cost to taxpayers could be as high as $500 billion over the next 40 years).
14. See Bruce A. Green, Symposium: Financial Institutions and Regulation, the S & L Crisis: Death and Transfiguration: After the Fall: The Criminal Law Enforcement Response to the S & L Crisis, 59 FORDHAM L. REV. S155, S155 (1991) (stating that many commentators attributed the savings and loan crisis to many factors, such as the rise of market interest rates, inflation of the 1980s, the decline of the real estate market in the 1980s, governmental regulatory failure, and legal restrictions on the ability of S&Ls to diversify their portfolios); Kenneth E. Scott, Never Again: The S & L Bailout Bill, 45 BUS. LAW. 1883, 1884-93 (1990) (forwarding six reasons for the failure of the FSLIC: (1) Savings and loans were poorly designed financial intermediaries; (2) the deposit insurance system was flawed; (3) inflation of 1980; (4) lack of a presidential response; (5) poor management strategies by those running the institutions; and (6) the actual outcome of those poor management decisions).
15. See 136 CONG. REC. S17595, S17601 (daily ed. Oct. 27, 1990) (statement of Sen. Biden) (proclaiming that “[t]he white-collar criminals who are responsible for this massive ripoff must be brought to justice”); id. (stating “[i]uch of the S&L crisis can be directly attributed to fraud and insider abuse; William
specific declarations by individuals both inside and outside Congress, that the role of criminal activity in the savings and loan crisis of the 1980s was minimal, or at least overstated. Congress passed legislation designed to punish the supposed wrongdoers. This Congressional reaction resulted in the passage of 18 U.S.C.A. § 225, criminalizing a CFCE.

Functionally and structurally, the CFCE resembles the CCE, passed in 1970, upon which the CFCE was largely based. Both statutes create crimes that are compound in nature, meaning that elements of the CFCE and the CCE include other substantive offenses.

The CFCE has relatively few components: a defendant must have a managerial or supervisory role in a criminal enterprise, and the enterprise must gross $5 million or more within a two year period. A criminal enterprise is the commission of a "series" of underlying crimes specifically delineated in the statute itself, which includes offenses such as bank fraud, bank embezzlement,
and wire fraud affecting a financial institution. According to the vast majority of case law interpreting the closely related CCE, a "series" is three violations.

Punishment under the CFCE is severe in the context of white-collar crime. A defendant convicted under the statute faces a minimum of ten years in prison and a maximum of a life sentence without parole. Additionally, heavy fines may be imposed: up to $10 million if the defendant is an individual, and $20 million if the defendant is an organization. A life sentence without parole is the second most severe federal punishment next to the death penalty, thus the severity of the penalties available under the CFCE is unsurpassed in the arena of white-collar crime.

As with any powerful weapon, the CFCE may have some unwanted collateral effects. The remainder of this Comment addresses whether the application of the CFCE potentially violates the constitutional right to be free from double jeopardy.

23. See United States v. Correa-Ventura, 6 F.3d 1070, 1082 (5th Cir. 1993) (stating "the three offenses necessary to constitute a series"); United States v. Scarpa, 913 F.2d 993, 1022-23 (2d Cir. 1990) (upholding a jury instruction requiring three violations of federal narcotics laws); United States v. Baker, 905 F.2d 1100, 1103-05 (7th Cir. 1990) (acknowledging most circuits define a series as three violations). The Seventh Circuit does not include a drug conspiracy as counting toward the series, and therefore only two substantive crimes are required. Id. at 1104. The court came to this conclusion because a drug conspiracy is a lesser included offense of the CCE, and to require three offenses for a series, then to tell the jury that a conspiracy counts as one of those three offenses, would engender confusion. Id. However, the court did feel that "[t]his brings us into harmony in result, although not in exposition, with the seven other circuits that set a minimum of three violations and allow the included conspiracy to serve as one." Id. at 1105.

24. See, e.g., 18 U.S.C.A. § 201 (West Supp. 1996) (regulating bribery of public officials and witnesses and having a maximum sentence of 15 years); id. § 656 (West Supp. 1996) (governing bank embezzlement, imposing a maximum 30 year sentence and $1 million fine); id. § 1341 (West Supp. 1996) (prohibiting mail fraud, with a maximum sentence of five years in most cases, but 30 years maximum if the fraud affects a financial institution); id. § 1343 (West Supp. 1996) (governing wire fraud and imposing a maximum sentence of five years, unless the fraud affects a financial institution, in which case the maximum sentence is 30 years); id. § 1344 (West Supp. 1996) (prohibiting bank fraud and carrying with it a maximum sentence of 30 years and up to a $1 million fine). However, the CFCE statute carries with it a possible life sentence, and a fine of up to $10 million for an individual, and up to $20 million for an organization. Id. § 225 (West Supp. 1996).


29. See 136 CONG. REC. S17595, S17601 (daily ed. October 27, 1990) (statement of Sen. Biden) (stating that the CFCE was part of "the toughest white-collar crime bill in U.S. history"); see also supra note 25 (contrasting the penalties available under the CFCE with those available under other white-collar crimes).

30. See U.S. CONST. amend. V (stating that "nor shall any person be subject for the same offen[s]e to be twice put in jeopardy of life or limb").
III. DOUBLE JEOPARDY

The Double Jeopardy Clause is deceptively simple: "[N]or shall any person be subject for the same offen[s]e to be twice put in jeopardy of life or limb . . ."31 In contrast, the United States Supreme Court's jurisprudence on the subject has been anything but simple.32 This complexity is largely the result of a lack of continuity, as exemplified by the case of Grady v. Corbin.33 The Supreme Court overruled Grady in 1993 after a mere three year tenure as the controlling law in double jeopardy cases dealing with successive prosecutions.34

To obfuscate matters further, justices have advocated divergent tests over the years to attempt to deal with the key issue in double jeopardy cases, that is what constitutes the "same offense."35 Due to this intellectual tangle, the lower courts have had trouble deciphering the language of the United States Supreme Court in this area, causing a great deal of confusion.36

While a treatise can be written on the theoretical underpinnings of the Double Jeopardy Clause, this Comment discusses only the basic principles of double jeopardy.37 These principles will then be applied to the CFCE.

A. The Basics of Double Jeopardy

North Carolina v. Pearce38 forwarded the definitive statement of the interests protected by the Double Jeopardy Clause: "It protects against a second prosecution for the same offense after acquittal. It protects against a second

31. Id.
32. See Albernaz v. United States, 450 U.S. 333, 343 (1981) (observing that the law of double jeopardy "is a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator"); see also Brenner, supra note 19, at 968 (stating that "double jeopardy principles are complex, uncertain, and difficult to apply").
35. See Garrett v. United States, 471 U.S. 773, 786 (1985) (stating that for a double jeopardy claim under the Fifth Amendment to the Constitution, the "critical inquiry" is whether two offenses are considered the "same offense"); see also Dixon, 509 U.S. at 704-05 (mandating a return to the Blockburger "same elements" test by a 5-4 majority); Grady, 495 U.S. at 521 (establishing a "same conduct" test for successive prosecutions by a 5-4 majority); Ashe v. Swenson, 397 U.S. 436, 453-54 (1970) (Brennan, J., concurring) (advocating that the court should adopt a "same transaction" test); Blockburger v. United States, 284 U.S. 299, 304 (1932) (originating the test that bears its name: "whether each provision requires proof of a fact which the other does not").

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prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense. Moreover, Green v. United States articulated the underlying rationale of the Double Jeopardy Clause, expressing the need to protect individuals from prosecutorial oppression and harassment. The court specifically feared that prosecutors would practice their presentations numerous times until they got it “right,” and convict potentially innocent defendants.

When a defendant presents a double jeopardy challenge by alleging that the state is prosecuting the defendant under two statutes that are really the “same offense,” Garrett v. United States defines the analytical starting point. The first question to ask is “whether the legislature intended that each violation be a separate offense. If Congress intended that there only be one offense there would be no statutory authorization for a subsequent prosecution and that would end the double jeopardy analysis.” In other words, if a legislative body intended for crime A and crime B to be the same crime, then the government cannot bring both charges based on the same event. This threshold test announced in Garrett applies to all three protections defined in Pearce, which stated that the Double Jeopardy Clause bars a second prosecution for the same offense after acquittal and after a conviction, as well as bars multiple punishments for the same offense. Once the prosecution shows that Congress intended two separate offenses, a court will proceed to the next step: whether the prosecution comports with the Double Jeopardy Clause of the United States Constitution.

This first step quoted above is generally moot as it seems highly unlikely that a legislative body would intend for two separate statutes to be the same offense.

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40. 355 U.S. 184 (1957).
41. See Green, 355 U.S. at 187-88 (indicating that “the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to live in a continuing state of anxiety... as well as enhancing the possibility that even though innocent he may be found guilty”); see also Tibbs v. Florida, 457 U.S. 31, 41 (1982) (declaring that the Double Jeopardy Clause “prevents the State from honing its trial strategies and perfecting its evidence through successive attempts at conviction”); cf. Dixon, 509 U.S. at 710, 11 n.15 (1993) (commenting that prosecutors are not likely to abuse their discretion because of pragmatic concerns such as heavy case loads and judicial economy).
43. Garrett, 471 U.S. at 778. The Double Jeopardy Clause indicates that if a defendant is not charged with the “same offense,” constitutional protections will not attach. U.S. Const. amend. V.
44. Pearce, 395 U.S. at 717.
45. See Blockburger v. United States, 284 U.S. 299, 302 (1932) (originating the so-called “Blockburger test” to ascertain whether a legislative body intended that two statutes should be separate offenses by determining whether the statutes have mutually exclusive elements). This same elements test has become the standard for double jeopardy analysis. Id.
46. See Garrett, 471 U.S. at 786 (stating “[h]aving determined that Congress intended... a separate offense we must now determine whether prosecution... is constitutional under the Double Jeopardy Clause of the Fifth Amendment”).
Therefore, the primary query in a double jeopardy challenge is whether a defendant is being prosecuted twice for the “same offense.”

Using the “same offense” analysis, a successful double jeopardy defense would arise in the following scenario. A court convicts a defendant of bank robbery in State A on November 1. State A charges the defendant with the same bank robbery in State A on December 1. State A is prosecuting the defendant twice for the same offense after being convicted for that offense, by the same sovereign. This is barred by the second prong of Pearce. Therefore, if the government attempted to prosecute the charges brought on December 1, the defendant would have a successful double jeopardy claim.

1. Multiple Punishment in a Single Action

When the federal government brings all charges against a defendant in a single proceeding, legislative intent analysis merges with constitutional analysis. If Congress intended separate crimes, then the defendant has no double jeopardy claim so long as all charges are brought in the same proceeding. Therefore, the double jeopardy inquiry for cases implicated under the third “protection” established in Pearce (barring multiple punishments for the same offense) ends at the intent stage.

To aid the court in determining statutory intent, courts use the test set forth in Blockburger v. United States. Blockburger stated that when each offense requires proof of a fact or an element which the other does not, then the offenses are not the same for double jeopardy purposes. The Blockburger formulation may be conceptualized as follows: if one were to lay the elements of statute A over the elements of statute B, and each offense has an edge which protrudes from one but not the other, then the offenses are not “the same,” and multiple punishment in the same action would be permitted. On the other hand, if there are no protruding edges, then a court may conclude that the statutes are the same under Blockburger, as other factors are relevant.

47. See id. (proclaiming that the “critical inquiry” in a Double Jeopardy claim under the Fifth Amendment to the U.S. Constitution is whether two offenses are considered the “same offense”).
48. See Pearce, 395 U.S. at 717 (stating that the Double Jeopardy Clause protects against a second prosecution for the same offense after a conviction).
49. See Missouri v. Hunter, 459 U.S. 359, 366 (1983) (holding that with respect to cumulative sentences imposed in a single trial, the only function of the Double Jeopardy Clause is to prevent the imposition of greater punishment than the legislature intended); Albernaz v. United States, 450 U.S. 333, 344 (1981) (stating that “the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended”); Whalen v. United States, 445 U.S. 684, 689 (1980) (indicating that the Double Jeopardy Clause simply precludes federal courts from imposing consecutive sentences in a single trial unless authorized by Congress).
51. Blockburger, 284 U.S. at 304.
In multiple punishment cases, the *Blockburger* formulation is merely a rule of statutory construction, and not absolutely binding.\(^5\) Therefore, even if the statutes under examination are the same under a *Blockburger* test, if other evidence shows that the legislature intended separate crimes, then there will be no double jeopardy bar.

Once a court determines that a legislative body has intended two separate crimes, the query ends; the prosecution of multiple offenses in a single proceeding is allowed.\(^5\)

2. *Successive Prosecutions*

As with multiple punishment cases, the key issue is whether a violation charged in the second prosecution is the "same offense" as the offense previously prosecuted.\(^5\) A defendant may not be prosecuted in a subsequent proceeding for the same offense after he has been convicted or acquitted of that offense.\(^5\) In making this determination, a *Blockburger* analysis\(^6\) is also used to conduct a constitutional analysis in cases of successive prosecutions, just as it is used above.

However, when ascertaining whether two crimes are the "same offense" in cases of successive prosecutions, the *Blockburger* test mentioned in the previous section is dispositive.\(^7\) If each statute in question does not have different elements, then they are the "same offense."\(^8\)

By sustaining a defendant's double jeopardy claim based upon a *Blockburger* analysis alone, the Supreme Court has granted a higher quantum of protection to individuals in cases of successive prosecutions.\(^9\) In multiple punishment cases,
legislative intent to create different offenses controls despite a contrary result under the *Blockburger* test. In contrast, *Blockburger* is determinative in successive prosecution cases, even if the prosecution produces evidence that the legislature intended two separate offenses.

The extra measure of protection granted defendants who face successive trials exists because the potential harm is patently greater than when they face multiple charges in a single trial. The prosecution gains the ability to force a defendant through the expense and rigor of a new trial, and the prosecution can test its case by charging a narrow offense in the first trial, then it can broaden the scope of the prosecution in the second trial. Moreover, there are heightened constitutional and societal interests at stake when a person faces the prospect of repeated governmental harassment and oppression. The prospect of being dragged into court time and time again to face accusations based upon the "same offense" is exactly what the Double Jeopardy Clause condemns.

3. The Lesser Included Offense Analysis

In *Brown v. Ohio*, the United States Supreme Court enunciated the concept of the "lesser included offense." The defendant in *Brown* stole an automobile on November 29, 1973, and was apprehended on December 8, 1973. The local
police charged Brown with “joyriding,” or driving a vehicle without the consent of the owner. Brown pleaded guilty to this charge, and was sentenced. Upon the defendant’s release, the local police charged Brown with motor vehicle theft. The United States Supreme Court found that joyriding was a “lesser included offense” of motor vehicle theft, hence they were the “same offense,” and barred the second prosecution.

Brown stated that if a “greater” offense includes all of the elements of a “lesser” crime, the offenses are the same for double jeopardy purposes, regardless of the sequence of prosecution. In light of stare decisis, it is worth mentioning that the lesser included offense analysis is merely a subset of the Blockburger formulation. That the lesser included offense model and Blockburger are consistent becomes clear upon an explication of the lesser included offense as defined by Brown.

To begin, Professors LaFave and Israel have used the following model to describe the concept of the lesser included offense: imagine two circles, A and B, constituting the elements of two statutes. If the circles merely overlap, or are mutually exclusive, the offenses are not the same. On the other hand, if those elements form a set of concentric circles, then one statute is a lesser included offense of the greater. Therefore, they are the “same offense” for double jeopardy purposes, as each statute does not “require proof of a fact which the other does not.” The “lesser” offense is necessarily proven by the “greater” offense, as all of the elements of the “lesser” are subsumed by the “greater,” and the government may not proceed with a prosecution under statute A in one proceeding and a prosecution under statute B in another. Hence, the “lesser included offense” analysis is completely consistent with the Blockburger formulation as a lesser included offense does not contain any elements that the greater does not.

During the same term Brown was decided, the United States Supreme Court issued a per curiam opinion in the case of Harris v. Oklahoma. Ostensibly, Harris served to close a subtle loophole left open by Brown. As Brown is a logical outgrowth of Blockburger, only the elements specified in the statutes in question are relevant in determining whether one statute is a lesser

66. Id.; see id. (noting that the defendant was charged with joyriding as was then defined by section 4545.04(d) of the Ohio Revised Code).
67. Brown, 432 U.S. at 162.
68. Id.; see id. (stating that the defendant was subsequently charged with auto theft as was then defined by section 4545.04(A) of the Ohio Revised Code).
70. Id. at 169.
71. LAFAVE ET AL., supra note 59, at § 17.4.
72. Blockburger, 284 U.S. at 304.
73. See Brown, 432 U.S. at 169 (pronouncing that the Fifth Amendment forbids successive prosecutions of a lesser included and greater offense, regardless of the sequence).
74. Blockburger, 284 U.S. at 304.
included offense of the other. In *Harris*, the court's quandary arose from the following facts: the defendant was convicted in state court of felony-murder using robbery with a firearm as the underlying felony; he was subsequently indicted for robbery with a firearm. The loophole resulted from the fact that the precise elements of robbery with a firearm were not delineated in the greater offense of felony-murder; the felony-murder statute merely incorporated all felonies by reference. Therefore, under a stringent *Blockburger*/lesser included offense analysis, each crime *does* require proof of a fact which the other does not. Without much discussion, the court determined that such a reading would be too exacting and stated: "When as here, conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution..."

While it has been suggested that the *Harris* decision was an exception to the *Blockburger*/lesser included offense test, this Comment will treat *Harris* as a mere modification of *Blockburger*, since only elements of crimes are ultimately relevant. When the greater crime lists component lesser offenses, the lesser offenses are *de facto* elements of the greater crime, even when the full text of the underlying predicate is not included in the greater offense. With the CFCE, one possible element of a criminal enterprise is bank fraud. Needless to say all of the elements of bank fraud are subsumed by the CFCE, even if they are not explicitly set forth in the CFCE itself. Therefore, *Harris* is not truly an exception to *Blockburger*.

In sum, under *Harris*, as long as the greater crime necessarily proves the lesser crime, the two statutes exist in a relationship of greater and lesser included offenses. They are, therefore, the "same offense" for double jeopardy purposes.

B. Reaffirmation of the Traditional Blockburger Test: United States v. Dixon

While the test the United States Supreme Court has used to determine what constitutes the same offense in successive prosecutions has changed throughout
the years, the recent case of *United States v. Dixon* solidified the preeminence of *Blockburger*. In *Dixon*, the court overruled the “same conduct” test established in *Grady v. Corbin*, and returned to *Blockburger*’s “same elements test.”

The *Dixon* court reasoned that the broad protection afforded defendants through the “same conduct” test of *Grady* “lacked Constitutional roots,” and therefore must be overruled.

In reaching its decision, the *Grady* court stated that *Blockburger* did not satisfactorily protect defendants from the myriad burdens of multiple trials. To justify a rule beyond *Blockburger*, the majority relied in large part upon *dictum* announced in two cases. In *Illinois v. Vitale*, the Court stated that since the defendant had already been convicted for conduct that was an essential element of the present crime, double jeopardy barred the present prosecution. Moreover, in *Brown*, the Court asserted that *Blockburger* was not the only standard for determining whether successive prosecutions involve the same offense. From this, a new double jeopardy standard was born in the form of the “same conduct test,” prohibiting a subsequent prosecution when the government must prove previously prosecuted conduct to establish an essential element of the present crime(s). The “same conduct” formulation was to have a very short life-span, and the “same elements” analysis of *Blockburger* would soon become the relevant inquiry.

Merely three years after *Grady* was decided, the United States Supreme Court reversed its field, and returned to *Blockburger* in *Dixon*. While Justice Scalia was able to muster a majority vote to mandate this return, the United States Supreme Court Justices disagreed as to how the test should be applied. Only one other justice (Justice Kennedy) agreed with Justice Scalia, who stated that the

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83. See *Grady*, 495 U.S. at 521, overruled by *United States v. Dixon*, 113 S. Ct. 2849 (1993) (establishing that a subsequent prosecution is barred if the state must prove, as an essential element of the present crime, conduct which was proven in a previous prosecution) (5-4 majority).
84. 509 U.S. 688 (1993); see id. at 704-05 (overruling *Grady* explicitly, as it lacked historical roots, and pronouncing a return to the *Blockburger* test) (5-4 majority).
86. *Dixon*, 509 U.S. at 704-05.
87. The “same conduct” tests prevents a subsequent prosecution if the state must prove, as an essential element of the present crime, conduct that was proven in a previous prosecution. *Grady*, 495 U.S. at 521.
89. *Grady*, 495 U.S. at 520.
95. *Id.* at 688.

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specific facts of a case should be considered when analyzing whether two statutes constitute the "same offense." 96

On the other hand, Chief Justice Rehnquist, who concurred in part and dissented in part, argued that crimes should be analyzed in the "ordinary sense" for double jeopardy purposes. 97 Chief Justice Rehnquist's interpretation of the Blockburger rule appears closer to a literal reading of the rule's original formulation, since only the elements of the two statutes in question are relevant in a Blockburger analysis. 98 Chief Justice Rehnquist's "ordinary sense" version of Blockburger was endorsed by Justices O'Connor and Thomas. 99

The disagreement between Chief Justice Rehnquist and Justice Scalia becomes clear upon a brief discussion of one of the two combined cases decided in Dixon. The trial court issued a contempt order which forbade the defendant from violating any criminal offense. 100 Thereafter, the defendant was arrested on possession of cocaine charges, and convicted under both the contempt and possession charges. 101 The issue was whether the contempt order and the cocaine possession charge were the "same offense" for double jeopardy purposes.

Justice Scalia determined that any criminal offense was a lesser included offense of the contempt order, as proof of violation of the contempt order proved the underlying violation of possession. 102 Therefore, the two crimes were the "same offense" for double jeopardy purposes, and Blockburger barred any subsequent prosecution of the underlying offense. 103

Under Chief Justice Rehnquist's "ordinary sense" formulation, a successive prosecution should not have been barred, because possession of cocaine with intent to distribute is not a lesser included offense of contempt of court in the

96. Id. In Dixon, the defendant was convicted for violating a contempt order which forbade him from violating any criminal offense; the defendant subsequently was arrested and indicted for possession of cocaine. Id. at 691-92. Justice Scalia determined that the possession charge was a lesser included offense of the contempt order, as proof of violation of the contempt order necessarily proved the underlying violation. Id. at 698-700. Therefore, the charges were the "same offense" for double jeopardy purposes, and the Double Jeopardy Clause barred any subsequent prosecution of the underlying offense. Id. at 700-01.

97. See id. at 713-14 (Rehnquist, C.J., concurring in part and dissenting in part) (indicating that contempt of court should be viewed in its ordinary sense).

98. See Blockburger, 284 U.S. at 304 (quoting Morey v. Commonwealth, 108 Mass. 433 (1871)) (indicating that the Blockburger test is a comparison of two statutes: "a single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other").


100. Id. at 691-92.

101. Id.

102. Id. at 699.

103. Id. at 700. The underlying offense was possession of cocaine with intent to distribute. Id. at 691. Note the interesting procedural posture: Justice Scalia only convinced one other Justice to both acquit the defendant and return to Blockburger. However, Justice Scalia was able to establish two different majorities. One majority decided to acquit the defendant. Id. The other majority voted to return to Blockburger. Id.
ordinary sense.\textsuperscript{104} What the Chief Justice meant by "ordinary sense" is not entirely clear, as some case-specific facts must be taken into account. What is clear is that he seemed most concerned with whether the elements of the lesser crime are necessarily subsumed by the greater offense.\textsuperscript{105}

To illustrate his point, Chief Justice Rehnquist contrasted the felony-murder case of \textit{Harris v. Oklahoma}\textsuperscript{106} with the facts of \textit{Dixon}.\textsuperscript{107} The defendant in \textit{Harris} was convicted of felony-murder in which robbery with a firearm was the underlying felony. The defendant was subsequently prosecuted for robbery with a firearm.\textsuperscript{108} The second prosecution was properly barred as a second prosecution for the same offense;\textsuperscript{109} robbery with a firearm was a lesser included offense of felony-murder, which used robbery with a firearm as an element.\textsuperscript{110} From this perspective, a clearer picture of "ordinary sense" develops. Chief Justice Rehnquist reasoned that robbery with a firearm is necessarily a step towards the commission of felony-murder, as it establishes an element of felony-murder.\textsuperscript{111} Moreover, the relationship between the two statutes in question was important to the Chief Justice; he implied that a generic reference in one offense that incorporates the elements of another offense would mean that one offense was indeed a lesser included offense of the other in the ordinary sense.\textsuperscript{112}

In contrast, possession with intent to distribute is certainly not a necessary step in the commission of contempt of court; possession of cocaine does not satisfy an element of contempt, nor does it lead to the establishment of an element of contempt in the ordinary sense.\textsuperscript{113} Additionally, the contempt of court statute did not make any generic references to any underlying crimes. Therefore, using this formulation, robbery with a firearm is a lesser included offense of felony-murder in the ordinary sense, and possession of cocaine with intent to distribute is not a lesser included offense of contempt of court in the ordinary sense.

Although the United States Supreme Court has not subsequently clarified exactly how to apply \textit{Blockburger}, at least one lower federal court has addressed this question. In \textit{United States v. Adams},\textsuperscript{114} the eleventh federal circuit considered whether a \textit{Blockburger} analysis should be performed on the elements of the statute alone, or whether the facts of the case as detailed in the indictment should

\textsuperscript{104} \textit{Id.} at 713-14 (Rehnquist, C.J., concurring in part and dissenting in part).

\textsuperscript{105} \textit{Id.} at 719-20 (Rehnquist, C.J., concurring in part and dissenting in part).

\textsuperscript{106} 433 U.S. 682 (1977).

\textsuperscript{107} \textit{Dixon}, 509 U.S. at 717-18 (Rehnquist, C.J., concurring in part and dissenting in part).

\textsuperscript{108} \textit{Harris}, 433 U.S. at 682.

\textsuperscript{109} \textit{Id.}

\textsuperscript{110} \textit{Id.}

\textsuperscript{111} \textit{Dixon}, 509 U.S. at 719-20 (Rehnquist, C.J., concurring in part and dissenting in part).

\textsuperscript{112} \textit{See id.} at 717-18 (Rehnquist, C.J., concurring in part and dissenting in part) (stating that, in the present case, there was no "generic reference" in the crime of contempt of court to the underlying charge that incorporated the elements of the purported lesser offense).

\textsuperscript{113} \textit{Id.} at 719-20 (Rehnquist, C.J., concurring in part and dissenting in part).

\textsuperscript{114} 1 F.3d 1566 (11th Cir. 1993).
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be considered." The Adams Court endorsed Chief Justice Rehnquist's ordinary sense version of Blockburger, as only the elements of the statutes in question were relevant.  

While the preceding summation has been anything but exhaustive, this section has disclosed that in the context of multiple punishments in a single prosecution, the Double Jeopardy Clause does no more than prevent a court from imposing greater punishment than that intended by the legislature. By contrast, in successive prosecutions, the government may not proceed with the second prosecution when the two statutes at issue are the same under a Blockburger/lesser included offense analysis—when the conviction of a greater crime cannot be had without conviction of the lesser crime.

C. Application of the Blockburger/Lesser Included Offense Test to the CFCE

This Comment will now apply the principles discussed above to the CFCE, and conclude that multiple punishment under the CFCE and its predicates in a single action does not violate the current double jeopardy doctrine.  

Regarding successive prosecutions, this Comment will show that the CFCE and its predicates are the greater and the lesser included offenses, respectively. Therefore, a prosecution of the CFCE should not be pursued in a separate action apart from its predicates. However, current United States Supreme Court dicta indicates that lesser included offense analysis does not control modern compound crimes.

In the final part of this section, this Comment will argue that the United States Supreme Court's rationale for not applying the lesser included offense analysis to modern compound crimes is contrary to the spirit of the Double Jeopardy Clause.

115. Adams, 1 F.3d at 1572.
116. See id. at 1574 (holding that the Blockburger test is to be applied to the elements of a statute, not to the averments that go beyond the statutory elements).
117. See supra notes 49-53 and accompanying text (explaining double jeopardy jurisprudence in the context of multiple punishment in a single action).
118. See supra notes 54-63 and accompanying text (describing double jeopardy law in the area of successive prosecutions).
119. See infra notes 123-26 and accompanying text (concluding the Double Jeopardy Clause does not bar the imposition of multiple punishments under the CFCE and its predicates).
120. See infra notes 127-38 and accompanying text (arguing that the CFCE and its predicates exist in a greater/lesser included offense relationship).
121. See infra notes 141-76 and accompanying text (describing the United States Supreme Court's reluctance to extend lesser included offense analysis to modern compound crimes such as the CFCE).
122. See infra notes 177-203 and accompanying text (criticizing the United States Supreme Court's current posture regarding lesser included offense analysis and modern compound crimes).
1. **Multiple Punishment**

Hypothetically, Mr. X is indicted for five counts of bank fraud and the CFCE, in federal district court in 1992. He argues that the CFCE and the underlying predicates are the "same offense" for double jeopardy purposes, and he may not receive cumulative punishment if convicted on all counts. Mr. X argues that a Blockburger/lesser included offense analysis will show that the bank fraud charges require proof of the same facts that CFCE does. As bank fraud is but one element of the CFCE, all of the elements of bank fraud are subsumed by the CFCE. Therefore, bank fraud and the CFCE are the same offense for double jeopardy purposes since bank fraud is a lesser included offense of the CFCE.

Unfortunately for Mr. X, a person faced with defending against the CFCE and individual predicate offenses in a single proceeding has little chance of success, as legislative intent controls despite a favorable outcome under Blockburger. The government would simply need to show that Congress intended for bank fraud and the CFCE to be separate offenses.

Although analyzing the CFCE and its predicates in light of Blockburger alone would save the defendant from cumulative punishment, in the context of multiple punishment in a single action, Blockburger is merely a tool of statutory construction to aid a court in determining legislative intent.

Contrary congressional intent unambiguously states that the CFCE and its predicate offenses are separate crimes in the context of multiple prosecutions; the statute's legislative history reveals that Congress wished to address a specific new criminal. From this a court could draw the inference that Congress intended for bank fraud and the CFCE to be two separate offenses. Therefore, as it is unlikely that a defendant would have a cognizable double jeopardy claim if the govern-

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123. See Missouri v. Hunter 459 U.S. 359, 366 (1983) (holding, "[w]ith respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended"). The court also noted that regardless of whether two statutes are the same under Blockburger, legislative intent controls. Id. at 368-69; see Albernaz v. United States, 450 U.S. 333, 344 (1981) (stating that the question of what is allowed by the Constitution in the realm of multiple punishments in a single trial is not different from asking what the legislature intended); Whalen v. United States, 445 U.S. 684, 689 (1980) (indicating that the Double Jeopardy Clause precludes consecutive sentences imposed by a federal court in a single trial only to the extent that Congress authorizes).

124. See Hunter, 459 U.S. at 368-69 (stating that upon clear showing of legislative intent to authorize cumulative punishments, that intent will control regardless of the outcome of a Blockburger analysis).

125. See Albernaz, 450 U.S. at 340 (stating that in cases of multiple punishment in a single trial, the Blockburger test is merely a rule of statutory construction, and is not controlling where there is clear legislative intent to the contrary).

126. See, e.g., 136 CONG. REC. S9488, S9488 (daily ed. July 11, 1990) (statement of Sen. Shelby) (proclaiming that the CFCE "creates a new, strong deterrent to white collar crime by authorizing life imprisonment for "S&L kingpins"" emphasizing added); 136 CONG. REC. S7595, S7601 (daily ed. October, 1990) (statement of Sen. Biden) (stating that punishment doled out under the CFCE will be severe for "so-called S&L kingpins").
ment brings all charges in a single proceeding, multiple punishment in single proceeding would be allowed.

2. Successive Prosecutions

As mentioned earlier, legislative intent is not dispositive in cases of successive prosecutions; the analysis should proceed further. On its face, the CFCE and its predicates present a clear-cut case of the “lesser included offense” aspect of the “same offense” rule. The following hypothetical is illustrative: In 1992, the federal government prosecuted Mr. X on five counts of bank fraud. Presume that the government knew Mr. X had managed a total of five people acting in concert, and the enterprise grossed $10 million in an eighteen-month span. Further, assume Mr. X is convicted on all counts.

Subsequently, in 1994, the U.S. Attorney’s office indicts Mr. X under the CFCE, and uses the prior bank fraud charges as the predicate offenses for the CFCE charge. Under a Blockburgerlesser included offense analysis, although the CFCE charge involves proving more elements than mere bank fraud, proof of the CFCE necessarily proves the bank fraud charges; therefore, the bank fraud charges do not require “proof of a fact which the other does not.” As a result, the bank fraud charges are “lesser included offenses” of the CFCE, and are the “same offense” for double jeopardy purposes. Thus, the prosecution in 1994 should be barred, as violative of the second prong of North Carolina v. Pearce, which prohibits the prosecution of the same offense after a conviction.

The preceding analysis would also withstand an “ordinary sense” interpretation of Blockburger, which Chief Justice Rehnquist advocated in Dixon, as the CFCE specifies the necessary underlying offenses. Under the Chief Justice’s logic in Dixon, the supervision of one bank fraud count is necessarily a step in the commission of a Continuing Financial Crimes Enterprise. While one bank

127. See supra notes 54-63 and accompanying text.
128. See Brown v. Ohio, 432 U.S. 161, 169 (1977) (forbidding successive prosecutions for a greater and lesser included offense, regardless of the sequence).
130. See id. (governing bank fraud); cf. id. at § 225 (West Supp. 1996) (describing the CFCE statute).
132. Id.
134. See Pearce, 395 U.S. at 717 (stating the double jeopardy clause protects “against a second prosecution for the same offense after acquittal”).
135. 18 U.S.C.A. § 225 (West Supp. 1996); see United States v. Dixon, 509 U.S. 688, 717-18 (1993) (Rehnquist, C.J., concurring in part and dissenting in part) (stating that a generic reference to an underlying felony within a felony-murder statute was sufficient to incorporate the particular underlying felony as a lesser included offense in Harris).
136. See Dixon, 509 U.S. at 719-20 (Rehnquist, C.J., concurring in part and dissenting in part) (stating that greater and lesser included offenses require the lesser offense to be necessarily included in the greater).
fraud violation does not establish an element of the CFCE in its entirety, it is certainly a component in the statute’s definition of a “continuing financial crimes enterprise.” Thus, in the “ordinary sense” of the CFCE, bank fraud is a lesser included offense.

However, as developed below, the double jeopardy provisions enunciated in *Pearce* and *Blockburger* probably would not apply to the fact pattern stated above. As a result, *Mr. X* would be subject to the second prosecution in 1994 under the modern compound crime of CFCE, despite the fact that bank fraud is a lesser included offense of the CFCE in the ordinary sense. This apparent exception to the lesser included offense doctrine may be extracted upon an examination of United States Supreme Court case law.

**D. Why a Traditional Lesser Included Offense Analysis Would Not Be Applied to the CFCE**

1. *Garrett v. United States*

*Garrett v. United States* is the leading United States Supreme Court case dealing with the relationship between a modern compound statute such as the Racketeer Influenced and Corrupt Organizations Act (RICO), the CCE, or the CFCE and its predicates in a relevant double jeopardy context.

In *Garrett*, the defendant operated an extensive drug operation from 1976 to 1981. In 1981, he was charged with federal substantive drug offenses in the

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138. See id. (defining a “continuing financial crimes enterprise” as a series of delineated violations, including bank fraud as one of the specified crimes).


145. *Garrett*, 471 U.S. 773; see id. (deciding a double jeopardy case arising from the use of 21 U.S.C.A. § 848, the CCE statute). An earlier case, *Jeffers v. United States*, also addressed a double jeopardy challenge arising out of the use of 21 U.S.C. A. § 848. Jeffers v. United States, 432 U.S. 137 (1977). However, the *Jeffers* court decided a slightly different issue: whether conspiracy is a lesser included offense of 21 U.S.C.A. § 848, which includes a quasi-conspiracy element of acting “in concert with.” Id. at 146-47. A plurality of the court concluded that conspiracy is a lesser included offense of 21 U.S.C.A. § 848. Id. at 150. However, the plurality allowed the prosecution of the conspiracy charge in one trial and the criminal enterprise charge in another because the defendant had expressly requested separate trials. Id. at 152-54.

state of Washington. Simultaneously, he was under investigation in Florida for violations of the CCE. The defendant's request to have all of the charges against him consolidated into one trial was denied. Two months after the defendant pleaded guilty to the charges stemming from the activities in Washington, he was indicted in Florida under the CCE. In the course of the subsequent trial, the government used many of the Washington activities to support the CCE charge. The defendant argued that a CCE conviction was barred as violative of double jeopardy since he had previously pleaded guilty to lesser included offenses of the CCE. The Court upheld the second prosecution. The fact that all of the activities which comprised the CCE charge had not been completed at the time the defendant was indicted under the lesser charges in Washington was dispositive.

This fact proved determinative as the Court in Garrett invoked the exception announced in Diaz v. United States, which allows a subsequent prosecution for the "same offense" when the second offense has not been completed by the time of the indictment of the first offense. Therefore, the application of the Diaz exception was enough to decide the issue in Garrett. No double jeopardy claim was available to the defendant since the crimes comprising the CCE violation had not been completed by the time the defendant was indicted in Washington.

However, the Garrett court did not stop there. In dicta, the Court stated, "significant differences caution against ready transportation of the 'lesser included offense' principles of double jeopardy from the classically simple situation presented in Brown to the multi-layered conduct, both as to time and to place, involved in this case." In cautioning against the use of lesser included off

147. Id. at 775.
148. Id.
149. Id.
150. Id. at 776.
151. Id.
152. Id. at 787.
153. See id. at 793 (stating that the Double Jeopardy Clause was not violated under the facts of the present case).
154. Id. at 791.
155. 223 U.S. 442 (1912); see id. at 448-49 (granting the exception on the following facts: the defendant was initially prosecuted on assault and battery charges; after the defendant's trial on the assault and battery charges, the victim died from injuries suffered as the result of the battery). The State then indicted the defendant on homicide charges. Id. The United States Supreme Court did not bar the subsequent prosecution. Id.
156. See Garrett, 471 U.S. at 792-93 (holding that as the continuing criminal enterprise had not been completed at the time the Washington charges were brought, the Diaz rule would allow the Washington charges to be used as a predicate offense).
157. Id. at 791.
158. Id. at 790. The Court stated it had serious doubts as to whether the offense to which the defendant pleaded guilty in Washington was a "lesser included offense" of the CCE. Id.
159. Id. at 789.
offense analysis with modern compound crimes, the Garrett court focused upon purported discrepancies between the case at hand and the facts of Brown v. Ohio.\textsuperscript{160}

The Court differentiated between a single course of conduct, as described in Brown, and the intricate, multi-layered conduct of the drug operations in Garrett.\textsuperscript{161} The Garrett court expressed reluctance to extend the lesser included offense analysis to the latter largely because it could not conceptualize the latter as a "single course of conduct," and because in Brown, the defendant was "simultaneously committing both the lesser included . . . and the greater felony."\textsuperscript{162}

Furthermore, the majority justified its stance by forming the following argument: to force the government to choose between prosecuting the defendant presently for the underlying predicates or releasing the defendant and letting him complete his enterprise would be absurd.\textsuperscript{163} Certainly, an inflexible application of Blockburger would foreclose a prosecution of a modern compound crime upon the previous prosecution of its underlying predicates.\textsuperscript{164} However, the very exception used by the court in Garrett answers this dilemma. The Diaz exception would allow the government to prosecute underlying predicates in one trial, then the CFCE in a subsequent trial, so long as the CFCE was not complete at the time the government indicted the defendant on the predicates. This directly addresses the Garrett court's concern that the government will be forced to either prematurely pursue the predicates or unnecessarily delay prosecution of the defendants.

In addition to the dicta, perhaps the most complete policy arguments forwarded by a member of the United States Supreme Court against finding that a modern compound crime and its predicates are the "same offense" are found in Justice O'Connor's concurrence in Garrett.\textsuperscript{165} She pointed out that the Double Jeopardy Clause is not absolute, and accommodations must be made to forward society's interest in prosecuting those who have violated the law.\textsuperscript{166} Moreover, she echoed the majority's stance that the Double Jeopardy Clause should not be used to force the government's hand, either by waiting for a defendant to establish an "enterprise," or by prosecuting a defendant prematurely, charging him with only a limited number of predicates.\textsuperscript{167}

\begin{itemize}
\item[160.] 432 U.S. 161 (1977).
\item[161.] Garrett, 471 U.S. at 787-89; see supra notes 65-70 and accompanying text (describing the relevant facts of Brown).
\item[162.] Garrett, 471 U.S. at 787-89.
\item[163.] Id. at 785-86.
\item[164.] Id. at 798 (O'Connor, J., concurring).
\item[165.] Id. at 795-99 (O'Connor, J., concurring).
\item[166.] Id. at 796 (O'Connor, J., concurring).
\item[167.] Id. at 798 (O'Connor, J., concurring).
\end{itemize}
2. United States v. Felix

In many respects, United States v. Felix\(^{168}\) embraced the Garrett dicta regarding "multi-layered conduct." In Felix, the Court considered using the lesser included offense logic in analyzing the prosecution of a conspiracy and a previously prosecuted substantive crime.\(^{169}\) The defendant in Felix operated an illicit drug facility in Oklahoma, and while attempting to obtain precursor chemicals in Missouri, the defendant was apprehended and charged with federal substantive drug offenses in Missouri.\(^{170}\) Subsequently, the government charged the defendant with federal drug conspiracy charges in Oklahoma, and used the Missouri acts to prove the Oklahoma conspiracy.\(^{171}\)

Alluding to Garrett, the Court stated, "[r]eliance on the lesser included offense analysis . . . is therefore much less helpful in analyzing subsequent conspiracy prosecutions . . . just as it falls short in examining CCE offenses."\(^{172}\) As with Garrett, the Supreme Court's discussion of the lesser included offense analysis when scrutinizing modern compound crimes was dicta.\(^{173}\) To decide the case, the Felix court relied upon an axiom of double jeopardy jurisprudence: conspiracies to commit crimes are separate from the substantive crimes themselves.\(^{174}\) Therefore, any further discussion by the United States Supreme Court regarding the wisdom of using the lesser included offense logic when analyzing modern compound crimes was unnecessary.

In both Garrett and Felix, the United States Supreme Court refused to extend traditional double jeopardy jurisprudence to modern compound crimes,\(^{175}\) yet it has not announced a rule that would satisfactorily address double jeopardy and


\(^{169}\) Felix, 503 U.S. at 381-83.

\(^{170}\) Id. at 380.

\(^{171}\) Id. at 380-84

\(^{172}\) Id. at 389-90. The quotation is merely dicta, as the court ultimately based its holding on the premise that conspiracies to commit crimes have been considered separate from the actual substantive crimes long before the "same conduct" test advocated by the defendant had been adopted. Id. at 1384; see United States v. Bayer, 331 U.S. 532, 542 (1947) (stating that agreements to perform illegal acts are distinct from the acts themselves); Pinkerton v. United States, 328 U.S. 640, 643 (1946) (holding that a conspiracy to commit a crime, and the substantive crime itself are not the "same offense").

\(^{173}\) The court held that the prosecution of a conspiracy in a case in which the government relied upon previously prosecuted overt acts does not violate the Double Jeopardy Clause, by relying on the traditional rule that a substantive crime, and the agreement to commit that crime, are not the same offense. Felix, 509 U.S. at 389-90.

\(^{174}\) See id. at 389-90 (noting that specific cases the defendant wished to invoke predated the rule that a conspiracy is not the same offense as a substantive crime for double jeopardy purposes); see also Bayer, 331 U.S. at 542 (stating that agreements to perform illegal acts are distinct from the acts themselves); Pinkerton, 328 U.S. at 643 (holding that a conspiracy to commit a crime, and the substantive crime itself are not the "same offense").

\(^{175}\) See supra notes 141-76 and accompanying text (describing the United States Supreme Court's current stance regarding the use of the lesser included offense analysis to modern compound crimes).
modern compound crimes. All of the Supreme Court's dicta indicate that if a situation akin to the aforementioned Mr. X's would arise, double jeopardy protection would not be available to him. This vacuum is not supportable in light of relevant precedent.

E. Criticism of the United States Supreme Court's Position

The basic protections of Blockburger should be available to defendants in cases involving successive prosecutions of the CFCE and its predicate offenses. Any concerns that the United States Supreme Court may have in applying Blockburger to modern compound crimes are sufficiently addressed through the exceptions announced in Diaz v. United States177 and Brown v. Ohio.178

As alluded to above, the United States Supreme Court has directly discussed the issue of double jeopardy in the context of a modern compound crime and its predicates only once, in Garrett. There, the Court stated its reluctance to apply the lesser included offense analysis to compound crimes.179

The two primary reasons the Court gave for cautioning against the use of the lesser included offense analysis for double jeopardy issues arising from modern compound crimes were: (1) A defendant charged with two simple crimes, as in Brown, engages in a single course of conduct from a spatial and temporal perspective;180 and (2) a defendant charged with two simple crimes commits both

176. See Felix, 503 U.S. at 390-91 ( intimating in dicta that lesser included offense analysis would not be helpful in the context of a compound crime). Yet the court did not forward an analysis that it would favor in modern compound crime cases. Id.; see Garrett v. United States, 471 U.S. 773, 787-90 (1985) (expressing in dicta the difference between modern compound crimes and simple fact patterns arising from traditional crimes, and cautioning against extending lesser included offense analysis to the former); supra notes 141-67 and accompanying text (discussing the United States Supreme Court's decision in Garrett).

177. 223 U.S. 442 (1912).

178. 432 U.S. 161 (1977); see Garrett, 471 U.S. at 789-90 (addressing the concern that, "the Double Jeopardy Clause may be employed to force the Government's hand"). The Court seemed troubled by the notion that the prosecution would either have to withhold charging the defendant with the lesser crimes until the requirements were met to allow the defendant to be indicted on the greater charge, or the government would have to indict the defendant on the greater charge before the defendant was even finished committing the greater charge. Id. at 789-90; see Brown, 432 U.S. at 169 n.7 (stating that a double jeopardy exception may exist when the government cannot proceed on a greater charge if all of the facts necessary to charge the defendant with that crime have not been uncovered by the state despite the exercise of due diligence); Diaz, 223 U.S. at 448-49 (exempting from double jeopardy analysis successive prosecutions when the second offense is not completed at the time of the indictment of the first offense). Applied to the Court's concerns in Garrett, the prosecution would not be barred from using the lesser offense previously prosecuted per the Diaz exception, since the greater crime was not complete at the time of the indictment of the lesser offense. Id.

179. See Felix, 503 U.S. at 390-91 (stating lesser included offense analysis falls short in examining the compound crime of CCE); Garrett, 471 U.S. at 789 (cautioning against the use of lesser included offense analysis when dealing with multilayered conduct, which is often present in a compound crime).

180. See Garrett, 471 U.S. at 787-89 ( intimating that a defendant such as the one in Brown engages in a single course of conduct, and cautioning against using a lesser included offense to complex crimes as they are different from Brown, both as to "time and to place").
crimes simultaneously. These distinctions are not satisfactory and will be discussed in turn below.

First, although running a financial crimes enterprise may not be a “singular act” in the normal sense, Congress has deemed the requisite series of acts discreet and singular enough to define those acts as a specific crime. Additionally, the Garrett court placed an emphasis upon the fact that the defendant’s acts occurred over a long time and in many locations. However, from temporal and spatial perspectives, the facts in Brown may present no more of a “single course of conduct” than running a financial crimes enterprise. The conduct alleged in Brown occurred over eight days. An individual could violate the CFCE in eight days; the defendant need only supervise the commission of three bank fraud actions, for example, that gross more than $5 million. Such a defendant may conduct all of his activities from the same office. From a time and place viewpoint, so important to the Court in Garrett, this hypothetical is just as singular an act as the crimes committed in Brown.

Granted, due to the complex nature of the CFCE, it seems likely that a defendant will often (but not invariably) commit the acts in many places and over a long period of time. Yet that fact should not dictate the parameters of constitutional jurisprudence. Time and time again, the United States Supreme Court has invalidated significant intrusions into personal freedoms simply because the government was justified in its actions from a purely statistical perspective. Indeed, as Justice Stewart pointed out in Faretta v. California, “[p]ersonal liberties are not rooted in the law of averages.” Therefore, reliance on mere quantitative probabilities is misplaced.

The second distinction raised by the Court in Garrett, that the defendant in Brown committed both offenses simultaneously, is equally without merit. Even

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181. See id. at 789 (stating that the defendant in Brown was committing both the greater and the lesser offenses simultaneously, and the Garrett defendant simply did not commit the underlying predicates and the CCE concurrently).


183. See Garrett, 471 U.S. at 789 (distinguishing the classically simple situation presented in Brown from the “multilayered conduct, both as to time and to place . . .” present in Garrett) (emphasis added).

184. See Brown, 432 U.S. at 162-63 (indicating that the defendant illegally took possession of a car on Nov. 29, and continued to have possession until Dec. 8).

185. Cases involving the Fourth Amendment are instructive. For example, for any non-minor seizure, the police must have some quantum of individualized suspicion, be it probable cause or reasonable suspicion. See generally Illinois v. Gates, 462 U.S. 213 (1983); Terry v. Ohio, 392 U.S. 1 (1968). A bare assertion that a defendant superficially fit within a statistical profile is insufficient. See Reid v. Georgia, 448 U.S. 438, 440-42 (1979) (vacating a state court decision that validated a seizure on such grounds).

186. 422 U.S. 806 (1975).

187. Faretta, 422 U.S. at 834.

188. See Garrett, 471 U.S. at 789 (stating that the defendant in Brown simultaneously committed both the greater and lesser included offenses, and that the same “simply is not true of Garrett”).
with the so called "simple situation presented in Brown," a defendant may not necessarily commit both crimes simultaneously.

Consider the following variation on the facts in Brown: suppose the defendant did not intend to deprive the owner of his vehicle permanently when he first took the car; he only wished to embark upon a "joyride." Only after driving the car around for a couple of days did the defendant decide that he wanted to deprive the owner of his car. Under these facts, the defendant did not commit "auto theft" until he developed the requisite mens rea for auto theft. Therefore, the defendant did not commit both crimes until the threshold point when he decided to deprive the owner of possession permanently.

The same could be the case in a CFCE prosecution. A defendant may commit acts that have met all the requirements of the CFCE, except that the enterprise has not yet grossed $5 million. The defendant continues his bank fraud scheme, and eventually he reaps $5 million from the criminal enterprise. Again, the defendant will, at some point, be violating both the CFCE and the bank fraud statute, but not until some "threshold" point is reached. As a result, differentiating modern compound crimes from regular offenses on the basis that a defendant commits both offenses simultaneously only with simple offenses is based on two erroneous assumptions: (1) That a defendant charged with two simple crimes always commits both crimes simultaneously, and (2) that a defendant charged with a modern compound offense and its predicates never commits both crimes simultaneously.

As mentioned above, Felix merely parroted Garrett in many respects, and the Court stated in a conclusory manner that lesser included offense analysis is "much less helpful" for modern compound crimes. The Court never articulated what might be helpful.

In the preceding cases, the United States Supreme Court expressed reluctance to extend double jeopardy to modern compound crimes merely because the conduct involved is often complex, and usually extends over a long period of time. Yet Congress deemed it proper to criminalize this complex behavior. It seems incongruous that a legislative body may take into account multi-layered conduct

189. Id.
190. See Ohio Rev. Code Ann. § 2913.02 (Baldwin 1994) (defining "theft" generally); id. at § 2913.03 (Baldwin 1994) (governing unauthorized use of a vehicle).
192. The posture of the United States Supreme Court may be best encapsulated by Justice Rehnquist's dissent in Whalen v. United States. Whalen v. United States, 445 U.S. 684 (1980) (Rehnquist, J., dissenting). Justice Rehnquist stated that the lesser included offense analysis is "perhaps even misdirected" when considering modern compound crimes and their predicates, yet he gave no reason why it is misdirected, and offered no solution to the problems faced by a defendant such as Mr. X. Id. at 708-09.
193. See Felix, 503 U.S. at 389-91 (stating that the lesser included offense analysis is much less helpful when analyzing the modern compound crime of the CCE); Garrett, 471 U.S. at 789 (cautioning against the use of the lesser included offense logic in cases involving multilayered conduct); see also So, supra note 139, at 362 (stating that there may be an exception to successive prosecution double jeopardy protection for compound crimes).
when criminalizing an act or acts, yet when constitutional rights are at stake, the United States Supreme Court refuses to acknowledge those rights because of the very conduct Congress deemed criminal. Although logical symmetry is not a central tenet of the law,\textsuperscript{194} double jeopardy protection is neither a transitory right nor a "fragile guarantee . . . ."\textsuperscript{195} As stated in Benton v. Maryland,\textsuperscript{196} "the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage . . . ."\textsuperscript{197} Despite Chief Justice Rehnquist's contention that predicate offenses to a modern compound crime and the modern compound crime itself are clearly not "same offenses,"\textsuperscript{198} upon an examination of the policies behind double jeopardy proscriptions, Chief Justice Rehnquist's conclusion is wrong. A defendant could be subjected to dire legal consequences, based upon offenses that have already been proven in a previous prosecution. As the Mr. X hypothetical points out, the government could convict a defendant of bank fraud in one trial, and subsequently prove that charge again in a CFCE prosecution; this is simply antithetical to the Double Jeopardy Clause. Ultimately, with a right as fundamental and basic as the protection against double jeopardy, the United States Supreme Court should not merely dismiss the potential for prosecutorial oppression mentioned in Green\textsuperscript{199} simply because the lesser included offense analysis is, in the opinion of the Court, "much less helpful."\textsuperscript{200}

Although overruling mere dicta is impossible, the United States Supreme Court should rethink the position taken in Garrett. This Comment has shown that the predicates of the CFCE are, under a literal reading of the relevant rule, lesser included offenses of the CFCE.\textsuperscript{201} While the Court did give justifications for cautioning against the use of the lesser included offense analysis with modern

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194. See, e.g., Oliver Wendell Holmes Jr., The Common Law 244 (Mark DeWolfe Howe ed., Harvard University Press 1963) (1881) (stating: "The distinctions of the law are founded on experience, not on logic").

195. Brown, 432 U.S. at 169. In Justice Powell's majority opinion, he stated that the "Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units." Id. at 169.


198. See Felix, 503 U.S. at 385-86 (discussing the defendant's interlinked activities in Oklahoma and Missouri, and concluding that none of the offenses were in any sense the "same offenses" because the conduct occurred in different times and places and because there was no common conduct).

199. See Green v. United States, 355 U.S. 184, 187-88 (1957) (stating that the state should not use its power and resources to make repeated attempts to convict an individual for an alleged offense).

200. See Felix, 503 U.S. at 390-91 (proclaiming that the lesser included offense analysis is not very helpful when dealing with a compound crime such as the CCE in the Garrett case).

201. See supra notes 127-40 and accompanying text (demonstrating that the CFCE and its underlying predicates exist as greater and lesser included offenses).
compound crimes, as argued above, these reasons are not persuasive. Therefore, the CFCE and its underlying predicates should be considered the “same offense” in cases of successive prosecutions.

F. The Supreme Court Should Extend the Lesser Included Offense Analysis to the CFCE

A simple lesser included offense test applied to the CFCE and its predicates satisfactorily protects the constitutional rights of defendants against vexatious, duplicative trials, in which the prosecution could continually hone its presentation until the government achieves a guilty verdict. Although several proposed double jeopardy tests exist that would grant a defendant much greater protection than Blockburger, for example the same transaction test, the same conduct test, and the same evidence test, the ambitions of this Comment do not stretch so far.

Whether the Blockburger formulation is, from a theoretical perspective, the best method for protecting a defendant from double jeopardy is not currently at issue. Arguably, Blockburger affords only minimal protection. However, from a practical perspective, Blockburger is the only formulation expressly accepted by the United States Supreme Court. This Comment recognizes that defendants are especially at risk of double jeopardy with modern compound crimes, due to

202. See supra notes 141-176 and accompanying text (justifying the Court’s caution against using the lesser included offense analysis).
203. See supra notes 177-200 and accompanying text (dissecting the rationale of the Supreme Court in this area).
204. See Brown v. Ohio, 432 U.S. 161, 165 (1977) (addressing the justification for double jeopardy by noting that “the Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors”).
205. See id. at 170 (Brennan, J., concurring) (stating that while he agrees with the majority’s result, he stands by his thesis that the Double Jeopardy Clause requires that all charges must be brought in a single proceeding which springs from a “single criminal act, occurrence, episode or transaction” (quoting Ashe v. Swenson, 397 U.S. 436, 453-54, & 454 n.7 (1970) (Brennan, J., concurring))).
206. See Grady v. Corbin, 495 U.S. 508, 521 (1990) (holding that the Double Jeopardy Clause prevents a subsequent prosecution if, to prove an essential element of a crime, the government will have to prove conduct previously prosecuted, overruled by United States v. Dixon, 509 U.S. 688 (1993)).
207. See Ciucci v. Illinois, 356 U.S. 571, 573 (1958) (Douglas, J., dissenting) (suggesting that a same evidence test is the better approach, which would preclude the prosecution from harassing the accused with repeated trials and convictions using the same evidence).
208. This is so because a legislative body could circumvent the Blockburger test by merely modifying the underlying “predicates” so that they are not quite equivalent to existing substantive statutes. Congress would merely need to avoid creating a “crime within a crime.” Instead of stating that a series of bank fraud prosecutions is required to form an “enterprise,” the statute could state that something less than bank fraud is enough. If bank fraud contains the elements A, B, and C, and the modern compound crime’s “predicate” contains only elements A and B, then each statute would contain elements that the other did not, and they would not be “same offenses” for double jeopardy purposes.
209. See Dixon, 509 U.S. at 704 (overruling the same conduct test of Grady and returning to the same elements test of Blockburger).
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the wide variety of possible crimes that could be lesser included offenses of the CFCE, RICO or CCE. Accordingly, the United States Supreme Court should be willing to apply the accepted double jeopardy mode of analysis to modern compound crimes such as the CFCE. As demonstrated above, the predicate crimes of the CFCE are the lesser included offenses of the CFCE in the "ordinary sense." This Comment simply advocates the proposition that they should be treated as "same offenses" for double jeopardy purposes.

The concept of treating underlying predicate crimes as lesser included offenses of modern compound crimes is certainly not a revelation. In his extensive review of RICO, Barry Tarlow stated that "[t]he relationship of a RICO offense to the predicate offenses is clearly that of greater and lesser-included offenses." Furthermore, in a case decided soon after Garrett, a federal appellate judge pronounced: "Neither the words nor the logic of the opinion imply that a predicate offense would not be considered a lesser included offense within a CCE charge once the CCE had been completed." Indeed, in her concurrence in Garrett, Justice O'Connor gave additional support to the assertions of this Comment, as she stated that a defendant's double jeopardy claim is much more compelling when the predicate offenses and the modern compound crime have all been completed.

Certainly, governmental and societal interests call for a balanced approach to this issue. The interests of the government in promptly and aggressively prosecuting modern compound crimes are adequately protected through two common sense exceptions to double jeopardy analysis. The first was enunciated in Diaz v. United States and the second was in Brown v. Ohio. These cases allow for a subsequent prosecution of the "same offense" under either one of the

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210. See Stanley Arkin, Prosecutorial Vindictiveness and Big-Bang Statutes, N.Y. L.J., June 10, 1993, at 3 (stating that the advent of modern compound crimes such as RICO, CCE, and CFCE allows for a greater risk of prosecutorial vindictiveness); Poulin, supra note 37, at 136 (proposing that modern compound crimes create a greater risk of fragmented prosecutions); Barry Tarlow, RICO Revisited, 17 GA. L. REV. 291, 423-24 (1983) (commenting that dangers exist to individual rights and liberties because of the breadth of the modern compound crime of RICO).

211. See supra notes 127-40 and accompanying text (showing that previously prosecuted predicate crimes are lesser included offenses of the CFCE).

212. Tarlow, supra note 210, at 404-05.


214. See Garrett v. United States, 471 U.S. 773, 799 (1985) (O'Connor, J., concurring) (stating that a defendant's interest in finality would be much more compelling in a case in which he was prosecuted for an underlying predicate, did not commit any further criminal acts, and was later prosecuted for a compound crime). This is in contrast to the actual defendant in Garrett, who continued his criminal enterprise after he was indicted for some of the underlying predicates. Id. at 799; see supra notes 129-34 and accompanying text (setting forth the Mr. X hypothetical).

215. 223 U.S. 442 (1912); see id. at 448-49 (holding that where a subsequent offense has not been completed at the time of the indictment of the first offense, double jeopardy protections will not apply).

216. 432 U.S. 161 (1977); see id. at 169 n.7 (stating that "[a]n exception may exist where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence").
following circumstances: if the second crime was inchoate at the time of the indictment of the first, or if the government, using due diligence, has not uncovered the necessary facts to charge the defendant with the second offense.

So that the theories enunciated in Brown and Diaz are not totally in the abstract, let us return to Mr. X. As indicated earlier, if the Blockburger test was applied to the facts given, a second prosecution should be barred as the "same offense," since any of the predicates are "lesser included offenses" of the CFCE. The crimes prosecuted by the government in the first trial did not "require proof of a fact which the other does not." The Blockburger rule would protect a defendant from the possibility of the government fragmenting the charges and "subjecting him to embarrassment, expense, and ordeal, and compelling him to live in a continuing state of anxiety . . . ."

In the hypothetical above, the government knew that the defendant had met all the criteria for a CFCE charge, yet the government did not add that charge to the initial indictment. The use of the Blockburger test would properly bar a second prosecution.

Rational policy supports this result as the pursuit of a modern compound crimes conviction can be a fertile breeding ground for prosecutorial abuse. It is repugnant to the Fifth Amendment to allow a prosecutor to try a defendant for underlying predicate offenses in one trial, when the prosecution knows that the defendant has also met the criteria for the CFCE offense, then in a second trial, to prosecute the CFCE offense. In theory, the trial of the underlying predicates can serve as a dress rehearsal for the CFCE prosecution. With the second trial, the prosecutor has been able to rehearse the presentation, which essentially allows the

217. See Diaz, 223 U.S. at 448-49 (holding that as the second crime had not been completed at the time of the first crime's indictment, the government could proceed with a second prosecution without fear of a double jeopardy defense).

218. See Brown, 432 U.S. at 169 n.7 (articulating that an exception to the lesser included offense doctrine for successive prosecutions may exist where the state cannot proceed on the greater charge because the government failed to discover the facts necessary to prosecute the defendant with the greater charge, even after exercising due diligence).

219. See supra notes 129-34 and accompanying text (describing the Mr. X hypothetical). In 1992, Mr. X was charged and convicted in federal court of five counts of bank fraud. Id. It was assumed the government knew the defendant supervised a total of five people acting in concert, and the enterprise grossed $10 million in an 18-month span (these factors meet the elements of the CFCE). Id. In 1994, the federal government decides to charge the defendant with the CFCE. Id.

220. See supra notes 127-39 and accompanying text (demonstrating that the CFCE and its underlying predicates are the "same offense" in successive prosecutions).


223. See Arkin, supra note 210, at 3 (stating that the advent of compound crimes such as RICO, CCE, and CFCE allows for a greater risk of prosecutorial vindictiveness); Tarlow, supra note 210, at 423-24 (commenting that dangers exist to individual rights and liberties because of the breadth of the modern compound crime of RICO).
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prosecutor the opportunity for a “second bite at the apple” in the subsequent trial.224

However, if at the time of the first indictment, the government was not aware that the defendant’s bank fraud scheme had grossed over $5 million, the Brown exception could be invoked. The relevant portion of Brown stated that if the government failed to discover the facts necessary to establish the second charge even after the exercise of due diligence, the defendant would have no double jeopardy claim.225 Thus, if the government used due diligence in its investigation, and did not know that the defendant’s scheme had grossed $5 million, the double jeopardy protections afforded by Blockburger would not apply.

The “due diligence” standard is not an overly burdensome, nor unfair, requirement of the government.226 So long as the government conducts an investigation that is objectively reasonable, the due diligence standard is met.227 For example, in United States v. Tolliver,228 a due diligence determination in a double jeopardy context will be made based upon “facts reasonably available to the government at the time.”229

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224. See Grady, 495 U.S. at 518 (addressing the possibility of a state being able to “rehearse its presentation” in instances of successive prosecutions, which may increase the risk of an erroneous conviction); Tibbs v. Florida, 457 U.S. 31, 41 (1982) (observing that the Double Jeopardy Clause “prevents the State from honing its trial strategies and perfecting its evidence through successive attempts at conviction”); United States v. Maza, 983 F.2d 1004, 1010 (11th Cir. 1993) (expressing concerns over multiple prosecutions), rev’d on other grounds, 983 F.2d 1004 (1993).

225. See Brown, 432 U.S. at 169 n.7 (stating that “an exception may exist where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence”).

226. See United States v. Boldin, 772 F.2d 719, 732 (11th Cir. 1985) (holding that the government met its due diligence standard when an informant who was a key factor in a second prosecution did not begin cooperating with the government until seven months after the first trial); cf. Maza, 764 F. Supp. at 1454-55 (finding that the government did not meet the due diligence standard when all the information used in the second prosecution was in the hands of the prosecutor in the first prosecution, yet the first prosecutor failed to charge the defendant with the crimes charged in the second prosecution).


228. 61 F.3d 1189 (5th Cir. 1995).

229. Tolliver, 61 F.3d at 1211. In Tolliver, the government did not know that the defendant was involved in a larger conspiracy when it initially indicted him. Id. at 1211. Moreover, evidence implicating the defendant in some of his most culpable conduct in the second charge was not even suspected at the time of the initial prosecution. Id. at 1212.
The *Diaz* exception offers an alternate means for the government to avoid the application of *Blockburger* when prosecuting a defendant under the CFCE in one trial and the underlying predicates in another. In *Diaz*, the State charged the defendant with assault and battery for kicking his victim. Mr. Diaz was found guilty of this offense, and he paid a fine; subsequently, the victim died of wounds inflicted by the defendant. As a result of the victim's death, the prosecutor charged the defendant with homicide. In refuting the defendant's argument that he was being placed twice in jeopardy for the same offense, the Court stated that it was not possible for the defendant to be placed in jeopardy for the homicide charge until the victim had died. Likewise, if a "financial crimes enterprise" was not complete when charges alleging underlying predicates were brought, the government could raise the *Diaz* exception to defeat a double jeopardy defense to a subsequent prosecution of the CFCE. For example, if a defendant's scheme had grossed only $2 million dollars at the time he was indicted for bank fraud, the government could still charge the defendant under the CFCE at a later date, when the enterprise actually did gross $5 million.

The *Brown* and *Diaz* exceptions to double jeopardy analysis directly address *Garrett*, in which the court feared that a strict interpretation of the Double Jeopardy Clause would hamstring prosecutors. The Court did not want to force the government to either bring actions prematurely, perhaps before the prosecution is ready, or idly wait until the modern compound crime had been completed before bringing charges. By allowing the government the limited ability to prosecute the underlying predicate offenses in one trial, and the CFCE in another, without fear of a double jeopardy bar, federal prosecutors could choose their strategy, and the government would not be compelled either to prosecute prematurely or to delay prosecution.

The proposal of this Comment to use the lesser included offense analysis may have some detractors who will argue that the well-established conspiracy exception should apply to modern compound crimes such as the CFCE. The basis

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230. See *Diaz*, 223 U.S. at 448-49 (holding that when the second crime had not been completed at the time of the first crime's indictment, the government will not be barred from pursuing the second offense in a subsequent action). Remember, the *Diaz* exception is not an archaic relic with no ties to the modern world. The Court in *Garrett* specifically relied upon this exception. *Garrett*, 471 U.S. at 791-93; see supra notes 141-67 and accompanying text (detailing the holding of *Garrett*).


232. *Id.*

233. *Id.*

234. *Id.* at 448-49.

235. See supra notes 159-67 and accompanying text (discussing the concerns raised by the Court in *Garrett*).

236. *Garrett*, 471 U.S. at 785-86; *Id.* at 795-99 (O'Connor, J., concurring).
of this argument would be that both modern compound crimes and conspiracies suffer from similar analytical pitfalls.\footnote{237}{United States v. Felix, 503 U.S. 378 (1992). Support may be found for this proposition in the following quote: "[L]esser included offense analysis . . . is therefore much less helpful in analyzing subsequent conspiracy prosecutions . . . just as it falls short in examining CCE offenses . . . based on previously prosecuted predicate acts." \textit{Id.}}

\textit{United States v. Felix} expresses the conspiracy exception: "A substantive crime, and a conspiracy to commit that crime, are not the 'same offense' for double jeopardy purposes."\footnote{238}{\textit{Id.} at 389-90.} By extension, it is possible that the same policies underlying the conspiracy exception should be applied to the CFCE to differentiate the "enterprise" from its component predicate offenses, as both modern compound crimes and conspiracies usually involve numerous persons, in different places, at different times. Conspiracies, however, are distinguishable from the CFCE, as conspiracies are completely distinct crimes from any substantive offenses to which they may be related.\footnote{239}{\textit{See infra} notes 244-48 and accompanying text (concluding that conspiracies and substantive offenses are not the same under Blockburger).} A conspiracy may exist without substantive criminal acts, and a substantive criminal act may be committed without a conspiracy, whereas that is not so with a modern compound crime.\footnote{240}{See 18 U.S.C.A. § 225 (West Supp. 1996) (setting forth the requirements of a financial crimes enterprise).} Modern compound crimes and their predicates are intricately intertwined; substantive criminal acts must have been committed to establish a criminal "enterprise."\footnote{241}{\textit{See id.} (detailing the necessary criminal acts to establish a financial crimes enterprise); \textit{Garrett}, 471 U.S. at 777 (stating that the modern compound crime of the CCE is not a conspiracy offense as it requires the completion of the criminal objective, not just an agreement).} In fact, the United States Supreme Court has acknowledged that a modern compound crime is more closely related to underlying predicate offenses than is a conspiracy.\footnote{242}{\textit{See Garrett}, 471 U.S. at 778 (noting that the CCE is not distinct from its underlying predicate offenses in the way that conspiracy to commit a crime differs from the actual substantive offense).} Upon closer examination, the "conspiracy exception" is not a true exception at all, but merely an application of \textit{Blockburger}.\footnote{243}{\textit{Pinkerton v. United States}, 328 U.S. 640, 643 (1946) (establishing the so-called conspiracy exception). The Court stated that the plea of double jeopardy is not a defense to a conviction of both a substantive offense and the agreement to commit that offense. \textit{Id.} at 643.} Proof of a conspiracy does not require the proof of any substantive acts, and proof of a substantive offense does not necessarily prove a conspiracy;\footnote{244}{\textit{See United States v. Shabani}, 115 S. Ct. 382, 385 (1994) (holding that to convict a defendant under 21 U.S.C.A. § 846, the Federal Drug Conspiracy Statute, the government need not prove "the commission of any overt acts in furtherance of the conspiracy," since there is no explicit requirement of an overt act); \textit{Singer v. United States}, 323 U.S. 338, 340 (1945) (stating that the Selective Service Act "does not require an overt act for the offense of conspiracy").} each provision does not require "proof of a fact which the other does not."\footnote{245}{\textit{Blockburger}, 284 U.S. at 304.} For example, compare the federal conspiracy statute with the federal
mail fraud statute. Conspiracy requires that two or more persons conspire to commit any offense against the United States.\(^{246}\) In contrast, mail fraud does not contain this element, and includes substantive acts which are absent from the conspiracy statute.\(^{247}\) As each statute contains an element which the other does not, they are not the "same offense" for double jeopardy purposes. Subsequent prosecutions of a conspiracy to commit a crime and the substantive crime itself could withstand scrutiny under Blockburger and the lesser included offense analysis.

Despite the fact that the United States Supreme Court has yet to accept a rule to protect defendants from double jeopardy in modern compound crime cases, the Blockburger/lesser included offense rule, coupled with the Diaz and Brown exceptions, achieves an appropriate balance. Defendants are protected from the threat of multiple trials springing from the same series of acts, yet the government may proceed with a prosecution immediately while still preserving its ability to bring the second charge. The only showing that the government must make to invoke one of the exceptions is to prove that either the financial crimes enterprise was not complete at the time of the first indictment or, even after exercising due diligence, the government was not able to discover the defendant had violated the CFCE. Yet this is not all that is to be said regarding double jeopardy and the modern compound offense of the CFCE. Due to the many acts often involved in a CFCE prosecution, the danger exists that a prosecutor may allege two or more enterprises exist, when in actuality, only one exists. This would violate the fundamental proscription of the Double Jeopardy Clause: to be put twice in jeopardy for the same offense.\(^{248}\)

**G. Double Jeopardy Issues When More Than One Enterprise Is Alleged**

A second area of concern in the realm of double jeopardy and modern compound crimes is the danger of prosecutors alleging that the defendant committed two counts of CFCE from what is, in fact, only a singular "enterprise." This is not a dilemma when traditional compound crimes are at issue. For example, with felony-murder,\(^{249}\) if there is but one dead body, the government may only charge the defendant with one murder. Determining whether there is only one "body" (enterprise) with the CFCE is far more challenging.

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247. See id. § 1341 (West Supp. 1996) (requiring that a defendant use the mail service in the perpetration of his fraudulent scheme). This is not an element under the federal conspiracy statute. Id. § 371 (West Supp. 1996).
248. U.S. CONST. amend. V.
249. See BLACK'S LAW DICTIONARY 617 (6th ed. 1990) (defining "felony-murder" as an unintended death resulting from the commission or attempt of a felony).
To illustrate this challenge, suppose Mr. X supervises five counts of bank fraud, and five counts of mail fraud against one bank. All of Mr. X's activities are conducted from the same office, and he has the same group of subordinates who carry out his orders. Further assume these activities occur in the same general time frame.

Thereafter, the local United States Attorney's Office separates the five counts of bank fraud and the five counts of mail fraud into two separate counts under the CFCE statute. Assume the government could prove the required criteria for each particular CFCE charge. The defendant is tried under the CFCE using the bank fraud charges as predicate offenses, and then the defendant is convicted and sentenced. Not satisfied with the sentence received by the defendant, the U.S. Attorney's Office subsequently prosecutes the defendant under a second CFCE charge, using the five mail fraud counts as the requisite predicate offenses.

Under the prevailing Blockburger test, the government could prosecute the defendant in successive trials. This is the case because the proof of the second CFCE charge (using mail fraud as the predicates) does not necessarily prove the underlying bank fraud counts prosecuted in the first case, and the first CFCE charge (using bank fraud as the predicates) does not prove the mail fraud counts. Without the practical constraints of there being only one "body," there is no limit to the number of "enterprises" a prosecutor could allege so long as procedural elements, such as the dollar amount, could be met for each charge. This is so because under current United States Supreme Court double jeopardy jurisprudence, there would be nothing to prevent the government from pursuing a case in this manner, as the only test accepted by the Court for successive prosecutions is the Blockburger formulation.

While the United States Supreme Court discussed this dilemma in Braverman v. United States, and stated that one criminal agreement should not be

251. Id. § 1343 (West Supp. 1996).
252. The CFCE statute provides that:
(a) Whoever—
   (1) organizes, manages, or supervises a continuing financial crimes enterprise; and
   (2) receives $5,000,000 or more in gross receipts from such enterprise during any 24-month period, shall be fined not more than $10,000,000 if an individual, or $20,000,000 if an organization, and imprisoned for a term of not less than 10 years and which may be life.

b) For purposes of subsection (a), the term "continuing financial crimes enterprise" means a series of violations under section 215, 656, 657, 1005, 1006, 1007, 1014, 1032, or 1344 of this title, or section 1341 or 1343 affecting a financial institution, committed by at least 4 persons acting in concert.

Id. § 225 (West Supp. 1996).
253. See United States v. Dixon, 509 U.S. 688, 704-05 (1993) (holding that the Blockburger test is deeply rooted in history, and has been accepted in many prior cases, while overruling the same-conduct rule forwarded by Grady).
254. 317 U.S. 49 (1942).
fragmented into several conspiracies merely because multiple statutes were violated, the Court offered no specific method of protection against dividing one conspiracy into many.\(^{255}\) However, at least as early as the late 1970s, federal appellate courts have determined that, due to the relative ease of fragmenting one actual conspiracy into several conspiracy charges, the traditional *Blockburger* analysis will just not suffice.\(^{256}\) In an attempt to confront this issue, many of the lower federal courts have devised a test for use in cases of alleged multiple conspiracies, which due to their intrinsic complexity can be of use here, as both criminal conspiracies and modern compound crimes often involve numerous acts that occur over a long time span and in many locations.\(^{257}\) Likewise, as the same policies are at issue,\(^{258}\) several federal circuit courts have adopted similar tests to confront the problem of prosecutors fragmenting one pattern of racketeering activity into several RICO violations.\(^{259}\)

Although some formulations differ, most of the tests could fall under the "totality of the circumstances" rubric,\(^{260}\) by which the court considers several

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256. See United States v. Tercero, 580 F.2d 312, 314-15 (8th Cir. 1978) (stating that the same evidence test had come under recent criticism in conspiracy cases, and that by choosing one set of overt acts in one indictment, and another set in a different indictment, the government could "carve one large conspiracy into several smaller agreements"); United States v. Marable, 578 F.2d 151, 153 (5th Cir. 1978) (arguing that the same evidence test would allow the construction of multiple conspiracy prosecutions from a single agreement); United States v. Papa, 533 F.2d 815, 820 (2d Cir. 1976) (commenting that the same evidence test is open to question in conspiracy cases as a prosecutor might be able to pursue multiple indictments based on but a single conspiracy). Note that all of these federal courts used the term "same evidence test." See *Grady v. Corbin*, 495 U.S. 508, 522 n.12 (1990) (observing that commentators and judges alike have mistakenly referred to the *Blockburger* test as a "same evidence" test, and stating that "[t]his is a misnomer"), overruled by United States v. Dixon, 509 U.S. 688 (1993). The Court went on to state that the *Blockburger* test has nothing to do with the evidence presented at trial, it is only concerned with the statutory elements of the offenses charged. *Id.* at 522 n.12.

257. See United States v. Felix, 503 U.S. 378, 390 (1992) (stating that "conspiracy prosecutions involve similar allegations of multilayered conduct as to time and place").

258. See United States v. Ciancaglini, 858 F.2d 923, 930 (3d Cir. 1988) (stating that "RICO is not an anvil on which the government can break an enterprise's over-all pattern of racketeering into discrete parts in order to obtain more than one chance of conviction").

259. See, e.g., *Ciancaglini*, 858 F.2d at 929 (using a totality of the circumstances test to ascertain whether the same pattern of racketeering activity existed); United States v. Langella, 804 F.2d 185, 189-90 (2d Cir. 1986) (concluding that two patterns of racketeering activity existed by using a five part test); United States v. Dean, 647 F.2d 779, 788 (8th Cir. 1981) (borrowing a five factor test from multiple conspiracy cases to determine whether more than one pattern of racketeering activity was present), cert. denied, 456 U.S. 1006 (1982).

260. See United States v. Macchia, 35 F.3d 662, 667 (2d Cir. 1994) (applying an eight part test: (1) the criminal offenses charged in successive indictments; (2) the overlap of participants; (3) the overlap of time; (4) similarity of operation; (5) the existence of common overt acts; (6) the geographic scope of the alleged conspiracies or location where overt acts occurred; (7) common objectives; and (8) the degree of interdependence between alleged distinct conspiracies); United States v. Mintz, 16 F.3d 1101, 1104 (10th Cir. 1994) (holding that in double jeopardy analyses involving conspiracies, a court must determine whether the two transactions were interdependent and whether the defendants involved were united in a common goal); see also United States v. Nyhuis, 8 F.3d 731, 736 (11th Cir. 1993) (adhering to a five part test similar to
factors in making its determination as to whether there was one or more conspiracies. Interestingly, it seems only one United States Supreme Court Justice has even considered the use of a species of the totality of the circumstances test to address the fragmentation dangers faced by Mr. X.\textsuperscript{261}

To illustrate the application of a totality of the circumstances test, this Comment will use an inquiry articulated by one of the lower federal courts, although this opinion was not published. This test examines five factors:

(1) [T]he time periods covered by the alleged conspiracies; (2) the places where the conspiracies are alleged to have occurred; (3) the persons charged as coconspirators; (4) the overt acts alleged to have been committed in furtherance of the conspiracies, or any other descriptions of the offenses charged which indicate the nature and scope of the activities being prosecuted; and (5) the substantive statutes alleged to have been violated.\textsuperscript{262}

In the case of the CFCE, a court could substitute the words "criminal enterprise," where "conspiracy" is currently placed, with one slight modification. The United States Supreme Court unequivocally rejected the "same conduct" formulation as a litmus test for double jeopardy violations in United States v. Dixon.\textsuperscript{263} Therefore, the inference may be drawn that any test that uses the similarity of conduct as a factor conflicts with Dixon; thus the fourth variable listed above cannot enter into the calculus.\textsuperscript{264} Applying the remaining elements of the test to the hypothetical, a court would determine that: The alleged criminal enterprises occurred in the same time frame; Mr. X conducted his business in largely the same location; the enterprise involved the same people; and Mr. X is accused of committing similar crimes (two counts of CFCE).


\textsuperscript{262} United States v. Aleman, 7 F.3d 404, 411 (4th Cir. 1993) (adhering to the five step test); United States v. Okolie, 3 F.3d 287, 290 (8th Cir. 1993) (adopting the five step test); United States v. Gibbons, 994 F.2d 299, 301 (6th Cir. 1993) (indicating the court will apply the five step test); United States v. Greer, 939 F.2d 1076, 1087 (5th Cir. 1991) (using the five step test to determine whether one or more than one conspiracy exists).

\textsuperscript{263} See Dixon, 509 U.S. at 703-04 (1993) (stating that Grady forbids successive prosecutions if the government must prove, to establish essential elements of a crime, the same conduct in subsequent trials, and then holding that "Grady must be overruled").

\textsuperscript{264} But see Macchia, 35 F.3d at 668-71 (considering overt acts in its totality of the circumstances analysis, even after acknowledging that the same conduct test was overruled in Dixon); Mintz, 16 F.3d at 1104 (stating that the Tenth Circuit's multiple conspiracy test was unaffected by Dixon); Nyhuis, 8 F.3d at 734-38 (conceding that the same conduct test was eliminated, and continuing to use overt acts as one of the variables in a multiple conspiracy test).
Again, the purpose of the five elements test is to determine whether a singular criminal "enterprise" existed. Given the above facts, there was only one enterprise. Therefore, the government should not be allowed to fragment the charges in the hypothetical above, and the second prosecution should be barred as violative of the Fifth Amendment right to be free from double jeopardy.

The application of a "totality of the circumstances" test to cases of alleged multiple modern compound crimes would guard against the fragmentation of one offense into several,\(^{265}\) which, as illustrated above, is possible under a Blockburger test. In sum, without the practical limitations inherently imposed upon traditional compound crimes such as felony-murder, a more comprehensive "totality of the circumstances" test is needed in cases of alleged multiple criminal enterprises.

H. Collateral Estoppel

The settled doctrine of collateral estoppel effectively protects a defendant under the first prong of Pearce, prohibiting a second prosecution for the same offense after acquittal.\(^{266}\) If Mr. X was charged with bank fraud against Bank A in 1992 and acquitted, collateral estoppel would likely bar the relitigation of those same bank fraud issues in a subsequent CFCE trial.

The definition of collateral estoppel is quite basic: when an issue of ultimate fact has been determined by a valid judgement, that issue cannot again be litigated between the same parties.\(^{267}\) The United States Supreme Court held that this principle is a component of the Double Jeopardy Clause in Ashe v. Swenson.\(^{268}\) Therefore, if Mr. X was acquitted on the underlying bank fraud charges, the government probably could not use those same bank fraud charges as predicates in a later CFCE prosecution.

General verdicts prevent the absolute invocation of collateral estoppel to prohibit subsequent prosecution under the CFCE.\(^{269}\) Under Ashe, if the acquittal was obtained through a general verdict, the court should examine the record of

\(^{265}\) See Poulin, supra note 37, at 120 (describing the benefits of the totality of the circumstances test over a traditional Blockburger analysis: "The totality of circumstances test was developed to prohibit the fragmentation that Blockburger allows").

\(^{266}\) North Carolina v. Pearce, 395 U.S. 711, 717 (1969) (announcing that the Double Jeopardy Clause protects against a second prosecution for the same offense after acquittal).

\(^{267}\) Schiro v. Farley, 114 S. Ct. 783, 790 (1994); see id. (stating that collateral estoppel means that when an issue of ultimate fact has already been determined in a valid and final judgment, that issue cannot again be litigated by the same parties in a subsequent action); BLACK'S LAW DICTIONARY 261 (6th ed. 1990) (defining "collateral estoppel" as a bar to subsequent litigation since the issue has already been adjudicated in a court of law).

\(^{268}\) 397 U.S. 436 (1970); see id. at 444-45 (holding that the established rule of collateral estoppel is embodied in the Fifth Amendment).

\(^{269}\) See Ashe, 397 U.S. at 444 (noting that collateral estoppel in criminal cases should not be applied in a hyper technical manner, in light of general verdicts).
the prior proceeding, and determine whether the jury could have grounded its verdict upon an issue other than the one the defendant wants to foreclose from consideration.\textsuperscript{270} If the jury predicated its acquittal on issues other than whether the defendant committed acts constituting the elements of the offense, the government is not estopped.\textsuperscript{271} Applied to the Mr. X hypothetical, if an examination of the trial record reveals that the jury could have rationally acquitted the defendant because it believed that Bank A was not a "financial institution" as defined in the bank fraud statute,\textsuperscript{272} then the government could use the bank fraud charges in the CFCE prosecution, if the conduct also defrauded Banks B and C.\textsuperscript{273} On the other hand, if the only issue before the jury was whether Mr. X committed bank fraud at all, then collateral estoppel would attach, and the subsequent prosecution would be barred.\textsuperscript{274}

Although the United States Supreme Court has not directly addressed whether collateral estoppel principles should apply to modern compound crimes and their predicates, it seems that the policies underlying the rule are not subject to the same problems the Court considered fatal to applying the lesser included offense analysis to modern compound crimes.\textsuperscript{275} Note that the definition of collateral estoppel does not require that the activity for which the defendant was previously acquitted for, be the "same offense" as the present crime.\textsuperscript{276} As discussed above, this seems to have been determinative to the justices; they could not fathom that a modern compound crime and its predicates could possibly be the "same offense."\textsuperscript{277} Furthermore, some commentators have suggested that the doctrine of collateral estoppel is independent of substantive criminal law.\textsuperscript{278} Hence, the theoretical problems that the United States Supreme Court has had with defining a modern compound crime and its predicates as the "same offense" simply do not come into play.\textsuperscript{279} It would not be necessary for a defendant to couch the

\textsuperscript{270} Id.
\textsuperscript{271} Id.
\textsuperscript{272} See 18 U.S.C.A. § 1344 (West Supp. 1996) (defining a "financial institution" as any one of a variety of banks or credit unions).
\textsuperscript{273} See Ashe, 397 U.S. at 444 (stating that collateral estoppel does not bar a subsequent prosecution after an acquittal on a general verdict if the jury could have rationally grounded its decision on an issue other than the one the defendant seeks to have foreclosed).
\textsuperscript{274} Id. at 445.
\textsuperscript{275} See supra notes 141-76 and accompanying text (describing the United States Supreme Court's reluctance to consider modern compound crimes and their predicate greater and lesser included offenses, respectively).
\textsuperscript{276} See supra note 267 (defining "collateral estoppel").
\textsuperscript{277} See supra notes 141-76 and accompanying text (describing the United States Supreme Court's reluctance to consider modern compound crimes and their predicates greater and lesser included offenses, respectively).
\textsuperscript{278} See Brenner, supra note 19, at 990 (stating that the doctrine of collateral estoppel is independent of substantive criminal law).
\textsuperscript{279} See supra notes 141-76 and accompanying text (discussing the United States Supreme Court's concerns regarding modern compound crimes and Double Jeopardy issues).
defendant’s arguments in terms of being put twice in jeopardy for the same offense. The defendant would merely need to show that an issue of ultimate fact has been proven in his favor, that is, he has been acquitted of an underlying predicate offense, a necessary component of the present CFCE charge. As a result, it seems likely that the doctrine of collateral estoppel would be available to a defendant as a shield against improper charges under the CFCE.

I. Prosecutorial Guidelines: Substance or Window Dressing?

As one final note regarding double jeopardy and modern compound crimes, some may assert that a prosecutor, using prosecutorial discretion, will simply not choose to pursue the aforementioned Mr. X in the manner(s) described above, despite the fact that the prosecution would not be constrained by the present interpretation of the United States Constitution. In fact, there are currently prosecutorial guidelines that address this very matter.

Section 9-2.142 of the United States Attorneys’ Manual prohibits successive prosecution of substantially the same act, acts or transaction following a prior federal prosecution, unless there is a compelling federal interest supporting the second prosecution. The manual does not state precisely what a compelling interest is, but it does list certain crimes which may be “compelling”; these crimes include civil rights cases, tax cases, and organized crime cases.

The genesis of the policy was the case of *Petite v. United States*, in which the Solicitor General stated the general policy of the federal government as: “several offenses arising out of a single transaction should be alleged and tried together and should not be made the basis of multiple prosecutions.”

Despite the laudable goals proclaimed by the Solicitor General, and manifested in the internal policy of the Justice Department, the internal regulations of the Justice Department confer no substantive rights upon defendants. Most importantly, the United States Supreme Court announced in *Rinaldi v. United States* that the *Petite* policy is “not constitutionally mandated.” In

281. See id. § 9-2.142 n.8 (stating that whether or not a compelling interest is at stake depends upon the facts and circumstances of each case, but the manual does list certain priority cases, such as civil rights cases, organized crime cases, tax cases, firearms cases, and cases involving crimes against federal officials, witnesses or informants).
283. See *Petite*, 361 U.S. at 530 (stating that the policy in question is dictated by fairness to the defendant, and to promote efficient and orderly law enforcement). Interestingly, this mirrors the broad “same transaction” test advocated by Justice Brennan, but never accepted by a majority of justices. *Ashe v. Swenson*, 397 U.S. 439, 453-54 (1970) (Brennan, J., concurring).
284. See U.S. Atty’s Manual § 9-2.142 (B)(3) (1992) (maintaining that the policy regarding successive prosecutions set forth in the manual are for internal guidance only, and no substantive rights are to be created).
addition, several federal Courts of Appeals have concluded that no substantive
can be obtained. Therefore, a defendant is ultimately still at the mercy of prosecutors, rendering inert the constitutional
tsafeguards of the Double Jeopardy Clause. Notwithstanding the fact that the Petite policy does not grant substantive rights to defendants, even establishing a violation may be difficult enough. The Petite policy is waived when a compelling federal interest exists that supports the subsequent prosecution. Although there is only a sparse amount of case law on the matter, courts have given a tremendous amount of deference to the Department of Justice in determining what constitutes a compelling federal interest. With free reign to define compelling interests, it is not out of the question that the Justice Department could make a circular assertion in the case of the CFCE. This argument would look to the severity of the penalties available under the CFCE (up to life imprisonment and a $10 million fine for an individual) and conclude that Congress has shown, through these harsh penalties, that it deems the apprehension and punishment of financial kingpins to be vitally important. As a result, a prosecution under the CFCE is per se compelling.

Of course, in the final analysis of the Petite policy, even assuming a defendant could hurdle the substantial obstacle of proving a violation, such a triumph would be a pyrrhic victory, as defendants simply have no remedy. In leaving the decision of whether to pursue the CFCE and its predicates in successive trials completely up to prosecutors, the very purpose of constitutional proscriptions is subverted. If the framers thought governmental actions would always comport with the preservation of personal liberty, they would not have crafted the Bill of Rights.

287. See United States v. Kummer, 15 F.3d 1455, 1461 (8th Cir. 1994) (holding that the Petite policy does not generally confer substantive rights); United States v. Heidecke, 900 F.2d 1155, 1156 (7th Cir. 1990) (concluding that the Petite policy does not give a defendant substantive rights as it is only an internal government guideline).


289. See Kummer, 15 F.3d at 1461 (addressing the question of whether the government had the requisite compelling interest, the court stated that they lacked the power to review decisions made by the Department of Justice); United States v. Perales, 838 F. Supp. 196, 201 (M.D. Pa. 1992) (stating in conclusory dicta that, "it is obvious that the federal government has a compelling interest"). The "obvious" compelling interest entailed stemming the escalation of drug-related offenses. Id. at 201.


291. See supra notes 286-89 and accompanying text (illuminating the fact that no substantive rights are implicated with the Petite policy).
IV. CONCLUSION

By refusing to extend even the minimal safeguards of the Blockburger test to modern compound crimes such as the CFCE and their predicates, the United States Supreme Court has placed defendants at the mercy of the system, with no check on prosecutorial discretion. While prosecutors, in the main, are men and women of extraordinary integrity, both society and the United States Supreme Court have acknowledged that citizens need a buffer to protect against the abuse of their power. More often than not, the necessary buffer has taken the form of constitutional protection embodied in the Bill of Rights. Specifically at issue during this Comment has been the Fifth Amendment’s proscription against double jeopardy. Through its decisions, the United States Supreme Court has eliminated one layer of protection for defendants especially at risk of the double jeopardy dangers feared by the framers. Without the shield of the Fifth Amendment to protect them, defendants accused of modern compound crimes can only hope that prosecutors adhere to internal guidelines, and abide by their creed to do justice.

292. See supra notes 141-76 and accompanying text (reviewing United States Supreme Court jurisprudence in this area, and concluding that the Court has crafted a modern compound crime exception to traditional double jeopardy analysis).

293. See supra notes 141-76 and accompanying text (analyzing the Supreme Court’s decisions related to double jeopardy).