"High Comedy But Inferior Justice": The Aftermath of Grady v. Corbin

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"High Comedy but Inferior Justice": The Aftermath of Grady v. Corbin

I. INTRODUCTION

The rule of law espoused in the United States Supreme Court decision of Grady v. Corbin serves to expand a defendant's protection against double jeopardy. However, the apparent intent of the opinion is to allow a defendant the protection of the Fifth Amendment Double Jeopardy Clause. The apparent effect of the opinion is to allow a defendant to escape punishment for crimes which do not appear to violate the defendant's double jeopardy rights. The question presented is: Under what circumstances do subsequent prosecutions for crimes committed in a single episode or transaction violate a defendant's protection against double jeopardy? This analysis will focus on what constitutes the "same offense" under the Double Jeopardy Clause. It will demonstrate the far-reaching effects of Grady and the impact it has had on prosecutors' offices across the country.

II. STATEMENT OF THE CASE

On October 3, 1987, Thomas Corbin drove his automobile across the double line of a New York highway striking two oncoming vehicles. Corbin received two uniform traffic tickets that evening: One for driving while intoxicated, the other for failing to keep right of the median. Assistant District Attorney Thomas Dolan learned that the driver of one of the two other vehicles, Brenda Dirago, died as a result of the collision and that her passenger, Daniel Dirago, survived but sustained serious injuries.

Three days later a second Assistant District Attorney, Frank Chase, began gathering evidence for a homicide prosecution against Corbin, in addition to preparing assault charges for the injuries to the passenger. According to the lower court:

4. Id. at ———, 110 S. Ct. at 2088. Corbin took a blood test at the hospital which indicated he had a blood alcohol level of 0.19%, nearly twice the legal limit. Id.
5. Id. at ———, 110 S. Ct. at 2087-88.
6. Id.
Despite his active involvement in building a homicide case against [Corbin], however, Chase did not attempt to ascertain the date [Corbin] was scheduled to appear... on the traffic tickets, nor did he inform, either the Town Justice Court or the Assistant District Attorney covering that court about his pending investigation.\(^7\)

As a result, when Corbin pleaded guilty to the two misdemeanor traffic tickets on October 27, 1987, the presiding judge was unaware of the fatality that stemmed from the accident\(^8\) and accepted Corbin's guilty plea to the misdemeanor charges.\(^9\)

Two months later, a grand jury indicted Corbin on various homicide and assault charges which arose from the October 3, 1987 incident.\(^10\) The prosecution identified the three reckless or negligent acts upon which it would rely to prove the homicide and assault charges as follows: "(1) operating a motor vehicle on a public highway in an intoxicated condition, (2) failing to keep right of the median, and (3) driving approximately 45 to 50 miles per hour in heavy rain, 'which was a speed too fast for the weather and road conditions then pending.'"\(^11\) Two of the three acts outlined by the prosecution encompassed the same conduct as the traffic citations for which Corbin had previously been convicted. Corbin moved to dismiss the indictment on statutory and constitutional double jeopardy grounds.\(^12\) Af-
after a hearing, the trial court denied the motion. Corbin then sought a writ of prohibition to bar prosecution of all counts in the indictment. The appellate division denied the petition but the New York Court of Appeals reversed.

The United States Supreme Court affirmed the New York Court of Appeals ruling in a five to four decision. Justice Brennan, writing the majority opinion for the sharply divided Court, held that a prosecution on the indictment constituted a violation of the Double Jeopardy Clause.

III. BACKGROUND OF THE LAW

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The constitutional prohibition of double jeopardy consists of three separate guarantees: "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." "It has long been understood that separate statutory crimes need not be identical—either in constituent elements or in actual proof—in order to be the same within the meaning of the constitutional prohibition." For years, courts have searched for the meaning of the "same offense" language of the Double Jeopardy Clause.

In Blockburger v. United States, the Supreme Court articulated a standard which determined when two prosecutions were for the same offense and, therefore, barred by the Double Jeopardy Clause.
the jury found the defendant guilty of three counts of violating the Harrison Narcotic Act. The first conviction was for the sale of a controlled substance not in or from the original stamped package, as required by the statute. The second conviction was for a separate sale of the same drug the following day to the same purchaser. The third conviction was for selling the drug "not in pursuance of a written order by the purchaser" as the statute required. The defendant appealed his convictions on double jeopardy grounds arguing that the two sales made to the same purchaser constituted a single, continuing offense.

The Court rejected Blockburger's contention on statutory and constitutional grounds. The Court concluded that the Narcotic Act did not create the offense of engaging in the business of selling the prohibited and forbidden drugs. Rather, the Act penalized any sale that violated the Act. Consequently, "[e]ach of several successive sales constitute[d] a distinct offense, however closely they ... follow[ed] each other." The Court found that the first sale had been completed and therefore was distinct from the second sale made the following day.

Prosecutions for the Same Offense: In Search of a Definition, 71 IOWA L. REV. 323, 343 (1986). In the case of In re Nielsen, the Court held that a conviction of a greater crime was a bar to a subsequent prosecution for a lesser one. 131 U.S. 176 (1889). The Nielsen Court concluded that a conviction for cohabitation (a greater crime) barred a subsequent prosecution for adultery (a lesser included crime). Id. at 186. However, the Court did not articulate a standard by which to evaluate when a crime is the "same" for double jeopardy purposes. Legal scholars believe that the Nielsen Court used a "necessary element" test which precludes a second trial "if the prosecution must rely on conduct already used to prove another offense." Thomas, supra at 339.

It has been suggested that double jeopardy considerations vary depending on whether the defendant's first trial ended in a conviction, autrefois convict, or an acquittal, autrefois acquit. The Nielsen Court wrote: "Whether an acquittal would have had the same effect to bar the second indictment is a different question, on which we express no opinion." Nielsen, 131 U.S. at 187. However, "[b]oth the history of and the values protected by the double jeopardy clause ... suggest that the result of the first trial should make no difference in deciding whether a second trial is for the same offense." Thomas, supra at 339.

23. Blockburger, 284 U.S. at 301.
24. Id.
25. Id.
26. Id.
27. Id.
29. In particular, a violation of the Narcotic Act constitutes any sale of a controlled substance, defined as one not made in or from the original stamped package, or not made in pursuance of a written order by the purchaser. Id. at 300 nn.1-2.
30. Id. The Court relied on the distinction found in WHARTON'S CRIMINAL LAW § 34 (11th ed. 1912) which states: "when the impulse is single, but one indictment lies, no matter how long the action may continue. If successive impulses are separately given, even though all unite in swelling a common stream of action, separate indictments lie." Blockburger, 284 U.S. at 302.
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In its constitutional analysis, the Court articulated a rule to determine whether the two sales were the "same offense" under the Double Jeopardy Clause.

The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not . . . . "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." 32

In applying this "additional element" test, the Court held that while the second sale violated the same two sections of the Act that the first sale did, each section required proof of an additional fact which the other did not. Thus, because the defendant had committed two distinct crimes after he had made the second sale, the defendant's double jeopardy claim was without merit. 33

The Supreme Court applied the Blockburger test in the case of Brown v. Ohio. 34 In Brown, the defendant pleaded guilty to joyriding. 35 Upon the completion of his sentence for that offense, 36 the State indicted Brown for theft of the car in which he had been caught joyriding. 37 Brown pleaded guilty to that offense, with the understanding that the trial court would consider his claim of double jeopardy on a motion to withdraw his plea. 38 However, the trial court overruled Brown's double jeopardy objection.

In the majority opinion, Justice Powell quoted the Blockburger test and described it as the "established test for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative pun-

32. Id. at 304 (citations omitted). If one statute does not require any additional elements to prove a particular offense, that offense is said to be a "lesser included offense." A prosecution of a defendant for both the greater offense and the lesser included offense is unconstitutional because they are the "same" for double jeopardy purposes. Brown v. Ohio, 432 U.S. 161, 168 (1977).
33. Blockburger, 284 U.S. at 303-04.
35. Id. at 162. The governing Ohio statute on "joyriding" stated that: "No person shall purposely take, operate, or keep any motor vehicle without the consent of its owner." Id. n.1.
36. The court sentenced Brown to thirty days in jail and a $100 fine. Id. at 162.
37. Brown, 432 U.S. at 162-63. The governing Ohio statute on auto theft read that: "No person shall steal any motor vehicle." Id. at 163. Brown stole the auto from a parking lot in East Cleveland, Ohio, on November 29, 1973. Police apprehended him in Wickliffe, Ohio, on December 8, 1973. Id. at 162.
38. Id. at 163.
ishment." In applying the Blockburger test, the Court ruled that joyriding and auto theft constituted "the same statutory offense" within the meaning of the Double Jeopardy Clause. Thus, when Brown pleaded guilty to the lesser included offense of joyriding, and then subsequently pleaded guilty to the greater offense of auto theft, he was placed in double jeopardy.

Two weeks after the Brown decision, the Court decided Harris v. Oklahoma. During a robbery, Harris' companion shot and killed a grocery clerk. A jury convicted Harris of felony murder. The State then indicted and convicted him for robbery with a firearm. "The two prosecutions were not for the 'same offense' under Blockburger since, as a statutory matter, felony murder could be established by proof of any felony, not just robbery, and robbery with a firearm did not require proof of a death." However, the State conceded that the robbery was the underlying felony, all elements of which had already been proved in the felony murder prosecution. Therefore, the Court held that the Double Jeopardy Clause barred the prosecution for the robbery because it was a species of the lesser included offense of felony murder.

Three years after Harris, the Supreme Court heard a case strikingly similar in fact to Grady. In Illinois v. Vitale, an auto driven by the defendant struck and killed two small children. At the scene of the accident, a po-
lice officer issued Vitale a citation for failing to reduce speed to avoid an accident.49 After a bench trial, the court convicted the defendant for this offense.50 The following day, the State charged Vitale with two counts of involuntary manslaughter.51 Vitale argued that failure to reduce speed was a lesser included offense of involuntary manslaughter.52 The Supreme Court disagreed, holding that as long as the State relied on evidence other than that used to prove the failure to reduce speed the Double Jeopardy Clause would not bar a conviction for involuntary manslaughter.53

_Dowling v. United States_54 preceded _Grady_ by approximately four months. It suggests that the rule of law expounded in _Grady_ is fact intensive. In _Dowling_, a jury acquitted the defendant of burglary, attempted robbery, assault, and weapons offenses.55 Vena Henry, who was the victim in that case, testified on the government's behalf against Dowling.56 Ms. Henry also testified on the government's behalf against Dowling in a subsequent trial for an unrelated bank robbery. The government used her testimony for the limited purpose of establishing Dowling's identity as the robber.57 The jury found Dowling guilty of the bank robbery.

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49. Id. at 411.
50. Id. at 412. The court sentenced Vitale to a $15 fine. The maximum punishment in Illinois for failing to reduce speed was thirty days in jail or a $500 fine. Id. n.3.
51. Id. at 412-13.
52. Id. The Illinois Supreme Court held that "the lesser offense [of] failing to reduce speed, requires no proof beyond that which is necessary for conviction of the greater, involuntary manslaughter . . . ." Id. at 414 (quoting _In re Vitale_, 375 N.E.2d 87, 91 (Ill. 1978)). The court concluded further that "for purposes of the double jeopardy clause, the greater offense is by definition the 'same' as the lesser offense included within it." Id. Thus, the manslaughter prosecution was barred by the Double Jeopardy Clause.
53. _Vitale_, 447 U.S. at 420. The Supreme Court held that:
[I]f manslaughter by automobile does not always entail proof of a failure to slow, then the two offenses are not the 'same' under the _Blockburger_ test. The mere possibility that the State will seek to rely on all of the ingredients necessarily included in the traffic offense to establish an element of its manslaughter case would not be sufficient to bar the latter prosecution. 
_Id_. at 419 (emphasis added). The Court appeared to focus on the evidence used to prove the conduct rather than on the conduct itself.

The _Vitale_ Court suggested that if the prosecution sought to establish an essential element of the manslaughter charge by proving all the elements of the conviction for failure to slow, the defendant would have a substantial double jeopardy claim. _Id_. at 421. After _Grady_, the dictum of _Vitale_ is now the law of the land. _See infra_ note 71 and accompanying text.

55. _Dowling_, 493 U.S. at 345.
56. _Id_. at 344.
57. _Id_. at 345. The government also used Ms. Henry's testimony to establish a link between Dowling and another person involved in both robberies, Delroy Christian. _Id_. The government relied on_FED. R. EVID. 404(b) which provides that evidence of other crimes, wrongs, or acts may
Dowling appealed on double jeopardy grounds, arguing that his prior acquittal precluded the government from introducing Ms. Henry's testimony. Writing for the majority, Justice White stated that the common law doctrine of collateral estoppel does not, in all circumstances, bar the later use of evidence relating to prior conduct for which the defendant has been previously acquitted. In affirming Dowling's conviction, the Court concluded that the evidence was admissible because Dowling failed to demonstrate that his acquittal in the first trial represented a jury determination that he was not one of the men who entered Ms. Henry's home.

be admissible against a defendant for purposes other than character evidence. (The corresponding rule in Wisconsin is found at Wis. Stat. § 904.04(2) (1989-90)). Rule 404(b) deems such evidence admissible in order to establish "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." During the trial for the bank robbery, the district court properly instructed the jury to use Ms. Henry's testimony for the limited purpose of establishing the defendant's identity as the robber. Dowling, 493 U.S. at 345-46.

One aspect of the protection against double jeopardy is the doctrine of collateral estoppel. Collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." Ashe v. Swenson, 397 U.S. 436, 443 (1970). The principle of collateral estoppel developed in civil litigation. However, it has been an established rule of federal criminal law for almost seventy-five years. See United States v. Oppenheimer, 242 U.S. 85 (1916). Defendants most commonly invoke collateral estoppel "to foreclose an issue resolved by an earlier acquittal and thus to bar prosecution entirely." See Ann Bowen Poulin, Collateral Estoppel in Criminal Cases: Reuse of Evidence After Acquittal, 58 U. Cin. L. Rev. 1 (1989).

In its continuing search for a meaning of the "same offense," the Supreme Court held that collateral estoppel was embodied in the Fifth Amendment guarantee against double jeopardy, and, therefore, an acquittal precluded a state from bringing a defendant to trial again on that same charge. Ashe, 397 U.S. at 445-46.

The Court distinguished Dowling from Ashe on its facts. at 347. In Ashe, three or four masked gunmen, one of whom was Ashe, robbed six participants in a poker game. Ashe, 397 U.S. at 437. At Ashe's first trial, the evidence clearly established that the named victim, Knight, had been one of the victims of the armed robbery. at 438. The Court noted that the proof of that fact was "unassailable." However, the evidence used to identify Ashe as one of the gunmen was weak. The jury found the defendant "not guilty due to insufficient evidence." at 439.

Six weeks later, the State prosecuted Ashe for the robbery of a second poker player. The trial court overruled Ashe's motion to dismiss which he based on his previous acquittal. The witnesses at the second trial were generally the same. Nevertheless, the witnesses' testimony which identified Ashe as one of the gunmen was "substantially stronger." at 439-40. The jury found Ashe guilty at the second trial. at 439.

The Supreme Court held that Ashe's conviction was improper, because the issue of the defendant's identity had been determined at the first trial. "The single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers. And the jury by its verdict found that he had not." at 445. Therefore, based on the doctrine of collateral estoppel, the Court reversed Ashe's conviction.

Dowling, 493 U.S. at 350. The trial judge, who had also presided at Dowling's first trial, recalled that Dowling "was not acquitted on the issue of identification." at 351. The Court
The rule of law articulated in *Grady v. Corbin* 62 is a dramatic expansion of the *Blockburger* test. The opinion, authored by Justice Brennan, appears to be a culmination of his attempts over the years to modify the *Blockburger* test.63 *Grady* redefined the parameters of a defendant's rights under the Double Jeopardy Clause indicating that the *Blockburger* test is an insufficient mechanism by which to resolve double jeopardy disputes. In fact, "[t]he *Blockburger* test is simply a 'rule of statutory construction,' a guide to determining whether the legislature intended multiple punishments."64 Recognizing that the *Blockburger* test had developed "in the context of multiple punishments imposed in a single prosecution,"65 the Court concluded that the *Blockburger* test required modifications in the event of successive prosecutions.66

The Court expressed concern for protecting individuals against the threat of successive prosecutions. The Court stated that "the State . . . should not be allowed to make repeated attempts to convict an individual . . . thereby . . . compelling him to live in a continuing state of anxiety and insecurity."67 Another apparent reason for this protection is that

acknowledged that "[t]here are any number of possible explanations for the jury's acquittal verdict at Dowling's first trial." *Id.* at 352.

It is significant to note that the defendant has the burden of proof to demonstrate that the first jury verdict determined an ultimate issue of consequence in the subsequent trial. *Id.* at 350. Notwithstanding, it appears to be within the court's discretion to decide whether the prior jury verdict did, in fact, determine the disputed fact. For example, the Court in *Ashe* speculated that the jury could only have returned an acquittal because the state failed to prove the defendant's identity as the perpetrator. *Ashe*, 397 U.S. at 445. However, the *Dowling* Court was unwilling to make such an assumption. *Dowling*, 493 U.S. at 352. The *Dowling* majority properly refused to assume the role of the jury.

66.  *Grady*, 495 U.S. at ___, 110 S. Ct. at 2091. A technical comparison of the elements of the two offenses required by the *Blockburger* test does not protect defendants sufficiently from the burden of multiple trials. *Id.* at ___, 110 S. Ct. at 2086. The Court explicitly stated that *Grady* applies regardless of whether the first trial ended in an acquittal or a conviction. *See also supra* note 22.
67.  *Grady*, 495 U.S. at ___, 110 S. Ct. at 2091 (quoting Green v. United States, 355 U.S. 184, 187 (1957)).
"[m]ultiple prosecutions also give the State an opportunity to rehearse its presentation of proof, thus increasing the risk of an erroneous conviction . . . ."68

Consequently, the majority held that a strict application of the Blockburger test was not the exclusive means of determining whether a subsequent prosecution violates the Double Jeopardy Clause.69 The Court reiterated that "the Double Jeopardy Clause of the Fifth Amendment prohibits successive prosecutions for the same criminal act or transaction under two criminal statutes whenever each statute does not 'require[e] proof of a fact which the other does not.'"70 Thereupon, the Court adopted the dicta set forth in Illinois v. Vitale, to be the supreme law of the land. The Court held that "[t]he Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted."71 In attempting to reconcile its holding with Dowling v. United States, the Court indicated that Grady was not an "actual evidence" or "same evidence" test.72 Rather, the critical inquiry is what conduct the State will prove, not the evidence used to prove that conduct.73 The Court stated: "The presentation of specific evidence in one trial does not forever prevent the government from introducing that same evidence in a subsequent proceeding."74

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68. Grady, 495 U.S. at ——, 110 S. Ct. at 2091-92. The Grady Court further elaborated: The State could improve its presentation of proof with each trial, assessing which witnesses gave the most persuasive testimony, which documents had the greatest impact, which opening and closing arguments most persuaded the jurors. Corbin would be forced either to contest each of these trials or to plead guilty to avoid the harassment and expense. Id. at ——, 110 S. Ct. at 2093; see Ashe v. Swenson, 397 U.S. 436, 447 (1970) (the state conceded that after the defendant's first trial, the prosecutor at the subsequent trial did "what every good attorney would do—he refined his presentation in light of the turn of events at the first trial.").


70. Grady, 495 U.S. at ——, 110 S. Ct. at 2087 (alteration in original) (footnote omitted) (quoting Blockburger v. United States, 284 U.S. 299, 304 (1932)). This is the traditional Blockburger test.

71. Grady, 495 U.S. at ——, 110 S. Ct. at 2093 (footnote omitted).

72. Id. (footnote omitted).

73. Id.

74. Id.; see supra note 53 and accompanying text. Thus, in Dowling the government would not have violated the Grady test when it used Ms. Henry's testimony at Dowling's trial for the bank robbery. The government used the evidence to establish the defendant's identity as the bank robber. This use of evidence apparently is not the same, under Grady, as using Ms. Henry's testimony to establish the defendant's identity as the man who invaded her home. See Dowling v. United States, 493 U.S. 342 (1990).

However, Grady held that "a State cannot avoid the dictates of the Double Jeopardy Clause merely by altering in successive prosecutions the evidence offered to prove the same conduct."
The State conceded that the conduct it would prove to establish essential elements of the homicide and assault offenses was the entirety of the conduct for which Corbin had been previously convicted. Applying its new test to these facts, the majority held that the Double Jeopardy Clause barred Corbin's subsequent prosecution. The Court did note that its holding would not bar a subsequent prosecution on the homicide and assault charges if the State did not rely on proving the conduct for which Corbin had already been convicted.

In a dissenting opinion, Justice O'Connor espoused her belief that the new rule articulated by the majority "casts doubt on the continued vitality of Rule 404(b)." According to Justice O'Connor, the majority's ruling effectively rendered Dowling "a nullity in many circumstances." She astutely recognized that if a situation identical to Dowling arose today, "a conscientious judge attempting to apply the test enunciated by the Court . . . would probably conclude that the witness's testimony was barred by the Double Jeopardy Clause."

Justice Scalia's dissent rejected the majority's requirement "that all charges arising out of a single occurrence must be joined in a single indictment." After presenting a textual and historical analysis, Justice Scalia observed that "Blockburger furnishes . . . the 'established test' for determining whether successive prosecutions arising out of the same events are for

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Grady, 495 U.S. at ——, 110 S. Ct. at 2093. For example, if two bystanders had witnessed Corbin's accident, the State could not call one witness at the first trial and then call the other witness at the second trial to testify to the same conduct. Id.

75. Grady, 495 U.S. at ——, 110 S. Ct. at 2094.

76. Id.

77. Id. Unfortunately, the only other conduct which remained in the bill of particulars was speeding. Evidence of that conduct alone was insufficient to sustain the convictions for the homicide and assault charges.

78. Id. at ——, 110 S. Ct. at 2096 (O'Connor, J., dissenting). Grady may have serious ramifications in prosecuting "signature crimes" where identity may be the crucial issue.

79. Id. at ——, 110 S. Ct. at 2095. In dissent, Justice O'Connor stated: The record in Dowling indicated that the Government was offering the eyewitness testimony to establish the defendant's identity, "an essential element of an offense charged in [the subsequent] prosecution," . . . and that the testimony would likely "prove conduct that constitutes an offense for which the defendant has already been prosecuted" . . . Under the Court's reasoning, the Government's attempt to introduce the eyewitness testimony would bar the second prosecution of Dowling for bank robbery. As a practical matter, this means that the same evidence ruled admissible in Dowling is barred by Grady.

Id. at ——, 110 S. Ct. at 2095-96 (emphasis added) (citations omitted). Because the Court decided the two cases only four months apart, it is difficult to reconcile their apparent inconsistencies.

80. Id. at ——, 110 S. Ct. at 2095.

81. Id. at ——, 110 S. Ct. at 2096 (Scalia, J., dissenting). Chief Justice Rehnquist and Justice Kennedy joined in Justice Scalia's dissent.
the 'same offence [sic].' " Accordingly, he would depart from the Blockburger rule in only two situations. "One occurs where a statutory offense expressly incorporates another statutory offense without specifying the latter's elements." The other situation occurs in the area of collateral estoppel. Subject to these two exceptions, Justice Scalia would adhere to the Blockburger test regardless of the overlap between the proof required for each prosecution.

The dissent recognized that in Vitale, the Court did not decide whether a "second prosecution would constitute double jeopardy if it required proof of the conduct for which Vitale had already been convicted." However, in answering this question now, Justice Scalia responded with a resounding no. The Grady dissenters wondered if the judge in the second trial bore the burden of deciding whether the evidence proved the earlier charge, and if so, by what burden of proof. Furthermore, Justice Scalia stated that the Dowling decision precluded the result reached by the majority. According to Justice Scalia:

The difference in our holding today cannot rationally be explained by the fact that in Dowling, unlike the present case, the two crimes were part of separate transactions; that in no way alters the central vice (according to today's holding) that the defendant was forced a second time to defend against proof that he had committed a robbery for which he had already been prosecuted. In Dowling, as here, conduct establishing a previously prosecuted offense was relied upon, not because that offense was a statutory element of the second offense, but only because the conduct would prove the existence of a statutory element. If that did not offend the Double Jeopardy Clause in Dowling, it should not do so here.

Foreshadowing a tentative future for the Grady decision, Justice Scalia stated: "A limitation that is so unsupported in reason and so absurd in application is unlikely to survive."

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82. Grady, 495 U.S. at ——, 110 S. Ct. at 2097 (quoting Brown v. Ohio, 432 U.S. 161, 166 (1977)).
83. Grady, 495 U.S. at ——, 110 S. Ct. at 2097; see Harris v. Oklahoma, 433 U.S. 682 (1977).
84. Grady, 495 U.S. at ——, 110 S. Ct. at 2097; see supra notes 59-60 and accompanying text.
85. Grady, 495 U.S. at ——, 110 S. Ct. at 2097; see Ianelli v. United States, 420 U.S. 770 (1975).
86. Grady, 495 U.S. at ——, 110 S. Ct. at 2101.
87. Id.
88. Id. at ——, 110 S. Ct. at 2104.
89. Id. at ——, 110 S. Ct. at 2102.
90. Id. at ——, 110 S. Ct. at 2104.
V. ANALYSIS

The rule articulated in Grady v. Corbin\(^91\) appears on its face to be a clarification of the Blockburger test. However, it is in fact a perversion of that rule. Rather than clarify the meaning of the "same offense" language of the Double Jeopardy Clause, Grady handcuffs prosecutors in their efforts to achieve justice.

The Blockburger test, as Missouri v. Hunter\(^92\) recognized, is a rule of statutory construction. It is a guide to determine whether the legislature intended multiple punishments.\(^93\) Its beauty is in its simplicity. The test merely requires that a comparison be made of the statutory elements of the offenses for which the State intends to prosecute. Such a comparison is done objectively, thus precluding selective prosecution or vindictiveness. However, Grady added a subjective element to that objective test. The Grady test requires the trial court to review the evidence proved in the first trial. The court must then determine whether the prosecutor will seek to establish an essential element of the second crime by proving conduct for which the defendant has been previously acquitted or convicted.

A number of problems are almost certain to arise as a result of Grady. For example, what if the trial court does decide that the prosecutor would rely on evidence already used to convict the defendant in the first trial? One can only surmise that this may allow the prosecutor to go back to the drawing board and redesign a new case against the defendant. In the alternative, Grady may require that the prosecutor dismiss the case against the defendant entirely.

In addition, it is impractical, not to mention unfair, to require the prosecutor to reveal all of the evidence he/she intends to use to prosecute the defendant. It is impractical because such a requirement only serves to further bog down the already overcrowded criminal justice system. Likewise, it is unfair to require the prosecution to give the defense a "sneak preview" of its case-in-chief.

Furthermore, whether or not the evidence is the same as the evidence at the first trial requires a subjective evaluation. As a result, courts throughout the country will apply the test inconsistently. One court may allow the prosecution to go forward, while another court may rule that Grady bars the prosecution from proceeding (unless the prosecutor can do so without the excluded evidence). Grady does not offer any guidelines in applying the new standard.

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As Justice Scalia’s dissent aptly recognizes, Grady leaves a question unanswered: to what degree must the evidence be proved at the first trial in order to result in its exclusion in the second trial? Even if we assume the evidence must be proved beyond a reasonable doubt, it is impossible to know whether any one piece of evidence has been proved to this degree. If the jury in the first trial returned a guilty verdict, we cannot be certain on what evidence it based its decision. If the jury returned an acquittal, we are equally uncertain which evidence it believed or disbelieved. Again, Grady does not resolve this problem.

Grady has been the law for over a year, and recently its impact is becoming apparent. In United States v. Quinones, the defendant pleaded to

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94. See, e.g., Dowling v. United States, 493 U.S. 342 (1990). Certainly, the prosecution offered Ms. Henry's testimony in the first trial to establish the defendant's identity. Id. at 345. Yet, the Dowling Court allowed Ms. Henry's testimony to establish the identity of the defendant at the second trial. However, the Grady Court would have disallowed this type of evidence.

It is interesting to note that Grady does not cite to United States v. Halper, 490 U.S. 435 (1989). In Halper, the Supreme Court recognized that "jeopardy" can attach when the second prosecution is for a civil offense. 490 U.S. at 441. Irwin Halper worked as a manager of a company which provided medical services for patients who received Medicare. Id. at 437. He submitted 65 separate false claims to Medicare for reimbursement for services rendered. Id. The government charged and convicted Halper on 65 counts of violating the criminal false claims statute, and on 16 counts of mail fraud. Id. The government then brought suit against Halper under the civil False Claims Act seeking penalties of $2,000 per claim, which aggregated to $130,000. Id. at 438.

Justice Blackmun, delivering the opinion for a unanimous Court, held that the civil penalties were so punitive as to constitute a second punishment in violation of the Double Jeopardy Clause. Justice Blackmun wrote:

[A] defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.

Id. at 448-49. According to the High Court, the actual labels of "criminal" or "civil" are less important than the penalties imposed on the defendant. Id. at 447.

The Court recognized that it may be difficult to "determine the precise dollar figure at which a civil sanction has accomplished its remedial purpose of making the Government whole, but beyond which the sanction takes on the quality of punishment." Id. at 449. The Court remanded the case to allow the government an opportunity to demonstrate how its injuries justified the extreme civil sanctions. Id. at 452; see also United States v. Mayers, 897 F.2d 1126, 1127 (11th Cir.), cert. denied, 111 S. Ct. 178 (1990) (the order of the criminal and civil prosecutions is irrelevant in applying the Halper principle); United States v. Pani, 717 F. Supp. 1013 (S.D.N.Y. 1989) (the disparity between the civil penalty and the government's injury was too great to trigger Halper).

Grady has no impact on the Halper principle, which encompassed a purely civil proceeding following a purely criminal one. Grady did not explicitly address the impact of Halper in the situation where one prosecution is for quasi-criminal conduct, such as operating a vehicle while intoxicated. However, one can reasonably infer from the facts and holding in Grady that the actual labels of "criminal," "civil," and "quasi-criminal" are less significant than the penalties they carry when evaluating a double jeopardy claim.
The court decided that he did so in an attempt to create a double jeopardy claim. The court held that *Grady* did not overrule prior case law which recognized that a defendant may not use the Double Jeopardy Clause as a sword. Other courts have also attempted to distinguish *Grady*. In *United States v. Ortiz-Alarcon*, the court limited the *Grady* "same conduct" test to successive prosecutions and held that *Grady* does not apply to multiple punishment cases. A number of states have applied *Grady* with varying results. To date, the only Wisconsin case which interprets *Grady* is *State v. Harris*. In *State v. Harris*, the defendant pleaded guilty to operating a motor vehicle after revocation. The State subsequently charged him with feloniously operating a motor vehicle without the owner's consent. Both offenses arose from the same incident. The court accurately recognized that the critical inquiry in *Grady* is what conduct the State will prove, not the evidence the State will use to prove that conduct. However, the court's conclusion seems incongruous with the *Grady* ruling. The Wisconsin court held:

*Grady* viewed driving while intoxicated as conduct. . . . Similarly, we view driving while revoked as conduct. The fact that one acts while in a state of intoxication or in a state of revocation does not alter the analysis. For purposes of evaluating the quality or nature of an actor's conduct, which is one function of proof at a trial, the actor's status is an essential component of his behavior and therefore is not to be ignored or separated. Harris' conduct here was operating while revoked. That is not the conduct upon which the state relies to prove the second prosecution.

In sum, the court of appeals found that the Double Jeopardy Clause did not bar the subsequent prosecution. In its analysis, the court did not separate the essential element of "operating" from the rest of the statutory ele-

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96. *Id.* at 928.

97. 917 F.2d 651 (1st Cir. 1990), cert. denied, 111 S. Ct. 2035 (1991). A number of courts have rejected the suggestion that *Grady* precludes proof of previously prosecuted conduct in a subsequent RICO prosecution, at least where the RICO offense continues beyond the prior prosecution. *United States v. Scarpa*, 913 F.2d 993 (2d Cir. 1990); *accord United States v. Pungitore*, 910 F.2d 1084 (3d Cir. 1990), cert. denied, 111 S. Ct. 2010 (1991); *see also United States v. Esposito*, 912 F.2d 60 (3d Cir. 1990), cert. dismissed, 111 S. Ct. 806 (1991).

98. *State v. Harris*, 161 Wis. 2d 758, 469 N.W.2d 207 (Ct. App. 1991). The only other Wisconsin case which mentions *Grady is State v. Myers*, 158 Wis. 2d 356, 370 n.9, 461 N.W.2d 777, 783 n.9 (1990). However, *Myers* neither applies nor interprets *Grady*, it only refers to *Grady* as an authority on double jeopardy.

99. *Harris*, 161 Wis. 2d at 760, 469 N.W.2d at 208.

100. *Id.* at 764, 469 N.W.2d at 210 (emphasis added).
ments. Had it done so, Grady certainly would have forced the Wisconsin Court of Appeals to reach a different result. Thus, the court’s subjective delineation of the elements of the crimes charged served to circumvent the impact of Grady. Perhaps this case will find its way to the United States Supreme Court and be the one to overrule Grady. Until then, divergent results continue to prosper among the State courts.

In State v. Magazine, a South Carolina court determined that Grady barred a subsequent prosecution of the defendant’s wife for assault and battery following the imposition of a contempt sanction for violating a family court protective order. However, in State v. Clarke, the same court held that Grady did not bar a subsequent prosecution for unlawfully carrying a pistol following the defendant’s acquittal for unlawfully changing lanes, despite the fact that both charges grew out of the same facts.

Hovey v. Superior Court is an Arizona case with facts strikingly similar to Grady and with just as frustrating a result. In Hovey, the defendant pleaded guilty to leaving the scene of a fatal accident. The state subsequently indicted Hovey for manslaughter based on the same incident. The court held that Grady barred the manslaughter charge because the prosecution would necessarily have to reprove the accident, death, and recklessness involved in the first offense. The Hovey court appeared to apply a “same evidence” test rather than the “same conduct” test as mandated by Grady. This is another example of the inconsistent application of a decision “unsupported in reason” and “absurd in application.”

VI. CONCLUSION

The rule of law mandated by Grady v. Corbin allows a defendant to escape prosecution for a crime that does not violate the Blockburger test. Just as a defendant has the right to enjoy the protection afforded by the Double Jeopardy Clause, so too does society have the right to punish wrongdoers for their crimes. It is neither fair nor just to allow the Corbins and the Hoveys of the world to escape punishment for manslaughter by pleading guilty to a traffic offense.

101. Id.
105. Id. at 417.
106. Id.
107. Id. at 419.
It is apparent that the *Grady* decision does not accomplish its goal. The apparent goal of *Grady* is to allow a defendant the protection of the Double Jeopardy Clause. The apparent effect, however, is to allow a defendant to use the Double Jeopardy Clause as a shield. *Grady* allows the accused to escape prosecution for crimes which are not the "same offense" under the *Blockburger* test. By introducing the subjective element of analyzing the evidence proved at a prior trial, yet failing to set forth workable guidelines by which to apply this new test, the Court has invited inconsistent application of the law. Historically, the *Blockburger* test has served as an objective and practical framework by which to determine whether the Double Jeopardy Clause bars a subsequent prosecution. Whatever shortcomings the *Blockburger* test may have, *Grady v. Corbin* does not remedy them. If there is to be a modification of the *Blockburger* test, the Supreme Court should try again to find it.

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