TOURO LAW
JACOB D. FUCHSBERG LAW CENTER

Touro Law Review

Volume 24 | Number 2 Article 10

May 2014

Court of Appeals of New York - Polito v. Walsh

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Cover Page Footnote

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COURT OF APPEALS OF NEW YORK

Polito v. Walsh[1]
(decided June 28, 2007)

Carmine Polito and Mario Fortunato were convicted in federal court of murder in aid of racketeering.[2] On appeal, both convictions were reversed and the cases dismissed because the government failed to prove the requisite predicate racketeering acts.[3] A New York grand jury subsequently indicted both men on state murder charges stemming from the same activity upon which the racketeering conviction had been based.[4] The defendants challenged the state's effort to prosecute them, claiming the second prosecution was for the same crime. The defendants did not rely on the United States Constitution[5] nor the New York Constitution,[6] both of which forbid double jeopardy.[7] Rather, the defendants invoked New York's statutory protection against double jeopardy,[8] and sought a writ of prohibition to stop the proceedings for violations of section 40.20(1) of the Criminal

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[1] 871 N.E.2d 537 (N.Y. 2007).

[2] *Polito*, 871 N.E.2d at 537.

[3] United States v. Bruno, 383 F.3d 65, 86 (2d Cir. 2004).

[4] *Polito*, 871 N.E.2d at 538.

[5] U.S. CONST. amend. V states, in relevant part: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life of limb . . . ."

[6] N.Y. CONST. art. 1, § 6 states, in relevant part: "No person shall be subject to be twice put in jeopardy for the same offense . . . ."

[7] Double jeopardy is "[t]he fact of being prosecuted or sentenced twice for substantially the same offense." BLACK'S LAW DICTIONARY 528 (8th ed. 2004).

[8] N.Y. CRIM. PROC. LAW § 40.20(1) (McKinney 2006) states: "A person may not be twice prosecuted for the same offense."

Procedure Law ("CPL").[9] The New York Court of Appeals ruled in favor of the prosecution and held the state prosecution could proceed because it did not fall within the double jeopardy prohibition the statute proscribes.[10]

In federal court, the defendants were tried and convicted of committing violent crimes in aid of racketeering activity[11] for allegedly murdering Sabatino Lombardi and attempting to murder Michael D'Urso "for the purpose of gaining entrance to and maintaining and increasing position" in racketeering activity.[12] At trial, the prosecution portrayed a stormy relationship between the victims and the alleged murder suspects.[13] Evidence showed D'Urso, on numerous occasions, spurred by offensive remarks, had physically attacked Fortunato.[14] Additionally, evidence showed Lombardi, a reputed member of the Genovese crime family, had once attempted to stop Polito from associating with the Bonnano crime family, a move met with indignation.[15] Finally, there was evidence presented that Polito asked his cousin to kill D'Urso and Lombardi.[16] Ultimately, both

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[9] *Polito*, 871 N.E.2d at 538.

[10] *Id.* at 541.

[11] *Polito*, 871 N.E.2d at 537. *See* 18 U.S.C.A. § 1959(a) (West 2007) which states, in relevant part:

> Whoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders . . . or attempts or conspires so to do, shall be punished.

[12] *Polito*, 871 N.E.2d at 538 (quoting 18 U.S.C.A. § 1959(a)).

[13] *Bruno*, 383 F.3d at 72-74.

[14] *Id.* at 72-73.

[15] *Id.* at 72, 74.

[16] *Id.* at 74.

men were shot—Lombardi fatally.[17] The United States Court of Appeals for the Second Circuit reversed the defendants' convictions, holding it was an improper application of the statute because the shooting was not in furtherance of the alleged racketeering activity, but instead out of "personal hatred and to avoid the repayment of gambling debts."[18] On June 13, 2005, the defendants were indicted on state murder charges, based on the same activity for which their murder in aid of racketeering conviction was overturned.[19] The defendants responded by filing an Article 78[20] petition with the appellate division, seeking to prevent the state from proceeding with the murder prosecution through a writ of prohibition.[21] After being denied relief from the Second Department, the defendants were granted leave to appeal to the New York Court of Appeals.[22]

The defendants did not argue that the United States Constitution prohibited successive prosecutions in state and federal court for the same conduct, and they did not specifically claim that the New York State Constitution's double jeopardy clause[23] was violated.[24]

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[17] *Id.* at 74-75.

[18] *Polito*, 871 N.E.2d at 537. *See Bruno*, 383 F.3d at 85.

[19] *Polito*, 871 N.E.2d at 538. *See* N.Y. PENAL LAW § 125.25(1) (McKinney 2006) ("A person is guilty of murder in the second degree when: 1. With intent to cause the death of another person, he causes the death of such person or of a third person. . . .").

[20] Article 78 allows a plaintiff to request an appellate court to review the authority of an officer attempting to enforce an order of certiorari, mandamus, or prohibition. *See* N.Y. C.P.L.R. 7801 (McKinney 2007).

[21] *Polito*, 871 N.E.2d at 538. *See* Polito v. Walsh, 823 N.Y.S.2d 92 (App. Div. 2d Dep't 2006).

[22] *Polito*, 871 N.E.2d at 538. *See* Polito v. Walsh, 860 N.E.2d 991 (N.Y. 2006).

[23] *See* N.Y. CONST. art I, § 6. *See also* Benton v. Maryland, 395 U.S. 784, 787 (1969) (holding the constitutional guarantee of the Fifth Amendment is applicable to the States through the Due Process Clause of the Fourteenth Amendment).

[24] *Polito*, 871 N.E.2d at 538. *See* Bartkus v. Illinois, 359 U.S. 121, 139 n.30 (1959) (holding that the Fourteenth Amendment does not prohibit successive federal and state prosecu-

Instead, the defendants argued New York's double jeopardy statute affords them protection from subsequent prosecution for the murder of Lombardi and D'Urso because they were already tried for murder under the federal racketeering statute.[25]

The Court of Appeals affirmed the appellate division's denial of the writ of prohibition, holding the defendants' contention that the prosecution was barred by section 40.20 of the CPL was without merit.[26] The court held that section 40.20(1) does not reject the dual sovereignty doctrine, which permits successive state and federal prosecutions, and overruled several previous cases indicating otherwise.[27] The court explained that any protection in addition to that provided by either the state or federal constitutions is provided by section 40.20(2) of the CPL.[28] However, the court held that section 40.20(2) expressly denied protection under the circumstances presented by the defendants, and, as a result, it rejected the defendant's appeal of the denial of the writ.[29]

New York implements its state constitutional prohibition on double jeopardy through section 40.20 of the CPL, which contains two parts.[30] The second subdivision states "a person may not be separately prosecuted for two [separate] offenses based upon the

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tions for the same conduct). *Bartkus* is discussed more thoroughly later in this piece.

[25] *Polito*, 871 N.E.2d at 538. *See* 18 U.S.C.A. 1959(a).

[26] *Polito*, 871 N.E.2d at 538, 541. *See* N.Y. CRIM. PROC. LAW § 40.20.

[27] *Polito*, 871 N.E.2d at 541 ("We now conclude that [*Booth*, *Rivera*, and *Abraham*] require clarification, if not correction."). *See* Booth v. Clary, 635 N.E.2d 279 (N.Y. 1994); People v. Rivera, 456 N.E.2d 492 (N.Y. 1983); Abraham v. Justices of N.Y. Sup. Ct. Bronx County, 338 N.E.2d 597 (N.Y. 1975).

[28] *Polito*, 871 N.E.2d at 541; N.Y. CRIM. PROC. LAW § 40.20(2).

[29] N.Y. CRIM. PROC. LAW § 40.20(2); *Polito*, 871 N.E.2d at 541.

[30] *See* N.Y. CRIM. PROC. LAW § 40.20(1), (2).

same act or criminal transaction unless" one of eight exceptions applied.[31] The sixth exception directly applied to the *Polito* case.[32] The defendants were charged with a violation committed in another jurisdiction,[33] convicted in that same jurisdiction, and that conviction was terminated by a federal appeals court's order "expressly founded upon insufficiency of evidence to establish some element of aid of racketeering which is not an element of murder."[34] The defense, however, did not base their appeal on this subdivision.[35]

The first subdivision of the statute contains similar language to that of the United States Constitution. It states "[a] person may not be twice prosecuted for the same offense."[36] The defendants argued the court's statutory interpretation of the term "same offense" was too narrow, and contrary to legislative intent.[37] Furthermore, the defendants asserted that the Fifth Amendment and section 40.20 contain an identical phrase: "same offense."[38] They claimed that the authors of the statute could not have intended to give less protection than the

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[31] *See id.* at § 40.20(2) (setting forth the eight exceptions to the rule contained in subdivision one).

[32] N.Y. CRIM. PROC. LAW § 40.20(2)(f) states:

> One of the offenses consists of a violation of a statutory provision of another jurisdiction, which offense has been prosecuted in such other jurisdiction and has there been terminated by a court order expressly founded upon insufficiency of evidence to establish some element of such offense which is not an element of the other offense, defined by the laws of this state.

[33] *Bruno*, 383 F.3d at 71.

[34] *Polito*, 871 N.E.2d at 539.

[35] *Id.*

[36] U.S. CONST. amend. V; N.Y. CRIM. PROC. LAW § 40.20(1).

[37] N.Y. CRIM. PROC. LAW § 40.10(1) (McKinney 2006) ("An 'offense' is committed whenever any conduct is performed which violates a statutory provision defining an offense; and when the same conduct or criminal transaction violates two or more such statutory provisions each such violation constitutes a separate and distinct offense."); *Polito*, 871 N.E.2d at 540.

[38] U.S. CONST. amend V.; N.Y. CRIM. PROC. LAW § 40.20(1); *Polito*, 871 N.E.2d at 540.

United States Constitution, and the words "same offense" should be interpreted in accordance with the *Blockburger* test.[39] Under this interpretation, the defendants argued, double jeopardy would preclude the second prosecution.[40]

In *Blockburger v. United States*, the defendant delivered the prescription drug morphine hydrochloride to a purchaser in a tampered package.[41] At the rendezvous, the purchaser paid for an additional amount which was delivered the next day.[42] The defendant was convicted on three of five counts contained in the indictment stemming from both days' transactions;[43] each resulted in a separate five-year prison sentence, and the defendant appealed, arguing the multiple convictions were for one offense.[44] The Supreme Court held that when a separate provision of a statute requires proof of an additional fact that the other does not, there is more than one offense for which the defendant may be convicted.[45] Using what has become known as the *Blockburger* test, the Court held that because additional facts were required to prove each statutory violation, more than one offense was committed by the defendant.[46]

In *Bartkus v. Illinois*, the United States Supreme Court held

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[39] *Polito*, 871 N.E.2d at 540. *See* Blockburger v. United States, 284 U.S. 299 (1932).

[40] *Polito*, 871 N.E.2d. at 540.

[41] *Blockburger*, 284 U.S. at 301.

[42] *Id.*

[43] Under the federal statute, the defendant was convicted for the sale of drugs not in its original packaging on two separate occasions, and for the sale of drugs not made pursuant to written order. *Id.*; 26 U.S.C.A. § 692 (West 2003).

[44] *Blockburger*, 284 U.S. at 300-01. The defendant claimed that failure to sell drugs in its original packaging and failure to sell drugs without written prescription, although both are violations under different subdivisions of the same statute, only constituted one offense. *Id.*

[45] *Id.* at 304 (citing Gavieres v. United States, 220 U.S. 338, 342 (1911)).

[46] *Id.*

that the Double Jeopardy Clause of the United States Constitution did not bar successive prosecutions for the same conduct in federal and state court.[47] This has become known as the dual sovereignty doctrine.[48] In *Bartkus*, the defendant was tried and acquitted in a federal district court for robbing a federally insured savings and loan association.[49] However, one month after the defendant was acquitted in federal court, he was indicted in an Illinois state court for the same criminal activity where he was subsequently tried, convicted, and sentenced to life imprisonment.[50] The defendant appealed, claiming that he was previously acquitted in federal court, and therefore the subsequent prosecution in state court was barred by the Double Jeopardy Clause.[51] The Illinois Supreme Court affirmed the decision and the Supreme Court granted certiorari.[52] The Court affirmed, holding that a subsequent prosecution in state court, after acquittal in federal court, does not deprive a defendant of due process of law.[53]

In *Grady v. Corbin*,[54] Thomas Corbin's automobile veered into oncoming traffic, striking two other cars, killing a woman and injuring her husband.[55] The defendant was issued two traffic tickets and subsequently pleaded guilty to both in a town court where the presiding judge was unaware of the ongoing criminal investigation

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47 *Bartkus*, 359 U.S. at 138.
48 *See Polito*, 871 N.E.2d at 538 (citing *Bartkus*, 359 U.S. at 132-33).
49 *Bartkus*, 359 U.S. at 121-22.
50 *Id.* at 122.
51 *Id.*
52 *Id.*
53 *Id.* at 139.
54 495 U.S. 508 (1990).
55 *Grady*, 495 U.S. at 508.

into the fatal crash.[56] Later, the defendant was indicted for his involvement in the car crash and sought a writ of prohibition claiming his right against double jeopardy prohibited the subsequent prosecution.[57] The Court held that the prosecution could not proceed because the government would have to prove conduct for which the defendant had already been prosecuted to establish essential elements of the charges in the indictment, which would unconstitutionally place the defendant in jeopardy twice for the same offense.[58] The *Grady* holding required courts to look first at whether a second prosecution passes the *Blockburger* test, and, if so, then whether it passes the "same conduct test" before determining if separate offenses were committed and a second prosecution was permissible.[59]

The issue before the Court in *United States v. Dixon*[60] was whether subsequent criminal charges were barred by the Double Jeopardy Clause after a defendant had previously been held in contempt of court for conduct at issue because it violated a condition of his pre-trial release from jail in an unrelated matter.[61] Dixon was initially arrested for second degree murder and released on bond with

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[56] *Id.*

[57] *Id.* at 514.

[58] *Id.* at 514-15. The charges in the indictment were reckless manslaughter, two counts of second degree vehicular manslaughter, criminally negligent homicide, third degree reckless assault, and two counts of driving while intoxicated. Corbin v. Hillery, 543 N.E.2d 714, 716 (N.Y. 1989).

[59] This test was originally suggested in *Illinois v. Vitale* ten years earlier. *See Vitale*, 447 U.S. 410, 419-20 (1980).

[60] 509 U.S. 688 (1993).

[61] *Dixon*, 509 U.S. at 691-94. This case was a consolidation of two cases comprised of nearly identical facts. For purposes of this piece, only the facts of Dixon's case are discussed.

certain conditions.[62] Before the murder trial began, Dixon was re-arrested and indicted for felony cocaine charges: a clear violation of his conditional release.[63] At the hearing to address the alleged violation, the defendant was held in contempt of court for possessing cocaine and sentenced to 180 days in jail.[64] Subsequently, the defendant filed a motion to dismiss the cocaine charges on double jeopardy grounds because he had already been convicted of contempt of court for possessing the same cocaine.[65] The *Dixon* Court held that the second prosecution would violate double jeopardy and expressly overruled *Grady*, and held the *Blockburger* test was the exclusive test to be used when analyzing whether the "same offense" has been committed for double jeopardy purposes.[66]

Before the Court of Appeals in *People v. Biggs*[67] was a defendant who allegedly shot and killed two people and was tried for murder under alternate theories of intentional murder and depraved indifference murder.[68] At trial, the defendant was acquitted of intentional murder after the court found that there was insufficient evidence on that charge. The jury also acquitted him of depraved indifference

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[62] *Id.* at 691. The relevant portion of Dixon's conditional release was "that he was not to commit any criminal offense." *Id.* (internal quotation marks omitted).

[63] *Id.*

[64] *Id.* at 691-92.

[65] *Id.* at 692.

[66] *Dixon*, 509 U.S. at 704. The second prosecution would not be impermissible under *Blockburger* because the condition on the defendant was that he not be charged with a crime. *See supra* note 62. By punishing him for possessing cocaine, the court was imposing punishment not for an act that specifically violated a condition of his release, but rather for an act that violated the penal code incorporated by reference into the court order. *Dixon*, 509 U.S. at 697-98. The defendant could only be held in contempt because his conduct violated that statute, and so a prosecution would therefore punish him twice for the same offense. *Id.* at 711.

[67] 803 N.E.2d 370 (N.Y. 2003).

[68] *Biggs*, 803 N.E.2d at 371.

murder, but was unable to reach a verdict on the lesser offense of reckless [second degree] manslaughter.[69] Subsequently, the defendant was indicted on first and second degree manslaughter charges for the same activity and appealed after being convicted of first degree manslaughter at a second trial.[70] The court considered whether the charges on which the defendant was convicted should have been dismissed due to double jeopardy preclusion based on the previous acquittal for intentional murder.[71] The court held that the two were the "same offense" under the federal *Blockburger* test, because to commit intentional murder in the second degree, one must have the intent to kill, and therefore that same person must have the intent to seriously physically injure another person during the same act.[72] Under the *Blockburger* test, a subsequent conviction was barred as there was no further proof of facts necessary to sustain a conviction for intentional manslaughter when the prosecution had already attempted to prove the greater offense of intentional murder.[73]

In *Biggs*, the defendant wanted the court to apply CPL section 40.20, not the federal *Blockburger* test.[74] However, in New York, to

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[69] *Id.* The Court of Appeals made the determination that the trial court's withdrawal of the intentional murder charges from the jury constituted an acquittal for double jeopardy purposes. *Id.*

[70] *Id.* at 372. The defendant was not convicted of reckless manslaughter because the jury was instructed to only consider that charge if they acquitted the defendant of intentional manslaughter.

[71] *Id.* at 371. The court, for purposes of analysis, examined the statutory elements required to commit murder in the second degree and manslaughter in the first degree. *Id.* at 373 n.1. Murder in the second degree requires the intent to cause death and actual causation of the death of another. *Id.* First degree manslaughter does not require intent to kill, but merely to cause serious physical injury, but where death nevertheless results. *Id.*

[72] *Id.*

[73] *Biggs*, 803 N.E.2d at 374.

[74] N.Y. CRIM. PROC. LAW §40.20; *Blockburger*, 284 U.S. at 304; *Biggs*, 803 N.E.2d at 374.

invoke CPL section 40.20, the defendant must preserve the right to do so at trial.[75] While a defendant's constitutional double jeopardy claim need not be preserved at trial, if a defendant fails to assert his statutory claim at the trial stage, as was the case in *Biggs*, that right is unpreserved and lost for appellate review, and the defendant may only attain a reversal on constitutional double jeopardy grounds.[76] Therefore, the court used *Blockburger* as its criterion, not section 40.20 of the CPL.[77]

Earlier, in *People v. Lo Cicero*,[78] three defendants were tried and acquitted in federal court for allegedly hijacking a truck of imported goods.[79] Before their federal trial began, the state brought charges against them for the same conduct in question.[80] After acquittal in federal court, the defendants filed a motion to dismiss the state charges claiming double jeopardy precluded a subsequent trial.[81] The People argued that federal and state governments may punish a defendant for the same act if a law has been violated in both jurisdictions.[82] The state court rejected this argument, relying on then-current statutory provisions, and held that a second prosecution in state court was barred after an acquittal in a federal court.[83] *Lo*

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[75] *Biggs*, 803 N.E.2d at 374. "A statutory claim that one may not be separately prosecuted for two offenses based on the same act or criminal transaction . . . must be duly preserved if there is to be appellate review." *Id.* (quoting People v. Dodson, 396 N.E.2d 194, 195 (N.Y. 1979)) (alteration in original).

[76] *Biggs*, 803 N.E.2d at 374.

[77] *Id.*

[78] 200 N.E.2d 622 (N.Y. 1964).

[79] *Lo Cicero*, 200 N.E.2d at 623.

[80] *Id.*

[81] *Id.*

[82] *Id.* at 623-24 (citing *Bartkus*, 359 U.S. at 121).

[83] *Lo Cicero*, 200 N.E.2d at 624.

Cicero essentially rejected the dual sovereignty doctrine and was a clear sign that New York intended to afford greater double jeopardy protection than that which the United States Constitution requires. This decision has had a profound effect on many cases, but, according to *Polito*, it required clarification or correction to accurately reflect the relationship between New York's statutory double jeopardy protections and the United States Constitution's dual sovereignty doctrine.[84]

Later, in *People v. Rivera*, the defendant was tried on several charges alleging he beat a man with metal pipes until the victim was injured so severely that he fell into a coma.[85] At trial, the defendant was acquitted of intentional assault but convicted of reckless endangerment in the first degree.[86] Four years later, the victim succumbed to his injuries and died, and the defendant was indicted again, this time for depraved indifference murder.[87] The defendant moved to dismiss the indictment claiming that double jeopardy barred a subsequent prosecution.[88] The People rebutted this contention by citing section 40.20(2)(d)[89] of the CPL, arguing it was created for the spe-

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[84] *Polito*, 871 N.E.2d at 541.

[85] *Rivera*, 456 N.E.2d at 494.

[86] *Id.* *See* N.Y. PENAL LAW § 120.25 (McKinney 2004) which states: "A person is guilty of reckless endangerment in the first degree when, under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person."

[87] *Rivera*, 456 N.E.2d at 494. *See* N.Y. PENAL LAW § 125.25(2) which states, in relevant part: "A person is guilty of murder in the second degree when . . . [u]nder circumstances evincing a depraved indifference to human life . . . causes the death of another person."

[88] *Rivera*, 456 N.E.2d at 494.

[89] N.Y. CRIM. PROC. LAW § 40.20(2)(d) provides, in relevant part:

> A person may not be separately prosecuted for two offenses based upon the same act or criminal transaction unless . . . [o]ne of the offenses is . . . some other offense resulting in physical injury to a person, and the

cific purpose of narrowing New York's broad double jeopardy statutory provision.[90] The court held that the second trial was not precluded because under subdivision (2)(d), the second offense falls within the exception.[91] Therefore, in application, the defendant was originally prosecuted for reckless endangerment resulting in physical harm, but the victim's death completed the commission of a separate offense.[92]

Finally, in *Klein v. Murtagh*,[93] the defendants were tried, convicted, had their convictions reversed on appeal, and were subsequently acquitted at a retrial in federal court for allegedly violating the Federal Travel Act.[94] The men then were indicted in state court for conduct arising out of the same activity and argued subsequent prosecution would violate their state and federal constitutional rights, which is impermissible under section 40.20 of the CPL.[95] It was clear to the court, however, that the offenses the defendants were being prosecuted for were not the "same offense" under section 40.10.[96] As the court explained, when section 40.20 is read alone, there are situations where a defendant may have less protection than the United States Constitution affords, but when read in conjunction with subdivision two and section 40.10, the statutory provision confers more

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> other offense is one of homicide based upon the death of such person from the same physical injury, and such death occurs after a prosecution for the . . . other non-homicide offense.

[90] *Rivera*, 456 N.E.2d at 494-95 (citing *Abraham*, 338 N.E.2d at 597).

[91] *Rivera*, 456 N.E.2d at 497.

[92] *Id.*

[93] 355 N.Y.S.2d 622 (App. Div. 2d Dep't 1974), *aff'd*, 318 N.E.2d 606 (N.Y. 1974).

[94] *Klein*, 355 N.Y.S.2d at 624. *See* 18 U.S.C.A. § 1952 (West 2002).

[95] N.Y. CRIM. PROC. LAW § 40.20; *Klein*, 355 N.Y.S.2d at 625.

[96] *Klein*, 355 N.Y.S.2d at 625.

protection than what is required.[97] Therefore, the subsequent prosecution in state court was not in violation of the United States Constitution.[98]

In *Polito*, the defendants argued for the New York Court of Appeals to apply the *Blockburger* test because, under *Blockburger*, the defense contended that the subsequent prosecution for murder would be prohibited.[99] Accordingly, it was argued that, because the federal prosecution required proof of every element required by the state murder statute, jeopardy had attached, precluding proof of additional facts to convict the defendants for the separate crime of murder in state court.[100] The defense conceded that during the federal trial, the prosecution was required to prove the elements for "aid of racketeering," and New York's murder statute does not require proof of any of those elements.[101] However, because all elements of murder were proven during the federal trial, no additional facts would be required to convict the defendants of murder in state court.[102] The defense also claimed that the trial court's narrow interpretation of "same offense" under the New York statute was incorrect because it confers less protection than the Fifth Amendment interpretation of "offense" under the *Blockburger* test.[103]

When interpreting the term "same offense" in section 40.10, it appears clear that the language requires a narrower interpretation than

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[97] *Id.* at 628.
[98] *Id.* at 630.
[99] *Polito*, 871 N.E.2d at 540.
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.*

that of *Blockburger*.[104] Under the *Blockburger* test, to prove there was only a single offense, the defendant must merely prove that one statutory provision requires proof of a fact the other does not. On the other hand, under section 40.10, a defendant must overcome a much higher hurdle, because the prosecution must merely prove a defendant's conduct violated more than one statutory provision.[105] The *Polito* defendants claimed that when applying New York's statutory provision to the facts presented, the double jeopardy analysis articulated in *Blockburger* controlled because the statute was not intended to confer less protection than the United States Constitution.[106]

However, the *Polito* defendants urged the court to find section 40.10(1), when read in conjunction with section 40.20(1), conferred less protection than the state or federal constitutions, without even considering section 40.20(2).[107] The People countered that any constitutional deficiency presented by such an interpretation of section 40.10(1) and section 40.20(1) would be overcome by the provisions of section 40.20(2).[108] The court held that section 40.20(2) was directly applicable to the defendant's case and clearly permitted the prosecution they challenged.[109] In resting their denial of the defendant's writ of prohibition on the second prong of section 40.20, the court left the merits of the parties' constitutional double jeopardy

[104] *See* N.Y. CRIM. PROC. LAW § 40.10(1); *Blockburger*, 284 U.S. at 304.
[105] N.Y. CRIM. PROC. LAW § 40.10(1); *Polito*, 871 N.E.2d at 540.
[106] N.Y. CRIM. PROC. LAW § 40.10(1); *Polito*, 871 N.E.2d at 540.
[107] N.Y. CRIM. PROC. LAW §§ 40.10(1), 40.20(2); *Polito*, 871 N.E.2d at 539.
[108] *Polito*, 871 N.E.2d at 540.
[109] *Id.* at 541.

contentions to be considered in the future.[110] Furthermore, to succeed, the defendants had the burden of persuading the Court of Appeals not only that section CPL 40.10(1) requires use of the federal *Blockburger* standard, but additionally that the statute rejects the dual sovereignty doctrine.[111]

Faced with the apparent ambiguity and difficulty inherent in interpreting the phrase "same offense," many courts, judges, and scholars have formulated their own innovative approaches in attempting to create a test more susceptible to congruent application.[112] These tests often seem more rational than the *Blockburger* approach. In *Richardson v. State*,[113] for example, the defendant was convicted of robbery and battery for conduct arising out of a single incident where several men stopped on a bridge, beat another man, and subsequently kicked him over the edge of the bridge.[114] First, the court analyzed the alleged statutory violations and concluded that there was no double jeopardy violation because the subsequent statutory violation required proof of an additional fact for which the other did not.[115] That analysis however, is only half of the test. Additionally, the court looked at the "actual evidence" test and examined whether the facts of the second trial could have been determined by the facts

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[110] *Id.*

[111] *Id.* at 538, 541 (holding that the defendants were unable to meet either of these contentions).

[112] *See, e.g.*, Anne Bowen Poulin, *Double Jeopardy Protection From Successive Prosecution: A Proposed Approach*, 92 GEO. L.J. 1183 (2004); George C. Thomas III, *A Modest Proposal to Save the Double Jeopardy Clause*, 69 WASH. U. L.Q. 195 (1991).

[113] 717 N.E.2d 32 (Ind. 1999).

[114] *Richardson*, 717 N.E.2d at 54.

[115] *Id.* at 52.

shown at the first trial.[116] To prevail, the defendant must prove there is "a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense."[117] The court held, contrary to the *Blockburger* analysis, there was only one offense under the "actual evidence" test.[118] The court reasoned there was only one offense because there was a reasonable possibility that the evidentiary facts which the jury would use to establish the first offense would be used to establish the essential elements of the second offense.[119] In *Polito*, the defendants did not ask the court to consider this broader approach. To convict the defendants in the federal racketeering trial, it was necessary to prove every element of murder as the crime is spelled out under New York State law.[120] Applying the "actual evidence" test, the essential elements which were used by the prosecution during the first trial to prove murder would be used to prove the essential elements of murder in New York. Therefore, under the actual evidence test, the defendants would have been protected from re-prosecution.

The *Polito* court was asked whether the defendants were being improperly prosecuted a second time after the termination of a previous prosecution in federal court stemming from the "same offense."[121] Interpretation of the term "same offense" has led to mas-

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[116] *Id.* at 42 n.23.

[117] *Id.* at 53.

[118] *Id.* at 54-55.

[119] *Richardson*, 717 N.E.2d at 49-50.

[120] *Polito*, 871 N.E.2d at 540.

[121] *Id.* at 538. The Fifth Amendment does not allow: a subsequent prosecution for the same offense after acquittal; a subsequent prosecution for the same offense after conviction;

sive incongruity throughout this nation's courts.[122] There is often uncertainty as to whether one, or more than one, offense has been committed for certain activity. Most states adhere to the *Blockburger* test by adopting its exact terminology, or something very similar, but as a result of the inherent difficulties interpreting the terminology, courts have come up with various methods of their own.[123] These other approaches have been met with both enthusiasm and with sharp opposition, causing heated debate.[124]

The *Blockburger* test is the standard approach used by courts in the United States as a guideline for determining whether the "same offense" was committed.[125] This is commonly referred to as the "evidence approach."[126] This approach has three variations: the required evidence test, the alleged evidence test, and the actual evidence test.[127] In general, this approach focuses on the evidence obtained by the prosecution and how the legal system is allowed to utilize such evidence to formulate a case against defendants.[128] Another approach is the "behavioral approach," which focuses on the defendant's acts at the time he is alleged to have committed them to

nor multiple punishments for the same offense.

[122] David Mccune, Case Note, United States v. Dixon*: What Does "Same Offense" Really Mean?*, 48 ARK. L. REV. 709, 709, 743 (1995) (stating that "[t]he flexibility with which to apply *Dixon*'s same conduct approach will be difficult for the lower courts to interpret").

[123] *Id. See* Alex Tsiatsos, Note, *Double Jeopardy Law and the Separation of Powers*, 109 W. VA. L. REV. 527, 564-70 (2007) (listing each individual states' methodology for determining whether one, or more than one, offense has been committed for double jeopardy purposes).

[124] *See, e.g.*, Ashe v. Swenson, 397 U.S. 436, 463-69 (1970) (Burger, C.J., dissenting).

[125] *See Dixon*, 509 U.S. at 704.

[126] State v. Bolarinho, 850 A.2d 907, 909 (R.I. 2004).

[127] United States v. Inmon, 568 F.2d 326, 332 (3d Cir. 1977).

[128] *Richardson*, 717 N.E.2d at 42.

determine whether they were separate or distinct.[129] Finally, some courts use the "same transaction" test which attempts to provide much greater protection than the other tests.[130]

The majority of jurisdictions continue to employ the *Blockburger* "required evidence test."[131] The Supreme Court has made this the benchmark for analyzing a "same offense" issue under double jeopardy.[132] The Court held that if analysis under the *Blockburger* test demonstrates that more than one offense has been committed, jeopardy has not attached, and the defendant may be tried again.[133] While this test is used in the majority of state courts, and sets forth the minimal constitutional protection states may afford, it is not the only test courts may use.[134] As *Richardson* illustrated, the "actual evidence" test provides a feasible alternative to *Blockburger* which courts use to create uniformity. However, only a minority of jurisdictions employ this approach.

The third variation of the *Blockburger* test is the "alleged evidence" test, where an offense is the same if there is a "sufficient similarity" between the allegations of each indictment.[135] This test falls somewhere between the "actual" and "required" evidence tests because preclusion of subsequent indictment turns on whether antici-

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[129] *See id.* at 41.

[130] *See Dixon*, 509 U.S. at 709 n.14.

[131] *See* Tsiatsos, *supra* note 123, at 564-70.

[132] *Dixon*, 509 U.S. at 704.

[133] *Id.* at 700.

[134] *See, e.g.*, Erickson v. State, 950 P.2d 580, 582 (Alaska Ct. App. 1997) (holding the court will decide whether one, or more than one, offense was convicted by looking at the statutes violated in relation to the crime and decide how society's interest would be best served); State v. Denton, 938 S.W.2d 373, 381 (Tenn. 1996) (holding that in addition to *Blockburger*, each case will be looked at on a case-by-case basis).

[135] State v. Gocken, 896 P.2d 1267, 1277 (Wash. 1995) (Johnson, J., dissenting).

pated evidence is presented.[136] However, this test has not garnered much support.[137] In fact, the "alleged evidence" test has been used so seldomly, if at all, that "it appears to have fallen into 'deserved desuetude' " in courts throughout the country.[138]

State v. Schackow[139] offers yet another methodology. New Mexico requires courts to undertake a two-part analysis. First, the defendant's conduct must violate more than one statutory provision.[140] Then, the court must decide whether the provision's legislative intent was to punish a defendant for multiple statutory violations for the offense of which he is accused.[141] For the Double Jeopardy Clause to be implicated, the first prong must be answered positively, and the second negatively.[142] This method, however, while offering another innovative approach, is ineffective because it adds to the ambiguity of *Blockburger* and effectively gives courts more discretion to rule on a case-by-case basis, undoubtedly leading to incongruent decisions. Despite the obvious intent to provide a uniform means of applying the double jeopardy provision, the application demonstrates an inability to guide courts to consistent outcomes.

Adopted in *Grady v. Corbin*, the "same conduct" test which was overruled in *Dixon*, was used to determine whether one, or more

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[136] Notes and Comments, *Twice in Jeopardy*, 72 YALE L.J. 262, 269 n.32 (1965).

[137] Richard Finacom, Comment, *Successive Prosecutions and the Continuing Criminal Enterprise: The Double Jeopardy Analysis in* Garrett v. United States, 13 HASTINGS CONST. L.Q. 785, 796 n.82 (1986).

[138] *Id.*

[139] 143 P.3d 745 (N.M. Ct. App. 2006).

[140] *Schackow*, 143 P.3d at 751.

[141] *Id.*

[142] *Id.*

than one, offense was committed.[143] This approach, commonly referred to as the "behavioral approach," is based upon the defendant's conduct for each of his charged crimes. The "same conduct" test bans a subsequent prosecution "if, to establish an essential element of an offense charged in [the second trial], the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted."[144] A proper analysis under this test requires the court to assess the conduct itself and determine whether it was the "same offense," rather than examining the evidence necessary to prove the conduct.[145] In *Corbin*, the Supreme Court reasoned that if *Blockburger* was the exclusive test, the defendant could be tried separately in four consecutive trials.[146] In a relatively simple analysis applying the "same conduct" test, the court held, because the prosecution would be proving the conduct, from which the defendant was convicted of traffic offenses, to establish the essential elements of the homicide and assault offenses,[147] double jeopardy barred the subsequent prosecutions.[148] Likewise, in *Polito*, it appears that applying the "same conduct" test would have barred any subsequent prosecution of the defendants. To convict the defendants of murder, the prosecution would have to prove the requisite conduct: the actual murder of the men. This is the same conduct that was necessary to

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[143] *Grady*, 495 U.S. at 509.

[144] *Id.* at 510.

[145] *Id.* at 521.

[146] *Id.* at 520. Once each for "failure to keep right of the median, for driving while intoxicated, for assault, and for homicide." *Id.*

[147] The defense conceded that *Blockburger* did not bar subsequent prosecution of reckless manslaughter, criminally negligent homicide, and third degree reckless assault. *Id.* at 522.

[148] *Grady*, 495 U.S. at 510.

prove the statutory requirement of "murder in the aid of racketeering activity."

Three years after *Grady*, the Supreme Court revisited the issue in *Dixon*. The Court overruled *Grady*, holding the *Blockburger* test as the benchmark test for double jeopardy purposes, for determining whether there have been multiple punishments for a single offense.[149] While not purporting to hold the "same conduct" test unconstitutional, the Court noted that it is not required to analyze such situations using both the *Blockburger* and "same conduct" test.[150] The overruling of *Grady* three years after its decision illustrates the extent of the difficulties courts have with the issue. In fact, there was heated discussion over the way with which precedent was dealt with.[151]

Another, more liberal, approach stems from the "same conduct" test, and is called the "same transaction" test.[152] This test requires the prosecution to charge all offenses based on one event together. Justice Brennan was the principle proponent of this more protective test because the "same evidence" test allows multiple prosecutions for the same offense.[153] Arguably, the "same conduct" test is simply too broad because it lacks the essential element of being definite and specific.[154] In effect, the adoption of the "same transaction" test would require the prosecution to join all the charges from a

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[149] *Dixon*, 509 U.S. at 704.

[150] *Id.*

[151] *See id.* at 741 (Blackmun, J., dissenting) (stating that he was dismayed how the Court so "cavalierly" overruled *Grady* after a mere three years).

[152] *Id.* at 709 n.14 (majority opinion)

[153] *Ashe*, 397 U.S. at 451 (Brennan, J., concurring).

[154] Harris v. State, 17 S.E.2d 573, 578 (Ga. 1941).

single criminal transaction together.[155] However, a major problem arises because the term "transaction" creates another ambiguity with which courts must deal with, and the real question courts should face is whether or not the said acts were the "same offense."[156]

The evidence and behavior approaches are the most commonly employed methods to determine when conduct constitutes the "same offense," but the list is by no means all inclusive. *Polito* demonstrates the need for a uniform approach to determining when double jeopardy protects and when it does not. That approach needs to encompass multiple steps to ensure a more predictable result with adequate protection.

New York's statutory provisions for interpreting the term "same offense" are without question broader than those minimally required by the United States Constitution.[157] However, a uniform test for determining what constitutes the "same offense" has eluded federal and state courts alike. If Congress does not fix the punishment for a federal offense clearly and without ambiguity, confusion concerning the law will continue to exist.[158] Unfortunately, history has shown that courts have a very difficult time formulating a coherent and applicable test to resolve whether or not the "same offense" has been committed for double jeopardy purposes. New York at least, through section 40.20(1) and section 40.20(2) of the CPL, has provided its citizens with greater protection than that afforded by the

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[155] *See* Poulin, *supra* note 112, at 1240.

[156] *See* George C. Thomas III, *A Blameworthy Act Approach to the Double Jeopardy Same Offense Problem*, 83 CAL. L. REV. 1027, 1037 (1995).

[157] *See* People v. Berkowitz, 406 N.E.2d 783, 790 (N.Y. 1980).

[158] *See* Bell v. United States, 349 U.S. 81, 84 (1955).

Federal Constitution. Under subsection one of the statutory provisions, it appears at first blush that New York offers less protection than what is provided. However, the *Polito* court correctly reasoned that the constitutional deficiencies inherent in the statute are overcome by the limited exceptions in subsection two, which make the statutory provision as a whole very broad in scope.[159]

The *Blockburger* evidence test is simply too ambiguous and gives prosecutors the ability and opportunity to abuse their power in re-prosecuting the accused, which is "simply intolerable."[160] Applied in practice, *Blockburger* is so easily circumvented that the notion of double jeopardy protection is in serious doubt.[161] In principle, double jeopardy exists to protect citizens from being twice prosecuted for the "same offense."[162] In reality, because of the ambiguity surrounding the test, it is uncertain whether citizens are actually afforded this protection.

New York's statutory implementation of its state constitutional double jeopardy prohibition is, in effect, very broad and offers much more protection than required under the United States Constitution.[163] The Federal Constitution, all ambiguities aside, more than likely provides greater protection than that of section 40.10(1) and section 40.20(1). However, as the *Polito* court reasoned, these statutes do not offend constitutional requirements because section

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[159] *Polito*, 871 N.E.2d at 541.

[160] *Ashe*, 397 U.S. at 452 (Brennan, J., concurring).

[161] *See* Poulin, *supra* note 112, at 1214. *See also Dixon*, 509 U.S. at 749 (Souter, J., dissenting) ("*Blockburger* . . . is insufficient . . . against successive prosecution . . . .").

[162] *See* U.S. CONST. amend. V; N.Y. CONST. art. I, § 6.

[163] *See* N.Y. CRIM. PROC. LAW §§ 40.10(1), 40.20(1)-(2).

40.20(2) confers whatever protections section 40.10(1) and section 40.20(1) deny.[164] Unless one of the eight exceptions is directly applicable, section 40.20(2) denies multiple prosecutions for multiple offenses based upon the same activity.[165] From the above analysis, it is clear these exceptions provide more protection than minimally required by the Federal Constitution and is the reason the New York statute offers some of the broadest double jeopardy protection in the United States.[166]

Only one thing is easy to discern about double jeopardy: it is not easy to enforce uniformly. To be prosecuted and acquitted or convicted for an act and later face the misfortune of re-prosecution for another statutory violation stemming from the same act is contrary to the protection many citizens believe they possess. Protection from being subject to prosecution more than once is "a vital safeguard and 'a fundamental ideal in our constitutional heritage.' "[167] Courts and legislatures must focus on the shortcomings of the current system and create effective safeguards. A prosecutor should be required to bring all possible known or knowable charges, at the time of the original prosecution, or lose the ability to bring them at all. Among the evils of a subsequent second prosecution is the prejudice suffered by the defendant on account of knowledge acquired by prosecutors who learn from errors made during the first trial. Although this is perhaps an inevitable occurrence in the instance of ap-

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[164] *Polito*, 871 N.E.2d 541.
[165] N.Y. CRIM. PROC. LAW § 40.20(2).
[166] *See* Tsiatsos, *supra* note 123, at 564-70.
[167] *Booth*, 635 N.E.2d at 280 (quoting *Benton*, 395 U.S. at 794).

pellate reversal, it is worrisome that crafty prosecutors can take another bite at the apple. If evidence to prosecute a defendant could have, or reasonably should have, been introduced during the first proceeding, the prosecution should be barred from again prosecuting a defendant if the offense for which he is subsequently tried for could have been introduced at the original trial. Subsequently-discovered evidence should also be forbidden to ensure the defendant is not harassed, further intruding on constitutional protections.[168] Protection from double jeopardy would be increased by placing the burden on prosecutors to demonstrate due diligence and ensure justice is served during the first trial. As it may be, the possibility remains that there will be some attempt to circumvent the system, but, in the majority of circumstances, prosecutors will abide by their professional responsibilities and perform ethically.[169]

As courts throughout the country craft new methods to tackle ambiguities, it is likely some will follow New York's lead and eliminate by statute at least some of the ambiguities that epitomize *Blockburger* and its progeny. Regardless, history dictates a strong likelihood that the Supreme Court will review this topic several more times.

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[168] *See, e.g.*, Justices of Boston Mun. Court v. Lydon, 466 U.S. 294, 307 (1984) (stating double jeopardy claims should be analyzed under policies ensuring the defendant does not "live in a continuing state of anxiety and insecurity"); State v. Currie, 197 A.2d 678, 681 (N.J. 1964) (stating there is no questioning the constitutional protection of double jeopardy and impermissibility of harassing and oppressing an individual with multiple prosecutions for the same offense).

[169] *See* MODEL RULES OF PROF'L CONDUCT R. 3.8 (1980).