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Reverse Rico Double Jeopardy Protection Under United States v. Esposito: Someone's in the Kitchen with Grady, but It's Not the Third Circuit

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"Reverse Rico" Double Jeopardy Protection Under *United States v. Esposito*: Someone's in the Kitchen with *Grady*, but It's Not the Third Circuit*

I. INTRODUCTION[1]

The fifth amendment to the United States Constitution provides in part: "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb. . . ."[2] The Supreme Court has held that the double jeopardy clause provides three distinct double jeopardy protections.[3] First, the double jeopardy clause prohibits successive prosecutions for the same offense after acquittal. Second, it provides protection against multiple punishments for the same offense. Finally, the double jeopardy clause protects against successive prosecutions for the same offense after a conviction.[4] Although application of this constitutional safeguard appears simple, courts have struggled with application of the double jeopardy clause to crimes springing from complex statutory schemes such as the Racketeer Influenced and Corrupt Organizations Act (RICO).[5]

In 1970, Congress passed RICO in hopes of combatting sophisticated crime in the United States. A person violates RICO by engaging in one or more of the following activities: (1) using income derived from a pattern of racketeering activity to acquire

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1. Prior to an introduction, it is important for the reader to understand what this casenote *is not* about. Because of limitations on length, this casenote will not examine the history of double jeopardy law nor discuss the struggle between Congress and courts as to which branch should define "crimes." Additionally, this casenote does not propose that the law in *Grady v. Corbin*, 110 S. Ct. 2084 (1990), is good law, only that it is the proper law to apply. Nor will this casenote address the value of *Grady* given the fact that it is a 5-4 decision and the author of the opinion, Justice Brennan, no longer sits on the Court. Moreover, this casenote will not suggest how courts, which struggle to apply Supreme Court decisions, should actually apply those decisions.

2. U.S. CONST. amend. V.

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

4. *Id.* at 717.

5. 18 U.S.C. §§ 1961-1968 (1988). RICO is Title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901(a), 81 Stat. 941.

an interest in an enterprise;[6] (2) acquiring or maintaining an interest in, or control of, an enterprise through a pattern of racketeering activity;[7] (3) conducting the affairs of an enterprise through a pattern of racketeering activity;[8] or (4) conspiring to commit any of the above offenses.[9] Additionally, the pattern of racketeering activity must include commission of at least two of the listed predicate offenses[10] within a ten-year period.[11]

Individuals convicted of a RICO violation and later convicted of one or more of its predicate offenses charged as a separate substantive offense "consistently assert on appeal that their convictions and accompanying punishments violate the double jeopardy clause of the fifth amendment."[12] However, "the federal courts of appeals generally have agreed that a criminal defendant may be sentenced under both . . . the penalty provisions of RICO and the penalty provisions of the predicate offenses."[13] Moreover, at least two circuit courts have held that the double jeopardy clause does not prohibit the use of prior convictions for predicate offenses to support a later RICO charge.[14] In fact, the Third Circuit in the "reverse RICO"[15] case *United States v. Esposito*[16] went so far as to hold that the defendant's acquittal on a RICO charge did not bar his subsequent prosecution for the predicate acts.

Part II of this note discusses the Supreme Court's application and analysis of the double jeopardy clause. Part III explains the facts and reasoning behind the *Esposito* decision. Part IV analyzes *Esposito* and demonstrates that the Third Circuit's re-

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6. 18 U.S.C. § 1962(a) (1988).

7. *Id.* at § 1962(b).

8. *Id.* at § 1962(c).

9. *Id.* at § 1962(d).

10. Predicate offenses are listed in 18 U.S.C. § 1961(1) (1988).

11. *See* § 1961(5).

12. Note, *RICO and the Predicate Offenses: An Analysis of Double Jeopardy and Verdict Consistency Problems*, 58 NOTRE DAME L. REV. 382, 384 (1982)(citing seven circuit court cases to this effect).

13. Comment, *Multiple Prosecutions and Punishments Under RICO: A Chip Off the Old "Blockburger"*, 52 U. CIN. L. REV. 467, 468 (1983)(citing ten circuit court cases to this effect).

14. United States v. Grayson, 795 F.2d 278 (3d Cir. 1986), *cert. denied*, 481 U.S. 1018 (1987); United States v. Phillips, 664 F.2d 971 (5th Cir. 1981).

15. A "reverse RICO" case occurs when a defendant is prosecuted for violating RICO and then later prosecuted for violating the predicate offenses. In the traditional situation, a defendant is first convicted for violating RICO predicate offenses and then those convictions are used to support a later RICO charge.

16. 912 F.2d 60 (3d Cir.), *cert. dismissed*, 111 S. Ct. 806 (1991).

liance on the test announced in *Garrett v. United States*[17] was not justified and that the Third Circuit should have relied solely on the test announced by the Supreme Court in *Grady v. Corbin*[18]. Moreover, part IV argues that when the Third Circuit finally did apply *Grady*, it did so improperly. Finally, part V examines the impact of *Grady* on future successive prosecutions involving RICO. This note concludes that the *Grady* test mandates that successive prosecutions involving RICO, such as those the defendant faced in *Esposito* be prohibited. If this is not the result that Congress intended, Congress must indicate this to the Court so that the Court can create a RICO double jeopardy test which meets the requirements of congressional intent.

II. BACKGROUND: THE SUPREME COURT'S APPLICATION AND ANALYSIS OF THE DOUBLE JEOPARDY CLAUSE

More than half a century ago, the Supreme Court, in *Blockburger v. United States,*[19] first established the test for determining whether two offenses are the "same" for double jeopardy purposes. In *Blockburger*, the defendant was convicted of two separate drug offenses: a sale not in or from the original stamped package, and a sale without a written prescription.[20] The Supreme Court stated that although there was only one drug sale, punishment for two offenses arising out of the same criminal act does not violate the double jeopardy clause if "each [offense] requires proof of a fact which the other does not."[21] Under this test, the Court upheld the defendant's consecutive sentences under both statutes; failure to satisfy this test, however, seemed to implicate the protections of the double jeopardy clause. "The Court did not expressly give the '*Blockburger* test' constitutional import, but for many years the Court seemed to consider it tightly linked to the double jeopardy clause."[22]

In *Whalen v. United States,*[23] a divided Supreme Court altered its analytical approach to the double jeopardy clause and its application of the *Blockburger* test. In *Whalen*, the defend-

17. 471 U.S. 773 (1985).
18. 110 S. Ct. 2084 (1990).
19. 284 U.S. 299 (1932).
20. *Id.* at 300-01.
21. *Id.* at 304.
22. Note, *A Proposal For Legislative Effectuation of Double Jeopardy Protection,* 41 HASTINGS L.J. 669, 670 (1990).
23. 445 U.S. 684 (1980).

ant was convicted of felony-murder and rape and was sentenced by the trial court to consecutive prison terms under each offense.[24] In a questionable decision on the merits,[25] the majority held that the *Blockburger* test was not a constitutional test, but rather a rule of statutory construction to be used to determine whether Congress intended to permit cumulative sentences under multiple statutes for a single course of conduct.[26] By referring to *Blockburger* as a rule of statutory and not constitutional construction, "the Court inched toward disconnecting the double jeopardy clause from the question of cumulative punishment to the extent such punishment is legislatively authorized."[27]

Finally, the Supreme Court in *Grady v. Corbin*[28] once again modified the *Blockburger* double jeopardy test. On October 3, 1987, the defendant, Thomas Corbin, drove his car across the double yellow line in LaGrange, New York, killing the driver of an oncoming vehicle.[29] While being treated at the hospital for his own injuries, Corbin was served with two traffic tickets.[30] Three days after the accident, an assistant district attorney began gathering evidence for a homicide prosecution of the case.[31] On October 27, 1987, Corbin pled guilty to both traffic tickets before the town justice but did not inform the court that a death was caused by the accident.[32] The guilty plea was accepted and Corbin was sentenced to a six-month license revocation, a $350 fine, and a $10 surcharge.[33]

Meanwhile, the homicide investigation continued. On January 19, 1988, a grand jury indicted Corbin on several counts of

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24. *Id.* at 685.

25. In *Whalen*, a District of Columbia statute appeared to specifically reject application of the *Blockburger* test in favor of letting the trial judge use his discretion to decide the issue of cumulative punishment. *Whalen*, 445 U.S. at 691. D.C. CODE ANN. § 23-112 (1973) provided in part: "A sentence . . . shall, unless the court imposing such sentence expressly provides otherwise, run consecutively to any other sentence . . . *whether or not* the offense . . . arises out of the same transaction and requires proof of a fact which the other does not." *Whalen*, 445 U.S. at 691 (emphasis altered).

26. *Whalen*, 445 U.S. at 691.

27. Note, *supra* note 22, at 677.

28. 110 S. Ct. 2084 (1990).

29. *Id.* at 2087-88.

30. *Id.* at 2088. One ticket charged defendant with the misdemeanor of driving while intoxicated and the other charged him with failing to keep to the right of the median. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 2089.

homicide and assault.[34] Corbin moved to dismiss the indictment on statutory and double jeopardy grounds but the court denied the motion.[35] Corbin then sought a writ of prohibition against prosecution of the indictment on double jeopardy grounds. The Appellate Division denied the petition without opinion, but the New York Court of Appeals reversed.[36] The United States Supreme Court affirmed in a five to four decision, holding that Corbin's second prosecution would violate the double jeopardy clause.[37]

In *Grady*, the Court adopted dictum from *Illinois v. Vitale*[38] as law.[39] Noting that "the *Blockburger* test is simply a 'rule of statutory construction,' a guide to determining whether the legislature intended multiple punishment,"[40] the Court stated that the *Blockburger* test should not be relied on exclusively to vindicate the double jeopardy clause protections.[41] Writing for the majority, Justice Brennan held that courts must apply a two-part test to determine whether a second prosecution violates the double jeopardy clause.[42] First, a court must apply the traditional *Blockburger* test. "If application of that test reveals that the offenses have identical statutory elements or that one is a lesser included offense of the other, then the inquiry must cease, and the subsequent prosecution is barred."[43] Second, if a subsequent prosecution survives the *Blockburger* test, a court must determine whether "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."[44] If this occurs, the defendant is protected by the double jeopardy clause and the prosecution is prohibited.

Applying this new rule to the facts in *Grady*, the Court held

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34. *Id.*

35. *Id.* The court ruled that Corbin's failure "to inform the Town Justice Court at the time of the guilty plea that [he] had been involved in a fatal accident constituted a 'material misrepresentation of fact' that 'was prejudicial to the administration of justice.'" *Id.*

36. *Id.*

37. *Id.* at 2089-90.

38. 447 U.S. 410 (1980).

39. *See Grady*, 110 S. Ct. at 2090 (citing *Vitale*, 447 U.S. at 420).

40. *Id.* at 2091-92.

41. *Id.*

42. *Id.* at 2093.

43. *Id.* at 2090.

44. *Id.* at 2093.

that the double jeopardy clause barred subsequent prosecution because "the State [had] admitted that it [would] prove the entirety of the conduct for which Corbin was convicted."[45] Moreover, the Court emphasized that the new two-step test (analysis) was not a "same evidence" test and that the *Blockburger* test is "concerned solely with the statutory elements of the offenses charged" and "has nothing to do with the *evidence* presented at trial."[46]

III. The Third Circuit's Application of Double Jeopardy Protection in *United States v. Esposito*[47]

A. *The Facts of* Esposito

In *United States v. Esposito*, the Third Circuit determined that acquittal on a RICO charge does not bar a subsequent prosecution for the predicate acts under the *Grady* test. In 1988, defendant Esposito, along with nineteen others, was acquitted by a jury in *United States v. Accetturo*.[48] In *Accetturo*, Esposito was named in four counts of a twelve-count indictment. Count two of the indictment charged Esposito with participation in a racketeering enterprise[49] in violation of RICO.[50] In this count, Esposito was specifically charged with violating four predicate acts: "participating in a drug distribution conspiracy from 1977 to July 1985; cocaine distribution in November 1984; cocaine distribution in December 1984; and cocaine distribution in January 1985."[51] Esposito was eventually acquitted of all RICO charges in *Accetturo*.

After Esposito's acquittal, a federal grand jury returned a three-count indictment against him.[52] The indictment alleged drug distribution[53] on three different dates: on or about December 5, 1984; on or about December 20, 1984; and on or about

45. *Id.* at 2094.

46. *Id.* at 2093 n.12 (emphasis in original).

47. 912 F.2d 60 (3d Cir.), *cert. dismissed*, 111 S. Ct. 806 (1990).

48. Cr. No. 85-292, (D.N.J. 1988)(cited in *Esposito*, 912 F.2d at 61).

49. *Esposito*, 912 F.2d at 61.

50. 18 U.S.C. § 1962(c) (1988).

51. *Esposito*, 912 F.2d at 61.

52. *Id.*

53. *Id.* The indictment alleged drug distribution in violation of 21 U.S.C. § 841(a)(1) (1988).

January 9, 1985.[54] The government conceded that these counts were based on the same transactions that supported the RICO predicate charges in count two of the *Accetturo* indictment.[55] Esposito filed a motion to dismiss the second indictment on the grounds of double jeopardy, collateral estoppel, and deprivation of due process, claiming that the second indictment constituted vindictive prosecution.[56] The district court denied his motion to dismiss. Esposito sought review from the Third Circuit, and limited his appeal to the claim that the second indictment violated the double jeopardy clause. Upon review, the Third Circuit affirmed the district court's decision and held that Esposito's second indictment after an acquittal on RICO charges did not violate the double jeopardy clause of the fifth amendment.[57]

B. The Reasoning of the Third Circuit in Esposito

In determining whether defendant's second indictment violated double jeopardy, the *Esposito* court limited its inquiry to one key issue: "[W]hether Esposito's second prosecution offend[ed] the protection afforded by the Double Jeopardy Clause from later prosecution for the same offense after being acquitted."[58] To resolve this issue, the court relied on the two-step test established in *Garrett v. United States*.[59] The first requirement of *Garrett* was whether Congress "intended that each violation be a separate offense."[60] In addressing this issue, the court pointed out that Congress intended to allow a conviction to be used as a predicate act in a later RICO prosecution because RICO's statutory language clearly shows that Congress intended to supplement, rather that supplant, existing crimes and punishments.[61]

Moreover, the court maintained there was nothing in the legislative history to suggest that Congress would not permit a criminal prosecution for predicate acts after a RICO prosecution since Congress envisioned RICO as a new and additional law en-

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54. *Esposito*, 912 F.2d at 61.
55. *Id.*
56. *Id.*
57. *Id.* at 65, 67.
58. *Id.* at 63.
59. 471 U.S. 773 (1985).
60. *Id.* at 778.
61. *Esposito*, 912 F.2d at 63 (citing United States v. Grayson, 795 F.2d 278, 282 (3d Cir. 1986), *cert. denied*, 481 U.S. 1018 (1987)).

forcement weapon.[62] The court argued, therefore, that it was Congress's intent to make RICO a separate offense from its predicate acts. Finally, the court reasoned that since RICO and its predicate acts are separate offenses, the *Blockburger* test is inapplicable.[63] This was so because " 'the *Blockburger* rule is not controlling when the legislative intent is clear from the face of the statute or the legislative history.' "[64]

Finding the first requirement of the *Garrett* test satisfied, the court proceeded with the second requirement of *Garrett* which was "whether the offense in the second prosecution is considered to be the 'same offense' as the offense in the first prosecution within the meaning of the Double Jeopardy Clause."[65] In answering this question, the court first restated its holding in *United States v. Grayson*[66] "that a 'RICO offense is not, in a literal sense, the 'same' offense as one of the predicate offenses.' "[67] Next, the court stated that it is well established that criminal conspiracy is a separate offense from individual substantive offenses. Therefore, according to the court,

> [i]f the collective criminal agreement that is the hallmark of a conspiracy is sufficiently distinct from the substantive offenses for double jeopardy purposes . . . then the even more complex conduct needed to support a RICO charge, such as the requirement of both an enterprise and a pattern of activity, constitutes an offense different than and separate from [the substantive offenses charged].[68]

The court found that under the *Garrett* test, Esposito's subsequent indictment did not violate the double jeopardy clause.

Finally, the court considered whether the Supreme Court's decision in *Grady* affected its resolution of the issues in *Esposito*. First, the court recognized that since *Grady* is not a "same evidence" test, the mere fact that the same evidence is introduced in successive prosecutions does not in itself call for double jeopardy protections.[69] Second, the court argued that since a RICO violation involves more complex conduct than is required

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62. *Id.*
63. *Id.* at 64.
64. *Id.* (quoting *Garrett*, 471 U.S. at 779).
65. *Id.* at 63 (citing *Garrett*, 471 U.S. at 786).
66. 795 F.2d 278 (3d Cir. 1986), *cert. denied*, 481 U.S. 1018 (1987).
67. *Esposito*, 912 F.2d at 64 (quoting *Grayson*, 795 F.2d at 283).
68. *Id.* at 65 (citation omitted).
69. *Id.* at 64-65.

to violate a RICO predicate, the *Grady* test does not stand as a barrier to successive prosecutions.[70] As the court noted, Esposito "was not prosecuted [in the first trial] for the same conduct as that set forth in the [second] indictment . . . and hence *Grady* does not mandate a finding that this prosecution is barred by double jeopardy."[71] Therefore, the court found that neither the *Garrett* nor the *Grady* test called for a bar to the defendant's successive prosecutions on double jeopardy grounds.

IV. Analysis of the Third Circuit's Decision in *Esposito*

The *Esposito* court relied on the *Garrett* test to show that an acquittal on a RICO charge does not bar subsequent prosecution on the predicate acts, notwithstanding the Supreme Court's recent formulation of a new double jeopardy test in *Grady*. The following analysis will make clear that the Third Circuit's reliance on *Garrett* was not justified. Moreover, the Third Circuit should have relied solely on *Grady*, and when the court finally did apply *Grady*, it applied *Grady* improperly.

A. Application of the Garrett *Test in RICO Cases*

In *Esposito*, the Third Circuit used the *Garrett* test because it felt that when the Supreme Court faced a "somewhat comparable situation, the Supreme Court directed the courts to undertake [the *Garrett*] two-step analysis."[72] In *Garrett*, the defendant pled guilty to one count of importing marijuana into Washington State.[73] Approximately two months later, the defendant was indicted in Florida for engaging in a continuing criminal enterprise,[74] a compound offense[75] which requires proof

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70. *Id.* at 65.

71. *Id.* To further support its position that RICO and its predicates may be the subject of successive prosecutions, the court quoted *United States v. Dunbar*, 591 F.2d 1190, 1192 (5th Cir. 1979), *panel opinion adopted in relevant part*, 611 F.2d 985 (5th Cir.)(en banc), *cert. denied*, 447 U.S. 926 (1980), where the court stated that "no court in this country has ever held that a defendant may not be indicted and tried once for conspiracy and thereafter tried for . . . distributing controlled substances." *Esposito*, 912 F.2d at 65.

72. *Esposito*, 912 F.2d at 63 (citing *Garrett*, 471 U.S. at 778).

73. *Garrett*, 471 U.S. at 775. Defendant pled guilty under 21 U.S.C. §§ 952, 960(a)(1), 960(b)(2) and 18 U.S.C. § 2. He was assessed a $15,000 fine and sentenced to five years' imprisonment.

74. 21 U.S.C. § 848 (1988).

75. A compound offense is one that "incorporates several other offenses by reference and compounds those offenses if a certain additional element is present." Whalen v. United States, 445 U.S. 684, 709 (1980)(Rehnquist, J., dissenting).

of predicate crimes. The defendant's continuing criminal enterprise charge (CCE) encompassed the time period of the Washington State offense and continued after the defendant's Washington guilty plea.

The defendant filed a motion to dismiss the CCE charge stating that it included criminal activities that were the subject of his Washington State guilty plea. Relying on *Brown v. Ohio*,[76] defendant claimed that the Washington charge to which he pled guilty was a "lesser included offense" of the CCE charge. Therefore, to use the Washington offense as an element of the CCE charge placed the defendant twice in jeopardy for the same offense in violation of the fifth amendment.[77] The district court denied the defendant's motion and the defendant was convicted on the CCE charge. On appeal, the Eleventh Circuit rejected the defendant's double jeopardy argument. The Supreme Court granted certiorari and affirmed.[78]

Writing for the majority, Justice Rehnquist in *Garrett* fashioned a new two-prong test,[79] cautioning that the *Brown* "lesser included offense" test may not be the proper test to apply under the CCE statute.[80] In *Brown*, the defendant committed the single act of driving a stolen car and was charged with felony auto theft and the lesser included offense of joyriding.[81] In comparison, the criminal activity in *Garrett* occurred over more than a five-year period and involved some incidents unrelated to the Washington plea bargain.[82] As a result, Rehnquist noted, "These significant differences caution against ready transposition of the 'lesser included offense' principles of double jeopardy from the classically simple situation presented in *Brown* to the multilayered conduct, both as to time and place, involved in this case."[83] Justice Rehnquist concluded that "it does not violate the Double Jeopardy Clause *under the facts of this case* to pros-

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76. 432 U.S. 161 (1977)(where the misdemeanor of joyriding in a car was a lesser included offense in the felony of auto theft, a prosecution for the joyriding barred a second prosecution for the felony auto theft charge). *Id.* at 168-69.

77. *Garrett*, 471 U.S. at 787.

78. *Id.* at 795.

79. *See supra* notes 60 & 65 and accompanying text.

80. *Garrett*, 471 U.S. at 789.

81. *Brown*, 432 U.S. at 162-63.

82. *Garrett*, 471 U.S. at 788.

83. *Id.* at 789.

ecute the CCE offense after a prior conviction for one of the predicate offenses."[84]

The *Esposito* court's application of the *Garrett* test was improper because the test should be limited to the facts of the *Garrett* case. In *Garrett*, the defendant's multi-layered CCE conduct, which was the reason for the new test, "*continued* after [his] guilty plea to the Washington State offense."[85] Since the defendant's criminal conduct continued after his guilty plea, the Court held the double jeopardy clause to be an invalid defense.[86] Therefore, *Garrett*'s holding "is that the defendant continued his criminal conduct after the initial prosecution and thus forfeited any double jeopardy protection he might have had against a new prosecution for another offense that encompassed the entire criminal transaction."[87]

The facts presented in *Esposito* do not call for application of the *Garrett* test. In *Esposito*, the defendant was acquitted on RICO charges in the first prosecution and then indicted a second time for the underlying predicate acts. The government conceded that the second indictment was based on the transactions that supported the initial RICO prosecution. The defendant's entire course of criminal conduct identified in both the first prosecution and the second indictment had occurred prior to the first prosecution. Since there was no continuing criminal conduct to bar double jeopardy protection, as there was in *Garrett*, the Third Circuit erred when it applied the *Garrett* test to deny the defendant double jeopardy protection.[88]

To further support its application of the *Garrett* test, the Third Circuit asserted that double jeopardy issues raised in con-

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84. *Id.* at 793 (emphasis added).

85. Thomas, *The Prohibition of Successive Prosecutions for the Same Offense: In Search of a Definition*, 71 IOWA L. REV. 323, 365 (1986)(citation omitted)(emphasis added).

86. *Id.*

87. Thomas, *An Elegant Theory of Double Jeopardy*, 4 U. ILL. L. REV. 827, 875 (1988). For a similar analysis, see United States v. Scarpa, 913 F.2d 993 (2d Cir. 1990). In *Scarpa*, the court concluded that since *Grady* cited *Garrett* twice with apparent approval, "we do not regard *Grady* as precluding the proof of previously prosecuted conduct as predicate acts in a subsequent RICO prosecution . . . where, as here, the RICO (or CCE) offense continues beyond the prior prosecution." *Id.* at 1014 n.8.

88. *But cf.* United States v. Pungitore, 910 F.2d 1084, 1110-11 (3d Cir. 1990)(where the Third Circuit again addressed the issue and held that *Garrett* precludes application of the *Grady* test beyond crimes involving a single course of conduct). However, it should be noted that the Third Circuit once again failed to heed the Supreme Court's pronouncements in Jeffers v. United States, 532 F.2d 1101 (7th Cir. 1976), *aff'd in part, vacated in part*, 432 U.S. 137 (1977), discussed *infra* notes 93-97 and accompanying text.

nection with prosecution of compound predicate offenses such as RICO or CCE "do not fit precisely within the analytic [sic] lines used in other double jeopardy cases."[89] The *Esposito* court relied on the *Garrett* test because it found it more applicable than the *Grady* test was to compound predicate crimes such as RICO. In fact, in *United States v. Pungitore*[90] which was decided the same day as *United States v. Esposito*, the Third Circuit said:

> We conclude that *Grady*, which finds its roots in 'single transaction' cases such as *Brown*, is no more applicable . . . [to RICO] than *Brown* was in *Garrett*. . . .
>
> Thus, we reject [the defendant's] double jeopardy argument on the basis of . . . *Garrett*, which distinguished single course of conduct crimes . . . from compound-complex crimes, like [RICO]. However significant *Grady v. Corbin* may prove to be in cases of simple felonies, we are confident that it has nothing whatsoever to do with [RICO].[91]

In effect, the *Esposito* court limited the *Grady* test to its facts and utilized *Garrett* as the new RICO double jeopardy test.

However, the Supreme Court has already addressed and rejected the notion that complex statutory crimes such as RICO should be tested by a different double jeopardy standard than simple course of conduct crimes. In *Jeffers v. United States*,[92] the Seventh Circuit found that one offense charged against the defendant was a lesser included offense of the other, but held that the Supreme Court's decision in *Iannelli v. United States*[93] created a new double jeopardy rule applicable only to complex crimes.[94] The Supreme Court remanded the case, with eight justices (including Justice Rehnquist) holding that the Seventh Circuit misread *Iannelli*.[95] Justice Blackmun noted that, con-

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89. *Esposito*, 912 F.2d at 62.

90. 910 F.2d 1084 (3rd Cir. 1990).

91. *Id.* at 1111.

92. 532 F.2d 1101 (7th Cir. 1976), *aff'd in part, vacated in part*, 432 U.S. 137 (1977).

93. 420 U.S. 770 (1975). In *Iannelli*, eight defendants were each convicted of running an illegal gambling business in violation of 18 U.S.C. § 1955—a complex statutory crime—and of conspiracy to run such a business in violation of 18 U.S.C. § 371. *Iannelli*, 420 U.S. at 771-72. The defendants challenged their convictions claiming that punishment under both offenses violated the fifth amendment. The Supreme Court affirmed their convictions and stated, "We think it evident that Congress intended to retain each offense as an 'independent curb' available for use in the strategy against organized crime." *Id.* at 791.

94. *Jeffers*, 532 F.2d at 1108.

95. *Jeffers*, 432 U.S. at 160 n.7 (Stevens, J., dissenting in part and concurring in part).

trary to the holding of the Court of Appeals, *Iannelli* created no exception to general double jeopardy provisions for complex statutory crimes.[96] As one author has commented, "why, . . . should the double jeopardy clause apply differently in *Garrett* because the legislature has enacted a complex statute that requires multilayered conduct to establish a violation?"[97] The Supreme Court answered this question by holding that all crimes, both simple and complex, will be subject to the same double jeopardy standards.[98]

It is evident that "*Garrett* represents a wrong turn in double jeopardy theory. . . . The negative effect of *Garrett* will reach all offenses that proscribe a course of conduct, including conspiracy, CCE, and racketeering (RICO) offenses."[99] From the foregoing analysis, it is clear that the *Esposito* court erred in applying the *Garrett* test and *Garrett* should be limited to its facts.

B. Application of the Grady *Test in RICO Cases*

As discussed above, the Supreme Court in *Grady v. Corbin* held that even if a subsequent prosecution survives the *Blockburger* test, a court must determine whether "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."[100] In essence, *Grady* is a conduct-focused test.[101]

In *Esposito*, the Third Circuit reluctantly applied the Supreme Court's *Grady* test after it had satisfied itself, using the *Garrett* test, that the defendant's double jeopardy rights had not been violated.[102] Although the Third Circuit applied the *Grady* test, it did so only to placate the Supreme Court, which only months earlier had established this new double jeopardy

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96. *Id.* at 151.

97. Thomas, *supra* note 85, at 367.

98. *Jeffers*, 432 U.S. at 151.

99. Thomas, *supra* note 87, at 877-78 (citation omitted).

100. *Grady*, 110 S. Ct. at 2093 (emphasis added).

101. History supports using a conduct-based test. *See* Thomas, *supra* note 87, at 850.

102. The court stated: "Esposito's argument that *Grady* is dispositive in this case fails to take into account the Supreme Court's holding in *Garrett* . . . . *Garrett* was cited by the majority in *Grady*, and nothing in that opinion purports to derogate from the *Garrett* holding." *Esposito*, 912 F.2d at 65 (citations omitted).

test. Moreover, the *Esposito* court's application of *Grady*, which was merely form over function, led to the wrong outcome.

Applying the *Grady* test to the facts in *Esposito*, the court first noted that the defendant "argues that his prosecution on the substantive drug offenses is barred because he was charged in the earlier RICO case with the same distributions of cocaine which constitute Counts One, Two and Three of the present indictment."[103] The court responded by stating that "Esposito was not prosecuted [in the first trial] for the narcotics violations but for participating in a racketeering enterprise through a pattern of racketeering activity consisting of narcotics distributions."[104] Finally, the court concluded that "while the same evidence may be presented against Esposito in both trials, *he was not prosecuted* in [the first trial] *for the same conduct* as that set forth in the indictment here, and hence *Grady* does not mandate a finding that this prosecution is barred by double jeopardy."[105]

The Third Circuit's application of *Grady* was flawed and its outcome is insupportable. In *Esposito*, the defendant was being prosecuted twice, under two different statutes and indictments, for the same conduct. In fact, the *Esposito* court even recognized that "[t]he government concedes that these counts [in the second indictment] were based on the transactions [i.e., conduct] that supported [the RICO] predicate acts charged in Count Two of the earlier *Accetturo* indictment."[106] More specifically, the racketeering acts described in one of the counts of the RICO indictment *charged the very same distribution of cocaine* which later constituted several counts in the second indictment.[107] The government conceded this very point.[108] To argue in *Esposito* that the defendant was not being prosecuted twice for the same conduct would be to, as the defendant stated, "torture language in a manner that would offend the Geneva Convention."[109]

The only other federal circuit to properly apply the *Grady* test in the RICO double jeopardy context[110] has implied that a

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103. *Id.* at 64.

104. *Id.*

105. *Id.* at 65 (emphasis added).

106. *Id.* at 61 (citation omitted).

107. Appellant's Brief at 4, United States v. Esposito, 912 F.2d 60 (3d Cir. 1990)(No. 89-5971).

108. Appellee's Brief at 6.

109. Appellant's Letter Memorandum at 2.

110. For another example of a court failing to properly apply *Grady* in the RICO

prosecution under RICO followed by a prosecution for one of its predicate acts violates the double jeopardy clause under *Grady* because the defendant's same conduct is prosecuted twice. In *United States v. Russo*,[111] the defendant was initially prosecuted for a RICO conspiracy with obstruction of justice charged as one of the predicate acts.[112] The defendant was then acquitted of all RICO charges. However, he was subsequently convicted, after a one-week trial, of the identical obstruction of justice charge under a different statute.[113] The defendant appealed his conviction on double jeopardy grounds and the Second Circuit reversed his conviction.[114]

In *Russo*, the court directed the parties to submit letter briefs addressing the impact of *Grady* on the subsequent prosecution. The court highlighted that "[i]n its letter brief, the government conceded that prosecution of the obstruction of justice charges . . . following acquittal of the RICO conspiracy . . . was inconsistent with the 'conduct' test announced in *Grady*."[115] As a result, the government moved to remand the case for the purpose of entering a *nolle prosequi* (no prosecution) order.[116] Believing the motion to be proper under the circumstances, the Second Circuit granted the government's motion and reversed the conviction.[117]

The Second Circuit has also properly applied the *Grady* test in the context of successive conspiracy prosecutions. In *United States v. Calderone*,[118] the Second Circuit held the *Grady* test barred a narcotics conspiracy prosecution after an earlier com-

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double jeopardy context, see United States v. Johnson, 911 F.2d 1394 (10th Cir. 1990). In *Johnson*, the court cited *Garrett* in permitting multiple convictions on charges of racketeering, RICO conspiracy and conspiracy to distribute heroin. *Id.* at 1398. Not only did the Tenth Circuit fail to state why *Grady* should not be the applicable rule in RICO double jeopardy cases, the court *failed* to even mention *Grady* in its decision. Therefore, it appears that the Tenth Circuit is unfamiliar with the current law in this area and it is questionable whether *Johnson* can be regarded as good law. *See also* United States v. Farmer, No. 89-1491 (7th Cir. Jan. 28, 1991)(LEXIS, Genfed library, 7th Cir. file)(where the court, citing to United States v. Pungitore, 910 F.2d 1084 (3d Cir. 1990), questioned whether *Grady* should be applied in RICO double jeopardy cases but held this issue need not be decided because defendant's double jeopardy claims failed on other grounds).

111. 906 F.2d 77 (2d Cir. 1990)(per curiam).

112. *Id.* at 78.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. 917 F.2d 717 (2d Cir. 1990).

plex conspiracy prosecution resulted in the defendant's acquittal.[119] The court first pointed out that "[a]lthough *Grady* involved the successive prosecution of separate crimes arising from a single event, nothing in the [*Grady*] opinion suggests that the Court intended to limit the [*Grady*] test to those particular circumstances."[120] In fact, the court stated that "the Court's concern with the dangers multiple trials . . . suggest[s] that the *Grady* test was intended to guide double jeopardy analysis in *all* cases involving successive prosecutions."[121] Finally, the court noted that the Supreme Court in *Grady* described the *Grady* test in "inclusive, generally applicable terms throughout the opinion."[122]

The foregoing analysis demonstrates that the *Esposito* court erred in its application of the *Grady* test. As the government in *Esposito* admitted, the defendant would have been prosecuted twice for the same conduct, i.e. *the very same distribution of cocaine*; hence, *Grady* mandates a finding that the defendant's second prosecution would be barred by the double jeopardy clause.

V. The Future of RICO Double Jeopardy Protection

In the last fifty years, the Supreme Court has vacillated in its analytical approach to the double jeopardy clause. In *Blockburger*, the Court established a test with constitutional overtones and for many years considered it tightly linked to the double jeopardy clause.[123] In *Whalen*, the Court altered its view of *Blockburger* and said that the test should now be used to determine whether Congress intended to permit cumulative sentences under multiple statutes for a single course of conduct.[124] Recently, the Supreme Court in *Grady* once again modified its approach to the double jeopardy clause by stating that courts should focus on whether the defendant is being prose-

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119. *Id.* at 722.

120. *Id.* at 721.

121. *Id.* (emphasis added).

122. *Id.* (citing *Grady* 110 S. Ct. at 2093)(emphasis in original).

123. *See supra* note 22 and accompanying text.

124. However, the Court in *Albernaz v. United States*, 450 U.S. 333 (1981) suggested that since "Congress is 'predominantly a lawyer's body . . .' and is presumed to know the law, Congress must have known about the *Blockburger* test and intended its application. *Id.* 341-42 (citations omitted). Therefore, "[t]his proposition . . . tends to discredit the idea that the *Blockburger* test at its origin discerned, or was designed to discern, legislative intent." Note, *supra* note 22, at 683 n.86.

cuted twice for the same conduct. Because of this constant change, courts have been unclear as to which double jeopardy test is proper. In addition, "[m]ost commentators . . . have found the history of double jeopardy protection to be ambiguous. . . ."[125]

Although *Grady* properly expands the scope of double jeopardy protection, the majority failed to fully present its rationale for the policies underlying its decision.[126] For this reason, courts in cases such as *Esposito* have struggled, and will continue to struggle, in applying *Grady* to more complicated factual situations such as successive prosecutions involving RICO. This confusion results because courts that are faced with safeguarding double jeopardy protections find there is no stable history and settled practice in this area which demands, much less compels, a particular result.[127] Thus, to some degree, i.e., within constitutional bounds, courts feel unrestrained in this area to act as they wish and justify their actions as they see fit.

As the law now stands, the Supreme Court will apply *Grady* to ensure double jeopardy protections, but this may bar successive prosecutions involving RICO such as the defendant faced in *Esposito*.[128] If this is not what Congress intended, then Congress has the task of explicitly declaring that any and all forms of successive prosecution involving RICO are permitted. At which time, the Supreme Court could fashion a double jeopardy test for complex crimes such as RICO. This new test would meet the requirements of congressional intent.

VI. CONCLUSION

The Supreme Court has struggled for some time in attempt-

125. Leading Cases, 104 HARV. L. REV. 129, 154 (1990). *See also* Cantrell, *Double Jeopardy and Multiple Punishment: An Historical and Constitutional Analysis*, 24 S. TEX. L.J. 735, 770 (1983); Note, *A Closer Look at the Supreme Court and the Double Jeopardy Clause*, 49 OHIO ST. L.J. 799, 802 (1988).

126. Leading Cases, *supra* note 125, at 154.

127. *Id.*

128. If *Grady* continues to be the law, it is questionable whether RICO jurisprudence in the area of double jeopardy can survive in any form. It is evident that the Third Circuit's decision in United States v. Pungitore, 910 F.2d 1084 (3d Cir. 1990) cannot be reconciled with *Grady*. At some point, either the Third Circuit has to reconsider its position or the Supreme Court has to reaffirm *Grady* in the RICO context. The *Esposito* case, however, will not be a panacea because the Third Circuit denied a rehearing and the Supreme Court dismissed certiorari. *Esposito*, 912 F.2d at 60 (3d Cir.), *cert. dismissed*, 111 S. Ct. 806 (1990). Nevertheless, whether *Grady* will survive remains to be seen. *See supra* note 1.

ing to define the scope of double jeopardy protection. In *Grady*, the Court announced a new double jeopardy test by reaffirming the *Blockburger* test and further holding that the double jeopardy clause bars prosecuting a defendant twice for the same conduct. The *Esposito* court erred when it applied the *Garrett* test because *Garrett* should be limited to its facts. Moreover, the Supreme Court has held that complex statutory crimes should not be tested by a different double jeopardy standard than simple course of conduct crimes.

The *Esposito* court also erred when it held that *Grady* did not mandate a finding that the defendant's second prosecution would be barred under the double jeopardy clause. Since the defendant would have been prosecuted twice for the very same distribution of cocaine, *Grady* would mandate that the second prosecution be barred under the double jeopardy clause.

Application of the *Grady* test to successive prosecutions involving RICO, such as the defendant faced in *Esposito*, results in a prohibition of the second prosecution. If this is not what Congress intended, Congress must explicitly inform the Court of this so that the Court can fashion a RICO double jeopardy test which meets the requirements of congressional intent.

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