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Fifth Amendment--Double Jeopardy

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FIFTH AMENDMENT—DOUBLE JEOPARDY

United States v. Sanford, 429 U.S. 14.
United States v. Morrison, 429 U.S. 1.
United States v. Martin Linen Supply Co., 97 S. Ct. 1349 (1977).
Lee v. United States, 97 S. Ct. 2141 (1977).
Jeffers v. United States, 97 S. Ct. 2207 (1977).
Brown v. Ohio, 97 S. Ct. 2221 (1977).

The Supreme Court in the 1976 Term dealt with two distinct double jeopardy issues in deciding a series of cases interpreting the double jeopardy clause. The Court in the first group of cases addressed the issue of whether the Government may try a defendant twice for the same statutory offense. In the second group of cases, the Court dealt with the question of whether an individual charged with violation of two statutory offenses could be successively convicted of both crimes.

The issue of successive prosecutions for the same statutory offense arose in four different factual settings. In *United States v. Sanford,*[1] the Court held that the double jeopardy clause did not prohibit a Government appeal of the dismissal of an indictment which followed a hung jury. In *United States v. Lee,*[2] the Government was not barred from appealing a mid-trial dismissal which had been initiated by the defendant. The Court in *United States v. Martin Linen Supply Co.,*[3] held that the attachment of jeopardy prevented a Government appeal from a judgment of acquittal following a hung jury. Finally in *United States v. Morrison*[4] the Court held that double jeopardy was not implicated in Government appeals from post-verdict suppression of evidence rulings.[5]

Because of the different factual circumstances involved in each case, it is difficult to reconcile the Court's rulings. However, these cases are illustrative of several new developments in the law of double jeopardy. First, *Morrison,* and *Martin Linen Supply* all indicate the Court's newly settled rule that a trial judge's finding of guilt or innocence is constitutionally equivalent to a jury verdict. More importantly, three of the four cases signal a new focus by the Court in the reprosecution area. The Court will now look less at the form of the ruling or at the identity of the party deciding the question of guilt, and more at the substance of the ruling terminating the first trial. Of the four cases, only *Sanford* continues to rely on the earlier approach of creating mechanical rules to deal with double jeopardy questions. The result in *Sanford* may nevertheless be reconciled with the new trend because of the factual distinction that the trial judge in *Sanford* had relinquished jurisdiction over the case before the defendant received a favorable disposition.

In the second group of cases, the Court addressed the question of whether an individual could be successively convicted of two offenses for conduct arising out of the same act. The case of *Brown v. Ohio*[6] made applicable to the states the historic principle that an individual may not be convicted of a greater offense after conviction of a lesser included offense, or vice versa.[7] But at the same time, the Court in *Jeffers v. United States*[8] nullified the *Brown* rule in part, by holding that a defendant who objects to a Government motion to consolidate two closely related charges waives his double jeopardy rights.

[1] 429 U.S. 14 (1976).
[2] 97 S. Ct. 2141 (1977).
[3] 97 S. Ct. 1349 (1977).
[4] 429 U.S. 1 (1976). *Morrison* was decided together with United States v. Rose, 429 U.S. 5 (1976). The operative facts and result in *Rose* were identical to *Morrison.* Later in the Term, the Court decided United States v. Kopp, 429 U.S. 121 (1976). Again, the operative facts and result of *Kopp* are identical to *Morrison.*
[5] The Court decided one additional case dealing with the Government's right to reprosecute a defendant for the same statutory offense: Finch v. United States, 97 S. Ct. 2909 (1977). For the facts and rationale of *Finch,* see note 62 *infra.*
[6] 97 S. Ct. 2221 (1977).
[7] This principle is based on the "same evidence" test first stated in Morey v. Commonwealth, 108 Mass. 433, 434 (1871), and adopted by the Court in Gavieres v. United States, 220 U.S. 338 (1911).
[8] Harris v. Oklahoma, 97 S. Ct. 2912 (1977), also deals with the Government's right to successively prosecute for multiple offenses arising out of the same act. For the facts, rationale, and possibly important implications of *Harris,* see note 80 *infra.*

Jeffers reduced the defendant's double jeopardy rights.[9] Prior to *Jeffers*, it was the duty of the prosecutor to avoid double jeopardy problems when a defendant was charged with two closely related offenses. But as a result of *Jeffers*, the Government now has the right to prosecute twice for the "same offense" if the defendant objects to a consolidated trial or succeeds in severing the charges against him, notwithstanding the fact that the defendant may have legitimate reasons for objecting to a consolidated trial.[10]

I. Successive Prosecution For The Same Statutory Offense

Prior to the 1976 Term, one common element could be distilled from the cases in the reprosecution area of double jeopardy. Double jeopardy rights were not implicated until the attachment of technical jeopardy. Technical jeopardy attaches in a jury trial when the jury is sworn and empaneled, and in a bench trial when the judge begins to hear evidence.[11] Beyond this common element, however, the Court's cases were not consistent. The cases were inconsistent because the double jeopardy issue arose in several different factual situations and the Court applied a separate rule to each without considering whether the results were reconcilable. It had been established, for instance, that the Government could retry a defendant after a mistrial if there was a "manifest necessity" for the declaration of the mistrial,[12] and that the Government could appeal the dismissal of an indictment if the indictment was dismissed prior to the start of the first trial or subsequent to a jury verdict of guilt.[13] But the Government could not appeal from a directed verdict,[14] retry a defendant after a jury acquittal,[15] or appeal from the midtrial dismissal of an indictment.[16]

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[9] 97 S. Ct. 2207 (1977).

[10] The double jeopardy clause protects against reprosecution for the same offense after a conviction or reprosecution for the same offense after an acquittal. *See* North Carolina v. Pearce, 395 U.S. 711, 717 (1969). If one offense is a lesser included offense of the other, the "same evidence" test is violated, and the two offenses constitute the same offense for purposes of double jeopardy. Brown v. Ohio, 97 S. Ct. at 2226 (1977). If the defendant is successively tried for both statutory offenses, his double jeopardy rights are violated. Prior to *Jeffers*, the Court permitted reprosecution for the "same offense" in only one situation: when the events necessary to complete the greater crime had not yet occurred at the time prosecution for the lesser offense had begun. Diaz v. United States, 223 U.S. 442, 448–49 (1912). For facts, see note 79 *infra*.

[11] Serfass v. United States, 420 U.S. 377, 388 (1975).

[12] United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824). The test stated in *Perez* provides that a defendant may be reprosecuted after the declaration of a mistrial if there was a "manifest necessity" for the declaration of the mistrial or "the ends of public justice would otherwise be defeated." *Id.* The current interpretation of the *Perez* rule may be found in Illinois v. Somerville, 410 U.S. 458, 464 (1973). "A trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial."

[13] Serfass v. United States, 420 U.S. 377 (1975), held that the Government could appeal the dismissal of an indictment prior to the attachment of jeopardy. United States v. Wilson, 420 U.S. 332 (1975), held that the Government could appeal a post-verdict dismissal. The rationale of both cases is that the double jeopardy clause is directed not at Government appeals, but at the threat of successive prosecutions. A successful appeal of a pre-trial dismissal would enable the Government to try a defendant for the first time, and not the second time. A successful appeal of a post-verdict dismissal would reinstate the jury verdict. Neither situation presents any threat of a successive prosecution.

[14] Fong Foo v. United States, 369 U.S. 141 (1962), held that the double jeopardy clause did not permit a Government appeal from a directed verdict. Chief Justice Burger in his dissent in *Martin Linen Supply Co.* stated that the rationale of the Court in *Fong Foo* was that had the Court permitted an appeal from a directed verdict, the defendant would be deprived of his right to proceed to the jury and to have the proceedings against him ended. 97 S. Ct. at 1360 n.* (Burger, C.J., dissenting).

Directed verdicts were abolished in the federal system and were replaced by judgments of acquittal when Federal Rule of Criminal Procedure 29 was enacted. Rule 29(a) now allows the granting of judgments of acquittal prior to the submission of the case to the jury.

[15] United States v. Ball, 163 U.S. 662 (1896), held that a defendant may not be reprosecuted after a jury acquittal. Kepner v. United States, 195 U.S. 100 (1904), held, on the basis of a Phillipine statute incorporating the language of the double jeopardy clause, that the Government could not appeal a jury verdict of acquittal. The fact that the Government may not retry a defendant after a jury acquittal is a fundamental policy of the double jeopardy clause. *See* United States v. Wilson, 420 U.S. at 339–43.

[16] United States v. Jenkins, 420 U.S. 358 (1975), prohibits a Government appeal if, on remand, further proceedings to determine the guilt or innocence of the accused would be required. Lee v. United States, 97 S. Ct. 2141 (1977), discussed in the principal text, substantially limits *Jenkins*.

The Court began the 1976 Term with a *per curiam* double jeopardy decision which neither clarified nor conflicted with any of these earlier technical rules. The case did, however, clarify earlier dictum regarding the role of the judge as a factfinder for double jeopardy purposes. In *United States v. Morrison*,[17] the Court held that there was no distinction between a jury verdict in a jury trial and the judge's general finding in a bench trial.

Following a bench trial, the defendant in *Morrison* was found guilty of possession of marihuana with intent to distribute.[18] Before sentence was imposed, the trial judge suppressed the drug evidence on the basis of an intervening Supreme Court decision limiting border patrol searches.[19] While the Government appeal from the *Morrison* ruling was pending in the court of appeals, however, the search limitation was held by the Supreme Court not to be retroactively effective.[20] The Government, on the basis of these later decisions, moved for summary reversal, but the court of appeals dismissed, finding that the double jeopardy clause would bar retrial.[21]

The Supreme Court summarily reversed. Appeals were permitted from post-verdict dismissals, the Court stated, because a successful appeal would not require further proceedings, but would simply reinstate the jury verdict of guilt. A Government appeal was permitted in this case, the Court reasoned, because a judge's general finding of guilt is equivalent to a jury verdict for purposes of double jeopardy. A successful appeal would reinstate the judge's general finding, and like the case of the jury verdict, no further proceedings would be required.[22]

Morrison represents a clear affirmance of the Court's dictum in *United States v. Jenkins*.[23] In that case, the Court held that the Government could not appeal the dismissal of an indictment if, on remand, further proceedings going to the elements of the offense charged would be required. The defendant in *Jenkins* had been tried by the judge instead of a jury, but the Court's holding applied only to the judge's role as interpreter of the law, not to his role as factfinder. Nevertheless, in dictum, the Court noted the significance of the growing trend toward the employment of bench trials in place of jury trials, and stated that for purposes of double jeopardy analysis there could be no distinction between a jury verdict and a judge's finding in a bench trial.[24] When the Court in *Morrison* was confronted with the situation of the trial judge acting as the trier of fact, it turned the dictum of *Jenkins* into law.

Like *Morrison*, the Court's second double jeopardy case did not conflict with prior precedent. In *United States v. Sanford*,[25] the Court reaffirmed the rule that double jeopardy rights are not implicated until technical jeopardy has attached. The Court in *Sanford* applied the concept of technical jeopardy to permit a Government appeal from an adverse ruling prior to an anticipated second trial.

The defendant in *Sanford* was charged with illegal game hunting in Yellowstone National Park. The jury deadlocked, and a mistrial was declared. Several months later, while the Government was preparing to try the defendant again, the district court dismissed the indictment, finding on the basis of evidence introduced at the first trial that the Government had consented to the defendant's allegedly illegal acts.[26]

The court of appeals dismissed the Government's appeal, relying on *United States v. Jenkins*.[27] It will be recalled that *Jenkins* held that double jeopardy barred a Government appeal from the dismissal of an indictment if further adjudication of guilt would be necessary. The Court in *Jenkins* distinguished that result from the case of a mistrial, where retrial would be permitted. The Court reasoned that the critical

[17] 429 U.S. 1 (1976).

[18] The defendant was charged with violation of 21 U.S.C. § 841(a)(1) (1970).

[19] Almeida-Sanchez v. United States, 413 U.S. 266 (1973).

[20] United States v. Peltier, 422 U.S. 531 (1975); Bowen v. United States, 422 U.S. 916 (1975).

[21] 429 U.S. at 1–3. Morrison was stopped at an immigration checkpoint in Truth or Consequences, New Mexico, and drugs were discovered in a search of his car. *Almeida-Sanchez* limits the right of the government under the fourth amendment to conduct roving border patrol searches.

[22] *Id.* at 3–4.

[23] 420 U.S. 358 (1975).

[24] "Since the Double Jeopardy Clause of the Fifth Amendment nowhere distinguishes between bench and jury trials, the principles given expression through that Clause apply to cases tried by a judge." *Id.* at 365.

[25] 429 U.S. 14 (1976).

[26] 536 F.2d 871, 871–72 (9th Cir. 1976).

[27] *Id.* at 872.

element of the *Jenkins* trial proceeding was that it terminated in the defendants favor,[28] but the Court did not state why this factor was of such importance. In *Sanford,* the court of appeals adopted this reasoning and concluded that the proceedings had terminated in the defendant's favor when the indictment was dismissed.[29]

The Supreme Court summarily reversed. It stated that when a mistrial is declared, the Government has a right to retry a defendant, and until jeopardy has attached in the second trial, a Government appeal is permitted from any order dismissing the indictment. The judge's dismissal of the indictment, was for purposes of double jeopardy analysis, similar to a pre-trial ruling in the first trial.[30] Although the Supreme Court in *Sanford* recognized the vitality of the *Jenkins* rule, it limited the rule's application to those cases where the original trial judge retained jurisdiction over the parties.[31] The trial judge in *Sanford* had relinquished jurisdiction over the case when he declared a mistrial.

The Supreme Court's decision in *Sanford* rests solidly on past precedent. The purpose of the double jeopardy clause, the Court has stated, is to prevent successive prosecutions for the same offense.[32] The Court, however, has carved out an exception to this general rule in the case of mistrials when a hung jury or procedural unfairness in the first trial makes it impossible to reach a verdict in the first trial or to submit the case to the jury. It is not so much a successive prosecution that is barred, but an unnecessary prosecution that is prohibited.[33]

The jury in *Sanford* could not reach a verdict, making a second trial necessary to resolve the question of guilt or innocence. Since the indictment was dismissed prior to a second trial which the Government had a right to prosecute, a Government appeal from the dismissal was allowed.

The case of *United States v. Martin Linen Supply Co.*[34] was the third significant double jeopardy case considered by the Court last term. In holding that the Government could not appeal a judgment of acquittal following a hung jury, the Court was at the same time consistent with its rulings in *Morrison* and *Rose* and apparently inconsistent with its holding in *Sanford.*

The defendants in *Martin Linen Supply Co.* were charged with contempt for an alleged violation of an antitrust consent decree. The individual defendant was acquitted, but the jury was deadlocked as to the guilt of the two corporate defendants.[35] The judge dismissed the jury and orally declared a mistrial, but reserved the right to consider whether a judgment of acquittal should be entered.[36] The defendants made timely motions for judgments of acquittal pursuant to Federal Rule of Criminal Procedure 29(c); two months later the motions were granted.[37]

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[28] 429 U.S. at 16.

[29] 536 F.2d at 872.

[30] 429 U.S. at 16.

[31] *Jenkins* on its face prohibits all Government appeals from the dismissal of an indictment. Appeals are forbidden because a successful appeal would result in the successive prosecution of the defendant. The rationale of *Serfass* does not apply to this case, see note 13 *supra,* because the successful appeal in *Serfass* would enable the Government to try the defendant for the first time and not the second time. The Court, however, has recognized an exception to the general rule that a defendant cannot be prosecuted twice for the same offense if the first proceeding ends in a mistrial, see note 12 *supra,* and this exception was applied in *Sanford* to permit the Government appeal.

[32] United States v. Wilson, 420 U.S. at 342-43.

[33] The Court has followed this rule with but one exception, stated in Illinois v. Somerville, 410 U.S. 458 (1973). The Court in *Somerville* held that the defendant could be retried after the prosecutor had requested a mistrial because of an incurable defect in the indictment which would have necessitated reversal on appeal if the defendant had been convicted. The second prosecution in *Somerville* was unnecessary in the sense that the defendant possibly could have been acquitted in the first trial if the proceedings against him had been allowed to continue. This exception, however, does not affect the validity of this statement for the discussion of *Sanford.*

[34] 97 S. Ct. 1349 (1977).

[35] Martin Linen Supply Co. was charged with Texas Sanitary Towel Co. and the president of both companies, William Troy.

[36] The Supreme Court's opinion does not clearly state what occurred during the trial. A more complete statement of the facts is available in the opinion of the court of appeals at 534 F.2d 585, 587 (5th Cir. 1976). When the deadlocked jury returned to the courtroom, the judge discharged the jury, and declared a mistrial. After the jurors departed, the judge stated to counsel that in his opinion this case was one of the weakest contempt cases he had ever seen, and he advised counsel that he would consider timely motions for a judgment of acquittal.

[37] 97 S. Ct. at 1351-52. FED. R. CRIM. P. 29(c) provides in relevant part: "If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made . . . ."

When the Government appealed the ruling under the Criminal Appeals Act, the court of appeals dismissed, citing *Jenkins*.[38] The court stated that the Government may not appeal, if, on remand, further proceedings would be required to determine the guilt or innocence of the accused. Granting certiorari solely to decide whether judgments of acquittal under Rule 29(c) are appealable by the Government pursuant to the Criminal Appeals Act, the Supreme Court affirmed the decision of the court of appeals.

The Court, compared the judgment of acquittal in this case with its previous decisions barring a Government appeal from a jury acquittal and a directed verdict,[39] and found that permitting an appeal in this case would be consistent with these past decisions. A fundamental policy of the double jeopardy clause, the Court observed, was that a jury acquittal could not be reviewed. The acquittal in this case was a true acquittal because it represented "a resolution, correct or not, of some or all of the factual elements of the offense charged.[40]

The majority concluded that a directed verdict, like the jury acquittal, could not be reviewed. The Court stated that the acquittal mechanism in Rule 29 of the Federal Rules of Criminal Procedure replaced the directed verdict and only modified that prior procedure by giving the judge greater flexibility in timing his action.[41] Because the Court could not distinguish the judgment of acquittal in this case from a jury acquittal or directed verdict, a Government appeal could not be permitted.

Justice Stevens concurred in the result. He believed that the Criminal Appeals Act did not authorize Government appeals from judgments of acquittal. The language of the Act does not mention appeals from such judgments, he stated; nor does the legislative history indicate that Congress intended to include appeals from this type of judicial ruling within the provisions of the Act. He therefore felt that it was not necessary to reach the constitutional question.[42]

Chief Justice Burger dissented. He asserted that the majority's decision in *Martin Linen Supply Co.* could not be distinguished from the result in *Sanford.* He also argued that *Fong Foo v. United States,*[43] the case relied on by the

[38] 534 F.2d 585 (5th Cir. 1976). 18 U.S.C. § 3731 (1970), *as amended by* Omnibus Crime Control and Safe Streets Act Amendments, Pub. L. No. 91-644, tit. III, §14(a), 84 stat. 1890, provides in relevant part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

The Government may not appeal on adverse ruling in a criminal case unless authorized by statute. *See* United States v Sanges, 144 U.S. 310 (1892). First enacted in 1907, the original Criminal Appeals Act ch. 2564, 34 stat. 1246, allowed Government appeals in only a limited number of circumstances. The right to appeal was based on common law rules of pleading like the plea in bar. The present statute was enacted in 1971. For a discussion of the limitations and complexities of the pre-1971 statute, see *Double Jeopardy and Government Appeals of Criminal Dismissals,* 52 TEX. L. REV. 303, 309-11 (1974); United States v. Wilson, 420 U.S. at 336-37.

[39] United States v. Ball, 163 U.S. 662 (1896); Fong Foo v. United States, 369 U.S. 141 (1962); Kepner v. United States, 195 U.S. 100 (1904). For holdings of these cases, see notes 14-15 *supra.*

[40] 97 S. Ct. at 1355.

[41] *Id.* at 1356.

[42] *Id.* at 1357-60. (Stevens, J., concurring). Justice Stevens stated that the plain words of the statute did not authorize Government appeals from judgments of acquittal and that there was nothing in the legislative history indicating that Congress intended a contrary result. For the text of the statute, see note 38 *supra.* Justice Stevens noted that the Senate report, S. Rep. 91-1296 (1970), stated that the purpose of the 1971 amendments was "to resolve serious problems that have frequently arisen with respect to the right of the United States to appeal rulings which terminate prosecutions other than by judgment of acquittal." *Id.* at 2. The Conference Committee removed the language preventing appeals from judgments of acquittal and substituted the language permitting an appeal from any decision dismissing an indictment or information as long as the appeal did not violate the double jeopardy clause. H.R. Rep. No. 91-1768 (1970). But the Justice stated the Conference Committee did not state it intended to permit appeals from judgments of acquittal when it removed the language from the bill.

The bill's sponsor, the Justice continued, did not intend to authorize such a radical change in the law as would have occurred if judgments of acquittal were appealable. The bill was intended as "noncontroversial legislation which would do away with unnecessary and perplexing jurisdictional problems in appeals by the Government in criminal cases." 97 S. Ct. at 1359 (Stevens, J., dissenting) (quoting 116 CONG. REC. 35659 (1970) (remarks of Senator Hsuka)).

[43] 369 U.S. 141 (1962). For the holding in *Fong Foo* and its suggested rationale, see note 14, *supra.*

majority for the proposition that Government appeals from a directed verdict were barred, could be readily distinguished on its facts. An appeal is not permitted from a directed verdict, Burger stated, because a successful appeal would deprive the defendant of his right to have the case settled once and for all by a jury verdict of acquittal during the first trial. He believed that interest was not implicated in *Martin Linen Supply Co.* because the judgment of acquittal was granted after the jury deadlocked. The Court's argument that the judgment of acquittal represented a final resolution of the case on its facts was also misdirected, he claimed, since a judgment of acquittal is not a ruling on the facts, but a ruling on the law.[44]

The Court's decision in *Martin Linen Supply Co.*, like its decision in *Sanford*, is a defensible exposition of the double jeopardy clause grounded on past precedent. The Court in this case simply extended its rulings, which had barred appeals from jury acquittals and directed verdicts, to cover a new type of acquittal—the judgment of acquittal—as applied to a fact situation not previously addressed by the Court.[45] The double jeopardy clause has historically been directed against the threat of reprosecution after a finding of insufficient evidence. The Court in *Martin Linen Supply Co.* extended the doctrine which bars appeal from a finding of insufficient evidence made prior to submission of the case to the jury or as a result of the jury verdict itself; the doctrine now includes the finding of insufficient evidence following the discharge of a hung jury. This new holding represents a difference in timing from past decisions, but it otherwise does not differ from prior decisions.

By extending the doctrine as it did, the Court decided *Martin Linen Supply Co.* consistently with the rationale of *Morrison* which was that the trial judge's ruling on the facts should be constitutionally equivalent to a jury verdict. If the jury cannot reach a verdict, the trial judge, by entering a judgment of acquittal, replaces the jury in its role of determining guilt or innocence. In *Martin Linen Supply Co.*, like *Morrison*, the trial judge's finding of fact has been given constitutional significance.

Chief Justice Burger was technically correct, insofar as a judgment of acquittal is a ruling of law, and not a ruling on the facts—at least in the case of a jury trial. In deciding whether a judgment of acquittal should be entered, the trial judge does not rule on the weight of the evidence but rather on its sufficiency.[46] He does not rule on whether the defendant is guilty or innocent, but rather on whether the evidence is sufficient for the jury to make a decision of guilt or innocence.

But the fact that the judgment of acquittal is a ruling of law, and not of fact, is irrelevant to the outcome of this case. If the evidence is insufficient to submit to the jury, the trial judge would necessarily reach the same result if he were acting as trier of fact. In both cases the defendant would be innocent.

Nevertheless, the Chief Justice was not mistaken in his criticism that *Martin Linen Supply Co.* is inconsistent with *Sanford*. In that case, as in *Martin Linen Supply Co.*, there was a judicial determination following a hung jury that the defendant was innocent of the offense charged. And although the judge in *Sanford* dismissed

[44] 97 S. Ct. at 1360 (Burger, C.J., dissenting). In deciding whether the Government may appeal an adverse ruling or retry the defendant, the right of the defendant to proceed to a verdict is an important factor considered by the Court.

Retrial is not permitted after a mistrial if the case could have been submitted to the jury. *See* Downum v. United States, 372 U.S. 734 (1963) (retrial barred when a mistrial was declared due to the failure of the prosecutor to subpoena a witness); United States v. Jorn, 400 U.S. 470 (1971) (retrial barred when judge declared a mistrial to permit witnesses to be advised of their right against self-incrimination).

For a good discussion of the right to proceed to a verdict, see Illinois v. Somerville, 410 U.S. 458 (1973), where the Court, over vigorous dissent, concluded that within the narrow facts of the case, the state's interest in conserving its prosecutorial resources outweighed the defendant's right to proceed to a verdict.

The Court has not explicitly considered the right of the defendant to proceed to a verdict in deciding the cases governing appeals from dismissals or acquittals, but the cases have been decided consistently with this right. *See* United States v. Wilson, 420 U.S. 332 (1975) (post-verdict ruling, appeal allowed); United States v. Jenkins, 420 U.S. 358 (1975) (mid-trial dismissal, appeal prohibited); Fong Foo v. United States, 369 U.S. 141 (1962) (directed verdict, appeal prohibited); Kepner v. United States, 195 U.S. 100 (1904) (jury verdict of acquittal, appeal prohibited); United States v. Ball, 163 U.S. 662 (1896) (jury verdict of acquittal, no retrial).

[45] The Court, prior to *Martin Linen Supply Co.*, had not addressed the question of whether the Government could appeal a judicial ruling entered in the first proceeding after a mistrial had been declared.

[46] United States v. Isaacs, 516 F.2d 409, 410 (5th Cir.), *cert. denied*, 423 U.S. 936 (1975); United States v. Consolidated Laundries Corp., 291 F.2d 563, 574 (2d Cir. 1961).

the indictment and did not grant a judgment of acquittal, the Court in *Martin Linen Supply Co.* emphasized that the form of the judge's ruling is immaterial for double jeopady purposes.[47] It is the substance of the ruling that counts.

The difference in the two decisions which seems to explain the opposite results is that in *Sanford* the indictment was dismissed prior to a second trial; whereas in *Martin Linen Supply Co.*, because the trial judge reserved the right to grant a judgment of acquittal when he declared a mistrial, the granting of the judgment of acquittal acted as the formal termination of the first proceeding. Why this distinction should have constitutional significance was not clear at the time the two cases were decided. It was subsequently clarified by the later decision of *Lee v. United States.*[48]

In *Lee v. United States,* the Court resolved a conflict between the results in the line of cases prohibiting retrial after the dismissal of an indictment and the line of cases permitting retrial after a mistrial.[49] The indictment charging Lee with theft was defective on its face. It failed to allege the specific intent required by the statute.[50] At the close of the prosecutor's opening statement in the bench trial, defendant's counsel moved to dismiss the indictment. The judge reserved decision on the motion, but granted it at the close of the evidence. Under a subsequent corrected indictment Lee was convicted of the same statutory offense.[51]

The court of appeals affirmed the conviction, stating that unlike the usual mid-trial dismissal, the proceeding in this case did not terminate in the defendant's favor. Secondly, the Court reasoned that if retrial would have been permitted on appeal had Lee been convicted during the first trial,[52] it should also be permitted if the defendant obtains a dismissal prior to conviction on the first trial.[53]

The Supreme Court affirmed. It stated that the action of the trial judge in this case was the functional equivalent of a mistrial, and that dismissals granted on grounds consistent with reprosecution would be treated like mistrials for double jeopardy purposes. The Court concluded further that if the first proceeding is terminated on the belief—correct or not—that the defendant could not be convicted of the offense charged, then an appeal or retrial would be barred.[54] The Court continued by stating that retrial is permitted after a defendant requests a mistrial, because the defendant is not deprived of his right to proceed to a verdict. Although the request for a dismissal in this case resulted from the negligent failure of the prosecutor to draft the indictment properly, the Court permitted retrial since there was no evidence of prosecutorial or judicial overreaching.[55]

Justice Brennan concurred in the opinion. He stated that it would have been a different case if the trial judge had been given sufficient time to rule on the defendant's motion prior to trial. If the judge had been given sufficient time, his failure to rule on the motion would have placed the defendant in jeopardy needlessly. The trial judge's action in this case was reasonable, however, because the defendant's motion was made at such a late point in the proceedings that the judge did not have sufficient time to rule on it prior to the attachment of jeopardy, nor did defendant's counsel object to a continuance of the trial pending a ruling on the motion.[56]

Justice Rehnquist also wrote a separate concurrence, stating that he thought a precedential

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[47] 97 S. CT. at 1354 n.9.

[48] 97 S. Ct. 2141 (1977).

[49] See notes 13 & 16 *supra.*

[50] Lee stole two billfolds from the blind operator of a concession stand at a United States Post Office in Ft. Wayne, Indiana. He was charged with violation of the Assimilative Crimes Act, 18 U.S.C. §13 (1970), and the applicable Indiana statute, IND. CODE ANN. § 35-17-5-1 (Burns 1971) (repealed 1977), which provided that an individual commits theft when he "knowingly . . . obtains or exerts unauthorized control over property of the owner . . . and . . . intends to deprive the owner of the benefit of the property." 97 S. Ct. at 2143 n.1 (quoting § 35-17-5-1).

[51] 97 S. Ct. at 2143–44.

[52] United States v. Ball, 163 U.S. 662 (1896), in addition to holding that a defendant could not be retried after a jury acquittal, held that a defendant could be retried after a conviction was reversed due to a defective indictment.

[53] 539 F.2d 612 (7th Cir. 1976).

[54] 97 S. Ct. at 2146.

[55] The Court reached this conclusion by applying United States v. Dinitz, 424 U.S. 600 (1976). *Dinitz* held that a defendant who requests a mistrial waives his right to object to a retrial if the request was not prompted by prosecutorial or judicial overreaching. Since the dismissal in *Lee* was the functional equivalent of a mistrial, and the dismissal had been requested by the defendant, it was a relatively simple matter for the Court to reach its holding by applying *Dinitz.*

[56] 97 S. Ct. at 2148–49 (Brennan, J., concurring).

foundation had been laid in *United States v. Wilson*[57] and *United States v. Jenkins* which prohibited retrial after a mid-trial dismissal but permitted reprosecution after a mistrial. This simplistic "bright-line" analysis, he stated, was circumvented by the Court in *Martin Linen Supply Co.*, a decision in which he did not participate. There, the Court held that the Government could not retry a defendant after the factfinding portion of the trial had aborted into a mistrial. Justice Rehnquist demonstrated that he more than any other member of the Court, clearly saw that the Court was moving away from the "bright-line" analysis which had clung to the security of mechanical rules based on the timing and form of the termination of the first proceeding. He interpreted the *Martin Linen Supply Co.* rejection of *Jenkins* and *Wilson* as the rejection of these mechanical rules used to determine the double jeopardy question. However, having indicated the Court's abandonment of the mechanical approach, Justice Rehnquist refused to state what analysis he believed had been substituted by the Court. In noncommittal language he simply said that he now felt free to reexamine the assumptions he voiced in the majority opinion in *Jenkins*. He concurred in *Lee* because he felt that the majority had articulated a historically defensible discussion of the double jeopardy clause.[58]

Justice Marshall dissented. He stated that the Court should exercise its supervisory powers and prohibit retrial when the first trial was terminated as a result of the prosecutor's negligence.[59]

The importance of *Lee* in the overall scheme of double jeopardy analysis does not lie in its result, but in the process of reasoning employed by the Court to reach the result. The Court in *Jenkins* had stated that it was of critical importance that the proceedings had terminated in the defendant's favor.[60] But the case, on its face, prohibited any Government appeal from a midtrial dismissal. *Lee* limits the rule in *Jenkins* to those cases where the first proceeding terminated on the belief that the defendant could not be convicted of the offense charged.

The limitation of *Jenkins* in *Lee* explains, but perhaps does not justify, the opposite results of *Martin Linen Supply Co.* and *Sanford*. On the one hand, *Martin Linen Supply Co.* is consistent with the reasoning in *Lee* because the first proceeding ended with the judgment of acquittal, granted on the belief that the defendant could not be convicted of the offense. In *Sanford* however, the facts are distinguishable. There, the first proceeding ended when the hung jury caused the declaration of a mistrial, which, by definition, could not indicate whether the defendant was guilty or innocent. The first trial, therefore, ended on grounds consistent with reprosecution.

Martin Linen Supply Co., as explained by the reasoning in *Lee*, has carved out an important exception to the general rule permitting retrial after a mistrial. The case establishes that the declaration of a mistrial which meets the requirement of the "manifest necessity" test will not automatically permit retrial. In the case of a mistrial, as in the case of a dismissal, the proceedings must end on grounds consistent with reprosecution. If the trial judge should declare a mistrial, but at the same time retain jurisdiction to consider a motion for the dismissal of the indictment or a judgment of acquittal, and subsequently grant one of these motions, a Government appeal or retrial is barred.

The reprosecution cases in the 1976 Term have made some important changes in the outline of double jeopardy law. The requirement that the defendant be in technical jeopardy before he may invoke double jeopardy rights has not changed. Double jeopardy protections may also not be invoked if there is no threat of a successive prosecution. Thus it appears that the Government may still appeal the post-verdict dismissal of an indictment. But in the context of post-verdict judgments of acquittal, an area not yet addressed by the Court, predictions based on past precedent may not be as viable. In *Jenkins*, the Court stated in dictum that the Government could appeal a post-verdict judgment of acquittal.[61] The strong emphasis by the Court in *Morrison*, and *Martin Linen Supply Co.* on the importance of the trial judge's finding of fact, however, now leaves open the question whether the Government may appeal such a ruling.

As stated earlier, the most important change in the Court's thinking is the shift away from

[57] 420 U.S. 332 (1975).
[58] 97 S. Ct. at 2149 (Rehnquist, J., concurring).
[59] *Id.* at 2149-50 (Marshall, J., dissenting).
[60] 420 U.S. at 365 n.7.
[61] *Id.* at 365.

basing the availability of retrials or Government appeals on whether the first trial ended in a mistrial, acquittal, or dismissal. Instead the Court is now inquiring into the reasons for the termination of the first proceeding—permitting retrial if the first proceeding terminated on grounds consistent with reprosecution, but barring retrial or appeal if the first proceeding terminated on the belief that the defendant could not be convicted of the offense as charged.

As Justice Rehnquist may have forseen in his concurrence in *Lee,* the Court's new approach may presage further abandonment of the technical rules of the past. No longer would the Government's right to further prosecute the defendant be regulated at the point in the proceedings when the Government's attempt to convict was momentarily halted; rather, regulation would be based on the lower court's determination that, due to the insufficiency of the Government's case, further prosecution would be pointless.[62] Such an approach would better comport with the double jeopardy clause's purpose of preventing vexatious prosecution and harassment of the defendant. But as the Court in *Sanford* made clear in reaffirming the requirement of technical jeopardy, it is not yet ready to extend this new approach to its logical limits.

II. Multiple Punishments for the Same Act

In the first group of cases in the 1976 Term, the Court dealt with the issue of whether a Government appeal or retrial would place the defendant twice in jeopardy for the same statutory offense. In *Brown v. Ohio*[63] and *Jeffers v. United States*,[64] the defendants were each convicted of separate statutory offenses in successive trials. The issues the Court addressed in these two cases were (1) whether the two statutory offenses constituted the "same offense" within the meaning of the double jeopardy clause, and (2) whether the defendant, by objecting to the consolidation of charges against him, could waive his right against successive prosecutions for the "same offense."

Prior to the 1976 Term, the Court had applied two separate doctrines to determine whether an individual could be successively convicted of related charges or convicted of related charges in one trial—the "same evidence" test and the "rule of lenity." The "same evidence" test as a doctrine of double jeopardy prohibits successive prosecution of closely related charges if the same elements required to prove one statutory offense are sufficient to convict of the other.[65] The "rule of lenity" is a

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[62] Justice Rehnquist, however, in his dissenting opinion to Finch v. United States, 97 S. Ct. 2909, 2910–12 (1977) (Rehnquist, J., dissenting), explained what he believed the new approach of the Court should be. The Court in *Finch* held that the Government may not appeal from a trial judge's determination of innocence when the parties have submitted the case for a ruling on an agreed statement of facts. The defendant in *Finch* was found standing on land owned by the state of Montana. But his fishing lure was found in a river reserved for use by the Crow Indians. Had he committed an offense? The district court, on the basis of an agreed statement of facts, thought he had not and dismissed the information. 395 F. Supp. 205 (1975).

In a short per curiam decision, the Supreme Court summarily concluded that jeopardy had attached when the parties submitted the case for a ruling and that a Government appeal was barred because the proceedings had ended "on the ground, correct or not, that the defendant simply [could not] be convicted of the offense charged." 97 S. Ct. at 2910 (quoting *Lee,* 97 S. Ct. at 2146).

Justice Rehnquist, joined by the Chief Justice, dissented. 97 S. Ct. at 2910–12 (Rehnquist, J., dissenting). The Justice criticized the Court for concluding without discussion that jeopardy had attached. He also criticized the Court for failing to consider the effect on double jeopardy doctrine of *Martin Linen Supply Co., Lee* and United States v. Dinitz, 424 U.S. 600 (1976). For the facts of *Dinitz,* see note 94 *infra*; for its holding, see note 55 *supra*. Going beyond the thesis advanced in the principal text that a defendant may not be reprosecuted if the trial judge believes he cannot be convicted of the offense charged, a position supported by the majority in *Finch,* Justice Rehnquist emphasized that the recent cases demonstrate that the Court is moving toward a balancing and fairness test. Without stating definitively that he would hold that a Government appeal was appropriate in this case, Justice Rehnquist concluded by stating that he would have set the case for oral argument.

In stating the factors to be considered in his balancing test, Justice Rehnquist neglected to mention two related principles developed by the Court in the recent term that support its finding in *Finch*: (1) a trial judge's finding of innocence should be the constitutional equivalent of a jury acquittal and (2) a defendant may not be reprosecuted if the first proceeding terminated on the belief that the defendant cannot be convicted of the offense charged.

[63] 97 S. Ct. 2221 (1977).

[64] 97 S. Ct. 2207 (1977).

[65] The test in its present form was first stated in Morey v. Commonwealth, 108 Mass. 433, 434 (1871),

rule of statutory construction. If Congress has not clearly indicated an intent to punish a defendant for two closely related offenses arising out of a single act, the Court will favor leniency and either void the second conviction, if the defendant was successively convicted, or reduce the punishment if the defendant was convicted of two offenses in a single trial.[66] In *Brown v. Ohio*[67] the Court reaffirmed the constitutionality of the "same evidence" test, applied it to the states, and conferred constitutional status to one aspect of the "rule of lenity."

Brown stole an automobile and kept it in his possession for nine days. He was convicted of joyriding, a misdemeanor, in the county where he was apprehended. He was later convicted of auto theft, a felony, in the county where the car was first taken.[68]

The Ohio Court of Appeals affirmed the auto theft conviction, and the Ohio Supreme Court denied leave to appeal. The appellate court conceded that joyriding and auto theft

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and was applied by the Court in Gavieres v. United States, 220 U.S. 338 (1911), to determine if a defendant could be successively convicted of two offenses. It is commonly cited as the *Blockburger* "same evidence" test from Blockburger v. United States, 284 U.S. 299, 304 (1932), and it provides that:

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

The title of the test does not accurately describe how it works. The same evidence may be presented in a particular case to prove violation of two separate statutory offenses and both convictions may be upheld. This occurred in Gore v. United States, 357 U.S. 386 (1958) (proof of the single fact that the defendant possessed unstamped narcotics was sufficient to prove the commission of two offenses). The test is violated only if the same evidence *required* to prove one crime supplies the proof *required* to prove another crime. In other words, to violate the test, one of the crimes must be a lesser included offense of the other.

For an explanation of the test, criticism and suggested alternatives, see 52 WASH. L. REV. 142, 159–70 (1976).

[66] The best statement of the "rule of lenity" is found in Note, *Twice in Jeopardy*, 75 YALE L.J. 262, 316 (1965) (footnotes omitted). The term the "rule of lenity" is a shorthand expression for the common-law principle that penal statutes should be strictly construed. Under this rule:

> [D]oubts concerning legislative intent should be resolved against the creation of multiple units of conviction. The underlying rationale is that the legislature can clearly prescribe the punishment it sees fit for any particular crime, and a person's liberty should be "forfeited only if the legislature has clearly indicated that it should and only to the extent that it has plainly authorized."

Id. The rule has two separate branches. The first branch prohibits multiple punishment for the same or similar offense when Congress has not clearly indicated an intent to punish an individual for each discrete portion of one continuous criminal transaction. This branch of the rule was applied in *In re* Nielsen, 131 U.S. 176 (1889). A Mormon was charged with unlawful cohabitation for conduct occurring over a period of several months. He was subsequently charged with adultery with the same woman on a date one day after the alleged unlawful cohabitation period ended. The Court reversed the adultery conviction.

The second branch of the rule prohibits multiple punishment for two closely related offenses or multiple convictions of a single offense for conduct arising out of one act if Congress did not intend such punishment. *See, e.g.*, Heflin v. United States, 358 U.S. 415 (1959) (defendant bank robber could not be punished for both bank robbery and receiving stolen money); Ladner v. United States, 358 U.S. 169 (1958) (defendant liable for one assault where single discharge from a shotgun wounded two officers); Prince v. United States, 352 U.S. 322 (1957) (crime of entry with intent to rob not cumulatively punishable with the consummated robbery); Bell v. United States, 349 U.S. 81 (1955) (transporting more than one woman at one time in interstate commerce constitutes one violation of the Mann Act).

If a defendant is successively prosecuted for two offenses in violation of the "rule of lenity," the second conviction will be reversed. *See In re* Nielsen, 131 U.S. 176 (1889). If prosecution results in multiple convictions for the same statutory offense, all convictions except one will be vacated. *See* Bell v. United States, 349 U.S. 81 (1955). If the defendant is convicted of two related offenses for conduct arising out of one act, the court will determine which offense Congress intended to punish, and the other sentence, but not conviction, will be vacated. *See* Heflin v. United States, 358 U.S. 415 (1959).

[67] 97 S. Ct. 2221 (1977).

[68] Brown was charged with joyriding under OHIO REV. CODE ANN. § 4549.04(D) (repealed 1974, current version at OHIO REV. CODE ANN. § 2913.03 (A) (1974 Baldwin Replacement Unit)) which provided that, "No person shall purposefully take, operate, or keep any motor vehicle without the consent of its owner." He was charged with auto theft under OHIO REV. CODE ANN. § 4549.04(A) (repealed 1974, current version at OHIO REV. CODE ANN. § 2913.02 & 2913.71 (1974 Baldwin Replacement Unit)) which provided, "No person shall steal any motor vehicle." *See* Legislative Service Commission Note (1973), OHIO REV. CODE ANN. § 2913.03 (1974 Baldwin Replacement Unit).

constituted the "same offense" under the double jeopardy clause; it stated that the elements of proof required to convict of the two crimes were identical except that the auto theft charge required the additional proof of an intent to permanently deprive the owner of his property. The court nevertheless affirmed the conviction, concluding that the original taking and the subsequent operation of the car nine days later were two separate criminal acts.[69]

The United States Supreme Court reversed. The Court agreed with the state court's interpretation that the two offenses constituted one offense under the double jeopardy clause, but disagreed with the conclusion that the defendant's convictions were based on two separate acts.

In determining that the defendant was convicted twice for the same offense under the double jeopardy clause, the Court applied the "same evidence" test of *Blockburger v. United States,*[70] which provides that an individual may not be convicted of two offenses if each requires proof of a fact that the other does not.[71] Since the crime of joyriding required proof of no fact not necessary to prove auto theft, the defendant could only be convicted of one offense. It was immaterial to the Court that the defendant was first convicted of the lesser offense and later convicted of the greater offense. The test would also have been violated if he had first been convicted of the greater offense.[72] The Court concluded by observing that if the Ohio legislature had provided that joyriding was a separate offense for each day the car was operated, or if the Ohio courts had construed the statute to that effect, the Court would have had to reconsider its decision.[73]

Justice Brennan, joined by Justice Marshall, concurred. They adhered to their long-held belief that the double jeopardy clause requires that all charges arising out of one criminal transaction be tried in one proceeding.[74] Justice Blackmun, joined by Chief Justice Burger and Justice Rehnquist, dissented. The dissenters agreed with the Court's double jeopardy analysis, but asserted that the Ohio courts could properly find that the defendant's acts were sufficiently distinct to constitute two offenses.[75]

A state court's interpretation of state statutes is ordinarily binding on the Supreme Court.[76] In *Brown,* however, the Court disregarded the Ohio court's interpretation that the defendant had committed two separate criminal acts. By stating that the defendant committed one act and not two, the Supreme Court implicitly conferred constitutional status to the "rule of lenity" and applied it to the states. This rule has been applied to determine both whether the legislature intended to convict of two related charges arising out of one act, and whether the legislature intended multiple convictions for the same statutory offense arising out of one continuous criminal transaction.[77] In *Brown,* the Court determined that the defendant had been engaged in one continuous criminal transaction. It was not necessary, however, to reach the question of the legislative intent to impose cumulative punishment for the two closely related offenses, since the double jeopardy clause, through the "same evidence" test, barred successive conviction of both crimes.

The "same evidence" test used in *Brown* had been solidly established in the Court's precedents.[78] The case is novel, however, in its application of the "rule of lenity" to the states. The rule now has constitutional status in the context of determining whether the legislature

[69] 97 S. Ct. at 2224.

[70] 284 U.S. 299, 304 (1932).

[71] If a defendant is successively convicted of two offenses violative of the "same evidence" test, the court will vacate the second conviction. *Brown,* 97 S. Ct. 2221. The test does not have constitutional status if an individual is convicted of two closely related offenses in one trial. The test, in the latter context, functions as a judicial presumption under the "rule of lenity" that Congress did not intend to punish the defendant for both offenses. *See* Ianelli v. United States, 420 U.S. 770, 785 n.17 (1975). For a discussion of the complexities of the "same evidence" test, see note 65 *supra,* and for the "rule of lenity," see note 66 *supra.*

[72] 97 S. Ct. at 2227.

[73] 97 S. Ct. at 2227 n.8.

[74] 97 S. Ct. at 2227–28 (Brennan, J., concurring). Justice Brennan, joined by Justices Marshall and Douglas, had earlier stated this interpretation in Ashe v. Swenson, 397 U.S. 436, 448 (1970) (Brennan, J., concurring). The Justices believed that requiring that all charges be tried against the defendant in one proceeding would enforce the ancient prohibition against vexatious multiple prosecutions.

[75] 97 S. Ct. at 2228 (Blackmun, J., dissenting).

[76] *See* Garner v. Louisiana, 368 U.S. 157, 169 (1961).

[77] For discussion of the "rule of lenity," see note 66 *supra.*

[78] See note 65 *supra.*

intended to create multiple units of conviction for one continuous criminal transaction. It remains to be seen whether the Court will apply the test when a defendant in a state case is convicted of two closely related offenses not violative of the "same evidence" test.

The use of the "same evidence" test to void a second conviction for the same offense is not without exceptions. The first exception permits reprosecution of the greater offense when all the events necessary for completion of the greater crime have not taken place at the time of the prosecution for the lesser offense.[79] A second exception arguably established by the Court in the recent Term is that a defendant cannot be convicted in successive trials of both felony murder and the underlying felony, although conviction of both offenses would not violate the "same evidence" test.[80] The third exception was established in *Jeffers v. United States*[81] which was issued the same day as *Brown*. *Jeffers* holds that a defendant who successfully objects to a Government motion to consolidate closely related charges and who fails to raise the issue that one offense may be a lesser included offense of the other, waives his right to object to successive prosecutions for what is constitutionally the same offense.

Jeffers was the head of a narcotics distribution network in Gary, Indiana, known as the "Family."[82] Jeffers was charged with conspiracy to distribute heroin and cocaine in violation of 21 U.S.C. § 846[83] with nine other co-conspirators. Additionally, he was charged with conducting a continuous criminal enterprise to distribute heroin and cocaine in violation of 21 U.S.C. § 848.[84]

[79] Diaz v. United States, 223 U.S. 442, 448–49 (1912). The defendant was convicted in successive trials of assault and battery and homicide. The victim had not yet died at the time the assault and battery prosecution began.

[80] This proposition was possibly established in Harris v. Oklahoma, 97 S. Ct. 2912 (1977), although it is probable the Court reached this result by misconstruing the opinion of the Oklahoma Court of Criminal Appeals in the same case, 555 P.2d 76 (Okla. Crim. 1976).

In the course of an armed robbery, a confederate of the defendant shot and killed a grocery store clerk. The defendant was convicted of felony murder. He was subsequently convicted of robbery with firearms. The Supreme Court in a per curiam decision reversed the robbery conviction on the ground that successive convictions of armed robbery and felony murder would violate the double jeopardy clause. The Court reached this result by concluding that the Oklahoma courts require proof of the completed felony before an individual may be convicted of felony murder. The Oklahoma court stated: "In a felony murder case, the proof of the underlying felony is needed to prove the intent necessary for the felony murder conviction." 555 P.2d 76, 80–81 (Okla. Crim. 1976).

If by this statement, the state court meant that it was necessary to prove the completion of the underlying felony before an individual could be convicted of felony murder, then the underlying felony would be a lesser offense of felony murder, and successive prosecutions would violate the double jeopardy clause. This was the interpretation given this statement by the Supreme Court: "When, as here, conviction for a greater crime, murder, cannot be had without conviction for the lesser crime . . . the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater offense." 97 S. Ct. at 2912. But unfortunately, this is probably not what the Oklahoma court intended this statement to mean. The statement of the state court may as easily be read as meaning that proof of an attempt to commit the underlying felony is required to convict of felony murder, but proof of the completion of the underlying felony is not required. The "same evidence" test would then not be violated, because to prove armed robbery, it is not necessary to prove a killing, and convict of felony murder, it is not necessary to prove that the underlying felony was completed, but only attempted. For an explanation of the "same evidence" test, see note 65 *supra*.

The cases cited by the Oklahoma court support the contention that the Oklahoma court did not intend to require proof of the completion of the underlying felony as an element of a felony murder offense. *See, e.g.*, State v. Hicks, 530 S.W.2d 396, 400–01 (Mo. App. 1975) (cited with approval in Harris v. State, 555 P.2d at 81 n.1) ("the offense of robbery requires proof of a taking of property; the offense of murder requires proof of a killing.").

[81] 97 S. Ct. 2207 (1977).

[82] 97 S. Ct. at 2210. This narcotics operation was reported to have netted $5,000 per day.

[83] Section 846 provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter [Control and Enforcement] is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

[84] Section 848, which requires concerted action with five or more persons, provides, in relevant part:

> (a)(1). Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment [and] to a fine of not more than $100,000.
>
> . . . .
>
> (b). For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—
>
> . . . .
>
> (2) such violation is a part of a continuing series of violations of this subchapter . . .

Jeffers was charged in separate indictments. Prior to the conspiracy trial, the Government made a motion to consolidate the charges. Jeffers objected, arguing that much of the evidence admissible against him and the other co-defendants on the conspiracy count would inculpate him on the continuing criminal enterprise charge. The district court, apparently agreeing with Jeffers, denied the Government's motion. Jeffers was subsequently convicted of conspiracy.

Jeffers, prior to the continuing enterprise trial, moved to dismiss the indictment on the ground that he was being tried twice for the same offense. The Government in response argued that conspiracy was not a lesser included offense of conducting a continuing criminal enterprise. The district court agreed, denied Jeffers' motion, and Jeffers was again convicted.[85]

The court of appeals affirmed the continuing criminal enterprise conviction. It stated that conspiracy was a lesser included offense of conducting a continuous criminal enterprise, but that in the case of complex statutory crimes such as this, the double jeopardy clause would not bar successive prosecutions.[86]

The Supreme Court affirmed the convictions, but vacated the fine imposed on the conspiracy count. The first issue addressed in the plurality opinion authored by Justice Blackmun[87] was whether successive convictions for conspiracy and engaging in a continuing criminal enterprise violated the *Blockburger* "same evidence" test. To answer this question, the Court inquired whether conspiracy was a lesser included offense of engaging in a continuing criminal enterprise.

The plurality stated that the legislative history indicated that Congress intended that the "in concert" requirement in the continuing criminal enterprise statute require proof of the existence of a criminal agreement; therefore, conspiracy was a lesser included offense. But the opinion further stated that it was unnecessary to definitively decide the lesser offense question because, assuming *arguendo* that conspiracy was a lesser included offense, Jeffers had nevertheless waived his double jeopardy rights. He did so by objecting to the Government's motion to consolidate the charges against him, and by failing to raise the issue that conspiracy might be a lesser included offense. The Government was thus allowed to prosecute Jeffers successively for both offenses. The plurality noted in addition that a waiver would be implied if the defendant successfully requested a severance of the charges in a joint trial.[88]

After disposing of Jeffers' double jeopardy claim, the Court concluded that Congress, in view of the comprehensive penalty structure of the criminal enterprise statute, did not intend cumulative punishment for the two offenses. Employing the "rule of lenity," the Court vacated the fine imposed for conspiracy.[89] It was

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

(c). In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and [parole shall not be allowed].

[85] *Id.* at 2211–12.

[86] 532 F.2d 1101 (7th Cir. 1976). The court concluded that Ianelli v. United States, 420 U.S. 770 (1975), created an exception to the "same evidence" rule in the case of complex statutory crimes.

The defendant in *Ianelli* was charged with violation of penal statutes almost indistinguishable from the statutory provisions in *Jeffers*. He was charged with violation of 18 U.S.C. § 371, the general conspiracy statute; and 18 U.S.C. § 1955, a statute making it a crime to conduct a gambling operation with five or more persons in violation of state law. The defendant was convicted of both offenses in one trial, so the double jeopardy clause was not at issue. See note 71 *supra*.

The Supreme Court in *Ianelli* stated the "same evidence" test serves as a judicial presumption of legislative intent, and stated conviction of §§ 371 and 1955 did not violate the test. The unlawful gambling operation statute did not require proof of an agreement, and the conspiracy statute did not require proof of the existence of an unlawful gambling operation. 420 U.S. at 785 n.17.

In light of the above, it is unclear how the court of appeals construed *Ianelli* to create an exception to the "same evidence" test in the case of complex statutory crimes. The Supreme Court in its opinion in *Jeffers* and the parties in their briefs ignored the argument of the court of appeals.

[87] The opinion was joined by Chief Justice Burger and Justices Rehnquist and Powell.

[88] 97 S. Ct. at 2217–18.

[89] 97 S. Ct. at 2218–20. The fine was vacated under the branch of the "rule of lenity" preventing multiple punishment for two offenses for conduct arising out of a single criminal transaction. See note 66 *supra*.

not necessary to vacate the fifteen year prison sentence Jeffers received for participating in a conspiracy, because Jeffers had been sentenced to life imprisonment without probation or parole[90] for engaging in the continuing criminal enterprise.

Justice White concurred in part, agreeing with the Government's position that conspiracy and engaging in a continuing criminal enterprise were distinct offenses. He disagreed with the plurality position that Congress did not intend cumulative punishment for the two offenses.[91]

Justice Stevens, joined by Justices Brennan, Stewart and Marshall, dissented. The dissenters asserted that to preserve a constitutional right, the defendant in *Jeffers* was required to advise the Government of the legal consequences of its acts. The Government was as responsible as the defendant for the fact that two trials occurred. The dissenters pointed out that the Government returned separate indictments against Jeffers, decided to join him with other defendants and tried him on lesser charges first.[92]

The plurality's waiver theory in *Jeffers* nullifies in large part the lesser included and greater offense rule stated in *Brown*. To get around *Brown,* the prosecutor need only obtain a joint indictment or consolidate the charges against the defendant. If the defendant successfully objects, he waives his double jeopardy rights against successive prosecutions.

The plurality's argument that Jeffers waived his double jeopardy rights by objecting to a consolidation of the charges against him is not supported by precedent.[93] The Government had argued in its brief that Jeffers had waived his constitutional protection by objecting to a consolidated trial citing *United States v. Dinitz*[94] for support. *Dinitz* held that in the absence of judicial or prosecutorial overreaching, a defendant who requests a mistrial waives his right to object to a retrial. Like the defendant in *Dinitz,* the Government reasoned that Jeffers was solely responsible for the two trials. If he had not objected to the consolidated trial, he would have only been subject to one trial, and no double issue would have arisen.[95]

But *Dinitz* is not applicable to this case. Retrial is not permitted after the declaration of a mistrial unless the jury could not reach a verdict, or unless for reasons of procedural fairness it is not possible to submit the case to the jury.[96] The Court has limited the rule allowing retrials after mistrials because to permit a broader rule would deprive the defendant of his right to proceed to a verdict.[97] If the defendant has elected to terminate the trial, the reason for prohibiting a retrial is gone, and he may be reprosecuted. When a defendant objects to a consolidated trial, other rights are implicated, including the right to a fair trial. The petitioner in *Jeffers* had argued that to construe his act of objecting to consolidation as a waiver of double jeopardy would have forced him to make a Hobson's choice. He would have been forced to give up one constitutional right, his right to a fair trial, in order to preserve another, his right against double jeopardy.[98]

The plurality recognized the validity of this argument by stating there might be cases where the defendant's right to a fair trial and his right against double jeopardy would conflict. However, it reasoned that it would not be necessary to decide the issue in *Jeffers,* because Jeffers could easily have avoided this conflict by requesting a severance from his co-defend-

[90] 97 S. Ct. at 2213.

[91] 97 S. Ct. at 2220 (White, J., concurring). The Government had argued that the "in concert" requirement in the continuing criminal enterprise statute did not require proof of the existence of a criminal agreement. *See* 21 U.S.C. § 848(b)(2)(A) (1970), *supra* note 82. One ringleader could control "five innocent dupes" who would not have the specific intent required to convict of conspiracy. 97 S. Ct. at 2214. If the Government's argument had been accepted by the plurality, the elements of the offenses in *Jeffers* would be indistinguishable from the elements of the penal statutes in *Ianelli,* and the "same evidence" test would not have been violated. See note 86 *supra.*

[92] 97 S. Ct. at 2220 (Stevens, J., dissenting).

[93] The plurality cited no precedent in its opinion for its novel argument, but adopted argument advanced by the Government in its brief. *See* Brief of Respondent at 32-49.

[94] 424 U.S. 600 (1976). In *Dinitz,* one of petitioner's co-counsel was excluded from the courtroom after making repeated references to nonexistent evidence and expressing personal opinions during the opening statement. One of defendant's other co-counsel then requested a mistrial on the ground that he was unable to proceed with the defense. The court granted the motion. 424 U.S. at 602-04. There was no evidence of either prosecutorial or judicial overreaching in the case.

[95] Brief of Respondent at 34-35.

[96] See note 12 *supra.*

[97] See note 44 *supra.*

[98] 97 S. Ct. at 2217 n.21.

ants.[99] Jeffers had conceded in his reply brief that had he been tried separately, his right to a fair trial would not have been violated. But he asserted that the double jeopardy problem could have easily been solved if the *Government* had requested that he be tried separately.[100]

By forcing the defendant to request a severance, in order to preserve his double jeopardy rights guaranteed by the constitution, the defendant must request that he be prosecuted by a method of trial where these rights are not implicated. However, the dissent pointed out that the defendant should not be blamed for failing to request a severance because "defense counsel—not having . . . [read] today's plurality opinion—had no reason to believe he had a duty to suggest it."[101]

The plurality did not explain what the result would have been had Jeffers raised the double jeopardy issue in his objection to the consolidated trial. One possibility is that the burden of requesting a severance from the co-defendants would shift to the Government if the defendant raised the double jeopardy issue and the trial judge had ruled that one charge was a lesser included offense. The dissent characterized the obligation of the defendant to raise the constitutional issue as a requirement that the defendant inform the prosecution about the legal consequences of its act.[102] In response the plurality stated: "The right to have both charges resolved in one proceeding, if it exists, was petitioner's."[103]

Prior to *Jeffers*, if the defendant had successfully objected to a Government motion to consolidate or had succeeded in severing the charges against him, the Government could not later try him for the other offense if one of the offenses was a lesser included offense. *Jeffers* shifts the risk from the Government to the defendant to make sure double jeopardy rights are not violated when he is charged with two closely related offenses.[104] *Jeffers* makes it possible for a defendant to waive his double jeopardy rights without being aware that there is a double jeopardy issue in his case. When charged with closely related offenses, the defendant, due to the complexities of the "same evidence" test,[105] cannot be certain if one of the offenses is a lesser included offense of the other. This problem is particularly acute when a defendant is charged with a complex statutory offense similar to the charge in *Jeffers*. Defendant's counsel cannot determine if one offense is a lesser included offense of the other because the statute may not have received judicial interpretation.

Added to this uncertainty is the obligation imposed on the defendant by the Court to request an alternative method of trial or waive his guaranteed rights, or the obligation to raise the double jeopardy issue and perhaps force the Government to select an alternate method of trial. Because of the realities of trial strategy, time, or expense, selection of an alternative method of trial may not be in the defendant's best interests. Due to these considerations, the defendant may elect the more certain course and object to the Government's motion or seek to sever the charges against him; but again, he would thereby unintentionally relinquish a right which he was not even sure was at issue in the case—his right to be free from double jeopardy.

The *Jeffers* decision will probably not affect the rights of a defendant tried alone on closely related charges. If so charged, the single defendant could probably not successfully object to a Government motion to consolidate. But in a multiple defendant trial, where evidence against one defendant may inculpate another, to preserve both his constitutional right to a fair trial and his constitutional right to be free from double jeopardy, the defendant will have to request a severance from his co-defendants.[106]

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[99] *Id.*

[100] Reply Brief of Petitioner at 6.

[101] 97 S. Ct. at 2220 n.3 (Stevens, J., dissenting).

[102] *Id.* at 2221.

[103] *Id.* at 2218 n.22 (plurality opinion).

[104] The waiver argument in *Jeffers* has no precedential foundation. See note 93 *supra*. And since it is an exception to the general rule that a defendant cannot be successively convicted of the "same offense," *Brown*, 97 S. Ct. 2221, prior to *Jeffers* the Government could try the defendant only once if the motion to consolidate the charges was denied. *Jeffers* permits a defendant to be successively prosecuted for the same offense in violation of the "same evidence" test.

[105] See note 65 *supra*. As examples of the complexities of the test, the Government argued all the way to the Supreme Court that the defendant committed two distinct offenses, and the wording of the statutes in *Jeffers* is almost indistinguishable from the wording of the statutes in *Ianelli*, where the Court held that the "same evidence" test was not violated. See note 91 *supra*.

[106] The defendant in *Jeffers*, in his argument against consolidation of the charges, stated that the evidence against his co-defendants on the conspiracy count would unfairly inculpate him on the continuing

The multiple punishment cases in this last Term have significantly changed the law. The double jeopardy "same evidence" test has been applied to the states, and at least one aspect of the "rule of lenity" now has constitutional dimensions. But in *Jeffers* the Court has established that if the defendant is partly responsible for the fact that he was successively prosecuted, he will waive his double jeopardy rights. Only four Justices supported the waiver theory, and the only precedent that the Government could cite in support of the argument was a case readily distinguishable. The plurality waiver theory, therefore, is ripe for reevaluation.

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criminal enterprise count. 97 S. Ct. at 2212. This problem does not exist if a defendant is tried alone on a multiple indictment. If the charges are so closely related as to qualify as the same offense under the double jeopardy clause, the evidence to prove one offense will prove the other, and the problem of unfair prejudice will not arise.