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THE DOUBLE JEOPARDY DEFENSE AND MULTIPLE PROSECUTIONS FOR CONSPIRACY

William H. Theis*

A was tried and acquitted for conspiracy to distribute cocaine. It was alleged that he had conspired with B and C to sell cocaine in Chicago in December of 1993.

A is now charged with conspiracy to sell cocaine in Chicago and Milwaukee. His alleged co-conspirators are D and E, and their conspiracy is alleged to have occurred in April of 1993.

A wishes to plead double jeopardy. Is this a good plea? Who decides—judge or jury? When is the plea raised and when is it resolved? What is the test of double jeopardy? What is the standard of proof?

The Supreme Court has given little guidance on these issues. Although in the last twenty years the high court has considered the Double Jeopardy Clause1 in numerous cases,2 its opinions

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1. The Fifth Amendment to the United States Constitution provides, in relevant part: “nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.” U.S. Const. amend. V. Double jeopardy protection is also available to defendants in state court prosecutions because the Fourteenth Amendment to the United States Constitution incorporates the protections found in the Fifth Amendment and makes those protections fully applicable to state court prosecutions. Benton v. Maryland, 395 U.S. 784, 794 (1969) (overruling Palko v. Connecticut, 302 U.S. 319 (1937)).

2. The Court has repeatedly held, however, despite persistent criticism, e.g., Daniel A. Braun, Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism, 20 Am. J. Crim. L. 1 (1992), that under the “dual sovereignty doctrine” it is permissible to prosecute an individual in state court and then to bring a prosecution for the same conduct in federal court and vice versa. E.g., Bartkus v. Illinois, 359 U.S. 121, 123-24 (1959); cf. Heath v. Alabama, 474 U.S. 82, 87 (1985) (holding succes-
have not focused on the unique problems raised by the double jeopardy plea in successive conspiracy prosecutions. The lower courts have decided a number of cases raising these issues, but their opinions have not evolved clear rules or even a clear approach.

I. A BRIEF INTRODUCTION TO DOUBLE JEOPARDY

The double jeopardy cases deal with two basic situations. In the first, the question is whether the defendant may be prosecuted in separate proceedings under separate statutes and receive multiple punishments for what seems a single incident or course of conduct. For example, if a defendant conspires to sell drugs and actually sells drugs on a particular occasion, may he be prosecuted twice, once for the conspiracy, and once for the sale? Current law says he may be prosecuted twice. In the second situation, the question is whether the defendant may be prosecuted more than once and receive multiple punishments under the same statute for what seems a single incident or course of conduct. For example, if a defendant sells drugs to A and then sells drugs to B minutes later, may the defendant be prosecuted for two sales? Current law allows separate prosecutions for these two violations of the same statute. Hybrids of these two situations arise when the defendant is prosecuted for multiple different statutory offenses, as well as multiple alleged violations of a single statutory offense.

Successive prosecutions for conspiracy fall within the framework of the second prototype. The resolution of a double jeopardy plea is often less than clear in this second prototype because the nature of the conspiracy offense is so different from other offenses. Unlike the sale of drugs, the robbery of a bank, or the theft of an automobile, the starting and stopping points of a conspiracy are not clearly defined. Courts must examine a course of conduct and decide whether one conspiracy or more than one conspiracy exists, which is considerably different from deciding whether there was one bank robbery or two bank robberies.

The general principles of the double jeopardy doctrine relevant to this problem have remained relatively unchanged. Although the law in this

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5. These problems also arise when a single prosecution is based on multiple counts, and the question is whether the defendant can be subjected to cumulative punishment. E.g., Braverman v. United States, 317 U.S. 49 (1942).
area has shifted, the current law looks much the same as it did when Morey v. Commonwealth declared in 1871:

A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offence.

Courts have often cited this general statement in double jeopardy cases involving each prototypical situation.

The first situation—multiple proceedings under multiple statutes—has been frequently litigated. Although, by definition, successive prosecutions for conspiracy fall into the second situation, it is important to summarize the major cases in the first situation, since these cases have provided a context for decisions involving multiple prosecutions for conspiracy.

The Supreme Court, over one hundred years ago, adopted a Morey formulation to assess the double jeopardy defense when multiple prosecutions are brought under multiple statutes. This doctrine has come to be known as the Blockburger rule, named after the leading case of Blockburger.


108 Mass. 433 (1871).

Id. at 434.

The most recent statement by the United States Supreme Court of the Morey rule is found in Dixon, 113 S. Ct. at 2849.


Ex parte Nielsen, 131 U.S. 176, 187-88 (1889).
Blockburger relied heavily on Morey and re-stated Morey as follows:

Each of the offenses created requires proof of a different element. The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.\(^1\)

Thus, Blockburger approved separate punishments in a single prosecution for selling drugs without the required stamp and for selling the same quantity of drugs without a written order.\(^2\) Although this test examines and compares the elements of the statutes in question, it has often been referred to as a "same evidence" test.\(^3\)

Blockburger's "same evidence" test has received continuous criticism.\(^4\) In Grady v. Corbin,\(^5\) the Court substantially modified Blockburger by

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14. Id. at 304.
15. In Blockburger, the Court dealt with multiple punishments imposed on multiple charges tried at a single trial. It has been persuasively argued that Blockburger would lead to ludicrous results if it were applied to multiple punishments imposed after multiple trials. See Thomas, An Elegant Theory, supra note 10, at 847. The Supreme Court's most recent pronouncement in Dixon takes the position that Blockburger is equally relevant to multiple punishments following a single trial and to multiple punishments following multiple trials:

The centerpiece of Justice SOUTER's analysis is an appealing theory of a "successive prosecution" strand of the Double Jeopardy Clause that has a different meaning from its supposed "successive punishment" strand. We have often noted that the Clause serves the function of preventing both successive punishment and successive prosecution, see, e.g., North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), but there is no authority, except Grady, for the proposition that it has different meanings in the two contexts. That is perhaps because it is embarrassing to assert that the single term "same offence" (the words of the Fifth Amendment at issue here) has two different meanings—that what is the same offense is yet not the same offense.

113 S. Ct. at 2860 (emphasis in original).


17. For example, George C. Thomas III asserts:

If "same offense" means the same statutory offense, the term is self-defining, but the protection is very limited. Many criminal statutes overlap in scope, thus creating the possibility of a series of trials based on the same conduct. For example, one commentator noted that a single sale of narcotics could prove the seller guilty of nine federal offenses. An interpretation of the Double Jeopardy Clause that permits nine trials for a single sale trivializes the clause and the finality principle that underlies it. The image of nine indictments, nine arraignments, nine preliminary examinations, nine jury selections, nine proofs of the same sale, nine jury deliberations, and nine verdicts—occurring over a period of years—is a darkly mocking picture of justice reminiscent of Kafka's The Trial.

Thomas, An Elegant Theory, supra note 10, at 847 (footnotes omitted).

adding a second layer of analysis. In *Grady*, the defendant pleaded guilty to drunk driving and failure to keep his automobile on the right side of the road. He was later indicted for vehicular homicide arising out of the same incident. He pleaded a double jeopardy defense based upon his earlier plea to the traffic offenses. Although *Blockburger* forbids reprosecution after conviction on a lesser included offense, these traffic offenses were not lesser included offenses to the homicide charge.

The Court did not abandon *Blockburger*, but ruled that *Blockburger* should be applied as a first inquiry. The Court made new law by declaring that, even though the second prosecution survived the *Blockburger* test, it might nonetheless be barred under the Double Jeopardy Clause. The Court saw inherent unfairness in allowing the government to bring successive prosecutions as a means of honing its trial strategy and practicing its presentation until the government "got it right." For that reason, a second prosecution would be barred, if, to establish an essential element of the offense, the government must prove conduct for which the defendant had already been prosecuted.

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19. The Court had faced much the same facts and contentions in an earlier case, *Illinois v. Vitale*, 447 U.S. 410 (1980), but had not given a definitive resolution of the issue, sending the case back to the state courts for further consideration.

20. *E.g.*, *Brown v. Ohio*, 432 U.S. 161, 169 (1977). But the Court has been unwilling to follow out the full implications of the lesser included offense doctrine when the greater offense is a non-traditional offense of a complex nature. See *Garrett v. United States*, 471 U.S. 773, 789 (1985) (prosecution for a predicate offense does not necessarily bar prosecution for a continuing criminal enterprise); *see also* *Amar & Marcus*, *supra* note 10, at 29-30 (persuasively arguing that the treatment of lesser included offenses is not consistent with *Blockburger*).

21. *See* *Schmuck v. United States*, 489 U.S. 705, 719 (1989) (lesser offense must be part of the legal definition of the greater offense, based upon a comparison of the statutory elements of the two offenses).

22. The *Grady* majority asserted that its decision was based on its earlier decisions in *Illinois v. Vitale*, 447 U.S. 410 (1980); *Harris v. Oklahoma*, 433 U.S. 682 (1977); *Brown v. Ohio*, 432 U.S. 161 (1977), and other authorities. *Grady v. Corbin*, 495 U.S. at 515-19. The dissenters took quite a different view. 495 U.S. at 536-44. Although *Grady* may have been presaged in the Court's earlier opinions, that opinion was by no means a restatement of obvious, well-accepted principles, as evidenced by its explicit overruling by *Dixon*. *See supra* note 6. *See also* United States v. Salerno, 964 F.2d 172 (2d Cir. 1992) (refusing to give *Grady* retroactive application because it was a new development).

23. The majority reasoned that the *Blockburger* test was developed in the context of multiple punishments imposed in a single prosecution. They concluded *Blockburger* was simply a rule of statutory construction and a guide to determining whether the legislature had intended multiple punishments. *Blockburger* was not deemed to speak to the factually different situation in which the defendant was prosecuted in successive prosecutions. *Grady*, 495 U.S. at 516-18. Just three years later, *Dixon* explicitly rejected the premise that the Double Jeopardy Clause can have a different meaning in different contexts and declared *Blockburger* to be the constitutional standard for both multiple punishments and multiple prosecutions. *Dixon*, 113 S. Ct. at 2860.

24. *See* *Tibbs v. Florida*, 457 U.S. 31, 41 (1982) (the Double Jeopardy Clause "prevents the State from honing its trial strategies and perfecting its evidence through successive attempts at conviction"); *Ashe v. Swenson*, 397 U.S. 436, 447 (1970) (in applying collateral estoppel, the Court prohibited "what every good attorney would do—he refined his presentation in light of the turn of events at the first trial"); *Green v. United States*, 355 U.S. 184, 187 (1957) ("the State should not be allowed to make repeated attempts to convict an individual for an alleged offense").
Under this new approach, the State was forbidden to prove vehicular homicide predicated on drunkenness or on failure to stay on the right-hand-side of the road. The prosecution could, however, rely on proof of speeding or some other traffic violation to prove its homicide charge. The Court noted that it was not adopting, and refused to adopt, a "same transaction" test. Under that test, which would amount to a rule of compulsory joinder, the Government would have been precluded from bringing any homicide charge because Corbin had already been punished for the transaction leading to the vehicular homicide. The Court did not seem to be overly troubled by the fact that, under its new test, the Government would still have considerable leeway to hone or at least modify its theory of the case through multiple prosecutions.

The Court soon had an opportunity to test the application of Grady. In United States v. Felix, the defendant had been convicted of various drug offenses, but had not been charged with conspiracy. He was later indicted for a conspiracy offense, and some of the overt acts in support of the conspiracy charge involved the same conduct underlying his prior convictions. Had Grady been rigorously applied, the Court would have rejected a conspiracy charge based on proof of the prior prosecuted conduct, although it would have allowed proof of conduct not previously prosecuted. But the Court did not reach this conclusion. It observed that conspiracy was an offense with elements different from the non-conspiracy offenses. The Court stressed that the agreement to violate the law was the essence of the conspiracy offense and was not an element of the previously prosecuted drug offenses. Its pre-Grady decisions had repeatedly held that conspiracy was an offense separate from offenses committed pursuant to a conspiracy. The Court refused to consider the suggestion that the agreement found in a conspiracy is proved by the same conduct that is often charged as completed offenses. The Court

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25. Grady, 495 U.S. at 523-24 n.15.
26. Under a "same transaction" test, the prosecution would be obliged to bring at one time all charges arising from a single criminal transaction. Justice Brennan has long advocated this reading of the Double Jeopardy Clause, e.g., Jones v. Thomas, 491 U.S. 376, 387-88 (1989) (Brennan, J., dissenting), but the Court has persistently refused to take this approach, e.g., Garrett v. United States, 471 U.S. 773, 790 (1985), except to the extent that a prior acquittal may create collateral estoppel, see Ashe, 397 U.S. at 436.
28. Id. at 388 ("Taken out of context, and read literally, this language [from Grady] supports the defense of double jeopardy.").
29. Id. at 389-90.
31. Felix, 503 U.S. at 391-92. The majority made explicit reference to the Second Circuit's opinion in United States v. Calderone, 917 F.2d 717 (2d Cir. 1990), rev'd and remanded, 112 S. Ct. 1657, aff'd, 982 F.2d 42 (2d Cir. 1992). Justices Stevens and Blackman, concurring in Felix, believed that since the essence of conspiracy is an agreement, the overt
did not overrule *Grady*, but held that *Grady* would not bar a conspiracy prosecution when the defendant had been prosecuted for a related completed offense. Instead, conspiracy prosecutions would be tested solely under the *Blockburger* rule. Although *Grady* was not explicitly overruled, the Court refused to go to the second step of the analysis mandated in *Grady*.

*Felix*'s large exception to *Grady* proved to be *Grady*'s undoing. The following year, the Court, relying in part on *Felix*, overruled *Grady* in *United States v. Dixon*. The *Felix* exception was viewed as an example of *Grady*'s unworkable nature and became a basis for overruling *Grady*. *Dixon* emphatically announced a return to *Blockburger* as the sole

acts in furtherance of the conspiracy are actually separate from the conspiracy itself. For that reason, relying on *Grady*, they would reach the same result as the majority. *Felix*, 503 U.S. at 392.

32. 113 S. Ct. 2849 (1993). *Dixon* was a consolidation of two cases, both arising in the District of Columbia. Dixon was given bond in a murder case and was ordered not to violate any laws while on bond. Dixon was later charged with a drug offense. Before he was tried on the drug offense, he was held in contempt of court based on proof of the drug offense. When he later stood trial on the drug offense, he asserted a double jeopardy defense, based on his prior punishment for contempt of court. In a companion case, Foster was put under a civil protective order not to assault his wife. He was tried on various contempt charges arising out of separate assaults on his wife. He was also indicted for assault, assault with intent to kill, and threats to kidnap for these same incidents, and he pleaded double jeopardy as a defense to the indictment.

Five of the Justices agreed to overrule *Grady* and to return to *Blockburger*. However, the application of *Blockburger* caused a serious division among the five Justices. Justices Scalia and Kennedy believed the Court must compare the elements of the offense that had to be established in the contempt proceeding with the elements of the offense in the criminal case. *Dixon*, 113 S. Ct. at 2856. Since the elements of the drug offense had to be established in order to prove contempt, Dixon could not be prosecuted for the same events charged in the indictment for the drug offenses. *Id.* at 2858. In Foster's case, the defendant could not be prosecuted for assault, since he had already been held in contempt of court for assault. Foster could be prosecuted, however, for the same incidents on charges of assault with intent to kill and threats to kidnap and injure. Since the civil protective order prohibited assault, his contempt was predicated solely on proof of the elements of assault, but not assault with intent to kill or threats to kidnap. Thus, consistent with *Blockburger*, these more serious charges were not barred by a double jeopardy plea. *Id.* at 2859.

Chief Justice Rehnquist and two other Justices agreed that *Grady* should be overruled, but argued that Justice Scalia's opinion did not properly apply *Blockburger*. *Id.* at 2865 (Rehnquist, C.J., concurring in part and dissenting in part). In their view, the underlying conduct—drug dealing or assault—was not an element of the offense of contempt of court. The elements of the offense are the existence of a court order and willful violation of that order. The Rehnquist opinion charged that once a court goes beyond those generic elements, it slips into a *Grady* analysis. *Id.* at 2867.

33. As Justice Scalia stated:

But *Grady* was not only wrong in principle; it has already proved unstable in application. Less than two years after it came down, in *United States v. Felix*, we were forced to recognize a large exception to it. There we concluded that a subsequent prosecution for conspiracy to manufacture, possess, and distribute methamphetamine was not barred by a previous conviction for attempt to manufacture the same substance. We offered as a justification for avoiding a "literal" (i.e., faithful) reading of *Grady" longstanding authority" to the effect that prosecution for conspiracy is not precluded by prior prosecution for the substantive offense. Of course, the very existence of such a large and longstanding "exception" to the *Grady* rule gave cause for concern that the rule was not an accurate expression of the law.

*Dixon*, 113 S. Ct. at 2863 (citations omitted).
double jeopardy test to be used both in multiple punishment cases and in successive prosecution cases.\textsuperscript{34} Although \textit{Dixon} did not hold that double jeopardy must be tested solely under the law existent as of the date when the Fifth Amendment was enacted,\textsuperscript{35} \textit{Dixon} stressed that \textit{Blockburger} has deep historical roots that must be respected.\textsuperscript{36} \textit{Blockburger} was transformed into the measure of constitutional protection.\textsuperscript{37} \textit{Grady} was overruled because it did not embody traditional double jeopardy law.

This passage implies that \textit{Grady} was intended to overrule and displace \textit{Blockburger}. \textit{Grady} never so held. Instead, \textit{Grady} added a layer of analysis. In \textit{Felix}, there was no double jeopardy, since the Court refused to go to the second level. \textit{Felix} did not demonstrate \textit{Grady}'s unworkability. \textit{Felix} illustrated the Court's unwillingness to go to \textit{Grady}'s second level.

\textbf{34.} As Justice Scalia stated:

We have often noted that the [Double Jeopardy] Clause serves the function of preventing both successive punishment and successive prosecution, but there is no authority, except \textit{Grady}, for the proposition that it has different meanings in the two contexts. That is perhaps because it is embarrassing to assert that the single term "same offense" (the words of the Fifth Amendment at issue here) has two different meanings—that what is the same offense is yet not the same offense.

\textit{Id.} at 2860 (emphasis in original) (citations omitted).

\textbf{35.} Justice Scalia's opinion implicitly acknowledged that a strictly historical approach would not work in the context of \textit{Dixon}, since the use of the contempt power in \textit{Dixon} was historically anomalous. That is, at common law, a court would not have entered the sort of orders that formed the heart of the contempt prosecutions in \textit{Dixon}. \textit{Id.} at 2855. The concurring Justices persuasively noted a rich historical tradition that allowed further prosecution after a finding of contempt. \textit{Id.} at 2865-66. (Rehnquist, C.J., concurring in part and dissenting in part).

In a broader sense, it is clear that the Court has not adhered to a strict historical reading of the Double Jeopardy Clause. See United States v. Wilson, 420 U.S. 332 (1975) (allowing a government appeal).

\textbf{36.} Justice Scalia stated: "\textit{Blockburger} analysis . . . has deep historical roots and has been accepted in numerous precedents of this Court. . . . [T]he 'same-conduct' rule it [\textit{Grady}] announced is wholly inconsistent with the earlier Supreme Court precedent and with the clearer common-law understanding of double jeopardy." \textit{Dixon}, 113 S. Ct. at 2860.

Justice Scalia's opinion for the Court traced \textit{Blockburger}'s roots back to \textit{The King v. Vandercomb}, 168 Eng. Rep. 455 (K.B. 1796). 113 S. Ct. at 2863. It is highly questionable that \textit{Vandercomb} provides any historical roots for \textit{Blockburger} or \textit{Dixon}. \textit{Vandercomb} dealt with an acquittal based upon a variance between charge and proof. Since the defendants in \textit{Vandercomb} had been acquitted for a variance, they were not in jeopardy for the burglary charged and could be once again charged for a burglary involving the same transaction. See authorities cited \textit{infra} note 53. The Supreme Court has rejected \textit{Vandercomb}'s rule. See \textit{Sanabria v. United States}, 437 U.S. 54, 75-78 (1978); \textit{Ball v. United States}, 163 U.S. 662 (1896) (acquittal on a defective indictment bars later prosecution, reviewing the English authorities and decisively rejecting them). Moreover, there was no question in \textit{Vandercomb} concerning offenses that had different elements, the issue in \textit{Dixon}.

Curiously, \textit{Vandercomb} referred to the then traditional practice of refusing to give a copy of the prior indictment to the defense. Instead, the defense was merely entitled to listen to a slow reading of the prior indictment. 168 Eng. Rep. at 457. No one suggests that this traditional aspect of double jeopardy law should be fixed as part of the Fifth Amendment. Indeed, traditional double jeopardy law had many unattractive features that have been decisively rejected. See, e.g., Ireland's Case, 7 How. St. Tr. 79 (1678) (court prohibited jury from deliberating because evidence insufficient to convict, and second prosecution allowed once crown had strengthened its case), \textit{discussed} in \textit{Thomas, An Elegant Theory}, supra note 10, at 843-44.

\textbf{37.} \textit{Garrett v. United States} had earlier declared that \textit{Blockburger} was merely a canon of statutory interpretation. 471 U.S. at 780.
Although five Justices agreed to overrule *Grady* and to return to *Blockburger*, they disagreed sharply on their application of *Blockburger* to the facts presented in *Dixon*. One faction charged—quite plausibly—that the other faction's application of *Blockburger* was no different than the *Grady* analysis. *Dixon* involved such unusual facts that it may be too soon to say what *Dixon* really means. *Dixon* may prove as ephemeral as *Grady* and may itself be overruled or greatly modified.

To return to the observation made earlier, double jeopardy law has not substantially changed since *Morey*. But double jeopardy is a vexing area of the law and could be subject to major changes.

In the first situation, the Court limits itself to a comparison of the statutory elements of the charged offenses. In the second situation the statutory elements of the charged offenses are identical. The Court must therefore make different inquiries, although in a general sense its inquiries fit within the classic *Morey* formulation. In this second situation, the Court compares the indictments and considers whether evidence sufficient to prove one indictment would be sufficient to prove the other indictment. For example, if *A* is convicted of murdering *B*, that conviction would not bar an indictment for murdering *C*. If the indictment charges *A* with murdering *B*, proof that *A* murdered *C* should be excluded. Even if allowed, either erroneously or for some limited purpose, *A*’s murder of *C* will not by itself sustain the charge that *A* murdered *B* and will not permit a finding of guilt, not even as to *C*’s murder, even though it might be clear that *A* murdered *C*.

Since, on an indictment for the murder of *B*, *A* cannot be convicted of *C*’s murder, *A*’s trial for murdering *B* is no bar to a later trial for murdering *C*.

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38. Chief Justice Rehnquist, writing for himself and Justices O’Connor and Thomas, reasoned that under *Blockburger*, the elements of the prior prosecution for contempt of court were the existence of a court order made known to the defendant and a willful violation of that order. The elements of contempt of court were in no way identical to the elements of the drug offenses and the assault offenses tried separately. *Dixon*, 113 S. Ct. at 2866. Justice Scalia, charged the concurring Justices, should have focused solely on the statutory elements, not on the underlying facts that were employed to establish contempt of court:

> By focusing on the facts needed to show a violation of the specific court orders involved in this case, and not on the generic elements of the crime of contempt of court, Justice Scalia’s double jeopardy analysis bears a striking resemblance to that found in *Grady*—not what one would expect in an opinion that overrules *Grady*.

*Id.* at 2867.

39. As noted earlier, the Court has a history of overruling itself in the double jeopardy area. See *supra* note 8 and accompanying text.

40. In *Department of Revenue v. Kurth Ranch*, 114 S. Ct. 1937 (1994), the Court, over vigorous dissent, ruled that a marijuana tax was impermissible double punishment. The ruling has started much debate about the double jeopardy treatment of civil forfeitures. See, e.g., United States v. $405,089.23 U.S. Currency, 33 F.3d 1210, 1216-22 (9th Cir. 1994).

41. See *supra* text accompanying note 8 (quoting *Morey* formulation).

42. Burton v. United States, 202 U.S. 344, 379-81 (1906); Piquett v. United States, 81 F.2d 75, 79 (7th Cir.), *cert. denied*, 298 U.S. 664 (1936); Ferracane v. United States, 29 F.2d 691, 692 (7th Cir. 1928); Henry v. United States, 15 F.2d 365, 366 (1st Cir. 1926).
This statement of the double jeopardy test presupposes the existence of the fatal variance doctrine. Anglo-American law has always recognized the doctrine that the indictment limits the evidence. The impermissible incongruity between charge and proof is called fatal variance or variance. In part, the doctrine is one of fairness; that is, the defendant should know what the charges are and should not be subjected to last-minute changes. The doctrine also rests on the constitutional right to indictment by grand jury.

II. THE VARIANCE DOCTRINE AND ITS RELATION TO DOUBLE JEOPARDY

The variance doctrine has traditionally led to some technical results. But, over the years, the concept of variance has been greatly diluted to the advantage of the prosecution, paralleling the development in civil procedure that amendments to the pleadings are freely allowed unless there is substantial prejudice to the opponent. Under the modern formulation of the variance doctrine, the prosecution may prove any crime...

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43. A number of federal cases distinguish between amendment, which is not allowed unless the amendment goes to a "formal" defect, e.g., Russell v. United States, 369 U.S. 749, 770 (1962) (dictum), and variance, which is allowed unless the variance is "prejudicial" and, hence, fatal, e.g., Stirone v. United States, 361 U.S. 212, 217 (1960). It is questionable whether this distinction has any real significance. In all instances, the question is whether the incongruity between pleading and proof is material or prejudicial. See United States v. Cina, 699 F.2d 853, 856-58 (7th Cir.), cert. denied, 464 U.S. 991 (1983).

44. As early as 1813, Chief Justice Marshall declared in The Schooner Hoppet v. United States, 11 U.S. (7 Cranch) 389, 394-95 (1813):

The rule that a man shall not be charged with one crime and convicted of another, may sometimes cover real guilt, but its observance is essential to the preservation of innocence. It is only a modification of this rule, that the accusation on which the prosecution is founded, should state the crime which is to be proved, and state such a crime as will justify the judgment to be pronounced.

The reasons for this rule are,

1st. That the party accused may know against what charge to direct his defence.

2d. That the Court may see with judicial eyes that the fact, alleged to have been committed, is an offence against the laws, and may also discern the punishment annexed by law to the specific offence. . . . It is therefore a maxim of the civil law that a decree must be secundum alegata as well as secundum probata. It would seem to be a maxim essential to the due administration of justice in all courts.

45. Russell, 369 U.S. at 766 (fundamental fairness requires that defendant know the charge and that the prosecution be unable to obtain a conviction on one ground and uphold it on another).


47. See Ex parte Bain, 121 U.S. 1 (1887) (indictment charged fraud on Comptroller of the Currency and his agent; proof showed fraud only on Comptroller's agent; conviction could not stand), overruled in part by United States v. Miller, 471 U.S. 130 (1985) (Government need not prove all allegations, so long as allegations proven amount to a crime charged within the indictment).

48. Berger v. United States, 295 U.S. 78 (1935) (variance must be substantial and must cause prejudice, as is required in civil cases).

49. FED. R. CIV. P. 15.
that is fairly comprehended within the terms of the indictment and need not prove all the indictment's allegations, so long as its proof does not broaden the terms of the indictment.\(^5\) Even under traditional variance doctrine, the prosecution was permitted to prove facts contrary to those alleged if the facts were not material.\(^6\) "Materiality" is not subject to rigid standards and has evolved to give the prosecution more flexibility.\(^7\)

To the extent that the variance doctrine imposes a rigorous pleading and proof obligation on the prosecution, it would seem to impose a corresponding less rigorous burden on the prosecution in the double jeopardy context. If the prosecution's proof is strictly limited by the indictment, then the prosecution would seem to have greater freedom under the Double Jeopardy Clause to bring a second indictment that calls for proof not exactly matching the proof required under the first indictment.\(^8\) But, to the extent that the prosecution has leeway under the variance doctrine, the defendant would seem to have greater protection under the double jeopardy doctrine.\(^9\)

Indeed, the defendant's double jeopardy protection is even more generous because the courts have been unwilling to posit a strict equivalency between the two doctrines when doing so would defeat a double jeopardy defense. The courts have gone beyond a comparison of the texts of the two indictments in order to determine whether the two prosecutions were for the same offense. The defendant has been allowed to introduce evidence to establish that the two charged offenses are in fact a single offense.\(^10\) At a fairly early stage, even when variance placed substantial limits on the prosecution, the courts announced that double jeopardy protection could not be thwarted by artful pleading.\(^11\) The courts recognized

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\(^5\) Miller, 471 U.S. at 130.

\(^6\) Modern variance doctrine even suggests that if a defendant makes a tactical decision to lie back and make use of "variance," he has demonstrated that he was not misled or prejudiced, which deprives him of a variance claim. United States v. Alvarez, 972 F.2d 1000, 1004 (9th Cir. 1992), \textit{cert. denied}, 113 S. Ct. 1427 (1993). If this approach is taken seriously, then variance doctrine offers the defendant only illusory protection.

\(^7\) Russell, 369 U.S. at 770; Berger, 295 U.S. at 78.


\(^9\) See \textit{Friedland, supra} note 10, at 69-72. For an early example, see United States v. Nickerson, 58 U.S. (17 How.) 204 (1854).

\(^10\) Russell, 369 U.S. at 764 (defendants "could rely upon other parts of the present record in the event that future proceedings should be taken against them"); Bartell v. United States, 227 U.S. 427, 433 (1913) ("it is the right of the accused to resort to parol testimony to show the subject-matter of the former conviction"); Durland v. United States, 161 U.S. 306, 314-15 (1896) ("parol evidence is always admissible, and sometimes necessary, to establish the defence [sic] of prior conviction or acquittal"); Dunbar v. United States, 156 U.S. 185, 191 (1895) ("parol testimony . . . is often requisite to sustain a plea of once in jeopardy"); Capone v. United States, 56 F.2d 927, 933 (7th Cir.), \textit{cert. denied}, 186 U.S. 553 (1932).

\(^11\) Writing in the 17th century, Hale recognized this practice as well-entrenched:

\textit{If a man be indicted for the robbery or murder of John a Stiles and acquitted, and after indicted for the robbery or murder of John a Nokes, yet he may plead auterfoits acquit, and aver it to be the same person notwithstanding the variance in the sirname, for a man may have divers surnames . . . . If A. be
that the right not to be tried twice for the same offense is not the same as
the right to have fair notice of the charges or to have the protection of
indictment by a grand jury.

In order to compare the two indictments and any supplementary evi-
dence, the court must have an understanding of the offense’s “unit of
prosecution.” Determination of an offense’s unit of prosecution is not
always an easy task.\textsuperscript{57} These difficulties are more pronounced when the
court confronts an arguably “continuing” or “continuous” offense. Con-
tinuing is not a reference to the defendant’s recidivist behavior. Instead,
when the legislature places no temporal limits on an offense, the offense
is said to be continuing in nature, and there may be only one prosecution
and one punishment for all criminal activity occurring prior to the date of
indictment. For example, is operating an illegal tavern one offense, or as
many offenses as there are drinks poured, customers served, or days of
operation?\textsuperscript{58} The answer depends upon a particularized reading of legis-
lative intent in each instance.\textsuperscript{59}

In \textit{Ex parte Snow},\textsuperscript{60} the Court pulled these various strands together.\textsuperscript{57}\textsuperscript{7}
\textit{Snow} illustrated that the Supreme Court will not confine itself to the alle-
gations of the indictment if those allegations are subject to artificial ma-
nipulation and if the unit of prosecution is open-ended. Snow, a
practicing polygamist in the Territory of Utah, was charged with three
counts of unlawful cohabitation for three successive calendar years with
the same seven women. The Court held that cohabitation is “inherently,
a continuous offence.”\textsuperscript{61} Absent a specific legislative definition of the
offense that included temporal boundaries, the offense could not be made
the subject of multiple prosecutions. The prosecution could not divide
three years of cohabitation into three separate offenses, just as it could
not have brought a separate charge for each month or for each week of

\footnotesize{indicted in the county of B. for a robbery or other felony supposed to be
done at D. in the county of B. and be acquitted, and be afterwards indicted
for a robbery upon the same person in the county of B. but at another vill,
yet he shall plead auterfois acquit notwithstanding the variance of the vill,
and may aver it to be the same . . . .}

2 \textsc{Matthew Hale}, \textsc{The History of the Pleas of the Crown}, 244-45 (1682). \textit{See also}
\textsc{William L. Clark, Jr., Handbook of Criminal Procedure} 399 (1895) (“It would be
absurd to suppose that, by varying the day, parish, or any other allegation the precise
accuracy of which is not material, the prosecutor could change the rights of a defendant,
and subject him to a second trial.”).

\footnotesize{57. Compare Ebeling v. Morgan, 237 U.S. 625 (1915) (multiple convictions for opening
multiple sacks of mail during a single incident) \textit{with} Ladner v. United States, 358 U.S. 169
(1958) (single shotgun blast at multiple federal law enforcement agents is a single assault).

58. \textit{Commonwealth} v. Robinson, 126 Mass. 259 (1879) (keeping a tavern is a single
continuing offense).

59. Sanabria v. United States, 437 U.S. 54, 70 (1978); Brown v. Ohio, 432 U.S. 161,

60. 120 U.S. 274 (1887).

61. \textit{Id.} at 281.
cohabitation. Since the legislature had set no temporal bounds on the offense, any limit set by the prosecution was inherently arbitrary.

The Court amplified this doctrine in *Ex parte Nielsen*. Nielsen was charged with cohabitation with two women for a period of time ending on May 13, 1888. He was also charged with adultery with one of the same two women on May 14, 1888. The Court ruled that adultery was a lesser included offense of cohabitation, which, even under the *Morey* rule, would normally bar a separate prosecution for cohabitation. The Government, however, had a second argument to uphold Nielsen's conviction. Although adultery might generally be a lesser included offense of cohabitation, the adultery in Nielsen's case could not be a lesser included offense, the Government argued, since the cohabitation charged in the indictment covered a period of time different from that of the adultery. The Government was obviously calling for a technical comparison of the two indictments.

The Court rejected this approach by allowing the prisoner to show that he had in fact cohabited with the same two women beyond the May 13 date specified in the indictment. The indictment's allegations could not turn a continuous offense into a series of separate offenses, at least if the defendant was willing to challenge the assertions in the indictment. Only the legislature, not the prosecutor or the grand jury, could make an inherently continuous crime into several offenses. Because time was not an essential element of the offense, the allegations of the indictment could not make time material so as to eliminate a double jeopardy defense.

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62. The Court extensively relied on the English case of *Crepps v. Durden*, 98 Eng. Rep. 1283 (K.B. 1777), which disapproved separate fines for each loaf of bread sold by a baker on Sunday in violation of a statute that provided, “no tradesman . . . shall do or exercise any worldly labour [sic] . . . on the Lord's Day . . .” Id. at 1285. Lord Mansfield had held that the statute permitted only one violation per Sunday, regardless of how many loaves of bread the baker made or sold. *Snow* also relied on *Robinson*, 126 Mass. at 259, which ruled that keeping a house for the illegal sale of alcoholic beverages was a continuous offense.

63. *Robinson*, 126 Mass. at 259, reflects an early application of *Morey*. The defendant was prosecuted for operating an illegal tavern between January 1 and May 28, 1878, and was acquitted on June 19, 1878. He was then charged with operating an illegal tavern between January 1 and August 20, 1878. The court held the double jeopardy defense should be sustained and that the court could not revise the indictment to charge an offense between June 19 and August 20, 1878.

64. 131 U.S. 176 (1889).

65. Id. at 187. Although the Court professed to follow *Morey*, it is questionable whether it was entirely faithful to *Morey*. Since cohabitation does not require that any of the participants be married, but adultery does make this requirement, it is doubtful that adultery, under a strict application of *Morey*, is a lesser included offense. This is an observation that even *Nielsen* acknowledged had some merit, since *Morey* had found no double jeopardy under almost identical statutes. Id. at 189. But the Court ruled that the common element of sexual intercourse was sufficient to make adultery a lesser included offense of cohabitation, even though *Snow* had earlier stated that holding oneself out as married, not sexual intercourse, was the key element of cohabitation. Id. at 187.

It should be noted that adultery is not a continuous offense, since each act of intercourse amounts to a new offense. *Rollin M. Perkins, Criminal Law* 377-79 (2d ed. 1969). Hence, the Supreme Court created the anomalous situation of a non-continuing offense, adultery, being the lesser included offense of a continuing crime, cohabitation.

66. Id. at 185.
In *Snow*, the Court looked at the two charges and drew conclusions from the face of the indictment. In *Nielsen*, the Court went beyond the indictment to consider factual matters not contained in the four corners of the charging instrument. Unfortunately, neither case dealt with a fact pattern that would have thrown more light on the Court's commitment to double jeopardy; neither case involved a polygamist who added or deleted cohabitants from his polygamous relationship. The preceding discussion demonstrates that it is important to determine the "unit of prosecution" for conspiracy. One must know the conspiracy's unit of prosecution in order to analyze a double jeopardy plea to a conspiracy charge.

III. THE ELEMENTS OF CONSPIRACY

Conspiracy is the embodiment of a continuing offense. The unit of prosecution is the agreement, but this generality is largely uninformative unless one knows the details of the particular agreement. Conspiracy has no natural limits. Since conspiracy is an agreement to commit an offense or offenses, its limits are determined by those who make the agreement. Once a person enters a conspiracy, he cannot withdraw from it unless he takes affirmative action that disavows or defeats the purpose of the conspiracy (tattling to the police is the classic, although not the exclusive, method of withdrawal).

67. More recently, in *Brown*, 432 U.S. at 169-70, the Court held that, because "joyriding" in a stolen vehicle was a continuing offense, the prosecution could not bring separate prosecutions charging joyriding on different days in the same stolen car. Although *Brown* is best known for its discussion of greater and lesser offenses, it is also significant for its continued insistence that when a statute sets no temporal limits on an offense, a prosecutor may not bring multiple charges by arbitrarily dividing a range of time into separate fragments.


If the conspiracy offense requires an overt act and if the defendant withdraws before an overt act in furtherance of the conspiracy has occurred, then he has committed no offense. But, once anyone has committed an overt act, withdrawal will not serve as a defense to the conspiracy charge. United States v. Nicoll, 644 F.2d 1308, 1315-16 (5th Cir.), cert. denied, 457 U.S. 1118 (1982), except to the extent that the withdrawal commences the running of the statute of limitations as to the withdrawing defendant, United States v. Read, 658 F.2d 1225, 1232-33 (7th Cir. 1981). Such a defendant may be able to plead a statute of limitations defense that would be unavailable to the other conspirators. Even when withdrawal does not defeat a charge of conspiracy, it does have the effect of defeating liability under *Pinkerton v. United States*, 328 U.S. 640 (1946), for substantive offenses committed by co-conspirators after withdrawal. United States v. Gonzalez, 797 F.2d 915, 916-17 (10th Cir. 1986). Withdrawal has also been said to exclude the later declarations of co-conspirators. United States v. Mardian, 546 F.2d 973, 978 n.5 (D.C. Cir. 1976) (dictum).
old members leave and new members join. This proposition results from the basic premise that the conspiracy is not a group of individuals, but is rather an agreement; hence, the identity of the conspirators is immaterial to the offense.

Whether there is one conspiracy or many depends on a defendant's agreement. For example, A and B agree to rob a bank and have no understanding as to future bank robberies. If they later rob additional banks, they may have entered into a conspiracy or conspiracies separate from their original conspiracy. On the other hand, if A and B agree to pursue any and all prospects within a range of illegal activity, then the conspiracy could conceivably last for years. For example, A and his underlings buy and sell tons of cocaine over a five-year period. A is participating in a single conspiracy during this period.

The difficulty in setting boundaries on conspiracy comes from the dichotomy between its definition as a crime and the manner in which the crime is classically proved. Conspiracy is said to be a criminal agreement, but it must often be inferred from the cooperative acts of various individuals. If A and B rob a bank in June, A, B, and C rob a second bank in July, and A and C rob a third bank in August, is there one conspiracy among all three to rob banks? Or is A in a single conspiracy to rob banks, and are B and C in multiple conspiracies to rob banks? Or is each robbery a separate conspiracy as to those robbers participating in that robbery? It is doubtful the robbers ever thought about these questions, and there will seldom, if ever, be direct evidence of their agreement, including their intentions. Any agreement comes not from the conspirators' subjective meeting of the minds but from a conclusion drawn by a judge or jury based on all the facts and circumstances in light of the principles of conspiracy law. Unfortunately, this focus on the actions of the group sometimes leads to the erroneous conclusion that a conspiracy is a group *of people, when, instead, a conspiracy is a defendant's agreement.

The answer to the question—one conspiracy or many—depends upon the context in which it is raised. Whether there is more than one conspir-

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71. See authorities cited supra note 31.

72. E.g., Iannelli v. United States, 420 U.S. 770, 778 n.10 (1975); Interstate Circuit v. United States, 306 U.S. 208, 221 (1939); United States v. Arzola-Amaya, 867 F.2d 1504, 1511 (5th Cir.), cert. denied, 493 U.S. 933 (1989). This phenomenon is an outgrowth of the idea expressed in Fiswick v. United States, 329 U.S. 211, 216 (1946), that conspiracy is a continuing offense to the extent that the conspirators engage in "continuous cooperation . . . to keep it up . . . ."

acy affects joinder of defendants in the indictment, severance of defendants for trial, admissibility of evidence, vicarious liability for related substantive offenses, variance, and punishment, in addition to double jeopardy. In each of these contexts, the law pursues different ends, even though the question—one conspiracy or many—may seem the same because of the short-hand formula.

Any double jeopardy test based upon an examination of the indictments in successive cases will probably yield little assistance. Since the essence of the crime is the defendant’s agreement with others, the identity of these others, the date of the agreement, the place of the agreement, and the overt acts in furtherance of the agreement need not be set forth with any great particularity in the indictment, and are often pleaded in the most general of terms. Even if set forth, these facts should do little to defeat a defendant’s double jeopardy protection. These non-essential details could be manipulated too easily by careful pleading, which Snow and Nielsen have disapproved. A court will usually have to look beyond the indictments, unless in two different indictments the government has helpfully pleaded what is obviously the same offense.

IV. THE SUPREME COURT AND MULTIPLE CONSPIRACIES

The Supreme Court has given little direct guidance on these matters. Since Congress enacted the general federal conspiracy statute in 1867, it was only in the mid-twentieth century that the Court came to deal with

74. If the indictment charges a single conspiracy, then joinder of multiple defendants named in the conspiratorial activities is permissible under Federal Rule of Criminal Procedure 8. Schaffer v. United States, 362 U.S. 511 (1960). Although the allegations of the indictment are usually conclusive as to whether joinder is proper, United States v. Velasquez, 772 F.2d 1348, 1354 (7th Cir. 1985), cert. denied, 475 U.S. 1021 (1986), the allegations may occasionally reveal the existence of multiple conspiracies, despite the Government’s contention that it has pleaded merely a single conspiracy. See United States v. Levine, 546 F.2d 658 (5th Cir. 1977).
75. See, e.g., Kotteakos v. United States, 328 U.S. 750 (1946); United States v. Varelli, 407 F.2d 735, 744-48 (7th Cir. 1969).
76. Declarations of co-conspirators are admissible to the extent that they were made in furtherance of the conspiracy and during the course of the conspiracy. If a statement is made in furtherance of conspiracy A, that statement would not be admissible to establish the existence of a separate conspiracy B. Kotteakos, 328 U.S. at 771. For an example of this principle, see United States v. Fielding, 645 F.2d 719, 727 (9th Cir. 1981).
77. Pinkerton v. United States, 328 U.S. 640 (1946), allows punishment of conspirators, under certain conditions, for substantive offenses on a theory of vicarious liability. But if there are multiple conspiracies, and a defendant is a member of only one conspiracy, his vicarious liability would extend only to offenses related to the conspiracy of which he was a member.
78. The federal sentencing guidelines allow a defendant to be punished for conduct committed by co-conspirators. 18 U.S.C.S. app. § 1B1.3(a)(1)(B) (Law. Co-op. 1995). If there are multiple conspiracies, only one of which a defendant has joined, a defendant’s punishment would be correspondingly limited.
multiple prosecutions for conspiracy. In *Braverman v. United States*, the Government charged the defendants in a single indictment with seven separate conspiracy offenses as a result of a moonshining operation. The defendants received consecutive sentences based on verdicts of guilty on each of the seven counts. Each conspiracy charge, brought under the general conspiracy statute, had as its object the violation of a separate section of the Internal Revenue Code. Although in form the indictment charged seven conspiracies, the Government conceded that there was a single agreement to violate seven different statutes.

The Court suggested that, absent a full record, it might have been willing to accept the allegation in the indictment that there were seven conspiracies. But since the Government conceded that the proof at trial showed a single agreement, the Court held that this agreement did not become seven conspiracies merely because it contemplated the violation of seven statutes. The agreement constitutes the crime of conspiracy: "the single continuing agreement . . . differs from successive acts which violate a single penal statute and from a single act which violates two statutes." Hence, the defendants could not receive consecutive sentences on each of the charged conspiracies.

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81. 317 U.S. 49 (1942).
82. *Id.* at 52. Generally, the cases agreed that a conspiracy to violate several statutes would be one conspiracy, not several conspiracies. *E.g.*, Short v. United States, 91 F.2d 614, 622-24 (4th Cir. 1937) (later prosecution barred); Tramp v. United States, 86 F.2d 83-84 (8th Cir. 1936) (indictment not duplicitous); Bertsch v. Snook, 36 F.2d 155, 156 (4th Cir. 1929) (multiple punishments disallowed); Powe v. United States, 11 F.2d 598, 599 (5th Cir. 1926) (multiple punishments disallowed); Murphy v. United States, 285 F. 801, 815-18 (7th Cir.) (opinion on rehearing), *cert. denied*, 261 U.S. 617 (1923); Haywood v. United States, 268 F. 795, 805 (7th Cir. 1920)(indictment not duplicitous); Magon v. United States, 260 F. 811, 813 (9th Cir. 1919) (indictment not duplicitous), *cert. denied*, 256 U.S. 689 (1921); John Gund Brewing Co. v. United States, 206 F. 386, 386 (8th Cir. 1913)(indictment not duplicitous).
83. 317 U.S. at 52-53.
84. *Id.* at 54. *Braverman*'s holding was anticipated by previous decisions. *See, e.g.*, Frohwerk v. United States, 249 U.S. 204, 210 (1919) (Holmes, J.) ("The conspiracy is the crime, and that is one, however diverse its objects."); United States v. Rabinowitch, 238 U.S. 78, 86 (1915) (a single conspiracy might have for its object the violation of two or more substantive offenses).

The lower courts had not been unanimous in endorsing the view ultimately reached in *Braverman*. Schultz v. Hudspeth, 123 F.2d 729, 731-32 (10th Cir. 1941), *cert. denied*, 317 U.S. 682 (1942) (allowing multiple convictions for a single transaction); Fleisher v. United States, 91 F.2d 404, 406 (6th Cir.), *rev’d*, 302 U.S. 218 (1937) (reversing first count of the indictment).
85. *Braverman*, 317 U.S. at 54. *Braverman* disapproved consecutive sentences but did not disapprove the filing of separate conspiracy counts within a single indictment. As a matter of pleading, the Government may either charge a single conspiracy with multiple objects, Short v. United States, 91 F.2d 614 (4th Cir. 1937), or multiple conspiracy counts, each with a different substantive offense as its object, Lewis v. United States, 4 F.2d 520 (5th Cir. 1925), so long as consecutive sentences are not imposed.

After *Griffin v. United States*, 502 U.S. 46 (1991), it is likely that the preferred route will be to charge a single count of conspiracy, alleging multiple offenses as the object of the conspiracy, since *Griffin* allows a guilty verdict to stand upon proof that any one object of the charged conspiracy was agreed upon by the conspirators. The Second Circuit has recommended, however, that multiple counts be presented in a single indictment so that the
Braverman partially resolved what had been a frequently litigated double jeopardy issue in conspiracy cases. But, thanks to the Government's concession, the Court did not have to resolve the thorniest aspect of the issue.\textsuperscript{86} The Supreme Court has not yet established in the double jeopardy context how to determine whether there was one agreement or more than one agreement.\textsuperscript{87} The Court's suggestion in Sanabria v. United

jury's attention can be better focused. United States v. Calderone, 982 F.2d 42, 48 (2d Cir. 1992).

\textsuperscript{86} In United States v. Richardson, 588 F.2d 1235 (9th Cir. 1979), cert. denied, 440 U.S. 947 (1979), the defendants were prosecuted in one proceeding for two conspiracies, one for smuggling and one for distributing smuggled goods. The Ninth Circuit held that it was for the jury to decide whether there was one or more than one conspiracy, and the court refused to set aside the multiple verdicts and the multiple punishments attached. Accord United States v. Wessels, 12 F.3d 746 (8th Cir. 1993), cert. denied, 115 S. Ct. 105 (1994) (defendant pleaded guilty to conspiracy in Count 1, found guilty by jury on Count 2, and sentenced on both counts). Although Richardson and Wessels are not demonstrably inconsistent with Braverman, they by no means represent the course of the law after Braverman. See, e.g., United States v. Olivas, 786 F.2d 659, 664 (5th Cir. 1986) (held multiple conspiracy convictions violated the Double Jeopardy Clause).

\textsuperscript{87} In United States v. Broce, 488 U.S. 563 (1989), the defendants filed a collateral attack on their guilty pleas, alleging that they had pleaded guilty to the same conspiracy charged in two separate indictments. They had been indicted in two separate indictments, allowed those indictments to be consolidated, pleaded guilty to both indictments, and received separate fines on each of the two indictments. When a co-conspirator successfully waged a double jeopardy defense, the defendants regretted their guilty pleas and moved to vacate their pleas as to the second indictment. A majority of the Court refused to consider their argument on the merits, holding that the defendants' guilty pleas waived the double jeopardy defense.

Justice Stevens concurred in the result. Although he stressed that the Court had not ruled on the merits of the double jeopardy defense, he went out of his way to note his belief that their defense was of "doubtful character." \textit{Id.} at 580. He believed that it would be possible for a defendant to participate in a grand conspiracy stretching over decades and, at the same time, to participate simultaneously in a series of smaller related conspiracies, each of which could be separately prosecuted on separate occasions and punished separately. \textit{Id.} at 580-81. Justice Stevens believed that these defendants most likely fell into this pattern.

The three dissenters argued that the merits of the double jeopardy defense should have been reached. Quoting extensively from Short, 91 F.2d at 614, discussed \textit{infra} text accompanying notes 110-24, the dissenters argued that there was clear support for a double jeopardy defense. \textit{Id.} at 584-85. They also made reference to United States v. Korfant, 771 F.2d 660 (2d Cir. 1985), discussed \textit{infra} text accompanying notes 158-61, without indicating how specifically, if at all, Korfant was in accord with \textit{Short}. \textit{Id.} at 585 n.2. All in all, \textit{Broce} gives very little indication of how the present Court would line up on the issues raised in this Article.

\textit{Albernaz v. United States}, 450 U.S. 333 (1981), gives even less guidance. In \textit{Albernaz}, the Court held that there could be separate punishments for both conspiracy to import marijuana, 21 U.S.C. \S 963, and conspiracy to distribute marijuana, 21 U.S.C. \S 846. Although \textit{Braverman} prohibits the prosecution from charging separate conspiracies based merely upon the substantive offense that the defendants agreed to commit, \textit{Albernaz} allows Congress to fashion a separate conspiracy peculiar to each possible substantive offense that might be the object of conspiratorial conduct. In this regard, the Court saw ample precedent for its result in \textit{American Tobacco Co. v. United States}, 328 U.S. 781 (1946), wherein the Court approved separate convictions for conspiracy to restrain trade and conspiracy to monopolize, each conspiracy being the subject of a separate congressional prohibition. Since Congress provided for separate conspiracies, \textit{Albernaz} and \textit{American Tobacco} clearly came under the rule of \textit{Blockburger v. United States}, 284 U.S. 299 (1932), and do not directly speak to the problem at hand.

The \textit{Albernaz} doctrine can lead to oppressive results. United States v. Johnson, 977 F.2d 1360, 1371, 1375-76 (10th Cir. 1992), cert. denied, 113 S. Ct. 1024 (1993) (separate charges
that conspiracies were somewhat like illegal gambling businesses provides no real help, since it is unclear how the courts determine whether there was one illegal gambling business or more than one such business.

Perhaps the Supreme Court's most famous multiple conspiracy case (but not a double jeopardy case) is *Kotteakos v. United States*, a perennial beacon of false hope for the criminal defense bar. In *Kotteakos*, thirty-two defendants were charged in a single count of conspiracy. At the center of the conspiracy were a loan broker and close associates who helped the various defendants obtain fraudulent loans. (The broker and his associates pleaded guilty and never went to trial.) The evidence revealed that most of these borrowers did not know each other and were indifferent to whether any of the others were successful in obtaining fraudulent loans. It is not even clear that the individual loan recipients knew that others were obtaining similarly fraudulent loans. Each fraudulent loan was, in the Court's eyes, a separate conspiracy. The broker was the "hub" of a wheel, the borrowers were "spokes," but there was no "rim" to complete the conspiratorial "wheel." The lower court found as a matter of law, and the Government conceded before the Supreme Court, that the single conspiracy charged in the indictment was not proven and that there were multiple conspiracies. The only question was for conspiracy to use a firearm to facilitate a drug offense and conspiracy to manufacture, distribute, or use drugs; United States v. Deshaw, 974 F.2d 667, 670 (5th Cir. 1992) (drug importation and distribution conspiracy and RICO conspiracy can be separate charges although they involve same conduct); United States v. Lanier, 920 F.2d 887, 894-95 (11th Cir.), cert. denied, 502 U.S. 872 (1991) (one scheme to defraud charged under separate conspiracy statutes); United States v. Johnson, 911 F.2d 1394, 1397-98 (10th Cir. 1990), cert. denied, 498 U.S. 1050 (1991) (separate charges for RICO conspiracy and conspiracy to distribute drugs).


It is, however, theoretically possible that a defendant could be in separate conspiracies, one of which is not a lesser included offense of a charged CCE, thereby allowing him to be prosecuted for CCE after prosecution for a separate conspiracy. United States v. Evans, 951 F.2d 729 (6th Cir. 1991), cert. denied, 504 U.S. 920 (1992). *Garrett* does not resolve how to determine the separate nature of such conspiracies.

91. 328 U.S. 750 (1946).
92. See Blumenthal v. United States, 332 U.S. 539, 558 (1947) (explaining the Court's prior holding in *Kotteakos*).
whether this variance between allegation and proof was prejudicial enough to warrant reversal and remand for separate trials. The Court answered this question in the affirmative and reversed, finding that the separate conspiracies warranted separate trials. In this respect, Kotteakos is not only a case about prejudicial variance, but it is also a case about separate trials.

Kotteakos assumed that in any given case there was either one conspiracy or more than one conspiracy. The Court did not explore whether the core members (the loan broker and his associates) might have been in a single conspiracy and whether, at the same time, the borrowers might have been in multiple conspiracies. That is, any one peripheral member (a borrower) might have been in a conspiracy with the core members, but not with other peripheral members. Under this analysis, the core members would be in a single conspiracy with each other and with all the peripheral members, even though there would also be multiple conspiracies, as seen from the vantage points of peripheral members. The Court could have found that these core members were engaged in a single conspiracy because of their continuous efforts to obtain loans for others, even though the borrowers were not conspiring with each other. Kotteakos ignored this possibility because of the doctrine that a variance must be prejudicial and because the core members had pleaded guilty. Even though Kotteakos found a variance, reversal was not automatic and depended on a finding of prejudice, which the Court found as to the peripheral members. If, on the other hand, only core members had gone to trial in Kotteakos, the Court could have found multiple conspiracies. In that scenario, there would be no prejudice and no need to sever, which would have brought the same result as a finding that the core members were in a single conspiracy.

94. The Government relied on the harmless error statute, which had been recently construed and applied in Berger v. United States, 295 U.S. 78 (1935).

95. Id. at 776. If the court discovers in mid-trial that there are multiple conspiracies, it has discretion whether to grant a severance, which has the effect of granting a mistrial as to at least some of the defendants. See, e.g., Schaffer v. United States, 362 U.S. 511 (1960). If, however, the determination of multiple conspiracies is made on appeal, the normal course is to remand for separate trials without any consideration of the possibility of a joint trial. See, e.g., United States v. Varelli, 407 F.2d 735, 748 (7th Cir. 1969).

96. Curiously, the Court ordered retrials, not acquittals, even though prior law would have arguably allowed acquittals. See supra note 54; Mercante v. United States, 49 F.2d 156 (10th Cir. 1931); United States v. Wills, 36 F.2d 855 (3d Cir. 1929). If the Government did not prove the charged conspiracy, and the variance was material, then the proper course would be acquittal, which could then set the stage for a double jeopardy claim. (As noted in infra note 105 and accompanying text, post-Kotteakos cases may have made it more difficult to establish a material variance.) By treating the issue as one of joinder, 328 U.S. at 757-58, the Court was able to deny acquittal as the remedy. Accord United States v. Bertolotti, 529 F.2d 149, 155-56 (2d Cir. 1975). Later cases have made it clearer that variance (if material) must result in acquittal, which creates a bar to re-prosecution for the same offense. See, e.g., Sanabria, 437 U.S. at 54.

Kotteakos precipitated a vast body of case law on the variance between a charge of a single conspiracy and the proof of multiple conspiracies.\textsuperscript{98} Defendants devote substantial effort to establishing that they were really members of a "smaller" conspiracy than the one charged.\textsuperscript{99} This typically futile\textsuperscript{100} exercise continues even after the Court's 1985 decision in \textit{United States v. Miller},\textsuperscript{101} which, without explicitly overruling \textit{Kotteakos}, made it a dead letter on the variance issue.

The Government charged Miller with a mail fraud scheme having two components. He had engineered a burglary loss and had inflated the


\textsuperscript{99} This effort not only takes the form of motions for acquittal, but also the form of requests for multiple conspiracy instructions. A typical multiple conspiracy instruction, if given, reads as follows:

\textit{Count} \_\_\_ of the indictment charges that defendant \_\_\_\_ knowingly and deliberately entered into a conspiracy to [describe substantive offense(s)][defraud the United States].

In order to sustain its burden of proof for this charge, the government must show that the single [overall][umbrella][master] conspiracy alleged in Count \_\_\_ of the indictment existed. Proof of separate or independent conspiracies is not sufficient.

In determining whether or not any single conspiracy has been shown by the evidence in the case you must decide whether common, master, or overall goals or objectives existed which served as the focal point for the efforts and actions of any members to the agreement. In arriving at this decision you may consider the length of time the alleged conspiracy existed, the mutual dependence or assistance between various persons alleged to have been its members, and the complexity of the goal(s) or objective(s) shown.

A single conspiracy may involve various people at differing levels and may involve numerous transactions which are conducted over some period of time and at various places. In order to establish a single conspiracy, however, the government need not prove that an alleged co-conspirator knew each of the other alleged members of the conspiracy nor need it establish that an alleged co-conspirator was aware of each of the transactions alleged in the indictment.

Even if the evidence in the case shows that defendant \_\_\_\_ was a member of some conspiracy, but that this conspiracy is not the single conspiracy charged in the indictment, you must acquit defendant \_\_\_\_.

Unless the government proves the existence of the single [overall][umbrella][master] conspiracy described in the indictment beyond a reasonable doubt, you must acquit defendant \_\_\_.

2 Edward J. Devitt et al., \textit{Federal Jury Instructions} § 28.09 (1990). This instruction is often refused as a matter of law. E.g., United States v. Gray, 47 F.3d 1359, 1368 (4th Cir. 1995); United States v. Taren-Palma, 997 F.2d 525, 530 (9th Cir. 1993), \textit{cert. denied}, 114 S. Ct. 1648 (1994); United States v. Roark, 924 F.2d 1426, 1429-30 (8th Cir. 1991); United States v. Mazanti, 888 F.2d 1165, 1173-74 (7th Cir. 1989), \textit{cert. denied}, 495 U.S. 930 (1990); United States v. Hernandez, 862 F.2d 17, 24 n.3 (2d Cir. 1988), \textit{cert. denied}, 489 U.S. 1032 (1989); United States v. Ashley, 555 F.2d 462, 467-68 (5th Cir.), \textit{cert. denied}, 434 U.S. 869 (1977). Even if the instruction is given, it is questionable whether a jury can understand the concept, much less be willing to employ it to acquit a defendant. If the \textit{Kotteakos} principle of variance has any vitality, the defendant's best hope lies in a request for a directed finding and not a jury instruction.

\textsuperscript{100} See United States v. Yant, 977 F.2d 399, 407-08 (8th Cir. 1992); United States v. Calderone, 917 F.2d 717, 718-19 (2d Cir. 1990); United States v. Camiel, 689 F.2d 31 (3d Cir. 1982) (multiple mail fraud schemes) for successful effort.

\textsuperscript{101} 471 U.S. 130 (1985).
dollar value for the allegedly stolen items. The Government proceeded to trial only on the theory of an inflated claim and did not attempt to prove that the burglary was at the insured's sufferance. Miller argued for reversal on the ground that the indictment charged two aspects of the crime and that the Government had proved only one. Overruling in part its earlier decision in *Ex parte Bain*, Miller argued for reversal on the ground that the indictment charged two aspects of the crime and that the Government had proved only one. Overruling in part its earlier decision in *Ex parte Bain*, the Court ruled that, if an indictment charges multiple aspects of a crime, there is no variance, so long as the Government can prove one of the multiple aspects. The proof may not broaden the indictment, but it may narrow the indictment.

Miller was not a conspiracy case, but it established a principle of broad application that should extend to conspiracy charges. If an indictment charges a wide-ranging conspiracy, the defendant may be convicted of any conspiracy that can be regarded as a component or a part of the charged conspiracy. In the later case of *Griffin v. United States*, the Court explicitly held that a charge of conspiracy to commit crimes A and B can be sustained on proof of a conspiracy to commit either crime.

Considered together, Miller and Griffin make it doubtful that *Kotteakos* remains good variance law, even on the facts presented in *Kotteakos* itself (although it should be good law on severance and admissibility of co-conspirator declarations). If borrower A conspires with the loan broker, but not with the other thirty borrowers, A is still guilty of conspiracy. But this will be a narrower conspiracy than that charged in the indictment, and there is no variance. (In *Kotteakos*, there was variance, and it was prejudicial.) Even without a finding of variance, it might still be unfair to have a joint trial with the other borrowers, which was the other main point of *Kotteakos*. The variance aspect of *Kotteakos*, however, seems greatly undermined by Miller.

*Kotteakos* provides uncertain directions for solving variance problems, and it remains to be seen whether *Kotteakos* has any validity in the double jeopardy area. If *Kotteakos* speaks to the double jeopardy issue, then it would follow that the leading conspirator, "the hub of the wheel," could have been prosecuted and sentenced thirty-two different times for the offense of conspiracy had the Government chosen to pursue him on the multiple charges that the Court discerned in the sole conspiracy count in the indictment. On its face, this possibility seems unsound.

It is questionable whether variance and double jeopardy should have any linkage in conspiracy cases. On a verbal level, the existence of multiple conspiracies is the operative inquiry in both contexts. Variance

102. 121 U.S. 1 (1887).
103. *Miller*, 471 U.S. at 140-44.
106. *Id.* at 49-50. *Griffin* gave only a glancing cite to *Miller*, 502 U.S. at 56-57, and made no reference at all to *Kotteakos*.
107. *See United States v. Ragins*, 840 F.2d 1184, 1191 & n.3 (4th Cir. 1988) (indicting core member on nine counts of conspiracy).
is meant to protect a defendant's right to indictment by grand jury and his
geright to fair notice of the charges. Double jeopardy, on the other hand, is
meant to protect the defendant from the unfairness of the government's
polishing its case through repeated presentation or repeatedly seeking
more punishment for the same conduct. Whether a defendant, consistent
with the Grand Jury Clause and related due process requirements, could
be convicted on the first indictment through evidence to be presented on
the second indictment really says nothing about the interests implicated
by the Double Jeopardy Clause. Snow and Nielsen recognized these
limitations.109

V. THE RESPONSE OF THE COURT OF APPEALS

Although the Supreme Court has given little guidance on these specific
problems, the courts of appeals have generated a substantial body of law
relating to the double jeopardy defense in successive conspiracy prosecu-
tions. A leading decision is the Fourth Circuit's 1937 decision in Short v.
United States.110 The Government argued against double jeopardy on the
ground that the indictments alleged different time periods, different loca-
tions, different co-conspirators, different overt acts, and different statu-
tory violations as the objects of the charged conspiracies. The
Government's argument was straightforward: proof of the allegations in
the later indictment would not sustain a conviction under the prior
indictments.

The Fourth Circuit methodically brushed these differences aside. The
court did not rely entirely on a broad reading of Snow, but it did rely on a
comparison of the indictments. As far as the differences in time were
concerned, the court held that the allegations in the indictments over-
lapped each other and, thus, were broad enough to allow either indict-
ment to be proved by the facts presented in the other case.111

It is well settled that, where a continuing offense such as conspiracy
is charged as having been committed within a stated period, an ac-
quittal or conviction will bar another prosecution for the same of-
fense as having been committed within a period which
overlaps any part of the former period. The reason is that proof of
the commission of the offense during the overlapping period is suffi-
cient to sustain a conviction under either of the indictments; and the
accused is thus subjected to double jeopardy as to offenses commit-
ted within that period.112

Similar comparisons were made between the two indictments as to the
differences in places and co-conspirators.113 Anticipating Braverman,114
the court also ruled that the government could not turn a single conspir-

109. Snow, 120 U.S. at 274; Nielsen, 131 U.S. at 176.
110. 91 F.2d 614 (4th Cir. 1937).
111. Id. at 620.
112. Id.
113. Id.
acy into multiple conspiracies by alleging that each conspiracy had as its object the violation of a separate provision of the criminal code.\textsuperscript{115}

Differences as to overt acts between the two indictments were of no consequence. The court reasoned that the gist of conspiracy is the agreement and not the overt acts.\textsuperscript{116}

[O]nly one overt act need be alleged or proven to justify conviction of a continuing conspiracy extending over a period of years in the furtherance of which many overt acts may have been committed; and to hold that a difference in the overt acts charged in the indictment constitutes a difference in the charge of crime would permit the prosecution of the same conspiracy as many times as there are acts done in furtherance of it. This cannot be the law.\textsuperscript{117}

One might infer from \textit{Short} that, had the indictments been more narrowly drawn, the court would have come to a different conclusion on double jeopardy. This conclusion, however, would seem to be foreclosed by \textit{Snow} and \textit{Nielsen}. \textit{Short} itself recognized that any differences between the indictments must relate to material differences; as the court noted, “The constitutional provision against double jeopardy is a matter of substance and may not be thus nullified by the mere forms of pleading.”\textsuperscript{118} Although \textit{Short} partially justified its result through a close comparison of the indictments, \textit{Short} also operated on a higher plane consistent with \textit{Snow} and \textit{Nielsen} to the extent that it focused on agreement as the essence of the crime and discounted evidentiary detail as determinative of the double jeopardy defense.\textsuperscript{119} \textit{Short} had significant precedential support, but it also discarded and disapproved cases that had taken a more wooden approach to double jeopardy.\textsuperscript{120}

\begin{itemize}
\item 115. Short v. United States, 91 F.2d 614, 620-21 (4th Cir. 1937).
\item 116. It is established beyond any doubt that in a narcotics conspiracy, the crime is complete upon agreement, and no overt act is required. United States v. Shabani, 115 S. Ct. 382, 383-84 (1994). The reasoning of \textit{Shabani} would apply to any conspiracy statute that makes no explicit reference to overt acts. The presumption is that conspiracy requires no overt act unless the legislature specifically provides for the necessity of an overt act.
\item 117. \textit{Short}, 91 F.2d at 621.
\item 118. \textit{Id.} at 624. The court stated its philosophy as follows: Blanket charges of “continuing” conspiracy with named defendants and with “other persons to the grand jurors unknown” fulfill a useful purpose in the prosecution of crime, but they must not be used in such a way as to contravene constitutional guaranties. If the government sees fit to send an indictment in this general form charging a continuing conspiracy for a period of time, it must do so with the understanding that upon conviction or acquittal further prosecution of that conspiracy during the period charged is barred, and that this result cannot be avoided by charging the conspiracy to have been formed in another district where overt acts in furtherance of it were committed, or by charging different overt acts as having been committed in furtherance of it, or by charging additional objects or the violation of additional statutes as within its purview, if in fact the second indictment involves substantially the same conspiracy as the first. \textit{Id.}
\item 119. Accord United States v. Ragins, 840 F.2d 1184, 1188 (4th Cir. 1988).
\item 120. Piquett v. United States, 81 F.2d 75, 80 (7th Cir.), \textit{cert. denied}, 298 U.S. 664 (1936) (“[T]he conspiracy or conspiracies to carry out those objects must of necessity constitute separate offenses, in view of the fact that the grand jury and the District Attorney chose to...
In addition, Short emphasized an aspect of double jeopardy law that seems to have been forgotten in modern cases. Short did not rule on the merits of the defendants' double jeopardy defense. Instead, Short ruled that the district court erred in refusing to allow the jury to consider that defense. Since the double jeopardy defense in Short could be neither accepted nor denied on the basis of a comparison of the indictments, defendants had the right to a jury trial on their defense. Historically, the law required the jury to decide the double jeopardy defense before the prosecution presented its case unless the facts were so clear that a directed finding would be appropriate.

Although Short is still considered a leading case, much of the recent case law, influenced by Kotteakos, strays from Short's dictates. Significantly, this dissonance does not seem to be recognized. The decisions of the Second Circuit will be examined in some detail since the case law in the Second Circuit is so extensive, is largely representative of the course
of the law as found in the other circuits, and has been influential with the other circuits.

The first modern Second Circuit decision is *United States v. Mazzochi*, in which the defendants pleaded guilty to two counts of conspiracy. One count alleged a conspiracy leading to a sale of drugs on a specific day, and the other count alleged a conspiracy leading to a separate sale of drugs on the same day. Although the defendants pleaded guilty to both counts, the court set aside the consecutive sentences imposed.

It might indeed be possible to describe in substantially the same terms two conspiracies, really separate because from the outset one was to result in one sale only, the other in another; but the scheme alleged in these counts forbids such an interpretation. It is apparent that at the outset no particular sale could have been specifically in mind; the conspirators could not know to whom they would sell; they arranged a plan for disposing of their drugs by which they should be sold on general solicitation, and the specific sales were the result of that method.

Now it would be preposterous to argue that, if several persons combined to sell drugs generally, that single venture breaks up into as many separate ventures as there chance to be sales. The sales are the conclusion and the fruit of the original plan, the very reason for its being; they may be multiform, but the plan is single. In this regard a conspiracy is wholly unlike the substantive crimes which it contemplates.

*Mazzochi* wisely focused on the act of agreement, even though the defendants' completed drug sales were the only available evidence as to their intent. The court was unwilling to find multiple agreements merely because there were multiple sales.

*Kotteakos* played a significant role in the Second Circuit's analysis in *United States v. Mallah*, the next major case. Defendant Pacelli challenged his conspiracy conviction on the basis of double jeopardy. A prior indictment, on which he had been convicted, charged a narcotics conspiracy between January 1, 1971 and June 14, 1971. The indictment under review charged a narcotics conspiracy between January 1, 1971 and September 23, 1973. Both conspiracies allegedly had New York City as the base of operations. The first indictment named a small number of conspirators, as well as other unnamed conspirators, both known and unknown. The second indictment named numerous conspirators, although it did not name any individual named in the first indictment. Each indictment alleged different overt acts in support of the conspiracy, and the evidence demonstrated that Pacelli had a key role in the activities alleg-

126. 75 F.2d 497 (2d Cir. 1935) (per curiam).
127. *Id.* at 497-98 (citation omitted).
128. Since the defendants in *Mazzochi* pleaded guilty, it is questionable whether they would be able to claim double jeopardy protection. See *Broce*, 488 U.S. at 563, although *Broce* involved multiple prosecutions on separate occasions.
edly forming the two conspiracies. The Government argued that the two conspiracies were separate since the named conspirators and the overt acts in each indictment were different.

The court acknowledged that the traditional double jeopardy test focuses on whether evidence to support a conviction under one indictment would also support a conviction under the other indictment. Under a strict application of this test, Pacelli would have had difficulty in proving a double jeopardy defense, since the alleged co-conspirators and overt acts were different in the two indictments. The court, however, relying on Short, was especially concerned about the ease with which the Government could, through artful pleading, avoid the defendant's double jeopardy protection. Conspiracy raises special problems. The essence of the crime is an agreement to violate the law, and it would be all too easy to convert a single agreement into two by alleging different conspirators, overt acts, dates, and places. The same agreement may be shown by different aggregations of proof concerning individuals and overt acts. Without explicitly saying so, the court held that the conspiracy's "unit of prosecution" was larger than the Government's indictment would suggest. Unfortunately, the court gave no clear guidance on a positive note.

The court set forth no clear test for determining, for double jeopardy purposes, whether there was one conspiracy or many; instead, the court relied on Kotteakos. The court chastised the Government for urging such a narrow approach in a double jeopardy context when, in cases with similar facts, it had argued for a broad view of Kotteakos in order to uphold joint trials of large numbers of conspirators. The court asked whether it would have approved, consistent with Kotteakos, a single trial concerning all the co-conspirators and all the overt acts identified in both indictments. If such a hypothetical joint trial would be permissible, then the defendant may successfully assert a double jeopardy defense.

130. Because the Government failed to satisfy the traditional test, Mallah found it unnecessary to adopt a broad policy of fairness akin to the civil law doctrines of res judicata and issue preclusion, id. at 985 n.7, as concurring opinions of Justice Brennan advocated in Ashe v. Swenson, 397 U.S. 436, 448-50 (1970), and Abbate v. United States, 359 U.S. 187, 196 (1959).

131. The Supreme Court, validating the almost unanimous opinion of the lower courts, has since conclusively determined that in narcotics conspiracies there is no requirement of an overt act. United States v. Shabani, 115 S. Ct. 382 (1994); see also supra note 113 and accompanying text.

132. Mallah, 503 F.2d at 985.


134. Id.


136. Mallah, 503 F.2d at 985.

137. In evaluating the double jeopardy claim, the court may look not only at the indictments, but also at the transcript of the previous trial. E.g., United States v. Puckett, 692 F.2d 663, 667 (10th Cir.), cert. denied, 459 U.S. 1091 (1982). It may also consider testimony
Mallah was very much a product of Kotteakos. Rather than focusing on the variance and double jeopardy problems raised by the defendant asserting the double jeopardy defense, Mallah focused on the conspirators as a group. If severance of peripheral members in a hypothetical joint trial would have been necessary, then Pacelli would have had no double jeopardy defense. Mallah carried forward the Kotteakos notion that a course of conduct is either one conspiracy or many, and that its nature is in no way dependent on the vantage point from which it is viewed. Since Mallah saw double jeopardy and variance as two sides of the same coin, Mallah did not consider (nor was it forced to consider) the possibility that the charged conspiracies might be both separate conspiracies under Kotteakos and a single conspiracy for the purpose of Pacelli’s double jeopardy argument.

Mallah made new law on a procedural level, and the Second Circuit failed to appreciate fully the novelty of its decision. Historically, the defendant had the burden of proof on the double jeopardy issue, and the cases did not draw a fine distinction between the burden of going forward with the evidence and the burden of persuasion. Mallah split the two burdens, placing the risk of non-persuasion on the government once the defendant raised enough evidence to put the issue into play. Mallah did not make clear what the defendant would have to show in order to shift the burden to the prosecution. (Later cases have stated the defendant must make a non-frivolous showing, which is not more informa-
Mallah merely held that, given the overlap in time and place between the two indictments, Pacelli had satisfied his burden of going forward with the evidence on the double jeopardy issue, and that the Government did not satisfy its burden of establishing that there were two separate conspiracies. The court suggested that "the element of time will be of considerable importance." It is tempting to read into this remark that continuing illegal behavior over a course of time will translate into a single conspiracy—or at least it will shift the burden to the government. The court also suggested that a narcotics conspiracy is more likely to be a single conspiracy and that defendants in non-narcotics cases would have a higher burden. But the court also suggested, as its later decisions have amply born out, that even a drug dealer can be in more than one conspiracy.

Decisions in other circuits have also held that the Government should have the ultimate burden. This burden is said to be especially appropriate when the defense is considered before trial, since the Government has a greater knowledge of the facts and circumstances leading to the successive indictments (Mallah was a review after a full trial on the second indictment).

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143. E.g., Stricklin, 591 F.2d at 1118.
144. The Government's burden is by the preponderance of the evidence. See Ragins, 840 F.2d at 1192; United States v. Liottard, 817 F.2d 1074, 1077 (3d Cir. 1987); In re Grand Jury Proceedings, 797 F.2d at 1380; Stricklin, 591 F.2d at 1119.
145. Mallah, 503 F.2d at 986.
146. Id. at 987.
148. United States v. Thornton, 972 F.2d 764, 767 (7th Cir. 1992); United States v. McHan, 966 F.2d 134, 138 (4th Cir. 1992); United States v. Benefield, 874 F.2d 1503, 1505 (11th Cir. 1989); In re Grand Jury Proceedings, 797 F.2d at 1380; United States v. Booth, 673 F.2d 27, 30-31 (1st Cir. 1982); United States v. Bendis, 681 F.2d 561, 564 (9th Cir. 1981), cert. denied, 459 U.S. 973 (1982); Stricklin, 591 F.2d at 1118; Tercero, 580 F.2d at 315 n.12; United States v. Inmon, 586 F.2d 326, 329-32 (3d Cir. 1977), cert. denied, 44 U.S. 859 (1979). Contra Mintz, 16 F.3d at 1104; United States v. Dorch, 5 F.3d 1056, 1060 (7th Cir. 1993), cert. denied, 115 S. Ct. 933 (1992) (Government has burden pre-trial, but defendant has burden after full trial).
149. Considered from a historical perspective, this argument is incoherent since the defendant always raised his double jeopardy defense before trial and was entitled to a jury determination of his defense before the prosecution was allowed to present its case. See authorities cited supra notes 123-24 and accompanying text.
150. United States v. Jabara, 644 F.2d 574, 576-77 (6th Cir. 1981); Stricklin, 591 F.2d at 1118; Inmon, 568 F.2d at 329-32.
151. A defendant may raise and litigate his double jeopardy claim before trial of the general issue. Abney v. United States, 431 U.S. 651 (1977). If his claim is denied, then he may take an interlocutory appeal. Id. at 662. Notwithstanding the district court's initial ruling or the appellate ruling on the interlocutory appeal, the district court may reconsider...
While Kotteakos helped the defendant in Mallah, tying the double jeopardy defense to Kotteakos defeated the defense in United States v. Papa. The court found that Papa was the head of two separate narcotics conspiracies. Because all his co-conspirators could not, consistent with Kotteakos, be tried at one time for one conspiracy, Papa could be tried twice for the two conspiracies. Although the court's conclusion that there were two conspiracies is questionable even as measured by Kotteakos, the more significant aspect of Papa is that the co-conspirators' right to a severance affected Papa's double jeopardy rights. Since the co-conspirators had a Kotteakos right to a severance, Papa, a core conspirator, had no double jeopardy rights. The court never considered that variance analysis might be only the first step and that the defendant might have a double jeopardy defense under the broader approach illustrated in Snow and Short.

A later case, United States v. Abbamonte, summarized the relationship between variance and double jeopardy as developed in the Second Circuit under the influence of Kotteakos:

Whether a defendant's criminal activities establish his participation in one large conspiracy or two separate conspiracies is an issue on which prosecutors and defense counsel have often changed positions "as nimbly as if dancing a quadrille." When a defendant challenges a conviction on the ground of variance, he urges that, though the indictment alleged one conspiracy, the evidence showed at least two; the Government contends there was only one conspiracy. However, when a defendant challenges a conviction on the ground of double jeopardy, or, as here, seeks to avoid trial on that ground, he contends that only one conspiracy exists, while the Government insists there are at least two.

the double jeopardy defense on the basis of all the evidence heard during the second trial, the pre-trial decision not being binding on the defendant. Stricklin, 591 F.2d at 1119.

This approach is entirely ahistorical, since the defendant was expected to litigate his double jeopardy claim before trial of the general issue and could not take an interlocutory appeal of an adverse ruling. Although the defendant is still expected to raise his double jeopardy defense before trial, courts have allowed it to be raised for the first time during the trial. United States v. Young, 503 F.2d 1072, 1074 (3d Cir. 1974).

152. 533 F.2d 815 (2d Cir. 1976).

153. Id. at 822. The court relied on its recent holding in United States v. Bertolotti, 529 F.2d 149, 151 (2d Cir. 1975).

154. 759 F.2d 1065 (2d Cir. 1985), aff'd, United States v. Del Vecchio, 800 F.2d 21 (2d Cir. 1986), overruled by United States v. Macchia, 41 F.3d 35 (2d Cir. 1994).

155. Id. at 1068 (citations omitted); accord Thornton, 972 F.2d at 770; United States v. Thomas, 759 F.2d 659, 667 n.6 (8th Cir. 1985); Stricklin, 591 F.2d at 1121.

In Abbamonte, the court noted the seemingly inconsistent positions taken by the Government (and also by the defense bar) as the context changed from variance to double jeopardy. The court forgot that, although variance doctrine often aids a double jeopardy defense, it does not necessarily defeat the defense. See 759 F.2d at 1065.

Much more disturbing are the often inconsistent results reached by the courts. Facts upon which a defendant could not be acquitted for variance or could not receive a multiple conspiracy instruction sometimes produce a finding that there are multiple conspiracies for double jeopardy purposes. Compare United States v. Aracri, 968 F.2d 1512, 1521-23 (2d Cir. 1992) with United States v. Macchia, 35 F.3d 662 (2d Cir. 1994). To some extent, these anomalies can be papered over by asserting that the existence of multiple conspiracies is a
Abbamonte, although applying Mallah to uphold the defense, observed that, "[t]he distinctions drawn in Mallah and Papa are not wholly satisfactory." This observation was a premonition of a later development. United States v. Korfant represents a significant break from Mallah and Papa. The short per curiam opinion in Korfant did not purport to overrule or modify prior Second Circuit cases; indeed, it cited all the Second Circuit cases in support of its result and implied that Korfant was merely an outgrowth of Mallah and other cases following Mallah. But Korfant's method is remarkably different from these earlier cases. Korfant set out a list of eight factors to determine whether a conspiracy conviction was barred by the Double Jeopardy Clause:

- The criminal offenses charged in successive indictments;
- The overlap of participants;
- The overlap of time;
- Similarity of operation;
- The existence of common overt acts;
- The geographic scope of the alleged conspiracies or location where overt acts occurred;
- Common objectives; and
- The degree of interdependence between alleged distinct conspiracies.

On this basis the court came to the conclusion that the executive of a national grocery chain engaged in several conspiracies with his competitors in separate local markets to fix prices, even though the alleged conspiracies overlapped in time. It would seem reasonably clear that

fact issue. E.g., United States v. Sureff, 15 F.3d 225, 229 (2d Cir. 1994); United States v. American Honda Motor Corp., 273 F. Supp. 810, 816 (N.D. Ill. 1967). But when on a set of given facts, a defendant would not even be entitled to a multiple conspiracy instruction, the defendant with materially the same facts should obtain double jeopardy protection.

Other representative Second Circuit cases from the Mallah era are United States v. DeFillipo, 590 F.2d 1228, 1232-35 (2d Cir.), cert. denied, 442 U.S. 920 (1979), and United States v. Bonmarnito, 524 F.2d 140, 145-46 (2d Cir. 1975).


When allegedly separate RICO conspiracies are tested under the Double Jeopardy Clause, additional factors are the similarity of the alleged RICO enterprises and the patterns of racketeering. United States v. Salerno, 964 F.2d 172, 175-76 (2d Cir. 1992); United States v. Ciancaglini, 858 F.2d 923, 927-28 (3d Cir. 1988); United States v. Langella, 804 F.2d 185 (2d Cir. 1986); United States v. Ruggiero, 754 F.2d 927 (11th Cir.), cert. denied, 471 U.S. 1127 (1985); United States v. Sinito, 723 F.2d 1250, 1256 (6th Cir. 1983).
Korfant had a continuous course of conduct of agreeing with others to fix prices. Conspirators may have come and gone, but his agreement continued over the years.

The trouble with Korfant is that it did not make clear how these factors relate to each other or to the overall inquiry. The court's evaluation of these factors seemed to break away from the variance test of Kotteakos but was not tied to any discernible test. More importantly, Korfant seemed to focus on the differences between the two indictments, without acknowledging that these differences are usually immaterial as a matter of substantive conspiracy law. The court in Korfant seemed to forget that the unit of prosecution is the agreement and that the "factors" are merely evidentiary detail. Although Korfant was presented as a distillation of prior cases, its methodology was different from these prior cases, and this difference has become more pronounced in the court's later applications.\footnote{See, e.g., United States v. Reiter, 848 F.2d 336 (2d Cir. 1988).} \footnote{917 F.2d 717 (2d Cir. 1990).} \footnote{495 U.S. 508 (1990).}

In United States v. Calderone,\footnote{Unless there has been prosecutorial overreaching, a defendant's request for a mistrial allows retrial consistent with the Double Jeopardy Clause. E.g., Ball v. United States, 163 U.S. 662 (1896).} the Second Circuit considered whether its Korfant jurisprudence was still good law after Grady v. Corbin.\footnote{917 F.2d at 718-19 (quoting the district court's remarks in granting a judgment of acquittal).} Calderone was prosecuted in an indictment that alleged multiple events, actors, and types of drugs. The court entered a finding of not guilty at the close of the Government's case and expressed the view that Calderone had entered a conspiracy, but not the large conspiracy alleged in the indictment. The district judge apparently relied on Kotteakos and did not consider the effect of Miller. Perhaps under Kotteakos the court should have granted a severance to Calderone, which would have had the effect of declaring a mistrial and allowing a retrial.\footnote{On remand from the Supreme Court, the Second Circuit made clear that the earlier dismissal was a true acquittal, which bars reprosecution for the same offense, and not a dismissal of the sort that would allow re-trial for the same offense. Calderone, 982 F.2d at 44 (relying on Burks v. United States, 437 U.S. 1 (1978)).} In any event, the court entered a finding of not guilty.\footnote{Although some earlier cases (e.g., United States v. Wills, 36 F.2d 855 (3d Cir. 1929)) had taken the different view that a dismissal for variance is not an acquittal for double jeopardy purposes, these cases never represented the weight of the law, see Friedland, supra note 10, at 65-69, and have been put to rest by Sanabria v. United States, 437 U.S. 54, 75-78 (1978).} The Government then recharged Calderone in a smaller conspiracy that encompassed only the evidence presented as to Calderone at the first trial.\footnote{982 F.2d at 44 (relying on Burks v. United States, 437 U.S. 1 (1978)).}
The Second Circuit refused to apply Korfant and held that it was bound by Grady, which it read to have displaced the Korfant analysis. Since Calderone had been tried on various events, those same events could not be used to establish his guilt in a second trial. The court perceptively noted that, although the crime of conspiracy is an agreement, the agreement is proved by what was said and done, not by formal recitations of an agreement. If events A, B, and C have already led to acquittal (or conviction) of a conspiracy, those same events may not be used to establish an allegedly separate agreement. Under this application of Grady, the Korfant factors and the Kotteakos test were irrelevant.

Ironically, the court did not seem to realize that Grady could leave significant opportunities for the government to prosecute multiple times for the same conspiracy. If the government can present new and additional conduct each time, it can engage in multiple prosecutions for what might be considered a single conspiracy under Kotteakos. On the facts of Calderone, this abuse was not possible, since the first trial had involved such a large and multi-faceted conspiracy, and it was beyond dispute that Calderone was involved in one small episode.

The Government sought review in Calderone and in a similar case, United States v. Gambino. The Supreme Court remanded both cases without opinion for further consideration in light of its recent decision in United States v. Felix. The Second Circuit, on remand in Gambino (Gambino II), believed that Felix did not provide direct guidance, since Felix involved multiple prosecutions under different statutes, not multiple prosecutions under the same statute. Gambino II concluded, however, that Felix warranted a return to the Korfant test and an abandonment of its prior opinion in Calderone. According to the Second Circuit, Felix emphasized that the crime is the agreement, not the conduct from which the agreement may be inferred. In fact, the Supreme Court stated in Felix that it did not wish to resolve the perceived dichotomy between the agreement and its proof. The Second Circuit thought that a return to Korfant would be truer to Felix, since Korfant focused more on the agreement itself, whereas Grady focused solely on evidentiary details.

167. Grady, 495 U.S. at 508.
168. Calderone, 917 F.2d at 721.
173. Id. at 231.
174. Id. at 232.
175. Id. at 231.
177. Gambino, 968 F.2d at 231. Although Grady would seem to focus on the evidentiary details, it is questionable that Korfant focuses on the agreement, as opposed to the evidentiary details. Korfant represents an unfocused examination of various factors, and there appears to be little emphasis in the Korfant opinion upon the essential act of agreement. Indeed, in its own way, Korfant seems to focus more on evidentiary details, than on the act of agreement.
Having returned to *Korfant*, the Second Circuit, on remand in *Calderone (Calderone II)*, observed that the *Korfant* analysis has a major deficiency. Under *Korfant* it is not clear whether a court "is to be influenced primarily by the extent to which the relevant facts pertinent to each factor overlap or by the extent to which they are distinct." Although conspiracy opinions have consistently criticized the metaphorical allusions to conspiracies as either chains or circles (a development inspired by *Kotteakos*), *Calderone II* introduced another geometric metaphor to analyze this inherently abstract problem:

Or, if the issue is thought of in geometric terms with the two conspiracies thought of as intersecting circles, is the emphasis on the extent of the area common to both circles or the extent of the area of each circle outside of the common area? For example, nearly all the facts relevant to a small conspiracy might be located within the "circle" of a large conspiracy, with the facts relevant to only one factor (for example, time) extending slightly outside the larger circle, yet the larger conspiracy might also encompass numerous facts outside the circle of the smaller conspiracy. If degree of commonality is important, the smaller conspiracy may be viewed as simply a part of the larger conspiracy, but if degree of difference is important, the numerous facts of the larger conspiracy not common to the smaller conspiracy would lead to a conclusion of separate conspiracies.

The circles described in *Calderone II* do not equate with the circle, or wheel, described in *Kotteakos*. In *Kotteakos*, a conspiracy might or might not be a wheel, with alternate consequences flowing from that finding. In *Calderone II*, every conspiracy is conceptualized as a circle, and that circle is compared for "overlap" with another circle representing the allegedly separate conspiracy. *Calderone II* does carry forward, however, the assumption in *Kotteakos* that a conspiracy is one or many in an objective sense and not relative as to any one conspirator.

After an extensive analysis of Second Circuit precedent, the *Calderone II* court concluded that its decisions established the following pattern:

>[W]e have held conspiracies to be different where the facts of a smaller conspiracy, pertinent to some *Korfant* factors, such as time and geography, were wholly contained within a larger conspiracy so long as there were sufficient factors that shared only a slight overlap of facts or none at all. Where the facts of the smaller conspiracy were substantially overlapping with those of the larger conspiracy, we have either held the conspiracies to be the same, as in *Mallah*, or

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179. *Id.* at 45.
181. 982 F.2d at 45-46.
183. 982 F.2d at 45-46.
sufficiently similar to require the Government to prove that they are different, as in Abbamonte. Viewed in this light, Calderone was an easy case under an application of the Korfant factors. "The pending case appears to be the first one to have reached this Court in which all of the facts pertinent to an identification of a conspiracy are wholly contained within a previously prosecuted conspiracy." The court upheld the double jeopardy defense once again, as it had under a Grady analysis, but it left completely unanswered what should be done with a case that did not have the unique facts of Calderone.

Implicit in this approach was that had the "smaller" conspiracy been tried first, double jeopardy would bar a prosecution for the "larger" conspiracy. But the court in Calderone II did leave open whether such a prosecution might be permissible if at the time of the first prosecution the Government was unaware of the larger conspiracy. Ironically, this "escape valve" for the Government seems related to the res judicata doctrine found in civil cases, even though the Supreme Court has consistently and stoutly refused to accept that civil res judicata doctrine can be of any use in the double jeopardy context.

Calderone II's emphasis on drawing circles is entirely misplaced, just as Korfant's emphasis on multiple factors is also misplaced, unless the exercise is viewed as a means to an end. The end is the determination of whether a defendant entered into one conspiracy or many. Whether there is one conspiracy or many depends on the essential nature of conspiracy as a continuing offense. Since conspiracy is a continuing offense, there is a presumption that once a defendant enters into a conspiracy, his offense continues, and he does not form new conspiracies each time he breaks the law, even though his accomplices may change. The Korfant factors may throw light on this inquiry, but they are subsidiary to the ultimate issue.

Calderone II is equally troublesome in carrying forward the assumption of Kotteakos that a conspiracy is a group of persons, as opposed to an
If conspiracy is viewed as an agreement, then the focus will be on each conspirator's agreement, not on the existence or composition of a group of persons. The mischief implicit in Calderone II bore full fruit in United States v. Macchia. Certain individuals were prosecuted for conspiracy to avoid payment of gasoline excise taxes. Two of these defendants were then indicted for a second conspiracy with the same objective, but one with a larger scope. The Second Circuit candidly admitted that there was an overlap between the two indictments on a number of factors and that the first conspiracy could have been pleaded as part of the conspiracy alleged in the second indictment. One of the two defendants raising the double jeopardy defense was said to control one hundred percent of the bootleg gasoline market in the New York City area during the time frame covered by the two indictments. Yet the court found this individual had no double jeopardy defense.

Each of the Korfant factors was examined. Most were found to overlap, but the overlap was not considered significant, since the factors were not significant in themselves. That these facts had little significance is true, but Macchia turned this wisdom on its head by asserting that this insignificance could defeat the double jeopardy defense. Instead, Macchia looked at the two alleged conspiracies and found that the common actors in the two conspiracies played different roles. Macchia thought this difference was significant, although no prior case had ever focused on the different roles played by the same conspirators in allegedly different conspiracies as a separate Korfant factor. In effect, the court created a ninth Korfant factor.

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191. A number of cases proceed on this same premise, often implicitly. See, e.g., United States v. Guzman, 852 F.2d 1117, 1120 (9th Cir. 1988); United States v. MacDougall, 790 F.2d 1135, 1147 (4th Cir. 1986).
192. Cases do find double jeopardy even when they examine the agreement in general, not the agreement of the defendant raising the issue. See, e.g., United States v. Jarvis, 7 F.3d 404, 412 (4th Cir. 1993).
193. 35 F.3d 662 (2d Cir. 1994).
194. Id. at 668.
195. Id. at 672.
196. Id. at 668-72.
197. Id. at 669-71.
198. Id. at 669-71.
199. Id. at 668.
200. “Coreness” implies that a conspiracy is a group of persons, not a defendant’s agreement. To that extent, Macchia continues the virtually unexamined assumption of Kotteakos.
Finally, the *Macchia* court asserted that the success of one conspiracy was not dependent on the success of the other.\(^{201}\) This type of inquiry assumes that there are separate conspiracies, the very issue to be decided. The inquiry ignores that a conspiracy may move from one illegal episode to another, regardless of success, without becoming a separate conspiracy.\(^{202}\) In fact, failure of a criminal episode may sometimes cause the conspirators to look for a new opportunity, but success can also instigate new offenses. As the cases repeatedly teach, success or failure is neutral to the offense of conspiracy.\(^{203}\) There is no reason why success or failure should establish the boundaries between one conspiracy or the other when success or failure is irrelevant to—or at least an unpredictable factor in—the existence or the continuation of a conspiracy.

All in all, *Macchia* expressed continued concern that the government would be able to defeat a defendant's double jeopardy protection by manipulating the terms of the indictment.\(^{204}\) This well-founded and well-intentioned concern would seem to lend little practical protection for the defendant if the court insists upon analyzing the issue under the terms it has chosen.\(^{205}\)

*Macchia*, although it ignored *Kotteakos*, continued the unspoken premise of *Kotteakos* that a conspiracy is a monolithic construct not dependent on any one conspirator's vantage point.\(^{206}\) *Macchia* took this premise to

\(^{201}\) *Macchia*, 35 F.3d at 671; accord United States v. Dortch, 5 F.3d 1056, 1063 (7th Cir. 1993) (stating that whether the two conspiracies depended on each other for success is the factor traditionally given most attention).


\(^{204}\) Chief Judge Newman, concurring, stressed that the Government had barely managed to prevail at the pre-trial stage and that the "[G]overnment would be well advised not to take rejection of the defense in this case as an invitation to make a regular practice of prosecuting the same defendants for larger conspiracies after concluding that sentencing on a smaller conspiracy was inadequate." *Macchia*, 35 F.3d at 673.

\(^{205}\) In *United States v. Aracri*, 968 F.2d 1512 (2d Cir. 1992), the Second Circuit had little difficulty in rejecting a multiple conspiracy argument, but in the context of variance, not double jeopardy, on facts that are not convincingly different from the facts presented in *Macchia*. *Aracri* pointed out that a single conspiracy is not transposed into a multiple conspiracy simply by lapse of time, change in membership, or a shifting emphasis on its locale of operations. *Id.* at 1521. Instead of separate conspiracies, the court viewed this as a case involving different phases of a single continuing conspiracy. *Id* at 1522.

Nevertheless, double jeopardy, even after *Macchia*, can be a viable defense. See United States v. McGowan, 854 F.2d 176 (E.D.N.Y. 1994), aff'd, 58 F.3d 3 (2d Cir. 1995).

\(^{206}\) Even when a court focuses on conspiracy as an agreement, not as a group of people, it may still deny a double jeopardy defense. The Seventh Circuit has held that two of the defendants were in a single agreement with each other to distribute cocaine, but they lacked double jeopardy protection, since, as a partnership, they joined other, multiple conspiracies to distribute cocaine. *Dortch*, 5 F.3d at 1063. No other reported case seems to have taken an approach of this sort. The Seventh Circuit, no doubt influenced by its landmark decision in *United States v. Townsend*, 924 F.2d 1385 (7th Cir. 1991), was compelled to view conspiracy as each defendant's agreement, not his membership in a group. That approach would give fairly broad double jeopardy protection. But the court managed to escape the confines of *Townsend* by suggesting that a partnership—which is a conspiracy—can itself be a party to a separate conspiratorial agreement.
an extreme by declaring that a person who had one hundred percent con-
trol of all illegal gasoline in the New York City area entered into separate
conspiracies, since co-conspirators came and went and even those who
stayed played different roles at different times.\textsuperscript{207} The court gave no ex-
planation as to why it did not pursue the much more likely alternative:
that this key player was in a single conspiracy whose co-conspirators
came and went, or waxed and waned in their responsibilities, as often
happens in large-scale, enduring criminal endeavors.\textsuperscript{208}

VI. CONCLUSION

In the double jeopardy context, the courts have not been consistent in
following the doctrine that conspiracy is a continuing offense and in ac-
cepting all the logical conclusions associated with that doctrine. Since
conspiracy is a continuing offense, there is no reason to believe, absent
compelling evidence, that a defendant has exited one conspiracy and en-
tered another.\textsuperscript{209} That he has different co-conspirators at various times is
a very weak indicator that he has moved from one conspiracy to another;
instead, it merely indicates that new co-conspirators have joined his
agreement.\textsuperscript{210} Given the nature of drug conspiracies, where this question
most often arises, the double jeopardy defense should be rarely rejected.
More generally, whenever a defendant repeatedly commits crimes of the
same general nature, it is highly probable that he is in a single conspiracy.

The multi-factor analysis—which has been universally adopted—is not
tied to any standard. None of the factors deemed important in this analy-
sis go to the material element of the offense, the defendant’s agreement.
It makes little sense to assess the overlap between two cases on these
multiple factors when these factors are not elements of the offense and
are merely evidentiary of the element of agreement. This concept is the
basic teaching of \textit{Short}, a case that all others profess to follow, but which,
as demonstrated, has been turned on its head.

The courts have failed to acknowledge fully that the variance doctrine
has changed so substantially that it should not control double jeopardy
inquiries in conspiracy cases. It makes little sense to compare conspiracy

\begin{footnotes}
\item[207] \textit{Macchia}, 35 F.3d at 669.
\item[208] An equally unusual approach is found in \textit{In re Grand Jury Proceedings}, 797 F.2d
1377, 1384-85 (1986), \textit{cert. denied}, 479 U.S. 1031 (1987), in which the Sixth Circuit distin-
guished between “parent” and “offspring” conspiracies. If the parent conspiracy is active,
then prosecution for either conspiracy bars prosecution for the other. If, however, the
parent conspiracy is “passive,” then prosecution of one offspring conspiracy does not bar
prosecution of another offspring conspiracy. Nonetheless, prosecution of one of the off-
spring conspiracies would bar prosecution of the passive parent conspiracy. \textit{Id.} By failing
to examine a defendant’s agreement from that defendant’s perspective, the court has en-
meshed itself in all sorts of pseudo-philosophical inquiries that have no real meaning and
no basis in precedent.
\end{footnotes}
indictments for their allegations of times, places, and actions when those allegations do not significantly limit the government's proof.

The courts have correctly placed on the prosecution the ultimate burden of persuasion on the double jeopardy issue. Since conspiracy is a continuing offense, once the defendant establishes a prior prosecution, the government should be required to prove that its new prosecution is for a different conspiracy. In doing so, the prosecution may point to dissimilarities, e.g., time, place, and accomplices, but those dissimilarities should be assessed against the rich legal background that says those dissimilarities are usually of no consequence.

The courts should especially consider and apply the numerous precedents that as a matter of law deny defendants jury instructions on multiple conspiracies.\footnote{See cases cited supra note 99.} If a defendant, under the liberal standard for obtaining a jury instruction,\footnote{E.g., United States v. Douglas, 818 F.2d 1317, 1320 (7th Cir. 1987) (defendant entitled to instruction if it has some foundation in the evidence, however tenuous).} cannot obtain a multiple conspiracy instruction on a given set of facts, then the government should not be able to bring two prosecutions on essentially the same set of facts. When a court has declared specific changes in personnel, places, or overt acts are so inconsequential that a jury may not even think about multiple conspiracies, it can have no principled basis for declaring that on essentially similar facts a defendant must endure separate trials and punishments.

Drawing circles and comparing the degree of overlap between those circles will not provide meaningful answers. And the true inquiry must never be lost: Did the defendant enter one essential agreement or two? That question has become lost in the thicket of Korfant factors, which yield unpredictable results.