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Case Comment

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CASE COMMENT

CRIMINAL LAW — DOUBLE JEOPARDY — MULTIPLE PUNISHMENTS — DEFENDANT CONVICTED OF HOUSEBREAKING AND ROBBERY NOT ENTITLED TO POST-CONVICTION RELIEF FROM CONSECUTIVE SENTENCES WHERE THE OFFENSES ARE FOUND TO BE SEPARATE. — On April 28, 1958, a nine-count indictment was returned in the United States District Court for the District of Columbia against the appellant, Roy J. Irby, and George W. Foster, charging them with one count of housebreaking, one count of robbery, one count of attempted robbery, and four counts of assault with a dangerous weapon. Count nine charged Irby with carrying a dangerous weapon.[1] On June 6, 1958, after appellant had been examined and found competent to stand trial, he was arraigned and entered pleas of not guilty to all counts.[2] On July 21, 1958, appellant, represented by counsel, withdrew his plea of not guilty and entered a plea of guilty to the counts of housebreaking[3] and robbery.[4] The remaining counts of the indictment were dismissed. Thereafter, appellant received consecutive sentences of from two to eight years for the offense of housebreaking and from four to twelve years for the offense of robbery. On March 19, 1965, after completing his term of imprisonment for the housebreaking offense, appellant moved under 28 U.S.C. § 2255[5] to have his sentence for robbery vacated or corrected on the ground that the two sentences could not validly have been made to run consecutively. After conducting a hearing on appellant's petition and taking the matter under advisement, the District Court for the District of Columbia denied the motion.

Irby appealed, and in an opinion dated March 15, 1967, a panel of the United States Court of Appeals for the District of Columbia Circuit, Judge McGowan dissenting, reversed and remanded the case to the district court for resentencing on the robbery count. However, in response to the Government's petition for a rehearing en banc, the judgment of the panel was vacated and a rehearing was ordered. After the rehearing, the majority of the District of Columbia Circuit Court affirmed the judgment of the district court and *held*: a

1 Brief for the United States Court of Appeals for the District of Columbia Circuit by Howard P. Willens as Amicus Curiae at 1, Irby v. United States, No. 19988 (D.C. Cir., Nov. 17, 1967) [hereinafter cited as Brief of Amicus Curiae].

2 Brief of Amicus Curiae, *supra* note 1, at 1.

3 Count one read as follows: "On or about February 24, 1958, within the District of Columbia, George W. Foster and Roy J. Irby entered the dwelling of David J. Weltman and Claire G. Weltman, with intent to steal property of another." Brief for Appellee at 2, Irby v. United States, No. 19988 (D.C. Cir., Nov. 17, 1967).

4 Count three charged:

> On or about February 24, 1958, within the District of Columbia, George W. Foster and Roy J. Irby, by force and violence and against resistance and by sudden and stealthy seizure and snatching and by putting in fear, stole and took from the person and from the immediate actual possession of Claire G. Weltman, property of Claire G. Weltman, of the value of about $2200.00, consisting of one fingerring of the value of $1400.00 and one fingerring of the value of $800.00. Brief for Appellee at 2, Irby v. United States, No. 19988 (D.C. Cir., Nov. 17, 1967).

5 A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence . . . was in excess of the maximum authorized by law . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence. 28 U.S.C. § 2255 (1964).

person convicted of housebreaking and robbery is not entitled to post-conviction relief from consecutive sentences under the rule of lenity where it appears that Congress intended the offenses to be separate. *Irby v. United States,* No. 19988 (D.C. Cir., Nov. 17, 1967).

The protection against double jeopardy guaranteed in the Federal Constitution[6] and most state constitutions[7] represents two distinct policies: (1) no person should be punished more than once for the same offense;[8] and (2) no one should be prosecuted more than once for the same offense.[9] It has been said that

> [t]he ban on multiple punishment imposes a limitation on judicial interpretation of substantive criminal law. It forbids penalizing an accused more severely than the law provides, through the device of finding that he has committed several violations of substantive law where only one exists.[10]

The restriction on multiple prosecutions, on the other hand, is designed to implement such procedural objectives as economy of time and money, avoidance of unnecessary harassment,[11] and psychological security.[12]

However, the rules that bar retrial and those that prohibit multiple punishment have a critical similarity. In both cases, their scope depends on what is meant by "the same offense."[13] In answer to this fundamental double jeopardy question, one writer has stated:

> According to ordinary language, two offenses are the same offense only if they are identical in law and fact . . . . The phrase "has committed an offense" is used as a substitute for "has failed to comply with some important standard"; and the number of offenses depends upon the number of standards violated. In the criminal law . . . the standards are discrete and precise. Each legal offense category . . . is a distinct standard, and each

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6 U.S. CONST. amend. V: ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ."

7 Though the phraseology varies, all states except Connecticut, Maryland, Massachusetts, North Carolina, and Vermont have double jeopardy provisions in their constitutions.

8 *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 169, 173 (1874). *See* Morgan v. Divine, 237 U.S. 632 (1915); Ebeling v. Morgan, 237 U.S. 625 (1915). For a discussion of state decisions, see People v. Savarese, 114 N.Y.S.2d 816 (Kings County Ct. 1952).

9 This policy has found expression in the maxim "no one shall be twice vexed for one and the same cause. *Nemo debit bis vexari pro una et eadem causa.*" *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 168-69 (1874). For a discussion of the origin of the maxim and its policies, see R. PERKINS, CASES AND MATERIALS ON CRIMINAL LAW AND PROCEDURE 650 (1952).

10 Comment, *Statutory Implementation of Double Jeapardy Clauses: New Life for a Moribund Constitutional Guarantee,* 65 YALE L.J. 339, 340 (1956).

11 Hurst v. State, 86 Ala. 604, 6 So. 120 (1889); State v. Hoag, 35 N.J. Super. 555, 561-62, 114 A.2d 573, 577 (App. Div. 1955). The stigma, harassment, and anxiety that a criminal prosecution entails have most frequently been recognized in cases involving the constitutional right to a speedy trial. *See Ex parte* Pickerill, 44 F. Supp. 741 (N.D. Tex. 1942); Note, *Dismissal of the Indictment as a Remedy for Denial of the Right to Speedy Trial,* 64 YALE L.J. 1208, 1212 (1955).

12 *See* United States v. Candelaria, 131 F. Supp. 797, 806 (S.D. Cal. 1955) (rehabilitation impossible where further prosecution threatened).

13 For a discussion of the various ways multiple offenses can be committed by a single act, see Horack, *The Multiple Consequences of a Single Criminal Act,* 21 MINN. L. REV. 805 (1937).

> failure to comply with a standard constitutes, in ordinary language, an offense.[14]

Most courts, however, have never confined themselves to such a restricted definition of "offense." Rather, the majority of courts have sensed that the policies of double jeopardy often embrace closely related or overlapping offenses. This insight has prompted a search for a mechanical test to determine what constitutes an "offense" and has led to considerable debate among courts and commentators attempting to insure the equitable punishment of an offender who violates more than one statutory provision in the course of a single criminal act.[15]

Most of the tests employed by the courts to determine the number of offenses for which an accused may be tried and punished as a result of one act are variations of the "same evidence" test originally formulated by Buller, J., in *The King v. Vandercomb & Abbott*.[16] Under the terms of this rule,

> [a] single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.[17]

Illustrative of the "same evidence" test is the decision of the Supreme Court in *Gavieres v. United States*[18] which held that a person convicted and punished under an ordinance prohibiting drunkenness and rude and boisterous language is not put in second jeopardy by being subsequently tried under another ordinance for insulting a public officer even though the latter charge is based on the same conduct and language as the former. Relying on two previous decisions,[19] the Supreme Court concluded: "[I]t is apparent that evidence sufficient for conviction under the first charge would not have convicted under the second indictment."[20]

Although many courts utilize the "same evidence" test as the standard for determining the number of offenses, some courts have carried it to extreme literal lengths, thereby subjecting themselves to the charge of splitting offenses.[21] In fact, "[i]t is this very rigidity of application that is the test's greatest weakness."[22] For example, under a statute forbidding the felonious cutting of mailbags, a strict Supreme Court held that since proof of the cutting of one sack

14 Note, *Twice in Jeopardy*, 75 YALE L.J. 262, 268-69 (1965).
15 *See generally* Kirchheimer, *The Act, the Offense and Double Jeopardy*, 58 YALE L.J. 513 (1949); Note, *supra* note 14; Comment *supra* note 10.
16 2 Leach 708, 168 Eng. Rep. 455 (Ex. 1796): "[U]nless the first indictment were such as the prisoner might have been convicted upon by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second." *Id.* at 720, 168 Eng. Rep. at 461.
17 Carter v. McClaughry, 183 U.S. 365, 395 (1902).
18 220 U.S. 338 (1911).
19 Carter v. McClaughry, 183 U.S. 365 (1902); Morey v. Commonwealth, 108 Mass. 433 (1871).
20 Gavieres v. United States, 220 U.S. 338, 343 (1911).
21 Comment, *Successive Prosecutions Based on the Same Evidence as Double Jeopardy*, 40 YALE L.J. 462, 469 (1931).
22 Note, *Double Jeopardy and the Concept of Identity of Offenses*, 7 BROOKLYN L. REV. 79, 82 (1937).

does not support the counts as to the other sacks, the cutting into each of the several sacks constitutes a separate crime for which the defendant can be separately punished.[23] This type of rationale has prompted one commenator to remark:

> It therefore appears that, under [the "same evidence"] rule, an overzealous prosecuting attorney can, by assiduously using his Thesaurus and statute-book and continually redefining the crime, each time requiring slightly different criminal elements, secure repeated convictions for the same offense.[24]

The possibility that the "same evidence" test may, in some situations, lead to an unjust result has been intimated even in cases allowing a second prosecution.[25]

In many instances the "same evidence" test has been departed from in one way or another.[26] Some courts have adopted the "same transaction" test which states that there can be only one prosecution, and therefore one punishment, for the consequences of a single criminal transaction.[27] It has also been held that a second prosecution is barred if the criminal intent involved is the same as was involved in a former prosecution and such intent constitutes a material element of the crime in each.[28] Likewise, two alleged offenses have been held to be one offense in legal contemplation if they both involve a single act and a single intent.[29] At least one case has suggested a "gravamen of the offense" test whereby a second prosecution is barred if each prosecution involves

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23 Ebeling v. Morgan, 237 U.S. 625, 631 (1915).

24 Note, *supra* note 22.

25 Whether it is a proper practice to harass and annoy the accused by successive prosecutions for offenses growing out of the same transaction is a matter which addresses itself to the sound discretion of the prosecuting attorney, who will be governed by the circumstances. But it may be doubted whether, in these minor offenses, the interest of the public is best served by such a course. Territory v. Stocker, 9 Mont. 6, 11, 22 Pac. 496, 498 (1889).

26 For example, the negative of the "same evidence" rule permits a second trial unless the evidence sufficient to support a conviction on the second indictment would have warranted conviction on the first. There is another formulation entitled "Buller's rule backwards" (Buller is the judge who originally formulated the "same evidence" test in the *Vandercomb* case), and still another test combines the rule and the rule backwards. These and other variations are discussed in Lugar, *Criminal Law, Double Jeopardy and Res Judicata,* 39 IOWA L. REV. 317, 321-22 & n.20 (1954). *See also* Note, *supra* note 22, at 82-83.

27 Jones v. State, 19 Ala. App. 600, 99 So. 770, *cert. denied,* 211 Ala. 701, 99 So. 924 (1924) (person cannot be separately punished, under separate counts of an indictment, both for the possession of liquor for sale and for mere possession); Roberts v. State, 14 Ga. 8 (1853) (conviction of burglary constitutes a bar to prosecution for robbery); Worley v. State, 42 Okl. Crim. 240, 275 Pac. 399 (1929) (conviction of arson for burning goods in a building precludes prosecution for arson for burning the building); State v. Coffman, 149 Tenn. 525, 261 S.W. 678 (1924) (there can be only one prosecution for the forgery of several names on one instrument).

28 State v. DeGraffenreid, 9 Baxt. 287 (Tenn. 1878) (conviction of burglary with intent to commit larceny constituted a bar to prosecution for the larceny); Ashton v. State, 31 Tex. Crim. 482, 21 S.W. 48 (1893) where the court, in holding that a conviction of assault with intent to murder one person was no bar to a prosecution for a like assault upon another person committed at the same time, said:

> The true test in such cases must be that, if the intent to kill the one is an intention formed and existing distinct from and independent of the intention to kill the other, the two acts cannot constitute a single offense. 21 S.W. at 48.

29 Cook v. State, 43 Tex. Crim. 182, 63 S.W. 872 (1901) (an aquittal of assault with intent to kill *G* constitutes a bar to prosecution for the murder of *D* if the two offenses charged involve "one act, one intent, one volition").

30 State v. Gapen, 17 Ind. App. 524, 527, 45 N.E. 678 (1896). A similar consideration

the same principal unlawful act.[30] This judicial uncertainty and resulting lack of unanimity over what constitutes the "same offense" has produced the following comment:

> It might almost be said that the courts, in attempting to do justice in the individual cases and at the same time to find some satisfactory criterion for determining what is the "same offense," have adopted arguments as numerous and varied as the cases themselves.[31]

In recent years, the Supreme Court has adopted a "rule of lenity"[32] which operates to mitigate the harshness of the "same evidence" rule. The "rule of lenity" was first announced in *Bell v. United States*[33] where the defendant had, on the same trip and in the same vehicle, transported two women across state lines for immoral purposes. He was indicted under the Mann Act and pleaded guilty on both counts of the indictment, each count referring to a different woman. The Court concluded that it was not clear that Congress intended that a person who simultaneously transported more than one woman in violation of the Mann Act should be liable to cumulative punishment for each woman so transported. Because of this congressional failure to make clear the appropriate unit of prosecution under the statute, the Court stated:

> When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. And this not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or antisocial conduct. It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment. This in no wise implies that language used in criminal statutes should not be read with the saving grace of common sense with which other enactments, not cast in technical language, are to be read. Nor does it assume that offenders against the law carefully read the penal code before they embark on crime. It merely means that if Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offense . . . .[34]

The "rule of lenity" is not a casual presumption about legislative intent. Rather it is a canon of construction that requires that legislative silence be interpreted in favor of lenity when there is doubt as to whether cumulative sentences may be given for the simultaneous violation of overlapping statutes.[35] The rule is thus designed to prevent multiple judicial punishment for a single legislative offense, *i.e.*, to preclude substantive double jeopardy.

This "rule of lenity," however, just as its predecessor, the "same evidence"

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seems to underlie the decision in State v. Cooper, 13 N.J.L. 361 (1833) where a conviction of arson was held to preclude a prosecution for murder for a death that unintentionally resulted from the setting of the fire.

31 Note, *Criminal Law—Double Jeopardy*, 24 MINN. L. REV. 522, 553 (1940).

32 Ladner v. United States, 358 U.S. 169, 178 (1958) (referred to as the "policy" of lenity). *See also* Castle v. United States, 368 U.S. 13 (1961); Milanovich v. United States, 365 U.S. 551, 561 (1961) (dissenting opinion).

33 349 U.S. 81 (1955).

34 *Id.* at 83-84.

35 *See* Note, *supra* note 14, at 316.

test, is not without its shortcomings. In its present stage of development, the rule is in conflict with the "same evidence" test with respect to underlying purpose and potential application. Sharply divided courts have continually disagreed on its scope.[36] Thus, the rule has failed to provide a reliable guideline for deciding the legality of cumulative punishments imposed for multiple offenses arising out of a single course of conduct. Moreover, the rule is totally dependent upon legislative intent and, as Circuit Judge Leventhal pointed out in his concurring opinion in *Irby,*

> it usually avails little to seek out specific legislative intent as to the particular offenses. Occasionally an ascertainable legislative objective concerning pyramiding of penalties may be discernible where Congress is addressing itself to a specific type of anti-social conduct. . . . But for the most part there is no ascertainable legislative intent on cumulation of punishment in relation to any particular offense or group of offenses even when the prohibiting statute is one passed by a national legislature in the exercise of its delegated powers.[37]

On the state and local levels, it is even less likely that any relevant legislative intent will be found, as to the interrelationship between the crimes involved.[38]

Finally, it has been suggested that the "rule of lenity" is subject to the usual deficiencies of a black letter rule of law in that, if strictly applied, the rule prohibits cumulative punishment regardless of the particular circumstances of a given case.[39] The sentencing judge is deprived of any discretion with respect to the imposition of consecutive sentences, even in those cases where it may be demonstrably necessary or desirable.

As a practical matter, the majority in *Irby* was able to avoid any consideration of these difficulties by holding that any doubt about what Congress intended with respect to punishment for the separate crimes of robbery and housebreaking was insufficient to cause the "rule of lenity" to operate. The four justices who joined in the majority opinion recognized that the mere existence of two separate crimes, each with different elements and its own prescribed punishment, does not necessarily indicate a legislative intent that such punishments be consecutively imposed. They agreed that any doubt as to a legislative purpose to encompass both punishments should be resolved in favor of the "rule of lenity." Nevertheless, the majority was quick to establish their acceptance of the lower tribunal's ruling "that the degree of doubt discernible on this record does not warrant invocation of the rule of lenity."[40] As in the lower court, the decision was based upon the historic conceptual difference between housebreaking as a crime against property and robbery as a crime against the person, as well as the notion that an invasion of the premises to steal does not irrevocably commit the wrongdoer to rob from the person of anyone found therein.

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36 Brief of Amicus Curiae, *supra* note 1, at 27.
37 Irby v. United States, No. 19988, at 8-9 (D.C. Cir., Nov. 17, 1967).
38 Brief of Amicus Curiae, *supra* note 1, at 31.
39 *Id.* at 32.
40 Irby v. United States, No. 19988, at 3 (D.C. Cir., Nov. 17, 1967).

> The choice is still his up to the moment of confrontation. If he decided to rob, consecutive punishments are not made available solely as a means of exacting greater retribution. Congress could well have conceived of them as a deterrent to compromising the safety of the person as well as the security of the premises. . . . We cannot, at any rate, say with confidence that Congress did not contemplate some additional disincentive for the latter.[41]

Furthermore, the majority pointed out that Irby's attack on consecutive sentences was not timely. This argument should have been made at the time the sentences were imposed, when a meaningful inquiry into the facts would have been possible.[42] It was this last point of the majority upon which the concurring opinion focused. Circuit Judge Leventhal agreed

> that it is possible that a combination at one scene of a housebreaking . . . , and a robbery, may reflect sufficiently separate criminal purposes to permit consecutive punishment. While they may also, I think, be so integrated as to preclude consecutive punishment, that objection is one that should ordinarily be put forward when sentence is imposed, or timely in a motion to reduce the sentence.[43]

As indicated earlier, Justice Leventhal felt that most efforts to ascertain legislative intent, in order to apply the "rule of lenity," would be futile.[44] Consequently, he advocated the following theory of punishment:

> When the same act [of the defendant] can be classified as different crimes, he may be punished with the most onerous penalty provided for the most extreme crime for which he was charged. But he is not to be given two or more consecutive punishments for what is essentially a single criminal episode . . . .[45]

Finally, Chief Judge Bazelon and Circuit Judge Wright, speaking in dissent and relying primarily upon *Prince v. United States*,[46] felt that the intent to steal, rather than just the illegal act of entry, is the gravamen of housebreaking. The applicable statute[47] defined housebreaking as entry with intent to commit another crime. The dissenters maintained that Irby had only one criminal purpose when he committed the two crimes.

> We think the record sufficiently shows that defendant entered the dwelling with the objective of stealing property, by force if necessary, and that he carried out this objective. Since there is substantial doubt that Congress intended cumulative punishment in this situation, the rule of lenity must

41 *Id.* at 4-5.
42 *Id.* at 7.
43 *Id.* at 7-8 (concurring opinion).
44 *See* text accompanying note 37 *supra.*
45 Irby v. United States, No. 19988, at 9 (D.C. Cir., Nov. 17, 1967) (concurring opinion).
46 352 U.S. 322 (1957). In *Prince,* the defendant was convicted of robbing a federally insured bank and entering the bank with intent to commit a felony. The Supreme Court held that Congress did not intend to punish cumulatively for both the preparation and the completed crime. *Id.* at 329.
47 D.C. CODE ANN. § 22-1801 (1967).

be applied. Irby should have been punished for either housebreaking or robbery but not both consecutively.[48]

The prohibition against multiple punishment is designed to guarantee that a defendant's sentence will fairly approximate, and not exceed, his criminal liability. This constitutional double jeopardy proviso is not a restriction on the legislature's power to define and punish offenses.[49] It is, however, a limitation on the judiciary in that it prevents courts from imposing multiple punishment when it appears that the legislature did not so intend.[50] When the legislature does clearly indicate its intent with respect to cumulative sentences, either in the statute itself or its official legislative history, then the courts' task of construction is at an end. In the vast majority of cases, however, no such unequivocal legislative intent is manifested.[51] Consequently, the court must resort to presumptions about legislative intent to determine the unit of conviction established by a statute. Yet, as has been seen, the generally accepted rules for determining the identity of offenses have proved to be inadequate to explain the decisions involving certain combinations of offenses and have failed to offer guidelines for future decisions. Therefore, if defendants are to be assured the protection that the double jeopardy clause was intended to provide, substantial legislative revision of these rules is necessary.

Admittedly, no statute can solve all the problems of substantive law encountered in regulating the imposition of punishment for related offenses. Nor is a complete revision of substantive criminal law, aimed at eliminating many instances of multiple coverage, feasible. But a future double jeopardy act could provide that courts, when confronted with questions of multiple punishment, take into consideration whether: (1) the illegal acts were a single continuing offense; (2) the number of victims affected the gravity of an offense; (3) one offense was included in another; (4) a specific statute should exclude a general one; (5) in reaching the final result by successive acts under the same statute, an accused has caused greater social harm or demonstrated more serious criminal intent than if he had accomplished the same criminal result by a single act.[52] Moreover, legislatures could aid statutory construction by indicating the extent to which new penal statutes are designed to supplant or supplement existing acts and by issuing general legislative directives to guide courts in their interpretation of substantive law. Such steps would, as one commentator noted, "induce greater uniformity and predictability of decision in the double jeopardy field."[53] Until such legislative assistance is forthcoming, the rule of lenity, despite its inadequacies, is still the most equitable rule. *Leo G. Stoff, Jr.*

48 Irby v. United States, No. 19988, at 25 (D.C. Cir., Nov. 17, 1967) (dissenting opinion).

49 The Supreme Court has noted that under federal law, there is nothing in the Constitution that would prevent Congress from punishing separately each step leading to the consummation of a transaction. Albrecht v. United States, 273 U.S. 1, 11 (1927). *See* Parker, *Some Aspects of Double Jeopardy,* 25 ST. JOHN'S L. REV. 188, 195 (1951).

50 "In each case [where two or more statutes are violated] the court must decide on the basis of its particular facts and the legislative intent whether . . . one or more punishments can be inflicted." People v. Moore, 143 Cal. App. 2d 333, 299 P.2d 691, 697 (1956). *See also* Ebeling v. Morgan, 237 U.S. 625 (1915).

51 *See e.g.,* Gore v. United States, 357 U.S. 386, 390, 394 (1958).

52 *See* Comment, *supra* note 10, at 367-68.

53 *Id.* at 367.