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TWO BITES AT THE APPLE: REQUIRING DOUBLE JEOPARDY PROTECTION IN GANG CASES

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ABSTRACT

The Double Jeopardy Clause of the Fifth Amendment of the United States constitution guarantees that a person cannot be punished twice for the same offense. This protection is meant, at least in part, to prevent the State from getting "two bites at the apple," or two chances to convict and punish a person for a single act. Yet under complex criminal statutes, a person who commits a single criminal act may be tried for that crime and then tried again for additional crimes – arising out of the exact same offense – based on allegations of committing the crime in furtherance of a criminal enterprise. In addition to increasing the chances of an unjust conviction and unconstitutionally punishing a person twice for the same offense, complex criminal statutes put undue pressure on criminal Defendants to plead guilty, to crimes they may or may not have committed, in order to avoid lifelong sentences. These laws primarily target Black and Brown men and contribute to racialized mass incarceration.

This article highlights gang statutes, a form of complex criminal liability, which punish alleged gang members for a given crime, then further punish those same accused members for

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committing the same crime in furtherance of a gang. This article identifies three double jeopardy violations, then offers three distinct suggestions for defense attorneys, ethical prosecutors, and judges to right these wrongs. First, gang prosecutions violate classic double jeopardy when predicated on a single, previously adjudicated criminal offense. Second, gang prosecutions violate collateral estoppel where criminal Defendants are found not guilty of a substantive criminal act, yet found guilty of the same act in furtherance of the gang. Third, multiple punishment double jeopardy is violated when Defendants are punished consecutively for a gang statute and conspiracy to violate the same gang statute.

This is the fourth article in a series that argues that gang statutes were created, and have operated, to incarcerate poor, young men of color—including seasoned gang members, novice gang members, and simply accused gang members—under a peculiar set of legal standards that violate the plain language of the United States Constitution. To ensure criminal Defendants, including gang members, due process of law, gang statues must be abolished. Until then, ethical prosecutors should refrain from bringing gang charges, and if they do bring gang charges, should avoid the constitutional violations described in this series.

INTRODUCTION

In April 2011 Perry Nelson Johnson sat with his girlfriend Angelique Petty and childhood friend Arthur Matthews on a porch in Baltimore City, Maryland.[1] While on the porch they were approached by three young men, alleged Black Guerrilla Family (BGF) members.[2] The three men questioned Johnson about statements made to police that resulted in the arrest and conviction of a fellow BGF member.[3] According to Matthews, after a brief argument and hand-to-hand fight, he, Johnson, and Petty retreated into the residence and locked the door behind them.[4] Once inside, Johnson retrieved a handgun and went back outside to further engage the BGF members.[5] Johnson, in pursuit of one of the alleged members, KJ,[6] left the porch and began shooting in his direction. Gunfire was returned, striking Johnson in the eye.[7]

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1. Transcript of Record, State v. KJ (Md. Cir. Ct. May 20, 2016) (No. 113310058). All sources relating to the case are on file with the author and available upon request..

2. The Black Guerilla Family ("BGF") originally began as a political organization that "grew out of increasing inmate interest and concern about prison conditions in California and across the country and with the patterns of brutal repression and abuse on the inside. . . . The Black Guerrilla Family was created to raise awareness, concern, and unity among inmates and the American public about both the harsh conditions that Black people faced as a whole, and the intense repression that Black inmates, especially those with unpopular political beliefs, faced inside California's prison." Azadeh Zohrabi, *Resistance and Repression: The Black Guerrilla Family in Context*, 9 HASTINGS RACE & POVERTY L.J. 167, 178 (2012). To this date, notwithstanding criminal gang activity, there exists an emphasis in BGF to fight against racial injustice.

3. *See* Transcript of Record, *supra* note 1, at 85:23-25, 86:1-11.

4. The initial assault was complete upon Johnson, Petty, and Matthews entering the house. The three BGF members turned from the house and began leaving the scene. *See id. at* 90:4-25.

5. *See id.* at 95: 20-25, 96:1-17. In Maryland, an individual who is the first aggressor in a conflict with another cannot claim self-defense. However, there are two exceptions to this rule. First, an individual may claim self-defense if he begins a non-deadly encounter but is met with deadly force. Second, an initial aggressor may claim self-defense after he clearly withdraws from the altercation. Watkins v. State, 555 A.2d 1087, 1088 (Md. Ct. Spec. App. 1988); WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 10.4(e) (3d ed. 2020). For more detailed discussion of self-defense, the first aggressor doctrine, and the effect of withdrawal, see Margaret Raymond*, Looking for Trouble: Framing and the Dignitary Interest in the Law of Self- Defense*, 71 OHIO STATE L.J. 287, 292–93 (2010); Joshua D. Brooks, Note, *Deadly-Force Self-Defense and the Problem of the Silent, Subtle Provocateur*, 24 CORNELL J.L. & PUB. POL'Y 533, 537–40 (2015).

6. Full name will be withheld for purposes of this article and referred to as simply KJ.

7. *See* Transcript of Record, *supra* note 1, at 90-91. Contemporaneously, a Baltimore city police officer witnessed the commotion on the porch of 904 North Avenue, turned his undercover police car around and gave chase. *See id.* The officer did not witness the shooting but did see a Black male running from the scene "holding his waist," according to the officer, demonstrating characteristics of an armed person. *See id.* The Black male was ordered to

On March 3, 2012, after a year of pretrial detention[8] and four state postponements,[9] KJ entered a plea agreement with the State of

stop and subsequently recovered from his pants leg was a .357 revolver with three spent shell casings. Based on witness statements and evidence recovered from the scene, Perry Johnson and that Black male, later identified as KJ, were both charged with first-degree attempted murder, handgun possession and related charges. *See generally id.* Perry Johnson agreed to help in the prosecution of KJ, while KJ refused to give a statement or participate in any prosecution not withstanding unambiguous and verifiable evidence from Arthur Matthews that Perry Johnson left a fist fight, retrieved a gun from inside 904 North Avenue and started shooting at a fleeing KJ. *See id.*

8. *See id.* KJ was held on pretrial detention based on a district court Judge finding of future dangerousness. *See generally* United States v. Salerno, 481 U.S. 739 (1987) (holding that pretrial detention is not a violation of Due Process Clause of the Fifth Amendment where the criminal defendant is held for a regulatory purpose and the court determines that there is no set of conditions that would ensure the defendant's appearance for trial and safety of the community). Although the majority held that pretrial detention based on future dangerousness was lawful, Justice Marshall dissented, arguing that never before in over two hundred years of American jurisprudence had a criminal defendant been held in detention based on the possibility that he may commit a crime in the future. *Id.* at 755–56. For further exploration of the constitutional problems with holding an individual based on future dangerousness, see Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1336–40 (2012) (arguing that pretrial detention is a violation of a Defendant's Sixth Amendment right to trial by jury, and that pretrial detention based on future dangerousness was not envisioned until 1984); John B. Howard, Jr., Note, *The Trial of Pretrial Dangerousness: Preventive Detention After* United States v. Salerno, 65 VA. L. REV. 639, 640 (1989) (arguing that the *Salerno* decision paved the way for an unjustified expansion in the use of pretrial detention based on dangerousness); Albert W. Alschuler, *Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 MICH. L. REV. 510, 511 (1986) (arguing that the Federal Bail Reform Act of 1984 is unconstitutional in failing to require adequate preliminary proof of guilt or convictability as a predicate for extended detention).

9. *See* Case Information Sheet, State v. K.J., No. 111126014 (Md. Cir. Ct. Mar. 13, 2012) (showing the guilty plea); State v. Hicks, 403 A.2d 356, 360–63 (Md. 1979) (holding that provisions of rule setting time limits within which defendant must be brought to trial are of mandatory application, binding upon prosecution and defense alike, and charges should be dismissed where the State fails to bring case to trial within the 120-day period prescribed by rule where extraordinary cause justifying trial postponement has not been established); Tunnell v. State, 223 A.3d 122, 138–39 (Md. 2020) (discussing the "*Hicks* date" or "*Hicks* Rule," established in *Hicks*, 403 A.2d at 360, in which the Court held that the time limits within which a criminal trial must be held in a Circuit Court are mandatory and cannot be violated absent a finding of good cause). Currently, MD. CT. R. 4-271 and MD. CODE ANN., CRIM. PROC. § 6-103 (West 2001) provide that the date of a criminal trial in the circuit court shall not be later than 180 days after the earlier of the appearance of counsel or the first appearance of the defendant before the Circuit Court. Nevertheless, pursuant to both the Rule and statute, for good cause shown, the county administrative judge or the judge's designee may change the trial date in the circuit court. R. 4-271; CRIM. PROC. § 6-103. In KJ's case good cause was found based on the unavailability of government witnesses over KJ's objections. *See* Transcript of Record, *supra* note 1. In a federal context, the Speedy Trial Act requires a Defendant to be tried within seventy days, but for a finding of excusable delay. 18 U.S.C. § 3161(d)(2). Excusable delay includes, but is not limited to, unavailability of witness, motions, and resolving discovery issues. § 3161(h)(1)-(7). The Sixth Amendment

Maryland, where he agreed to plead guilty to handgun possession[10] and a sentence of three years of incarceration.[11] In exchange, the state agreed to dismiss the attempted murder and related charges and the court entered the other counts *nolle prosequi*[12] with jeopardy attaching.[13] In accepting the plea agreement, KJ waived any self-defense argument,[14]

Constitutional Speedy Trial Right does not have a bright line rule. The Supreme Court has found that speedy trial violation could occur in instances as short as a year and a day. *See* Alschuler, *supra* note 8, at 516 (noting that "[t]he authors of the Speedy Trial Act recognized that the circumstances justifying delay cannot be reduced to a formula. . . . [I]n a complex case, federal pretrial detention can easily last longer than a year").

10. Under MD. CODE ANN., CRIM. LAW § 4-203 (West 2021), it is illegal to wear, carry, or transport a handgun (concealed or open) without a valid permit. *Id.* The code also prohibits carrying or transporting a gun on school property, or in a vehicle traveling on a public road, parking lot, waterway, airway, or with the deliberate purpose of injuring or killing another person. § 4-203(a)(1)(ii). Illegally carrying a firearm in Maryland is a misdemeanor. § 4-203(c)(1). Penalties vary depending on the number of previous offenses: Penalties for first offenders include up to three years in jail and fines ranging from $250 to $2,500. § 4-203(c)(2)(i). Sections 4-203(c)(3)(i), (c)(4)(i) provide the minimum and maximum prison terms for a person who has a prior handgun related conviction. The use of a firearm during a violent crime or a felony is a misdemeanor and can **add up to twenty years** to any other sentences imposed. § 4-204(c)(1)(i) (West 2021).

11. All but the handgun charge that KJ pled guilty to in 2011 were entered *Nolle Prosequi*. *See* Docket, State v. K.J., No. 111126014 (Md. Cir. Ct. May 6, 2011); *see also* Case Information Sheet, State v. K.J., No. 111126014 (Md. Cir. Ct. Mar. 13, 2012).

12. *Id. Nolle Prosequi* is a Latin phrase meaning "will no further prosecute." *Nolle Prosequi*, BLACK'S LAW DICTIONARY (11th ed. 2019). It amounts to a dismissal without prejudice.

13. *See* Case Information Sheet, *supra* note 11. Both KJ and the State of Maryland benefited from entering into a plea agreement. The state was able to secure a conviction, KJ's first, and KJ received the finality of a plea to a lesser included offense, thus limiting his liability.

14. *See* Transcript of Record, *supra* note 1, at 94:3-24; 95:1-23. KJ had a viable self-defense claim. In *State v. Faulkner*, 483 A.2d 759, 761 (Md. 1984), the Court of Appeals of Maryland held that a person is justified on the ground of self-defense if the following criteria are satisfied: (1) the accused had reasonable grounds to believe himself in apparent imminent or immediate danger of death or serious bodily harm from his assailant or potential assailant; (2) the accused in fact believed himself in this danger; (3) the accused claiming the right of self-defense was not the aggressor or provoked the conflict; (4) the force used was not unreasonable and excessive, that is, the force was not more force than the exigency demanded. *Accord* Roach v. State, 749 A.2d 787, 793 (Md. 2000); *see* DeVaughn v. State, 194 A.2d 109, 112 (Md. 1963) (explaining the duty to retreat and castle doctrine (quoting Bruce v. State, 145 A.2d 428, 433 (Md. 1958), *cert. denied*, 376 U.S. 527 (1964)). Outside of one's home, a person, before using deadly force in self-defense, has the duty "to retreat or avoid danger if such means were within his power and consistent with his safety." *Id.* (quoting *Bruce*, 145 A.2d at 433); *see also* Burch v. State, 696 A.2d 443, 458 (Md. 1997). *But see Bruce*, 145 A.2d at 433 (finding that a person does not have to retreat if it would not be safe for the person to do so; "if the peril of the defendant was imminent, he did not have to retreat but had a right to stand his ground and to defend and protect himself . . ."). The duty to retreat also does not apply if one is attacked in one's own home. *See* Crawford v. State, 190 A.2d 538, 541 (Md. 1963) ("[A] man faced with the danger of an attack upon his dwelling need not retreat from his home to escape the danger, but instead may stand his ground and, if necessary to repel the attack, may kill the attacker."). Since the killing of

and accepted responsibility for being illegally in possession of a handgun.[15]

Over two years later, in October 2013, KJ was charged in a seventeen-count gang indictment.[16] Count One alleged that KJ "conspire[d] . . . to establish and entrench a gang" with "two . . . primary objectives . . . violent crimes and the distribution of controlled dangerous substances."[17] Count Two alleged that KJ "participate[d] in a criminal [street] gang" and that he participated in the commission of a crime "for the benefit of, at the direction of, or in association with [the] criminal gang."[18] Membership in a gang is not a crime[19]—only through committing an act in furtherance of a gang does a violation of law occur. Thus, the indictment included 100 criminal acts allegedly performed by members in furtherance of BGF.[20]

Trayvon Martin by George Zimmerman, "stand your ground" laws (which Zimmerman initially claimed allowed him to use deadly force against Trayvon Martin rather than retreat) have come under attack. For a detailed discussion of this issue and the consequences for criminal Defendants, see Aya Gruber, *Race to Incarcerate: Punitive Impulse and the Bid to Repeal Stand Your Ground*, 68 UNIV. MIA. L. REV. 961 (2014). In Maryland to plead guilty a criminal Defendant must accept the facts of the allegation and agree to waive all substantive defenses. A criminal defendant can only appeal a guilty plea if 1) the court did not have jurisdiction, 2) the sentence was illegal, 3) the plea was not voluntary and 4) ineffective assistance of counsel. Post Conviction Procedure Act, MD. CODE ANN., CRIM. PROC. § 645A.

15. *See* Transcript of Record, *supra* note 1; *see also* Case Information Sheet, State v. K.J., No. 111126014 (Md. Cir. Ct. Mar. 13, 2012).

16. *See generally* Indictment, State vs. Jones, (Md. Cir. Ct. 2013) [hereinafter KJ Indictment 2013].

17. *Id.* at 1–11.

18. *Id.* at 12–22.

19. *See* Dawson v. Delaware, 503 U.S. 159, 167–68 (1992) (finding that gang membership was a First Amendment right). In Lanzetta v. New Jersey, 306 U.S. 451, 458 (1939), the Supreme Court overturned a New Jersey statute that made it a crime to be a known gang member. The court rejected New Jersey's argument that gang membership alone, without any illegal act on the part of the member, was sufficient to create criminal liability. *Id.* at 457. The Court held that "[*t*]*he challenged provision condemns no act or omission*; the terms it employs to indicate what it purports to denounce are so vague, indefinite and uncertain that it must be condemned as repugnant to the due process clause of the Fourteenth Amendment." *Id.* at 458 (emphasis added). The Supreme Court noted that the statute was unconstitutionally vague in two specific areas: the meaning of a "known" gang member (is reputation enough to make someone a gang member?) and the issue of "membership" in a gang (are any two people that commit crimes a gang?). *Id.* For further discussion of the unconstitutional vagueness of gang statutes, see Martin Baker, *Stuck in the Thicket: Struggling with Interpretation and Application of California's Anti-Gang STEP Act*, 11 BERKELEY J. CRIM. L. 101, 110 (2006) (arguing that without a clear definition of a "gang," the unconstitutionality found in *Lanzetta* applies to California's current anti-gang legislation).

20. *See* KJ Indictment 2013, *supra* note 16. At least 86 of the 100 acts in furtherance of the BGF did not involve KJ, but prosecutors were able to present facts about the other 86 allegations to prove the BGF existed and that the organization had at least three other members. *See id;* Transcript of Record, *supra* note 1.

Of these 100 acts,[21] fourteen alleged direct participation by KJ.[22] In the gang indictment, KJ was charged with first-degree murder, three attempted murders and multiple other crimes.[23] Each allegation was charged as a substantive crime and predicate act.[24] KJ was previously charged with or suspected of every substantive allegation in the 2013 gang indictment.[25]

Counts One and Two of the indictment were brought under Maryland Criminal Law Article § 9-804.[26] Section 9-804(a) states that a person may not "participate in a criminal [gang] knowing that the members . . . engage in a pattern of organized crime activity; and [may not] knowingly and willfully direct or participate in an underlying crime . . . committed for the benefit of, at the direction of, or in association with a criminal

21. *See* KJ Indictment 2013, *supra* note 16. None of the forty-three co-defendants in the 2013 gang indictment were alleged to have participated in any of the fourteen acts in furtherance of the gang that KJ was accused of committing. *See* Transcript of Record, *supra* note 1; *see also* KJ Indictment 2013, *supra* note 16. Thus, KJ was alleged to commit crimes on behalf of the BGF even though it was undisputed that he committed these crimes by himself and not in collaboration with other BGF members. *See* Transcript of Record, *supra* note 1; *see also* KJ Indictment 2013, *supra* note 16.

22. *See* Transcript of Record, *supra* note 1; *see also* KJ Indictment 2013, *supra* note 16. In the 2013 BGF gang indictment, KJ was charged with gang conspiracy, first-degree murder, and three attempted murders, each as substantive criminal charges and predicate acts to the gang conspiracy charge. KJ Indictment 2013, *supra* note 16, at 1, 12, 23. He was also charged with use of a firearm in a crime of violence and eleven other felonies. *Id.*at 24–26. KJ had already previously been charged with or suspected of every substantive allegation in the 2013 BGF gang indictment. *See* Transcript of Record, *supra* note 1.

23. KJ Indictment 2013, *supra* note 16.

24. A predicate offense is the criminal act that is "committed for the benefit of, at the direction of, or in association with a criminal [gang]." MD. CODE ANN., CRIM. LAW § 9-804 (a)(2) (West 2021).

25. *See* Fareed Nassor Hayat, *Preserving Due Process: Applying* Monell *Bifurcation to State Gang Cases*, 88 UNIV. CIN. L. REV. 129, 131 n.9 (2019). KJ was arrested on January 12, 2007 for attempted first degree murder, attempted second degree murder, assault in the first degree, assault in the second degree, attempted armed robbery, illegal possession of a handgun and discharge of a firearm. Docket, State v. KJ, No. 107024028 (Md. Cir. Ct. Nov. 6, 2007). All of the charges were dropped in Circuit Court on November 6, 2007. *Id.* KJ was charged on July 11, 2008 with attempted first-degree murder, attempted second degree murder, armed carjacking, armed robbery, assault, and theft. Docket, State v. KJ, No. 108193011 (Md. Cir. Ct. Aug. 3, 2009). All charges were dropped on August 3, 2009. *Id.* On November 10, 2008 KJ was charged with first degree murder, first degree assault, use of a handgun while committing a crime, and possession of a handgun. Docket, State v. KJ, No. 108315058 (Md. Cir. Ct. Aug. 8, 2010). All charges were dropped on August 8, 2010, but during this time KJ remained incarcerated in case. *Id.* On May 6, 2011, KJ was charged with attempted first-degree murder, attempted second degree murder, first degree assault, second degree assault, use of a handgun in committing a crime, possession of a handgun, reckless endangerment, and discharge of a firearm. Docket, State v. K.J, No. 111126014 (Md. Cir. Ct. May 6, 2011). All charges, except the handgun possession charge, were dismissed. *Id.*

26. *See* MD. CODE ANN., CRIM. LAW § 9-804 (West 2020) (discussing participation in a gang with knowledge of the gang's engagement in criminal activity).

[gang]."[27] Section 9-804(b)-(c) prohibits criminal gangs from using or investing profits from criminal activity in certain ways.[28] Section 9-804(d) separately states that a person may not conspire to violate the prior sections.[29] A person may be convicted under this statute if they participated in an "underlying crime" (a predicate act)[30] in furtherance of the gang.[31] KJ was convicted of the gang statute, conspiracy to violate the gang statute and multiple other counts in a six-week jury trial. KJ was sentenced to more than two life sentences.[32]

Two double jeopardy violations occurred in the prosecution and eventual sentencing of KJ for violating the Maryland gang statute. First, to support the gang allegation, the prosecution alleged multiple crimes committed in furtherance of the gang, including the attempted murder of Perry Nelson Johnson.[33] KJ was previously charged with the attempted murder of Perry Nelson Johnson,[34] agreed to a negotiated plea deal for related charges, served his sentence, and waived any defenses.[35]

Classic double jeopardy was violated when KJ was charged for a second time with the attempted murder of Perry Nelson Johnson as a predicate act to the gang statute. Classic double jeopardy protects a person from being put twice in jeopardy for the same offense.[36] Here, KJ faced jeopardy for the attempted murder of Perry Nelson Johnson in

27. § 9-804(a).

28. § 9-804(b)–(c).

29. § 9-804(d).

30. A predicate act is the criminal act that is "committed for the benefit of, at the direction of, or in association with a criminal [gang]." § 9-804(a)(2).

31. § 9-804(a) is violated where a person knowingly participates in a criminal organization *and* knowingly directs or participates in an underlying crime.

32. Brief for Appellant, KJ v. State, No. 113310058 (Md. Ct. Spec. App. 2016).

33. *See* KJ Indictment 2013, *supra* note 16, at 5, 15. The Assistant States' Attorney dropped the 2011 charge for the attempted murder of Perry Nelson after detectives uncovered overwhelming evidence that the shooting was done in self-defense. Likely due to this history, in the 2013 indictment this was not charged as a substantive attempted murder, only as a predicate act to the gang violation.

34. *See id*.

35. *See* Case Information Sheet, State v. K.J., No. 111126014 (Md. Cir. Ct. Mar. 13, 2012). As a term of KJ plea agreement he accepted the facts of possession of the handgun as alleged by the Assistant State Attorney's Statement of Probable Cause. *See also* Md. Rule 4-242. (The court may not accept a plea of guilty, including a conditional plea of guilty, until after an examination of the defendant on the record in open court conducted by the court, the State's Attorney, the attorney for the defendant, or any combination thereof, the court determines and announces on the record that (1) the defendant is pleading voluntarily, with understanding of the nature of the charge and the consequences of the plea; and (2) there is a factual basis for the plea. In addition, before accepting the plea, the court shall comply with section (f) of this Rule. The court may accept the plea of guilty even though the defendant does not admit guilt. Upon refusal to accept a plea of guilty, the court shall enter a plea of not guilty.)

36. *See infra* Section II.

2011,[37] and the charge was entered as a *nolle prosequi* with jeopardy attaching.[38] The Maryland gang statute and twenty-eight other states only require one predicate act to violate the gang statute.[39] When KJ

37. *See* KJ v. State, No. 113310058, 2019 WL 2929034, at *3 (Md. Ct. Spec. App. July 8, 2019). In *Mason v. State*, the Court of Appeals of Maryland held that where a Defendant enters a guilty plea in exchange for a *nolle prosequi* agreement, as KJ did, the state is prohibited from any further prosecution on the *nolle prosequi* counts. *See generally* Mason v. State, 488 A.2d 955 (Md. 1985). Any further prosecution of those counts violate double jeopardy. *See generally id.* As per Mason, once KJ pled guilty to handgun possession in exchange for a *nolle prosequi* agreement for the attempted murder of Perry Nelson, jeopardy attached to the attempted murder charge and further prosecution was prohibited. *See id*.

38. *See* KJ v. State, No. 113310058, 2019 WL 2929034, at *12 (Md. Ct. Spec. App. July 8, 2019). CRIM. LAW § 9-804 (2020) (the Maryland gang statute) prohibits a person from participating in a criminal gang or participating in any specified crime in furtherance of the gang. This means that if a person commits just one of the specified crimes in furtherance of the gang, they can be charged under the gang statute.

39. Twenty-eight states and the District of Columbia require only one predicate act. ARIZ. REV. STAT. ANN. §13-2321(B) (2007); CAL. PENAL CODE §186.22 (West 2018) (substantive and enhancement require only one predicate act); Delaware: the participation offense requires the accused assist with only one act, but that the gang has participated in two or more predicate acts DEL. CODE. ANN. tit. 11, §616 (West 2019); District of Columbia: "(b)(1) It is unlawful for any person who is a member of or actively participates in a criminal street gang to knowingly and willfully participate in any felony or violent misdemeanor committed for the benefit of, at the direction of, or in association with any other member or participant of that criminal street gang." D.C. CODE ANN. § 22-951 (West 2013); Florida: any act in furtherance of a gang—FLA. STAT. ANN. § 874.10 (West 2008)—carries a life sentence and the enhancements under 874.04 require only one act to apply, but also Florida RICO law requires more than one predicate offense. Chapter 874 is the Criminal Gang Enforcement and Prevention Act while Chapter 895 is offenses concerning racketeering and illegal debts; Georgia: any offense in furtherance of a gang. GA. CODE ANN., § 16-15-4 (West 2016); Idaho: IDAHO CODE ANN. § 18-8502 (West 2021), enhancement for one act; Illinois: 720 ILL. COMP. STAT. ANN. 5/25.5 (West 2018), illegal participation tied together with 740 ILL. COMP. STAT. ANN 147/15 (West 2018), creation of civil cause of action. However, The Gang and RICO statute requires at least 3 occurrences of predicate activity that are in some way related to each other and that have continuity between them, and that are separate acts 720 ILL. COMP. STAT. ANN. 5/33G-3 (West 2018); Indiana: IND. CODE ANN. § 35-45-9-3 (West 2016). Illegal participation in a criminal organization; Iowa: IOWA CODE ANN. § 723A.2 (2021); Kentucky: (enhancement) KY. REV. STAT. ANN. § 506.160 (West 2018); Louisiana: LA. STAT. ANN. § 15:1403 (1990); Maryland: MD. CODE ANN., CRIM. LAW § 9-804 (2020). Participation in criminal gang prohibited; Michigan: MICH. COMP. LAWS ANN. § 750.411 (West 2001); Minnesota: MINN. STAT. ANN. § 609.229 (West 2021) (Separate RICO charges); Mississippi: MISS. CODE ANN. § 97-44-19 (West 2001) (enhancement); Missouri: MO. ANN. STAT. § 578.425 (West 2020) (enhancement); Nevada: NEV. REV. STAT. ANN. § 193.168 (West 2009) enhancement Nevada Racketeering charges NEV. REV. STAT. ANN. § 207.390 (West 1983) requires 2 or more for racketeering activity; New Jersey: N.J. STAT. ANN. § 2C:33-29 (2008) "crime of gang criminality"; North Carolina N.C. GEN. STAT. ANN. § 14-50.15 (West 2017) Enhancement 7, North Carolina Continuing criminal enterprise N.C. GEN. STAT. ANN § 14-7.20 (West 2012) requires more; North Dakota: N.D. CENT. CODE ANN. § 12.1-06.2-02 (West 1995); Ohio: OHIO REV. CODE ANN. § 2923.42 (2007); Oklahoma: OKLA. STAT. tit. 21 § 856.3 (2011); Rhode Island: racketeering only requires one act for this crime 1956 R.I. GEN. LAWS ANN. § 11-57-1 (West 1985); South Dakota: S.D. CODIFIED LAWS § 22-

allegedly committed the attempted murder of Johnson, he was simultaneously in violation of the gang statute.[40] In other words, the single act of attempted murder was a violation of the substantive crime of attempted murder as well as a violation of the gang statute. By charging KJ once for the attempted murder as a substantive crime, and years later charging the exact same conduct in violation of the gang statute, the prosecution was given two bites at the apple in violation of the Double Jeopardy Clause of the Fifth Amendment.

Diaz v. United States[41] provides an exception to the prohibition against successive prosecutions for a single offense. If at the time of the 2011 indictment the prosecution did not know facts sufficient to bring the later charge, successive prosecution is permissible. For example, if the prosecution could not reasonably have known in 2011 that KJ was a BGF member, *Diaz* would permit the gang charge at a later date. However, in KJ's case, the prosecution was fully aware of sufficient facts.[42] KJ was alleged to be a BGF member and the shooting of Johnson was believed to be in furtherance of BGF in 2011.[43] The prosecutor and detectives knew in April 2011 that the attack on Johnson was, if believed, motivated by BGF retribution.[44] The *Diaz* exception thus does not apply. Classic double

10A-2 (1992) enhancement; Texas: TEX. PENAL CODE ANN. § 71.02 (2019); Utah: UTAH CODE ANN. § 76-3-203.1 (West 2020) enhancement; Virginia: VA. CODE ANN. § 18.2-46.2 (West 2000), however the RICO offense requires two or more predicate acts, and even includes the word criminal street gang; West Virginia: W. VA. CODE ANN. § 61-13-3 (West 2010) Anti-Organized Criminal enterprise act. Arkansas: "2 or more predicate offenses" Arkansas Criminal Gang, Organizations, or Enterprise Act. ARK. CODE ANN. §5-74-104 (West 1993); Connecticut: under CORA it's two or more predicate acts CONN. GEN. STAT. ANN. § 53-395 (2021) Def: § 29-7n ; Kansas: KAN. STAT. ANN. § 21-6329 (West 2014) (RICO); Montana: MONT. CODE ANN. § 45-8-405 (West 2009). Pattern of Criminal Street Gang Activity; New Mexico Racketeering: N.M. STAT. ANN. § 30-42-4 (West 2015); New York: RICO N.Y. Penal § 460.20 (Consol. 1986); Oregon: Racketeering OR. REV. STAT. ANN. § 166.720 (West 1997); Pennsylvania: Racketeering 18 PA. STAT. AND CONS. STAT. ANN. § 911 (2014); Tennessee RICO: TENN. CODE ANN. § 39-12-204 (West 2014); Washington: WASH. REV. CODE ANN. §§ 9A.82.001 (West 2001) Criminal profiteering act requires three or more; Wisconsin: WIS. STAT. ANN. § 946.83 (West 2020) Wisconsin RICO & CCE.

40. *See* KJ v. State, No. 113310058, 2019 WL 2929034 (Md. Ct. Spec. App. 2019).

41. Diaz v. United States, 223 U.S. 442, 458–59 (1912).

42. *See* KJ v. State, No. 113310058, 2019 WL 2929034 (Md. Ct. Spec. App. 2019).

43. *See* Fareed Nassor Hayat, *Preserving Due Process: Applying* Monell *Bifurcation to State Gang Cases*, 88 UNIV. CIN. L. REV., 196, 196–97 (2019). According to KJ's criminal history report, he had been arrested twenty-three prior times before the gang indictment. Of these arrests, thirteen were as a juvenile. The earliest date occurred on September 21, 2000. In addition, there are two events without dates showing KJ in police custody. These two incidents labelled KJ as a gang member at age thirteen based on the Lotus notes gang database indicated in the report and used by Baltimore City police. BALT. POLICE DEP'T, PERSON REPORT (2013).

44. *See generally id.* The transcript from the 2011-12 prosecution against KJ includes clear evidence that the prosecution was aware of KJ's involvement in the BGF, including

jeopardy was violated in bringing Johnson's attempted murder as a predicate to the gang charge in 2013.

Second, KJ was found guilty of violating the gang statute and conspiracy to violate the gang statute.[45] He was sentenced and punished consecutively in violation of the Double Jeopardy Clause as illuminated in the Supreme Court case *Rutledge v. United States.*[46] In *Rutledge*, the Supreme Court conducted a *Blockburger* analysis and found that a person cannot be punished cumulatively for a compound criminal violation, specifically Continuing Criminal Enterprise (CCE) and conspiracy at the same time.[47] According to *Rutledge,* conspiracy does not require proof of any element that a CCE charge does not already include.[48] Similarly, gang statutes–which require an agreement of several individuals to commit a crime–include all of the elements of a conspiracy. Thus, under *Blockburger,* a violation of a gang statute and conspiracy to violate a gang statute using the same predicate acts are the same offense and must merge at sentencing.[49] The court in *Rutledge* noted that if a clear legislative intent to punish conspiracy and CCE consecutively exist, the constitutional *Blockburger* analysis does not control.[50]

In *Killing Due Process: White Supremacy, Double Jeopardy and Gang Prosecutions*, I challenge this Supreme Court doctrine that allows legislative intent to override the mandate of the Constitution in order to

statements from Perry Nelson Johnson. In addition, KJ had been placed in a gang database at age 13.

45. *See* KJ v. State, No. 113310058, 2019 WL 2929034, at *3 (Md. Ct. Spec. App. 2019).
46. *See* Rutledge v. United States*,* 517 U.S. 292, 307 (1996).
47. *Id*.
48. *Id*. at 300.
49. *See* Blockburger v. United States, 284 U.S. 299, 302 (1932).
50. *See Rutledge*, 517 U.S. at 297–300.

increase the mass incarceration of Black[51] and Brown people.[52] However, it is important to note that there is no clear legislative intent in the Maryland gang statute, and in many others, to authorize cumulative punishments for violation of a gang statute and conspiracy.[53]

KA[54] was charged in the same indictment as KJ. KA was charged with 8 counts. As with KJ, count 1 was conspiracy to establish and entrench a gang by criminal means, and Count 2 was participation in a criminal street gang. The remaining counts were for drug possession with the intent to distribute or distribution. Of the 100 acts alleged in furtherance of the gang, just two alleged direct participation by KA. Predicate act 79 alleged that on October 17, 2012, KA possessed with intent to distribute heroin, cocaine, and marijuana. Predicate act 80 alleged that on October 31, 2012, KA distributed cocaine. KA was

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51. *See* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1710 n.3 (1993) ("I use the term 'Black' throughout the paper for the reasons articulated by Professor Kimberlé Crenshaw. I share her view that 'Blacks, like Asians, Latinos, and other 'minorities,' constitute a specific cultural group and, as such, require denotation as a proper noun.' Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law,* 101 HARV. L. REV. 1331, 1332 n.2 (1988). According to W.E.B. DuBois, '[t]he word 'Negro' was used for the first time in the world's history to tie color to race and blackness to slavery and degradation.' W.E. BURGHARDT DU BOIS, THE WORLD AND AFRICA 20 (1965). The usage of the lower case 'N' in 'negro' was part of the construction of an inferior image of Blacks that provided justification for and a defense of slavery. *See* W.E.B. Du Bois, *That Capital 'N,' in* 2 THE SEVENTH SON 12, 13 (Julius Lester ed., 1971). Thus, the use of the upper case and lower case in reference to racial identity has a particular political history. Although 'white' and 'Black' have been defined oppositionally, they are not functional opposites. 'White' has incorporated Black subordination; 'Black' is not based on domination . . . 'Black' is naming that is part of counterhegemonic practice.").

52. *See* Fareed Nassor Hayat, *Killing Due Process: Double Jeopardy, White Supremacy and Gang Prosecutions*, 69 UCLA L. REV. 1, 1–2, 3, 18 (2021). (stating that "in recent decades, as legislatures have expanded the prosecutorial state with weapons designed to punish Black and Brown criminal [D]efendants more harshly[,] . . . with complex criminal statutes such as [RICO], [CCE], and gang statutes. . . . [T]he U.S. Supreme Court has abrogated" its duty of Constitutional protection and is quite literally killing due process through the evisceration of double jeopardy and further stating that "[t]he dismantling of Fifth Amendment double jeopardy protection is the product of white supremacy, couched in a legislative intent narrative, for the purpose of expanding the carceral state," and that to revive due process and comply with the Double Jeopardy Clause of the 5th Amendment, its protection must extend to all Black and Brown people, including gang members).

53. MD. CRIM. LAW §9-804(f) (2020) (the gang statute) outlines penalties for violation of any provision of the gang statute. § 9-804(f) specifically authorizes consecutive sentences for violation of the gang statute and the commission of any underlying crime. *See id*. The statute does not discuss sentencing for participation in a criminal gang and conspiracy to violate the gang statute. *See id*. Absent legislative intent clearly authorizing consecutive sentences for the conspiracy provision and the other provisions of the statute, the *Blockburger* test controls.

54. KA's name is being withheld for the purposes of this article. Citations to the case in question deliberately withheld.

previously charged and fully acquitted of the October 31st cocaine distribution. Therefore, at the time of the 2013 indictment, KA's sole alleged criminal act in furtherance of the gang was the one incident of drug possession with the intent to distribute from October 17, 2012.[55]

There were two double jeopardy violations in KA's case. First, like KJ, KA was punished consecutively on the gang statute charge and conspiracy in violation of *Rutledge*.[56] Secondly, KA faced the possibility of criminal punishment for a crime that he had already been acquitted of, in violation of the principles of collateral estoppel outlined in *Ashe v. Swenson*.[57] Under *Ashe*, once an issue of ultimate fact has been determined by a valid and final judgment, that issue cannot be litigated again between the same parties in any future trial.[58] There was a valid and final acquittal of KA's October 31st cocaine distribution charge. Predicate acts, like all elements of a crime, must be proven beyond a reasonable doubt.[59] This means that whether KA sold cocaine on October

55. KJ Indictment 2013, *supra* note 16, at ¶ 79.

56. *See id.* at ¶ 79-80; U.S. v. Rutledge, 517 U.S. 292, 307 (1996).

57. Ashe v. Swenson, 397 U.S. 436, 448 (1970); *see* KJ Indictment 2013, *supra* note 16, at ¶ 79-80.

58. *Ashe,* 397 U.S. at 443.

59. *See* Apprendi v. New Jersey, 530 U.S. 466, 497 (2000) (Justice Stevens for the United States Supreme Court held that: (1) other than prior convictions, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be approved by a jury and proven beyond a reasonable doubt; (2) state hate crime law authorizing an increase in maximum prison sentence based on a judge's finding that, by a preponderance of the evidence, a defendant acted with the purpose of intimidating the victim based on the victim's particular characteristics, was a violation of the due process clause); *see also* Blakely v. Washington, 542 U.S. 296, 302 (2004) ("'Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' This rule reflects two longstanding tenets of common-law criminal jurisprudence: that the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbo[]rs,' 4 W. Blackstone, Commentaries on the Laws of England 343 (1769), and that 'an accusation which lacks any particular fact which the law makes essential to the punishment is … no accusation within the requirements of the common law, and it is no accusation in reason,' 1 J. Bishop, Criminal Procedure § 87, p. 55 (2d ed. 1872)."); *Blakely*, 542 U.S. at n.5 ("Justice B[reyer] cites Justice O'C[onnor]'s *Apprendi* dissent for the point that this Bishop quotation means only that indictments must charge facts that trigger statutory aggravation of a common-law offense. *Post,* at 2558–2559 (dissenting opinion). Of course, as he notes, Justice O'C[onnor] was referring to an entirely different quotation, from *Archbold*'s treatise. *See* 530 U.S., at 526, 120 S.Ct. 2348 (citing J. ARCHBOLD, PLEADING AND EVIDENCE IN CRIMINAL CASES 51, 188 (15th ed. 1862)). Justice B[reyer] claims the two are 'similar,' *post,* at 2558, but they are as similar as chalk and cheese. Bishop was not 'addressing' the 'problem' of statutes that aggravate common-law offenses. *Ibid.* Rather, the entire chapter of his treatise is devoted to the point that 'every fact which is legally essential to the punishment,' 1 CRIMINAL PROCEDURE § 81, at 51, must be charged in the indictment and proved to a jury, *id.*,, ch. 6, at 50–56. As one 'example' of this principle (appearing several pages before the language we quote in text above), he notes a statute aggravating common-law

31st – which had been resolved in a valid and final judgment – was necessarily relitigated as a predicate act within the gang prosecution. The relitigating of the October 31st allegation violates collateral estoppel.

KJ and KA's cases represent an alarming development in gang prosecutions across the United States of ignoring constitutional precedent–- *Blockburger, Ashe* and *Rutledge*-–in favor of punishment and in violation of the Double Jeopardy Clause of the Fifth Amendment. The issues raised in their cases[60] and this article will be of first impression when applied to gang statutes, if certiorari is granted to the United States Supreme Court. Until then, for Defendants and defense attorneys, the arguments outlined here should be used to challenge gang statute prosecutions, where only one previously adjudicated predicate act[61] is required to support the gang charge, or where a Defendant is being sentenced consecutively for a gang statute violation and conspiracy to entrench a gang.

Until then, prosecutors who consider themselves to be ethical, defenders of constitutional rights of even the accused and who actively describe themselves as progressive prosecutors, should exercise their discretion[62] and refuse to use previously adjudicated conduct as the sole basis of a gang charge and acknowledge the import of *Blockburger, Ashe*

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assault. *Id.* § 82, at 51–52. But nowhere is there the slightest indication that his general principle was *limited* to that example. Even Justice B[reyer]'s academic supporters do not make *that* claim. *See* Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1131–1132 (2001) (conceding that Bishop's treatise supports *Apprendi,* while criticizing its 'natural-law theorizing').").

60. *See* Fareed Nassor Hayat, *Preserving Due Process: Require the Frye and Daubert Expert Standards in State Gang Cases*, 51 N.M. L. REV. 196 (2021). The decision from the Maryland Court of Special Appeals for KJ's initial appeal can be found at KJ v. State, No. 113310058, 2019 WL 2929034, at *14 (Md. Ct. Spec. App. July 8, 2019), *cert. denied,* 466 Md. 224, 217 A.3d 1135 (2019) ("Viewing the elements of the three offenses in light of the required evidence test, it is clear that the elements of attempted murder do not share any common elements with conspiracy to entrench a gang and participation in a criminal gang. The State's prosecutorial strategy in this case did not violate the Double Jeopardy Clause."). This case is not precedential and is not cited as precedent in this paper. KA v. State, No. 1520, 2017 WL 1788138, at *5 (Md. Ct. Spec. App. May 5, 2017) (holding that if Paragraph 80 was improperly redacted, the October 31, 2012, offense of which appellant was acquitted was not the same offense for double jeopardy purposes as the offenses charged in the November 2013 indictment. The circuit court properly denied the motion to dismiss the indictment).

61. *See supra* note 24. There are 28 states in which an individual can be guilty of a gang statute after committing only one underlying crime (or predicate act) in furtherance of the gang. *See supra* note 39.

62. Los Angeles County District Attorney George Gascón, who has been labeled as a progressive prosecutor, in his effort to counter racial inequity in the criminal justice system, has committed to limiting gang enhancement prosecutions. Frank Stoltze, *LA's New DA George Gascón Ushers In Sweeping Changes, Less Punitive Approach to Crime*, LAIST (Dec. 7, 2020, 5:28 PM), https://laist.com/news/las-new-da-george-gascon-sworn-in-promises-sweeping-changes-less-punitive-approach-to-crime.

and *Rutledge*. Those same prosecutors must refrain from using previously acquitted acts as any part of a gang charge, and support simultaneous sentencing on gang statute convictions and conspiracy to entrench a gang.

Until then, trial court judges should be aware of the types of double jeopardy violations – established in *Blockburger, Ashe* and *Rutledge* – and dismiss gang cases accordingly. Appellate courts are encouraged to grant certiorari in state gang cases where double jeopardy issues arise in order to ensure that the Fifth Amendment Double Jeopardy Clause is being applied to all Defendants.

Finally, legislators should amend gang statutes to require more than one predicate act[63] in order to prevent an individual from being tried twice for the same offense committed during a single instance of criminal conduct. In sum, this article argues that, to comply with the Constitution, courts must extend the protections of the Fifth Amendment Double Jeopardy Clause and its protection to all people, including people charged as gang members.

This is the fourth article in a series that argues for an adherence to due process principles of the Fifth and Fourteenth Amendments. In the first article,[64] I argue that well-established evidentiary standards and our commitment to fundamental due process protections are jeopardized by gang statutes. Moreover, gang statutes were created, and have operated, to incarcerate poor, young men of color—including seasoned gang members, novice gang members, and simply accused gang members—under a peculiar set of legal standards that violate the plain language of the United States Constitution. The first article proposes the use of the *Monell* bifurcation standard to address the problems created by gang statutes. Specifically, separating gang allegations from substantive criminal acts in the prosecution's case to ensure criminal Defendants, including gang members, due process of law.

In the second article,[65] I argue that police gang expert testimony should only be admitted after the underlying criminal matter has been

63. State v. Lyons, 985 P.2d 204, 209–11 (Or. Ct. App. 1999) (holding that three prior convictions were based on same criminal episode as ORICO charge, for purposes of claim that ORICO prosecution was barred by former jeopardy statute; and ORICO prosecution would be prohibited if, on remand, trial court determined prosecutor had reasonable knowledge of ORICO offense at time of earlier prosecutions). The Oregon legislature originally included the requirement of two predicate acts to violate their state gang statute, ORICO. The intermediate court held that only one predicate act was required. The Oregon Court of Appeals found the one predicate act would be in violation of the Double Jeopardy Clause. *Id.*

64. Fareed Nassor Hayat, *Preserving Due Process: Applying* Monell *Bifurcation to State Gang Cases*, 88 U. CIN. L. REV. 129 (2019).

65. Fareed Nassor Hayat, *Preserving Due Process: Require the Frye and Daubert Expert Standards in State Gang Cases*, 51 N.M. L. REV. 196 (2021).

proven beyond a reasonable doubt, and even then, only if the police gang expert testimony abides by clearly defined rules of evidence. In addition, I argue that requiring the *Frye* and *Daubert*[66] expert standards for police officer testimony in gang cases would force compliance with constitutional protections and provide consistent application of clearly defined, and normally strictly adhered to, rules of evidence.

In the third article,[67] I argue that in recent decades, as legislatures have expanded the prosecutorial state with weapons designed to punish more criminal Defendants more harshly, the U.S. Supreme Court abrogated its duty of constitutional protection and is killing due process through the evisceration of double jeopardy. Specifically, the dismantling of Fifth Amendment double jeopardy protection is the product of white supremacy, couched in a legislative intent narrative, for the purpose of expanding the carceral state.

This paper builds on the prior articles and argues that gang prosecutions, by design and implementation, routinely violate double jeopardy and current Supreme Court precedent. This paper will proceed in five parts. Part I provides a short history of Fifth Amendment double jeopardy principles, the merger doctrine,[68] and how complex criminal liability statutes[69]—including gang statutes[70]—violate these fundamental principles. Part II introduces the four types of double

66. *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923) and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592 (1993), respectively, are standards applied in different jurisdictions to evaluate the reliability and admissibility of expert witness testimony.

67. Fareed Nassor Hayat, *Killing Due Process: Double Jeopardy, White Supremacy and Gang Prosecutions*, 69 UCLA L. REV. 18 (2021).

68. The Cornell Law School Legal Information Institute defines the Merger Doctrine as follows: "In criminal law, if a defendant commits a single act that simultaneously fulfills the definition of two separate offenses, merger will occur. This means that . . . the [D]efendant will only be charged with the greater offense. This prevents double jeopardy problems from arising." *Merger Doctrine*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/merger_doctrine (last visited Jan. 3, 2021); *see* State v. Gammil, 769 P.2d 1299, 1300 (N.M. Ct. App. 1989) ("Merger is an aspect of double jeopardy. Double jeopardy applies to subsequent prosecutions; merger applies to the concept of multiple punishment when multiple charges are brought in a single prosecution.").

69. Complex criminal liability (also called compound criminal liability) is a phenomenon in criminal law in which a single act by a person may constitute multiple offenses under the law. *See* Susan W. Brenner, *RICO, CCE, and Other Complex Crimes: The Transformation of American Criminal Law?*, 2 WM. & MARY BILL RTS. J. 239, 240 (1993); *see also* Blockburger v. United States, 284 U.S. 299, 305 (1932) (holding that a single act or transaction constitutes a violation of two distinct statutory provision if each provision requires proof of a fact which the other does not).

70. The majority of states have gang prevention laws that criminalize participation in a criminal gang organization and committing a criminal act knowingly in furtherance of the gang. These statutes are based on racialized myths about gangs and violence that are not supported by statistics, and are often used to introduce otherwise inadmissible evidence at criminal trials. *See* Fareed Nassor Hayat, *Preserving Due Process: Applying* Monell *Bifurcation to State Gang Cases*, 88 UNIV. CIN. L. REV. 129, 136–37 (2019).

jeopardy and highlights the seminal case of *Blockburger v. United States*[71] and its progeny. Part III examines classic double jeopardy (also known as successive prosecution) and argues that in states where gang statutes require only one predicate act, the gang violation must be prosecuted at the same time as the substantive criminal act and merge at sentencing, in order to comport with classic double jeopardy. Part IV defines collateral estoppel from the Supreme Court case *Ashe v. Swenson*[72] and argues that a double jeopardy violation occurs where an acquittal serves as the only basis of a gang violation. Finally, Part V applies the reasoning in *Rutledge v. United States*[73] to gang statutes, concluding that substantive gang charges must merge with conspiracy charges at the time of sentencing.

I. COMPLEX CRIMINAL LIABILITY SUBVERTS DUE PROCESS

Fifty years ago, an indictment such as the one charging KJ and KA simply did not exist.[74] Prior to the middle of the 20th century, the long-held American principle of personal accountability and criminal liability for specific acts formed the basis for American criminal prosecution: one unlawful act constituted one crime, and the person who committed the act was punished accordingly.[75] Gang statutes, a form of complex criminal liability,[76] reject traditional concepts of prosecution and adopt a form of expansive accountability; where a single act can be punished under multiple statutes, an individual can be punished for the acts of others and Defendants can be punished for previously adjudicated crimes. Under traditional limitations in which a single act constitutes a single crime, KJ would have been charged once with attempted murder, and handgun possession or handgun possession in a crime of violence for the shooting of Perry Nelson Johnson. If found guilty of any or all of those

71. Blockburger v. United States, 284 U.S. 299, 305 (1932) (holding that a single act or transaction constitutes a violation of two distinct statutory provision if each provision requires proof of a fact which the other does not).

72. Ashe v. Swenson, 397 U.S. 436, 437, 447–48 (1970) (defining collateral estoppel as "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit" and finding that because the jury found during the Defendant's initial trial that he was not the robber, collateral estoppel precluded further prosecution for the same robbery under the Double Jeopardy Clause).

73. Rutledge v. United States, 517 U.S. 292, 298, 307 (1996) (holding that conspiracy is a lesser included offense in a Continuing Criminal Enterprise).

74. *See* Susan W. Brenner, *RICO, CCE, and Other Complex Crimes: The Transformation of American Criminal Law?*, 2 WM. & MARY BILL RTS. J. 239, 242 (1993).

75. *Id.*

76. Complex criminal liability is also referred to as compound criminal liability. *See id.* at 241.

charges, admission of those convictions, or conclusions therefrom, would not form the basis for any subsequent trial or subsequent criminal charge.[77] KJ would have been tried for his specific criminal acts, punished accordingly, required to pay his debt to society, then given the opportunity to reintegrate back into his community. Traditional criminal liability gave way to punishment but the purpose of punishment[78] was timbered and final.

Historically, even in situations where a single act violates two statutes, protection has been in place to prevent cumulative sentences. For example, the doctrine of "felony murder" treats any homicide as murder if it occurs during the perpetration or attempted perpetration of a felony that is inherently dangerous to human life.[79]

A. Felony Murder and the Merger Doctrine

At common law, the doctrine of merger worked alongside the doctrine of double jeopardy to prevent cumulative punishment for a single offense, with merger barring cumulative liability for greater and lesser offenses.[80] One of the earliest examples of this was the merger limitation on felony murder.

In his article *Making the Best of Felony Murder*, Professor Guyora Binder explains that when the idea of felony murder first began to circulate in the 1700s, long before it became law, scholars reasoned that

77. FED. R. EVID. 404(a) ("Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait."). Most states have based their evidence codes after the Federal Rules of Evidence, and thus have an equivalent ban on propensity evidence. There are exceptions under Rule 404(b) where evidence of past acts introduced to show motive, identity, habit, or other issues in the case. *Id.* at 404(b).

78. *See* Robert Blecker, *Haven or Hell? Inside Lorton Central Prison: Experiences of Punishment Justified*, 42 STAN. L. REV. 1149 (1990) (explaining that the purposes of punishment are generally divided into two categories – utilitarian and retributivist). The first category of purposes is "utilitarian" or "consequentialist." *Id.* Under a utilitarian analysis, punishment (a bad thing in and of itself) is justified only insofar as its utility (positive impact) outweighs its negative. *Id.* Punishment is imposed to achieve goals that benefit society. *Id.* We do not punish for the sake of punishment but to achieve greater social good. *Id.* A non-exhaustive list of the typical utilitarian justifications for punishment would include rehabilitation, incapacitation, general deterrence (to deter the public in general), and specific deterrence (to deter specific targets from offending). *Id.* The second category of purposes of punishment is "retributivist" or "non-consequentialist." *Id.* Punishment under the retributivist justification for punishment need not serve the greater good. *Id.* Punishment is meted out because the criminal offender deserves punishment for the wrong committed. *Id.* An "eye for an eye" is an example of a retributivist norm. *Id.*

79. *See generally* Erwin S. Barbre, *What Felonies Are Inherently or Foreseeably Dangerous to Human Life for Purposes of Felony-Murder Doctrine*, 50 A.L.R.3d 397 (1973).

80. Brenner, *supra* note 69, at 242.

it must be limited in such a way that prevented a person for being punished twice for a single act.[81]

Scholars were concerned that, for example, a person who committed a violent assault that resulted in someone's death could be punished for both assault and murder during the course of an assault.[82] Binder explains that, in the earliest discussion of this, scholar William Hawkins argued that the predicate acts for felony murder cannot include violent attacks on someone that then results in their death-–rather, the predicate act must have a purpose other than physical harm to the victim.[83]

This was first explicitly affirmed in 1838 in a New York case, *People v. Rector*, which involved a murder charge resulting from a beating with a heavy iron bar.[84] The court rejected a felony murder theory, holding that "the blow cannot be a misdemeanor when it results in death, because the act is then a felony, to wit, manslaughter, ergo it is murder."[85] In other words, as Professor Binder explains, "[m]anslaughter could not be a predicate felony because it 'merged' with the homicide."[86] This logic was expanded to include additional crimes, such as felonious assault, and adopted in other states.[87]

Though *Blockburger* was not yet decided, the key piece of the analysis for courts evaluating double jeopardy and felony murder was whether

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81. Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. REV. 403, 525–26 (2011). For further discussion of the developments of the felony murder merger rule in different states, see David Mishook, *People v. Sarun Chun—In Its Latest Battle With Merger Doctrine, Has the California Supreme Court Effectively Merged Second-Degree Felony Murder Out of Existence?*, 15 BERKELEY J. CRIM. L. 127 (2010) (exploring the history of and recent changes to the merger doctrine for felony murder in California, including the 2009 decision in *People v. Sarun Chun* that any crime which is assaultive in nature will merge with homicide); Russell R. Barton, *Application of the Merger Doctrine to the Felony Murder Rule in Texas: The Merger Muddle*, 42 BAYLOR L. REV. 535 (1990) (discussing the purpose of the merger doctrine as a limitation on the harshness of the felony murder rule, and examining alternative approaches for Texas to determine which underlying crimes will merge with homicide).

82. Binder, *supra* note 81, at 414.

83. Hawkins concluded that, "such killing shall be adjudged murder[,] which happens in the execution of an unlawful action principally intended for some other purpose, and not to do a personal injury to him in particular who happens to be slain . . . ." JOHN D. LAWSON, DEFENCES TO CRIME: THE ADJUDGED CASES ON DEFENCES TO CRIME 1039 (1886) (quoting 1 Hawk. P. C. 86, 89, 100).

84. *See* People v. Rector, 19 Wend. 569, 592–93 (N.Y. Sup. Ct. 1838); *see also* Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59, 174 (2004) and Jared Guemmer, *The Missouri Felony Murder Rule's Merger Limitation: A Doctrine in Limbo*, 80 MO. L. REV. 1165, 1168 (2015) (both discussing the history of New York's treatment of the merger doctrine in felony murder, beginning with *People v. Rector*).

85. Binder, *supra* note 81, at 527.

86. *Id.*

87. *Id.*

each act required proof of a fact that the other did not. In 1906, the New York Court of Appeals explicitly held that assault merged with felony murder because assault contained no element that was not an ingredient of the homicide.[88] This same logic was repeated in several other cases, and courts consistently held that felony murder merges with an underlying crime where the underlying crime is an inherent part of the murder. In other words, where a person can commit two crimes literally simultaneously (i.e., every second he is committing an act, he is violating two statutes),[89] the two must merge and a person cannot be sentenced cumulatively for both.

B. One Act, Infinite Crimes: Rise of Complex Criminal Liability

Single predicate act gang statutes violate traditional American principles of one unlawful act constituting one crime by allowing a person to be placed in jeopardy twice for a single crime: once for the crime itself, and again for committing the crime in furtherance of a gang. Gang statutes ensure that criminal Defendants are sentenced to lifelong sentences and unable to reassimilate into society in violation of double jeopardy.[90] The gang statute represents a troubling example of the growing trend toward multiple charges and punishments, both over time and in one trial, for a single criminal act. This trend has severe and disturbing implications for criminal Defendants' Fifth Amendment double jeopardy protections.[91] Complex criminal liability, specifically, gang statutes, violate Fifth Amendment protection by furthering the prosecutorial state beyond legitimate constitutional constraints.

In her paper, "RICO, CCE, and Other Complex Crimes: The Transformation of American Criminal Law[,]" Susan W. Brenner outlines the massive shift in criminal law that occurred with the advent

88. *Id.*

89. This is the same language that would be used in the case of *Blockburger v. United States*, which became the basis for analyzing the issue of "same offense" in double jeopardy. 284 U.S. 299, 302 (1932); Christine M.G. Davis et al., *Bar Arising from Former Prosecution Where Identity of Elements of Offenses Exist;* Blockburger *Test*, 26 Standard Pennsylvania Practice 2d § 132:247. For further discussion of the development of the *Blockburger* test and the Supreme Court's confusing and often contradictory treatment of it, see generally Aquannette Y. Chinnery, Note, *United States v. Dixon: The Death of the Grady v. Corbin "Same Conduct" Test for Double Jeopardy*, 47 RUTGERS L. REV. 247 (1994).

90. *See generally* BABE HOWELL & PRISCILLA BUSTAMANTE, REPORT ON THE BRONX 120 MASS "GANG" PROSECUTION (2019) (detailing how criminal Defendants in a 2016 gang raid in New York City were prosecuted under a federal RICO indictment for conduct that had been already adjudicated in state courts. Most defendants plead guilty and accepted sentences within the guidelines, rather than be subjected to lifelong sentences, even though many had no prior felony convictions, and had already served their sentences for the underlying crimes or been found not guilty of the substantive crime).

91. *See supra* discussion of KJ and KA cases at the beginning of this section.

of complex criminal liability.[92] Complex criminal liability will be summarized here with additional background on the doctrine of conspiracy. Brenner writes that, "[h]istorically, Anglo-American criminal law implicitly assumed that an act constituted the commission of one and only one crime. For centuries, this seldom articulated assumption structured the conceptualization of 'crime,' as in Blackstone's statement that a crime is 'an act committed . . . in violation of a public law.'"[93]

Brenner posits that the dismantling of the assumption of "one act one crime" first began to dissolve with the Supreme Court's evolving treatment of conspiracy.[94] A conspiracy is a criminal act defined by an agreement between two or more people to commit an unlawful act.[95] A charge of conspiracy generally requires that four elements be proven beyond a reasonable doubt: (1) an agreement between at least two parties, (2) an illegal goal, (3) that the Defendant knew of the agreement and voluntarily participated in it, and (4) some overt act in furtherance of the conspiracy.[96]

At common law, conspiracy was a misdemeanor that merged into a completed felony.[97] Under this model, a person who conspired to commit a crime and then committed that crime could be charged only with the completed commission of the crime.[98] This changed first with the Supreme Court's 1895 decision in *Clune v. United States*,[99] which held

92. Susan W. Brenner, *RICO, CCE, and Other Complex Crimes: The Transformation of American Criminal Law?*, 2 WM. & MARY BILL RTS. J. 239, 242, 245 (1993) (noting that historically, Anglo-American law assumed that that an act constituted the commission of only one crime, yet "[c]ompound liability became a major influence on federal law in 1970, with the adoption of RICO and CCE").

93. *Id.* at 242.

94. *Id*. at 246–47.

95. 15A C.J.S. *Conspiracy* § 128 (2021). Conspiracy is a dangerous tool in the hands of prosecutors because they can obtain extremely lengthy sentences for even minor crimes by holding someone accountable for all acts commit by anyone in an alleged conspiracy. Prosecutors can use the threats of long sentences to coerce guilty pleas, even for minor crimes. For additional discussion of this issue, see generally HUMAN RTS. WATCH, AN OFFER YOU CAN'T REFUSE: HOW US FEDERAL PROSECUTORS FORCE DRUG DEFENDANTS TO PLEAD GUILTY (2013). Paul Marcus has argued that conspiracy charges give significant power to prosecutors and makes convictions possible without constitutional standards of proof, yet the alleged justification for charging conspiracy in addition to a substantive crime—namely that criminal group behavior is more dangerous than individual criminal activity—has never been supported by empirical data. Paul Marcus, *Criminal Conspiracy Law: Time to Turn Back From an Ever Expanding, Ever More Troubling Area*, 1 WM. & MARY BILL RTS. J. 1, 5 (Spring 1992).

96. Robert R. Arreola et al., *Federal Criminal Conspiracy,* 34 AM. CRIM. L. REV. 617, 619–20 (1997).

97. Brenner, *supra* note 69, at 246.

98. *See id.*

99. Clune v. United States, 159 U.S. 590, 595 (1895) ("Whatever may be thought of the wisdom or propriety of a statute making a conspiracy to do an act punishable more severely than the doing of the act itself, it is a matter to be considered solely by the legislative body.

that "[a] conspiracy to commit an offense is denounced as itsel [sic] a separate offense . . . . The power exists [in the legislature] to separate the conspiracy from the act itself . . . ."[100] The next major decision came in 1946 in *Pinkerton v. United States*.[101] In *Pinkerton,* the Supreme Court confirmed that an individual can be liable for the conspiracy *and* the target crime(s) if the conspiracy is successful.[102] This is true even if the individual was not present at the time of the substantive crime, did not know of or approve of the plan, and took no active role.[103] This doctrine and its clear implications have faced strong critiques from the very beginning. Justice Rutledge warned in his dissenting opinion in *Pinkerton* that:

> The looseness with which the charge may be proved, the almost unlimited scope of vicarious responsibility for others' acts which follows once agreement is shown, the psychological advantages of such trials for securing convictions by attributing to one proof against another, these and other inducements require that the broad limits of discretion allowed to prosecuting officers in relation to such charges and trials be not expanded into new, wider and more dubious areas of choice.[104]

Beyond Justice Rutledge's dissent, judicial extension of prosecutorial power through conspiracy has not been without additional challenge and limitation. The Court of Appeals of New York rejected the *Pinkerton* doctrine altogether in *People v. McGee* finding it "repugnant to our system of jurisprudence. . . to impose punishment . . . for substantive offenses in which [the Defendant] did not participate."[105]

Despite these warnings, *Pinkerton* was just the beginning of a trend of punishing people for crimes they personally had not committed and punishing Defendants twice for a single crime. As Brenner explains, this trend would take off at unprecedented levels beginning in 1970 with the

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The power exists to separate the conspiracy from the act itself, and to affix distinct and independent penalties to each.").

100. *Id*. at 595.

101. Brenner, *supra* note 69, at 247.

102. *Id.*; Pinkerton v. United States, 328 U.S. 640, 646–47 (1946).

103. *See, e.g.*, United States v. Mothersill, 87 F.3d 1214, 1220 (11th Cir. 1996) (holding all leaders of a drug operation convicted of murder where one member decided alone to put a pipe bomb in his car and it unexpectedly exploded, killing a police officer).

104. Pinkerton v. United States, 328 U.S. 640, 650 (1946) (Rutledge, J., dissenting). In addition to concerns about extending liability beyond the person who commit a crime, Justice Rutledge dissented in *Pinkerton* on double jeopardy grounds, stating that this broad liability "either convicts one man for another's crimes or punishes the man convicted twice for the same offense." *Id.* at 649.

105. People v. McGee, 49 N.Y.2d 48 (1979).

legislature's passage of the Racketeer Influenced and Corrupt Organizations Act (RICO) and the CCE statute.[106] Gang Statutes are a continuation of this trend toward abrogating traditional rules of criminal prosecution for the purpose of obtaining easier convictions and subjecting many more Defendants to the mechanism of the carceral state.[107]

In 1970 Congress passed the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, providing new "tools"[108] for prosecutors to target perceived organized crime.[109] The RICO statute prohibited a person from using income derived from a pattern of racketeering to establish an enterprise whose activities affect interstate commerce.[110]

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106. Susan W. Brenner, *S.C.A.R.F.A.C.E.: A Speculation on Double Jeopardy and Compound Criminal Liability*, 27 NEW ENG. L. REV. 915, 916–17, 977 (1993) (arguing compound liability statutes such as RICO and CCE give prosecutors even more latitude than they already have in exercising discretion in the charges they bring, and make it easier for prosecutors to coerce Defendants to plead guilty by threatening draconian sentences). Other scholars have also noted the potential for prosecutorial abuse inherent in compound crimes. Bennett L. Gershman argues that the CCE and RICO statutes increase prosecutorial power, and the flexibility to join parties and crimes pursuant to statutes like these create "megatrials" that increase the chances of convictions. Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 406, 410 (1992). Similarly, Professor Johnson, in a letter to Paul Marcus, lamented that, "[a]ll of the opportunities for abuse and excess have been magnified in RICO, as the courts have construed that misleading statute. . . . Broad and vaguely defined offenses, combined with horrendous sentencing possibilities, give the prosecution the power to make an offer which the defense cannot refuse." Marcus, *supra* note 95, at 17. Brenner also notes there are double jeopardy issues inherent in CCE charges because under *Blockburger,* a CCE offense is the same offense as the predicate act because the predicate act does not require proof of any fact that the CCE statute does not already require. Susan W. Brenner, *supra* note 106, at 953–54, 971 ("Under *Blockburger*, the predicates are clearly lesser included offenses . . . . To avoid these restrictions, the lower federal courts are distorting and/or ignoring these standards, thereby adding to the confusion that exists in double jeopardy law.").

107. *See* Hayat, *supra* note 25, at 138–39 ("The Racketeer Influence and Corruption Act ("RICO") has been cited as the basis for the proliferation of State gang statutes. RICO's purported legislative intent was to target sophisticated criminal enterprises. Similarly, state gang statutes purportedly target those with knowledge that '[the gang's] members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang.'").

108. This article rejects the word "tools" as a way to describe the purpose of RICO. Here, I use the word weapons as opposed to the word "tools" as described in other writings because the expansion of criminal liability has been used to weaponize criminal statutes to further mass incarceration. Tools fix problems while weapons are used to wage war, albeit unsuccessful wars. The war on drugs or the war on poverty being examples of failed efforts. RICO does little to correct structural problems of class, education, economics and racism. RICO, gang statutes and other complex criminal statutes are thus weapons and used primarily against Black and Brown people.

109. *See* Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922.

110. *See id.* at § 1962.

"[R]acketeering activity" includes a number of enumerated acts, including dealing a controlled substance.[111] In passing RICO, Congress noted that "organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption . . . ."[112] RICO was passed by Congress to provide prosecutors with new "weapons"[113] to address the perceived threat of sophisticated organized crime and its financial impact on the United States.[114] After the federal RICO statute was passed, states began passing their own RICO statutes, some of which no longer limited RICO prosecutions to organized crime.[115] In addition to states passing their own RICO statutes, states also enacted statutes specifically targeting criminal street gangs, starting with the 1988 STEP Act in California.[116]

The same year that Congress enacted RICO they also enacted the Continuing Criminal Enterprise statute, 21 U.S.C. § 848 (1988).[117] The

111. *Id*. at § 1961.

112. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922.

113. See *supra* notes 52 and 108 for an explanation generally.

114. Many scholars have noted that while the RICO statute was originally designed to target the leaders of sophisticated mafia operations, it was quickly expanded to cover a broader array of street gangs as well as lower-level gang members. *See* A. Laxmidas Sawkar, *From the Mafia to Milking Cows: State RICO Act Expansion*, 41 ARIZ. L. REV. 1133, 1133 (1999); Jordan B. Woods, *Systemic Racial Bias and RICO's Application to Criminal Street and Prison Gangs*, 17 MICH. J. RACE & L. 303, 304 (2012); NATALIE Y. MOORE & LANCE WILLIAMS, THE ALMIGHTY BLACK P STONE NATION: THE RISE, FALL, AND RESURGENCE OF AN AMERICAN GANG (2011). Professor Babe Howell has also written extensively on the use of RICO conspiracy charges for against young men committing low-level crimes. *See* BABE HOWELL, REPORT ON THE BRONX 120 MASS "GANG" PROSECUTION (2019). Given the timing of the war on drugs and statements made by numerous politicians about crime and incarceration as a mechanism of racial control, there is also reason to believe that RICO and similar statutes were originally passed with predominantly Black and Brown inner city street gang members in mind. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW (2010).

115. A. Laxmidas Sawkar, *From the Mafia to Milking Cows: State RICO Act Expansion*, 41 ARIZ. L. REV. 1133, 1133–35 (1999).

116. *See* Hayat, *Preserving Due Process: Applying* Monell *Bifurcation to State Gang Cases*, 88 UNIV. CIN. L. REV. 129, 138 n.40 (citing Kim Strosnider, *Anti-Gang Ordinances After* City Of Chicago v. Morales*: The Intersection Of Race, Vagueness Doctrine, and Equal Protection in the Criminal Law*, 39 AM. CRIM. L. REV. 101, 107 (2002)) ("'Ten states have comprehensive or omnibus statutory schemes dealing with gangs, many of them patterned after California's STEP Act or federal racketeering law.'); David R. Truman, Note, *The Jets and Sharks Are Dead: State Statutory Responses to Criminal Street Gangs,* 73 WASH. U. L. Q. 683, 686 (1995) ('California, home of the 'street gang capital of the United States,' took the lead in this statutory fight against gangs by passing the Street Terrorism Enforcement and Protection Act (STEP Act) in 1988. Similar in structure to the federal Racketeer Influenced and Corrupt Organizations Act (RICO), the STEP Act creates a new substantive crime of participation in criminal street gang activity.'").

117. Brenner, *supra* note 69, at 253.

CCE statute prohibits a person from committing certain enumerated crime as a part of a continuing series of violations undertaken in concert with five or more persons if such person has a supervisory, organizer or management position, and from which such person obtains substantial income or resources.[118] Gang statutes like the ones that KJ and KA were charged under are largely modeled after RICO and CCE statutes.[119]

There are a number of due process concerns with this model.[120] First and foremost, an overwhelming amount of power is put in the hands of the prosecution, and in particular gives prosecutors enormous leverage in plea bargaining, even when many of their charges are supported by manipulated, unreliable, and inadmissible evidence.[121] This power is used primarily to incarcerate poor young Black and Brown people, notwithstanding claims made in the passing of RICO of addressing "sophisticated enterprise."[122]

Being labeled as a gang member – even if only as an unfounded allegation – often makes it virtually impossible that an individual will be released on reasonable bail pre-trial, regardless of criminal history or the severity of the crime.[123] Pre-trial detention, in turn, increases the chances of a conviction regardless of the individual's actual guilt–particularly for accused gang members who may face harsh prison conditions.[124] The combination of pre-trial detention and the over-filing of gang related charges that carry heavy sentences also has the effect of pressuring Defendants to plead guilty.[125]

For example, in April 2016, 120 young Black and other men of color were indicted in what was boasted to be the largest "gang raid" in New

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118. *Id*. at 935–36.

119. *See* Hayat, *supra* note 25; see also *supra* note 114 for the discussion of the use of RICO statutes to target low-level gang members.

120. *See* Hayat, *supra* note 25, at 145; Brenner, *supra* note 69, at 298 ("Among other things, prosecutors can use statutes like RICO and CCE to construct charges that provide a significant incentive for plea bargaining, as they would impose varying degrees of iterative liability if a defendant were to insist on going to trial."); *see* BABE HOWELL, REPORT ON THE BRONX 120 MASS "GANG" PROSECUTION 15 (2019).

121. *See* Hayat, *supra* note 25, at 140.

122. *See supra* text accompanying note 114.

123. K. Babe Howell, *Fear Itself: The Impact of Allegations of Gang Affiliation on Pre-Trial Detention*, 23 CUNY ACAD. WORKS 621 (2011).

124. Michael Cannell, *Assumed Dangerous Until Proven Innocent: The Constitutional Defect in Alleging Gang Affiliation at Bail Hearings*, 63 DEPAUL L. REV. 1027, 1047 (2014) (noting that jails may segregate alleged gang members and place them in lockdown for up to twenty-three hours a day, further pressuring Defendants to plead guilty).

125. *See* H. Mitchell Caldwell, *Reeling in Gang Prosecutions: Seeking a Balance in Gang Prosecution*, 18 U. PA. J. L. & SOC. CHANGE 341, 364 (2015); Susan W. Brenner, *Rico, CCE, and Other Complex Crimes: The Transformation of American Criminal Law?*, 2 WM. & MARY BILL RTS. J. 239, 298 (1993).

York City's history.[126] The young men generally faced conspiracy charges under RICO.[127] Of the 120 Defendants, 115 pled guilty.[128] One of the Defendants that rejected the plea was Carletto Allen.[129] At trial, the prosecution was unable to prove the gang charge beyond a reasonable doubt.[130] Yet the high sentences that RICO can bring had already motivated over 100 young men to plead guilty to crimes for which there may have been no evidence to prove guilt beyond a reasonable doubt.[131]

For those willing to go to trial, introducing gang evidence at trial increases the likelihood of a conviction[132] without proof beyond a reasonable doubt of the substantive crime charged.[133] This occurs because of the prejudicial nature of gang evidence, and jurors' tendency to believe that the more charges exist against a person, the more likely it is that they are guilty.[134]

This paper focuses on another danger of complex criminal liability: the subversion of Defendants' Fifth Amendment double jeopardy rights when charged under gang statutes. Under gang statutes, a person who commits a single crime (such as drug distribution or handgun possession) may be charged for that crime, charged for committing that crime in furtherance of a gang or other criminal enterprise, and charged with conspiring to entrench said criminal enterprise.

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126. BABE HOWELL, REPORT ON THE BRONX 120 MASS "GANG" PROSECUTION 4 (2019).

127. Alice Speri, *The Largest Gang Raid in NYC History Swept Up Dozens of Young People Who Weren't in Gangs*, Intercept (April 25, 2019, 6:00 AM), https://theintercept.com/2019/04/25/bronx-120-report-mass-gang-prosecution-rico/.

128. Alice Speri, *The Largest Gang Raid in NYC History Swept Up Dozens of Young People Who Weren't in Gangs*, INTERCEPT (Apr. 25, 2019, 6:00 AM), https://theintercept.com/2019/04/25/bronx-120-report-mass-gang-prosecution-rico/; BABE HOWELL, REPORT ON THE BRONX 120 MASS "GANG" PROSECUTION (2019).

129. Speri, *supra* note 127.

130. *See* Alice Speri, *New York Gang Prosecutions Use Conspiracy Charges to Criminalize Whole Communities*, INTERCEPT (June 7, 2018, 11:50 AM), https://theintercept.com/2018/06/07/rico-gang-prosecution-nyc/.

131. *See id.*

132. Hayat, *supra* note 52.

133. Alice Speri, *The Largest Gang Raid in NYC History Swept Up Dozens of Young People Who Weren't in Gangs*, INTERCEPT (April 25, 2019, 6:00 AM), https://theintercept.com/2019/04/25/bronx-120-report-mass-gang-prosecution-rico/ (noting that at the trial of Carletto Allen, jurors were told about all the crimes the Bronx 120 as a whole had been accused of, even those that Allen was not involved with).

134. *See* Hayat, *supra* note 25, at 140; Speri, *supra* note 127 (noting that gang charges allow jurors to hear about all the crimes committed by the gang, even if the individual on trial was not involved); *see also* People v. Albarran, 149 Cal. App. 4th 214, 232 (2007) (holding a Defendant's constitutional right to fair trial to be violated where the introduction of gang evidence is so prejudicial as to render the trial fundamentally unfair); State v. Torrez, 210 P.3d 228, 235 (N.M. 2009) ("To be sure, evidence of gang affiliation could be used improperly as a backdoor means of introducing character evidence by associating the Defendant with the gang and describing the gang's bad acts.").

C. Scholars on Constitutional Violations in Gang Prosecutions

Many scholars have written about the numerous problems associated with gang statutes in the context of mass incarceration and deportation without due process of law.

Significant writing has been done on gang databases, which allow individuals to be labeled as gang members without any proof whatsoever or right to challenge one's classification, creating constitutional issues around freedom of expression and criminalization of status.[135] These databases then allow for increased surveillance and harsher penalties for crimes committed in Black and Brown communities.[136]

Many have noted that Gang databases can be particularly problematic in the context of immigration, where unfounded gang allegations can result in the deportation without due process of law of young immigrants to the United States.[137]

Some scholars have also explored the effects of gang allegations at the trial stage. First, as discussed above, due process is threatened by the admission of inflammatory statements and false narratives during gang prosecutions, including through the use of expert testimony.[138]

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135. *See* K. Babe Howell, *Gang Policing: The Post Stop-and-Frisk Justification for Profile-Based Policing* 5 UNIV. DENVER CRIM. L. REV. 1, 2 (2015) (arguing that gang policing replaced stop-and-frisk in New York City as a way to surveil and control young people of color and to continue stopping individuals in high crime areas without constitutional barriers); Thomas A. Myers, *The Unconstitutionality, Ineffectiveness, and Alternatives of Gang Injunctions*, 14. MICH. J. RACE & L. 285, 294 (2009); Joshua D. Wright, *The Constitutional Failure of Gang Databases*, 2 STAN. J. C.R. & C.L. 115, 126 (2005) (noting that individuals can be added to the gang database in California based on meeting two of ten criteria set by police officers, which can include entirely legal and behavior such as wearing certain colors and being in a photo with other "known gang members"); H. Mitchell Caldwell, *Reeling in Gang Prosecution: Seeking a Balance in Gang Prosecution*, 18 U. PA. J. L. & SOC. CHANGE 341, 364–66 (2015) (arguing that unfounded gang allegations increase the maximum sentences for low level crimes and coerce plea bargaining).

136. K. Babe Howell, *Gang Policing: The Post Stop-and-Frisk Justification for Profile-Based Policing*, 5 UNIV. DENVER CRIM. L. REV. 1, 3 (2015).

137. *See, e.g.*, N.Y. IMMIGR. COAL. & CITY UNIV. OF N.Y. SCH. OF L. IMMIGRANT & NON-CITIZEN RTS. CLINIC, SWEPT UP IN THE SWEEP: THE IMPACT OF GANG ALLEGATIONS ON IMMIGRANT NEW YORKERS 23 (2018), https://www.law.cuny.edu/wp-content/uploads/page assets/academics/clinics/immigration/SweptUp_Report_Final-1.pdf; Laila Hlass, *The School to Deportation Pipeline*, 34 GA. ST. U. L. REV. 697, 701 (2018); Katherine Conway, *Fundamentally Unfair: Databases, Deportation, and the Crimmigrant Gang Member*, 67 AM. U. L. REV. 269, 277 (2017); Rachel Jordan et al., *Proving a Negative: Challenging Unsubstantiated Gang Allegations in Immigration Court*, 42 CHAMPION 46 (2018); Rebecca A. Hufstader, Note, *Immigration Reliance on Gang Databases: Unchecked Discretion and Undesirable Consequences*, 90 N.Y. UNIV. L. REV. 671, 685 (2015).

138. *See, e.g.*, Fareed Nassor Hayat, *Preserving Due Process: Applying* Monell *Bifurcation to State Gang Cases*, 88 UNIV. CIN. L. REV. 129, 165 (2019) (arguing that gang charges should be litigated separately from the specific crime charged due to the inflammatory, confusing, and prejudicial use of gang evidence during prosecutions for

A small number of scholars have explored double jeopardy concerns with other types of compound criminal statutes, in particular the Racketeer Influenced and Corrupt Organizations statute (RICO) and the Continuing Criminal Enterprise statute (CCE). These writings are decades old, and have primarily focused on the substantial confusion surrounding the Supreme Court's double jeopardy doctrine and proposals to clarify the doctrine more generally.[139]

This article is the first to examine violations of double jeopardy occurring in gang prosecutions that are unconstitutional under existing

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substantive crimes); K. Babe Howell, *Prosecutorial Misconduct: Mass Gang Indictments and Inflammatory Statements*, 123 DICKINSON L. REV. 691, 691 (2019) (arguing that the inflammatory statements used in prosecutions threaten due process and bolster false narratives about gangs and violence); Christopher McGinnis & Sarah Eisenhart, *Interrogation is Not Ethnography: The Irrational Admission of Gang Cops as Experts in the Field of Sociology*, 7 HASTINGS RACE & POVERTY L. J. 111, 128–29 (2010) (arguing that police officers are unqualified to serve as gang experts in trials and often improperly express their opinions on gang behavior in ways that jeopardize due process); Michael Jacko, Burris v. State*: Suggestions for the Continued Development of the Rule for Admitting the Testimony of Gang Experts*, 74 MD. L. REV. ENDNOTES 53, 71 (2015) (arguing that the current standard for evaluating gang experts in inadequate to ensure that evidence is excluded if the probative value is substantially outweighed by a risk of prejudice); H. Mitchell Caldwell, *Reeling in Gang Prosecution: Seeking a Balance in Gang Prosecution*, 18 U. PA. J. L. & SOC. CHANGE 341, 366 (2015) (noting that despite lack of direct proof that an individual is in a gang, an expert can testify at trial that a Defendant is in a gang, and jurors will be likely to focus on the danger of the gang rather than the proof of the particular crime charged).

139. *See generally* Susan W. Brenner, *S.C.A.R.F.A.C.E.: A Speculation on Double Jeopardy and Compound Criminal Liability*, 27 NEW ENG. L. REV. 915 (1993) (exploring the development of compound criminal crimes and the Supreme Court's evolving treatment of double jeopardy in that context, and examining some of the confusion and contradictions in the context of a fake compound crime); George C. Thomas III, *Multiple Punishments for the Same Offense: The Analysis After* Missouri v. Hunter *or Don Quixote, the Sargasso Sea, and the Gordian Knot*, 62 WASH. UNIV. L. Q. 79 (1984) (exploring the Supreme Court's evolving treatment of simultaneous double jeopardy, including the controversy over the Supreme Court's decision to relegate the multiple punishment doctrine to a tool of statutory construction); Susan R. Klein & Katherine P. Chiarello, *Successive Prosecutions and Compound Criminal Statutes: A Functional Test*, 77 TEX. L. REV. 333 (1998) (noting that compound crimes do not fit neatly into the 'same offense' test for double jeopardy and suggesting a functional test to examine double jeopardy issues in the context of compound crimes); Anne Bowen Poulin, *Double Jeopardy Protection Against Successive Prosecutions in Complex Criminal Cases: A Model*, 25 CONN. L. REV. 95 (1992) (exploring double jeopardy issues in the context of RICO and CCE and suggests a new more comprehensive test); Amy J. Kappeler, *Supreme Court Review: Changing the Tide of Double Jeopardy in the Context of Continuing Criminal Enterprise,* Rutledge v. United States, *116 S. Ct. 1251 (1996)*, 87 J. CRIM. L. & CRIMINOLOGY 976 (1997) (arguing that the Supreme Court has been confusing and inconsistent in its treatment of double jeopardy for compound crimes such as CCE and RICO); Ramona Lennea McGee, Note, *Criminal RICO and Double Jeopardy Analysis in the Wake of* Grady v. Corbin*: Is this RICO's Achilles' Heel?*, 77 CORNELL L. REV. 687 (1992) (analyzing the impact of Grady v. Corbin on RICO prosecutions and double jeopardy, and arguing that *Grady* should be confined to its facts or construed as inapplicable for RICO prosecutions).

Supreme Court precedent. These arguments have not been considered by the Supreme Court in the context of gang prosecutions. This article provides a pragmatic means for defense attorneys, ethical prosecutors, judges, and legislatures considering the constitutionality of gang prosecutions.

II. TYPES OF DOUBLE JEOPARDY

The distinctions between the types of double jeopardy are critical to understanding the arguments outlined in this paper. Double jeopardy embraces four "distinct species,"[140] or types of double jeopardy. First, classic double jeopardy (also called successive prosecutions) precludes a second prosecution after a person has already been charged for an offense and jeopardy attached (either through conviction, acquittal, or a dismissal with prejudice).[141] A violation of classic double jeopardy occurred in the case of KJ, where KJ was charged for the same conduct of attempted murder and then later the same attempted murder as a predicate act to the gang charge. This is further discussed in section III of this paper.

Second, collateral estoppel prevents the relitigating of any issue that has been decided through a valid and final judgment.[142] For example, if the location of the Defendant at a particular time is decided conclusively by the jury, that same question may not be re-litigated at a future trial. A violation of collateral estoppel occurred in the case of KA, where a charge for which KA had been acquitted–-meaning the jury determined conclusively that KA did not commit the crime in question – was later used as a predicate act for his gang charge. This argument is discussed in more detail in section IV of this paper.

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140. Moore v. State, 18 A.3d 981, 997 (Md. Ct. Spec. App. 2011) (referring to double jeopardy of four different "species"); Fields v. State, 626 A.2d 1037, 1038 (1993) ("When dealing with a generic category or *portmanteau* phenomenon such as double jeopardy, it is indispensable at the outset to identify the particular species of double jeopardy being invoked. There are no less than four such species within the genus 'double jeopardy.' Each carry a different history; each serves a different purpose; each has different implementing rules.").

141. *See, e.g.*, Burks v. United States, 437 U.S. 1, 11 (1978). The *Burks* Court found that the successive prosecution of a Defendant whose conviction was reversed on appeal for sufficiency of the evidence was forbidden under Double Jeopardy principals. *Id.* ("The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. This is central to the objective of the prohibition against successive trials. The Clause does not allow 'the State . . . to make repeated attempts to convict an individual for an alleged offense,' since '[t]he constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.").

142. *See* Ashe v. Swenson, 397 U.S. 436, 442 (1970).

Third, simultaneous jeopardy (also called "cumulative punishment" or "multiple punishment") protects a Defendant from consecutive sentences for a single criminal act.[143] Under simultaneous double jeopardy, an offense that makes up part of a more serious offense will merge with the more serious offense at sentencing.[144] For example, if a person is charged with assault and murder for a single attack, the assault will merge with the murder at sentencing and the Defendant will be sentenced only to the murder.[145] This occurred in the cases of both KJ and KA, where the Defendants were sentenced consecutively for gang statute violations and conspiracy to violate the gang statute, as discussed in section V of this paper.

Finally, the protection against retrial following a mistrial protects a Defendant from a second trial after their first trial resulted in a mistrial, unless the decision to declare a mistrial was absolutely necessary.[146] This type of double jeopardy is not addressed in this paper. Each require a distinct analysis to determine whether a Defendant's double jeopardy rights were violated.[147] Though the analyses diverge, simultaneous double jeopardy and classic double jeopardy doctrines are both rooted in the *Blockburger* same offense test. 2

A. Blockburger *Same Offense Test*

The primary test used to determine whether double jeopardy has been violated is the *Blockburger*[148] test.[149] *Blockburger* is used to determine the key issues in any double jeopardy analysis: whether two offenses are the *same* such that a person is being tried for the *same* offense.[150] In *Blockburger* the Supreme Court held that when the Defendant is charged with two offenses, one of which is a lesser included offense of the other, the acts are considered the "same offense," and

143. *See Moore*, 18 A.3d at 997.

144. *See id.*

145. Under the merger limitation for felony murder, a Defendant who commits murder in the course of certain felonies can only be punished for the murder and not the underlying felony. *See* Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. REV. 403, 525–26 (2011).

146. United States v. Perez*,* 22 U.S. 579, 580 (1824) (holding that a mistrial based on manifest necessity will not bar further prosecution for double jeopardy purposes).

147. Fields v. State, 626 A.2d 1037, 1038 (Md. Ct. App. 1993) ("[W]hen dealing with a generic category or *portmanteau* phenomenon such as double jeopardy, it is indispensable at the outset to identify the particular species of double jeopardy being invoked. There are no less than four such species within the genus 'double jeopardy.' Each carry a different history; each serves a different purpose; each has different implementing rules."). *See* People v. Arndt, 90 Cal. Rptr. 2d 415 (1999).

148. Blockburger v. United States, 284 U.S. 299, 304 (1932).

149. Grady v. Corbin, 495 U.S. 508, 516 (1990).

150. *Id.*

punishment for both is precluded under double jeopardy.[151] Specifically, in *Blockburger* the Defendant was charged with the Harrison Narcotic Act, which criminalized individuals who were not authorized buyers, i.e., doctors or medical professionals, for the sale and purchase of opiates.[152] Under the Harrison Narcotic Act the Defendant was charged for two separate counts resulting from the same sale of opiates; one charge related to the selling of opiates outside of the original stamped package and, two, relating to the sale of the opiate without a written order.[153] The Defendant argued that because the two charges originated from the same transaction then the offenses were the "same offense" for double jeopardy purposes.[154] The United States Supreme Court then pronounced what would become the *Blockburger* test in stating:

> The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not . . . [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.[155]

Because the selling of opiates outside of the original stamped packages and selling opiates without a written order each contained an element that the other does not, "although both sections were violated by the one sale, two offenses were committed."[156] In sum, a Defendant has violated two statutes only if both of the statutes violated require proof of a fact that the other does not. This means, for example, that if Statute 1 requires proof of A, B, and C, while Statute 2 requires proof of A, B, C, and D, these are the same offenses for double jeopardy purposes because Statute 1 does not require proof of any fact that Statute 2 also does not require. More specifically, Statute 1 would be considered a "lesser included offense" of Statute 2 because of all the elements of statute 1 are included in Statute 2 – thus once a person has violated Statute 2, they have automatically also violated the lesser offense of Statute 1.[157]

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151. *Id.*
152. *Id.*; Webb v. United States, 249 U.S. 96 (1919).
153. Blockburger v. United States, 284 U.S. 299, 300–01 (1932).
154. *Id.* at 301.
155. *Id.* at 304.
156. *Id.*
157. As explained by the Supreme Court of Missouri, an offense is a lesser included offense of another statute if, among other ways, "[i]t is established by proof of the same or

B. Brown, Garret*, and* Diaz

Three additional cases aid in understanding double jeopardy as applied to gang statutes–-*Brown v. Ohio,*[158] *Diaz v. United States*[159] and *Garrett v. United States*.[160]

In *Brown*, the Supreme Court clarified that classic double jeopardy prohibits the prosecuting of a lesser included offense which occurs *literally* simultaneously with the greater offense.[161] Defendant Nathaniel Brown stole a car and drove it around town.[162] Over a week later, Brown was caught still driving the car.[163] The police charged him with "joyriding."[164] Brown was prosecuted for joyriding and served a jail term.[165] Upon release, Brown was charged in a second prosecution with auto theft.[166] The Court held that "applying the *Blockburger* test . . . joyriding and auto theft . . . constitute 'the same statutory offense' within the meaning of the Double Jeopardy Clause . . . the lesser offense—joyriding—requires no proof beyond that which is required for conviction of the greater—auto theft."[167] A later Supreme Court case, *Garrett,* discussed *ante,* in applying *Brown* stated that the Defendant had committed one offense because "[e]very minute that [the Defendant] drove or possessed the stolen automobile he was simultaneously committing both the lesser included misdemeanor and the greater felony . . . ."[168]

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less than all the facts required to establish the commission of the offense charged . . . . An offense is a lesser included offense if it is impossible to commit the greater without necessarily committing the lesser." State v. Hardin, 429 S.W.3d 417, 422 (Mo. 2014); *see also* Sours v. State, 593 S.W.2d 208, 213 (1980), *vacated*, 603 S.W.2d 592 (1980) ("the word 'each' is essential to a proper application of the Blockburger criterion. If statute A requires proof of a fact not required by statute B, but statute B does not require proof of any fact not required by statute A, then the offense defined by statute B is a lesser included offense of that defined by statute A.").

158. Brown v. Ohio, 432 U.S. 161, 167–68 (1977).

159. Diaz v. United States, 223 U.S. 442 (1912).

160. Garrett v. United States, 471 U.S. 773 (1985).

161. *Brown*, 432 U.S. at 168–170.

162. *Id.* at 162.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 162–63.

167. *Id.* at 167–68 ("Here the Ohio Court of Appeals has authoritatively defined the elements of the two Ohio crimes: Joyriding consists of taking or operating a vehicle without the owner's consent, and auto theft consists of joyriding with the intent permanently to deprive the owner of possession. Joyriding is the lesser included offense. The prosecutor who has established joyriding need only prove the requisite intent in order to establish auto theft; the prosecutor who has established auto theft necessarily has established joyriding as well.").

168. Garrett v. United States, 471 U.S. 773, 789 (1985).

Brown demonstrates that in the context of classic double jeopardy, a lesser included offense merges with the greater offense for jeopardy purposes where a person is violating both acts *literally* at the same time. It is thus unconstitutional for a person to be charged with a crime and then later charged with a different crime for the same exact conduct.

Diaz works as an exception to *Blockburger* and *Brown,* allowing for successive prosecutions using the lesser included offense in charging a greater offense in circumstances where a reasonable prosecutor was unaware of facts of the greater offense.[169] In *Diaz* the Defendant was convicted for assault and battery.[170] Later, when the complainant succumbed to the injuries, the Defendant was charged with and convicted of homicide in a subsequent prosecution.[171] The Court rejected the Defendant's double jeopardy argument, because "[a]t the time of the trial for the latter the death had not ensued, and not until it did ensue was the homicide committed. Then, and not before, was it possible to put the accused in jeopardy for that offense."[172] *Brown* explicitly recognized that *Diaz* is an exception to the double jeopardy analysis that *Blockburger* demands.[173]

The Supreme Court in *Garrett v. United States* outlined how *Blockburger* and *Diaz* applied to a compound crime.[174] A gang statute is a compound crime (also called a complex crime) because it prohibits certain underlying crimes, such as drug distribution or murder, and then creates an additional crime when these acts are done in furtherance of a gang. The CCE statute is also a compound crime because it prohibits the sale of drugs, and additionally prohibits that same sale of drugs as part of a series of acts done in concert with others. These types of statutes pose a particular challenge for a double jeopardy analysis because they proscribe multiple punishments for a single crime. However, the doctrine of *Blockburger* and merger still apply-–even in the context of a compound crime, a person cannot be tried for a lesser offense and later tried for the greater offense unless the *Diaz* exception controls.[175]

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169. Diaz v. United States, 223 U.S. 442, 444 (1912); *Brown*, 432 U.S. at 169 n.7 ("An exception may exist where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence.").

170. *Diaz*, 223 U.S. at 444.

171. *Id.*

172. *Id*. at 448–49.

173. *Brown*, 432 U.S. at 169 n.7 ("An exception may exist where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence.").

174. For a complete discussion of compound crimes, see *supra* Section II.

175. Jeffers v. United States, 432 U.S. 137, 150–51 (1977) ("*Brown* reaffirms the rule that one convicted of the greater offense may not be subjected to a second prosecution on

Using the rationales of *Blockburger*, *Brown* and *Diaz,* the Supreme Court in *Garrett* created a three-step process for examining issues of double jeopardy in complex criminal statutes: (1) the court must determine the legislative intent for the organized crime statute to be a separate offense, (2) the individual facts must pass the *Blockburger* test to survive double jeopardy and (3) in multiple punishment prosecutions where consecutive sentences are imposed in a single proceeding, the court will determine whether the legislature intended to permit cumulative punishment for each offense.[176] The first two parts of the test are applicable in a successive prosecution case.[177]

In *Garrett,* the Defendant pled guilty to "one count of importation of mari[j]uana" in Washington, which the prosecution later used as an "underlying . . . prior conviction . . . offered to prove one of three predicate offenses that must be shown," in a separate trial, for the crime of engaging in a continuing criminal enterprise.[178]

The Court began by finding that "[w]here the same conduct violates two statutory provisions, the first step in the double jeopardy analysis is to determine whether the legislature — in this case Congress — intended that each violation be a separate offense."[179] As a first step in the subsequent prosecution analysis, the Court found that the legislature did in fact intend multiple punishments for both the predicate act of importation of marijuana and the CCE offense.[180]

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the lesser offense . . . *Ianelli* created no exception to these general jeopardy principles for complex statutory crimes."). *Jeffers* is used by the state to suggest that the constitution permits subsequent prosecution of the same offense in complex criminal cases. *See id.* at 142. However, in the case of *Jeffers*, subsequent prosecution for the same crime was permitted only because the Defendant waived double jeopardy where he demanded severance. *Id.* at 142–43, 154. Specifically, the Defendant was charged with conspiracy to distribute drugs and CCE, based on some of the same incidents of drug distribution. *Id.* at 140–41. Jeffers filed motions to sever the CCE from the conspiracy. *Id.* at 142–43. The prosecution objected to a separate trial. *Id.* at 142. The motion was granted. *Id.* at 143. Jeffers was convicted in the first trial. *Id.* When the prosecution proceeded with the second trial, Jeffers objected. *Id.* at 144. Eventually, the Supreme Court found that Jeffers waived double jeopardy protection when he demanded a second trial. *Id.* at 154. So, even though the Court permitted a second prosecution in *Jeffers*, it was not because CCE and conspiracy was not the same offense, rather because double jeopardy was waived for the incidents of drug distribution that were not included in the first prosecution.

176. Garrett v. United States, 471 U.S. 773, 793 (1985).

177. *Id.* After completing steps one and two of the analysis, the Court stated: "[h]aving concluded that Congress intended CCE to be a separate offense and that it does not violate the Double Jeopardy Clause under the facts of this case to prosecute the CCE offense after a prior conviction for one of the predicate offenses, the only remaining issue is whether the Double Jeopardy Clause bars cumulative punishments." *Id.*

178. *Id.* at 775–76.

179. *Id.* at 778.

180. *Id.* at 778–86.

The Court then proceeded to the second step, "[h]aving determined that Congress intended CCE to be a separate offense and that it intended to permit prosecution for both the predicate offenses and the CCE offense, . . . [t]he critical inquiry is whether CCE is considered the 'same offense' as one or more of its predicate offenses within the meaning of the Double Jeopardy Clause."[181] To determine whether the CCE was the "same offense" as a predicate act, the Court took two additional steps: first, whether prosecution for CCE and its predicate act would pass the *Blockburger* test and, second, whether it would pass *Diaz*.[182]

First, in relation to *Blockburger,* the Court relied on *Brown* in finding that CCE and the predicate offense were not literally simultaneous as *Blockburger* analysis requires.[183] Specifically, "the misdemeanor of joyriding" is a "lesser included offense of the felony of auto theft" because "[e]very minute that [the Defendant] drove or possessed the stolen automobile he was simultaneously committing both the lesser included misdemeanor and the greater felony."[184] In contrast, *Garrett* concluded that importation of marijuana, which served as only one of the *three necessary predicate offenses* for "engaging in a continuing criminal enterprise" did "not lend itself to the simple analogy of a single course of conduct—stealing a car—comprising a lesser included misdemeanor within a felony" because when the Defendant "committed the first of the three predicate offenses required to form the basis for a CCE prosecution, it could not then have been said with any certainty that he would necessarily go ahead and commit the other violations required to render him liable on a CCE charge."[185] Thus, it was the fact that, unlike joyriding, the offense of engaging in continuing criminal enterprise could not occur "simultaneously" with the single predicate offense of "importing marihuana."[186] Because there were two additional predicate offenses, the predicate could not be the lesser included under the reasoning in *Blockburger*.[187]

Second, the court determined that the *Diaz* exception allowed for the prosecution of both the prior convicted conduct, i.e., the predicate act, and the CCE charge.[188] Because CCE requires *three predicate offenses*, the Court in *Garrett* concluded that at the time the Defendant was indicted in Washington with the importation of marijuana charge, the two remaining predicate acts had not been completed in order to charge the

181. *Id*. at 786.
182. *Id*. at 778–93.
183. *Id*. at 790.
184. *Id*. at 787, 789.
185. *Id*. at 776, 788–89.
186. *Id*. at 777, 789–90.
187. *Id*. at 788–89.
188. *Id*. at 791.

Defendant under CCE.[189] Because the crime of CCE had not been completed until after the Washington indictment and after the Defendant had committed the remaining predicate acts, the *Diaz* exception applied.[190]

The court in *Garrett* then proceeded to determine the legislative intent to impose cumulative punishments, applicable only to the issue of whether consecutive sentences could be imposed in a single proceeding.[191]

The critical point of the analysis is that a prosecutor can charge a person with a crime and later use that crime to support a CCE charge because CCE charges require three predicate acts, and the prosecutor cannot successfully prosecute a CCE charge until all three have been completed. Thus, at the time the Defendant commits the first crime, it is impossible for a prosecutor to bring a CCE charge. Gang statutes that require only one predicate act plainly do not meet the criteria for the same exception to the Double Jeopardy Clause of the Fifth Amendment--as soon as the first predicate act is complete, a Defendant has successfully violated the gang statute simultaneously.

With these principles in mind, this article details three double jeopardy violations that occur during the prosecution of gang cases: (1) violation of the protection against successive prosecution where a Defendant is charged with a substantive crime and later charged with the same crime in furtherance of a gang,[192] (2) violation of the collateral estoppel protection when a Defendant is acquitted of a substantive crime yet that crime is used as the basis of a gang charge,[193] and (3) violation of the protection against multiple punishments when a Defendant is sentenced consecutively on a gang charge and a conspiracy charge.[194] These arguments are supported by current Supreme Court precedent.

III. ADJUDICATED ACTS IN SUBSEQUENT PROSECUTION

This section centers on classic double jeopardy. Classic double jeopardy protects a person from prosecution after conviction,[195]

189. *Id*.

190. *Id*. In her concurring opinion, Justice O'Connor emphasized the importance of the *Diaz* exception. *Id*. at 796–97 (O'Connor, J., concurring). Specifically, a second prosecution for a greater included offense should be based on continued criminal activity by the Defendant, or discovery of facts that the government could not reasonably have discovered earlier. *Id*.

191. *Id*. at 793–95.

192. Blockburger v. United States, 284 U.S. 299 (1932*)*; *see* discussion *infra* Section III.

193. Ashe v. Swenson, 397 U.S. 436 (1970*)*; *see* discussion *infra* Section IV.

194. Rutledge v. United States, 517 U.S. 292 (1996); *see* discussion *infra* Section V.

195. Burks v. United States, 437 U.S. 1, 11 (1978).

acquittal[196] or dismissal with prejudice.[197] In KJ's case, classic double jeopardy was violated when the attempted murder of Perry Nelson Johnson was dismissed with prejudice, then recharged as a predicate act in the gang prosecution. In short, classic double jeopardy—subsequent prosecution—successive prosecution, protects valid final judgments in subsequent proceedings.[198]

Classic double jeopardy protects a Defendant's interest in "finality" and prevents the prosecution from two bites to prove the same conduct. In *Burks v. United States,* the Supreme Court of the United States found that successive prosecution of a Defendant whose conviction was reversed on appeal for sufficiency of the evidence was forbidden under the Double Jeopardy Clause.[199] Specifically, "the Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding."[200] This is central to the objective of the prohibition against successive trials. The clause does not allow "'the State . . . to make repeated attempts to convict an individual for an alleged offense,' since '[t]he constitutional prohibition against "double jeopardy" was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.'"[201]

In states that require only one predicate act to convict a criminal Defendant of a violation of the gang statute, double jeopardy is violated if the subsequent gang prosecution is based solely on the previously adjudicated lesser included crime. Classic double jeopardy protection clearly attaches where a person has been convicted or acquitted of a crime. In addition, classic double jeopardy attaches when a case is dismissed or entered *nolle prosequi* as a term of a plea agreement.

In *Mason v. State* the Court of Appeals clarified that jeopardy attaches as a term of plea agreement in Maryland.[202] Mr. Mason was charged on September 16, 1982 with multiple charges of conspiracy to distribute (CDS).[203] These charges were divided across two information[204]

196. *Id.* at 17; *Ashe*, 397 U.S. at 447.
197. Mason v. State, 488 A.2d 955, 957 (Md. 1985).
198. *See Burks*, 437 U.S. at 11 (1978).
199. *Id.* at 16–18.
200. *Id.* at 11.
201. *Id.* (quoting Green v. United States, 355 U.S. 184, 187 (1957)).
202. *Mason*, 302 Md. at 435.
203. *Id*. at 436.
204. An information is a verified written accusation against a person that can initiate prosecution without an indictment. 1 NY CLS DESK ED. GILBERT'S CRIMINAL PRACTICE ANNUAL ARTICLE 100 (2015). An information sets out sufficient facts for the criminal charges against a person. An information does not require a grand jury's determination to proceed to filing criminal charges. An information is presented to a judicial officer in the form of a sworn affidavit, usually written by a police officer. A judge examines the

—the first information included conspiracy to distribute CDS charges from August 14, 1982, and the second information included conspiracy to distribute CDS charges from August 13, 1982.[205] In November, Mr. Mason pled guilty to count 1 of the first information—possession with intent to distribute cocaine from August 14.[206] The State agreed to enter a *nolle prosequi* on that count, as well as some of the remaining counts in both information, including a charge in the second information of possession of cocaine with intent to distribute from August 13.[207] Approximately four months later, Mr. Mason was charged in a new conspiracy that was based on the same acts of conspiracy to distribute CDS from August 13th and 14th of 1982.[208] This indictment included heroin, marijuana, and cocaine related offenses.[209] Mr. Mason pled guilty to both the heroin and cocaine offenses, but was only sentenced on the heroin offense which he then challenged, arguing this conviction was a violation of his Fifth Amendment double jeopardy protections.[210]

On appeal, the Maryland Court of Appeals agreed with Mr. Mason and held that he was denied his Fifth Amendment double jeopardy protections because the *nolle prosequi* in exchange for his guilty plea on his November 1982 charges barred further prosecution for that offense.[211] The court emphasized that once the trial court accepts the Defendant's guilty plea and the Defendant complies with the terms of that agreement, the State is "barred from any further prosecution on the charges so *nol-*

information and decides whether there is probable cause that a crime occurred. An information differs from an indictment because it is presented by a competent public officer on his oath of office, instead of a grand jury on their oath. Together with the pleas of guilty, not guilty, or *nolo contendere*, the indictment and information constitute the pleadings in Federal criminal proceedings. *See* FED. R. CRIM. P. 12(a). The 5th Amendment to the United States Constitution requires that a felony prosecution begin with an indictment. To acquire an indictment the prosecutor must offer possible charges to a grand jury. A grand jury is composed of qualified members of the community. The grand jurors hear the prosecutor's evidence of the suggested crimes. Once the evidence is considered, the grand jury decides if there is probable cause for the prosecution to proceed. If probable cause is determined, the grand jury issues an indictment that describes the criminal charges against a person and the factual basis for those charges. An information is a significantly faster and less cumbersome method of initiating prosecution. Yet whether an information or an indictment provides more fairness to the criminal Defendants is debated among scholars. For a discussion of the advantages and disadvantages of indictments versus an information and the historical context of their development, see Justin R. Miller, *Informations or Indictments in Felony Cases*, 8 MINN. L. REV. 379 (1924).

205. *Mason*, 302 Md. at 436.
206. *Id*. at 436–37.
207. *Id*. at 436.
208. *Id*. at 437.
209. *Id*.
210. *Id*. at 437–39.
211. *Id*. at 439.

prossed" as either a new charge or a component of a new charge.[212] "[S]imply put, any further prosecution under those nol-prossed counts violate[s] the rule against double jeopardy."[213] Thus, following *Mason,* when a Defendant receives a *nolle-prosequi* agreement in exchange for a guilty plea, he cannot be charged in the future with a crime stemming from the same acts that are covered by that agreement.

The court in *Mason* also affirmed that to determine whether the prosecution is charging the Defendant for the same offense that was resolved via plea, the *Blockburger* test[214] controls. The Maryland Court of Appeals squarely rejected the argument that because the charges for which Mr. Mason was *noll-prossed* were conspiracy to distribute cocaine, and the later indictment was conspiracy to distribute heroin, Mr. Mason was not being charged for the same offense that had been *noll-prossed.*[215] The court notes that the crime of conspiracy is that of an illegal agreement – the agreement itself is the crime.[216] The court then held that,

> [o]rdinarily, a single agreement to engage in criminal activity does not become several conspiracies because it has as its purpose the commission of several offenses.[217] . . . [a]n application of these principles demonstrates that a [D]efendant who distributes a number of controlled dangerous substances in accordance with a single unlawful agreement commits but one crime: common law conspiracy.[218]

A. Classic Double Jeopardy Applied to Gang Statutes

Applying the rationale of *Blockburger, Brown, Diaz and Garret* demonstrates that where a gang statute crime occurs with only one predicate act, it is a violation of double jeopardy for an individual to be tried for a predicate act and then later tried for that same act as part of a gang charge. As stated *supra*, in cases of classic/successive prosecution, as opposed to multiple punishment prosecution, *Garrett* requires just a two-step approach when considering a second prosecution for conduct that has already been tried and jeopardy has attached:[219] (1) the court

212. *Id.* at 440.
213. *Id.* at 441 (emphasis added).
214. Blockburger v. United States, 284 U.S. 299 (1932).
215. *Mason*, 302 Md. at 441.
216. *Id*. at 444–45.
217. *Id.*
218. *Id.* at 445.
219. Garrett v. United States, 471 U.S. 773, 778 (1985). Where a valid and final judgment is made in a case, it is unconstitutional for the state to reprosecute the Defendant for the same conduct or increase the sentence. Jeopardy may attach after or as early as the

must determine the legislative intent for the organized crime statute to be a separate offense, and (2) the individual facts must pass the *Blockburger* test to comply with double jeopardy.[220] This second part of the rule is where the gang statutes in jurisdictions that only require one act fail constitutional muster.[221]

Gang statutes requiring only one predicate act cannot pass the *Blockburger* test as applied in *Brown*.[222] Where only one predicate offense is required to commit a gang statute violation, it is possible to commit both the predicate offense and gang violation offense "simultaneously." By way of analogy, like in *Brown* where the Defendant "simultaneously" committed the greater offense of joyriding and the lesser included offense of auto theft when the Defendant stole and drove the vehicle because "every minute that [the Defendant] drove or possessed the stolen automobile he was simultaneously committing both the lesser included misdemeanor and the greater felony;"[223] likewise, every minute that KJ engaged in the lesser included offenses, i.e. attempted murder against Perry Nelson Johnson, he was simultaneously committing both the lesser included offenses of attempted murder and the greater offense of attempted murder on behalf of the gang. This means that once a person has received a valid and final judgment on their substantive crime, the prosecution cannot later charge them with violating the state gang statute using the sole same offense as the adjudicated predicate act.

By allowing the prosecution to use the adjudicated crimes as the only predicate act in gang statutes, the prosecution is given a "second bite at the apple" – another chance to prove that the person committed the

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start of a trial, and the 5th Amendment Double Jeopardy Clause then provides a bar to reprosecution. *See* State v. Raber, 982 N.E.2d 684, 689 (Ohio 2012) ("The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution protects against the imposition of multiple criminal punishments for the same offense in successive proceedings.") (citing Hudson v. United States, 522 U.S. 93, 99 (1977)); United States v. Fogel, 829 F.2d 77, 87 (D.C. Cir. 1987) (explaining that "[i]f a [D]efendant has a legitimate expectation of finality, then an increase in that sentence is prohibited by the double jeopardy clause"); Richard A. Brown, *The Double Jeopardy Clause: Refining the Constitutional Proscription Against Successive Criminal Prosecutions*, 19 UCLA L. REV. 804, 806–07 (1972) ("[U]nder the federal doctrine, a criminal defendant is once in 'jeopardy' for purposes of barring a second prosecution when the jury is sworn, or, in a court trial, when the prosecution presents its first evidence. After a defendant is placed in jeopardy, whether or not the proceeding results in a verdict or judgment, the prosecution is barred from reprosecuting for the 'same offense.'").

220. *Garrett*, 471 U.S. at 778.

221. *Id.*

222. *See* Brown v. Ohio, 432, U.S. 161, 168 (1977).

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

predicate act and the ability to punish the Defendant for a second time.[224] This violates the Double Jeopardy Clause and unjustly limits the Defendant's interest in protecting "finality"[225] of the trial. Such prosecutions, directed almost exclusively at Black and Brown people charged as street gang members,[226] unjustly subject Defendants to a second trial for the same crime in violation of the Fifth Amendment Double Jeopardy Clause.

IV. COLLATERAL ESTOPPEL VIOLATIONS

This section discusses the impact of gang statutes on the Fifth Amendment Double Jeopardy principle of collateral estoppel. Here it is argued that gang statutes violate double jeopardy where previously acquitted conduct is used to provide a second bite at the apple for conviction.

In *Ashe v. Swenson* the Supreme Court stated that "collateral estoppel" means that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.[227] Although first developed in civil litigation, collateral estoppel also applies in criminal law.[228] In *Ashe*, the Defendant was charged in separate

224. Burks v. United States, 437 U.S. 1, 17 (1978). Because a predicate act is a required element of a gang charge, the jury necessarily must find the Defendant guilty of the predicate act in order to find him guilty of the gang statute.

225. *Id.* at 16.

226. Keegan Stephen writes:

> Across the nation, over ninety percent of people added to gang databases are Black or Latino, most with no serious criminal records, while studies suggest that at least twenty-five percent of gang members are white, and openly violent white supremacist gangs avoid this intense policing. In New York City (NYC), ninety-nine percent of the people included in the New York Police Department's (NYPD) gang database are Black or Latino and only one percent are white. In Chicago, nearly ninety-six percent of the people included in the Chicago Police Department's gang database are Black or Latino, and a majority of those included have never been arrested for a violent offense or weapons charge. In Mississippi, one hundred percent of the people arrested under the State's gang law from 2010 through 2017 were Black, despite Mississippi's own Association of Gang Investigators saying that fifty-three percent of "verified gang members" are white.

Keegan Stephan, *Conspiracy: Contemporary Gang Policing and Prosecution*s, 40 CARDOZO L. REV. 991, 995 (2019) (internal citations omitted).

227. Ashe v. Swenson, 397 U.S. 436, 443 (1970); *see* E.H. Schopler, Annotation, *Modern Status of the Doctrine of Res Judicata in Criminal Cases*, 9 A.L.R. Fed. 3d Art. 203, 38 (1966) ("While, generally speaking, in civil cases the application of the doctrine of res judicata may not be predicated upon a verdict, in criminal cases the reference is in some jurisdictions to the doctrine of 'estoppel by verdict,' rather than to the doctrine of collateral estoppel. However, this difference in nomenclature does not signify a difference in the concept.").

228. *Ashe*, 397 U.S. at 443.

indictments for the robbery of six individuals at a poker game.[229] The jury found Defendant Ashe not guilty of committing the robbery, specifically finding insufficient evidence to prove Ashe was one of the robbers of the poker players.[230] Ashe was then later tried for the robbery of another one of the poker players, based on the exact same incident for which the jury had already determined that he was not one of the robbers.[231] In the second trial, Ashe was convicted of robbery.[232] In other words, the second jury found that Ashe *was* one of the robbers.[233] The Supreme Court granted certiorari and Justice Stewart, writing for the Court, ruled that the second prosecution had been barred under the Fifth Amendment Double Jeopardy Clause, specifically saying that the straightforward application of collateral estoppel required this conclusion.[234] The Court emphasized that it was not a question of whether the different charges were separate offenses or whether cumulative punishment was permitted, but rather whether the court was relitigating a decided question of fact.[235]

> The question is not whether Missouri could validly charge the petitioner with six separate offenses for the robbery of the six poker players. It is not whether he could have received a total of six punishments if he had been convicted in a single trial of robbing the six victims. It is simply whether, after a jury determined by its verdict that the petitioner was not one of the robbers, the State could constitutionally hale him before a new jury to litigate that issue again. [236]

State gang statutes violate the prohibition on successive prosecution where the proceedings resulted in a valid and final judgment of acquittal, and the Defendant is then charged with the same substantive crimes in furtherance of a gang.

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229. *Id*. at 437–38.
230. *Id*. at 439.
231. *Id*.
232. *Id*. at 439–40.
233. *See id*. at 440.
234. *Id*. at 445.
235. *Id*. at 444 ("Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.'").
236. *Id*. at 446.

A. Collateral Estoppel Applied to Gang Cases

As discussed *supra*, KA was charged with violating Maryland's gang statute with two predicate acts, both drug charges, from October 17, and October 31, 2012.[237] KA had already been charged with the October 31 drug distribution and had been acquitted in a valid and final judgment.[238]

When KA was found not guilty of drug distribution on October 31, 2012, the state was prohibited by the Double Jeopardy Clause from charging him with drug distribution in furtherance of the BGF for the same instance of drug distribution.[239] The principles of collateral estoppel make clear that once the jury found that KA did not distribute drugs on October 31, 2012, he certainly could not have distributed those same drugs, on that same occasion, on behalf of the BGF.[240]

On appeal, KA's attorney raised a double jeopardy challenge to the inclusion of the drug charge for which he had been acquitted.[241] Rather than considering a collateral estoppel violation, the Court of Special Appeals dismissed this challenge by finding that the gang statute and the predicate act of the drug charge were not the "same offense" for double jeopardy purposes.[242] However, as the Supreme Court explicitly held in *Ashe v. Swenson,* the issue for a collateral estoppel challenge is not whether the two charges are the same offense.[243] Rather, the prosecution is categorically prohibited from relitigating a previous finding of fact.[244] In order to find KA guilty of the gang statute, the jury would also have to find him guilty of the predicate act of distribution of drugs… an act that he had already been acquitted of.[245] Therefore, by bringing the previously acquitted drug charge as a predicate act for the gang statute, the prosecution was attempting to re-litigate a question of fact that had already been decided in a previous case. This is prohibited by *Ashe* and its state law equivalents — numerous state courts have also recognized that collateral estoppel applies in criminal cases to bar relitigating previously decided facts.[246] The Maryland Court of Appeals

237. *See* KJ Indictment 2013, *supra* note 16.
238. *See id.*
239. *See id.*
240. *See id.*
241. KA v. State, No. 1520, 2017 WL 1788138, at *2 (Md. Ct. Spec. App. May 5, 2017).
242. *Id.* at *3.
243. *See* Ashe v. Swenson, 397 U.S. 436, 445–47 (1970).
244. *See id.*
245. *See* KJ Indictment 2013, *supra* note 16.
246. *See, e.g.*, Powers v. State, 401 A.2d 1031 (Md. 1979); State v. Morlock, 557 P.2d 1315, 1317 (Wash. 1976); Alvord v. State, 322 So. 2d 533, 539 (Fla. 1975), *overruled on other grounds by* Caso v. State, 524 So. 2d 422 (Fla. 1988); People v. Valdez, 405 P.3d 413, 416 (Colo. App. 2017); Simon v. Commonwealth, 258 S.E.2d. 567, 569 (Va. 1979); People v.

denied certiorari in this case, effectively sanctioning the lower court's refusal to follow clear law for certain Defendants.[247]

To ensure that a Defendant's double jeopardy rights through collateral estoppel are not violated, gang statutes should be amended to prohibit prosecutors from presenting predicate acts for which the Defendant has already been acquitted. Judges, prosecutors, and defense attorneys should be aware that it is a violation of collateral estoppel to use a crime for which the Defendant has been acquitted in order to prove a gang statute violation. More importantly, defenders of the Constitution and those who believe that Fifth Amendment protection belongs to gang members too should reject the use of gang statutes in violation of Fifth Amendment collateral estoppel.

V. GANG CONVICTIONS MERGE WITH CONSPIRACY

This section will argue that, at sentencing, a conviction for violation of a gang statute must merge with a conviction for conspiracy to entrench a gang. This follows the precedent from *Rutledge v. United States* holding that a conspiracy conviction and a Continuing Criminal Enterprise (CCE) conviction must merge at sentencing. [248]

State gang statutes often include a separate offense for conspiracy to entrench a gang. For example, the Maryland gang statute includes multiple sections that are various forms of conspiracy.[249] Section (a) prohibits a person from participating in a criminal gang or participating in a specified crime in furtherance of the gang.[250] Sections (b) and (c) prohibit the use of proceeds or property acquired through the underlying crime.[251] Finally, section (d) states that a person "may not conspire to

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Goodman, 503 N.E.2d 996, 999–1000 (N.Y. 1986) (all holding that collateral estoppel prohibits the litigation of a question of fact already determined in a prior acquittal).

247. KA v. State, 168 A.3d 58 (Md. Ct. Spec. App. 2017) (denying certiorari).

248. Rutledge v. United States, 517 U.S. 292 (1996); *see* Susan R. Klein & Katherine P. Chiarello, *Successive Prosecutions and Compound Criminal Statutes: A Functional Test*, 77 TEX. L. REV. 333, 351 (1998). The authors note that in *Rutledge*, "[t]he Court held that the 'in concert' element turns every CCE into a drug conspiracy as well," therefore drug conspiracy was a lesser included offense of the CCE and constituted the 'same offense' for double jeopardy purposes. The authors go on to analyze the *Rutledge* decision in the context of other Supreme Court double jeopardy decisions, as well as the historical development of double jeopardy law. They propose a "functional test" for double jeopardy in the context of compound criminal crimes and their predicates based on the "prosecutor's reasons for bringing the second prosecution." *Id.* It is my position that predicate acts and conspiracy will almost always include lesser offenses in the compound crime, because the compound crime already requires proof of every element that the predicate or conspiracy charge requires.

249. MD. CODE ANN., CRIM. LAW § 9-804 (West 2020).

250. § 9-804(a).

251. § 9-804(b)–(c).

violate subsection[s] (a), (b), or (c)."[252] The gang statute thus incorporates the doctrine of conspiracy into its language. Under current Supreme Court precedent, conspiracy and the substantive offense (i.e., robbery, murder or drug distribution) committed are not the same offense for double jeopardy purposes and a person can be prosecuted and punished for both.[253]

Under the Supreme Court's reasoning in *Rutledge v. United States,*[254] it is a violation of double jeopardy to impose multiple punishment on a person for both violating a gang statute and conspiracy to violate a gang statute.[255] This occurred in *KA* and *KJ* respectively, among countless others.[256]

A. Before Rutledge

Until the Supreme Court's decision in *Rutledge*, there was a Circuit split on whether predicate acts are separate offenses from CCE for double jeopardy purposes. The Fifth Circuit, in *United States v. Guthrie,*[257] held that predicate acts and a CCE offense are never the same offense for double jeopardy purposes; thus, according to the Fifth Circuit, it was not a violation to punish a person for both.[258] In that case, Raymond Guthrie was charged with two counts of conspiracy as well as engaging in a continuing criminal enterprise.[259] The court cited *Garrett* extensively, and admitted that:

> The Court . . . stopped just short of holding that a continuing criminal enterprise's predicate offenses were not lesser included offenses . . . [w]e, however . . . hold that predicate offenses of a

252. § 9-804.

253. *See, e.g.*, United States v. Felix, 503 U.S. 378, 391 (1992) ("We think it best not to enmesh in such subtleties the established doctrine that a conspiracy to commit a crime is a separate offense from the crime itself."); United States v. Bayer, 331 U.S. 532, 542 (1947) ("But the same overt acts charged in a conspiracy count may also be charged and proved as substantive offenses, for the agreement to do the act is distinct from the act itself."); Pinkerton v. United States, 328 U.S. 640, 643 (1946) ("It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses.").

254. Rutledge v. United States, 517 U.S. 292 (1996).

255. *Id.* at 307. As described in detail later in this section, as with CCE and Conspiracy, there is no element of a conspiracy charge that is not already included in a gang charge. This means that they are the same offense for double jeopardy purposes and a court cannot impose two punishments for that same offense.

256. Both KA and KJ were convicted of participation in a gang and conspiracy to violate the gang statute.

257. United States v. Guthrie, 789 F.2d 356 (5th Cir. 1986).

258. United States v. Guthrie, 789 F.2d 356, 361 (5th Cir. 1986).

259. *Id*. at 358.

> continuing criminal enterprise violation are not lesser included offenses of the continuing criminal enterprise for purposes of the Fifth Amendment's Double Jeopardy Clause.[260]

In sum, the Fifth Circuit borrowed a portion of the Supreme Court's reasoning in *Garrett* but ignored the in-depth, fact-specific inquiry that had been conducted.[261] The Supreme Court intentionally refrained from holding that predicate offenses were always separate offenses from the CCE violation, instead emphasizing that this specific case involved multiple unrelated acts over time, and that the CCE violation did not occur simultaneously with the predicate acts, as discussed above.[262] In making a broad statement that predicate acts are always separate offenses from CCE, the Fifth Circuit ignored the analysis required by the Supreme Court in *Blockburger, Brown*, and *Garrett.*

The dissent in *Guthrie* makes clear how expansive the majority's decision was, and why the Supreme Court could not and did not come to the same conclusion as the Fifth Circuit's plurality.[263] Judge Rubin, dissenting, emphasizes the language in *Garrett* stating that "the CCE prosecution . . . does not violate the Double Jeopardy Clause *under the facts of this case."*[264] Judge Rubin argues that "[n]either the words nor the logic of the [*Garrett*] opinion imply that a predicate offense would not be considered a lesser included offense within a CCE charge once the CCE had been completed."[265] The dissent would further hold that the substantive charges in the *Guthrie* indictment are lesser included offenses to the CCE charge and should be barred by double jeopardy.[266]

The erroneous holding from the Fifth Circuit highlights the problem with many courts' jeopardy analyses for state gang statutes-—even where the legislature may have intended a separate offense, courts must still

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260. *Id*. at 360.

261. *Id*. at 356; Garrett v. United States, 471 U.S. 773, 793 (1985) (examining the number of acts that were needed over time in order to violate a CCE charge).

262. *Guthrie*, 789 F.2d at 359–60.

263. *See id*. at 362 (Rubin, J., dissenting).

264. *Id*. (emphasis added).

265. *Id*.

266. *Id*. at 362–63. ("If, with full knowledge of the facts, [the government] chooses – as it did with Guthrie – to prosecute first for the CCE and not then to include separate charges for each of the predicate offenses, the government should be held to its choice. Otherwise the government might prosecute a defendant for CCE and then, if he were acquitted, as Guthrie was, or if the government were dissatisfied with his sentence, it might prosecute him not only for one but for each of the predicate offenses seriatim. More than collateral estoppel bars this kind of governmental manipulation. This is precisely the kind of peril the Double Jeopardy Clause was designed to prevent. The Constitution does not permit prosecutors so much rope for repeated attempts to string up the accused. Guthrie should not be forced to defend himself a second time against a crime that was relied upon as a necessary element of proof in an earlier trial at which the prosecution was unsuccessful.").

apply *Blockburger* to determine the constitutional validity of these statutes.

In contrast, the Eleventh Circuit properly followed *Garrett's* requirement for a fact-specific double jeopardy inquiry for CCE charges. In *United States v. Reed*, the Eleventh Circuit held that drug conspiracy was a lesser included offense of CCE, and it was a violation of double jeopardy to prosecute a Defendant for CCE following a conviction on the lesser included conspiracy offense.[267] In *Reed*, five Defendants were charged with varying conspiracy counts and CCE charges based off a series of drug importations of cocaine from South America through the Bahamas to the United States.[268] The double jeopardy ruling applied to only one Defendant, Reed, who was first convicted of conspiracy to import cocaine in 1988 and later convicted of a CCE charged in 1989.[269] The court adopted the rule from *Garrett*, breaking it into three steps: first, a determination of whether the legislature intended the predicate act and the CCE charge to be separate offenses; second, whether the CCE offense is considered the same offense as one or more predicate acts within the meaning of the Double Jeopardy Clause; and third, whether the Double Jeopardy Clause bars cumulative punishments for the predicate act and the CCE.[270]

The court applied this approach in *Reed* and found that prosecution for conspiracy and CCE, based on the same unlawful agreement, violates double jeopardy.[271]

B. Rutledge *Resolved Split*

In *Rutledge v. United States,* the Supreme Court resolved the circuit split and held that it is a violation of double jeopardy to penalize a person for both conspiracy and CCE.[272] In that case, Mr. Rutledge was found guilty of one count of conspiracy to distribute cocaine, and one count of CCE for a series of acts involving cocaine distribution.[273] The Court highlighted that the "in concert" element of the CCE offense was based on the same agreement as the conspiracy.[274] While the Court began their analysis with a discussion of congressional intent, they made clear that the presumption is that Congress does not intend to punish cumulatively

267. United States v. Reed, 980 F.2d 1568 (11th Cir. 1993).
268. *Id.* at 1571.
269. *Id.* at 1577–1581.
270. *Id.* at 1575.
271. *Id.* at 1580.
272. Rutledge v. United States, 517 U.S. 292, 307 (1996).
273. *See id.* at 292.
274. *Id.* at 294.

for the same offense.[275] To punish cumulatively, legislative intent to do so must be clear.[276] Since Congress did not clearly state that both CCE and conspiracy were separate offenses and that cumulative punishment was permissible, the Fifth Amendment Double Jeopardy Clause prohibited cumulative punishment.

After a discussion of congressional intent, the Court applied the *Blockburger* test, which held that double jeopardy is violated where a person is penalized under two statutes unless each requires proof of an element that the other does not.[277] The Court reasoned that the "in concert" element of the CCE offense signifies mutual agreement in common plan or enterprise and requires proof of conspiracy that would also violate statutes on conspiracy to distribute controlled substances, and the conspiracy statute does not require proof of any fact that is not also part of the CCE offense.[278]

C. Rutledge *Applied to Gang Statutes*

For the purpose of a double jeopardy analysis regarding conspiracy, gang statutes are substantially similar to CCE statutes. As in *Rutledge,* a *Blockburger* application demonstrates that gang statutes violate double jeopardy when punishment for both conspiracy and gang statute convictions are permitted.

The federal gang statute,[279] which many state gang statutes are modeled after, punishes a person who commits a crime and simultaneously (1) participates in a criminal street gang with knowledge that its members engage in or have engaged in a continuing series of [enumerated] offenses and (2) intends to promote or further the felonious activities of the criminal street gang or maintain or increase his or her position in the gang.[280] A criminal street gang is defined as an association of five or more persons, with a primary purpose of committing

275. *Id.* at 297.

276. *Id.* at 297–98. In a forthcoming article, *Killing Due Process*: *Double Jeopardy, White Supremacy, and Gang Prosecutions*, I argue that the Supreme Court decision to allow unlimited punishments in a single trial, so long as they are authorized by congress, represents an abrogation of the Supreme Court's duty to protect individuals from government overreach. Such deference also furthers mass incarceration of Black and Brown men, who are the primary targets of compound criminal liability statutes that are prone to multiple punishment violations. Elizabeth Hinton, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, VERA EVIDENCE BRIEF (May 2018) https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf.

277. *Rutledge*, 517 U.S. at 298.

278. *Id.* at 298–300.

279. CRIMINAL STREET GANGS, 18 U.S.C. § 521 (West 2018).

280. *Id.*

enumerated criminal offenses, the members of which engage, or have engaged in a continuing series of offenses, and the activities of which affect interstate or foreign commerce.[281] As stated *supra*, a charge of conspiracy requires proof of (1) an agreement between at least two parties, (2) an illegal goal, (3) that the Defendant knew of the agreement and voluntarily participated in it, and (4) some overt act in furtherance of the conspiracy.[282]

Under a *Blockburger* test as applied in *Rutledge,* a conspiracy charge does not require proof of any element that a typical gang statute does not. The gang statute requirement of "an association of 5 or more persons" requires proof of an agreement between at least two parties.[283] The "primary purpose[]" of committing criminal offenses requires proof of an illegal goal.[284] The requirement that the Defendant participated in this gang with knowledge of the criminal activity and an intention to promote or further such crimes proscribe the same conduct as "the [D]efendant knew of the conspiratorial agreement and voluntarily participated in it."[285] Finally, because a gang statute applies when a person has committed an enumerated crime in furtherance of the gang, the requirement of "an overt act" is clear.[286] Since conspiracy does not require proof of an element that a gang statute does not, and clear legislative intent to punish cumulatively is absent from the statutes,[287] punishment for both conspiracy and a gang statute is a violation of a Defendant's double jeopardy protections.[288]

KJ and KA were able to be cumulatively sentenced for conspiracy to entrench BGF and a violation of the Maryland Gang Statute for the same criminal acts.[289] Their punishments violate double jeopardy. The Fifth Amendment required merger of their sentences.[290] The Fifth Amendment as incorporated against the States through the Fourteenth Amendment applies to the descendants of formerly enslaved Africans, including street gang members. To reject constitutional violations, state gang statutes must be amended to ensure double jeopardy protection for street gang members as *Rutledge* requires.

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281. *Id.*
282. *See* Arreola, *supra* note 96, at 619–20.
283. CRIMINAL STREET GANGS, 18 U.S.C.A. § 521 (West 2018).
284. *Id.*
285. *See* Arreola, *supra* note 96, at 625.
286. *Id.* at 628.
287. *See, e.g.*, CAL. PENAL CODE § 186.22 (West 2018); GA. CODE ANN. § 16-15-3 (West 2019).
288. *See* Arreola, *supra* note 96, at 632.
289. *See* discussion *supra* Section I.
290. In KJ's case, an extra term of imprisonment was added to the sentence.

CONCLUSION

The issues raised in this article are ripe for the Supreme Court to resolve. Until then, Defendants and defense attorneys should make the arguments outlined in this article in trial and on appeal to challenge gang statute violations where only one predicate act was required and the Defendant has suffered jeopardy for that act, where previously acquitted conduct was used as a predicate act to support the gang statute violation, or where the Defendant was sentenced consecutively for a gang statute violation and conspiracy gang violation. Ethical prosecutors, who are defenders of constitutional rights of even the accused and who actively hold themselves out as progressive prosecutors, must exercise their discretion and refuse to use previously adjudicated conduct as the sole basis of a gang charge. Those same prosecutors must refrain from using previously acquitted acts as any part of a gang charge, and support concurrent sentencing on gang statute convictions and conspiracy to violate the gang statute to avoid unjust sentences and stop mass incarceration. This article is a calling to trial court judges to sentence criminal Defendants charged with gang statutes justly and rule accordingly on motions to dismiss for violation of the Fifth Amendment. Appellate courts are urged to grant certiorari in state gang cases where double jeopardy issues arise in order to ensure that the Fifth Amendment is being equally applied to all Defendants. Finally, legislatures should amend gang statutes to require more than one predicate act in order to prevent the prosecutor from having two bites at the apple and subjecting criminal Defendants to more punishment than the Constitution permits. In sum, to comply with the Constitution, courts and legislatures must extend the protections of the Fifth Amendment Double Jeopardy Clause and all of its protection to all people, including Black and Brown inner city gang members.