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Criminal Law: Double Jeopardy

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CRIMINAL LAW: DOUBLE JEOPARDY

INTRODUCTION

The Tenth Circuit reviewed a large number of double jeopardy cases during the 1995-96 Survey period.[1] The most remarkable of these occurred in the arena of civil forfeiture.[2] Prior to 1996, various circuits around the country interpreted Supreme Court case holdings[3] to mean that a civil *in rem* forfeiture following a criminal conviction constituted double jeopardy.[4] In *United States v. Ursery*,[5] however, the court stated unambiguously that several circuits had misinterpreted those decisions.[6] Two Tenth Circuit cases demonstrate the pre-*Ursery* posture[7] and post-*Ursery* turnaround.[8]

This Survey begins with a general discussion of the Double Jeopardy Clause and Supreme Court precedent. Section II offers a discussion of the dual issues arising in cases when a criminal conviction precedes or follows civil sanctions, including *in rem* civil forfeitures of property used to further criminal activity and civil monetary penalties in the form of fines. Section III addresses multiple charges stemming from the same set of facts or occurrences. In Section IV, the Survey tracks Tenth Circuit decisions regarding successive prosecutions in the form of retrials.

I. BACKGROUND

The Double Jeopardy Clause of the Fifth Amendment states in part: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."[9] The Double Jeopardy Clause generally "protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense."[10] While the Constitution only mentions "life or limb," double jeopar-

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1. The Tenth Circuit reviewed approximately 51 cases involving the Double Jeopardy Clause from September 1995 to September 1996. *See, e.g.*, Yparrea v. Dorsey, 64 F.3d 577 (10th Cir. 1995); United States v. Meyer, 95 F.3d 1161 (10th Cir. 1996).

2. *See, e.g.*, United States v. 9844 South Titan Court, 75 F.3d 1470 (10th Cir. 1996); United States v. Lopez, 93 F.3d 694 (10th Cir. 1996).

3. *See* Montana Dep't of Revenue v. Kurth Ranch, 114 S. Ct. 1937 (1994) (holding that a tax imposed on illegal drugs after criminal conviction and confiscation of the drugs constituted a second punishment for the same offense); Austin v. United States, 509 U.S. 602 (1993) (ruling Eighth Amendment restrictions on excessive fines apply to *in rem* civil forfeiture); United States v. Halper, 490 U.S. 435 (1989) (stating a civil penalty not rationally related to the government's actual damages may constitute punishment).

4. *See infra* notes 71-82, 142-53 and accompanying text.

5. United States v. Ursery, 116 S. Ct. 2135 (1996).

6. *Ursery*, 116 S. Ct. at 2144 (correcting the Sixth and Ninth Circuits' interpretation of *Kurth Ranch*, *Austin*, and *Halper*).

7. *South Titan Court*, 75 F.3d at 1483.

8. *Lopez*, 93 F.3d at 696-97 (1996).

9. U.S. CONST. amend. V.

10. North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

dy protection also covers imprisonment and monetary penalties.[11] The double jeopardy doctrine originally prohibited a second trial for an offense after a judgment for that same offense.[12] This made its application straightforward and unambiguous. Modern legislative expansion of substantive crimes generated more complexity with respect to the overall issues and the elements that comprise those crimes, providing fertile soil for inconsistent judicial application, misunderstanding, and confusion.[13]

Perhaps in part because of these complexities, courts have carved out exceptions to these general principles. Double jeopardy does not bar civil forfeitures, some remedial civil sanctions, two convictions arising out of the same act if each offense requires proof of separate facts, or retrial of cases infected by trial error.[14]

II. MULTIPLE PUNISHMENTS? CRIMINAL CONVICTION AND CIVIL SANCTIONS

A. *Background*

Following the Supreme Court's decisions in *United States v. Halper*,[15] *Austin v. United States*,[16] and *Montana Department of Revenue v. Kurth Ranch*,[17] the Tenth Circuit, in *United States v. South Titan Court*,[18] assumed that the Court had shifted its position regarding double jeopardy and civil forfeiture.[19] The Supreme Court then clarified its position in *United States v. Ursery*[20] and announced to misguided circuits throughout the country that its posture regarding civil forfeiture in the double jeopardy context remained consistent with two hundred years of jurisprudence.[21] The Tenth Circuit's holding in *United States v. Lopez*[22] demonstrated a complete turnaround from *South Titan Court* and reflected the Tenth Circuit's new understanding in light of *Ursery*.[23] To understand this development and the source of the Tenth Circuit's earlier confusion, this background section briefly reviews the history of civil forfeiture jurisprudence, the Supreme Court cases that led the Tenth Circuit astray, and the content of the Court's clarification in *Ursery*.

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11. *Kurth Ranch*, 114 S. Ct. at 1941 n.1.

12. Adam R. Fox, *The Ninth Circuit Renegade*—United States v. $405,089.23 U.S. Currency: *Finding Double Jeopardy in a Single Coordinated Prosecution*, 5 CORNELL J.L. & PUB. POL'Y 67, 68-69 (1995).

13. James A. Shellenberger & James A. Strazzella, *The Lesser Included Offense Doctrine and the Constitution: The Development of Due Process and Double Jeopardy Remedies*, 79 MARQ. L. REV. 1, 117-18 (1995).

14. *Ursery*, 116 S. Ct. at 2142; Blockburger v. United States, 284 U.S. 299, 304 (1932); Fox, *supra* note 12, at 69-71.

15. 490 U.S. 435, 447-48 (1989).

16. 509 U.S. 602, 618 (1993).

17. 114 S. Ct. 1937, 1948 (1994).

18. 75 F.3d 1470 (10th Cir. 1996).

19. *South Titan Court*, 75 F.3d at 1483-84.

20. 116 S. Ct. 2135 (1996).

21. *Ursery*, 116 S. Ct. at 2142-44; *see infra* notes 72-82, 129-53 and accompanying text (analyzing the Tenth, Second, Ninth, and Eighth Circuits' misunderstanding of the Court's position on civil forfeitures).

22. 93 F.3d 694 (10th Cir. 1996).

23. *Lopez*, 93 F.3d at 696-97.

1. Civil Forfeiture: Historical Context

Civil forfeiture originated in the law of admiralty and dates back two centuries.[24] In early admiralty cases, the forfeiture of property used in criminal activity did not constitute double jeopardy because courts treated the property itself, not its owner, as the cause of the offense.[25] The fiction of the "guilty vessel" stemmed from the desire to quickly and efficiently seize ships used for illegal activities without the burdens and delays associated with due process and conviction of the owners.[26] This type of seizure was especially appealing in an era when the owners often lived half the world away and no efficient modes of communication or travel existed. One of the earliest examples of the guilty property concept appears in an 1827 case in which a United States vessel captured a Spanish privateer, the *Palmyra*.[27] The Court permitted the *Palmyra*'s forfeiture prior to the owner's conviction since the forfeiture statute created *in rem* jurisdiction (against the property), independent of a criminal proceeding *in personam* (against the person).[28] This rendered concepts such as guilt or innocence of the owner and commensurate validity of the punishment irrelevant.[29]

2. Civil Forfeiture: *Austin v. United States*[30]

Some commentators and courts viewed *Austin v. United States* as signaling a shift toward treating civil forfeitures as punishment for double jeopardy purposes.[31] On June 13, 1990, Richard Lyle Austin met Keith Engebretson at Austin's body shop and agreed to sell Engebretson cocaine. Austin left the shop, went to his mobile home, and then returned to the shop with two grams of cocaine.[32] The trial court convicted Austin and sentenced him to seven years in prison for the drug offense.[33] The government obtained forfeiture of Austin's mobile home and auto body shop under the Drug Abuse Prevention

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24. *See, e.g.*, Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974); Van Oster v. Kansas, 272 U.S. 465 (1926); Goldsmith v. United States, 254 U.S. 505 (1921); Dobbins Distillery v. United States, 96 U.S. 395 (1877); The William Bagaley, 72 U.S. (5 Wall.) 377 (1866); Harmony v. United States, 43 U.S. (2 How.) 210 (1844); The Palmyra, 25 U.S. (12 Wheat.) 1 (1827); Phile qui tam v. The Ship Anna, 1 U.S. (1 Dall.) 197 (1787).

25. *See* Donald J. Boudreaux & A.C. Pritchard, *Civil Forfeiture and the War on Drugs: Lessons from Economics and History*, 33 SAN DIEGO L. REV. 79, 93 (1996) ("The legal fiction was that the property itself, without human intervention, caused the harm or violated the law."); *see, e.g.*, United States v. The Brig Malek Adhel, 43 U.S. (2 How.) 210, 233 (1844) ("The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which forfeiture attaches, without any reference whatsoever to the character or conduct of the owner.").

26. *See* Boudreaux & Pritchard, *supra* note 25, at 119-20; *see also, e.g.*, United States v. James Daniel Good Real Property, 510 U.S. 43, 57 (1993) (noting the historical necessity of seizing personal property, which can abscond, to establish jurisdiction over the property).

27. *The Palmyra*, 25 U.S. (12 Wheat.) at 8.

28. *Id.* at 14-15.

29. *Harmony*, 43 U.S. (2 How.) at 234.

30. 509 U.S. 602 (1993).

31. *See* J. Kelly Strader, *Taking the Wind Out of Government Sails?: Forfeitures and Just Compensation*, 23 PEPP. L. REV. 449, 474-75 (1996); Robert M. Sondak, *The Tide is Turning: Civil Forfeiture Law is Becoming More Accommodating to Innocent Mortgagees*, 48 CONSUMER FIN. L.Q. REP. 178, 179-80 (1994).

32. Austin v. United States, 509 U.S. 602, 605-06 (1993).

33. *Id.* at 604.

and Control Act (DAPCA),[34] on the theory that Austin used these items, like the Spanish vessel *Palmyra*, in the commission of the crime.[35] Thus, the government forced Austin to forfeit several thousand dollars worth of property as a result of his selling several hundred dollars worth of illicit narcotics.[36]

The Supreme Court granted certiorari in order to determine whether the forfeiture violated the Eighth Amendment's Excessive Fines Clause.[37] Finding that the forfeiture violated the Excessive Fines Clause, the Court did not address the issue of double jeopardy.[38] Since the Eighth Amendment limits the government's power to impose monetary punishments, the Court's decision turned on whether a civil forfeiture, like monetary fines, constitutes punishment under DAPCA § 881(A)(4) and (a)(7).[39]

The *Austin* Court outlined the historical foundation for civil forfeiture as consisting of: 1) the fiction that the property itself was guilty and/or 2) the notion that the owner assumed responsibility for the acts of those to whom the owner entrusted property.[40] In reality, the Court stated, owner negligence formed the basis of both rationales. According to the Court, the fiction of culpable property under the first rationale could not justify forfeiture when the owner took all reasonable measures to prevent the unlawful use of the property.[41] Under the second rationale, the Court noted, the law holds owners accountable for acts committed by those to whom owners negligently assign their property.[42] Citing extensive historical precedent, the Court affirmed that forfeiture always serves, at least in part, to punish the owner.[43] Thus, the Court determined that Eighth Amendment restrictions on excessive fines apply to *in rem* civil forfeiture without reaching the issue of double jeopardy.[44]

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34. DAPCA authorizes the forfeiture of:

(4) [a]ll conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner facilitate the transportation, sale, receipt, possession, or concealment of [controlled substances].

(6) [a]ll moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance . . . .

(7) [a]ll real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment . . . .

21 U.S.C. § 881(a) (1994).

35. *Austin*, 509 U.S. at 615-16.

36. Joseph B. Harrington, Austin v. United States: *Forfeiture as Punishment and the Implications for Warrantless Seizures*, 4 B.U. PUB. INT. L.J. 415, 419 (1995).

37. *Austin*, 509 U.S. at 604. The Excessive Fines Clause prohibits excessive bail, fines, and cruel and unusual punishment. U.S. CONST. amend. VIII.

38. *Id.* at 617-23.

39. *Id.* at 610.

40. *Id.* at 615.

41. *Id.* at 615-16 (citing *Goldsmith*, 254 U.S. at 511).

42. *Id.* at 616-18.

43. *Id.* at 618.

44. *Id.* at 621-22.

3. Civil Monetary Penalty: *United States v. Halper*[45] and *Department of Revenue v. Kurth Ranch.*[46]

Courts historically have held that government officials do not violate the Double Jeopardy Clause when they impose a remedial civil sanction and a criminal punishment for the same offense.[47] These holdings stem from the position that the Double Jeopardy Clause protects against multiple punishments for the same offense and that civil penalties are not traditionally designed to punish.[48] However, the Supreme Court appeared to retreat from this position in *Halper*.

In *Halper*, the government sought $130,000 in fines for $585 in damages on top of a $5,000 fine and two years in prison for violating the False Claims Act.[49] Noting the outcome depended on the facts of each case, the Court nevertheless ruled that a civil action may constitute punishment and trigger the Double Jeopardy Clause.[50] While the Court failed to establish a specific threshold for when a civil action passes into the realm of punishment, it succeeded in setting forth a generalized rule of proportionality which balances the damages to the government against the penalty imposed on the defendant.[51] The Court stated that a reasonableness rule applies, with a civil penalty constituting a second punishment only if it "bears no rational relation to the goal of compensating the Government for its loss."[52] In *Halper*, the Court concluded that a penalty 220 times the government's damages constituted a judgment not rationally related to the purpose of compensating the government.[53]

The Supreme Court, in *Kurth Ranch*, expanded the range of civil sanctions that may constitute punishment and give rise to a double jeopardy claim.[54] The Court held that a tax imposed on illegal drugs, after a criminal conviction and confiscation of the drugs, subjected the defendants to multiple punishments for the same offense.[55] Conceding that the government generally levies taxes to generate revenue, as opposed to furthering punitive goals, the Court held that a tax could nonetheless constitute punishment for double jeopardy purposes in certain instances.[56] In *Kurth Ranch*, the State of Montana imposed a tax on the possession and storage of dangerous drugs where the tax: (1) resulted from the perpetration of a crime; (2) served punitive rather than

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45. 490 U.S. 435 (1989).

46. 114 S. Ct. 1937 (1994).

47. *See, e.g.*, Eric Michael Anielak, Note, *Double Jeopardy: Protection Against Multiple Punishments*, 61 MO. L. REV. 169, 171 (1996) (discussing the dual imposition of civil sanctions and criminal penalties in the context of *Kurth Ranch*).

48. *Id.*

49. *Halper*, 490 U.S. at 441 (citing 31 U.S.C. §§ 3729-3731 (1982) (amended 1994)).

50. *Halper*, 490 U.S. at 443, 448.

51. *Id.* at 448-49.

52. *Id.* at 449.

53. *Id.* at 451.

54. *Kurth Ranch*, 114 S. Ct. at 1945-48.

55. *Id.* (noting that the government imposed the tax under Montana's Dangerous Drug Tax Act, MONT. CODE ANN. §§ 15-25-101 to -123 (repealed 1995)). *See* Charles K. Todd, Jr., *The Supreme Court Assaults State Drug Taxes with a Double Jeopardy Dagger: Death Blow, Serious Injury, or Flesh Wound?*, 29 IND. L. REV. 695, 695-96 (1996).

56. *Kurth Ranch*, 114 S. Ct. at 1946.

revenue generating purposes; and, (3) attached to goods which the taxpayer did not own at the time of taxation and never lawfully possessed in the first place.[57] The Court termed this drug tax a "concoction of anomalies" distinct from a standard property tax, and characterized the tax as punishment.[58]

4. *Ursery v. United States*[59]

In *United States v. Ursery*,[60] the Sixth Circuit construed *Austin* and *Halper* to mean that civil forfeiture constitutes punishment for double jeopardy purposes.[61] The suit commenced when Michigan police found marijuana growing in Ursery's house.[62] In addition to a criminal indictment for the drug offense, the government initiated civil forfeiture proceedings against the house under DAPCA.[63] Contending that, consistent with *Halper* and *Austin*, the civil forfeiture proceeding constituted punishment, the Sixth Circuit reversed on double jeopardy grounds.[64]

Citing double jeopardy precedent concerning civil forfeiture proceedings,[65] the Supreme Court reaffirmed its position that, as a remedial civil sanction, *in rem* civil forfeiture does not constitute punishment under the Double Jeopardy Clause.[66] *Halper*, the Court reasoned, involved a civil penalty, not a civil forfeiture.[67] While a civil monetary penalty may operate punitively when the fine sufficiently outweighs the government's damages, well established case law demonstrates that *in rem* civil forfeiture, as an action against the property itself, does not constitute punishment under the Double Jeopardy Clause.[68] The Court distinguished *Ursery* from *Austin* by holding that the latter addressed the Excessive Fines Clause.[69] While the Court conceded in *Austin* that judicial decisionmakers could characterize a forfeiture as punishment and subject it to the Excessive Fines Clause, *Austin* only mentioned the Double Jeopardy Clause in a footnote asserting its inapplicability to *in rem* civil

57. *Id.* at 1947-48.
58. *Id.* at 1948.
59. 116 S. Ct. 2135. The Court also reviewed *United States v. $405,089.23 United States Currency*, 33 F.3d 1210 (9th Cir. 1994), in which defendants convicted of conspiracy and money laundering were subsequently forced to undergo an *in rem* civil forfeiture proceeding. The Ninth Circuit contended that the forfeiture violated the Double Jeopardy Clause of the Fifth Amendment. *$405,089.23 United States Currency*, 33 F.3d at 1214; *see also supra* text accompanying notes 9-12. The Supreme Court reversed for reasons set forth in its concurrent review of *United States v. Ursery*, 59 F.3d 568 (6th Cir. 1995).
60. 59 F.3d 568 (6th Cir. 1995).
61. *Ursery*, 59 F.3d at 571-73.
62. *Ursery*, 116 S. Ct. 2135, 2138-39 (1996).
63. *Id.* at 570; *see also* 21 U.S.C. § 881(a)(7).
64. *Ursery*, 59 F.3d at 568.
65. United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984); Various Items of Personal Property v. United States, 282 U.S. 577 (1931).
66. *Ursery*, 116 S. Ct. at 2141-42.
67. *Id.* at 2144-45.
68. *Id.* at 2145. The Court applied a two-part test. First, the Court inquired whether Congress intended the forfeiture to be criminal or civil. Second, the Court asked if the forfeiture proceedings were "so punitive in fact as to 'persuade us that the forfeiture proceeding[s] may not legitimately be viewed as civil in nature,' despite Congress' intent." *Id.* at 2147 (citing *89 Firearms*, 465 U.S. at 366).
69. *Id.* at 2146.

forfeiture proceedings.[70] The Court dismissed *Kurth Ranch* as irrelevant to *Ursery* since the former involved a tax anomalous to standard taxes in that it served a punitive, rather than a revenue generating, purpose.[71]

B. In rem *Civil Forfeiture: Pre*-Ursery

1. *United States v. 9844 South Titan Court*[72]

a. *Facts*

On June 18, 1992, the United States District Court for the District of Colorado convicted Philip May of possession of cocaine with intent to distribute and other related crimes.[73] The Court sentenced May to ten years in prison, ordered him to pay a $12,500 fine, and assessed against him the cost of incarceration estimated at $100,000.[74] On July 8, 1992, the government filed a forfeiture action under DAPCA[75] against the residential and business properties which housed the cocaine.[76] May contended that the Supreme Court overruled the traditional notion that civil forfeiture does not constitute punishment with its decisions in *Halper, Austin,* and *Kurth Ranch,* and that his criminal punishment subsequent to the civil forfeiture amounted to double jeopardy.[77]

b. *Decision*

Citing the Ninth Circuit decision in *United States v. $405,089.23 United States Currency,*[78] the Tenth Circuit stated: "*Austin* makes it clear that forfeitures under [DAPCA] are punishment, and we agree with the Ninth Circuit that there is no difference between the excessive fines and the double jeopardy definition of punishment."[79] Relying on *Halper* and *Kurth Ranch,* the court found that two trials constitute two jeopardies.[80] Thus, even though the criminal and civil proceedings derived from the same overall prosecution, they constituted two distinct efforts to punish, which placed the defendant in double

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70. *Id.* at 2144-46 (citing *Austin,* 509 U.S. at 608 n.4).

71. *Id.* at 2147. The *Ursery* Court explained:

> *Halper* dealt with *in personam* civil penalties under the Double Jeopardy Clause; *Kurth Ranch* with a tax proceeding under the Double Jeopardy Clause; and *Austin* with civil forfeitures under the Excessive Fines Clause. None of those cases dealt with the subject of this case: *in rem* civil forfeitures for purposes of the Double Jeopardy Clause.

Id.

72. 75 F.3d 1470 (10th Cir. 1996).

73. *South Titan Court,* 75 F.3d at 1475.

74. *Id.*

75. 21 U.S.C. § 881(a)(7).

76. *South Titan Court,* 75 F.3d at 1475.

77. *Id.* at 1483-84.

78. 33 F.3d 1210, 1222 (9th Cir. 1994). Guided by *Halper* and *Austin,* the Ninth Circuit barred the forfeiture of property under DAPCA. The court asserted that the forfeiture constituted punishment for the same drug related conduct for which the defendants had already been convicted in the criminal proceedings. Thus, the forfeiture was a violation of double jeopardy. *Id.*

79. *South Titan Court,* 75 F.3d at 1484.

80. *Id.* at 1487.

jeopardy.[81] The court found that the forfeiture of May's house and business property amounted to a second punishment after May's criminal conviction on drug related charges, and barred the forfeitures on double jeopardy grounds.[82]

C. In rem *Civil Forfeiture: Post*-Ursery

1. *United States v. Lopez*[83]

a. *Facts*

On January 13, 1993, a search of Johnny Lopez's apartment revealed eight kilograms of cocaine, twenty kilograms of marijuana, $100,000, and a warranty deed conveying title to a residence.[84] The government asserted that the money and residence were used in, or were proceeds of, the drug activities.[85] Pursuant to DAPCA,[86] the court entered a judgment of civil *in rem* forfeiture against the cash and the residence.[87] Subsequent to the forfeiture, the government filed an indictment based on unlawful possession of the drugs with intent to distribute.[88] Lopez filed a motion to dismiss on double jeopardy grounds.[89] The district court found against Lopez since the prior civil forfeiture action involved elements not present in the criminal charges.[90]

b. *Decision*

The Tenth Circuit ruled against the defendant since *Ursery* rendered the double jeopardy issue irrelevant.[91] The Tenth Circuit recognized that under *Ursery, in rem* civil forfeiture is not considered punishment for purposes of the Double Jeopardy Clause.[92] Thus, even if the government based its *in rem* civil forfeiture and criminal indictment on the same offense, the defendant could not invoke double jeopardy protection since the forfeiture failed to constitute punishment and therefore never placed the defendant in jeopardy in the first place.[93]

D. In Rem *Civil Forfeiture: Pre*-Ursery *but Double Jeopardy Claim Rejected On Other Grounds*

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81. *Id.* at 1487-88.
82. *Id.* at 1484.
83. 93 F.3d 694 (10th Cir. 1996).
84. *Lopez*, 93 F.3d at 695.
85. *Id.*
86. 21 U.S.C. § 881(a)(7); *see* full text *supra* note 34.
87. *Lopez*, 93 F.3d at 695.
88. *Id.*
89. *Id.* at 696.
90. *Id.* One of the additional elements involved aiding a racketeering enterprise. *Id.*
91. *Id.* at 697.
92. *Id.* at 698 (citing *Ursery*, 116 S. Ct. at 2149).
93. *Id.* at 696-97.

1. *United States v. Cordoba*[94]

a. *Facts*

A search of Romualdo Cordoba's van unearthed 10 kilograms of cocaine.[95] The government instituted a civil forfeiture action against the van under DAPCA.[96] On the same day, the government charged Cordoba with possession and intent to distribute cocaine.[97] Subsequently, the government seized a $10,000 check and a Corvette contending that both were drug proceeds.[98] Cordoba agreed to the forfeiture of all property as part of a plea agreement.[99] Prior to sentencing, however, Cordoba filed a motion to dismiss alleging that the forfeiture and the criminal conviction violated the Double Jeopardy Clause.[100] The district court denied the motion to dismiss and the defendant raised the same argument on appeal.[101]

b. *Decision*

The Tenth Circuit held that since Cordoba had consented to the forfeiture in his plea agreement, he waived any right to object on double jeopardy grounds.[102] Although the plea agreement made no reference to double jeopardy and Cordoba potentially failed to understand his possible defenses, he nevertheless waived his right to the claim.[103] Thus, "[T]he Double Jeopardy Clause . . . does not relieve a defendant from the consequence(s) of his voluntary choice."[104]

2. *United States v. German*[105]

a. *Facts*

The government indicted Daniel German for possession with intent to distribute more than 100 kilograms of marijuana after seizing German's truck, which he used to transport the drug, under DAPCA.[106] At the time of German's arrest, the government gave him a "Notice of Seizure of a Conveyance for a Drug-Related Offense" which advised him of the forthcoming seizure.[107] The government subsequently sent a notice providing German with further details of the seizure and German signed a receipt acknowledging that

94. 71 F.3d 1543 (10th Cir. 1995).
95. *Cordoba*, 71 F.3d at 1544.
96. *Id.*; *see also* 21 U.S.C. § 881 (a)(4).
97. *Cordoba*, 71 F.3d at 1544.
98. *Id.*; *see also* 21 U.S.C. §§ 881 (a)(4) and (a)(6).
99. *Cordoba*, 71 F.3d at 1545.
100. *Id.* at 1545-46.
101. *Id.* at 1545.
102. *Id.* at 1546.
103. *Id.*
104. *Id.* (citing United States v. Scott, 437 U.S. 82 (1979)).
105. 76 F.3d 315 (10th Cir. 1996). For cases pertaining to the rule of law discussed in *German*, see *United States v. Clark*, 84 F.3d 378 (10th Cir. 1996); *United States v. Hardwell*, 80 F.3d 1471 (10th Cir. 1996); *United States v. Denogean*, 79 F.3d 1010 (10th Cir. 1996).
106. *German*, 76 F.3d at 316; *see also* 21 U.S.C. § 881 (a)(4).
107. *German*, 76 F.3d at 316.

he received it.[108] However, German failed to submit a claim of ownership along with a cost bond or an *in forma pauperis* declaration by the deadline.[109] Thus, German resorted to an administrative ruling which resulted in the forfeiture of the truck.[110] German then filed a motion to dismiss the criminal indictment on double jeopardy grounds.[111] The court held that because German did not judicially contest the forfeiture by filing a claim of ownership and bond in district court, the government never adjudicated his alleged culpability nor placed German in jeopardy.[112]

b. *Decision*

The Tenth Circuit rejected the defendant's assertion that his double jeopardy claim survived despite his failure to contest the forfeiture in district court.[113] The Tenth Circuit instead affirmed the district court and stated that since German failed to contest the civil forfeiture by filing a claim of ownership and bond, he did not become a party to the forfeiture proceeding.[114] Thus, the court never made a determination of guilt, and, for double jeopardy purposes, the government never punished German in the first place.[115]

E. *Monetary Penalty*

1. *United States v. Hudson*[116]

a. *Facts*

John Hudson, Larry Beresel, and Jack Rackley consented to pay the Office of the Comptroller of the Currency ("OCC") $16,600, $15,000, and $15,000, respectively for alleged banking violations.[117] After the government indicted the defendants for the same mis-allocations of bank funds that gave rise to the OCC sanctions, the defendants moved to dismiss based on double jeopardy.[118] The district court rejected the claim, asserting that the fines served remedial, not punitive, purposes.[119] The Tenth Circuit vacated and remanded so that the district court could ascertain the actual loss to the government and substantiate its assertion that the fines were solely remedial based on evidence that a rational relation existed between the fines and the

108. *Id.* at 316-17.
109. *Id.* at 317.
110. *Id.*
111. *Id.*
112. *Id.* at 318-19.
113. *Id.* at 319.
114. *Id.* at 319-20.
115. *Id.* at 318-19 (citing United States v. Torres, 28 F.3d 1463, 1465 (7th Cir. 1994)). Both the Third and the Fifth Circuits used similar reasoning to conclude defendants who failed to contest civil forfeiture actions never became parties and thus were never "punished" for double jeopardy purposes. *See* United States v. Baird, 63 F.3d 1213, 1214 (3d Cir. 1995); United States v. Arreola-Ramos, 60 F.3d 188, 189 (5th Cir. 1995).
116. 92 F.3d 1026 (10th Cir. 1996) [hereinafter *Hudson II*].
117. *Hudson II*, 92 F.3d at 1028.
118. *Id.*
119. *Id.*

government's damages.[120] On remand, an evidentiary hearing revealed that the OCC incurred $72,000 in expenses to pursue the defendants.[121] However, the court concluded that the sanction served punitive purposes since the OCC desired to use the fines to deter future violations.[122] Thus, the district court concluded that the indictment violated the Double Jeopardy Clause.[123] The government then appealed the district court's ruling.[124]

b. *Decision*

Relying on *Halper*, the court asserted that the only issue on appeal concerned whether the fine was grossly disproportionate to the sanction such that the latter advanced more than remedial purposes.[125] Under the test in *Halper*, the defendant suffers no punishment if a rational relationship exists between the fine and the aim of compensating the government for its loss.[126] Since the government proved damages of $72,000 and the fines amounted to $46,600, the court found the fines rationally related to the government's damages.[127] Thus, the district court abused its discretion in determining that the sanctions were not solely remedial.[128]

F. *Analysis*

The Supreme Court's holding in *Ursery* left many circuits scrambling to find a graceful way to assume a completely different posture with respect to *in rem* civil forfeitures and double jeopardy.[129] The Tenth Circuit underwent this adjustment as evidenced by its pre-*Ursery* decision in *Titan Court* and post-*Ursery* realignment in *Lopez*.

In *Titan Court*, the Tenth Circuit relied on *Halper*, *Kurth Ranch*, and *Austin* to determine that civil forfeiture may constitute punishment and that no distinction between civil and criminal punishments exists.[130] Thus, imposing multiple punishments for the same activity constitutes a violation of the Double Jeopardy Clause.[131] The precedent offered through *Austin* particularly compelled the Tenth Circuit because the court based the punishment in *Titan Court* on the same statute (DAPCA) and subsections[132] as the forfeiture in *Austin*.[133] Thus, the Tenth Circuit readily concurred with the Ninth Circuit[134] that no difference exists between "the excessive fines and the dou-

120. United States v. Hudson, 14 F.3d 536 (10th Cir. 1994) [hereinafter *Hudson I*].
121. *Id.*
122. *Hudson II*, 92 F.3d at 1028.
123. *Id.* at 1027.
124. *Id.*
125. *Id.* at 1028.
126. *Id.*
127. *Id.* at 1028-29.
128. *Id.* at 1030.
129. *See infra* notes 142-53 and accompanying text.
130. *South Titan Court*, 75 F.3d at 1484.
131. *Id.* at 1484.
132. 21 U.S.C. §§ 881 (a)(4) and (a)(7).
133. *South Titan Court*, 75 F.3d at 1484.
134. *$405,089.23 United States Currency*, 33 F.3d at 1219; *see supra* note 59 (describing the

ble jeopardy definition of punishment."[135]

However, in *Ursery* the Court stated that excessiveness under the Eighth Amendment does not constitute punishment for double jeopardy purposes under the Fifth Amendment.[136] Six months after the Tenth Circuit decided *Titan Court*, and two months after the Supreme Court's holding in *Ursery*, the Tenth Circuit heard the *Lopez* case. Like *Titan Court*, *Lopez* involved a criminal indictment for unlawful possession of drugs with intent to distribute and a civil *in rem* forfeiture action against property related to the drug offense under DAPCA.[137] Heeding the *Ursery* avouchment, the Tenth Circuit rejected as non-pertinent the double jeopardy issues surrounding the civil forfeiture.[138]

As with *Titan Court*, *Cordoba* and *German* involved double jeopardy claims resulting from criminal indictments and civil forfeitures relating to drug offenses. Although the Tenth Circuit decided *Cordoba* and *German* in a pre-*Ursery* arena under the misapprehension civil forfeitures constituted punishment, the Tenth Circuit avoided the issue by disposing of them on other grounds. By consenting to the forfeiture in *Cordoba*, the defendant waived his right to a double jeopardy claim.[139] Because the defendant failed to contest the forfeiture in *German*, the court never recognized him as a party and consequently never technically punished him.[140]

Hudson did not involve a civil forfeiture. Rather, like *Halper*, it entailed a monetary penalty. The Tenth Circuit in *Hudson* appropriately initiated a straightforward application of *Halper* since monetary penalties remained unaffected by *Ursery*. Since the fine was not grossly disproportionate and was rationally related to the costs incurred by the government, it was not punishment for the purposes of double jeopardy.[141]

G. *Other Circuits*

Like the Tenth Circuit, other Circuits reconciled their decisions with the Court's holding in *Ursery* and found that civil forfeiture does not constitute punishment for purposes of the Fifth Amendment.[142] However, while still in the pre-*Ursery* information vacuum, the Second Circuit postulated that the *Halper* disproportionality test applied to civil forfeiture.[143] The Second Cir-

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Ninth Circuit's position in *$405,089.23 United States Currency*).

135. *South Titan Court*, 75 F.3d at 1484 (citing *$405,089.23 United States Currency*, 33 F.3d at 1219).

136. *Ursery*, 116 S. Ct. at 2147.

137. 21 U.S.C. §§ 881 (a)(6) - (a)(7).

138. *Lopez*, 93 F.3d at 698.

139. *Cordoba*, 71 F.3d at 1546.

140. *German*, 76 F.3d at 318-19.

141. *Hudson II*, 92 F.3d at 1029. Other circuits agree that the post-*Ursery* litigation arena leaves *Halper*-type civil sanction cases unaffected. *See, e.g.*, S.A. Healy Co. v. Occupational Safety and Health Review Comm'n, 96 F.3d 906, 911 (7th Cir. 1996) (applying *Halper* to determine that a fine was so grossly disproportionate that double jeopardy attached).

142. *See infra* notes 145-53 and accompanying text.

143. United States v. G.P.S. Automotive Corp., 66 F.3d 483, 490 (2d Cir. 1995) (citing United States v. 38 Whalers Cove Drive, 954 F.2d 29, 35 (2d Cir. 1992)). The court offered a long perusal of the meaning of *Halper*, *Kurth Ranch*, and *Austin*, but left a definitive determination to a

cuit also suggested that *Austin* opened the door to punishment considerations in the realm of civil forfeiture.[144] After *Ursery*, the Second Circuit conceded: "*Austin* conveyed the impression to many federal courts that civil forfeiture should also be considered 'punishment' for purposes of the Double Jeopardy Clause of the Fifth Amendment . . . *Ursery* has effectively repudiated [that] . . . impression . . . ."[145]

The Ninth Circuit entertained the same pre-*Ursery* understanding when it ruled in *United States v. $405,089.23 United States Currency*, one of the lower court cases overturned in *Ursery*.[146] Two months after the *Ursery* decision, the Ninth Circuit had occasion to decide another case involving a civil *in rem* forfeiture under DAPCA.[147] In addition to conceding that *Ursery* required reversal of *$405,089.23 United States Currency*, the Ninth Circuit briefly explained *Ursery's* two-pronged test,[148] and asserted that the application of this test resulted in the conclusion that "civil *in rem* forfeitures pursuant to 21 U.S.C. § 881(a)(6) do not constitute punishment for purposes of the Double Jeopardy Clause. Because [the defendant's] property was forfeited pursuant to this section, his double jeopardy claim necessarily fails."[149] Thus, this holding marked a complete turn around by the Ninth Circuit in response to the Supreme Court's decision in *Ursery*.

Like the Second and Ninth Circuits, the Eighth Circuit allowed the forfeiture of a vessel which the owners used to transport drugs in addition to the criminal indictment for the drug offenses.[150] The court explained, "[U]ntil recently, it was unclear whether a criminal defendant was subject to double jeopardy when the government attempted civil forfeiture of property . . . The Supreme Court greatly clarified this area of the law with its decision in *United States v. Ursery*."[151] Nevertheless, the court addressed the issue of excessive fines and acknowledged that a defendant might still find relief under the Eighth Amendment's umbrella.[152] Further, the Ninth Circuit recognized that civil sanctions such as fines may still constitute punishment for double jeopardy purposes if they are "divorced from the government's damages and expenses."[153]

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later date because the "broader jurisprudential developments" relating to double jeopardy occurred after the appeal was briefed and argued. *Id.* at 492.

144. *G.P.S. Automotive*, 66 F.3d at 491-92.

145. United States v. Certain Funds, 96 F.3d 20, 25 (2d Cir. 1996); *see also* United States v. Brophil, 96 F.3d 31 (2d Cir. 1996).

146. 33 F.3d 1210 (9th Cir. 1996).

147. United States v. Sardone, 94 F.3d 1233 (9th Cir. 1996); *see also* 21 U.S.C. § 881.

148. *See supra* note 68 and accompanying text.

149. *Sardone*, 94 F.3d at 1236.

150. United States v. One 1970 36.9' Columbia Sailing Boat, 91 F.3d 1053, 1056 (8th Cir. 1996); *see also* United States v. Quinn, 95 F.3d 8 (8th Cir. 1996).

151. *Columbia Sailing Boat*, 91 F.3d at 1055-56.

152. *Id.* at 1057-58. However, the court concluded that in this instance the fine was not excessive. *Id.* at 1058.

153. United States v. Gartner, 93 F.3d 633, 634 (9th Cir. 1996) (quoting *Halper*, 490 U.S. at 442).

III. MULTIPLE CHARGES OF SUCCESSIVE PROSECUTIONS FOR AN ALLEGED "SAME OFFENSE"

A. *Background*

1. General

Within the double jeopardy context, "multiplicity" occurs when the same behavior constitutes more than one criminal offense.[154] To establish a violation of the Double Jeopardy Clause, the defendant must show that the multiple offenses charged derive from the same facts.[155] In 1932, the Supreme Court established two tests to determine what comprises a single "offense."[156] First, in the event of a continuing series of homogeneous acts, for example, tearing several mail bags open at one time, the test asks whether the law prohibits the individual act or the overall course of conduct.[157] If the law forbids the individual act, then each act amounts to a separate offense.[158] If the law enjoins the overall course of conduct, then each act combines to form a single offense.[159] Thus, if the law prohibits tearing open a mail bag, then each mail bag violation results in a separate offense.[160] Second, if one act violates two distinct statutory provisions, the test asks whether each provision requires proof of at least one element not required in the other provision.[161]

For example, in *Blockburger v. United States*,[162] the Supreme Court upheld the defendant's conviction for violating two separate offenses after he sold morphine hydrochloride in violation of the Harrison Anti-Narcotic Act.[163] The first offense stemmed from selling the drug in some form other than in the original stamped package.[164] The second offense resulted from selling the drug without a written order.[165] The courts frequently employ this second test and often refer to it as the *"Blockburger* analysis" or *"Blockburger* test."[166] However, the *Blockburger* test will not control if the legislature intends to create two separate offenses.[167]

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154. United States v. Richardson, 86 F.3d 1537, 1551 (10th Cir. 1996).
155. *Id.* at 1551-52.
156. *Blockburger*, 284 U.S. at 302-03.
157. *Id.; see, e.g.*, United States v. Callwood, 66 F.3d 1110, 1114-15 (10th Cir. 1995) (upholding a sentence of three consecutive prison terms for use of a firearm, even though the same firearm was used in the course of the three underlying offenses).
158. *Id.*
159. *Blockburger*, 284 U.S. at 302.
160. *Id.* at 303.
161. *Id.* at 304.
162. *Id.* at 301.
163. *Id.* at 300-01; *see also* Harrison Anti-Narcotic Act, ch. 136, §§ 1005-1007, 42 Stat. 298-301 (codified as amended in scattered sections of 26 U.S.C.).
164. *Id.* at 301 n.1
165. *Id.* at 303-04.
166. *See, e.g.*, United States v. Dixon, 509 U.S. 688 (1993).
167. Garrett v. United States, 471 U.S. 773, 779 (1985) (citing Missouri v. Hunter, 459 U.S. 359 (1983)).

2. Lesser or Greater Included Offenses

Lesser or greater included offenses do not survive the *Blockburger* test since courts treat the two offenses as one and the Double Jeopardy Clause bars multiple or successive prosecutions.[168] Although the greater offense includes at least one element not required in the lesser offense, the lesser offense requires no different elements than those required in the greater offense.[169] For example, assault with a dangerous weapon includes the lesser included offense of assault. While assault with a dangerous weapon includes elements not contained in assault per se, assault requires no other elements than those contained in assault with a dangerous weapon. In such situations the government can not invoke the *Blockburger* test, which requires unique elements in each offense, and a defendant's Double Jeopardy Clause challenge should succeed.[170]

This rule clearly applies in the event of a conviction for a greater offense followed by prosecutions for lesser included offenses since convictions for the latter require no proof beyond that which satisfied the conviction criteria for the former.[171] However, prosecution for a greater offense followed by conviction for a lesser included offense resulting from new developments in the case or charges from different subdivisions of a jurisdiction presents a more complex and ambiguous scenario.

In *Brown v. Ohio*,[172] the Supreme Court clarified this scenario when it ruled irrelevant the sequence of trial for greater and lesser included offenses.[173] In *Brown*, the defendant stole a car from Cleveland, Ohio, and the police apprehended him while he was driving in Wickliffe, Ohio.[174] The Wickliffe police charged the defendant of joyriding, which involves taking or operating a car without the owner's consent.[175] After the defendant served jail time in Wickliffe, the police returned him to Cleveland, where authorities indicted him for auto theft, which consists of joyriding with intent to permanently deprive the owner of possession.[176] Thus, joyriding represents a lesser included offense in the greater offense of auto theft.[177] Applying the *Blockburger* test, the Court held that joyriding and auto theft serve as the same offense for double jeopardy purposes, and barred conviction for the greater offense of auto theft.[178]

However, the Court in *Brown* conceded that exceptions might apply "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."[179] Thus,

168. Shellenberger & Strazzella, *supra* note 13, at 126.
169. *Id.*
170. *Id.*
171. *Id.*
172. 432 U.S. 161 (1977).
173. *Brown*, 432 U.S. at 168.
174. *Id.* at 162.
175. *Id.*
176. *Id.* at 162-64.
177. *Id.* at 162-63.
178. *Id.* at 168-69.
179. *Id.* at 169 n.7.

if the greater offense depends on facts that develop after the first trial, the courts may allow successive prosecutions.[180] The Court applied this exception in *Garrett* where the greater offense depended on facts occurring after the trial for the lesser offense such that the latter did not bar a subsequent prosecution for the greater offense.[181]

B. *Tenth Circuit Cases*

1. *Yparrea v. Dorsey*[182]

a. *Facts*

Christopher Yparrea broke into a house and stole some of its contents.[183] The court convicted Yparrea separately of larceny and burglary and enhanced his sentence by eight years based on New Mexico's habitual criminal offender statute.[184] After losing in state court, Yparrea filed a writ of habeas corpus, arguing that the enhancement of his sentence constituted a violation of the Double Jeopardy Clause since the sentences were based on the same underlying conduct.[185] A magistrate dismissed the claim and the district court dismissed the petition.[186]

b. *Decision*

The Tenth Circuit noted that, while burglary requires entry into the dwelling, larceny does not.[187] Further, larceny requires an actual confiscation, which burglary does not.[188] Applying the *Blockburger* test, the court determined that since each offense requires proof of a fact which the other does not, the defendant could not take refuge under the cover of the Fifth Amendment's Double Jeopardy Clause.[189]

2. *United States v. Richardson*[190]

a. *Facts*

The district court convicted Bobby Richardson on separate offenses of possession with intent to distribute cocaine and possession with intent to distribute methamphetamine.[191] On appeal, Richardson asserted that, because the authorities found the two substances together in his toolshed, possession of the substances constituted a single offense, and therefore the separate convictions

180. Shellenberger & Strazzella, *supra* note 13, at 149-50.
181. *Garrett*, 471 U.S. at 791-93.
182. 64 F.3d 577 (10th Cir. 1995).
183. *Yparrea*, 64 F.3d at 578.
184. *Id.*; *see also* N.M. STAT. ANN. § 31-18-17 (Michie 1996).
185. *Yparrea*, 64 F.3d at 578-79.
186. *Id.*
187. *Id.* at 580.
188. *Id.*
189. *Id.* at 579-80.
190. 86 F.3d 1537 (10th Cir. 1996).
191. *Richardson*, 86 F.3d at 1542.

resulted in a violation of the Double Jeopardy Clause.[192]

b. *Decision*

The plain language of DAPCA,[193] upon which the district court based the convictions, reveals congressional intent to treat possession of different controlled substances as separate offenses.[194] Further, the legislative history offers no contrary evidence.[195] Thus, the court concluded that Richardson's convictions did not merit double jeopardy protection.[196]

3. *United States v. Rodriguez-Aguirre*[197]

a. *Facts*

Gabriel Rodriquez-Aquirre served a sentence for conspiracy to distribute marijuana in Kansas.[198] Authorities in New Mexico subsequently indicted Aquirre, along with his co-conspirators, for activities arising out of a drug distribution ring.[199] After a mistrial in district court, a grand jury indicted Aguirre on all twenty-two counts.[200] One count charged Aguirre with engaging in a Continuing Criminal Enterprise ("CCE").[201] Aguirre moved to dismiss this count arguing that the conspiracy conviction in Kansas was a lesser included offense of the CCE count such that the conspiracy conviction prevented the government under *Brown* from retrying him on the greater CCE offense.[202] The district court denied the motion.[203]

b. *Decision*

The Tenth Circuit held that because the Kansas indictment alleged that the conspiracy continued until March of 1989 and the New Mexico indictment pertained to charges continuing through December of 1993, it did not constitute the same offense.[204] The court concluded that when a defendant continues unlawful conduct after prosecution, the state may still use that unlawful conduct in another case to prove a continuing violation.[205]

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192. *Id.* at 1552.
193. 21 U.S.C. § 841(a)(1).
194. *Richardson*, 86 F.3d at 1553 (citing United States v. Sturmoski, 971 F.2d 452, 461-62 (10th Cir. 1992) (finding clear evidence of congressional intent to punish through 21 U.S.C. § 841(a)(1))).
195. *Id.*
196. *Id.*
197. 73 F.3d 1023 (10th Cir. 1996).
198. *Rodriguez-Aguirre*, 73 F.3d at 1024.
199. *Id.*
200. *Id.*
201. *Id.* The CCE was in violation of 21 U.S.C. § 848. *Id.*
202. *Id.* at 1025.
203. *Id.* at 1024.
204. *Id.* at 1026.
205. *Id.* at 1026-27 (citing *Garrett*, 471 U.S. at 798).

C. *Analysis*

The facts of *Yparrea* suggest treating the larceny as a "lesser included offense" of the burglary.[206] However, although both convictions arose out of the same conduct, the harsh reality under the *Blockburger* test is that they represent two separate offenses if each conviction requires the proof of different facts.[207] The drug convictions in *Richardson* embraced no separate elements nor required a different set of facts.[208] However, congressional intent trumped *Blockburger* and required that the convictions receive treatment as separate offenses.[209] Thus, the hierarchical order of authority places the plain wording of the statute first, the legislative history second, and the *Blockburger* test last.[210]

While the State of Kansas convicted the defendant in *Rodriguez-Aguirre* of the lesser included offense of conspiracy to distribute marijuana, such that courts would typically bar the greater offense of CCE under the *Blockburger* test,[211] *Rodriguez-Aguirre* offered the exception set forth in *Brown* and applied in *Garrett*. Namely, since the greater offense depended on facts that occurred after the first trial, double jeopardy was not applicable.[212]

D. *Other Circuits*

While the Supreme Court's holdings in *Blockburger*, *Brown*, and *Garrett* tended to homogenize circuit court decisions with respect to the issues raised in *Yparrea* and *Rodriguez-Aguirre*, the Court's analysis in *Richardson* failed to provide a similar clarifying rationale. Although the First, Second, Fourth, Fifth, and Sixth Circuits concur with the Tenth Circuit regarding its decision to treat the simultaneous possession of varying controlled substances as separate offenses, they offer differing reasons for their results.[213] DAPCA prohibits the knowing manufacture, distribution, or dispensing of "*a*" controlled substance.[214] The Sixth Circuit held that simultaneous possession of heroin and methadone constituted separate offenses since the statute deems heroin a schedule I controlled substance while it regards methadone as a schedule II substance for purposes of punishment.[215] The Fifth Circuit asserted that when Congress passed DAPCA it intended to give judges maximum flexibility in fashioning sentences.[216] An interpretation treating all controlled substances

206. *See supra* notes 198-204 and accompanying text.
207. *Yparrea*, 64 F.3d at 579-80.
208. *Richardson*, 86 F.3d at 1549.
209. *Id.* at 1553.
210. *See Garrett*, 471 U.S. at 779; *see also* Shellenberger & Strazzella, *supra* note 13, at 122-25 (discussing the relationship between the *Blockburger* test and legislative intent).
211. Shellenberger & Strazzella, *supra* note 13, at 146-47.
212. *Rodriguez-Aguirre*, 73 F.3d at 1026-27.
213. *See infra* text accompanying notes 215-225.
214. 21 U.S.C. § 841(a)(1) (emphasis added).
215. United States v. Pope, 561 F.2d 663, 669 (6th Cir. 1977).
216. United States v. Davis, 656 F.2d 153, 158-59 (5th Cir. 1981) (citing H.R. REP. NO. 91-1444 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4570).

possessed simultaneously as one offense restricts that flexibility.[217] The Fourth Circuit cited to the Sixth Circuit and held that, since drugs listed in different schedules mandate different penalties, Congress intended the possession of each scheduled drug to constitute a separate violation.[218] The Second Circuit brushed the surface of several arguments by contending that Congress left one of the Second Circuit's prior decisions allowing the imposition of cumulative sentences for possession of different drugs undisturbed when it passed DAPCA.[219] The Second Circuit embraced the separate schedule proposition first offered by the Sixth Circuit as well as the congressional intent assertion introduced by the Fifth Circuit.[220] The First Circuit also adopted the congressional intent validation for treating different drugs as separate offenses and argued that the plain meaning of §841(a)(1) creates a violation for *a* controlled substance and not *a group* of controlled substances.[221] The Supreme Court declined to clarify the rationale for treating different, simultaneously possessed substances as separate offenses when it denied certiorari in the cases arising out of the First,[222] Second,[223] Fourth,[224] and Fifth[225] Circuits.

IV. SUCCESSIVE PROSECUTIONS: RETRIAL

A. *Background*

In *Lockhart v. Nelson*[226], the Supreme Court affirmed a century of jurisprudence by holding that the Double Jeopardy Clause does not bar retrial when a conviction is set aside due to an error in the trial proceedings.[227] The Court set forth the following policy rationale: "[I]t would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error . . . ."[228] In *Lockhart*, the appellate court reversed the initial conviction based on erroneous admission of evidence.[229] The Court found that as long as sufficient evidence exists to sustain a guilty verdict, even if it would have been insufficient without the erroneous admission, double jeopardy does not bar retrial.[230]

Nevertheless, the Court recognized an exception to this general rule when a reversal occurs due to insufficient evidence.[231] In *Burks v. United*

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217. *Davis*, 656 F.2d at 159.
218. United States v. Grandison, 783 F.2d 1152, 1156 (4th Cir. 1986).
219. *Id.* at 1156.
220. United States v. DeJesus, 806 F.2d 31, 36-7 (2d Cir. 1986).
221. United States v. Bonilla Romero, 836 F.2d 39, 47 (1st Cir. 1987).
222. Bonilla Romero v. United States, 488 U.S. 817 (1988).
223. DeJesus v. United States, 479 U.S. 1090 (1987).
224. Grandison v. United States, 479 U.S. 845 (1986).
225. Davis v. United States, 456 U.S. 930 (1982).
226. 488 U.S. 33 (1988).
227. *Lockhart*, 488 U.S. at 38 (citing United States v. Ball, 163 U.S. 662 (1896)).
228. *Id.* (citing *Ball*, 163 U.S. at 466).
229. *Id.* at 34.
230. *Id.* (conceding that if the evidence had been barred, the government would have attempted to offer additional evidence to satisfy its burden).
231. *Id.* at 39.

States,[232] the Court held that while reversal based on erroneous admission of evidence allows the defendant a trial free from error, reversal due to insufficiency of evidence amounts to an acquittal.[233] A distinct policy rationale exists for an acquittal in the second circumstance since society holds no "interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty."[234]

B. *Tenth Circuit Cases*

1. *United States v. Wacker*[235]

a. *Facts*

The court convicted Edith Wacker and six other defendants of various drug related offenses associated with a large marijuana harvesting and distribution operation located on her parent's farm.[236] The defendants appealed one of the convictions pertaining to the use of a firearm and argued for reversal of the conviction due to insufficiency of evidence.[237] While the evidence sufficed at the time of conviction, the Supreme Court changed the standard for determining what constitutes "use of a firearm" before the Tenth Circuit decided the case on appeal.[238] To obtain a conviction for "use" of a firearm at the time of the trial, the prosecution needed to establish that the defendants enjoyed "ready access" to the firearm and that the firearm served as an "integral part" of the criminal activity.[239] However, the Supreme Court subsequently changed the standard to require that the defendants actively employ the firearm during the crime.[240]

b. *Decision*

Relying on *Lockhart*, the Tenth Circuit reversed the trial court based on error rather than on "pure insufficiency of evidence," meaning double jeopardy could not bar a second trial on remand.[241] In the district court, the government produced evidence commensurate with the jury instruction based on the legal standard used at the time.[242] Thus, the Tenth Circuit asserted its unwillingness to reverse a conviction solely because the prosecution failed to present evidence which they did not know was relevant at the time.[243]

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232. 437 U.S. 1, 14-16 (1978).
233. *Burks*, 437 U.S. at 14-16.
234. *Id.* at 16.
235. 72 F.3d 1453 (10th Cir. 1995), *cert. denied*, 117 S. Ct. 136 (1996).
236. *Wacker*, 72 F.3d at 1460-62.
237. *Id.* at 1459-60.
238. *Id.* at 1464-65 (citing United States v. Bailey, 116 S. Ct. 501, 509 (1995) (changing the standard for "use" of a firearm to "actively employed the firearm during and in relation to the predicate crime")).
239. *Id.* at 1463.
240. *Id.*
241. *Id.* at 1465.
242. *Id.* at 1464-65.
243. *Id.* at 1465.

2. *United States v. Miller*[244]

a. *Facts*

The district court convicted Brian Miller and Michael Hicks of various drug related offenses.[245] The judge incorrectly instructed the jury regarding one of the grounds for conviction relating to the "use" of a firearm.[246] Hicks appealed asserting that with a proper instruction the jury might not have convicted him on the use of a firearm in relation to the drug trafficking crime.[247] While the government contended that Hicks carried the firearm, the jury enjoyed the liberty to reject that assertion and to convict him solely on the basis that he concealed the firearm in his van.[248] If so, similar to *Wacker*, the jury would have passed a conviction that was inconsistent with the new standard for "use" and "carrying" of a firearm. Since the jury returned a general verdict, uncertainty existed as to whether it relied on the incorrect instruction.[249]

b. *Decision*

Relying on its holding in *Wacker*, the Tenth Circuit found that it could remand for a new trial only if the jury could have returned a guilty verdict if it received proper instruction in the first instance.[250] The court found sufficient evidence to support a guilty verdict under the "carry" prong of the statute (not alleged in *Wacker*) since "carry" under the statute only requires that the defendant possessed, through dominion and control, and transported the firearm.[251] Since Hicks carried the firearm in his van during the crime's commission, the jury could have returned a guilty verdict even with a proper instruction. Thus, the Tenth Circuit remanded for a new trial.[252]

C. *Analysis*

Lockhart and *Burks*, together with their progeny, *Wacker* and *Miller*, set forth the rule and exceptions to the rule regarding retrials due to trial error and insufficiency of evidence. Trial error does not bar retrials as long as sufficient evidence exists for a jury to convict.[253] However, if the court reverses due to the lack of sufficient evidence to convict, then retrial violates double jeopardy

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244. 84 F.3d 1244 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 443 (1996).

245. *Miller*, 84 F.3d at 1247-48.

246. *Id.* at 1257.

247. *Id.* at 1257. The jury was told that it could find one of the defendants guilty of one of the counts if he "used" the firearms and he "used" them if he merely concealed them in his van. *Id.* This instruction was contrary to the requirements for "used" set forth in *Bailey*. *See supra* note 238 and accompanying text.

248. *Miller*, 84 F.3d at 1257.

249. *Id.* at 1257.

250. *Id.* at 1258.

251. *Id.* at 1258-60.

252. *Id.* at 1260-61. *But see* United States v. Smith, 82 F.3d 1564, 1567-68 (10th Cir. 1996) (addressing the same issue on appeal but finding that the evidence was not sufficient to support a conviction under a proper instruction).

253. *Lockhart*, 488 U.S. at 38.

since the reversal amounts to an acquittal.[254] However, if the insufficiency prompting the reversal stems from a changed legal standard[255] or an erroneous jury instruction,[256] as opposed to "true insufficiency of evidence"[257] then *Lockhart* applies and retrial may proceed.[258]

D. *Other Circuits*

In *United States v. Lanzotti*,[259] the Seventh Circuit allowed a retrial where the jury found the defendants guilty on several counts for participating in an illegal gambling business in violation of 18 U.S.C. § 1955.[260] After a jury conviction on all counts, the defendants argued, and the government conceded, that the government lacked sufficient evidence to support conviction on one of the counts.[261] The government changed its theory of conviction to one the evidence supported, and the Seventh Circuit determined that, since the new theory was not argued to the jury, the interests of justice required a new trial.[262] The defendants moved to dismiss contending that, because the evidence failed to support a conviction on the theory actually communicated to the jury, double jeopardy barred a new trial.[263] The district court denied the defendant's motion and the Seventh Circuit affirmed on the basis that the government's failure to support its legal theory by the facts proved at trial fell outside of the functional equivalent of an acquittal as defined by *Lockhart* and *Burks*.[264] True insufficiency of evidence requires the factual innocence of the defendant and does not derive from a court's determination of incongruity between the legal theory of conviction and the government's facts.[265]

The Eighth Circuit permitted retrial where the government convicted the defendant under the wrong capital murder provision.[266] Although the Eighth Circuit conceded the defendant's double jeopardy assertion contained "considerable logic" since there was insufficient evidence in the first trial to support the felony charge, it distinguished between reversal for true insufficiency of evidence and reversal for a legally defective indictment.[267] The Eighth Circuit recognized the difficulty of prevailing against a retrial based on a showing of insufficiency of evidence to the extent that it amounted to an acquittal.[268] However, the court defended the high standard, as a matter of policy, since without it appellate courts would not vehemently reverse due to trial error "if

254. *Burks*, 437 U.S. at 15-16.
255. *Wacker*, 72 F.3d at 1465.
256. *Miller*, 84 F.3d at 1257-58.
257. *Wacker*, 72 F.3d at 1465.
258. *Lockhart*, 488 U.S. at 38.
259. 90 F.3d 1217 (7th Cir. 1996).
260. *Lanzotti*, 90 F.3d at 1219; *see also* 18 U.S.C. § 1955 (1994).
261. *Id.* at 1219-20.
262. *Id.*
263. *Id.* at 1220.
264. *Id.* at 1221-22.
265. *Id.* at 1222-23.
266. Parker v. Norris, 64 F.3d 1178, 1180-82 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 820 (1996).
267. *Parker*, 64 F.3d at 1181 (citing *Ball*, 163 U.S. at 671-72).
268. *Id.*

they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution."[269]

CONCLUSION

The law affords little refuge for defendants under the umbrella of the Fifth Amendment's Double Jeopardy Clause. Although conviction for possession of different drugs does not require the proof of unique facts as set forth in *Blockburger*, the government treats the possession of each substance as a separate offense. Further, retrial for the same offense is not barred if the insufficiency of evidence in the first trial results from a changed legal standard or an erroneous jury instruction. Even these seemingly harsh laws appear relatively benign compared to the battering that a defendant must endure in the realm of *in rem* civil forfeitures. Relying on antiquated law dating back some two hundred years in the admiralty arena, the Court emphatically held that the government may confiscate a defendant's property and institute criminal punishment for the same drug related offense.

It is unusual for circuit courts to misunderstand the Supreme Court's position as profoundly as did the Second, Sixth, Eighth, Ninth, and Tenth Circuits in the civil forfeiture arena. *Ursery* changed the course of double jeopardy jurisprudence. Like the Tenth Circuit, many courts are struggling to understand this latest development and to realign themselves with the nation's highest Court.

Virginia Grace Brannon

269. *Id.* at 1182 (citing United States v. Tateo, 377 U.S. 463, 466 (1964)).