THE MUTUALLY EXCLUSIVE OFFENSE DOCTRINE AS A RULE OF EVIDENCE

Phillips v. United States, 518 F.2d 108 (4th Cir. 1975)

Defendant was indicted and tried for bank robbery in violation of the Federal Bank Robbery Act.[1] The district court set aside the resulting conviction of knowing possession of the proceeds of a bank robbery[2]

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* *As this issue went to press, the United States Supreme Court vacated the judgment in* Phillips *and remanded the case for further consideration in light of United States v. Gaddis, 424 U.S. 544 (1976). United States v. Phillips, 424 U.S. 961 (1976).* See *note 48 and text accompanying notes 57-61* infra. *On remand the Fourth Circuit affirmed defendant's conviction. Phillips v. United States, 538 F.2d 586 (1976).*

1. 18 U.S.C. § 2113 (1970). 18 U.S.C. § 2113(a) (1970) provides:

> Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any [federally insured] bank . . . or
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> Whoever enters or attempts to enter any bank . . . with intent to commit in such bank . . . any felony affecting such bank . . . and in violation of any statute of the United States, or any larceny—
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> Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

18 U.S.C. § 2113(d) (1970) provides:

> Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

2. Phillips v. United States, 502 F.2d 227, 228-29 (4th Cir. 1974). Defendant asserted an alibi defense. After retiring to consider its verdict, the jury asked for a supplementary instruction on the necessity of defendant's presence in the bank. The court replied that the jury must find that the defendant was present in the bank during the robbery in order to convict for robbery; such presence was unnecessary to convict on the "lesser included offense" of knowing possession of the proceeds of a bank robbery. Ten minutes after receiving this instruction, the jury returned its verdict finding the defendant guilty of possession of money stolen from a bank. *Id.* at 229.

It is unclear from the record why the defendant could not have been convicted as a principal even though not present in the bank during the robbery. 18 U.S.C. § 2 (1970) provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
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> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Judge Craven raised this argument in his dissent to the panel decision. Phillips v. United States, 502 F.2d 227, 234 n.3 (4th Cir. 1974) (Craven, J., dissenting).

Courts have repeatedly held that this section allows conviction of a defendant for bank robbery even if he were not present in the bank during the robbery. *See, e.g.*, United

on the ground that the indictment did not include this offense.[3] Defendant was subsequently indicted for illegal possession of the money he had earlier been charged with stealing.[4] At the trial on this

States v. Burkeen, 350 F.2d 261 (6th Cir. 1965), *cert. denied*, 382 U.S. 966 (1966); United States v. Simmons, 281 F.2d 354 (2d Cir. 1960); Tarkington v. United States, 194 F.2d 63 (4th Cir. 1952). Nor should the Government's failure to charge the defendant with a violation of this section have prevented his conviction. *See* Levine v. United States, 430 F.2d 641 (7th Cir. 1970) (one who is indicted as a principal may be convicted on evidence showing that he merely aided and abetted); United States v. Lugo-Baez, 412 F.2d 435 (8th Cir. 1969), *cert. denied*, 397 U.S. 966 (1970); United States v. Ramsey, 374 F.2d 192 (2d Cir. 1967); Nassif v. United States, 370 F.2d 147 (8th Cir. 1966); Lambert v. United States, 226 F.2d 602 (5th Cir. 1955), *cert. denied*, 350 U.S. 988 (1956); United States v. Hodorowicz, 105 F.2d 218 (7th Cir.), *cert. denied*, 308 U.S. 584 (1939). This result has been explained as follows:

> An indictment need not specifically charge aiding and abetting or causing the commission of an offense against the United States in order to support a jury verdict based upon the finding of either. All indictments must be read in effect as if the alternatives provided by 18 U.S.C. § 2 were embodied in each count.

United States v. Ehrenberg, 354 F. Supp. 460, 463 (E.D. Pa.), *aff'd*, 485 F.2d 682 (3d Cir. 1973), *cert. denied*, 416 U.S. 906 (1974). *See also* United States v. Bullock, 451 F.2d 884, 888 (5th Cir. 1971). Thus, had the evidence warranted, the trial judge in *Phillips* could have instructed the jury on an aiding and abetting theory although defendant was indicted only as a principal. *See* United States v. Taylor, 464 F.2d 240 (2d Cir. 1972); United States v. Duke, 409 F.2d 669 (4th Cir. 1969); Theriault v. United States, 401 F.2d 79 (8th Cir. 1968), *cert. denied*, 393 U.S. 1100 (1969); Pinkney v. United States, 380 F.2d 882 (5th Cir.), *cert. denied*, 390 U.S. 908 (1967); United States v. Lester, 363 F.2d 68 (6th Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967); Glass v. United States, 328 F.2d 754 (7th Cir.), *cert. denied*, 377 U.S. 983 (1964); United States v. Washington, 287 F.2d 819 (7th Cir.), *cert. denied*, 366 U.S. 969 (1961).

In both the panel and en banc decisions, the Fourth Circuit assumed that possession is not a lesser included offense of bank robbery. Phillips v. United States, 502 F.2d 227, 229 n.7 (4th Cir. 1974); Phillips v. United States, 518 F.2d 108, 111 (4th Cir. 1975) (en banc), *noted in* 11 WAKE FOR. L. REV. 691 (1975). The Supreme Court recently confirmed this assumption in United States v. Gaddis, 424 U.S. 544 (1976). For a discussion of lesser included offenses under the Federal Rules of Criminal Procedure, see Annot., 11 A.L.R. FED. 173 (1972).

3. Phillips v. United States, 502 F.2d 227, 229 (4th Cir. 1974). A footnote to Judge Craven's dissenting opinion explained:

> In Phillips' case the trial judge granted defendant's motion for new trial, giving as his reason:
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> > [I]n an abundance of caution, it may be that the charge of the lesser offense, given as it was, after a time of deliberation, could have been unduly influencing upon the jury.
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> App. 3. The trial judge had omitted the instruction on possessing stolen money from the original charge at the request of defense counsel who, in the judge's words, "was willing to go whole hog or nothing." Tr. 343, Trial of April 16, 17, 1973. The jury's question persuaded the judge that withholding the instruction was error.

Id. at 234-35 n.4. *See* note 2 *supra*.

4. Defendant was indicted under 18 U.S.C. § 2113(c) (1970), which provides:

charge, the government introduced evidence over objection tending to show that the defendant was present in the bank as a participant during the robbery to prove that he knew the money was stolen. Defendant was convicted. A panel of the Court of Appeals for the Fourth Circuit reversed the second conviction, holding that the first trial had resolved the question of defendant's presence in the bank against the Government;[5] collateral estoppel barred the Government from relitigating the issue.[6] On rehearing en banc, a majority of the court could not agree on the applicable reason, but affirmed the reversal and *held*: The Government could not introduce evidence showing that defendant was present in the bank and a participant in the robbery at his trial for possessing the proceeds of that robbery.[7] Three judges[8] adhered to the panel opinion's decision that collateral estoppel applied. Three judges[9]

> Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value knowing the same to have been taken from a bank . . . in violation of subsection (b) of this section shall be subject to the punishment provided by said subsection (b) for the taker.

18 U.S.C. § 2113(b) (1970) provides:

> Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank . . . shall be fined not more than $5,000 or imprisoned not more than ten years, or both . . . .

5. *See* note 2 *supra.*

6. Phillips v. United States, 502 F.2d 227 (4th Cir. 1974).

7. Phillips v. United States, 518 F.2d 108 (4th Cir. 1975).

As Judge Widener pointed out in dissent, this ruling left the court in the somewhat anomalous position of rejecting each rationale for reversing the trial court by a 4-3 margin, yet sustaining that result by a 6-1 margin. Four members of the court specifically held that the doctrine of collateral estoppel, *see* notes 30-34 *infra*, did not foreclose the government from offering the proof in question, yet the government could not introduce that very evidence because a minority of the court believed that the *Milanovich* rule, *see* notes 41-48 *infra*, rendered it inadmissible. Phillips v. United States, *supra* at 112. Mr. Justice Frankfurter once expressed his dissatisfaction with this kind of result as follows: "And so, conflicting minorities in combination bring to pass a result—paradoxical as it may appear—which differing majorities of the Court find insupportable." National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 655 (1949) (Frankfurter, J., dissenting).

Although *Phillips* failed to establish guidelines for lower courts in the Fourth Circuit, the decision itself is not necessarily erroneous. The primary task of any court is to decide the particular case before it. When six of seven judges agree, although for different reasons, that a criminal conviction should be reversed, the agreement on the result rather than the disagreement about the applicable reasons for that result must control.

8. Judges Winter, Russell, and Field applied the doctrine of collateral estoppel. *See* text accompanying notes 30-34 *infra.*

9. Chief Judge Haynsworth and Judges Craven and Butzner applied the *Milanovich* rule. *See* text accompanying notes 40-50 *infra.*

reasoned that the evidence was inadmissible under the mutually-exclusive-offense rule established in *Milanovich v. United States*.[10]

The Federal Bank Robbery Act[11] prohibits robbery,[12] attempted robbery,[13] larceny,[14] and armed robbery[15] of federally insured banks, and the reception, possession, and concealment of the proceeds of such robberies.[16] Congress undoubtedly has the power to outlaw and punish as separate and distinct offenses the severable ingredients of a single act.[17] Such statutory division of one act or integrated course of conduct into more than one crime[18] creates two distinct, though closely related,

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10. 365 U.S. 551 (1961). *See* text accompanying notes 40-50 *infra*.

In addition, the court instructed the district court that the defendant would be estopped from offering evidence at any subsequent trial that he was in the bank during the robbery and therefore a "thief" rather than a "receiver." Under this court's reading of *Milanovich*, such proof would establish the defendant's incapacity to be convicted as a receiver. *See* notes 40-50 *infra* and accompanying text. Once again, a majority of the court could not agree on the theory supporting this finding. Three judges relied on collateral estoppel and two others on equitable estoppel. Since Phillips took the position throughout both trials that he was neither in the bank during the robbery nor involved in it in any way, and nothing in the record indicates that he ever tried to raise such a defense, this issue was not properly before the court.

11. 18 U.S.C. § 2113 (1970). For a discussion of the history, validity, and construction of the Act, see Annot., 59 A.L.R.2d 946 (1958).

12. 18 U.S.C. § 2113(a) (1970), *quoted in* note 1 *supra*.

13. *Id.*

14. 18 U.S.C. § 2113(b) (1970), *quoted in* note 4 *supra*.

15. 18 U.S.C. § 2113(d) (1970), *quoted in* note 1 *supra*.

16. 18 U.S.C. § 2113(c) (1970), *quoted in* note 4 *supra*.

17. *See* Gore v. United States, 357 U.S. 386 (1958) (upholding consecutive sentences for a single sale of a drug in violation of three statutes) and cases cited therein; Blockburger v. United States, 284 U.S. 299 (1932); Albrecht v. United States, 273 U.S. 1, 11 (1927) ("There is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit and punishing also the completed transaction"); Morgan v. Devine, 237 U.S. 632 (1915) (upholding consecutive sentences for breaking into a post office with intent to commit larceny, and larceny). The double jeopardy clause limits the power of courts, not legislatures. *See* Comment, *Twice in Jeopardy*, 75 YALE L.J. 262, 302 (1965); Comment, *Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee*, 65 YALE L.J. 339, 363-68 (1955).

18. Although it is clearly necessary to limit the extent to which one act or integrated course of conduct can be treated as more than one crime and accompanied by cumulative penalties, solutions have not been forthcoming. As legislatures increase the number of separate offenses with overlapping application, problems arise more frequently. *See* J. SIGLER, DOUBLE JEOPARDY 64 (1969); Horack, *The Multiple Consequences of a Single Criminal Act*, 21 MINN. L. REV. 805, 820 (1937); Mayers and Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1, 29 (1960); Note, *Consecutive Sentences in Single Prosecutions: Judicial Multiplication of Statutory Penalties*, 67 YALE L.J. 916 (1958); Comment, *Twice in Jeopardy*, *supra* note 17, at

problems for the accused:[19] multiple vexation through separate trials on basically the same facts,[20] and multiple punishment for what is essentially one criminal activity.[21]

The fifth amendment's prohibition against placing a defendant twice in jeopardy for the "same offense"[22] offers some protection from both dangers. The double jeopardy clause prohibits retrial of the accused for the "same offense" after an acquittal.[23] When the accused has been convicted, the clause prohibits both imposition of multiple punishment[24]

279; Comment, *Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee, supra* note 17, at 341-44; 67 YALE L.J. 916 (1958).

19. *See* Kirchheimer, *The Act, the Offense and Double Jeopardy*, 58 YALE L.J. 513, 526-27 (1949); Note, *The Protection from Multiple Trials*, 11 STAN. L. REV. 735 (1959); Comment, *Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee, supra* note 17, at 340-46; 67 YALE L.J. 916, 918-23 (1958).

20. *See, e.g.*, United States v. Ewell, 383 U.S. 116 (1966) (single sale led to prosecution for selling narcotics without required order form, followed by prosecution for selling narcotics not in or from original package); Gavieres v. United States, 220 U.S. 338 (1911) (prosecution for insulting a public official following a conviction for disorderly conduct based on same words and conduct); Cox v. Gaffney, 459 F.2d 50 (10th Cir.), *cert. denied*, 409 U.S. 863 (1972) (possession of concealed handgun and possession of hand gun by convicted felon); Black v. Peyton, 292 F. Supp. 45 (W.D. Va. 1968) (rape and child molestation).

21. *See, e.g.*, Blockburger v. United States, 284 U.S. 299 (1932) (single sale of a narcotic drug in violation of three statutes); McGann v. United States, 261 F.2d 956 (4th Cir. 1958), *cert. denied*, 359 U.S. 974 (1959) (bank robbery and robbery on lands within the territorial jurisdiction of the United States based on single robbery); Crapo v. Johnston, 144 F.2d 863 (9th Cir.), *cert. denied*, 323 U.S. 785 (1944) (possession of unregistered firearm and possession of same firearm after a transfer without paying required transfer tax); United Cigar Whelan Stores Corp. v. United States, 113 F.2d 340 (9th Cir. 1940) (sale of denatured alcohol for beverage purposes and sale of denatured alcohol in unstamped container); United States v. White, 156 F. Supp. 37 (E.D. Va. 1957) (unlawful possession of distilling apparatus, unlawful carrying on of business of distiller, unlawful making of mash fit for distillation, and unlawful possession of distilled spirits).

22. "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ." U.S. CONST. amend. V.

23. This protection corresponds to the common law plea of *autrefois acquit*. *See* Comment, *Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee, supra* note 17, at 341-42 n.13; Comment, *Twice in Jeopardy, supra* note 17, at 262 n.1.

24. Some courts have maintained that the double jeopardy clause only protects against multiple trials and does not apply to multiple punishments for the "same offense" at one trial. *See, e.g.*, Holiday v. Johnston, 313 U.S. 342, 349 (1941) (dictum) ("the erroneous imposition of two sentences for a single offense of which the accused has been convicted, or as to which he has pleaded guilty, does not constitute double jeopardy"); Calvaresi v. United States, 216 F.2d 891, 902 (10th Cir. 1954) (dictum)

and a second trial of the accused for the "same offense."[25] Federal courts have traditionally employed the "same evidence" test[26]

("[T]he Fifth Amendment is not against the imposition of a double sentence for the same offense, but is against trying one for a second time for the same offense").

These cases, however, have either ignored or misread *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1874). In *Lange*, petitioner was convicted under a statute authorizing *either* fine or imprisonment. The trial court fined petitioner and ordered him jailed. Petitioner paid the fine and then brought a habeas corpus action, asserting that the double jeopardy clause protected him from the second punishment. The Supreme Court agreed, holding that imposition of two punishments at a single trial for a single offense when the statute authorizes only alternative punishments violates the double jeopardy clause. In vacating the prison sentence, the Court noted:

> For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict?
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> . . . [T]he Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it.

Id. at 173.

The Supreme Court has also heard collateral attacks by writ of habeas corpus in several cases in which multiple punishment was imposed at a single trial, allegedly for the "same offense." Although the Court found that the offenses were distinct, the decision to grant review implies that double jeopardy prohibits multiple punishments for the same offense. *See, e.g.*, Morgan v. Devine, 237 U.S. 632 (1915); Ebling v. Morgan, 237 U.S. 625 (1915); Carter v. McClaughry, 183 U.S. 365 (1902); Comment, *Twice in Jeopardy, supra* note 17, at 266 n.13; Comment, *Statutory Implementation of Double Jeopardy Clauses: New Life For a Moribund Constitutional Guarantee, supra* note 17, at 339-40 n.4. *But see* 67 YALE L.J. 916, 919-20 n.17 (1958).

The Supreme Court addressed this issue most recently in North Carolina v. Pearce, 395 U.S. 711 (1969). In *Pearce* the Court held that when a defendant has served part of a sentence imposed under a conviction which is later reversed, the punishment already exacted must be credited in imposing sentence for the same offense after retrial because "the Double Jeopardy Clause protects against multiple punishments for the same offense." *Id.* at 717.

25. This protection corresponds to the common law plea of *autrefois convict. See* Comment, *Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee, supra* note 17, at 341-42 n.13; Comment, *Twice in Jeopardy, supra* note 17, at 262 n.1.

26. This test was originally formulated in The King v. Vandercomb & Abbott, 2 Leach 708, 720, 168 Eng. Rep. 455, 461 (Ex. 1796):

> [U]nless the first indictment were such as the prisoner might have been convicted upon by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second.

It entered the American courts in somewhat altered form through the decision in Morey v. Commonwealth, 108 Mass. (12 Browne) 433, 434 (1871):

> A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other.

Thus, the "same evidence" test refers to the evidence required by the statute for conviction, not the evidence actually presented at trial. This test also bars a later prosecution if the evidence required to convict for either crime is sufficient to convict on the other.

to determine whether the double jeopardy clause applies. Under this test two offenses are not the "same offense" if each requires proof of a fact that the other does not.[27] Since each statutory provision usually requires proof of some separate facts, the "same evidence" test often exposes the defendant to separate trials[28] and multiple punishments[29] for a single criminal action.

In the context of multiple trials,[30] the doctrine of collateral estoppel, incorporated into the double jeopardy clause by the Supreme Court's decision in *Ashe v. Swenson*,[31] extends the protection of that clause beyond the narrow confines of the "same evidence" test.[32] When an

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Unlike the English rule, the American "same evidence" test thus bars prosecution of a lesser included offense after prosecution of the greater offense. The formula usually employed in the federal courts was announced in Gavieres v. United States, 220 U.S. 338, 342 (1911), *quoting* Morey v. Commonwealth, *supra* at 443:

> 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.

Courts use this test both in new prosecutions, following a conviction or acquittal (as in *Gavieres*), and in single trials at which multiple charges are brought. *See* Blockburger v. United States, 284 U.S. 299, 304 (1932); notes 35-37 *infra* and accompanying text. For a discussion of the history and development of the same evidence test and the problems associated with offense defining tests, see J. SIGLER, *supra* note 18, at 38-117, 155-87; Kirchheimer, *supra* note 19, at 527-34; Note, *supra* note 19, at 741-46; Comment, *Twice in Jeopardy, supra* note 17, at 269-83.

27. *See* note 26 *supra*. For variations of the same evidence test, see Lugar, *Criminal Law, Double Jeopardy and Res Judicata*, 39 IOWA L. REV. 317, 321-29 (1954); Note, *Double Jeopardy and the Concept of Identity of Offenses*, 7 BROOKLYN L. REV. 79, 83-86 (1937); Comment, *Twice in Jeopardy, supra* note 17, at 262-74; 56 YALE L.J. 132, 134 (1947).

28. *See* cases cited note 20 *supra*.

29. *See* cases cited note 21 *supra*.

30. In this context the policy underlying the double jeopardy clause is that

> the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-88 (1957).

31. 397 U.S. 436 (1970), *noted in* 71 COLUM. L. REV. 321 (1971).

32. 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." Ashe v. Swenson, 397 U.S. 436, 443 (1970). The doctrine has long been available to criminal defendants in federal courts. In United States v. Oppenheimer, 242 U.S. 85 (1916), the Supreme Court held that res judicata could bar a second prosecution for the same offense even when double jeopardy did not apply. In that case, an indictment was dismissed as barred by the statute of limitations. A later case involving different parties established that this dismissal was erroneous.

issue has been determined in favor of the defendant in a previous trial, collateral estoppel prevents the government from relitigating that

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Defendant was again indicted for the same offense, and the trial court dismissed once more; although defendant had not been placed in jeopardy in the first prosecution and, therefore, could not invoke the double jeopardy clause, the prior judgment was res judicata on the statute of limitations issue. In affirming this decision, Justice Holmes spoke for a unanimous Court:

> The safeguard provided by the Constitution against the gravest abuses has tended to give the impression that when it did not apply in terms, there was no other principle that could. But the Fifth Amendment was not intended to do away with what in the civil law is a fundamental principle of justice . . . in order, when a man has once been acquitted on the merits, to enable the government to prosecute him a second time.

Id. at 88. In Sealfon v. United States, 332 U.S. 575 (1948), the Court held that in a subsequent prosecution for a different offense, the doctrine would apply to "conclude those matters in issue which the verdict determined . . . ." *Id.* at 578. Although the Court termed this doctrine "res judicata," the prohibition against relitigating issues at a second trial in which a different offense is charged is actually collateral estoppel. *See* 71 COLUM. L. REV. 321, 327 n.43 (1971).

The scope of the protection afforded by collateral estoppel has increased as the proliferation of overlapping and related statutory offenses has continued to diminish the effectiveness of the traditional double jeopardy doctrine and res judicata, both of which apply only in the case of a reprosecution for the same offense. *See* 1B J. MOORE, FEDERAL PRACTICE ¶ 0.418[2], at 2766 (1974). One court has noted that collateral estoppel has "peculiar applicability . . . to successive actions 'growing out of the same transaction' . . . ." (*i.e.*, multiple trials at which a defendant is charged with offenses involving essentially similar, but not "the same" facts under the same evidence test). United States v. Kramer, 289 F.2d 909, 917 (2d Cir. 1961). *See* Lugar, *supra* note 27; Mayers and Yarbrough, *supra* note 18; Comment, *Twice in Jeopardy*, *supra* note 17; 71 COLUM. L. REV. 321 (1971).

Since collateral estoppel precludes relitigation only of those issues actually determined by a prior judgment, courts have experienced great difficulty applying the doctrine to criminal cases in which judgments are based on general verdicts of guilty or not guilty rather than on specific findings of fact. *See* Lugar, *supra* note 27, at 333-34; Mayers and Yarbrough, *supra* note 18, at 33-39; Comment, *Twice in Jeopardy*, *supra* note 17, at 283-86; 71 COLUM. L. REV. 321 (1971). Some courts refused to apply the doctrine in the face of the inevitable uncertainty about which issues had been determined in the prior litigation. In State v. Hoag, 21 N.J. 496, 122 A.2d 628 (1956), *aff'd*, 356 U.S. 464 (1958), the defendant, charged with robbing three individuals, offered an alibi defense, and was acquitted. He was then tried and convicted of robbing two other victims of the same crime. The Supreme Court of New Jersey rejected the contention that the defendant had established an alibi defense by the first trial, reasoning that although defendant never contested the occurrence of the robbery "the trial of the first three indictments involved several questions, not just the defendant's identity, and there is no way of knowing upon which question the jury's verdict turned." *Id.* at 505, 122 A.2d at 632. The United States Supreme Court affirmed and held that the defendant had not been denied due process. The majority reasoned that even if the Constitution required courts to apply collateral estoppel, the New Jersey court had done so. Hoag v. New Jersey, 356 U.S. 446, 471 (1958).

The Supreme Court subsequently condemned this judicial myopia, and insisted that

issue.[33] If the issue is essential to conviction in the later trial, the second prosecution is barred.[34]

The second problem—multiple punishment for a single course of criminal conduct—often arises at a single trial.[35] In this context the double jeopardy clause does not afford a defendant adequate protection.[36] Collateral estoppel cannot apply, and use of the "same evidence" test would often result in a multiplication of penalties for the defendant's

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courts examine the record of the prior prosecution to determine the issue upon which a rational jury must have based its verdict. In Ashe v. Swenson, *supra*, the Court reasoned:

> "If a later court is permitted to state that the jury may have disbelieved substantial and uncontradicted evidence of the prosecution on a point the defendant did not contest, the possibile multiplicity of prosecutions is staggering. . . . In fact, such a restrictive definition of 'determined' amounts simply to a rejection of collateral estoppel, since it is impossible to imagine a statutory offense in which the government has to prove only one element or issue to sustain a conviction."

397 U.S. at 444 n.9, *quoting* Mayers and Yarbrough, *supra* note 18, at 38. *Ashe*, like *Hoag*, involved a defendant who was tried for robbing some of the victims of a single crime. He relied on an alibi defense, was acquitted, and then was tried again for robbing another victim of the same crime. The Court reviewed the evidence, the alibi defense, and the jury instructions and decided that "[t]he single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers." *Id.* at 445. Since the jury accepted the alibi, collateral estoppel barred the state from trying him again for that robbery. The Court in *Ashe* instructed lower courts to apply the doctrine of collateral estoppel liberally and realistically, to assume that juries act rationally, and to adhere to the following guidelines when attempting to ascertain which issues were determined by a judgment based upon a general verdict:

> 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."

Id. at 444, *quoting* Mayers and Yarbrough, *supra* note 18, at 38-39. For discussion of the constitutional dimensions of collateral estoppel, see 1B J. MOORE, *supra* ¶ 0.418[2]; Lugar, *supra* note 27; Mayers and Yarbrough, *supra* note 18; Note, *Constitutional Collateral Estoppel: A Bar to Relitigation of Federal Habeas Decisions*, 80 YALE L.J. 1229 (1971); Comment, *Twice in Jeopardy*, *supra* note 17; Annot., 9 A.L.R.3d 203 (1966).

33. *See, e.g.*, United States v. Kramer, 289 F.2d 909 (2d Cir. 1961); United States v. DeAngelo, 138 F.2d 466 (3d Cir. 1943).

34. *See, e.g.*, Turner v. Arkansas, 407 U.S. 366 (1972); Harris v. Washington, 404 U.S. 55 (1971); Ashe v. Swenson, 397 U.S. 436 (1970); Sealfon v. United States, 332 U.S. 575 (1948); United States v. Kramer, 289 F.2d 909 (2d Cir. 1961).

35. *See* cases cited note 21 *supra*.

36. Courts respond to a plea of double jeopardy in this circumstance by applying the "same evidence" test, just as in the multiple trial situation. *See* notes 24 & 26 *supra*. Application of the "same evidence" test almost invariably results in a finding of separate offenses. *See* cases cited note 21 *supra*.

single criminal act.[37] The courts, however, have modified by statutory construction the harshness of the "same evidence" test. The Supreme Court has formulated a rule of lenity[38] which prohibits multiple punishment by strictly interpreting ambiguous statutory language dividing a single course of conduct into several offenses.[39]

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37. *See* cases cited note 21 *supra*. The policy underlying the protection against multiple punishment is "to insure that the defendant's punishment will be commensurate with, but not greater than, his criminal liability." Note, *supra* note 19, at 736-37 (footnote omitted). This protection has a constitutional dimension because although the double jeopardy clause does not limit congressional power to make "each stick in a faggot a single criminal unit," it does prohibit the judiciary from imposing multiple punishment when Congress has not provided for it. Bell v. United States, 349 U.S. 81, 83 (1955). *See* Note, *supra* note 19, at 737; Comment, *Twice in Jeopardy*, *supra* note 17, at 302-15; Comment, *Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee*, *supra* note 17, at 340, 363-64.

38. Bell v. United States, 349 U.S. 81, 83 (1955).

39. As Chief Justice Warren observed in dissent in Gore v. United States, 357 U.S. 386, 393 (1958), the problem of multiple punishment arises in two contexts: (1) defendant's single act or continuing course of conduct violates a single statutory prohibition more than once; and (2) defendant's act or course of conduct is prohibited by more than one statutory provision. The Court has employed a presumption against the propriety of multiple punishment to modify the harshness of the "same evidence" test in both situations. In the case of *In re* Snow, 120 U.S. 274 (1887), the Court construed a statute prohibiting cohabitation with more than one woman to create a "continuous offense." It was therefore held improper for the lower court to have imposed three consecutive sentences stemming from convictions which each charged cohabitation with the same seven women in a different year. In United States v. Universal C.I.T. Credit Corp., 344 U.S. 218 (1952), the Court held that a thirty-two count information charging an employer with separate offenses for violation of the minimum wage, overtime, and recordkeeping sections of the Fair Labor Standards Act with respect to each of his employees was properly reduced to a three-count information charging one violation of each section. The Court anticipated the language that three years later appeared as the rule of lenity:

> [W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive outlawry from some ambiguous implication.

Id. at 221-22. In Bell v. United States, 349 U.S. 81 (1955), the Court held that a single transportation of more than one woman across state lines for immoral purposes did not constitute more than one offense under the Mann Act. Although the Court conceded that Congress could provide for cumulative punishment for the transportation of each woman,

> [w]hen Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. . . . [I]f Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses . . . .

Id. at 83-84. The Court applied this rule in Ladner v. United States, 358 U.S. 169 (1958), holding that a single gunshot constituted only a single violation of a statute pro-

The Supreme Court has applied the rule of lenity to avert multiple punishment under the Federal Bank Robbery Act.[40] In *Prince v. United States*,[41] the Court concluded that Congress added the unlawful entry provision of the Act to criminalize conduct falling short of robbery. When a robbery is consummated, the unlawful entry "merges into the completed crime . . . ."[42] Courts could not, therefore, impose consecutive sentences for bank robbery and for entering a bank with intent to commit robbery. In *Heflin v. United States*,[43] the Court determined that Congress passed the receiving provision not to "pyramid penalties" on bank robbers but "to provide punishment for those

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hibiting assault on a federal officer even though the shot wounded more than one officer. The rule has also been applied to hold that a single interstate transportation of five forged money orders constituted a single punishable offense. Castle v. United States, 368 U.S. 13 (per curiam), *vacating* 287 F.2d 657 (5th Cir. 1961). For illustrations of the use of the rule of lenity to prohibit multiple punishment when a criminal transaction violates a number of overlapping statutory provisions, see United States v. Gaddis, 424 U.S. 544 (1976); Milanovich v. United States, 365 U.S. 551 (1961); Heflin v. United States, 358 U.S. 415 (1959); Prince v. United States, 352 U.S. 322 (1957). *See* notes 41-49 *infra* and accompanying text.

The rule of lenity is analogous to the maxim that criminal statutes are to be strictly construed. The former requires that doubt whether the legislature intended multiple punishments to be imposed for a single course of conduct be resolved in favor of the defendant; the latter mandates that doubt whether the legislature intended to prohibit a course of conduct at all must be resolved in favor of the defendant. The similarity is illustrated by Chief Justice Marshall's explanation of the basis of the maxim:

> The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that *the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.*

United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820) (emphasis added). One commentator explains the relationship between lenity and strict construction as follows:

> The rule of lenity is a penological analog to the rule of strict construction. Together they require that liberty be forfeited only if the legislature has clearly indicated that it should be, and only to the extent that it has plainly authorized. Both rules dictate that the punitive powers of the state may be invoked only pursuant to a definite, general and prospective prohibition, not at the arbitrary behest of public officials. Punishing convicted men is no less serious business than deciding whether they can be punished.

Comment, *Twice in Jeopardy*, *supra* note 17, at 316. The same author maintains that the rule of lenity is a "constitutionally compelled canon of construction." *Id.* at 316-17. For suggested rules of statutory construction for determining the propriety of multiple punishment absent clear legislative intent, see Kirchheimer, *supra* note 19.

40. 18 U.S.C. § 2113 (1970), *quoted in* notes 1 & 4 *supra*.

41. 352 U.S. 322 (1957).

42. *Id.* at 328.

43. 358 U.S. 415 (1959).

who receive the loot from the robbers" and "to reach a new group of wrongdoers."[44] The Court barred consecutive sentences for bank robbery and for receiving property stolen in that robbery.[45] Construing a similar statute,[46] the Court in *Milanovich v. United States*,[47] found the same legislative intent and held that when the evidence is sufficient to support a conviction for either larceny or receiving, the jury must be instructed that it can return a guilty verdict on either charge but not on both.[48] Finally, in *United States v. Gaddis*,[49] the Court extended

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44. *Id.* at 419-20.

45. *Id.* In Holiday v. Johnston, 313 U.S. 342 (1941), and Green v. United States, 365 U.S. 301 (1961), the Court noted that 18 U.S.C. § 2113(d), *quoted in* note 1 *supra*, does not create a separate offense but rather makes bank robbery an aggravated offense. Accordingly, two sentences may not be imposed on a defendant convicted under §§ 2113(a) and (d). The Government did not contest either case. O'Clair v. United States, 470 F.2d 1199 (1st Cir. 1972), applied the rule of lenity in holding that separate convictions under each section are improper even if only one sentence is imposed. The jury should be instructed to consider the aggravated charge first. *Id.* at 1204.

46. 18 U.S.C. § 641 (1970), which provides:

> Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells conveys or disposes of any record, voucher, money, or thing of value of the United States . . . or
>
> Whoever receives, conceals, or retains the same with intent to convert it to his own use or gain, knowing it to have been embezzled, stolen, purloined or converted—
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both . . . .

47. 365 U.S. 551 (1961). Defendant planned a robbery with three accomplices and drove them to its site—a naval base. Defendant waited in her car while the others broke into a safe on the base and hid the loot in a nearby woods. Approximately two weeks later she acquired some of the loot. Defendant was convicted of larceny and of receiving and concealing currency stolen in violation of 18 U.S.C. § 641 (1970). She was given a ten-year sentence on the larceny count and a five-year concurrent sentence on the receiving count. The Court of Appeals for the Fourth Circuit, relying on *Heflin*, *see* notes 43-45 *supra*, ordered the concurrent five-year sentence stricken, reasoning that Congress did not intend to permit the government to convict and punish a defendant for both stealing and receiving under this statute. Milanovich v. United States, 275 F.2d 716 (4th Cir. 1960). The Supreme Court ruled that vacating defendant's sentence for receiving stolen property did not cure the trial court's error in failing to instruct the jury that the defendant could not be convicted on both counts. The Court reversed both convictions, remanded for a new trial, and ordered the trial court to give the jury the proper instruction. *See* text accompanying note 48 *infra*. The current vitality of *Milanovich's* requirement of a new trial is suspect. *See* United States v. Gaddis, 424 U.S. 544, 551 (1976) (White, J., concurring).

48. 365 U.S. at 554-55. It is well established at common law that a person who actually steals property cannot be convicted of receiving the stolen property. The rationale for the rule is that it is factually impossible to receive goods from oneself. *See, e.g.*, Bargesser v. State, 95 Fla. 404, 116 So. 12 (1928); People v. Ensor, 310 Ill. 483, 142 N.E. 175 (1923); Robin v. People, 104 Ill. 565 (1882); Commonwealth

the "pyramiding of penalties" rationale to prohibit conviction for both bank robbery and possessing the proceeds of that robbery.[50]

In the view of three judges in *Phillips v. United States*,[51] "[t]he single rationally conceivable issue in dispute before the jury"[52] in the first trial was the defendant's presence in the bank at the time of the robbery. The jury's verdict established that he was not; therefore, collateral estoppel precluded introduction of evidence at defendant's second trial that he had been present.[53] Since the collateral estoppel issue in *Phillips* turned mainly on the reading of the record of the first trial,[54] the only real legal issue in this case was the applicability of *Milanovich*.

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v. Haskins, 128 Mass. 60 (1880); State v. Hamilton, 172 S.C. 453, 174 S.E. 396 (1934) (defendant entitled to a jury instruction that he could not be convicted of both larceny and receiving the stolen goods). Since the rule is based on a factual impossibility and not the desire to prevent the multiple punishment of thieves, it prohibits conviction of a defendant whom the evidence shows actually stole the goods even if receiving is the only crime with which he is or could be charged. It applies whether or not the defendant can be, or has been, convicted of theft. *See, e.g.*, Gallman v. State, 29 Ala. App. 264, 195 So. 768 (1940); People v. Ensor, *supra*; State v. Honig, 78 Mo. 249 (1883). The rationale for the rule does not apply, however, when the charge is possession rather than receiving. It is not factually impossible for a thief to possess property which he has stolen. *See* Carroll v. Sanford, 167 F.2d 878 (5th Cir. 1948) (upholding consecutive sentence for theft of goods from interstate shipment and possession of same); Bloch v. United States, 261 F. 321 (5th Cir. 1919), *cert. denied*, 253 U.S. 484 (1920). *See generally* Annot., 136 A.L.R. 1087 (1942).

The mutually-exclusive-offense doctrine, however, is based on statutory construction, not on the factual impossibility which underlies the common law rule. *See* Milanovich v. United States, 365 U.S. 551, 554 (1961); 47 IOWA L. REV. 740 (1962). The Supreme Court has hinted strongly that whether or not a defendant charged with reception or possession under 18 U.S.C. § 2113(c) as the actual thief is irrelevant to the propriety of his conviction under that section. *See* United States v. Gaddis, 424 U.S. 544, 550 n.15 (1976). The mutually-exclusive-offense rule only prohibits his conviction under both that section and § 2113(a), (b), or (d). *Id.*

49. 424 U.S. 544 (1976).

50. *See* note 4 *supra*.

51. 518 F.2d 108 (4th Cir. 1975).

52. Ashe v. Swenson, 397 U.S. 436, 445 (1970).

53. 518 F.2d at 110.

54. The four judges who rejected defendant's collateral estoppel argument presented no justification for their conclusion in the en banc decision. The court said that "on the facts as recited in the panel opinion the jury's implicit acquittal of bank robbery in the first trial did not collaterally estop the government . . . ." *Id.* at 109-10, *citing* Phillips v. United States, 502 F.2d 227, 233 (4th Cir. 1974) (Craven, J., dissenting). Judge Craven argued that since the jury at Phillips' first trial did not specifically find him not guilty of bank robbery, they could have reached their verdict without ever agreeing on whether Phillips was in the bank. He conceded that the double jeopardy clause protected against retrial on the robbery charge. *See* Green v. United States, 355 U.S. 184 (1957) (reversing a first degree murder conviction after an earlier guilty verdict on the

Three judges extended the *Milanovich* analysis to exclude the evidence. They reasoned that in prohibiting the possession of money stolen from a bank, Congress intended to reach a new group of wrongdoers—a group restricted to those who could not be reached by the bank robbery provisions of the Act. Therefore, one proven guilty of bank robbery cannot be convicted of possessing the proceeds of that robbery. Evidence of defendant's presence in the bank during the robbery would tend to prove that he had participated in the robbery. "[A]s a practical matter," such evidence was inadmissible at his trial as a possessor because allowing a jury to convict him of possession while believing him guilty of robbery would "implicitly violate" the *Milanovich* rule.[55]

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lesser included offense of second degree murder had been set aside on appeal). Although conceding that double jeopardy requires only exposure to conviction and not an actual verdict, Judge Craven argued that collateral estoppel requires an actual verdict since it "is premised on a factual determination in favor of the accused." 502 F.2d at 233.

By denying Phillips the benefit of collateral estoppel because he was only "implicitly" acquitted on the bank robbery charge, the court came close to adopting the "hypertechnical and archaic approach" condemned in Ashe v. Swenson, 397 U.S. 436, 444 (1970) (*see* notes 31-32 *supra*). The facts in *Phillips* (*see* note 2 *supra*) and the jury's refusal to convict defendant of robbery clearly show that it considered the issue of his presence in the bank and resolved it in his favor. A verdict of acquittal is not a precondition to applying collateral estoppel. The form of judgment is a factor that should be considered along with the evidence, the charges, jury instructions, and other matters in the record; it should not be conclusive. *See* United States v. Oppenheimer, 242 U.S. 85 (1916); Mulreed v. Kropp, 425 F.2d 1095 (6th Cir. 1970) (collateral estoppel applied to determination made in entering judgment on guilty plea when state law required trial court to determine factual basis of plea before accepting it); United States v. Armco Steel Corp., 252 F. Supp. 364 (S.D. Cal. 1966) (when delays attributable to insufficient evidence to go to trial, dismissal of case for unnecessary delay by prosecutor equivalent to a judgment of acquittal; collateral estoppel thus bars later trial).

Judge Craven's second argument against applying collateral estoppel in this case was that the retrial would be on the lesser charge. He conceives of collateral estoppel as a device to prevent "prosecutorial abuses" and "harassing the defendant by repeatedly calling him to answer the same proof." 502 F.2d at 234. This position conflicts, however, with the Supreme Court's rule in Harris v. Washington, 404 U.S. 55 (1971). In *Harris* the defendant was tried and acquitted for the murder of one victim of a bombing. The Court held that a subsequent trial of the defendant for the murder and assault of other victims of the bombing was barred by collateral estoppel even though expert testimony establishing the identity of the defendants was excluded at the first trial for reasons that would not apply at the second. The Court reasoned that since the issue of defendant's identity as the bomber was resolved in his favor at the first trial, "the constitutional guarantee applies irrespective of whether the jury considered all relevant evidence, and *irrespective of the good faith of the State in bringing successive prosecutions.*" *Id.* at 56-57 (emphasis added).

55. 518 F.2d at 109.

In a strongly worded dissent, Judge Widener correctly noted that the Supreme Court had fashioned the *Milanovich* rule to protect defendants against multiple punishment. The rule has nothing to do with the admissibility of evidence.[56]

In the *Milanovich* line of cases,[57] the Supreme Court applied the rule of lenity to hold that Congress intended to establish two mutually exclusive classes: those convicted of stealing and those convicted of receiving or possessing the proceeds of the robbery. The Court has never prohibited the introduction of evidence that would allow a jury to convict a defendant of possessing or receiving when it actually believed him guilty of stealing. In *Milanovich*, the Court remanded for a new trial on both the robbery and receiving charges in the face of evidence sufficient to support a conviction on either one.[58] Evidence on both charges was clearly admissible even though the jury could convict the defendant of either charge but not both.[59] *Phillips* thus bars the introduction of evidence that would have been admissible in *Milanovich*.

In *Phillips*, the defendant had already been acquitted on the robbery charge[60] and therefore could not suffer double conviction and punishment. Applying *Milanovich* to this situation extends the mutually-exclusive offense rule far beyond its rationale.[61]

In view of the weakness of the Fourth Circuit's opinion, it is unlikely that the other circuits will follow in transforming the *Milanovich* mutually-exclusive-offense doctrine into an evidentiary rule. Even within the Fourth Circuit, the concurrence of but three of the seven judges in this rationale diminishes its precedential force.

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56. *Id.* at 111-12.

57. *See* text accompanying notes 41-50 *supra*.

58. 365 U.S. at 554 n.5.

59. *Id.* at 554-55.

60. Phillips' "implicit acquittal" entitles him to protection of the double jeopardy clause against retrial for robbery. *See* Green v. United States, 355 U.S. 184 (1957).

61. In the absence of a question as to multiple punishment, it has never been suggested that there is anything improper in Congress' providing alternative statutory avenues of prosecution to assure the effective protection of one and the same interest.

United States v. O'Brien, 391 U.S. 367, 380 & nn.28-29 (1968) *citing Milanovich, Heflin,* and *Prince.*