ROB ONCE, SERVE TWICE?: PUNISHMENT UNDER BOTH THE FEDERAL BANK ROBBERY ACT AND THE HOBBS ACT VIOLATES THE DOUBLE JEOPARDY CLAUSE

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I. INTRODUCTION

The Federal Bank Robbery Act, 18 U.S.C. § 2113 ("FBRA"), proscribes bank robbery and attempted bank robbery.[1] To convict a defendant under the FBRA, the government must prove that the defendant took (or attempted to take) property in the custody of a financial institution through the use of force, violence, or intimidation.[2] Another federal criminal statute, the Hobbs Act, codified at 18 U.S.C. § 1951, proscribes extortion and robbery affecting commerce.[3] To convict a defendant under the Hobbs Act, the government must prove that the defendant took (or attempted to take) property from another through the use of force, violence or fear of injury.[4] In addition, convicting a defendant under the Hobbs Act requires proof that the robbery obstructed, delayed, or otherwise affected commerce.[5] Conviction under either statute carries a maximum sentence of twenty years imprisonment.[6]

The language of both Acts governs bank robbery, such that the government can elect to charge a defendant under either for a bank robbery offense. Instead of sentencing a defendant to the maximum twenty years imprisonment for a bank robbery offense exclusively under the FBRA, some courts punish defendants under both Acts. Sentencing a defendant under both Acts raises double jeopardy concerns under the Fifth Amendment of the United States Constitution.

Currently, there is a split among federal appellate courts as to whether punishment under both the FBRA and the Hobbs Act for bank robbery (or

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[1] 18 U.S.C. § 2113 (2006).

[2] *Id.* § 2113(a). Note that the FBRA also contains other offenses that the government can charge a defendant with. For the purposes of this Note, I limit the discussion of the FBRA to the bank robbery (or attempted bank robbery) offense under subsection (a).

[3] *Id.* § 1951.

[4] *Id.* § 1951(a).

[5] *Id.*

[6] *Id.* §§ 1951(a), 2113(a). Again, note that offenses other than bank robbery (or attempted bank robbery) under subsection (a) of the FBRA carry lesser sentences.

attempted bank robbery) violates the Double Jeopardy Clause. The Sixth, Eighth and Ninth Circuits have concluded that punishment under both Acts violates the Double Jeopardy Clause, whereas the Second and Eleventh Circuits have concluded that it does not.[7]

Although I support prosecution for bank robbery, careful analysis on this matter reveals that the law on this issue is definitive: punishment under both the FBRA and the Hobbs Act for bank robbery violates the Double Jeopardy Clause.[8] In this Note, I examine the current circuit-split and call for resolution in accordance with the Sixth, Eighth and Ninth Circuits. The following section discusses the historical development of the Double Jeopardy Clause and Supreme Court jurisprudence regarding its prohibition against multiple punishments. Section III introduces the current circuit-split on the matter, discussing the holdings and rationales of the federal appellate courts that have addressed whether punishment under both Acts violates the Double Jeopardy Clause.[9] In Section IV, I propose that the Supreme Court should resolve the circuit-split in favor of the Sixth, Eighth and Ninth Circuits and conclude that subjecting defendants to multiple punishments under the FBRA and the Hobbs Act constitutes a double jeopardy violation. Additionally, Section IV urges the Supreme Court to revisit its precedent permitting the government to charge defendants with multiple indictments for the "same offense" and conclude that said practice also violates the Double Jeopardy Clause. Finally, in Section V, I submit that resolution of the circuit-split presents the Court with an opportunity to restore teeth and integrity to the Double Jeopardy Clause's prohibition against multiple punishments.

II. Historical Development

In order to fully appreciate the constitutional significance of indicting and punishing defendants under the FBRA and the Hobbs Act for bank robbery, one must first become familiar with the principles that lie at the root of the Double Jeopardy Clause. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides in part, no person shall "be subject for the same offense to be twice put in jeopardy of life or limb."[10] The Supreme Court has interpreted the Double Jeopardy Clause to provide many protections for defendants. Although it is typically thought of as prohibiting subsequent prosecutions after trial, it in fact comprises "three separate constitutional protections."[11] As Justice Stewart succinctly stated in *North Carolina v.*

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[7] *Compare* United States v. Holloway, 309 F.3d 649 (9th Cir. 2002), United States v. Golay, 560 F.2d 866 (8th Cir. 1977), *and* United States v. Beck, 511 F.2d 997 (6th Cir. 1975), *with* United States v. Reddick, No. 05-13169, 2007 WL 1540210 (11th Cir. May 29, 2007), *cert. denied*, 128 S. Ct. 204 (2007), *and* United States v. Maldonado-Rivera, 922 F.2d 934 (2d Cir. 1990).

[8] Although I was originally intrigued by this topic because I worked as a bank teller for several years and support aggressive prosecution of bank robbery offenses, the purpose of this Note is to discuss the constitutional violation that arises when the government imposes multiple punishments under both the Hobbs Act and the FBRA.

[9] The research for this Note closed on December 15, 2008.

[10] U.S. Const. amend. V, cl. 2.

[11] North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

Pearce,[12] the Double Jeopardy Clause: "[P]rotects against a second prosecution for the *same offense* after acquittal. It protects against a second prosecution for the *same offense* after conviction. And it protects against multiple punishments for the *same offense*."[13] In sum, the Clause prohibits defendants from being subjected to double jeopardy for the "same offense."

A. Roots of the Double Jeopardy Clause

Beginning in the mid-thirteenth century, English common law embraced principles akin to the modern day protection against double jeopardy.[14] The common law incorporated double jeopardy principles in the form of the following pleas: *autrefoits acquit*, *autrefoits convict*, and pardon.[15] Sir William Blackstone described the pleas in his *Commentaries* as follows:

> First, [under] the plea of *autrefroits acquit*, or a former acquittal, . . . when a man is once fairly found not guilty upon any indictment, or other prosecution, before any court having competent jurisdiction of the offence, he may plead such acquittal in bar of any subsequent accusation for the same crime. . . . . And so also was an acquittal on an indictment a good bar to an appeal, by the common law . . . .
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> Secondly, the plea, of *autrefroits convict*, or a former conviction for the same identical crime, though no judgment was ever given, or perhaps will be, . . . is a good plea in bar to an indictment.
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> . . . .
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> Lastly, a *pardon* may be pleaded in bar; as at once destroying the end and purpose of the indictment, by remitting that punishment, which the prosecution is calculated to inflict.[16]

The language of the Double Jeopardy Clause as it appears in the Fifth Amendment of the United States Constitution is no doubt traceable to Blackstone.[17] He explained the essence of the pleas as follows: it is a "universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence."[18]

Early American common law also embraced double jeopardy principles. In enacting the Body of Liberties in 1691, colonial Massachusetts expressly adopted a guarantee against double jeopardy.[19] Paragraph 42 of the Body of Liberties provided: "[n]o man shall be twise [sic] sentenced by [c]ivill [sic] [j]ustice for one and the same [c]rime, offence, or [t]respasse [sic]."[20] Other

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[12] *Pearce*, 395 U.S. 711.

[13] *Id.* at 717 (emphasis added) (footnotes omitted).

[14] *See* DAVID S. RUDSTEIN, DOUBLE JEOPARDY: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 4 (2004). According to Rudstein, references of double jeopardy protection first appeared in the Talmud and the Old Testament. *Id.* at 1-2.

[15] *Id.* at 4.

[16] 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 335-37 (London, A. Strahan & W. Woodfall, 11th ed. 1791).

[17] *See* GEORGE C. THOMAS III, DOUBLE JEOPARDY: THE HISTORY, THE LAW 7 (1998) ("Blackstone was almost certainly the source of the Double Jeopardy Clause language.").

[18] 4 BLACKSTONE, *supra* note 16, at 335.

[19] RUDSTEIN, *supra* note 14, at 11.

[20] *Id.* (quoting Massachusetts Body of Liberties, para. 42 (1641), *reprinted in* RICHARD L. PERRY & JOHN C. COOPER, SOURCES OF OUR LIBERTIES: DOCUMENTARY ORIGINS OF INDIVIDUAL LIBERTIES IN THE UNITED STATES CONSTITUTION AND BILL OF RIGHTS 153 (1959)).

colonies followed suit thereafter and incorporated the guarantee against double jeopardy in constitutions, legislation and case law.[21]

The constitutional history of the Double Jeopardy Clause is traceable to James Madison, who submitted the Clause as part of the Bill of Rights to the Continental Congress.[22] The Clause ultimately became part of the Fifth Amendment of the United States Constitution upon ratification by the states in 1791.[23]

Since ratification, the Supreme Court has interpreted the freedom from double jeopardy to be a fundamental right.[24] Other than recognition as a fundamental right, however, jurisprudence interpreting the Double Jeopardy Clause is inconsistent and evolving. As Professor Akhil Reed Amar stated, "Modern Supreme Court case law is full of double jeopardy double talk."[25]

In the following Section, I provide a brief recitation of the Supreme Court jurisprudence on the issues of multiple punishments and multiple indictments for the "same offense."

B. "Same Offense" Jurisprudence

An offense can be the "same" in one of two ways. First, two offenses can literally be the same, in that they both require proof of the exact same elements to sustain conviction.[26] Second, two offenses can be constructively the same, in that although they require proof of different elements, they are nonetheless the "same offense" because they require proof of the same facts.[27]

1. Multiple Indictments

Unlike most double jeopardy jurisprudence, the law concerning multiple indictments is clear. If a single criminal offense violates more than one criminal statute, the government may charge a defendant with indictments under multiple statutes, regardless of whether the statutes proscribe the "same offense."[28] In *Ball v. United States*,[29] the Supreme Court condoned this practice.[30] As a result, the only constraint on charging defendants with multiple indictments for one criminal act lies with the district court, which retains the

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[21] *Id.* at 11-13.

[22] *See* THOMAS, *supra* note 17, at 84. Madison originally proposed the language as follows: "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence." *Id.* (quoting 1 ANNALS OF CONG. 434 (1789)).

[23] *See* RUDSTEIN, *supra* note 14, at 15.

[24] *See* Benton v. Maryland, 395 U.S. 784, 794 (1969).

[25] Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1807 (1997).

[26] THOMAS, *supra* note 17, at 167.

[27] *Id.*

[28] *See* 1A CHARLES ALAN WRIGHT & ANDREW D. LEIPOLD, FEDERAL PRACTICE AND PROCEDURE § 142 (4th ed. 2008).

[29] Ball v. United States, 470 U.S. 856 (1985).

[30] *Id.* at 865 ("We emphasize that while the Government may seek a multiple-count indictment against a felon for violations of §§ 922(h) and 1202(a) involving the same weapon where a single act establishes the receipt and possession, the accused may not suffer two convictions or sentences on that indictment.").

inherent discretion to limit the government's authority to prosecute multiple counts at trial.[31]

Proponents of charging defendants with multiple indictments for the "same offense" argue that permitting the government to prosecute a defendant under multiple counts at trial serves an important purpose in preserving judicial economy.[32] By prosecuting a defendant with multiple charges in a single proceeding, courts conserve time, lighten their dockets and save the expense of seating multiple juries for different trials.[33] Although judicial economy is the primary policy asserted to justify charging defendants with multiple indictments for one criminal act, it also benefits the defendant by preventing multiple trials for a number of related offenses.[34] Whereas multiple indictments for the same offense are permissible, multiple punishments run afoul of the guarantee against double jeopardy.[35]

2. Multiple Punishment

The Supreme Court has promulgated different versions of what is essentially the same legal test to determine when two separate offenses, stemming from two separate federal statutes, constructively constitute the "same offense" such that punishing someone under both violates the Double Jeopardy Clause.[36] The existence of many different approaches to answer this legal question reflects the disagreement among the Supreme Court Justices as to the purpose the Clause should serve.[37] As articulated by Professor Susan Klein,

> The crux of the disagreement is the following. If the Double Jeopardy Clause was designed solely to limit the ability of prosecutors to charge a defendant successively in contravention of legislative intent, then the Court should give legislatures free reign to define crimes in any manner they choose. The prosecutor would then be bound to respect a legislature's definition of an offense . . . . If, on the other hand, the Double Jeopardy Clause was designed to protect defendants from being successively tried for identical conduct, then neither the legislature nor the prosecutor can harass a defendant by repeated trials for that conduct.
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> This disagreement regarding from which governmental branch we are protecting those accused of crimes has resulted in a stream of changing legal tests for determining whether statutorily defined offenses are the 'same.'[38]

In other words, certain versions of the test provide that the purpose of the Double Jeopardy Clause is to circumscribe the authority of prosecutors to charge defendants, whereas other versions provide that the purpose is to cir-

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[31] *See* United States v. Johnson, 130 F.3d 1420, 1426 (10th Cir. 1997) ("A decision of whether to require the prosecution to elect between multiplicitous counts before trial is within the discretion of the trial court.") (citing United States v. Throneburg, 921 F.2d 654, 657 (6th Cir. 1990)).

[32] *See* Kenneth S. Bordens & Irwin A. Horowitz, *Joinder of Criminal Offenses: A Review of the Legal and Psychological Literature*, 9 LAW & HUM. BEHAV. 339, 340 (1985).

[33] *Id.*

[34] *Id.*

[35] *See* RUDSTEIN, *supra* note 14, at 74-76.

[36] *See* Susan R. Klein & Katherine P. Chiarello, *Successive Prosecutions and Compound Criminal Statutes: A Functional Test*, 77 TEX. L. REV. 333, 363 (1998).

[37] *Id.*

[38] *Id.* at 363-64.

cumscribe the authority of the legislature to criminalize identical conduct. The majority of the Court's versions of this legal test have been rooted in the former approach, which presupposes that the word "offense" carries an independent meaning such that the government cannot charge a defendant more than once for committing the "same offense."[39]

a. Evolution of the "Same Offense" Test

In the late nineteenth century, the Supreme Court articulated the first version of the "same offense" test, in *Ex parte Nielsen*.[40] The test is referred to as the "essence of the offense" test, and is used to determine when multiple punishments violate the Double Jeopardy Clause.[41] Under the "essence of the offense" test, two statutes criminalized the "same offense" if both were aimed at the same harm.[42] At the time, the Court explicitly rejected adopting a test considering the particular elements of each criminal statute, reasoning that such a test would vest too much authority with the legislature.[43]

The Court replaced the "essence of the offense" test with the "same evidence" test approximately twenty years later in *Gavieres v. United States*.[44] Reflecting a departure from circumscribing the legislature's authority, the "same evidence" test provided that multiple punishments violated the Double Jeopardy Clause only when use of the same evidence would support convictions under both criminal statutes.[45] The "same evidence" test was thus rooted in the theory that the Double Jeopardy Clause serves to protect defendants from prosecutorial abuse.

Two decades later, in *Blockburger v. United States*,[46] the Court essentially reaffirmed the applicability of the "same evidence" test, which became commonly known as the "*Blockburger* test."[47] At trial, a jury convicted Blockburger of two separate offenses under the Harrison Narcotic Act for the same sale of eight grains of morphine hydrochloride: unlawful sale of a narcotic drug "not in or from the original stamped package" and unlawful sale of a narcotic drug "having been made not in pursuance of a written order of the purchaser."[48] The trial court sentenced Blockburger under each offense.[49] On appeal, Blockburger argued that his sentences constituted multiple punishments for a single offense.[50] The Supreme Court affirmed the sentences, reasoning that the sale of narcotics did not constitute the "same offense" because although both offenses stemmed from the same sale, one offense required proof of an

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[39] *Id.*
[40] *Ex parte* Nielsen, 131 U.S. 176 (1889).
[41] *See* Klein & Chiarello, *supra* note 36, at 364 (discussing *Nielsen*, 131 U.S. at 189).
[42] *Id.* ("[t]he Court found that cohabitation and adultery were the 'same' offense because a sexual relationship with the second 'wife' was in fact the bad conduct upon which the first indictment was based."). *Id.* at 365.
[43] *Id.*
[44] Gavieres v. United States, 220 U.S. 338, 343 (1911).
[45] *Id.* at 343-44.
[46] Blockburger v. United States, 284 U.S. 299 (1932).
[47] *Id.* at 304.
[48] *Id.* at 301.
[49] *Id.*
[50] *Id.*

original stamped package and the other required proof of the absence of a written order.[51] As different evidence is required to prove packing and absence of a written order, the Court held that the charges were not the "same offense."[52] The Court articulated the test to determine if multiple punishments violate the Double Jeopardy Clause as follows: "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."[53]

In 1990, the Court replaced the *Blockburger* test, which it had applied to multiple punishment challenges for more than fifty years, with a broader "same conduct" test, adopted in *Grady v. Corbin*.[54] The "same conduct" test did not differ from the *Blockburger* test with respect to determining multiple punishments.[55] Rather, the test modified one of the other "three separate constitutional protections" the Double Jeopardy Clause affords.[56] The "same conduct" test provided defendants with broader protections against subsequent prosecutions by severely restricting the ability of a prosecutor to indict a defendant for charges that would reintroduce evidence used in a prior trial, even if the new charge or charges required proof of elements that the former charges did not.[57] The "same conduct" test was short lived, however, and the Court returned to the *Blockburger* test in 1993, in *United States v. Dixon*.[58]

b. Current Approach to Multiple Punishment Challenges

According to the Supreme Court in *Ohio v. Johnson*,[59] the protection against multiple punishments "is designed to ensure that the sentencing discretion of courts is confined to the limits established by the legislature."[60] As such, the "same offense" analysis under the *Blockburger* test cannot be performed without reference to the legislature–both in what punishment it authorized by statute and in whether it expressly intended to impose multiple punishments for the "same offense."[61] Thus, the current approach to determining whether multiple punishments violate the Double Jeopardy Clause is a three-part inquiry.

First, as a threshold matter, a court must analyze the language of the statutory offenses to determine if Congress intended to authorize punishment under each statute.[62] If two offenses are located in different sections of the United States Code or in different chapters of the same section, courts presume that Congress intended to authorize punishment under each statute.[63]

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[51] *Id.* at 303-04.
[52] *Id.* at 304.
[53] *Id.*
[54] Grady v. Corbin, 495 U.S. 508, 521-22 (1990).
[55] *See* Klein & Chiarello, *supra* note 36, at 367.
[56] *Id. See also* North Carolina v. Pearce, 395 U.S. 711, 717 (1969).
[57] *See* Klein & Chiarello, *supra* note 36, at 367.
[58] *See* United States v. Dixon, 509 U.S. 688, 704 (1993) (overruling *Grady*, 495 U.S. 508).
[59] Ohio v. Johnson, 467 U.S. 493 (1984).
[60] *Id.* at 499.
[61] *See* RUDSTEIN, *supra* note 14, at 156.
[62] *See* United States v. Maldonado-Rivera, 922 F.2d 934, 981 (2d. Cir. 1990).
[63] *Id.*

Second, to determine if both statutes proscribe the "same offense," a court applies the *Blockburger* test to inquire as to whether one of the criminal statutes requires proof of an element that the other statute does not.[64] This inquiry is based on the facts of each case.[65] Imposing multiple punishments on a defendant presumptively violates the Double Jeopardy Clause if proof of the same elements satisfies both criminal statutes.[66] If, however, proof of an additional element is required to sustain a conviction under one of the statutes, then punishment under both statutes does not violate the Double Jeopardy Clause.[67]

Lastly, if imposing multiple punishments on a defendant presumptively violates the Double Jeopardy Clause under a *Blockburger* analysis, a court must examine the legislative history of both charging statutes to determine if Congress nonetheless intended to impose multiple punishments for committing the "same offense."[68] As stated by Professor Rudstein, "[a]lthough the Supreme Court in *Blockburger* appeared to be establishing the constitutional standard for determining when cumulative punishments can be imposed in a single proceeding . . . the *Blockburger* test is merely 'a rule of statutory construction.'"[69] If the legislative history clearly indicates that Congress did not intend for courts to punish defendants for the "same offense" under multiple criminal statutes, then multiple punishments violate the Double Jeopardy Clause.[70] If, on the other hand, a review of the legislative history reveals that Congress expressly intended to impose multiple punishments on defendants for committing the same offense, then both sentences stand.[71]

III. Disagreement Among the Federal Courts of Appeals

Federal appellate courts that have reviewed double jeopardy challenges regarding convictions and multiple punishments under both the FBRA and the Hobbs Act have arrived at differing conclusions as to the viability of said practice. The Sixth, Eighth, and Ninth Circuit Courts of Appeals have concluded that imposing punishment under both the FBRA and the Hobbs Act for bank robbery (or attempted bank robbery) violates the Double Jeopardy Clause.[72] By contrast, the Second and Eleventh Circuits, have concluded that punishing a

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[64] Blockburger v. United States, 284 U.S. 299, 304 (1932).

[65] *See generally* Rudstein, *supra* note 14, at 74-76.

[66] *Blockburger*, 284 U.S. at 304.

[67] *Id.*

[68] *See* Albernaz v. United States, 450 U.S. 333, 340 (1981) ("The *Blockburger* test is a 'rule of statutory construction,' and because it serves as a means of discerning congressional purpose the rule should not be controlling where, for example, there is a clear indication of contrary legislative intent."); Whalen v. United States, 445 U.S. 684, 692 (1980).

[69] Rudstein, *supra* note 14, at 157.

[70] *Whalen*, 445 U.S. at 694-96.

[71] *See* Garrett v. United States, 471 U.S. 773, 779 (1985) (citing Missouri v. Hunter, 459 U.S. 359, 368 (1983); *Albernaz*, 450 U.S. at 340; *Whalen*, 445 U.S. at 691-92); *see also* United States v. Maldonado-Rivera, 922 F.2d 934, 981 (2d Cir. 1990).

[72] *See generally* United States v. Holloway, 309 F.3d 649 (9th Cir. 2002); United States v. Golay, 560 F.2d 866 (8th Cir. 1977); United States v. Beck, 511 F.2d 997 (6th Cir. 1975).

defendant under the FBRA and the Hobbs Act does not violate the Fifth Amendment guarantee against double jeopardy.[73]

To analyze a double jeopardy challenge under the FBRA and the Hobbs Act, one must first refer to the text of the statutes to determine what facts must be proved to sustain a conviction under each. The pertinent parts of the FBRA provide:

> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association . . . .
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> Shall be fined under this title or imprisoned not more than twenty years, or both.
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> (f) As used in this section the term "bank" means any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States, including a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978), and any institution the deposits of which are insured by the Federal Deposit Insurance Corporation.[74]

In other words, to convict a defendant under the FBRA, the government must prove that the defendant took (or attempted to take) property in the custody of a financial institution through the use of force, violence, or intimidation.[75]

To contrast, the pertinent provisions of the Hobbs Act provide:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.
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> (b) As used in this section—
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> (1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.
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> . . . . (3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.[76]

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[73] *See generally* United States v. Reddick, No. 05-13169, 2007 WL 1540210 (11th Cir. May 29, 2007), *cert. denied*, 128 S. Ct. 204 (2007); *Maldonado-Rivera*, 922 F.2d 934.

[74] 18 U.S.C. § 2113 (2006).

[75] *Id.* § 2113(a).

[76] *Id.* § 1951.

In short, to convict a defendant under the Hobbs Act, the government must prove that the defendant took (or attempted to take) property from another through the use of force, violence or fear of injury.[77] In addition, the government must also prove that the robbery obstructed, delayed, or otherwise affected interstate commerce.[78]

Based on a side-by-side comparison, both Acts require proof of an element that the other does not. The Hobbs Act requires proof of an affect on interstate commerce, which is not required to sustain a conviction under the FBRA, and the FBRA requires proof that the entity robbed was a "bank" as defined by the statute, which is not a requirement for robbery under the Hobbs Act.

A. Camp 1: Sentencing under both the FBRA and the Hobbs Act Violates the Double Jeopardy Clause

In this section, I discuss the cases from the Sixth, Eighth, and Ninth Circuit Courts of Appeals, whereby the courts ruled that subjecting a defendant to multiple punishments under both the FBRA and the Hobbs Act violated the Double Jeopardy Clause.

1. United States v. Beck[79]

In 1975, the Sixth Circuit evaluated the first double jeopardy challenge for multiple punishments under both Acts. The following is a brief recitation of the facts and circumstances at issue in *United States v. Beck*.

On December 29, 1972, defendant Richard Beck telephoned the manager of the Frayser branch of the National Bank of Commerce in Memphis, Tennessee.[80] Beck informed the manager that he had taken the manager's wife and grandchildren hostage and would not release them until he received $50,000 in cash.[81] The manager complied with Beck's demands and left a cloth bag containing the cash at the requested drop point.[82] Beck collected the money from the drop point and police apprehended him shortly thereafter.[83] A grand jury indicted Beck on two counts of bank extortion, under both the FBRA and the Hobbs Act.[84] The jury found Beck guilty on both counts and the trial court sentenced Beck to concurrent twenty and ten-year prison terms under the Hobbs Act and the FBRA, respectively.[85]

On appeal, the Sixth Circuit Court vacated the Hobbs Act conviction and affirmed the FBRA conviction.[86] Applying the *Blockburger* test, the court concluded that punishment under both Acts resulted in a double jeopardy violation because both Acts criminalize the "same offense"—proof of robbery of a "bank" under the FBRA also proves an affect on commerce (as required under

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[77] *Id.* § 1951(a).
[78] *Id.*
[79] United States v. Beck, 511 F.2d 997 (6th Cir. 1975).
[80] *Id*. at 999.
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.* at 999 n.4.
[85] *Id.* at 998.
[86] *Id.* at 999.

the Hobbs Act).[87] The court explained: "precisely the same facts which permit judicial notice of the interstate nature of a national bank's operations, without addition or modification, provide the basis for it and a conviction under [the FBRA]."[88]

In addition, the Sixth Circuit concluded that indictment under both the FBRA and the Hobbs Act was proper; reasoning that joinder of charges under both Acts did not result in the admission of evidence that would have been prejudicial to the defendant at trial.[89]

2. *United States v. Golay*[90]

Two years after the Sixth Circuit issued its opinion in *Beck*, the Eighth Circuit Court addressed the issue of multiple punishments under both Acts and followed suit with its sister circuit before it. In *United States v. Golay*, the trial court sentenced defendant George Golay to concurrent twenty and twenty-five year imprisonment sentences under the Hobbs Act and the FBRA, respectively, for his participation in a bank robbery.[91] Golay appealed the sentences on double jeopardy grounds.[92]

Applying the *Blockburger* test, the Eighth Circuit concluded that punishment under both statutes violated the Double Jeopardy Clause because proof of the same facts required to sustain a conviction under the FBRA also satisfied the statutory elements necessary to sustain a conviction under the Hobbs Act.[93] Finding the robbery elements under both criminal statutes to be the same, the court turned to proof of the commerce element under the Hobbs Act and reasoned, "banks are accustomed to operating on an interstate level," and proof of robbery of a financial institution "necessarily meet[s] the obstruction of commerce requirement under the Hobbs Act."[94] The Eighth Circuit reversed and remanded the case, instructing the trial court to remedy the illegal sentence it imposed.[95]

The Eighth Circuit analogized sentencing a defendant under both the FBRA and the Hobbs Act for bank robbery to a classic multiple punishment double jeopardy violation the Supreme Court identified in *Prince v. United States*.[96] In *Prince*, the trial court sentenced the defendant to fifteen years imprisonment under subsection (a) of the FBRA for entering a bank with intent to commit robbery and twenty years imprisonment for armed bank robbery under subsection (d) of the FBRA.[97] The defendant moved for a reduction in

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[87] *Id.* at 1000.
[88] *Id.*
[89] *Id.*
[90] United States v. Golay, 560 F.2d 866 (8th Cir. 1977).
[91] *Id.* at 867. A brief recitation of the facts are not provided here, as the Eighth Circuit did not discuss the factual circumstances concerning Golay's participation in the bank robbery in its double jeopardy analysis.
[92] *Id.*
[93] *Id.* at 869-70.
[94] *Id.* at 870.
[95] *Id.* at 871.
[96] Prince v. United States, 352 U.S. 322, 329 (1957).
[97] *See* Prince v. United States, 230 F.2d 568, 569 (5th Cir. 1956).

his sentence, which the district court denied.[98] The Fifth Circuit Court of Appeals affirmed and the defendant appealed.[99] The Supreme Court ultimately concluded that the imposition of multiple sentences for the same crime—bank robbery—violated the Double Jeopardy Clause because proof of all elements to sustain conviction under subsection (d) required proof of the same facts to satisfy the elements under subsection (a).[100]

Furthermore, as to indictment, the Eighth Circuit, like the Sixth Circuit before it, concluded that indictment under the FBRA and the Hobbs Act for bank robbery does not violate the Double Jeopardy Clause.[101]

3. United States v. Holloway[102]

Twenty years after the Eighth Circuit concluded that punishment under both the FBRA and the Hobbs Act resulted in a double jeopardy violation in *Golay*, the Ninth Circuit Court of Appeals reached the same conclusion. The following is a brief recitation of the factual circumstances at issue in *United States v. Holloway*.

On March 25, 1997, defendant Kenneth Holloway and an accomplice entered the First United Services Credit Union in Alameda, California, carrying firearms and demanding cash.[103] While his accomplice took money from a teller, Holloway "pistol-whipped" the manager and hit an employee.[104] Holloway and his accomplice fled the scene in a getaway car with a third accomplice.[105] Police apprehended all three men minutes later.[106]

In May 1998, a jury found Holloway guilty of bank robbery in violation of the FBRA for his participation in the robbery of the First United Services Credit Union.[107] Holloway appealed and the Ninth Circuit vacated the conviction, concluding that no reasonable jury could have concluded that the prosecu-

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[98] *Id.*

[99] *Id.* at 572.

[100] *See Prince*, 352 U.S. at 329.

[101] United States v. Golay, 560 F.2d 866, 869 (8th Cir. 1977).

[102] United States v. Holloway, 309 F.3d 649 (9th Cir. 2002). The Ninth Circuit Court of Appeals addressed a double jeopardy challenge under the Acts and reached a different conclusion in *United States v. LaBinia* in 1980. *See* United States v. LaBinia, 614 F.2d 1207 (9th Cir. 1980). In *LaBinia*, the court concluded that although both Acts criminalize the "same offense," Congress intended a broad reading of the Hobbs Act such that a defendant could (and would) be punished under both Acts for the "same offense." *Id.* at 1209-10. The Ninth Circuit's decision in *Holloway* departed from this precedent, in reliance on new legislative history concerning the 1986 Amendment to the FBRA providing that the FBRA should be the exclusive federal statute to criminalize bank extortion (and by analogy, bank robbery). *Holloway*, 309 F.3d at 651-52. For further discussion of the legislative history concerning the amendment to the FBRA, see *infra* notes 171-81 and accompanying text.

[103] *See* Appellee's Answering Brief at 4-5, United States v. Holloway, 309 F.3d 649 (9th Cir. 2002) (No. 01-10508).

[104] *Id.* at 5.

[105] *Id.*

[106] *Id.*

[107] *Holloway*, 309 F.3d at 651. The jury also found Holloway guilty of carrying a firearm in relation to a violent crime under 18 U.S.C. § 924(c) and of being a felon in possession of a firearm under 18 U.S.C. § 922(g)(1). *Id.*

tion proved, beyond a reasonable doubt, all of the requisite elements under the FBRA to satisfy the conviction.[108]

Soon thereafter, the government secured a superseding indictment against Holloway — this time for violating the Hobbs Act, again in connection with his participation in the First United Services Credit Union bank robbery.[109] Holloway moved for dismissal of the Hobbs Act indictment on double jeopardy grounds, which the district court denied.[110]

On appeal, the Ninth Circuit Court reversed and dismissed the Hobbs Act indictment, concluding, "[a]ny offense under the FBRA is an offense included within the Hobbs Act."[111] Specifically, the court concluded that the commerce element required under the Hobbs Act is also satisfied by the facts necessary to sustain a conviction for robbery of a "bank" under the FBRA.[112] The Ninth Circuit reasoned:

> The power of Congress to create, support, or protect financial institutions is not enumerated in the Constitution. This power is implied from the enumerated power of Congress to regulate commerce between the states. Only financial institutions that are instruments of interstate commerce fall within the protection of the FBRA. To rob an instrument of interstate commerce is to impede the flow of such commerce.[113]

Although *Holloway* differs procedurally from both *Beck* and *Golay*, the case stands for the same principle that both the FBRA and the Hobbs Act proscribe the "same offense," such that punishment under both violates the Double Jeopardy Clause.

B. Camp 2: Sentencing Under both the FBRA and Hobbs Act Does Not Violate the Double Jeopardy Clause

In this section, I discuss the cases from the Second and Eleventh Circuit Courts of Appeals, concluding that subjecting a defendant to multiple punishments under both the FBRA and the Hobbs Act does not violate the Double Jeopardy Clause. Until recently, the Second Circuit remained the lone federal court of appeals to reach this conclusion.[114] However, in 2007, the Eleventh Circuit joined ranks with the Second Circuit on this matter, concluding punishment under both Acts was permissible.[115]

1. United States v. Maldonado-Rivera[116]

In *United States v. Maldonado-Rivera*, the Second Circuit Court of Appeals considered appeals by four criminal defendants convicted of various charges in relation to their participation in a bank robbery.[117] As only defen-

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[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.* at 652.
[112] *Id.* at 651-52.
[113] *Id.* at 652 (citing McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 353-54 (1819)).
[114] *See* United States v. Maldonado-Rivera, 922 F.2d 934 (2d Cir. 1990).
[115] *See* United States v. Reddick, No. 05-13169, 2007 WL 1540210, at *15 (11th Cir. May 29, 2007).
[116] *Maldonado-Rivera*, 922 F.2d 934.
[117] *Id.* at 943.

dant Juan Segarra-Palmer raised double jeopardy issues on appeal, this Note only discusses the court's opinion as it pertains to him.[118] The trial court sentenced Segarra to four concurrent twenty-year prison sentences for violations of the FBRA to be followed by two concurrent twenty-years sentences for violations of the Hobbs Act based on his participation in an armed bank robbery of a Wells Fargo Bank depot in West Hartford, Connecticut.[119] Segarra and more than fifteen co-conspirators stole a total of $7,017,151 from the depot.[120] Segarra appealed his convictions, arguing that punishment under both the FBRA and Hobbs Act for bank robbery violated the Double Jeopardy Clause.[121]

The Second Circuit began its analysis under the *Blockburger* test by noting that because both statutory offenses appear in different chapters of Title 18 of the United States Code, Congress intended for courts to impose separate punishments for each offense.[122] Next, the court concluded that a conviction under the Hobbs Act required proof of a fact—that the robbery affected commerce—that is not statutorily required to sustain a conviction under the FBRA.[123] Consequently, the court reasoned that the FBRA and the Hobbs Act do not proscribe the "same offense" for double jeopardy purposes.[124] Lastly, the court discussed Congress' purposes in enacting each criminal statute and concluded that Congress' "distinct legislative goals confirm the presumption that Congress intended multiple punishments under these two sections."[125] The court concluded that in enacting the Hobbs Act, Congress was principally concerned with "protecting the flow of interstate commerce," whereas in enacting the FBRA, Congress was instead concerned with protecting federal banks.[126] Consequently, it affirmed the sentences imposed by the lower court.[127]

2. *United States v. Reddick*[128]

Although an unreported case, the Eleventh Circuit's recent discussion of whether punishment under both Acts violates the Double Jeopardy Clause in *United States v. Reddick* is instructive on this matter, for the court adopted a different approach to the resolution of a multiple punishment challenge.[129] The following is a brief recitation of the facts and circumstances at issue in *Reddick*.

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[118] *Id.* at 944. The other three defendants charged with participation in the bank robbery included: Roberto Jose Maldonado-Rivera, Antonio Camacho-Negron, and Norman Ramirez-Talavera. *Id.* at 943.

[119] *Id.* at 943-44. Note that defendant Segarra was also charged with other offenses for his participation in the armed bank robbery. *Id.* This discussion only addresses the charges under the FBRA and the Hobbs Act.

[120] *Id.* at 944.

[121] *Id.* at 980.

[122] *Id.* at 982.

[123] *Id.*

[124] *Id.*

[125] *Id.* at 983.

[126] *Id.*

[127] *Id.* at 984.

[128] United States v. Reddick, No. 05-13169, 2007 WL 1540210 (11th Cir. May 29, 2007), *cert. denied*, 128 S. Ct. 204 (2007).

[129] *Id.* at *14.

On April 14, 2004, three masked men entered the Sun Trust Bank in Port St. Lucie, Florida, brandishing firearms and demanding money.[130] The men ordered customers and bank employees to lie on the ground as they took money from the teller drawers and vault.[131] The men originally escaped with $60,381, but after abandoning $46,600 in front of the building when a dye pack exploded and marked the currency red, the total loss was reduced to $13,781.[132] One of the men entered into a plea agreement and identified defendant Rashard Reddick as a participant in the robbery.[133]

A jury found defendant Reddick guilty under both the FBRA and the Hobbs Act for his participation in an armed bank robbery.[134] The trial court sentenced Reddick to concurrent sentences of 115 months imprisonment for convictions under both Acts.[135] Reddick appealed, asserting double jeopardy challenges for indictment and punishment under both statutes.[136] On appeal, the Eleventh Circuit Court dismissed Reddick's double jeopardy challenges and affirmed the trial court's sentences.[137]

Contrary to other circuits, which reached differing conclusions in their application of the *Blockburger* test—an inquiry which must be made under the facts of each particular case—the Eleventh Circuit appears to have disregarded the *Blockburger* test in favor of a new test.[138] In *Reddick*, the court held that the proper test to determine if two statutes criminalize the "same offense" for double jeopardy purposes is whether a "hypothetical scenario" exists in which a "hypothetical defendant might violate one [statute] without violating the other."[139]

The Eleventh Circuit concluded that bank robbery under the FBRA is not the "same offense" as that proscribed under the Hobbs Act by analogizing to a hypothetical scenario that the court believed would result in a defendant violating the FBRA, but not the Hobbs Act.[140] Focusing on the commerce element, the court opined:

> [S]uppose that a person entered a federally chartered bank with the intent to steal a collection of art that the bank has exhibited in its lobby. He is armed. He encounters a security guard at gunpoint, who resists him, and who is able to overwhelm him within seconds of entering the door. The bank's interstate commerce transactions are not affected in any way as a result of the skirmish. The Government could clearly prosecute the individual under the FBRA, but not under the Hobbs Act.[141]

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130 *See* First Brief for the Defendant-Appellant at 3, United States v. Reddick, No. 05-13169, 2007 WL 1540210 (11th Cir. May 29, 2007) (No. 05-13169).

131 *Id.* at 3-4.

132 *Id.* at 4.

133 *Id.*

134 *Reddick*, 2007 WL 1540210, at *10. The jury also convicted Reddick of conspiracy to commit armed bank robbery under 18 U.S.C. § 371 and brandishing a firearm during the commission of a bank robbery under 18 U.S.C. § 924(c)(1). *Id.* at *9.

135 *Id.* at *10.

136 *Id.*

137 *Id.* at *15.

138 *Id.* at *14.

139 *Id.* (quoting United States v. Hassoun, 476 F.3d 1181, 1185 (11th Cir. 2007)).

140 *Id.*

141 *Id.*

Relying on its "hypothetical scenario" test, the court concluded that the sentencing of a defendant under both the FBRA and the Hobbs Act for participation in an armed bank robbery does not result in a double jeopardy violation.[142]

IV. BANK ROBBERY UNDER THE FBRA IS THE "SAME OFFENSE" AS BANK ROBBERY UNDER THE HOBBS ACT

The Supreme Court should grant certiorari to address whether punishment under both Acts violates the Double Jeopardy Clause and resolve the ongoing circuit-split in favor of the decisions rendered by the Sixth, Eighth, and Ninth Circuits. Under the *Blockburger* test, both statutes proscribe the "same offense" because proof of the elements necessary to sustain a conviction under the FBRA also results in proof of the facts necessary to sustain a conviction under the Hobbs Act. Additionally, a critical review of the legislative history concerning the Acts indicates that Congress intended the FBRA to be the exclusive federal statute to criminalize bank robbery. Moreover, the Supreme Court should utilize review of this issue as an opportunity to revisit its precedent permitting multiple indictments for the "same offense" and conclude that indictments for the "same offense" also violate the Double Jeopardy Clause.

A. Multiple Punishment for Bank Robbery Violates the Double Jeopardy Clause

In this section, I analyze the FBRA and the Hobbs Act under the three-step multiple punishment analysis set forth above and conclude that punishment under both Acts violates the Double Jeopardy Clause because the Acts criminalize the "same offense." The first step of the multiple punishment analysis is easily satisfied, whereas the second and third steps require careful analysis before reaching the ultimate conclusion that bank robbery under both the FBRA and Hobbs Act constitute the "same offense." This section discusses the three steps of this analysis as applied to the FBRA and Hobbs Act, in turn.

1. Step One: Congress Intended to Authorize Punishment Under Both Criminal Statutes

The first step of this analysis requires a court to review the language of the statutory offenses to determine if Congress intended to authorize punishment under each statute.[143] As set forth earlier, if two offenses are located in different sections of the United States Code or in different chapters within the same section, courts presume that Congress intended to authorize punishment for violations under each statute.[144]

Under the first step of this analysis, courts presume that Congress intended to punish conduct resulting in violations of both the FBRA and the Hobbs Act, because although both statutes are located in Title 18 of the United States Code,

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[142] *Id.* at *15.
[143] United States v. Maldonado-Rivera, 922 F.2d 934, 981 (2d Cir. 1990).
[144] *Id.*

they appear in different chapters.[145] The FBRA is located in the chapter entitled "Robbery and Burglary," whereas the Hobbs Act is located in the chapter entitled "Racketeering."[146] This placement satisfies the first step requiring each statute be set out in different sections of the United States Code.

2. Step Two: The FBRA and Hobbs Act Require Proof of the Same Facts

The second step of this analysis requires a court to perform a textual analysis to determine if one of the criminal statutes requires proof of a fact that the other criminal statute does not.[147] Courts should conduct the textual analysis in light of the facts concerning each particular defendant.[148]

A side-by-side comparison of the elements required to establish violations under both statutes for bank robbery demonstrates that the Hobbs Act calls for proof of an element that is not required to sustain a conviction under the FBRA — that the robbery affects interstate commerce.[149] Although on its face the Hobbs Act requires proof of an element that the FBRA does not, the following analysis establishes that both Acts criminalize the "same offense" because the same facts are required to establish: under the Hobbs Act, that the robbery affected commerce; and, under the FBRA, that the place of robbery was a "bank" as defined by the statute.

Courts have broadly interpreted the interstate commerce requirement under the Hobbs Act to require only proof of a small affect on interstate commerce.[150] As described by the Third Circuit Court of Appeals in *United States v. Farley*,[151] generally "only a de minimus showing of a reasonably probable effect" on commerce is necessary to prove that a robbery delayed, obstructed, or otherwise affected commerce.[152] For example, the Ninth Circuit concluded in *United States v. Lynch*[153] that robbery of an individual involved in the distribution and sale of methamphetamines satisfied the interstate commerce requirement under the Hobbs Act.[154] The Second Circuit has similarly found a tenuous relationship to satisfy the interstate commerce requirement.[155] In *United States v. Mapp*,[156] the Second Circuit held that robbery of a customer

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145 18 U.S.C. §§ 1951, 2113 (2006).

146 *See generally id.* §§ 1951, 2113.

147 *See* Blockburger v. United States, 284 U.S. 299, 304 (1932); RUDSTEIN, *supra* note 14, at 74-76.

148 *Compare Blockburger*, 284 U.S. at 304 (performing an analysis under the particular facts of the defendant's case), *with* United States v. Reddick, No. 05-13169, 2007 WL 1540210, at *14 (11th Cir. May 29, 2007) (proposing a hypothetical test to ascertain if any defendant could have violated one statute and not the other).

149 *Compare* 18 U.S.C. § 1951, *with* 18 U.S.C. § 2113.

150 Jay M. Zitter, Annotation, *What Constitutes Obstruction, Delay, or Effect on Commerce for Purposes of Hobbs Act (18 U.S.C.A. § 1951)—Robbery Cases*, 23 A.L.R. FED. 2D 1 (2007).

151 United States v. Farley, 760 F. Supp. 461 (E.D. Pa. 1991), *aff'd without opinion* 947 F.2d 937 (3d Cir. 1991).

152 *Id.* at 463.

153 United States v. Lynch, 437 F.3d 902 (9th Cir. 2006).

154 *Id.* at 911.

155 *See generally* United States v. Mapp, 170 F.3d 328 (2d Cir. 1999).

156 *Mapp*, 170 F.3d 328.

while standing in line at a bank constituted an affect on commerce such that conviction under the Hobbs Act was proper.[157]

The Sixth, Eighth, and Ninth Circuit Courts of Appeals reason that proof of robbery of a "bank" under the FBRA satisfies the interstate commerce requirement under the Hobbs Act because banks are instruments of commerce. This proposition has been long standing precedent ever since the Supreme Court first opined that Congress had the implied authority to create a bank pursuant to the Commerce Clause, among other enumerated Article I powers of the United States Constitution, in *McCulloch v. Maryland*.[158] Consequently, the argument follows that robbery of a "bank," an instrument of commerce, thereby affects commerce. The Ninth Circuit reached this conclusion by reasoning, "[t]o rob an instrument of interstate commerce is to impede the flow of such commerce."[159] As bank robbery necessarily affects commerce, a bank robbery offense under the FBRA is the "same offense" as a bank robbery under the Hobbs Act because both statutes require proof of the same facts.

Under traditional double jeopardy jurisprudence, a court is required to perform its multiple punishment analysis under the *Blockburger* test with reference to the particular facts of the case before it.[160] Even if the Supreme Court were to disregard precedent calling for a determination made on the facts of the case and adopt the "hypothetical scenario" test set forth by the Eleventh Circuit in *Reddick* to address this issue, it must still logically conclude that bank robbery under the FBRA and the Hobbs Act are the "same offense" under the facts of the "hypothetical scenario" test forth by the court.[161] In *Reddick*, the court hypothesized that bank robbery under the FBRA does not affect commerce if a defendant attempts to steal artwork from a bank's lobby.[162] This reasoning is flawed.

A defendant who commits attempted bank robbery, whether in an effort to steal money or the artwork hanging on the bank's lobby wall, violates the Hobbs Act because the defendant, in both instances, seeks to deprive the bank of its assets. As the Ninth Circuit stated in *Holloway*, "To rob an instrument of interstate commerce is to impede the flow of such commerce."[163] Seeking to rob a bank of any of its property, even the art hanging on its lobby wall, impedes the operations of the bank by resulting in the delay of conducting bank transactions. Any delay in bank operations, however short, satisfies the requirement under the Hobbs Act because "only a de minimus showing of a reasonably probable effect" on commerce is necessary to satisfy the commerce requirement.[164]

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[157] *Id.* at 331 n.4.

[158] *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 353 (1819).

[159] United States v. Holloway, 309 F.3d 649, 652 (9th Cir. 2002).

[160] *See generally* RUDSTEIN, *supra* note 14, at 74-76.

[161] I do not endorse adoption of the hypothetical test, and merely discuss the results reached if the Court were to adopt it.

[162] United States v. Reddick, No. 05-13169, 2007 WL 1540210, at *14 (11th Cir. May 29, 2007).

[163] *Holloway*, 309 F.3d at 652.

[164] United States v. Farley, 760 F. Supp. 461, 463 (E.D. Pa. 1991), *aff'd without opinion* 947 F.2d 937 (3d Cir. 1991).

In sum, the second step of this analysis provides that punishment for bank robbery under both the FBRA and the Hobbs Act presumptively violates the Double Jeopardy Clause because such punishment is for committing the "same offense." However, the third step of this analysis provides that multiple punishments do not violate the Double Jeopardy Clause if Congress specifically intended to subject defendants to multiple punishments for committing the "same offense."[165] Thus, the next and final step in this analysis is to determine if Congress nonetheless intended to impose multiple punishments for bank robbery.

3. Step Three: Legislative History Indicates that Congress Intended the FBRA to be the Exclusive Provision for Proscribing Bank Robbery

A review of the legislative history concerning both the FBRA and Hobbs Act reveals that Congress intended bank robbery offenses to be punished exclusively under the FBRA.

a. The Hobbs Act

An examination of the Congressional record reveals that Congress' primary motivation in enacting the Hobbs Act was to "protect interstate commerce from robbery and extortion, no matter by whom these crimes were committed."[166] The legislative history behind adoption of the Hobbs Act does not reveal that Congress was concerned with bank robbery in enacting the statute. Rather, the record is replete with indications that Congress was principally motivated in overturning *United States v. Local 807 International Brotherhood of Teamsters*,[167] a Supreme Court case holding that the Anti-Racketeering Act of 1934, a precedent to the Hobbs Act, did not apply to extortionate labor activities.[168] For example, when discussing the Hobbs Act, Representative Hancock declared: "[T]his bill is made necessary by the amazing decision of the Supreme Court in [*Local 807*] . . . [which] practically nullified the anti-racketeering bill of 1934."[169] Congress responded by passing the Hobbs Act a few years later, which broadly proscribes extortionate conduct, including such conduct by union members, by applying to "[w]hoever in any way or degree obstructs, delays, or affects commerce . . . by robbery or extortion . . . ."[170]

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[165] *See* Albernaz v. United States, 450 U.S. 333, 344 (1981).

[166] 91 CONG. REC. 11,904 (1945) (statement of Rep. Gwynne of Iowa).

[167] United States v. Local 807 Int'l Bhd. of Teamsters, 315 U.S. 521 (1942).

[168] *See generally id.* In *Local 807*, the government charged members of a New York City truck driving union with violating the Anti-Racketeering Act of 1934 for engaging in violent intimidation tactics against local farmers. *Id.* at 525-27. Ultimately, the Supreme Court held that the union's activities were not chargeable as extortion under the statute because the law specifically excluded application to organization activities seeking wage payment. *Id.* at 530-31. As the Court found that the union's activities were not within the purview of the current anti-racketeering statute, it concluded that the government could not charge the union. *Id.* For more discussion concerning Congress' response to *Local 807*, see James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA L. REV. 815, 889-91 (1988).

[169] 91 CONG. REC. 11,900 (1945) (statement of Rep. Hancock).

[170] 18 U.S.C. § 1951(a) (2006).

b. The FBRA

Congress passed the FBRA in 1934 to "[protect] the institutions in which [the Federal Government] is interested."[171] Congress amended the FBRA in 1986.[172] In amending the FBRA, the House Committee on the Judiciary noted, "[f]ederal courts are divided over the question whether [the FBRA] proscribes extortionate conduct."[173] In addition, the Committee clearly set forth its purpose in amending the FRBA in House Report 797, which provides:

> Extortionate conduct is prosecutable either under the bank robbery provision or the Hobbs Act, both of which carry the same maximum prison term (20 years). However, clarification as to which should be the applicable statute is desirable.
>
> The Justice Department believes that the natural and appropriate vehicle for prosecuting extortionate activity involving the obtaining of bank monies is 18 U.S.C. 2113(a), rather than the Hobbs Act, which has the purpose of safeguarding the channels of interstate and foreign commerce from the adverse effects of robbery and extortion. The Committee concurs. *Accordingly, section 51 amends 18 U.S.C. 2113(a) expressly to cover crimes of extortion directed at federally insured banks. The Committee intends to overrule those cases holding that only the Hobbs Act applies, and those cases holding that both the Hobbs Act and 18 U.S.C. 2113(a) apply, in order to make 18 U.S.C. 2113(a) the exclusive provision for prosecuting bank extortion*.[174]

Although addressing a multiple punishment argument under both Acts in 1990, after Congress amended the FBRA in 1986, the Second Circuit concluded in *Maldonado-Rivera* that Congress did not intend the FBRA to be the exclusive criminal statute to charge defendants with for bank robbery offenses.[175] An examination of the Second Circuit's discussion of the relevant legislative history in *Maldonado-Rivera* reveals the court's analytical error.

In 1982, in *United States v. Marrale*[176] the Second Circuit Court of Appeals examined the legislative history of the FBRA and concluded, "the Congressional debates centered on how best to protect federal banks, not on how to protect interstate or foreign commerce."[177] The court later relied on its prior examination of the FBRA's legislative history in *Marrale* in reaching its decision in *Maldonado-Rivera* in 1990.[178] Overlooking the 1986 Amendment to the FBRA, the Second Circuit concluded that Congress intended to impose multiple punishment for bank robbery with respect to the FBRA and the Hobbs Act.[179] The court's reliance on the legislative history of the FBRA in *Marrale* was clearly improper because *Marrale* was decided in 1982, prior to Congress'

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171 United States v. Marrale, 695 F.2d 658, 664 (2d Cir. 1982) (quoting H.R. REP. NO. 73-1461, at 2 (1934)).

172 *See generally* Criminal Law and Procedure Technical Amendments Act of 1986, Pub. L. No. 99-646, 100 Stat. 3592.

173 H.R. REP. NO. 99-797, at 32 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 6138, 6155.

174 *Id.* at 32-33, *as reprinted in* 1986 U.S.C.C.A.N. 6138, 6156 (emphasis added).

175 *See* United States v. Maldonado-Rivera, 922 F.2d 934, 983 (2d Cir. 1990).

176 United States v. Marrale, 695 F.2d 658 (2d Cir. 1982).

177 *Id.* at 664.

178 *Maldonado-Rivera*, 922 F.2d at 983.

179 *Id.*

amendment to the FBRA in 1986 to clearly provide that the FBRA is the exclusive criminal statute proscribing bank extortion.[180]

As Congress clearly indicated in the 1986 Amendment that the government should prosecute an individual for bank extortion exclusively under provisions of the FBRA, it would be absurd to conclude that Congress intended for the government to prosecute an individual for bank robbery under both Acts. The review of the House Committee on the Judiciary's report concerning adoption of the 1986 Amendment requires one to draw the logical connection that bank robbery, like bank extortion, both similarly proscribed under the FBRA and within the purview of the Hobbs Act, should be solely prosecuted under the FBRA. The connection is not a far reach, as the House Report provides that "extortion" as used in subsection (a) of the FBRA means "obtaining property from another person, without the other person's consent, induced by the wrongful use of actual or threatened force, violence, or fear" — a definition encompassing robbery.[181]

Thus, this analysis confirms that Congress intended the FBRA to be the exclusive criminal statute for the prosecution of bank robbery.[182] In sum, this three-step analysis for multiple punishment warrants the conclusion that bank robbery under both the FBRA and Hobbs Act criminalize the "same offense," such that punishing a defendant under both violates the Double Jeopardy Clause.

B. Indictment under both the FBRA and the Hobbs Act for Bank Robbery Runs Afoul of Double Jeopardy Principles

Resolution of this circuit-split surrounding multiple punishment under the FBRA and the Hobbs Act for bank robbery provides the Supreme Court with an opportunity to revisit its long established precedent permitting multiple indictments for the "same offense." Upon review of this issue, the Court should, in line with members of the Court, both past and present, conclude that said practice violates the Double Jeopardy Clause. Doing so would prevent prejudice to the defendant.

Under current doctrine, the government may seek multiple indictments against a defendant for the "same offense" without violating the Double Jeopardy Clause.[183] This practice results in adverse consequences, however, and as articulated by the Sixth Circuit in *United States v. Duncan*,[184] "may falsely suggest to a jury that a defendant has committed not one but several crimes."[185] As a result, defendants are more likely to be found guilty when charged under a

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[180] *Id.* (citing *Marrale*, 695 F.2d at 664).
[181] H.R. REP. NO. 99-797, at 32-33 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 6138, 6156.
[182] *Id.*, *as reprinted in* 1986 U.S.C.C.A.N. 6138, 6156.
[183] *See* Ball v. United States, 470 U.S. 856, 865 (1985).
[184] United States v. Duncan, 850 F.2d 1104 (6th Cir. 1988).
[185] *Id.* at 1108 n.4. *See also* United States v. Marquardt, 786 F.2d 771, 778 (7th Cir. 1986) (multi-count indictments create the impression to the jury that a defendant engaged in more criminal activity than in fact occurred); 1A WRIGHT & LEIPOLD, *supra* note 28, § 142, at 11 (expressing concern that multi-count indictments for the same offense "may have some psychological effect upon a jury by suggesting to it that defendant has committed not one but several crimes" (quoting United States v. Ketchum, 320 F.2d 3, 7 (2d Cir. 1963)).

multiple indictment for the "same offense" than when charged with violating a single criminal statute.[186]

In *Missouri v. Hunter*, Justice Thurgood Marshall argued in his dissent that charging a defendant with multiple indictments for the same offense violated the Double Jeopardy Clause.[187] Justice Marshall rejected multiple indictment practice for the "same offense" and stated:

> When multiple charges are brought, the defendant is 'put in jeopardy' as to each charge. To retain his freedom, the defendant must obtain an acquittal on all charges; to put the defendant in prison, the prosecution need only obtain a single guilty verdict. The prosecution's ability to bring multiple charges increases the risk that the defendant will be convicted on one or more of those charges.[188]

A number of psychological studies have confirmed Justice Marshall's concerns. Social science reveals that joinder of multiple indictments for the commission of a single crime results in a bias against the defendant such that a jury is more likely to find the defendant guilty on at least one count.[189]

1. Multiple Indictments Unfairly Favor the Prosecution

Permitting the government to charge defendants with multiple indictments increases the prosecution's ability to obtain a guilty verdict.[190] Justices Thurgood Marshall and Abe Fortas expressed concern that jurors are likely to render a "compromise verdict" when a defendant faces multiple indictments.[191] As described by Justice Fortas, a verdict is "compromised" when the jury finds the defendant guilty of one, but not all charges for the "same offense."[192] Justice Fortas reasoned that the vice of multiple indictments is that they "induce a doubtful jury to find the defendant guilty of the less serious offense rather than to continue the debate as to his innocence."[193] As stated by another court, compromise verdicts "pose significant threats to the proper functioning of the jury system" because they result in jurors falsely concluding that the defendant must be guilty of at least one charge if the government took the effort to charge the defendant with multiple indictments for one crime.[194]

In *United States v. Ball*,[195] in which the Supreme Court condoned the government practice of indicting defendants on multiple counts for the "same offense," Justice John Paul Stevens expressed concerns with the Court giving credence to this practice. Justice Stevens remarked in his concurrence, "I see no reason why this Court should go out of its way to encourage prosecutors to tilt the scales of justice against the defendant by employing such tactics."[196]

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[186] *See infra* notes 199-206 and accompanying text.
[187] Missouri v. Hunter, 459 U.S. 359, 371-72 (1983) (Marshall, J., dissenting).
[188] *Id.* at 372.
[189] *See infra* notes 199-206 and accompanying text.
[190] *See infra* notes 199-206 and accompanying text.
[191] *See Hunter*, 459 U.S. at 371-72 (Marshall, J., dissenting) (citing Cichos v. Indiana, 385 U.S. 76, 81 (1966) (Fortas, J., dissenting from dismissal of certiorari)).
[192] *Cichos*, 385 U.S. at 81 (Fortas, J., dissenting).
[193] *Id.*
[194] United States v. Clarridge, 811 F. Supp. 697, 702 (D.D.C. 1992).
[195] Ball v. United States, 470 U.S. 856 (1985).
[196] *Id.* at 867. (Stevens, J., concurring).

Echoing Justice Stevens, I believe that such a "tilt [of] the scales of justice"[197] offends the principles of the Double Jeopardy Clause by putting the defendant "twice . . . in jeopardy"[198] for offenses for which he or she could (and should) not be punished twice.

2. Defendants are More Likely to be Found Guilty of at Least One Offense When Charged with Multiple Indictments

Proponents of multiple indictments for the "same offense" often justify the practice as harmless, arguing that admission of the same evidence for proof of other charges does not result in prejudice to the defendant at trial.[199] Recent psychological studies reveal, however, that charging a defendant with multiple indictments for the "same offense" results in significant prejudice.

Social psychology studies demonstrate that juries are more likely to find a defendant guilty of the "same offense" when charged with multiple indictments than when the government charges the same defendant under a single indictment.[200] For example, researchers from Purdue University and the University of Wisconsin investigated the psychological effects on joined trials of multiple offenses and concluded that the joinder of charges for similar offenses at trial is more prejudicial than the joinder of dissimilar offenses.[201] The study presented participants with videotaped footage of criminal trials and varied the number of offenses the government charged the defendant with, the similarity of the additional charges and the similarity of the evidence admitted at trial.[202]

The results of the study demonstrated that jurors are more likely to find a defendant guilty of at least one offense when charged with multiple offenses than when the government charged the defendant with a single offense.[203] Moreover, the results of the study indicated that joinder of similar offenses at trial may result in more prejudice towards the defendant than joinder of dissimilar offenses.[204] Such a tendency for juror bias confirms that indictments for the "same offense," as well as multiple punishments, can result in double jeopardy violations.

Psychological data demonstrates that proponents' arguments in favor of multiple indictments for the "same offense" are flawed. The Supreme Court should conclude that indictment under both the FBRA and the Hobbs Act for bank robbery also violates the Double Jeopardy Clause. Permitting the government to secure a conviction under one of the statutes by charging the defendant

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197 *Id.*

198 U.S. CONST. amend. V, cl. 2.

199 *See, e.g.*, United States v. Beck, 511 F.2d 997, 1000 (6th Cir. 1975).

200 *See generally* Bordens & Horowitz, *supra* note 32; Irwin A. Horowitz, Kenneth S. Bordens & Marc. S. Feldman, *A Comparison of Verdicts Obtained in Severed and Joined Criminal Trials*, 10 J. APPLIED SOC. PSYCHOL. 444 (1980); Sarah Tanford & Steven Penrod, *Social Inference Processes in Juror Judgments of Multiple-Offense Trials*, 47 J. PERSONALITY & SOC. PSYCHOL. 749 (1984); Sarah Tanford, Steven Penrod & Rebecca Collins, *Decision Making in Joined Criminal Trials: The Influence of Charge Similarity, Evidence Similarity, and Limiting Instructions*, 9 LAW & HUM. BEHAV. 319 (1985).

201 *See generally* Tanford, Penrod & Collins, *supra* note 200.

202 *Id.*

203 *Id.* at 334-35.

204 *Id.* at 335.

under both, when punishment under both is unconstitutional, allows the government to improperly, as Justice Stevens would say, "tilt the scales of justice."[205] The practice of permitting multiple indictments for a single offense undermines the Double Jeopardy Clause, as it permits prejudicial effects by allowing defendants to be "twice put in jeopardy"[206] for committing the "same offense."

V. CONCLUSION

The Supreme Court should resolve the circuit-split in favor of the rulings of the Sixth, Eighth, and Ninth Circuit Courts of Appeals to conclude that multiple punishments under the FBRA and the Hobbs Act violate the Double Jeopardy Clause. As proof of the same facts necessary to secure a conviction for bank robbery under the FBRA necessarily satisfies the elements necessary to prove bank robbery under the Hobbs Act, both Acts proscribe the "same offense." Moreover, punishment under both statutes is unconstitutional because Congress intended the FBRA to be the sole criminal statute under which for the government may prosecute bank robbery.

Furthermore, resolution of the circuit-split will provide the Supreme Court with an opportunity to review the current practice of permitting the government to charge defendants with multiple counts for committing the same offense. This practice diminishes the integrity of the criminal justice system by permitting prosecutors to charge defendants with more offenses than a court can constitutionally convict a defendant of in an effort to enhance the government's ability to secure a conviction. As psychological data demonstrates that charging defendants with multiple indictments for the same offense results in a prejudicial effect to defendants and increases the likelihood of a defendant's guilt at trial, the Court should conclude that multiple indictments for the same offense, as well as multiple punishment, violates the Double Jeopardy Clause.

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[205] Ball v. United States, 470 U.S. 856, 867 (1985) (Stevens, J., concurring).
[206] U.S. CONST. amend. V, cl. 2.