The Constitutional Issue Hidden Within a Circuit Split: Double Jeopardy in the Context of Proving Predicate Offenses

David A. Fusco[†*]

[†] Associate, Kirkpatrick & Lockhart Preston Gates Ellis LLP; J.D., West Virginia University College of Law. I would like to acknowledge and thank the following individuals for their helpful comments in preparing this article: Professor Gerald G. Ashdown of the West Virginia University College of Law; my colleague, Michael D. Ricciuti; and the editors and members of the *Seton Hall Circuit Review*. I would also like to thank my entire family for its lifelong support and encouragement. Most of all, I would like to thank my wife Nicole, whose confidence and belief in me makes everything seem possible.

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I. INTRODUCTION

On April 16, 2007, the United States Court of Appeals for the Fourth Circuit handed down its decision in *United States v. Hayes* (the "*Hayes* Appeal").[1] In doing so, the Fourth Circuit became the lone circuit, splitting from nine others, in its interpretation of 18 U.S.C. § 922(g)(9).

Under 18 U.S.C. § 922(g)(9), it is a crime for any individual with a misdemeanor conviction of domestic violence ("MCDV") to possess, ship, or transport a firearm that has traveled in or affected interstate commerce. In the *Hayes* Appeal, the Fourth Circuit held that the predicate offense of an MCDV must have as an element a domestic relationship.[2] All nine other circuits to address this issue, however, have ruled to the contrary, holding that the MCDV need only have the element of force and that the relationship between the parties can be established using evidence beyond the elements of the underlying offense.[3] It is this process of proving the existence of a predicate offense—permitted by at least nine circuits—that this Article will explore in detail.

This Article will show that allowing predicate offenses to be proven using evidence outside the judicial record of a prior conviction has the potential to invoke a variety of constitutional concerns, including the Sixth Amendment's right to a speedy trial, the Tenth Amendment's protection of states' rights, and, most significantly, the Fifth Amendment's protection against double jeopardy. It is the goal of this Article to shed light on the most significant of these concerns. The Article establishes that proving the existence of a predicate offense with evidence outside the judicial record of a prior conviction, if permitted, must be subject to a double jeopardy analysis in order to protect a

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[1] United States v. Hayes, 482 F.3d 749 (4th Cir. 2007), *cert. granted*, 76 U.S.L.W. 3255 (U.S. Mar. 24, 2008) (No. 07-608) (holding that the text, structure, and legislative history of the law, and the rule of lenity, mandated that the statute be read to require that the MCDV have a domestic relationship as an element).

[2] *Id.* at 759.

[3] *See* United States v. Heckenliable, 446 F.3d 1048, 1049 (10th Cir. 2006); United States v. Belless, 338 F.3d 1063, 1067 (9th Cir. 2003); White v. Dep't of Justice, 328 F.3d 1361, 1364–67 (Fed. Cir. 2003); United States v. Shelton, 325 F.3d 553, 562 (5th Cir. 2003); United States v. Barnes, 353 U.S. App. D.C. 87, 295 F.3d 1354, 1358–61 (D.C. Cir. 2002); United States v. Kavoukian, 315 F.3d 139, 142–44 (2d Cir. 2002); United States v. Chavez, 204 F.3d 1305, 1313–14 (11th Cir. 2000); United States v. Meade, 175 F.3d 215, 218–21 (1st Cir. 1999); United States v. Smith, 171 F.3d 617, 619–21 (8th Cir. 1999).

defendant's constitutional rights. Because the statute and facts surrounding the *Hayes* case create the potential for double jeopardy concerns in the context of proving a predicate offense, this Article will explore the issue under those circumstances.

The use of double jeopardy analysis in this context has never been substantively addressed by the Supreme Court of the United States or any other federal court. Therefore, this Article provides a fresh look at the double jeopardy issue that arises when proving the existence of a predicate offense. This Article contends that allowing the prosecution to present new evidence outside the record of the prior conviction in *Hayes* would have violated the defendant's Fifth Amendment protection against double jeopardy.[4] This contention is reached by examining the circumstances in *Hayes* under the Supreme Court's current double jeopardy analysis.[5] In doing so, the Article concludes that any attempt by the federal government to use evidence outside the judicial record of a prior conviction in order to prove the existence of a predicate offense must be subject to double jeopardy analysis.[6]

Section II of the Article provides a background to lay the framework for the issues raised by proving predicate offenses as substantive elements of a federal charge at the guilt phase of a prosecution. Because of the limited case law on permissible evidence for proving predicate offenses at the guilt phase, this section will first discuss Supreme Court decisions involving such evidence at the sentencing phase of a criminal prosecution.[7] It will then discuss how the logic used at the sentencing phase carries over to the context of proving predicate offenses at the guilt phase. This section also provides background on *United States v. Hayes* ("*Hayes*"), a decision where the district court applied the Supreme Court's sentencing phase analysis to the guilt phase of a prosecution.[8] Finally, this section reveals how the circumstances of proving predicate offenses at the guilt phase with evidence outside the judicial record of the prior conviction raises the issue of double jeopardy.

In Section III, the Article explores a detailed analysis of the double jeopardy issue that arises from proving a predicate offense at the guilt phase of a prosecution with evidence that is not judicially noticeable because it is outside the judicial record of the prior conviction. First, this section recounts applicable Supreme Court precedent and the competing

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[4] *See infra* Section III.a.
[5] *Id.*
[6] *Id.*
[7] *See infra* Section II.a.
[8] 377 F. Supp. 2d 540 (N.D. W. Va. 2005).

theories surrounding double jeopardy analysis. Second, the section explains the doctrine of dual sovereignty and why it does not preclude the application of double jeopardy analysis in the predicate offense context. The discussion then applies double jeopardy analysis in the context of the *Hayes* decision in order to exemplify the double jeopardy concerns associated with proving predicate offenses generally. In doing so, this section concludes that a double jeopardy analysis will always be necessary to determine the constitutionality of proving the existence of a predicate offense that cannot be recognized through judicial notice.

Section IV provides a brief synopsis of other constitutional concerns that are likely to arise if a trial court admits evidence of a prior conviction outside that which is in the judicial record of the prior conviction. Specifically, it addresses the defendant's right to a speedy trial under the Sixth Amendment and the issue of state sovereignty under the Tenth Amendment.

Finally, Section V concludes the Article by describing the expectation of what the future may hold with regard to proving the existence of a predicate offense at the guilt phase of a prosecution.

II. PRIOR CONVICTIONS AND THEIR JUDICIAL RECORDS

A. Introduction

Before delving into the double jeopardy analysis of this Article, it is important to set forth a backdrop for the topic and the issue of proving predicate offenses generally.

In recent years, Congress has passed various laws that incorporate a defendant's prior state convictions into federal statutes.[9] Most frequently, the prior convictions are incorporated for the purposes of sentencing enhancements and as substantive elements of federal crimes. Moreover, much of the controversy regarding the use of these predicate offenses relates to what evidence may be used to prove that the underlying conviction qualifies as the conviction required by the incorporating statute. Due to the relatively recent implementation of such statutes, however, there is almost no case law addressing what evidence the federal government may use to prove the existence of a predicate offense at the guilt phase of a prosecution.

The Supreme Court, however, has addressed the similar issue of permissible evidence for proving predicate offenses at the sentencing

[9] *See, e.g.*, 18 U.S.C. §§ 922, 924 (2000).

phase of a criminal prosecution.[10] In that context, the Supreme Court held that, when proving the existence of a predicate offense, the government may not present evidence outside the judicial record of a prior conviction due to the defendant's Sixth Amendment right to a trial by jury.[11] This holding is particularly relevant because the extension of its rationale to the guilt phase of a prosecution is what potentially triggers the double jeopardy concerns addressed by this Article.[12] Thus, this section will explore that precedent and how it has been utilized in the context of proving the existence of a predicate offense at the guilt phase of a federal prosecution.

B. Prior Convictions and Sentencing Enhancements

In *Taylor v. United States*[13] and *Shepard v. United States*,[14] the Supreme Court addressed the scope of evidence that may be used by the federal government to prove the existence of a predicate offense for sentencing enhancement purposes.[15]

Taylor and *Shepard* involved the definition of burglary as a predicate offense for sentence enhancement purposes under the Armed Career Criminal Act ("ACCA").[16] As defined by the Court, the federal statute created a generic predicate offense of burglary that included any offense having the "basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure with intent to commit a crime."[17] In both cases the defendant had been convicted under a more broadly defined burglary statute that was not limited to entries into buildings or structures.[18] Consequently, the Court had to determine what evidence should be admitted to determine if the building or structure element of the predicate offense had been met.[19]

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[10] *See infra* Section II.a.

[11] Shepard v. United States, 125 S. Ct. 1254 (2005); s*ee infra* II.a.

[12] United States v. Hayes, 377 F. Supp. 2d. 540 (N.D. W. Va. 2005), *rev'd on other grounds*, United States v. Hayes, 482 F.3d 749 (4th Cir. 2007), *cert. granted*, 76 U.S.L.W. 3255 (U.S. Mar. 24, 2008) (No. 07-608).

[13] 495 U.S. 575 (1990).

[14] 125 S.Ct. 1254 (2005).

[15] *Taylor*, 495 U.S. at 575; *Shepard*, 125 S.Ct. at 1254 (extending the holding in *Taylor* to guilty pleas).

[16] *Taylor*, 495 U.S. at 577; *Shepard*, 125 S.Ct. 1257 (2005); s*ee also* 18 U.S.C. § 924(e) (2000).

[17] *Taylor*, 495 U.S. at 599.

[18] *Id*.; *Shepard,* 125 S. Ct. at 1257.

[19] *Taylor*, 495 U.S. at 599; *Shepard,* 125 S. Ct. at 1257.

In *Taylor*[20] and *Shepard*,[21] the Supreme Court held that, in order to protect the defendant's Sixth Amendment right to a trial by jury, the prosecution was limited to the judicially noticeable facts of the prior conviction. In explaining its rationale, the *Shepard* Court noted that "respect for congressional intent and avoidance of collateral trials require that evidence of a generic conviction be confined to records of the convicting court approaching the certainty of the record of conviction . . . ."[22] The Court further explained the controlling doctrine from *Taylor* by stating that it prohibited the admission of evidence not introduced at trial, even if that evidence was "uncontradicted" and "internally consistent" with the evidence that was admitted.[23]

In *Shepard*, the Court noted that using information outside the record of the prior offense to establish the existence of the predicate offense would require the sentencing judge to make a disputed finding of fact.[24] The Court held that the *Apprendi* line of decisions and the Sixth Amendment prohibited any such finding because those decisions "guarantee a jury's finding of any disputed fact essential to increase the ceiling of a potential sentence."[25] As a result, the sentencing court was not allowed to look to any evidence outside the judicial record in order to recognize the existence of the predicate offense.[26]

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[20] *Taylor*, 495 U.S. at 600–02 (the ACCA "mandates a formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions[,]" and this "categorical approach . . . may permit the sentencing court to go beyond the mere fact of conviction in a narrow range of cases where a jury was actually required to find all the elements of the generic [offense]").

[21] *Shepard*, 125 S. Ct. at 1263 (holding that "enquiry under the ACCA to determine whether a plea of guilty to burglary defined by a nongeneric statute necessarily admitted elements of the generic offense is limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information").

[22] *Id.* at 1261.

[23] *Id.*

[24] *Id.* at 1262.

[25] *Id.*; *see also* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (holding that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt). Many commentators have even advocated that this logic should result in predicate offenses having to be proven beyond a reasonable doubt at the sentencing phase of litigation. *See* Wayne A. Logan, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness*, 154 U. PA. L. REV. 257, 296 (2005). The Supreme Court did not, however, feel such a step was necessary. Rather, the Court found that limiting judicial notice to that of the judicial record was sufficient to protect the defendant's constitutional rights under the Sixth Amendment.

[26] *Shepard*, 125 S.Ct. at 1262.

Neither *Taylor* nor *Shepard* discussed the applicability of their holdings at the guilt phase of a prosecution.[27] Those decisions are pertinent to this Article, however, because lower federal courts have extended their application to that context.

C. Predicate Offenses as Substantive Elements to a Criminal Charge

In the only two federal cases to address whether the *Shepard* analysis applies to predicate offenses as substantive elements at the guilt phase of a prosecution, the courts held that it does.[28] Moreover, in *United States v. Hayes*, the more detailed of those opinions, the district court found that the *Shepard* standard is met as long as the facts are proven to a jury, even if they are proven at a proceeding subsequent to the prior conviction.[29]

The first federal decision to discuss the application of *Shepard* at the guilt phase of a prosecution was *United States v. Nobriga*, a May 2005 decision from the United States Court of Appeals for the Ninth Circuit.[30] In *Nobriga*, the Ninth Circuit specifically held that *Taylor* and *Shepard* were applicable at the guilt phase, and therefore limited the scope of evidence that could be used to prove the existence of the requisite predicate offense.[31] Though the opinion was later withdrawn as being moot, it still represents a recognition that the *Shepard* analysis may apply outside the context of the ACCA sentencing enhancements.[32]

Comment [A1]: Footnote Numbering

Similarly, in June 2005, the United States District Court for the Northern District of West Virginia issued an opinion recognizing *Shepard*'s applicability in the context of proving a predicate offense at the guilt phase of a prosecution.[33] In *United States v. Hayes*, the government intended to use facts outside the judicial record from a prior simple battery conviction to prove at trial that the prior state conviction actually satisfied the federal definition of an MCDV under 18 U.S.C. §

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[27] *Taylor*, 495 U.S. at 602; s*ee also Shepard*, 125 S.Ct. at 1263 (addressing the dissent's concern with the possibility of the government presenting evidence outside the judicial record of a prior conviction to a jury and the resulting prejudice that would occur).

[28] United States v. Nobriga, 408 F.3d 1178, 1182 (9th Cir. 2005) (*withdrawn*, United States v. Nobriga, 2006 U.S.App. LEXIS 10 (2006)); United States v. Hayes, 377 F. Supp. 2d. 540 (N.D. W. Va. 2005), *rev'd on other grounds*, United States v. Hayes, 482 F.3d 749 (4th Cir. 2007), *cert. granted*, 76 U.S.L.W. 3255 (U.S. Mar. 24, 2008) (No. 07-608).

[29] *Hayes*, 377 F. Supp. 2d at 542.

[30] *Nobriga*, 408 F.3d at 1179.

[31] *Id.* at 1182, n.4.

[32] *Id.* at 1181.

[33] *Hayes*, 377 F. Supp. 2d at 542.

922(g)(9).[34] In *Hayes*, the district court held that the evidentiary limits of *Shepard* applied to judicial fact-finding, and not to finding of facts made by a jury.[35] Therefore, the *Shepard* standard for limiting evidence to the judicial record of a guilty plea did not prevent the government from presenting that evidence to a jury.[36] Consequently, the government was permitted to indict the defendant for illegal possession of a firearm under 18 U.S.C. § 922(g)(9) because *Shepard* did not apply to facts proven to a jury.[37] However, to better understand how the court reached this decision and what impact its holding ultimately has on double jeopardy, it is helpful to take a closer look at the circumstances of the case.

D. United States v. Hayes

In 1994, in West Virginia magistrate court, Randy Edward Hayes pleaded guilty to a misdemeanor offense of simple battery.[38] Eleven years later, on January 4, 2005, Hayes was indicted by a federal grand jury under 18 U.S.C. §§ 922(g)(9), 924(a)(2), for illegally possessing a firearm while having been previously convicted of an MCDV.[39] The circumstances of Hayes' simple battery conviction are unclear from the decision; however, Hayes indicated that no judicially recognizable documentation of his prior conviction revealed the identity of his victim.[40] Hayes argued that, pursuant to the Supreme Court's decision in *Shepard*, the government could not prove the identity of his victim and thus could not prove that he had a prior conviction for an MCDV as defined by 18 U.S.C. § 922(g)(9).[41]

In *Hayes*, the district court first outlined the standards for sustaining a conviction under 18 U.S.C. § 922(g)(9):

> The Government must prove three elements beyond a reasonable doubt: (1) that the accused possessed, shipped, or transported a firearm; (2) that the firearm had traveled in or affected interstate

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[34] *Id.*

[35] *Hayes,* 377 F. Supp. 2d at 543.

[36] *Id.*

[37] *Id.* at 543.

[38] *Id.* at 540.

[39] 18 U.S.C. § 924(a)(2) (2000) is the penalty provision for a violation of 18 U.S.C. §§ 922(a)(6), (d), (g)–(j), (o) (2000).

[40] *Hayes*, 377 F. Supp. 2d at 541.

[41] *Id.*; *see also* Shepard v. United States, 125 S.Ct. 1254 (2005) (holding that in the context of sentence enhancements, the Sixth Amendment requires that a sentencing court limit itself to examining the statute of conviction, charging document, plea agreement, plea transcript, and any explicit factual finding by the trial judge to which the defendant assented, when determining whether a prior conviction is a felony for enhancement purposes).

> commerce; and (3) that the accused had been convicted of a misdemeanor crime of domestic violence.[42]

The district court also recognized that a crime of domestic violence is defined as a misdemeanor with an element including the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a person with whom the victim has a domestic relationship.[43] Moreover, citing the Fifth Circuit's decision in *United States v. Bethurum*, the court added that:

> [w]hether a predicate offense qualifies as a 'misdemeanor crime of domestic violence' pursuant to 18 U.S.C. § 921(a)(33) is a question of law rather than a separate and essential element of a violation of § 922(g)(9) which must be proved to the jury beyond a reasonable doubt.[44]

The district court, however, additionally discussed the Fourth Circuit's unpublished decision in *United States v. Ball*,[45] which, in accord with other circuits, held that a predicate offense under § 922(g)(9) only required that the predicate offense have one element—the element of physical force.[46] *Ball* also held that the prosecution carried the burden of proving to a jury beyond a reasonable doubt that a domestic relationship did in fact exist between the defendant and his victim.[47] The court in *Hayes* then synthesized the *Bethurum* and *Ball* decisions and held that a judge must only find the element of force in the predicate offense through judicial notice, and, if it is found, the prosecution is left to prove the domestic relationship to the jury.[48]

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[42] *Id.* (citing 18 U.S.C. § 922(g)(9)(2000); United States v. *Bethurum*, 343 F.3d 712, 716 (5th Cir. 2003)).

[43] 18 U.S.C. § 921(a)(33) (2000) (defining the crime as being: committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, parent or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim).

[44] *Hayes*, 377 F. Supp. 2d at 541 (citing *Bethurum*, 343 F.3d at 716–17); *see also* United States v. Bethurum, 343 F.3d 712, 717 (5th Cir. 2003).

[45] United States v. Ball, 7 F. App'x 210 (4th Cir. 2001) (unpublished), *overruled by* United States v. Hayes, 482 F.3d 749 (4th Cir. 2007), *cert. granted*, 76 U.S.L.W. 3255 (U.S. Mar. 24, 2008) (No. 07-608); s*ee also, infra*, Section II.C. (providing further analysis of the *Ball* decision).

[46] *Hayes*, 377 F. Supp. 2d at 541–42 (citing *Ball*, 7 F. App'x 210); s*ee also* United States v. Rodriguez-Deharo, 192 F. Supp. 2d 1031 (E.D. Cal. 2002) (adopting a similar rationale and following suit with the First, Eighth, and Eleventh Circuits).

[47] *Hayes*, 377 F. Supp. 2d at 542 (citing White v. Dep't of Justice, 328 F.3d 1361 (Fed. Cir. 2003)).

[48] *Id.*

In his defense, Hayes argued that the Supreme Court's decision in *Shepard* controlled what evidence the federal government could use to prove that his prior guilty plea to simple battery was in fact a prior conviction for a crime of domestic violence.[49] Thus, Hayes maintained that the evidence permitted for use by the prosecution should be limited to the "statute of conviction, charging document, plea agreement, plea transcript and any explicit factual finding by the trial judge to which the defendant assented."[50]

In rendering its decision, the district court first held that the *Shepard* analysis was applicable at the guilt phase of a prosecution.[51] The court qualified its holding, however, by indicating that *Shepard* only applied to judicial fact-finding and not fact-finding by a jury.[52] The court stated that *Shepard* did not apply to cases where the evidence outside the judicial record of the prior conviction would ultimately be proven to a jury.[53] The court reasoned that *Shepard* did not apply to such cases because they did not raise constitutional issues regarding a defendant's Sixth Amendment right to a jury trial.[54] Therefore, the court held that the prosecution should be permitted to use evidence outside the judicial record of Hayes' prior conviction to prove at trial that the prior conviction did in fact meet the federal definition of a crime of domestic violence.[55] Consequently, the court denied Hayes' motion to dismiss the superseding indictment because it was valid on its face and did not violate his Sixth Amendment rights under *Shepard*.[56]

On appeal of the *Hayes* decision, the Fourth Circuit reversed the district court's ruling regarding the appropriate manner for proving the existence of the predicate offense.[57] More specifically, the court of appeals concluded that the text, structure, and legislative history of 18 U.S.C. § 922(g)(9) and the rule of lenity required that a domestic relationship be an explicit element to the predicate offense.[58] Though the

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[49] *Id.*

[50] *Id.*

[51] *Id.* (citing United States v. Washington, 404 F.3d 834 (4th Cir. 2005) (following *Shepard* in the context of an attempt to equate a predicate offense of breaking and entering to a crime of violence through judicial notice for sentence enhancement purposes).

[52] *Id.*

[53] *Id.*

[54] *Id*. at 542–43.

[55] *Id.*

[56] *Id.* at 543.

[57] United States v. Hayes, 482 F.3d 749, 750 (4th Cir. 2007), *cert. granted*, 76 U.S.L.W. 3255 (U.S. Mar. 24, 2008) (No. 07-608).

[58] *Id.*

Hayes Appeal effectively nullified the topic of this Article with regard to Hayes personally, it is important to note that the Fourth Circuit's decision in the *Hayes* Appeal is inconsistent with each of the other circuits to address the issue.[59] Rather, most other circuits are in accord with the *Ball* decision relied upon by the district court in *Hayes*, which held that a predicate offense under section 922(g)(9) need only have the element of force and that the domestic relationship may be proven outside of the statutory elements.[60] Moreover, the Supreme Court recently granted *certiorari* to review the Fourth Circuit's decision in *Hayes* to effectively resolve this split between the circuits.[61] If the Supreme Court agrees with those circuits that do not require the domestic relationship to be included as a statutory element of the predicate offense, the double jeopardy concerns addressed in this Article will be revived in the *Hayes* case.

Furthermore, the district court's decision in *Hayes* appears consistent with the Supreme Court's holding in *Shepard* and effectively protects the defendant's Sixth Amendment right to a trial by jury. Thus, if the Supreme Court reverses the Fourth Circuit's decision in the *Hayes* Appeal, and holds that the domestic relationship need not be an element of the predicate offense, the district court's rationale in *Hayes* would likely be adopted in other circuits. Additionally, because the issue addressed by the Supreme Court is limited to the context of 18 U.S.C. § 922(g)(9), it is unclear what impact the Supreme Court's decision may have on the manner of proving predicate offenses generally.

Consequently, the facts presented by *Hayes*, and the district court's ruling regarding the manner in which a predicate offense may be proven, remain topics for consideration in the debate regarding the proper scope of proving predicate offenses.[62] Moreover, neither *Hayes* nor *Shepard*

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[59] *See* United States v. Heckenliable, 446 F.3d 1048, 1049 (10th Cir. 2006); United States v. Belless, 338 F.3d 1063, 1067 (9th Cir. 2003); White v. Dep't of Justice, 328 F.3d 1361, 1364–67 (Fed. Cir. 2003); United States v. Shelton, 325 F.3d 553, 562 (5th Cir. 2003); United States v. Barnes, 353 U.S. App. D.C. 87, 295 F.3d 1354, 1358–61 (D.C. Cir. 2002); United States v. Kavoukian, 315 F.3d 139, 142–44 (2d Cir. 2002); United States v. Chavez, 204 F.3d 1305, 1313–14 (11th Cir. 2000); United States v. Meade, 175 F.3d 215, 218–21 (1st Cir. 1999); United States v. Smith, 171 F.3d 617, 619–21 (8th Cir. 1999).

[60] United States v. Ball, 7 F. App'x 210 (4th Cir. 2001), *abrogated by* United States v. Hayes, 482 F.3d 749 (4th Cir. 2007), *cert. granted*, 76 U.S.L.W. 3255 (U.S. Mar. 24, 2008) (No. 07-608); s*ee, e.g.*, United States v. Rodriguez-Deharo, 192 F. Supp. 2d 1031 (E.D. Cal. 2002) (adopting a similar rationale and following the First, Eighth, and Eleventh Circuits).

[61] United States v. Hayes, 76 U.S.L.W. 3255 (U.S. Mar. 24, 2008) (No. 07-608).

[62] *See Heckenliable*, 446 F.3d at 1049; *Belless*, 338 F.3d at 1067; *White*, 328 F.3d at 1364–67; *Shelton*, 325 F.3d at 562; *Barnes*, 295 F.3d at 1358–61; *Kavoukian*, 315 F.3d at

addressed the Fifth Amendment issue of double jeopardy which may arise from allowing evidence of a prior conviction to be re-litigated at the guilt phase of a subsequent prosecution. Therefore, the remainder of this Article addresses the double jeopardy issue that might arise in such a situation, and predicts how that issue should be resolved. The Article seeks to accomplish this by providing an overview of double jeopardy analysis and then applying it to the facts of *Hayes* in order to exemplify the potential double jeopardy concerns associated with proving the existence of a predicate offense.

III. DOUBLE JEOPARDY AND PROVING PREDICATE OFFENSES

A. Double Jeopardy Analysis: An Overview

The Double Jeopardy Clause of the Fifth Amendment, which is applicable to the states through the Fourteenth Amendment, indicates that no person "shall be subject for the same offence to be twice put in jeopardy of life or limb."[63] Under the Fifth Amendment, the Double Jeopardy Clause provides three protections: it prevents a second prosecution of an offense after acquittal, it prevents a second prosecution after conviction, and it prevents multiple punishments for the same offense.[64] However, the most commonly litigated issue within the Double Jeopardy Clause is determining what constitutes the "same offense."

The Supreme Court has stated that the first step in the double jeopardy analysis is to determine whether the legislature intended that each violation be considered a separate offense.[65] When questions remain as to the legislative intent, however, the primary analysis for determining when two proceedings involve the same offense under the Double Jeopardy Clause is the "same elements" test laid out in *Blockburger v.*

142–44; *Chavez*, 204 F.3d at 1313–14; *Meade*, 175 F.3d at 218–21; *Smith*, 171 F.3d at 619–21.

[63] U.S. CONST. amend. V; *see also* Brown v. Ohio, 432 U.S. 161, 164 (1977).

[64] North Carolina v. Pearce, 395 U.S. 711, 717 (1969), *overruled on other grounds by* Alabama v. Smith, 490 U.S. 794 (1989); *see also* Karen J. Ciupak, *RICO and the Predicate Offense: An Analysis of Double Jeopardy and Verdict Consistency Problems*, 58 NOTRE DAME L. REV. 382, 393 (1982) (discussing the "three protections afforded by the double jeopardy clause").

[65] Garrett v. United States, 471 U.S. 773, 779 (1985); *see also* Ciupak, *supra* note 64, at 390 ("the *Blockburger* test [i]s a rule of statutory construction, to be used to determine whether Congress intended to create two offenses or one").

United States.[66] In essence, the *Blockburger* test "treats two offenses as different if and only if each requires an element the other does not."[67]

In *Blockburger*, the defendant was convicted of three counts of distributing morphine hydrochloride in violation of the Harrison Narcotic Act.[68] On appeal, the defendant argued that two of the convictions under section 1 and section 2 of the Act, respectively, should be punished as one offense because both charges involved the same sale to one individual.[69] The Supreme Court responded that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."[70] According to the Court, section 1 of the Act prohibited the sale of contraband not in its original stamped package, and section 2 prohibited the sale of any such contraband without a proper prescription.[71] Consequently, because each charge under the statute required proof of an element that the other did not, the single sale made by the defendant could be prosecuted as two separate offenses.[72]

In recent years, federal courts have consistently resolved double jeopardy questions involving similar offenses using *Blockburger*'s statutory construction test which is often referred to as simply the "same-elements" test.[73] The Supreme Court, however, has wrestled with expanding double jeopardy analysis to incorporate other tests for determining if separate offenses constitute the "same offense."[74]

Most recently, in *Grady v. Corbin*, the Supreme Court held that the *Blockburger* test does not conclude the double jeopardy analysis.[75] In *Grady*, the prosecution intended to re-prove the conduct of a defendant's

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[66] 284 U.S. 299, 304 (1932); s*ee also, e.g.*, United States v. Dixon, 509 U.S. 688, 696 (1993) ("The same-elements test, sometimes referred to as the 'Blockburger' test, inquires whether each offense contains an element not contained in the other; if not, they are the 'same offence' and double jeopardy bars additional punishment and successive prosecution.").

[67] Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 Yale L.J. 1807, 1813 (1997).

[68] *Blockburger*, 284 U.S. at 300.

[69] *Id.* at 300–01.

[70] *Id.* at 304.

[71] *Id.* at 303–04.

[72] *Id.*

[73] *See, e.g.*, United States v. Dixon, 509 U.S. 688 (1993).

[74] *Grady*, 495 U.S. 508, 517 (rejecting a "same evidence" test and adopting a "same conduct" test), *overruled by Dixon*, 509 U.S. at 712 (rejecting the "same conduct" analysis); *see also* Garrett v. United States, 471 U.S. 773, 790 (1985) (rejecting the "same transaction" test).

[75] *Grady*, 495 U.S. at 516.

prior conviction in order to rely upon it as the reckless or negligent act necessary to sustain homicide and assault charges.[76] In its decision, the Court stated that the Double Jeopardy Clause protects against a second prosecution for the same offense following acquittal or conviction and also protects against multiple punishments for the same offense.[77] Therefore, the Court held that the Double Jeopardy Clause:

> bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted . . . [. And] the critical inquiry is what conduct the state will prove, not the evidence that the state will use to prove the conduct (the "Same Conduct" test).[78]

Three terms later, however, the dissent in *Grady* prevailed in *United States v. Dixon*, the Court's most recent decision regarding the controlling analysis for double jeopardy issues.[79]

In an opinion written by Justice Antonin Scalia, the *Dixon* Court held that the *Grady* "same conduct" analysis lacked historical roots and was unworkable and was therefore overruled.[80] In *Dixon*, the defendant had previously been convicted of criminal contempt for violating a conditional release order and was subsequently prosecuted for the specific act which violated his conditional release.[81] The Court held that the *Blockburger* test precluded prosecution of the subsequent charge unless it passed the "same elements" test.[82] Consequently, the defendant could not be prosecuted for the activity that resulted in the contempt charge unless the subsequent prosecution involved a charge with differing elements from the contempt charge.[83]

Because Dixon's contempt charge required the prosecution to prove that he committed a violation of the drug laws as the basis for the violation of his conditional release, the subsequently-charged drug offense did not have an element that did not have to be proven to sustain the contempt charge.[84] Therefore, both charges qualified as the same

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[76] *Id.* at 513–14.
[77] *Id.* at 514.
[78] *Id.* at 521.
[79] *Dixon*, 509 U.S. at 688 (1993); s*ee also Grady*, 495 U.S. at 526 (Scalia, J., dissenting).
[80] *Dixon*, 509 U.S. at 711.
[81] *Id.* at 691.
[82] *Id.* at 700.
[83] *Id.* at 702.
[84] *Id.*

offense under the "same elements" test and the subsequent prosecution violated the Double Jeopardy Clause.[85] As a result, though the outcome in *Dixon* would likely have been the same under the "same conduct" analysis, the Supreme Court reverted back to placing the emphasis in double jeopardy analysis on the elements of the crime, rather than the conduct that must be proven.

The *Dixon* decision, however, did not expressly rule that the *Blockburger* "same elements" test was the exclusive test relevant to double jeopardy analysis.[86] Though the Court did hold that the "same elements" test was the primary analysis, a majority of the Justices could not define the scope of that analysis.[87] Consequently, the Justices's inability in *Dixon* to come to a consensus on the scope of *Blockburger* has been a topic of great discussion.[88] Some scholars have also argued that the *Blockburger* test is not flexible enough to address all double jeopardy questions.[89] In fact, the Supreme Court appears to agree on this point, and it has provided flexibility in the *Blockburger* analysis by allowing a deviation in two unique situations.[90]

First, in *Ashe v. Swenson*, the Court held that the doctrine of collateral estoppel was applicable to the Double Jeopardy Clause and that a court must rationally protect[91] a defendant from having to re-litigate issues that have already been determined by a valid judgment.[92] In *Ashe*,

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[85] *Id.*

[86] *Id.* at 697–712.

[87] *Id.*

[88] *See, e.g.*, Kathryn A. Pamenter, Comment, United States v. Dixon: *The Supreme Court Returns to the Traditional Standard for Double Jeopardy Analysis*, 69 NOTRE DAME L. REV. 575, 576–77 (1994); Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1813 (1997).

[89] *See, e.g.*, Anne Bowen Poulin, *Double Jeopardy Against Successive Prosecutions in Complex Cases: A Model*, 25 CONN. L. REV. 95, 101 (1992).

[90] *See generally* Harris v. Oklahoma, 433 U.S. 682 (1977); Ashe v. Swenson, 397 U.S. 436 (1970).

[91] The Court in *Ashe* stated that:

> [T]his approach requires a court to examine the record of the 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. The inquiry must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings. Any test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal.

Ashe, 397 U.S. at 444.

[92] *Id.*

the defendant was acquitted of robbing a particular individual as part of a robbery that in fact included six victims.[93] The Court in *Ashe* held that the prior determination that the defendant charged with robbing one of the victims was not present during the robbery prevented the prosecution from simply retrying the defendant for the robbery of one of the other six individuals.[94] The opinion stated that the "single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers. And the jury had found that he had not."[95] Therefore, the second prosecution for the robbery would be wholly impermissible.[96] Consequently, it appears the Court will allow a deviation from the traditional *Blockburger* analysis in a context where a second prosecution necessarily re-litigates issues that were resolved in the defendant's favor in prior litigation.[97]

The second variation of the *Blockburger* test occurred in *Harris v. Oklahoma*.[98] In *Harris*, the Court expressly held that "[w]hen . . . conviction of a greater crime . . . cannot be [held] without conviction of a lesser crime . . . the Double Jeopardy Clause bars [the] prosecution for the lesser crime after conviction of the greater one."[99] *Harris* involved the greater conviction of felony murder which barred the lesser conviction of robbery with firearms that was used as the predicate felony offense.[100] In this context, the prosecution necessarily selected an underlying felony—robbery with firearms—that had to be proven during the trial as the felony element of the felony murder charge.[101]

Hence, an attempt to subsequently charge the defendant with the underlying felony would fail *Blockburger* because the underlying felony was incorporated in its entirety into the felony murder charge, and, therefore, did not contain an element that the felony murder charge did not.[102] It also appears that this deviation parallels the logic stated in *Ashe* because the double jeopardy bar is based on the fact that the felony murder conviction could not be sustained if the jury had not already conclusively determined that a robbery with firearms had in fact

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[93] *Id.* at 437.
[94] *Id.* at 445.
[95] *Id.*
[96] *Id.*
[97] *See* Grady v. Corbin, 495 U.S. 508, 528 (1990) (Scalia, J., dissenting).
[98] 433 U.S. 682 (1977).
[99] *Id.* at 682.
[100] *Id.*
[101] *Id.*
[102] *Id.*

occurred.[103] Therefore, the second deviation to *Blockburger* appears to apply in the situation where a statutory offense incorporates as an element a category of offenses, which therefore precludes traditional *Blockburger* analysis because the statute does not explicitly incorporate the elements of a particular offense.[104]

Consequently, it follows that the most accurate description of the Supreme Court's standard for double jeopardy analysis is that the Fifth Amendment prohibits the successive prosecution or punishment for the same offense.[105] Moreover, in determining if two offenses are the same, the courts will look for clear legislative intent and then will determine if each offense contains an element distinct from the other.[106] Finally, even if the offenses do have distinct elements, they will be deemed the "same offense" if the prosecution of the prior offense determinatively litigated the facts at issue in the subsequent offense.[107]

Though the Supreme Court appears steadfast in its application of the analysis discussed above, the legal community is much wearier about its application.[108] Professor Jacqueline E. Ross has pointed out that there are as many as six different double jeopardy analyses that could be used in place of *Blockburger*'s "same elements" standard.[109] In fact, scholars advocate four of those tests as superior to *Blockburger*.[110] Specifically, these tests include a more rigid "same elements"[111] test, a "same act or transaction"[112] test, a "blameworthiness"[113] test, and even *Grady*'s "same conduct"[114] test.

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[103] *See also* United States v. Falkowski, 900 F. Supp. 1207, 1213 (D. Ala. 1995) (interpreting *Harris* to allow a felony prosecution subsequent to a prosecution for felony murder if it could be shown that the felony charge in the subsequent prosecution was not the felony that had been used to sustain the felony murder conviction).

[104] *See* Grady v. Corbin, 495 U.S. 508, 528 (1990) (Scalia, J., dissenting).

[105] North Carolina v. Pearce, 395 U.S. 711, 717 (1969), *overruled on other grounds by* Alabama v. Smith, 490 U.S. 794 (1989).

[106] Blockburger v. United States, 284 U.S. 299, 302–04 (1932).

[107] *See* Harris v. Oklahoma, 433 U.S. 682 (1977); Ashe v. Swenson, 397 U.S. 436, 445 (1970).

[108] *See, e.g.*, Susan R. Klein, Review Essay*: Double Jeopardy's Demise*, 88 CAL. L. REV. 1001 (2000) (reviewing GEORGE C. THOMAS III, *DOUBLE JEOPARDY: THE HISTORY, THE LAW* (1998)).

[109] Jacqueline E. Ross, *Damned Under Many Headings: The Problem of Multiple Punishment*, 29 AM. J. CRIM. L. 245, 258–66 (2002).

[110] *Id.*

[111] Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1813 (1997).

[112] Kirstin Pace, *Fifth Amendment—The Adoption of the "Same Elements" Test: The Supreme Court's Failure to Adequately Protect Defendants From Double Jeopardy*, 84 J. CRIM. L. & CRIMINOLOGY 769 (1994).

The more rigid "same elements" test is advocated by Professor Akhil Reed Amar, Southmayd Professor of Law and Political Science at Yale Law School.[115] Professor Amar argues that "same" should mean "same" under double jeopardy and that a court should not look beyond a statute to make that determination. In essence, Professor Amar states that a court should consider legislative intent and the statutory elements in order to preclude a second prosecution under the Fifth Amendment.[116] He also argues that other considerations such as the collateral estoppel problem addressed in *Ashe v. Swenson*, could be adequately addressed under due process analysis.[117] Consequently, Professor Amar's view most notably differs from *Blockburger* in that the Double Jeopardy Clause should not hold lesser or greater offenses to be the "same offense."[118]

The "same act" or "same transaction" test has been proffered by Kirstin Pace and, among others, Justice William J. Brennan.[119] This test "requires the prosecution, except in the most limited circumstances, to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction."[120] It is argued that this test is the best analysis for double jeopardy questions because it places proper restraint on the government to prevent harassing litigation, and ensures finality of adjudication.[121] Though the Supreme Court has squarely rejected the "same act" test, many scholars consider it a viable substitute for *Blockburger*'s "same elements" analysis.[122]

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[113] George C. Thomas III, *A Blameworthy Act Approach to the Double Jeopardy Same Offense Problem*, 83 CAL. L. REV. 1027 (1995).

[114] Susan R. Klein, Review Essay*: Double Jeopardy's Demise*, 88 CAL. L. REV. 1001 (2000) (reviewing GEORGE C. THOMAS III, *DOUBLE JEOPARDY: THE HISTORY, THE LAW* (1998)).

[115] Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1813 (1997).

[116] *Id.* at 1833.

[117] *Id.* at 1837.

[118] *Id.* at 1807.

[119] Kirstin Pace, *Fifth Amendment—The Adoption of the "Same Elements" Test: The Supreme Court's Failure to Adequately Protect Defendants From Double Jeopardy*, 84 J. CRIM. L. & CRIMINOLOGY 769 (1994). *See also* Garrett v. United States, 471 U.S. 773 (1985) (rejecting the "same transaction" test); Klein, *supra* note 114, at 1031 (noting Justice Brennan's support of the "same transaction" test).

[120] Kirstin Pace, *Fifth Amendment—The Adoption of the "Same Elements" Test: The Supreme Court's Failure to Adequately Protect Defendants From Double Jeopardy*, 84 J. CRIM. L. & CRIMINOLOGY 769, 801 (1994) (quoting Ashe v. Swenson, 397 U.S. 436, 453–54 (1970) (Brennan, J., concurring)).

[121] *Id.* at 802.

[122] *Id.*; s*ee also* Garrett v. United States, 471 U.S. 733 (1985) (rejecting the "same transaction" test).

The "blameworthiness" test has been promoted by Professor George C. Thomas of Rutgers University School of Law.[123] Professor Thomas argues that "offenses are the same for double jeopardy analysis when they manifest a single blameworthiness . . . . [and, often,] courts must infer whether the legislature intended to impose more than one conviction for the actor's conduct."[124] Professor Thomas contends that this test would relieve what he perceives to be the problem with *Blockburger*: sufficiently different descriptions of an offense will allow for subsequent prosecutions, even if inconsistent with legislative intent.[125]

It is evident from the discourse on the appropriate test for double jeopardy analysis that the future of the *Blockburger* test is questionable. Therefore, this Article will briefly address how its conclusion might fare under these other proposed double jeopardy tests. At this juncture, however, the Supreme Court has not indicated any departure from *Blockburger*'s "same elements" analysis. Consequently, this Article will focus its analysis of the double jeopardy issue involved with proving a predicate offense under that Supreme Court standard. In an effort to provide an example of this analysis, the Article specifically addresses the issue in the context of *United States v. Hayes*.

B. The Dual Sovereignty Issue

As a preliminary matter, this section will confront the issue of dual sovereignty and explain why that doctrine is not controlling in the context of this Article.

Under the doctrine of dual sovereignty, the Supreme Court has long held that double jeopardy does not bar successive prosecutions by state and federal authorities for the same conduct.[126] In *Abbate v. United States*, the Court discussed the culmination of precedent leading up to this conclusion, and in doing so, clearly set forth the legal basis for the doctrine as well as the public policy supporting its application. [127]

In *Abbate*, the Court first mentioned its prior decision in *United States v. Lanza*, which set forth the legal framework for dealing with the constitutional concerns surrounding a federal prosecution following a

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[123] George C. Thomas, *A Blameworthy Act Approach to the Double Jeopardy Same Offense Problem*, 83 CAL. L. REV. 1027 (1995).

[124] *Id.* at 1027.

[125] *Id.* at 1036.

[126] *See* Abbate v. United States, 359 U.S. 187, 189–96 (1959); *see also* Ciupak, *supra* note 64 (discussing Abbate v. United States, 359 U.S. 187, 196 (1959)).

[127] *Abbate*, 359 U.S. at 189–96.

state conviction for the same conduct.[128] In *Lanza*, the act of possessing liquor was a violation of both state and federal law—with the state deriving its authority from the police powers reserved by the Tenth Amendment and the federal law deriving its authority from the Eighteenth Amendment.[129] In permitting successive prosecutions under each sovereign's respective laws, the *Lanza* Court held that where an act is denounced as a crime by "two sovereignties, deriving power from different sources, . . . [it is] an offense against the peace and dignity of both and may be punished by each."[130] Following its acknowledgement of this principle, the *Abbate* Court emphasized that the lower federal courts had consistently read *Lanza* to hold that "a federal prosecution is not barred by a prior state prosecution of the same person for the same acts."[131]

Before affirming the lower courts' interpretation of *Lanza*, however, the *Abbate* Court also addressed the public policy concern surrounding the principle of dual sovereignty.[132] The opinion noted that the basic dilemma had been recognized for over a century and was based on the concern that infractions might only minimally affect the interest of one sovereign while having a much more profound effect on the interests of another.[133] Thus, absent a dual sovereignty limitation on double jeopardy, a relatively minor infraction of state law with a correspondingly lenient punishment might preclude the prosecution of much more serious federal crimes.[134]

Based on the legal principles set forth by *Lanza* and the concerns over equity in enforcement, the *Abbate* Court firmly held that under the doctrine of dual sovereignty, the Fifth Amendment's protection against double jeopardy did not prohibit the federal government from prosecuting an individual under its laws for acts already prosecuted under state law.[135]

Turning now to the topic of this Article, it should first be noted that in both *Abbate* and its progeny, the dual sovereignty doctrine has only been invoked in the context where both sovereigns have actually

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[128] *Id.* (quoting United States v. Lanza, 260 U.S. 377, 382 (1922)).
[129] *Id.* at 193.
[130] *Id.* at 194 (quoting *Lanza*, 260 U.S. at 382).
[131] *Id.*
[132] *Id.* at 195.
[133] *Id.*
[134] *Id.*
[135] *Id.* at 196.

exercised their authority to prohibit the same form of conduct.[136] Thus, it is clear that the federal prosecution in *Hayes* does not fit neatly into settled precedent regarding the dual sovereignty doctrine. More specifically, under 18 U.S.C. § 922(g)(9), the federal government has exercised its commerce power to prohibit anyone who has been convicted of a misdemeanor crime of domestic violence from traveling in interstate commerce with a firearm.[137] That statute, however, in no way criminalizes domestic violence at the federal level.[138] Rather, it merely incorporates a prior conviction of an MCDV as an element to the federal crime. Thus, the federal government has not exercised its sovereign authority to create a federal crime of domestic violence which would invoke the application of the dual sovereignty doctrine.

This Article argues that the circumstances of the *Hayes* case represent, in effect, one sovereign subjecting an individual to the equivalent of a second prosecution under the laws of another sovereign. More specifically, the federal law requires the existence of a separate domestic violence conviction which the federal government does not have the authority to prosecute. Thus, the presentation of evidence in relation to the circumstances of the prior conviction constitutes an effort to prove that the prior conviction should be treated as a domestic violence conviction, regardless of how the prior conviction is defined by the convicting sovereign.

The reasoning in this Article stipulates that presenting additional evidence in such a manner is not necessarily unconstitutional. However, in cases such as *Hayes*, where the state has an independent domestic violence statute that was not used to convict the individual, the federal government is essentially transforming a conviction under one state law into a conviction under another. This Article argues that if the manner in which that evidence is presented would be prohibited in a state court because of double jeopardy, then the federal government should not be permitted to circumvent the state system to achieve what would otherwise be prohibited by the Constitution. In sum, the argument presented by this Article is that the federal prosecution in *Hayes* would have, in effect, twice put the defendant in jeopardy under the laws of a

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[136] *See generally Abbate*, 359 U.S. at 196; *see also* United States v. Wheeler, 435 U.S. 313 (1978) (holding that a Navajo Tribe retained sovereign authority to enforce tribal laws, and, thus, the federal government was not prohibited from prosecuting same acts under federal law).

[137] *See* 18 U.S.C. § 922 (2006).

[138] *See id.*; *see also* 142 Cong. Rec. S10377–01 (1996) (statement of Sen. Lautenberg), at WL 517928.

single sovereign by transforming a state simple battery conviction into a state domestic battery conviction.

The Supreme Court has never addressed the applicability of the dual sovereignty doctrine in the context of predicate offenses. Permitting the federal government to prove the existence of a predicate offense in the manner presented above, however, should not fall under the dual sovereignty doctrine, because it would not be consistent with federal precedent. More specifically, the application of double jeopardy in this context would in no way limit a sovereign's independent authority to criminalize and prosecute offenses against the "peace and dignity" of the sovereign.[139] Rather, it would simply limit the manner in which a sovereign could prove the existence of a predicate offense that had been incorporated from the laws of another sovereign. Moreover, the public policy of the dual sovereignty doctrine also should not preclude the application of double jeopardy in this context. Particularly, it should not be precluded because it would in no way prohibit successive prosecutions by sovereigns that have chosen, for independent policy reasons, to actively criminalize the same form of conduct pursuant to their respective sovereign authority.[140]

Furthermore, dictum from the Supreme Court's decision in *Bartkus v. Illinois* lends support to the foregoing conclusion that the dual sovereignty doctrine should not be extended to include situations such as those presented in *Hayes*.[141] In *Bartkus*, the Court hinted that if a state prosecution was pursued at the behest of the federal government in an attempt to avoid the federal double jeopardy prohibition, then the state prosecution may not be protected by dual sovereignty because it is a "sham and a cover" for a federal prosecution.[142] In fact, the courts of appeals adopt this language to create an exception to the dual sovereignty doctrine.[143] The exception was aptly described by the District of Columbia Circuit when it held that "*Bartkus*, as we view it, stands for the proposition that federal authorities are proscribed from manipulating state processes to accomplish that which they cannot constitutionally do themselves."[144] The court explained that "[t]o hold otherwise would, of

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[139] *See* United States v. Lanza, 260 U.S. 377, 382 (1922).
[140] *See* Abbate v. United States, 359 U.S. 187, 195 (1959).
[141] 359 U.S. 121, 123 (1959).
[142] *Id.* at 124.
[143] *See, e.g.*, United States v. Liddy, 542 F.2d 76 (D.C. Cir. 1976); United States v. Aboumoussallem, 726 F.2d 906 (2d Cir. 1984).
[144] *Liddy*, 542 F.2d at 79.

course, result in a mockery of the dual sovereignty concept that underlies our system of criminal justice."[145]

Though the courts of appeals interpreted *Bartkus* in reference to what cannot be accomplished at the federal level due to double jeopardy, in contrast to *Hayes*, which deals with what cannot be accomplished at the federal level due to a lack of jurisdiction, the holdings still represent a restrictive interpretation of the dual sovereignty doctrine. More particularly, such an analysis lends support to a conclusion that the federal government should not be permitted to use the dual sovereignty doctrine to manipulate the laws of another sovereign in a manner that would otherwise be prohibited by the Constitution. Thus, in cases like *Hayes*, the federal government should not be permitted to exploit the dual sovereignty doctrine by using it to prove the existence of a state law conviction which the state itself would not be able to pursue because of double jeopardy.

Consequently, the principles and precedent surrounding the dual sovereignty doctrine reveal that there is no clear basis for precluding the applicability of the double jeopardy doctrine when one sovereign merely incorporates a predicate offense from another sovereign without criminalizing the predicate conduct under its own laws. Therefore, this Article analyzes whether the federal government's actions in *Hayes* would have led to a result that is contrary to the principles of double jeopardy.

C. Legislative Intent and the Legal Framework of Hayes' Convictions

Before providing an in-depth analysis of the double jeopardy issue presented by *United States v. Hayes* or predicate offenses generally, it is helpful to examine the legal framework used to charge the defendant Hayes. It is also necessary to understand the legislative intent of this framework in order to analyze the *Hayes* case under double jeopardy analysis.

In 1996, Congress stated in clear terms that this country would have "zero tolerance when it comes to guns and domestic violence."[146] In order to accomplish this mandate, and to strengthen the Violence Against Women Act of 1994 ("VAWA"), Congress invoked its commerce

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[145] *Id.*

[146] 142 Cong. Rec. S10377–01 (1996) (statement of Sen. Lautenberg), at WL 517928.

power[147] to amend 18 U.S.C. § 922, making it unlawful for any person convicted of an MCDV to possess a firearm or ammunition.[148]

The statute was amended with the sole intent of keeping guns away from those convicted of domestic violence crimes.[149] In doing so, Senator Frank R. Lautenberg (D-NJ) stated that the existing federal law preventing felons from possessing firearms was insufficient to keep firearms out of the hands of those who commit crimes of domestic violence.[150] Senator Lautenberg commented that many times, those guilty of domestic violence are only charged with a misdemeanor. Therefore, the senator remarked that an amendment to prevent misdemeanor domestic violence offenders from possessing firearms was necessary to protect the lives of wives and children.[151]

Due to its relatively short life span, 18 U.S.C. § 922(g)(9) generated many unanswered questions regarding the constitutionality of its application—particularly when the government attempts to equate one state offense to another in order to satisfy the predicate offense requirement. In order to fully understand the constitutional implications of such a practice, it is necessary to look at the legal framework of those offenses and the legislative intent behind them. Most importantly, in examining the implications of *Hayes*, it is necessary to recognize and compare West Virginia's separate statutes for the crimes of simple battery and domestic battery.[152]

In *Hayes*, the federal government attempted to satisfy the prior conviction element of 18 U.S.C. § 922(g)(9) by alleging that Hayes' state

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[147] U.S. CONST. art. I, § 8, cl. 3.

[148] 18 U.S.C. § 922(g)(9) (2000); *see also* United States v. Hayes, 377 F. Supp. 2d 540, 541 (N.D. W. Va. 2005) (stating that the three elements for conviction under § 922(g)(9) are: "(1) that the accused possessed, shipped, or transported a firearm; (2) that the firearm had traveled in or affected interstate commerce; and (3) that the accused had been convicted of a misdemeanor crime of domestic violence"), *rev'd on other grounds*, United States v. Hayes, 482 F.3d 749 (4th Cir. 2007), *cert. granted*, 76 U.S.L.W. 3255 (U.S. Mar. 24, 2008) (No. 07-608).

[149] 142 Cong. Rec. S10377–01 (1996) (statement of Sen. Lautenberg), at WL 517928.

[150] *Id.*

[151] *Id.*

[152] Note that it is not clear from the *Hayes* decision or the applicable sections of the West Virginia Code whether the crime of domestic battery was in effect at the time Hayes was charged, as the statute's passage and Hayes' guilty plea both occurred at some point in 1994. *See Hayes*, 377 F. Supp. 2d at 541; W. VA. CODE § 61-2-28 (2004). Regardless, the analysis in this Article remains relevant any time a state elects to prosecute a defendant, but chooses not to charge him with an offense that parallels the federal definition of the predicate offense.

conviction for simple battery was in fact a conviction for an MCDV.[153] However, because West Virginia has different statutes for the crimes of simple battery and domestic battery, an understanding of the legislative intent behind the creation of these statutes is necessary to analyze the double jeopardy issue in *Hayes*.

After a careful review of West Virginia's domestic violence statute[154] (which includes the charge of "domestic battery") and its statute for malicious or unlawful assault, assault, and battery[155] (the "physical violence" statute," which includes the charge of "simple battery"), it is apparent that a clear difference exists between the two statutes. The domestic violence statute specifies that the victim of the accused must be "his or her family or household member."[156] Of particular significance, the code also states that no individual may be prosecuted under both statutes for the same act.[157] Therefore, though the two statutes are very similar, they reflect clear legislative intent to recognize that a battery committed against someone of a domestic relationship is different from a battery committed against any other individual.

Furthermore, when comparing the two statutes with the federal definition of an MCDV, it is clear that the domestic violence statute in West Virginia represents the precise offense that was intended to be incorporated by 18 U.S.C. § 922(g)(9).[158]

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[153] United States v. Hayes, 377 F. Supp. 2d. 540 (N.D. W. Va. 2005), *rev'd on other grounds*, United States v. Hayes, 482 F.3d 749 (4th Cir. 2007), *cert. granted*, 76 U.S.L.W. 3255 (U.S. Mar. 24, 2008) (No. 07-608).

[154] W. VA. CODE § 61-2-28 (2004); *see* Appendix for the full text of this provision.

[155] W. VA. CODE § 61-2-9 (2004); *see* Appendix for the full text of this provision.

[156] W. VA. CODE §§ 61-2-28(a), (b) (2004). *See also* W. VA. CODE §§ 61-2-9(b), (c) (2004).

[157] *Id.* at § 61-2-28(f).

[158] *See* 18 U.S.C. § 921(a)(33) (2000) (defining a misdemeanor crime of domestic violence as:

> an offense that (i) is a misdemeanor under Federal, State, or Tribal law; and (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim).

D. Analyzing Hayes and Proving a Predicate Offense under Double Jeopardy Analysis

When applying double jeopardy analysis to the issue of proving a predicate offense as a substantive element of a federal criminal charge, two situations are possible. First, the prosecution may claim that the state conviction is literally the "same" as the federally defined predicate offense. Second, the prosecution may claim that the state conviction is not literally the "same" as the federally defined predicate offense, but for some other reason the prior conviction should qualify as the requisite predicate offense.

In the first scenario, double jeopardy does not become an issue if the offenses are literally the "same," because taking judicial notice of such a fact will not require any information beyond the elements of the offenses. This does not present a double jeopardy problem, because taking judicial notice of the record of a prior state conviction at the federal level would not constitute a second prosecution, since it would not require the litigation of any disputed fact.[159] Moreover, the Supreme Court has specifically stated that it is "well established that there is no double jeopardy bar to the use of prior convictions" in the context of subsequent offenses.[160] Therefore, a double jeopardy problem is not introduced by simply using a prior state conviction as a predicate offense to a federal crime.

However, when the prior conviction and the predicate offense are not literally the same act, and the prosecution attempts to re-litigate the facts of the prior conviction in order to show that it should qualify as the

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[159] *See generally* North Carolina v. Pearce, 395 U.S. 711, 717–18 (1969), *overruled on other grounds by* Alabama v. Smith, 490 U.S. 794 (1989) (stating that the Double Jeopardy Clause protects against a second prosecution following either acquittal or conviction and "[t]he Constitution was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it").

[160] Caspari v. Bohlen, 510 U.S. 383, 391 (1994); s*ee also* Moore v. Missouri, 159 U.S. 673, 676–77 (1895) (stating:

> The increased severity of the punishment for the subsequent offence is not a punishment for the same offence for the second time, but a severer punishment for the subsequent offence, the law which imposes the increased punishment being presumed to be known by all persons, and to deter those so inclined from the further commission of crime; and we are unable to see how the statute which imposes such increased punishment violates the provisions of our Constitution hereinbefore quoted. . . . The fact that the indictment charged a former conviction of another and entirely different offence, is not in fact charging him with an offence with respect of the former offence in the case in hand. The averments as to the former offence go as to the punishment only).

predicate offense, the double jeopardy analysis becomes complicated. This is particularly problematic when the defendant was not convicted under the state statute that explicitly parallels the federal definition of the predicate offense. In this scenario, double jeopardy becomes a potential issue because the prosecution is essentially asserting that being convicted for one state offense amounts to the equivalent of being convicted for a separate and distinct state offense. More specifically, the double jeopardy problem arises when the prosecution wishes to present new evidence regarding a prior conviction to prove it meets a different criminal definition. This is a problem under double jeopardy because litigating the validity of that evidence to attain an increased level of punishment may amount to prosecuting the prior offense a second time.[161]

For example, in *United States v. Hayes*, the prosecution sought to prove that a prior conviction of simple battery met the federal definition of an MCDV.[162] Moreover, because West Virginia has a specific domestic battery statute that parallels the federal definition, the federal government was effectively trying to prove that the defendant's prior conviction amounted to a state conviction for an offense other than that to which he pleaded guilty.[163] In order to accomplish this, the prosecution stated in its indictment that it would present evidence at trial proving that the prior conviction of simple battery did in fact meet the federal definition of an MCDV.[164] This practice would thus be re-litigating the circumstances of a prior conviction to achieve an additional degree of punishment. Therefore, because it is akin to re-prosecuting the facts of the underlying conviction, the practice raises the issue of double jeopardy and should invoke the application of the *Blockburger* "same elements" test.[165]

Under the *Blockburger* test and West Virginia law, the crimes of domestic battery and simple battery are in fact the "same offense" because each violation does not require an additional element that the other does not.[166] In fact, the only difference between the two statutes is

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[161] *See Pearce*, 395 U.S. at 717 (stating that the Double Jeopardy Clause prohibits multiple punishments for the same offense).

[162] United States v. Hayes, 377 F. Supp. 2d. 540 (N.D. W. Va. 2005), *rev'd on other grounds*, United States v. Hayes, 482 F.3d 749 (4th Cir. 2007), *cert. granted*, 76 U.S.L.W. 3255 (U.S. Mar. 24, 2008) (No. 07-608).

[163] *Cf.* 18 U.S.C. § 921(a)(33) (2006); W. VA. CODE § 61-2-28 (2004).

[164] *Hayes*, 377 F. Supp. 2d at 540–41.

[165] *See* Blockburger v. United States, 284 U.S. 299, 304 (1931) (stating that a single act may only be an offense against two statutes if each statute requires proof of an additional fact which the other does not).

[166] *Id.*; *see also* W. VA. CODE §§ 61-2-9, 28 (2004).

the identity of the victim.[167] Moreover, because the federal definition of a crime of domestic violence parallels West Virginia's domestic violence statute, proving the elements of the predicate offense in *Hayes* would necessarily involve proving the elements of the state domestic violence offense. Therefore, re-litigating the facts of Hayes' simple battery conviction in order to prove that it was in fact an MCDV would require the federal government to prove that Hayes had committed the state offense of domestic battery.

The situation in *Hayes* closely parallels the Supreme Court's decision in *Brown v. Ohio*.[168] In *Brown*, the defendant had been tried for the crime of joyriding, which required the prosecution to establish that the defendant took or operated a vehicle without the owner's consent.[169] Subsequently, the prosecution also sought an auto-theft conviction against the same defendant.[170] The auto-theft charge required the prosecution to prove the same elements as the joyriding offense, but required the additional element of intent to permanently deprive the owner of possession.[171] In its decision, the Court held that:

> as is invariably true of a greater and lesser included offense, the lesser offense . . . requires no proof beyond that which is required for conviction of the greater . . . [and] [t]he greater offense is therefore by definition the "same" for purposes of double jeopardy as any lesser offense included in it.[172]

Similarly, under the Court's holding in *Brown*, the West Virginia crime of simple battery is a lesser included offense of domestic battery. More particularly, domestic battery is statutorily defined as being simple battery with the additional element of the victim's domestic relationship with the defendant.[173] Consequently, the Fifth Amendment would clearly bar a subsequent prosecution under the domestic violence statute following a prior conviction for the same act under the physical violence statute. In fact, the West Virginia domestic violence statute appears to recognize this by stating that an individual cannot be charged under both the domestic violence statute and the physical violence statute for the same act.[174]

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[167] *See* W. VA. CODE §§ 61-2-9, 28 (2004).
[168] 432 U.S. 161 (1977).
[169] *Id.* at 167.
[170] *Id.*
[171] *Id.*
[172] *Id.* at 168.
[173] *See* W. VA. CODE §§ 61-2-9, 28 (2004).
[174] *See* W. VA. CODE § 61-2-28(f) (2004).

On the other hand, in *Hayes*, the prosecution did not seek a conviction for domestic battery stemming from the simple battery; rather, the prosecution sought to show that the simple battery met the federal definition of an MCDV.[175] Therefore, it is arguable that equating Hayes' simple battery conviction to a crime of domestic violence does not constitute a subsequent prosecution or a form of duplicative punishment barred by the Fifth Amendment.

In applying the *Shepard* analysis at the guilt phase, however, the district court in *Hayes* held that disputed facts outside the judicial record of the prior conviction must be submitted to the jury under the Sixth Amendment.[176] This necessarily amounts to requiring the prosecution to re-litigate the facts of the underlying conviction in order to qualify the conviction as an MCDV. Thus, the determination of the disputed contention regarding the victim of the prior conviction clearly constitutes a trial of the disputed evidence.[177] Moreover, this case illustrates that a state conviction of misdemeanor domestic violence carries a greater penalty than simple battery in that it restricts the constitutional right to bear arms at the federal level.[178] The state's decision to not allow an individual to be prosecuted under both statutes also reflects an understanding that doing so would be an impermissible form of duplicative punishment.[179]

It is also clear that a conviction of domestic battery carries a social stigma far different from a conviction for simple battery. Therefore, an attempt to prove the existence of an MCDV conviction with evidence outside the judicial record of the simple battery conviction would subject the defendant to the increased level of punishment associated with a separate state conviction through the re-litigation of the underlying facts

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[175] United States v. Hayes, 377 F. Supp. 2d. 540, 541 (N.D. W. Va. 2005), *rev'd on other grounds*, United States v. Hayes, 482 F.3d 749 (4th Cir. 2007), *cert. granted*, 76 U.S.L.W. 3255 (U.S. Mar. 24, 2008) (No. 07-608).

[176] *Id.* at 542.

[177] *See* BLACK'S LAW DICTIONARY 1222 (7th ed. 2000) (defining the word "trial" in the legal context as: "A formal judicial examination of evidence and determination of legal claims in an adversary proceeding.").

[178] U.S. CONST. amend. II. Though the precise scope of the constitutional right to bear arms has not been clearly delineated by the Supreme Court, the point remains the same—qualifying the state conviction as an MCDV will subject the defendant to a form of punishment above and beyond that which he received for the underlying conviction. *See generally* Parker v. District of Columbia, 478 F.3d 370 (D.C. Cir. 2007), *cert. granted*, District of Columbia v. Heller, 128 S. Ct. 645 (2007) (addressing the scope of the constitutional right to bear arms).

[179] *See* W. VA. CODE §§ 61-2-9, 28 (2004).

of the prior conviction.[180] Consequently, this re-litigation would force the defendant to "run the gauntlet" of defending the battery accusation a second time, and should be prohibited as a subsequent prosecution of the same offense under state law in violation of the Double Jeopardy Clause.[181]

Therefore, whether the prosecution claims to be re-litigating a prior conviction to prove the elements of West Virginia's domestic battery statute or to satisfy the federal definition of a crime of domestic violence, the practice will violate *Blockburger*'s "same elements test."[182] This occurs because domestic battery and the federal definition of a crime of domestic violence both have elements that simple battery does not, and simple battery does not have any elements other than those included in both the domestic battery statute and the federal definition.[183] Therefore, in the context of cases such as *Hayes*, the use of evidence outside the judicial record of the prior conviction will fail the *Blockburger* "same elements" test to run afoul of the Fifth Amendment's protection against double jeopardy.

Furthermore, this conclusion appears to be equally supported by the other double jeopardy tests proposed by legal scholars. Under the overturned "same conduct" standard promoted by Professor Susan R. Klein, a second prosecution would violate double jeopardy if "the government, to establish an essential element of an offense . . . [will] prove conduct that constitutes an offense for which the defendant ha[s] already been prosecuted."[184] In *Hayes*, any attempt to prove the victim of the battery would require the government to reprove the conduct that

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[180] North Carolina v. Pearce, 395 U.S. 711, 717 (1969), *overruled on other grounds by* Alabama v. Smith, 490 U.S. 794 (1989) (stating that the Double Jeopardy Clause prohibits multiple punishments for the same offense).

[181] Ashe v. Swenson, 397 U.S. 436, 445 (1970) (citing Green v. United States, 355 U.S. 184, 190 (1957)) (stating that the Double Jeopardy Clause "surely protects a man who has been acquitted from having to 'run the gauntlet' a second time."); s*ee also* North Carolina v. Pearce, 395 U.S. 711, 717–18 (1969) (the Double Jeopardy Clause protects against a second prosecution following either acquittal or conviction and "[t]he Constitution was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it"); Blockburger v. United States, 284 U.S. 299, 304 (1931) (stating that a single act may only be an offense against two statutes if each statute requires proof of an additional fact which the other does not).

[182] *See* Blockburger v. United States, 284 U.S. 299, 304 (1931) (stating that a single act may only be an offense against two statutes if each statute requires proof of an additional fact which the other does not).

[183] *See* W. VA. CODE § 61-2-9 (2004); 18 U.S.C. § 921(a)(33) (2006).

[184] Susan R. Klein, Review Essay*: Double Jeopardy's Demise*, 88 CAL. L. REV. 1001, 1011 (2000) (reviewing GEORGE C. THOMAS III, *DOUBLE JEOPARDY: THE HISTORY, THE LAW* (1998)).

constituted the simple battery conviction. Therefore, the "same conduct" standard would clearly bar a re-litigation of the underlying facts of Hayes' conviction.

Under the "same transaction" test advocated by Justice Brennan and others, double jeopardy is prevented by not allowing a second prosecution for an offense that arose out of the same conduct, episode, or transaction of the prior offense.[185] In *Hayes*, the context of Hayes' prior conviction is admittedly one occurrence of violence, and would clearly represent only a single transaction.[186] Therefore, a re-litigation of the circumstances of the simple battery conviction would be prohibited, as it would be under the "same conduct" test.

Under the rigid "same elements" test endorsed by Professor Akhil Reed Amar, a court should not look beyond legislative intent and the statutory elements of offenses in evaluating double jeopardy concerns.[187] Thus, in *Hayes*, the double jeopardy issue would still exist because the domestic violence statute clearly sets forth legislative intent to not allow successive prosecutions for simple battery and domestic battery.[188]

Finally, under the "blameworthiness" test advocated by Professor George C. Thomas III, double jeopardy would prevent a second prosecution if the legislature did not intend that a defendant could be prosecuted under both statutes because the act represented a single blameworthy act.[189] Again, a situation similar to *Hayes* would present a double jeopardy problem because the West Virginia legislature has clearly stated that a defendant cannot be prosecuted for both simple battery and domestic battery as the result of a single act.[190]

Consequently, the *Hayes* decision provides a clear example of how the manner in which a predicate offense is proven has the potential to raise serious questions regarding double jeopardy. Any federal statute that contains a predicate offense as an element will always require that the state conviction meet the federal definition. Moreover, any attempt to prove the elements of the federal definition with evidence outside the judicial record of the prior conviction will require a re-litigation of

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[185] *Id.* at 1031 (noting Justice Brennan's support of the "same transaction" test).

[186] United States v. Hayes, 377 F. Supp. 2d. 540 (N.D. W. Va. 2005), *rev'd on other grounds*, United States v. Hayes, 482 F.3d 749 (4th Cir. 2007), *cert. granted*, 76 U.S.L.W. 3255 (U.S. Mar. 24, 2008) (No. 07-608).

[187] Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1833 (1997).

[188] W. VA. CODE § 61-2-28(d)–(f) (2004).

[189] George C. Thomas, *A Blameworthy Act Approach to the Double Jeopardy Same Offense Problem*, 83 CAL. L. REV. 1027 (1995).

[190] W. VA. CODE § 61-2-28(d)–(f) (2004).

disputed facts from the prior conviction. Therefore, federal courts must apply a double jeopardy analysis to any attempt by the prosecution to use evidence outside the judicial record of a prior conviction to prove the existence of a predicate offense.

IV. OTHER CONSTITUTIONAL CONSIDERATIONS

In addition to double jeopardy, proving the existence of a predicate offense at the guilt phase of a prosecution may raise other constitutional issues as well. Thus, even if a court finds that proving the predicate offense at the guilt phase of a prosecution does not violate the Double Jeopardy Clause, further analysis should be performed before allowing the re-litigation of the prior conviction. More specifically, the circumstances of such a practice may raise issues of a defendant's right to a speedy trial under the Sixth Amendment and state sovereignty under the Tenth Amendment.[191] These issues are likely to be much more case-specific, however, because they are not subject to any uniform statutory analysis. Therefore, this section only intends to recognize the existence of these concerns and how they appeared in the context of *United States v. Hayes*.

In *Barker v. Wingo*, the Supreme Court set forth the controlling standard of review regarding constitutional challenges regarding the Sixth Amendment right to a speedy trial.[192] In *Barker*, the Court held that speedy trial questions require a court to use a balancing test on a case-by-case basis. In balancing the competing interests, a court should consider the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and the prejudice to the defendant."[193] In *Hayes*, the eleven-year span between the simple battery conviction and the potential proceeding to revisit the identity of the victim clearly raises concerns with regard to the defendant's right to a speedy trial.[194] Most particularly, such a lapse of time would clearly seem to inhibit the defendant's ability to establish any potential defense to the subsequent charge. Similarly, any case that attempts to prove a predicate offense at the guilt phase of a subsequent proceeding will likely generate similar questions surrounding the length of delay between the proceedings and the resulting prejudice caused to the defendant.

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[191] U.S. CONST. amends. VI, X.

[192] 407 U.S. 514, 522 (1972).

[193] *Id.* at 530.

[194] United States v. Hayes, 377 F. Supp. 2d. 540 (N.D. W. Va. 2005), *rev'd on other grounds*, United States v. Hayes, 482 F.3d 749 (4th Cir. 2007), *cert. granted*, 76 U.S.L.W. 3255 (U.S. Mar. 24, 2008) (No. 07-608).

In addition, an attempt by the federal government to prove a predicate offense at the guilt phase of a prosecution also raises Tenth Amendment issues regarding state sovereignty. In interpreting the Tenth Amendment, the Supreme Court has stated that "federal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power. . . ."[195] Consequently, any Tenth Amendment analysis in regard to proving the existence of a predicate offense will necessarily be case-specific. However, in any case where the federal government is attempting to re-litigate the circumstances of a state conviction, there is a risk that the state's interests may be impeded. For example, if the prior conviction was the result of a plea agreement, the federal government's attempt to equate that offense to another would seem to circumvent a state's deliberate exercise of its police powers. Therefore, in cases such as *Hayes*, the court should closely examine the circumstances of the prior conviction to ensure that the re-litigation of the underlying facts of that conviction will not violate the Tenth Amendment.

It is clear that the manner for proving the existence of a predicate offense has the potential to raise questions under both the Sixth Amendment and the Tenth Amendment. Consequently, if a court concludes that proving a predicate offense with evidence outside the judicial record of a prior conviction does not violate the Fifth Amendment's protection against double jeopardy, it must also perform a careful analysis of the facts to determine if the Sixth Amendment or Tenth Amendment should prohibit the practice.

V. CONCLUSION

At this time, it is unclear how the Supreme Court's decision in *Hayes* will affect the foregoing analysis. If the Court agrees with those circuits holding that a prior conviction need not have a domestic relationship element in order to qualify as an MCDV, the double jeopardy issue in *Hayes* will resurface. If the Court affirms the decision of the Fourth Circuit, the issue of double jeopardy will be removed from the context of 18 U.S.C. § 922. However, the issue of double jeopardy will remain in any context where a court allows the prosecution to prove the existence of a predicate offense with evidence outside the judicial record of the prior conviction. Therefore, to protect a defendant's rights under the Fifth Amendment, if a court cannot constitutionally take

[195] Nixon v. Mo. Mun. League, 541 U.S. 125, 140 (2004).

judicial notice of a predicate offense, it must invoke a double jeopardy analysis before allowing the prosecution to relitigate the circumstances of the prior conviction.

APPENDIX

W. VA. CODE § 61-2-28 (2004):

Domestic violence—Criminal acts: (a) Domestic battery.—Any person who unlawfully and intentionally makes physical contact of an insulting or provoking nature with his or her family or household member or unlawfully and intentionally causes physical harm to his or her family or household member, is guilty of a misdemeanor and, upon conviction thereof, shall be confined in a county or regional jail for not more than twelve months, or fined not more than five hundred dollars, or both. (b) Domestic assault.—Any person who unlawfully attempts to commit a violent injury against his or her family or household member or unlawfully commits an act which places his or her family or household member in reasonable apprehension of immediately receiving a violent injury, is guilty of a misdemeanor and, upon conviction thereof, shall be confined in a county or regional jail for not more than six months, or fined not more than one hundred dollars, or both. (c) Second offense.—Domestic Assault or Domestic Battery. A person convicted of a violation of subsection (a) of this section after having been previously convicted of a violation of subsection (a) or (b) of this section, after having been convicted of a violation of subsection (b) or (c), section nine of this article where the victim was his or her current or former spouse, current or former sexual or intimate partner, person with whom the defendant has a child in common, person with whom the defendant cohabits or has cohabited, a parent or guardian, the defendant's child or ward or a member of the defendant's household at the time of the offense or who has previously been granted a period of pretrial diversion pursuant to section twenty-two, article eleven of this chapter for a violation of subsection (a) or (b) of this section, or a violation of subsection (b) or (c), section nine of this article where the victim was a current or former spouse, current or former sexual or intimate partner, person with whom the defendant has a child in common, person with whom the defendant cohabits or has cohabited, a parent or guardian, the defendant's child or ward or a member of the defendant's household at the time of the offense is guilty of a misdemeanor and, upon conviction thereof, shall be confined in a county or regional jail for not less than sixty days nor more than one year, or fined not more than one thousand dollars, or both. A person convicted of a violation of subsection (b) of this section after having been previously convicted of a violation of subsection (a) or (b)

of this section, after having been convicted of a violation of subsection (b) or (c), section nine of this article where the victim was a current or former spouse, current or former sexual or intimate partner, person with whom the defendant has a child in common, person with whom the defendant cohabits or has cohabited, a parent or guardian, the defendant's child or ward or a member of the defendant's household at the time of the offense or having previously been granted a period of pretrial diversion pursuant to section twenty-two, article eleven of this chapter for a violation of subsection (a) or (b) of this section or subsection (b) or (c), section nine of this article where the victim was a current or former spouse, current or former sexual or intimate partner, person with whom the defendant has a child in common, person with whom the defendant cohabits or has cohabited, a parent or guardian, the defendant's child or ward or a member of the defendant's household at the time of the offense shall be confined in a county or regional jail for not less than thirty days nor more than six months, or fined not more than five hundred dollars, or both. (d) Any person who has been convicted of a third or subsequent violation of the provisions of subsection (a) or (b) of this section, a third or subsequent violation of the provisions of section nine of this article where the victim was a current or former spouse, current or former sexual or intimate partner, person with whom the defendant has a child in common, person with whom the defendant cohabits or has cohabited, a parent or guardian, the defendant's child or ward or a member of the defendant's household at the time of the offense or who has previously been granted a period of pretrial diversion pursuant to section twenty-two, article eleven of this chapter for a violation of subsection (a) or (b) of this section or a violation of the provisions of section nine of this article in which the victim was a current or former spouse, current or former sexual or intimate partner, person with whom the defendant has a child in common, person with whom the defendant cohabits or has cohabited, a parent or guardian, the defendant's child or ward or a member of the defendant's household at the time of the offense, or any combination of convictions or diversions for these offenses, is guilty of a felony if the offense occurs within ten years of a prior conviction of any of these offenses and, upon conviction thereof, shall be confined in a state correctional facility not less than one nor more than five years or fined not more than two thousand five hundred dollars, or both. (e) As used in this section, "family or household member" means "family or household member" as defined in 48-27-204 of this code. (f) A person charged with a violation of this section may not also be charged with a violation of subsection (b) or (c), section nine of this article for the same act. (g) No law-enforcement

officer may be subject to any civil or criminal action for false arrest or unlawful detention for effecting an arrest pursuant to this section or pursuant to 48-27-1002 of this code.

W. VA. CODE § 61-2-9 (2004):

Malicious or unlawful assault; assault; battery; penalties: (a) If any person maliciously shoot, stab, cut or wound any person, or by any means cause him bodily injury with intent to maim, disfigure, disable or kill, he shall, except where it is otherwise provided, be guilty of a felony and, upon conviction, shall be punished by confinement in the penitentiary not less than two nor more than ten years. If such act be done unlawfully, but not maliciously, with the intent aforesaid, the offender shall be guilty of a felony and, upon conviction, shall, in the discretion of the court, either be confined in the penitentiary not less than one nor more than five years, or be confined in jail not exceeding twelve months and fined not exceeding five hundred dollars. (b) Assault.—If any person unlawfully attempts to commit a violent injury to the person of another or unlawfully commits an act which places another in reasonable apprehension of immediately receiving a violent injury, he shall be guilty of a misdemeanor and, upon conviction, shall be confined in jail for not more than six months, or fined not more than one hundred dollars, or both such fine and imprisonment. (c) Battery.—If any person unlawfully and intentionally makes physical contact of an insulting or provoking nature with the person of another or unlawfully and intentionally causes physical harm to another person, he shall be guilty of a misdemeanor and, upon conviction, shall be confined in jail for not more than twelve months, or fined not more than five hundred dollars, or both such fine and imprisonment. (d) Any person convicted of a violation of subsection (b) or (c) of this section who has, in the ten years prior to said conviction, been convicted of a violation of either subsection (b) or (c) of this section where the victim was a current or former spouse, current or former sexual or intimate partner, a person with whom the defendant has a child in common, a person with whom the defendant cohabits or has cohabited, a parent or guardian, the defendant's child or ward or a member of the defendant's household at the time of the offense or convicted of a violation of section twenty-eight of this article or has served a period of pretrial diversion for an alleged violation of subsection (b) or (c) of this section or section twenty-eight of this article when the victim has such present or past relationship shall upon conviction be subject to the penalties set forth in section twenty-eight of this article for a second, third or subsequent criminal act of domestic violence offense, as appropriate.