

**CRIMINAL LAW: *HANKERSON V. STATE*—THE DOUBLE
JEOPARDY AND OFFENSIVE COLLATERAL ESTOPPEL
ISSUES THAT ATTEND RETRYING AGGRAVATING
FACTORS**

Brian Carter-Stiglitz[†]

I. INTRODUCTION.....	1518
II. BACKGROUND: JURY REVIEW AND DOUBLE JEOPARDY	1519
A. <i>Right to Jury Review</i>	1519
1. <i>Jury with a Capital J, or “Today You Are the Law”</i>	1519
2. <i>The Blakely Line</i>	1521
3. <i>Apprendi in Minnesota</i>	1524
B. <i>Double Jeopardy</i>	1525
1. <i>A Brief History</i>	1525
2. <i>“Life or Limb”</i>	1527
3. <i>“Twice Put in Jeopardy”</i>	1528
4. <i>“Same Offence”</i>	1533
III. THE <i>HANKERSON</i> DECISION	1534
A. <i>Statement of the Case and Facts</i>	1534
B. <i>The Hankerson Majority’s Analysis</i>	1536
IV. ANALYSIS OF THE <i>HANKERSON</i> DECISION.....	1537
A. <i>A Hypothetical</i>	1537
B. <i>The Use of Double-Jeopardy Precedent</i>	1538
C. <i>Offensive Collateral Estoppel</i>	1543
1. <i>Basics and Supreme Court Precedent</i>	1543
2. <i>The Circuits’ and States’ Take</i>	1545
3. <i>Argument Against Offensive Collateral Estoppel</i>	1546
D. <i>Avoided Issue: How Do Aggravating Factors Factor in Double Jeopardy?</i>	1551
V. CONCLUSION	1553

[†] J.D. Candidate, William Mitchell College of Law; Ph.D., University of Minnesota; B.A., Hanover College.

I. INTRODUCTION

A basic tenet of American criminal law is the distinction between facts that are elements of an offense and facts that a sentencing authority may find when selecting an appropriate sentence within a statutory range.¹ The Fifth Amendment protection from double jeopardy and the Sixth Amendment right to a jury trial apply to the former, but not the latter.² Recent United States Supreme Court decisions, specifically *Blakely v. Washington*³ and *Apprendi v. New Jersey*,⁴ drew a bright line marking this distinction.⁵ These rulings rendered Minnesota's sentencing guidelines unconstitutional because, under the guidelines, judges found the aggravating factors necessary to allow an upward departure from the presumptive sentence range.⁶ In other words, aggravating factors in Minnesota's sentencing guideline scheme are elements of an offense to be found by a jury and are thus subject to the Fifth and Sixth Amendments.

Dena Lyn Hankerson was sentenced to a 264-month prison term, including a 120-month upward departure based on judicially-found aggravating factors.⁷ Applying *Blakely* retroactively, a post-conviction court held that the sentence was unconstitutional and scheduled a "resentencing jury trial" without overturning the underlying conviction.⁸ In *Hankerson v. State*, the Minnesota Supreme Court held that the resentencing trial did not violate double jeopardy.⁹ But the court's conclusion is based on precedent that is distinguishable from *Hankerson*, and policy suggests that double jeopardy should apply. The court's decision also implicates the use of offensive collateral estoppel by the prosecution, which the court did not discuss. Furthermore, the *Hankerson* court avoided deciding whether aggravating factors figure into the "same offense" analysis, leaving open the question of whether double jeopardy applies at all to aggravating factors.

1. See *Monge v. California*, 524 U.S. 721, 737-39 (1998) (Scalia, J., dissenting).

2. U.S. CONST. amend. V-VI; *Monge*, 524 U.S. at 737 (Scalia, J., dissenting) (agreeing with the majority).

3. 542 U.S. 296 (2004).

4. 530 U.S. 466 (2000).

5. *Blakely*, 542 U.S. at 303-04; *Apprendi*, 530 U.S. at 490.

6. *State v. Shattuck*, 704 N.W.2d 131, 143 (Minn. 2005).

7. *Hankerson v. State*, 723 N.W.2d 232, 234 (Minn. 2006).

8. *Id.* at 235.

9. *Id.* at 239.

This note outlines the fundamentals of jury review and double jeopardy, and then it analyzes the *Hankerson* decision. Part II discusses the jurisprudence upon which *Hankerson* is based.¹⁰ Part II.A discusses the right to jury review, with the primary aim of explaining the line of Supreme Court cases that led to *Blakely*.¹¹ Part II.B reviews double-jeopardy jurisprudence.¹² This note emphasizes two major, recent reversals of double-jeopardy precedent in order to give an idea of how malleable the law has been in recent history and how slippery the analysis is. Admittedly, Part II indulges in a lengthy treatment of double-jeopardy jurisprudence, some of which is not absolutely necessary to develop the analysis of *Hankerson*. But by including the treatment it is my hope to provide a self-contained and succinct summary of double-jeopardy law that might aid those looking for a quick synopsis of the law as it stands now. Part III describes the *Hankerson* facts and the majority's reasoning.¹³ Part IV critiques the *Hankerson* analysis.¹⁴ Part IV.B criticizes the *Hankerson* court's use of double-jeopardy precedent.¹⁵ Part IV.C discusses the issue of offensive collateral estoppel, which was central to *Hankerson* but was not discussed by either the majority or the dissent.¹⁶ Finally, Part IV.D addresses a major issue that *Hankerson* left unresolved: whether double jeopardy can ever apply to aggravating factors.¹⁷

II. BACKGROUND: JURY REVIEW AND DOUBLE JEOPARDY

A. *Right to Jury Review*

1. *Jury with a Capital J, or "Today You Are the Law"*¹⁸

The right to a jury trial is firmly rooted in America's common-law heritage.¹⁹ Blackstone put it elegantly, stating:

10. See *infra* Part II.
11. See *infra* Part II.A.
12. See *infra* Part II.B.
13. See *infra* Part III.
14. See *infra* Part IV.
15. See *infra* Part IV.B.
16. See *infra* Part IV.C.
17. See *infra* Part IV.D.
18. THE VERDICT (Twentieth-Century Fox 1982). The quotation is from Frank Galvin's (Paul Newman) summation.
19. See WILLIAM BLACKSTONE, 4 COMMENTARIES *278, *342-44.

[liberty is only secure] so long as this palladium remains sacred and inviolate, not only from all open attacks . . . but also from all secret machinations, which may sap and undermine it; by introducing new and arbitrary methods of trial. And however convenient these may appear at first, (as doubtless all arbitrary powers, well executed, are the most convenient), yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters.²⁰

The Framers' concern with jury trial rights was so strong that they highlighted it in the Declaration of Independence: "For depriving us, in many Cases, of the benefits of a Trial by Jury."²¹ Revolutionary Americans had real reason to give the jury a starring role in the Declaration of Independence: Parliament barred the right to a jury trial for violations of the Stamp Act.²² The debate between Anti-Federalists and Federalists as to whether Article III of the proposed constitution sufficiently protected the jury-trial right further illustrates that the Framers considered the jury right centrally important.²³ Of course, the first Congress ultimately resolved the debate with the Fifth, Sixth, and Seventh Amendments.²⁴

It is important to recognize that the jury's power has changed considerably throughout American history. For example, jury power was at its apogee in eighteenth-century and early nineteenth-century America when juries decided matters of law.²⁵ In other

20. *Id.*

21. THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776).

22. CARL UBBELOHDE, THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION 76-77 (1960).

23. AKHIL REED AMAR, AMERICA'S CONSTITUTION 234 (2005).

24. *Id.* at 237.

25. *Sparf v. United States*, 156 U.S. 51, 163 (1895) (Gray, J., dissenting); *Georgia v. Brailsford*, 3 U.S. 1, 4 (1794). In *Sparf*, Justice Gray noted:

In 1815, at the trial of John Hodges, in the circuit court of the United States for the district of Maryland, for treason, William Pinkney, for the defendant, argued: 'The best security for the rights of individuals is to be found in the trial by jury. But the excellence of this institution consists in its exclusive power. The jury are here judges of law and fact, and are responsible only to God, to the prisoner, and to their own consciences.' And Mr. Justice Duvall, of this [C]ourt, after expressing his opinion upon the law of the case, said, with the concurrence of Judge Houston: 'The jury are not bound to conform to this opinion, because they have a right, in all criminal cases, to decide on the law and the facts.'

Sparf, 156 U.S. at 163 (Gray, J., dissenting).

words, “jury review today is just a shadow of what it was to” the Framers.²⁶ Cast in this light, the modern Court’s extension of jury review in *Apprendi*, *Ring*, and *Blakely* is, perhaps, less astonishing than first impression suggests.

2. *The Blakely Line*

Like *Hankerson*, *Monge v. California*²⁷ involved double jeopardy, but it also augured *Apprendi* and *Blakely*.²⁸ In *Monge*, the defendant was convicted of drug possession and transportation with an aggravating factor.²⁹ On appeal, the State conceded that its evidence of the aggravating factor (that Monge had “personally used a stick” in a prior felony) was insufficient and requested another opportunity to prove the aggravating factor.³⁰ The Supreme Court held that double jeopardy did not apply to sentencing proceedings and findings of aggravating factors.³¹

Justice Scalia’s dissent in *Monge* argued that the aggravating factor was functionally the same as an element of an offense.³² So the appellate court’s holding of insufficient evidence was an acquittal, and thus, double jeopardy barred the second prosecution.³³ Justice Scalia argued that allowing the legislature to label a factual finding a sentence enhancement versus an element of a crime “eviscerate[d] the Double Jeopardy Clause” and could be used to dispense the “inconvenient constitutional” right to a jury.³⁴ *Apprendi* and its progeny vindicated Scalia’s dissent.

*Jones v. United States*³⁵ followed the *Monge* dissent. In *Jones*, the Court addressed whether the federal car-jacking statute defined three separate offenses or a single offense with three possible sentences.³⁶ The Court concluded that the statute defined three

26. AMAR, *supra* note 23, at 242.

27. 524 U.S. 721 (1998).

28. *See id.* at 740 (Scalia, J., dissenting).

29. *Id.* at 724 (majority opinion).

30. *Id.* at 725–26.

31. *Id.* at 730. But the Supreme Court previously held that double jeopardy applies when sentencing proceedings have “the hallmarks of [a] trial.” *Id.* at 726 (citing *Bullington v. Missouri*, 451 U.S. 430, 439 (1981)). The *Monge* Court argued that *Bullington* was a rare exception because it involved a capital sentence. *Id.* at 730.

32. *Id.* at 741 n.2 (Scalia, J., dissenting).

33. *Id.* at 741.

34. *Id.* at 740.

35. 526 U.S. 227 (1999).

36. *Id.* at 229.

separate offenses.³⁷ Although the Court partially relied on statutory construction and comparison with similar statutes, the Court's conclusion turned on judicial economy.³⁸ The Court wanted to avoid the constitutional issue of whether a judge may find aggravating factors that determine the maximum possible sentence.³⁹

The *Jones* dissent, however, argued that judicial findings of aggravating factors do not raise Sixth Amendment issues.⁴⁰ Responding to the *Jones* dissent, the majority defined the constitutional concern: "[T]he required procedures for finding the facts that determine the maximum permissible punishment; these are the safeguards going to the formality of notice, the identity of the fact finder, and the burden of proof."⁴¹ Specifically, the *Jones* majority cited the Fifth Amendment's Due Process Clause, and the Sixth Amendment's guarantee of notice and a right to a jury trial.⁴² *Apprendi*'s and *Blakely*'s roots lie in *Jones*'s five to four avoidance decision.

If *Jones*, as the dissent rightly argued, cast doubt on the constitutionality of sentencing guidelines, *Apprendi* directly challenged them.⁴³ In *Apprendi*, the defendant pled guilty to two counts of second-degree firearm possession for an unlawful purpose and one count of third-degree unlawful possession of an antipersonnel bomb.⁴⁴ The firearm possession offense carried a maximum penalty of ten years of imprisonment.⁴⁵ But New Jersey's hate-crime law allowed a term of ten to twenty years when a second-degree offense was "with a purpose to intimidate an individual . . . because of race."⁴⁶ The trial judge determined that defendant *Apprendi*'s crime was racially motivated and departed from the ten-year maximum, imposing a twelve-year term.⁴⁷ The oft-cited holding from *Apprendi* is: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the

37. *Id.* at 251–52.

38. *Id.*

39. *Id.* at 248.

40. *Id.* at 268 (Kennedy, J., dissenting).

41. *Id.* at 243 n.6 (majority opinion).

42. *Id.*

43. *See id.* at 254 (Kennedy, J., dissenting).

44. *Apprendi v. New Jersey*, 530 U.S. 466, 469–70 (2000).

45. *Id.* at 468.

46. *Id.*

47. *Id.* at 471.

prescribed statutory maximum must be submitted to a jury.”⁴⁸ Accordingly, the trial judge’s finding of race-based motivation was unconstitutional judicial fact finding.⁴⁹ If a judicially found “sentencing enhancement” increases the statutory maximum penalty, then it functions as an element of an offense and must be found by a jury regardless of legislative labeling.⁵⁰

*Ring v. Arizona*⁵¹ reaffirmed *Apprendi* in the context of a death penalty case.⁵² Under Arizona law, following a jury’s guilty verdict for first-degree murder, a trial judge determined the presence or absence of the aggravating factors necessary to impose the death penalty.⁵³ A jury convicted Ring of felony murder for his participation in a robbery of an armored truck and the resulting murder of the truck’s driver.⁵⁴ The trial judge in *Ring* found the requisite aggravating factors.⁵⁵ The *Ring* Court held that “[i]f a State makes an increase in a defendant’s authorized punishment

48. *Id.* at 525 (O’Connor, J., dissenting). *See, e.g.*, *People v. Cardenas*, 66 Cal. Rptr. 3d 821, 828 (Ct. App. 2007); *State v. Robinson*, 937 A.2d 717, 719 n.7 (Conn. App. Ct. 2008); *Abrams v. State*, 971 So. 2d 1033, 1035–36 (Fla. Dist. Ct. App. 2008); *State v. Lowden*, 174 P.3d 895, 896 (Kan. Ct. App. 2008); *Spears v. State*, 724 N.W.2d 696, 698 (Minn. 2006); *State v. Read*, 938 A.2d 953, 960 (N.J. Super. Ct. App. Div. 2008); *State v. Wissink*, 652 S.E.2d 17, 19 (N.C. Ct. App. 2007).

49. *Apprendi*, 530 U.S. at 491–92.

50. *Id.* at 494 (“[T]he relevant inquiry is one not of form, but of effect.”).

51. 536 U.S. 584 (2002).

52. *Id.* at 588. *See also* ARIZ. REV. STAT. ANN. §§ 13-1105(A), (B) (2001).

53. *Ring*, 536 U.S. at 592.

54. *Id.* at 591. Note that under Arizona law, felony murder does not require that a defendant have actually killed someone. *Id.*

55. *Id.* at 594. *Ring* exemplifies the policy that underpins *Apprendi* and *Blakely*. In *Ring*, the trial judge determined whether Ring shot and killed a person and whether any aggravating factors were present. *Id.* at 594–95. The judge’s findings of these facts allowed for Ring’s execution. *Id.* The judge partially based his findings on the testimony of Ring’s accomplice, Greenham. *Id.* Greenham testified after making a deal with the prosecution that limited his sentence to a 330-month term of imprisonment. *Id.* at 593. The judge concluded from Greenham’s testimony that Ring shot the driver, and did so in an “especially heinous, cruel, or depraved manner.” *Id.* at 593–94. But Greenham also admitted that part of his testimony contradicted statements that he had previously made to Ring’s attorney. *Id.* at 594. Moreover, Greenham admitted that he testified as “pay back” for threats that Ring had made, and for Ring’s interference with the relationship between Greenham and Greenham’s ex-wife. *Id.*

Certainly, determining whether Greenham was a credible witness required judgment of debatable fact, the result of which meant Ring’s life or death. *See id.* at 593–96. If Arizona law had been written differently, defining the aggravating factors as elements of the offense rather than as an aggravating factor, then Ring would have had a constitutional right to have a jury make this judgment. *Id.* at 604–05. By labeling the fact an aggravating factor, the Arizona legislature denied Ring this constitutional right. *See id.* at 609.

contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt.”⁵⁶

But both *Apprendi* and *Ring* left unclear exactly what qualified as the statutory maximum in a mandatory sentencing guidelines system.⁵⁷ For example, suppose that drug possession carries a statutory sentence of ten to twenty years. But for a particular defendant, with a particular criminal history, mandatory sentencing guidelines require a range of ten to fifteen years. Is the statutory maximum for *Apprendi* purposes the twenty years defined in the statute, or the fifteen-year guideline sentence that the judge is *statutorily* required to follow? *Blakely* answered: “[T]he ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.”⁵⁸

3. *Apprendi in Minnesota*

Next consider how *Apprendi* and *Blakely* affected Minnesota law. The Minnesota Sentencing Guidelines are a determinate system enacted to ensure uniform and fair sentences.⁵⁹ The Guidelines operate like a two-variable equation: the judge plugs in the offense level and defendant’s criminal history, and the Guidelines yield a presumptive sentence range.⁶⁰ The district court has discretion to depart from the presumptive range “only if aggravating or mitigating circumstances are present.”⁶¹

On June 2, 2005, the Minnesota legislature amended Minnesota Statutes section 244.10 subdivision 5(a), and the sentencing guidelines, in order to make Minnesota’s guideline scheme constitutional in light of *Blakely*.⁶² But before the 2005 amendments to section 244.10 and the sentencing guidelines, judges found aggravating factors.⁶³ As amended, section 244.10

56. *Id.* at 602.

57. *Blakely v. Washington*, 542 U.S. 296, 304–06 (2004).

58. *Id.* at 303.

59. MINN. SENTENCING GUIDELINES I (2006).

60. *See State v. Shattuck*, 704 N.W.2d 131, 139 (Minn. 2005).

61. *State v. Best*, 449 N.W.2d 426, 427 (Minn. 1989). *See* MINN. SENTENCING GUIDELINES II.D.

62. *Hankerson v. State*, 723 N.W.2d 232, 234–35 (Minn. 2006).

63. MINN. STAT. § 244.10, subdiv. 2 (2004) (“[T]he *district court* shall make findings of fact [justifying] the reasons for departure from the Sentencing Guidelines . . .”) (emphasis added).

subdivision 5(a) requires that a jury find aggravating factors and stipulates that the jury requirement applies to resentencing hearings.⁶⁴ The sentencing guidelines also stipulate that a jury find aggravating factors, but the amended Guidelines became effective June 3, 2007 and did not mention resentencing.⁶⁵

In *State v. Shattuck*,⁶⁶ the Minnesota Supreme Court held that the pre-2005 sentencing guidelines were unconstitutional because they allowed upward departures from presumptive sentences based on judicial fact-finding.⁶⁷ The *Shattuck* court, however, stated that the unconstitutional portion could be severed from the otherwise constitutional portion of the guidelines.⁶⁸ The judicially modified statutes were short lived because the Minnesota Legislature corrected the problem with the 2005 amendments, which were enacted just as the court decided *Shattuck*.⁶⁹ Finally, the Minnesota Supreme Court held that *Blakely* applies retrospectively to only those cases pending on direct review when *Blakely* was decided.⁷⁰

B. Double Jeopardy

1. A Brief History

Although the precise origins of double jeopardy are unclear, its historical roots certainly run deep.⁷¹ For example, ancient Jewish law proscribed double jeopardy.⁷² Greek and Roman

64. MINN. STAT. § 244.10, subdiv. (5)(a) (2006).

65. See MINN. SENTENCING GUIDELINES II.D (affording the accused a right to a jury trial in determining whether the facts support a sentencing departure, but not mentioning resentencing in this section, or in any other section of the Guidelines).

66. 704 N.W.2d 131 (Minn. 2005).

67. *Id.* at 141–42.

68. *Id.* at 144; cf. *United States v. Booker*, 543 U.S. 220, 246–47 (2005) (severing the mandatory provisions from the federal sentencing guidelines and thus rendering them advisory and constitutional).

69. *Shattuck*, 704 N.W.2d at 148 n.17.

70. *State v. Houston*, 702 N.W.2d 268, 270–73 (Minn. 2005). The court also held that a trial court had the inherent power to impanel a jury to decide aggravating factors and that the failure to include averments of aggravating factors in the complaint does not violate Sixth Amendment or Fourteenth Amendment rights. *State v. Chauvin*, 723 N.W.2d 20, 29–30 (Minn. 2006).

71. See David S. Rudstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy*, 14 WM. & MARY BILL RTS. J. 193, 196–97 (2005) (tracing the origins of double jeopardy).

72. See *id.* at 197 (quoting BABYLONIAN TALMUD, KETHUBOTH 32b (Isidore Epstein ed., Samuel Daiches trans., 1936)).

jurisprudence also prohibited double jeopardy.⁷³ Referring to the Greek double-jeopardy prohibition, one commentator wrote: “[O]nce tried he could not be prosecuted again on the same charge, the rule *ne bis in eadem re* being accepted in Athens if not in Sparta.”⁷⁴ The Romans similarly protected against double jeopardy—*nemo debet bis puniri pro uno delicto*.⁷⁵ The Roman prohibition against double jeopardy was, however, of a different color than the modern prohibition.⁷⁶ For example, one Roman jurist stated that double jeopardy only barred a second prosecution after thirty days elapsed from the time of an acquittal.⁷⁷

Double jeopardy also traces back into English common law at least as far as the thirteenth century.⁷⁸ The common-law roots of double jeopardy commonly cited are the four pleas of *autrefois acquit*, *autrefois convict*, *autrefois attain*, and *former pardon*.⁷⁹ Double jeopardy first appeared in North America in 1641, in the Massachusetts Bay Colony’s “Body of Liberties.”⁸⁰ Of course, after the Revolution, the unamended Constitution contained no double-jeopardy protection. But on June 8, 1789 James Madison proposed amending the Constitution to add, *inter alia*, the protection that “[n]o person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offense.”⁸¹ Notwithstanding the importance of double-jeopardy history, its

73. See *id.* at 198. Justice Black stressed double jeopardy’s historical pedigree: “Even in the Dark Ages, when so many other principles of justice were lost, the idea that one trial and one punishment were enough remained alive” *Bartkus v. Illinois*, 359 U.S. 121, 152 (1959) (Black, J., dissenting).

74. Rudstein, *supra* note 71, at 198–99 (quoting J. WALTER JONES, *THE LAW AND LEGAL THEORY OF THE GREEKS: AN INTRODUCTION* 149 (1956)).

75. *Id.* at 198 (quoting JAY J. SIGLER, *DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY* 2 (1969)). *Nemo debet bis puniri pro uno delicto* means “no one ought to be punished for the same offense.” *BLACK’S LAW DICTIONARY* 1736 (8th ed. 2004).

76. See Rudstein, *supra* note 71, at 199 (describing the limited protection offered against double jeopardy in Roman law).

77. See *id.* (citing *The Opinions of Paulus* 4.17, in 1 *THE CIVIL LAW* 323 (S.P. Scott trans., 1973)).

78. *Id.* at 202.

79. Anne Bowen Poulin, *Double Jeopardy Protection from Successive Prosecution: A Proposed Approach*, 92 *GEO. L.J.* 1183, 1197 (2004).

80. Rudstein, *supra* note 71, at 221–22. The Massachusetts Body of Liberties has been declared the “most important . . . forerunner of the Bill of Rights.” *Id.* at 222 (quoting 1 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 69 (1971)).

81. *Id.* at 227 (quoting 1 *ANALS OF CONG.* 257, 451–52 (Joseph Gales ed., 1834)).

complete discussion is beyond the scope of this note and would only duplicate the efforts of other commentators.⁸²

The Double Jeopardy Clause states “nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.”⁸³ This seemingly simple sentence has been the source of an endless line of Supreme Court cases. It is convenient to break the clause into three elements: (1) jeopardy of life and limb; (2) twice put in jeopardy; and (3) same offense.⁸⁴

2. “Life or Limb”⁸⁵

The Court interpreted the life or limb element in *Ex parte Lange*,⁸⁶ the holding of which has remained intact since 1873.⁸⁷ The Court’s interpretation of the other two double-jeopardy elements has not been so stable: in the last thirty years the Court has overturned two lines of cases interpreting the twice put in jeopardy and same offense elements.⁸⁸

In *Lange*, Lange was convicted of stealing Post Office mail bags.⁸⁹ The trial judge mistakenly imposed a one-year prison sentence and a one-hundred dollar fine when only one or the other was allowed.⁹⁰ On a writ of habeas corpus the same trial

82. See generally JAY J. SIGLER, DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY (1969); GEORGE C. THOMAS III, DOUBLE JEOPARDY: THE HISTORY, THE LAW (1998); Rudstein, *supra* note 71. Historical perspectives may provide little guidance in resolving modern double-jeopardy issues. Poulin, *supra* note 79, at 1197 (pointing out, inter alia, that Justices Scalia and Brennan have employed historical arguments to arrive at opposite conclusions).

83. U.S. CONST. amend. V. The Double Jeopardy Clause applies to states courtesy of the Fourteenth Amendment’s Due Process Clause. *Benton v. Maryland*, 395 U.S. 784, 794 (1969). As *Blakely* also indicated, the Double Jeopardy Clause protects jury review. AMAR, *supra* note 23, at 330 (pointing out that double jeopardy functions to make a jury’s acquittal irreversible). Double jeopardy applies in three circumstances: (1) a second prosecution for the same offense after an acquittal; (2) a second prosecution for the same offense after a conviction; and (3) multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 719 (1969).

84. See Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1809 (1997).

85. U.S. CONST. amend V.

86. 85 U.S. 163 (1873).

87. See Stephen N. Limbaugh, *The Case of Ex Parte Lange (or How the Double Jeopardy Lost Its “Life or Limb”)*, 36 AM. CRIM. L. REV. 53, 55 (1999).

88. *United States v. Dixon*, 509 U.S. 688, 704 (1993); *Burks v. United States*, 437 U.S. 1, 18 (1978).

89. *Lange*, 85 U.S. at 164.

90. *Id.*

judge vacated the original judgment and imposed a one-year prison term without a fine.⁹¹ The judge did not order the refund of Lange's one-hundred dollars.⁹² The Supreme Court vacated Lange's sentence based on double jeopardy.⁹³ The effect of *Lange*, in which only a misdemeanor charge was at issue, is that a defendant's "life or limb" is now implicitly in jeopardy in all criminal cases.⁹⁴ *Lange* is, as one commentary puts it, the story of how the Double Jeopardy Clause "[l]ost [i]ts life or [l]imb."⁹⁵

3. "Twice Put in Jeopardy"⁹⁶

The line of cases interpreting twice put in jeopardy begins with *United States v. Ball*.⁹⁷ When analyzing the "twice put in jeopardy" element, there are two questions to consider: when does jeopardy begin (attach) and when does jeopardy end (terminate)? Jeopardy attaches when the jury is impaneled.⁹⁸ *Ball* makes another situation clear: a fact finder's acquittal terminates defendant's jeopardy.⁹⁹ In *Ball*, three defendants were indicted for murder.¹⁰⁰ The defendants were charged with shooting a Native American.¹⁰¹ A jury convicted two of the defendants and acquitted the third.¹⁰² The Supreme Court eventually overturned the convictions because the indictment failed to aver that the victim died from the gunshot

91. *Id.*

92. *Id.*

93. *Id.* The *Lange* dissent criticized the majority for its blatant breach of judicial economy; the Court decided the constitutional double-jeopardy issue rather than avoiding it by ordering a refund and credit for time served. *Id.* at 184–87 (Clifford, J., dissenting).

94. *See id.* at 170–71 (majority opinion). The *Lange* Court justified its non-formalist interpretation of the life or limb element mainly by pointing out that individual rights were at stake:

There is no more sacred duty of a court than . . . to maintain . . . the personal rights of the individual . . . ; and in such cases no narrow or illiberal construction should be given to the words of the fundamental law in which they are embodied.

Id. at 178.

95. *See* Limbaugh, *supra* note 87.

96. U.S. CONST. amend. V.

97. 163 U.S. 662 (1896).

98. *Crist v. Bretz*, 437 U.S. 28, 38 (1978).

99. *Fong Foo v. United States*, 369 U.S. 141, 143 (1962) (district judge's erroneous acquittal barred second prosecution); *Ball*, 163 U.S. at 671 (jury's acquittal barred second prosecution).

100. *Ball*, 163 U.S. at 663.

101. *Id.*

102. *Id.* at 664.

wound within a year and a day from being shot.¹⁰³ The Supreme Court remanded the case to the circuit court.¹⁰⁴ A second grand jury indicted all three defendants, and all three pled double jeopardy.¹⁰⁵ The circuit court rejected the double-jeopardy defense, and the second jury convicted all three defendants.¹⁰⁶

Unequivocally, the *Ball* court held that double jeopardy barred retrying the acquitted defendant: “[I]n this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense.”¹⁰⁷ But double jeopardy permitted the retrial of the two defendants who were previously convicted: “[A] defendant who procures a judgment against him upon an indictment to be set aside may be tried anew upon the same indictment.”¹⁰⁸

In *Bryan v. United States*,¹⁰⁹ the Court decided whether double jeopardy barred retrial after an appellate court’s reversal of a district judge’s erroneous denial of defendant’s motion to acquit for insufficient evidence.¹¹⁰ The *Bryan* court held that double jeopardy did not bar a second trial.¹¹¹ The Court invoked the waiver rule,¹¹² which provides that a defendant waives his right to a double-jeopardy defense by requesting a new trial following the reversal of a conviction on appeal.¹¹³ The *Bryan* rule yielded anomalous results: double jeopardy barred a second prosecution if the district judge correctly acquitted for insufficient evidence, but double jeopardy did not bar a second trial if the district judge incorrectly submitted the question to a jury and an appellate court later reversed.¹¹⁴ In *Burks v. United States*,¹¹⁵ the Court concluded

103. Causation required, evidently, that the victim dies within a year and a day after being assaulted by defendant. The second indictment read: “T. Box[, the victim,] did languish, and languishing did then and there instantly die, and did then and there die within a year and a day after the infliction of the said mortal wounds as aforesaid.” *Id.* at 665. The second time the grand jury took no chances: dying instantly from an injury meant dying within a year and a day from an injury.

104. *Id.* at 664.

105. *Id.* at 665.

106. *Id.* at 665–66.

107. *Id.* at 671.

108. *Id.* at 672.

109. 338 U.S. 552 (1950).

110. *Id.* at 560.

111. *Id.*

112. *Id.*

113. *Sumpter v. DeGroote*, 552 F.2d 1206, 1210 n.14 (7th Cir. 1977).

114. *Compare Fong Foo v. United States*, 369 U.S. 141 (1962) (holding that acquittal by district judge for insufficient evidence, even though potentially

that this distinction was “purely arbitrary.”¹¹⁶ *Burks* overruled *Bryan*, holding that double jeopardy bars retrial when an appellate court finds that a trial judge should have acquitted because of insufficient evidence.¹¹⁷

An important aspect of *Burks* was its explicit rejection of the abstract double-jeopardy theories (such as waiver and continuing jeopardy)¹¹⁸ in favor of the policy-balancing test in *United States v. Tateo*.¹¹⁹ The *Tateo* court stressed that policy controls double-jeopardy analysis.¹²⁰ The analysis balances “the defendant’s interest in repose and society’s interest in the orderly administration of justice.”¹²¹ Double jeopardy should protect against wearing down an innocent defendant with repeated prosecution¹²² and from the prosecution “honing its trial strategies” through successive prosecution.¹²³

But courts often point out that double-jeopardy immunity can disserve defendants because appellate courts would be less likely to

erroneous, barred a second trial), *with Bryan*, 338 U.S. at 560. Indeed the Court and the circuits struggled with *Bryan*. See *Yates v. United States*, 354 U.S. 298, 328 (1957); *Sapir v. United States*, 348 U.S. 373, 374 (1955); *Sumpter*, 552 F.2d at 1211 (stating that the *Ball* rule “operates in practice as an engine of inequity when applied in cases such as *Bryan*”); *United States v. DiSilvio*, 520 F.2d 247, 249 n.3 (3d Cir. 1975) (refusing to follow *Bryan*).

In the *Bryan* line of cases, the Court seemed to make a hyper-technical distinction. See *Burks v. United States*, 437 U.S. 1, 11 (1978). Double jeopardy bars retrial when an appellate court orders a judgment of acquittal *and* defendant did not ask for a new trial, but if defendant asks for a new trial (even in the alternative) defendant waives his or her claim to a double-jeopardy defense. *Sapir*, 348 U.S. at 374. The *Bryan* line typifies what happens when courts uncritically rely on “wholly fictional” theories of double jeopardy such as termination of jeopardy, continuing jeopardy, or waiver of jeopardy. See *Green v. United States*, 355 U.S. 184, 192 (1957).

115. 437 U.S. 1 (1978).

116. *Id.* at 11.

117. *Id.* at 17–18.

118. According to the continuing jeopardy and termination of jeopardy theories, jeopardy does not terminate until after defendant is acquitted or until defendant’s appeal clock has run. *Kepner v. United States*, 195 U.S. 100, 134 (1904). Justice Holmes advanced the continuing jeopardy theory in *Kepner*. *Id.* at 134–37. It has been evoked in recent Supreme Court decisions. *Sattazahn v. Pennsylvania*, 537 U.S. 101, 109 (2003); *Lockhart v. Nelson*, 488 U.S. 33, 40 (1988).

119. *Tateo*, 377 U.S. 463, 466 (1964), *cited in Burks*, 437 U.S. at 15 n.9. See also *Green*, 355 U.S. at 192.

120. *Tateo*, 377 U.S. at 466.

121. *Lockhart*, 488 U.S. at 48 (Marshall, J., dissenting).

122. *Green*, 355 U.S. at 187.

123. *Tibbs v. Florida*, 457 U.S. 31, 41 (1982); *Amar*, *supra* note 84, at 1822.

overturn trial court decisions if reversal resulted in immunity from further prosecution.¹²⁴ Commentators and courts have thus argued that these interests control double-jeopardy considerations.¹²⁵ The point to keep in mind when considering the Minnesota Supreme Court's decision in *Hankerson* is that mechanically applying "conceptual abstractions,"¹²⁶ such as termination of or continuing jeopardy, is a slippery business.¹²⁷

Specifically, the *Hankerson* majority relied on two post-*Burks* decisions that used the continuation of jeopardy theory, *Sattazahn v. Pennsylvania*¹²⁸ and *Lockhart v. Nelson*.¹²⁹ In *Sattazahn*, the jury deadlocked as to whether an aggravating factor was present.¹³⁰ In the absence of an aggravating factor, the court was forced to sentence the defendant to life imprisonment rather than impose the death penalty.¹³¹ After the defendant's conviction was overturned, a second jury found the aggravating factor after retrial, and the defendant was sentenced to death.¹³² The death sentence was not barred by double jeopardy because *absent an acquittal* of the aggravating factor, jeopardy had not terminated.¹³³

In *Lockhart*, the defendant received an enhanced sentence because of four prior convictions, but the defendant had actually been pardoned of one.¹³⁴ Three years after conviction, a federal court "declared the enhanced sentence to be invalid."¹³⁵ The State intended to resentence Lockhart based on another prior

124. *Tateo*, 377 U.S. at 466.

125. "[O]f greater importance than the conceptual abstractions employed to explain the *Ball* principle are the implications of that principle for the sound administration of Justice." *Id.* Even when the Supreme Court has heavily relied on the termination of jeopardy "conceptual abstraction," the Court has admitted that "the continuing jeopardy principle appears to rest on an amalgam of interests—e.g., fairness to society, lack of finality, and limited waiver, among others." *Price v. Georgia*, 398 U.S. 323, 329 n.4 (1970). *See also Rudstein, supra* note 71, at 195.

126. *Tateo*, 377 U.S. at 466.

127. *See, e.g., Burks v. United States*, 437 U.S. 1, 11 (1950) (explaining that a different result in the application of the double-jeopardy doctrine would occur, depending upon the level at which an error at trial was discovered).

128. 537 U.S. 101, 109 (2003).

129. 488 U.S. 33, 48 (1988).

130. *Sattazahn*, 537 U.S. at 104.

131. *Id.*

132. *Id.* at 105.

133. *Id.* at 109.

134. *Lockhart*, 488 U.S. at 36.

135. *Id.* at 37.

conviction.¹³⁶ The Supreme Court held that double jeopardy did not bar resentencing since the defendant's "conviction [was] reversed because evidence was erroneously admitted against him," not because of insufficient evidence.¹³⁷ Thus, there was no acquittal and no termination of jeopardy.¹³⁸ Note the inconsistent use of terms in *Lockhart*: "enhanced sentence" versus "conviction." The same semantic inconsistency arises in *Hankerson*.¹³⁹

To summarize, under the current "twice put in jeopardy" law, retrial of a defendant is barred by double jeopardy: (1) after an acquittal by a fact finder;¹⁴⁰ (2) after an appellate court's holding that a trial court should have acquitted because of insufficient evidence;¹⁴¹ and (3) while defendant remains convicted of the same offense.¹⁴² Double jeopardy does not bar successive prosecution when: (1) an appellate court overturns a conviction because it is against the weight of the evidence;¹⁴³ (2) a jury deadlocks as to a particular offense or element of an offense; or (3) a conviction is overturned based on a legal error.¹⁴⁴ Finally, double jeopardy does not necessarily bar the imposition of a sentence on retrial that is more severe than the sentence that was imposed for the first, overturned conviction.¹⁴⁵

136. *Id.*

137. *Id.* at 40.

138. *Id.*

139. *See infra* Part IV.A.

140. *Fong Foo v. United States*, 369 U.S. 141, 143 (1962); *Ball v. United States*, 163 U.S. 662, 671 (1896). Also, the conviction of a lesser included offense acts as an implied acquittal of the greater offense where: (1) a fact finder is authorized to find a defendant guilty of either a greater offense or the lesser included; (2) the fact finder finds the defendant guilty of the lesser included; and (3) the fact finder is silent on the greater offense. *Green v. United States*, 355 U.S. 184, 190 (1957). In such cases double jeopardy may bar retrial of the greater offense after the lesser offense conviction is overturned. *Id.*

141. *Burks v. United States*, 437 U.S. 1, 17-18 (1978).

142. *Brown v. Ohio*, 432 U.S. 161, 169 (1977) ("[T]he Fifth Amendment forbids successive prosecution . . . for a greater and lesser included offense."). This rule may be subject to a major exception when an appellate court allows a trial court to retain and retry. *See Bell v. State*, 292 S.E.2d 402, 404 (Ga. 1982); *infra* Part IV.A.

143. *Tibbs v. Florida*, 457 U.S. 31, 42 (1982).

144. *Sattazahn v. Pennsylvania*, 537 U.S. 101, 109 (2003).

145. *Stroud v. United States*, 251 U.S. 15, 18 (1919) (holding that the defendant's overturned murder conviction and life-imprisonment sentence did not bar a second conviction and a death sentence). Contrast *Stroud* with Minnesota law, which holds that a court cannot sentence a defendant who has obtained a new trial to a punishment "more onerous" than the first sentence. *State v. Holmes*, 281 Minn. 294, 296, 161 N.W.2d 650, 652 (Minn. 1968).

4. “Same Offence”¹⁴⁶

The Double Jeopardy Clause’s first element is the touchstone of double-jeopardy analysis: whether offenses are the “same offense.” *Blockburger v. United States*¹⁴⁷ provided a simple rule.¹⁴⁸ In a terse four page opinion that would eventually dominate double-jeopardy jurisprudence, the Court held that two offenses are the same offense unless each has an element that the other does not.¹⁴⁹

In *Grady v. Corbin*,¹⁵⁰ a five-to-four majority held that the definition of “same offense” was different depending on whether double jeopardy protected from successive prosecutions or cumulative punishment.¹⁵¹ According to *Grady*, in the case of successive prosecutions, two offenses are the same if the second offense contains one element of the first offense for which the state has already obtained a conviction.¹⁵² Eventually, the *Grady* dissent prevailed. In *United States v. Dixon*,¹⁵³ the Court overruled *Grady* in holding that the *Blockburger* test was the sole test for determining whether offenses are the same offense.¹⁵⁴ One effect of *Blockburger*

146. U.S. CONST. amend. V.

147. 284 U.S. 299 (1932).

148. *Id.* at 304.

149. *Id.*

150. 495 U.S. 508 (1990).

151. *Id.* at 516.

152. *Id.*

153. 509 U.S. 688 (1993).

154. *Id.* at 703–04. Note that numerous commentators have criticized the use of the *Blockburger* test as the sole same-offense test for all double jeopardy questions. Amar, *supra* note 84; Poulin, *supra* note 79. Professor Amar argues that the *Blockburger* test both under-protects and overprotects defendants from double jeopardy. Amar, *supra* note 84, at 1818–19. Under Professor Amar’s suggested definition, same offense means literally identical offense, i.e., violation of the same statute based on the same conduct. *Id.* at 1814–15 (“Same means same; and done is done—this is the obvious meaning of the Double Jeopardy Clause.”). The procedural protections that a defendant loses when a court adopts this narrow definition of same offense are made up for by Amar’s broad interpretation of the Due Process Clause. *Id.* at 1816.

Professor Poulin criticizes *Dixon* for adopting a one-size-fits-all holding when a more flexible approach is needed. Poulin, *supra* note 79, at 1214–18. *Blockburger*, Poulin argues, addressed the question of cumulative punishment, not successive prosecutions. See *Blockburger v. United States*, 284 U.S. 299, 303–04 (1932). In *Blockburger*, the defendant was convicted of selling prescription drugs after removing the drugs from their “original stamped package” and of selling prescription drugs to someone without a prescription. *Id.*

The question in *Blockburger* (like the question in all cases involving cumulative sentencing of offenses that arise out of the same transaction) was then one of legislative intent: did Congress intend the offenses to be stacked or was one

is to bar prosecution of a greater offense after a defendant has been convicted of the lesser included offense.¹⁵⁵

III. THE *HANKERSON* DECISION

A. *Statement of the Case and Facts*

In September 2002, after deliberating for eight hours, a jury convicted Dena Lyn Hankerson of first-degree criminal sexual conduct, burglary, and making terroristic threats.¹⁵⁶ Hankerson, a thirty-two-year old mother of two, knocked on the door of a home and found a twelve-year old girl babysitting two young children.¹⁵⁷ Hankerson left, but returned moments later to rape the twelve-year old girl.¹⁵⁸ According to news reports, Hankerson tried to get the victim to use drugs and offered to pay her for sex.¹⁵⁹ During the sexual assault, Hankerson punched the victim in the face, threatened to kill her, and threatened to kill the children in the victim's charge.¹⁶⁰ Hankerson stopped assaulting the victim only when the three-year old, whom the victim was babysitting, entered the room in which Hankerson was raping the girl.¹⁶¹

to supplant the other? Poulin, *supra* note 79, at 1206. Professor Poulin argues that Congress, after all, has authority to define whatever sentence it wishes so long as the defendant receives due process and the Eighth Amendment is satisfied. *Id.* Where the legislature intends that offenses arising out of the same transaction be punished separately, cumulative punishment does not offend double jeopardy. *Missouri v. Hunter*, 459 U.S. 359, 368–69 (1983).

Accordingly, *Blockburger* merely provides a default test with which to gauge whether the legislature intended cumulative punishment where the legislature did not explicitly state its intent. Poulin, *supra* note 79, at 1206. Thus, applying the *Blockburger* test in cases of successive prosecution is a story of square peg meets round hole that ends in under-protecting defendants from double jeopardy. *Id.* at 1208. Instead, Professor Poulin recommends, for cases of successive prosecutions, a broad transactional definition of same offense, counterweighted by the state's legitimate interests in successive prosecution. *Id.* at 1258–86. In other words, double jeopardy bars successive prosecution of offenses arising out of the same transaction, unless the state has a legitimate reason for the successive prosecutions. *Id.*

155. *Brown v. Ohio*, 432 U.S. 161, 166 (1977).

156. *Hankerson v. State*, 723 N.W.2d 232, 234 (Minn. 2006); Bob Burroughs, *Judge Throws Book at Woman*, RED WING REPUBLICAN EAGLE, Dec. 21, 2002, at 1.

157. Jen Cullen, *Jury: Rape Warrants Longer Sentence*, RED WING REPUBLICAN EAGLE, Aug. 25, 2007, at 1A.

158. *Id.* at 6A.

159. Burroughs, *supra* note 156, at 1.

160. *Hankerson*, 723 N.W.2d at 234.

161. Burroughs, *supra* note 156, at 15.

The victim's mother addressed the district court during the sentencing phase and explained the horrible effects of the assault on the victim.¹⁶² The mother asked that the judge impose the "largest sentence possible by law" on Hankerson.¹⁶³ The trial judge found four aggravating factors: (1) particularly cruel offense; (2) particularly vulnerable victim; (3) multiple acts of penetration; and (4) terroristic threats.¹⁶⁴ Accordingly, the judge imposed a sentence with "a 120-month upward departure from the 144-month presumptive sentence."¹⁶⁵ Hankerson appealed from the sentence.¹⁶⁶ The court of appeals affirmed the criminal sexual conduct and burglary convictions but reversed the terroristic threat conviction since the terroristic threats "arose out of a single behavioral incident," the sex crime.¹⁶⁷ On June 15, 2004, the Minnesota Supreme Court denied review of the appellate court's decision.¹⁶⁸

Nine days later the United States Supreme Court decided *Blakely*.¹⁶⁹ *Blakely* applied retrospectively because Hankerson's time to petition the Supreme Court had not expired.¹⁷⁰ Hankerson petitioned a post-conviction court for relief, asserting that the presumptive sentence should be substituted for the original sentence.¹⁷¹ The post-conviction court denied the request and scheduled a jury trial to resentence Hankerson.¹⁷² Hankerson appealed, and the Minnesota Supreme Court granted an accelerated review.¹⁷³

162. *Id.* at 1.

163. *Id.*

164. *Hankerson*, 723 N.W.2d at 237.

165. *Id.* at 234.

166. *State v. Hankerson*, No. A03-131, 2004 WL 771304, at *1 (Minn. Ct. App. Apr. 13, 2004).

167. *Id.* at *3.

168. *Hankerson*, 723 N.W.2d at 234.

169. *Blakely v. Washington*, 542 U.S. 296, 296 (2004).

170. *Hankerson*, 723 N.W.2d at 234 n.1.

171. *Id.* at 235.

172. *Id.* Strangely, the post-conviction court denied Hankerson's request to vacate her sentence. *Id.* at 239 n.4. Presumably, the court recognized that the sentence was "defective" and would have vacated it at some point before resentencing. *Id.* Justice Page considered the original sentence illegal. *Id.* at 244 (Page, J., dissenting).

173. *Id.* at 235.

B. *The Hankerson Majority's Analysis*

Hankerson raised three issues: (1) whether the 2005 amendments (and the attendant resentencing jury trial) applied retrospectively to Hankerson;¹⁷⁴ (2) whether application of the 2005 amendments was barred by the Constitution's Ex Post Facto Clause;¹⁷⁵ and (3) whether the resentencing trial was barred by double jeopardy.¹⁷⁶ The first two issues are beyond the scope of this note.¹⁷⁷ The Minnesota Supreme Court resolved all three issues in the state's favor.¹⁷⁸ The court then affirmed the post-conviction court's decision to impanel a jury to retry the aggravating factors.¹⁷⁹ On August 24, 2007, after deliberating for two hours, a jury found all four of the original aggravating factors.¹⁸⁰ The trial judge then resentenced Hankerson to the same ten-year upward departure.¹⁸¹

The *Hankerson* court based its double-jeopardy analysis on "termination of risk" logic, holding that Hankerson was not twice put in jeopardy because her jeopardy never terminated.¹⁸² The court eschewed the same offense issue, holding that the resentencing trial was a continuation of the first prosecution.¹⁸³ The court seemed to read *Sattazahn* and *Lockhart* as establishing a general rule that jeopardy is not terminated *unless* a fact finder acquits or there was insufficient evidence to submit the question to

174. *Id.*

175. U.S. CONST. art. I, § 9, cl. 3; *Hankerson*, 723 N.W.2d at 241.

176. *Id.* at 236.

177. Suffice it to say, the *Hankerson* court held that the 2005 amendments to section 244.10 subdivision 5(a) did apply to Hankerson, but the amendments to the sentencing guidelines did not. *Id.* However, the 2005-amended section 244.10 interpreted with the pre-2005-amended version of the sentencing guidelines allowed impaneling a jury for resentencing. *Id.* As to the second issue, the court held that the Ex Post Facto Clause did not bar the retrospective application of section 244.10 subdivision 5(a) because the change was procedural, not substantive, and operated to Hankerson's advantage. *Id.* at 243.

178. *Id.* at 236, 237, 243.

179. *Id.* at 244.

180. Cullen, *supra* note 157, at 6A.

181. *Id.* Judge Stacey, who presided over the original trial, told Hankerson "I'd give you more time if I could." Jen Cullen, *Leniency Denied in 'Shocking' Rape Case*, RED WING REPUBLICAN EAGLE, Oct. 13, 2007, at 6A. Verbalizing the defendant's interest in repose, perhaps, Hankerson said of her five-year-long criminal proceedings, "This has not been an easy journey." *Id.* at 1A.

182. *Hankerson*, 723 N.W.2d at 237.

183. *Id.*

the jury.¹⁸⁴ Since no fact finder had acquitted Hankerson of the aggravating factors, Hankerson's jeopardy never terminated.¹⁸⁵

Moreover, the majority's analogy with *Lockhart* seems particularly strong. The *Hankerson* majority stated that, as in *Lockhart*, the defendant's sentence was reversed but not the defendant's conviction.¹⁸⁶ Since double jeopardy did not bar resentencing in *Lockhart* and the attendant second trial to find aggravating factors, then neither did it bar resentencing and retrial in *Hankerson*.¹⁸⁷ The *Hankerson* court also cited two other decisions, one from Arizona and one from Oregon, each of which resolved the double-jeopardy issue in the same manner.¹⁸⁸

IV. ANALYSIS OF THE *HANKERSON* DECISION

A. *A Hypothetical*

Consider the following hypothetical. A defendant is charged with simple possession of a controlled substance and possession with intent to distribute, the former being a lesser included offense of the latter. A jury convicts on both counts. On appeal, the defendant successfully argues that the trial judge erred when instructing the jury on intent, and the appellate court overturns the possession with intent to distribute conviction. The appellate court leaves the conviction of the lesser included offense untouched, remands for retrial of the greater offense, *and* directs the trial court to estop the defendant from challenging his guilt as to the simple possession charge. The state need only prove intent, and failing that, the defendant will be guilty of the lesser included offense. Functionally, this is exactly what the Minnesota Supreme Court allowed except that in *Hankerson* the reversal concerned the functional equivalent of an element of an offense rather than a legislatively labeled element of an offense.

The maneuver is a two-step procedural dance; both steps are foreign to Minnesota when the reversal involves traditional elements of an offense. The first step is retain and retry—or

184. *Id.* at 238.

185. *Id.* at 238–39.

186. *Id.* at 239.

187. *Id.*

188. *Id.* at 240 (citing *Ring v. Arizona*, 536 U.S. 584 (2002); *State v. Sawatzky*, 125 P.3d 722 (Or. 2005)).

retaining a conviction of a lesser included offense and retrying only the greater offense when the greater-offense conviction is overturned. That is, a court retains a conviction of a lesser offense but retries the greater offense. If the second jury convicts on the greater offense, then the prior lesser-offense conviction merges with the second conviction. If the second jury acquits, then the first conviction stands. The second step is the prosecution's use of offensive collateral estoppel.

B. The Use of Double-Jeopardy Precedent

The first step—retrying the greater offense while retaining the conviction of the lesser offense—raises double-jeopardy concerns. *Brown v. Ohio*¹⁸⁹ stated quite plainly that the state cannot prosecute a defendant for the greater offense after successfully prosecuting the defendant for the lesser offense.¹⁹⁰ *Brown* involved a second prosecution where the state charged and successfully convicted the defendant of only the lesser offense, without charging the greater offense.¹⁹¹ Our hypothetical, and *Hankerson*, involve an overturned greater offense that was originally charged along with the lesser offense.¹⁹² *Brown* stated that “where . . . a person has been tried and convicted for a crime . . . he cannot be a second time tried . . . for the same offense.”¹⁹³ For our hypothetical and *Hankerson*, if the retrial of the greater offense is a “second time tried,” then *Brown* would bar the retrial of the greater offense without first reversing the lesser offense.¹⁹⁴ On the contrary, several states permit the retain and retry practice, but only a few decisions emanate from the particular state's supreme court.¹⁹⁵ The arguments for retain and retry in those cases mostly parallel those made in *Hankerson*. Namely, absent an acquittal, the defendant's jeopardy has not

189. 432 U.S. 161 (1977).

190. *Id.* at 166.

191. *Id.* at 162–63.

192. *Hankerson*, 723 N.W.2d at 248. *See also supra* Part IV.A.

193. *Brown*, 432 U.S. at 168.

194. *See id.* at 165.

195. *See, e.g.*, *Alley v. State*, 704 P.2d 233 (Alaska Ct. App. 1985); *State v. Rodriguez*, 7 P.3d 148 (Ariz. Ct. App. 2000); *United States v. Allen*, 755 A.2d 402 (D.C. 2000); *Bell v. State*, 292 S.E.2d 402 (Ga. 1982); *Commonwealth v. Pinero*, 729 N.E.2d 679 (Mass. App. Ct. 2000); *People v. Gonzalez*, 496 N.W.2d 312 (Mich. Ct. App. 1992); *State v. Snellbaker*, 639 A.2d 384 (N.J. Super. Ct. App. Div. 1994); *People v. Martinez*, 905 P.2d 715 (N.M. 1995); *Commonwealth v. McCane*, 539 A.2d 340 (Pa. 1988).

terminated. Consider, for example, the *Hankerson* court's double-jeopardy analysis.¹⁹⁶

As Justice Page argued in his dissent, nearly all of the double-jeopardy authority on which the majority relied involves cases where the defendant's conviction was overturned.¹⁹⁷ But the termination of jeopardy by acquittal analysis makes little sense when the defendant remains convicted, as in *Hankerson*.¹⁹⁸ Applying the acquittal test in these circumstances yields absurd results: the prosecution may prosecute a convicted criminal for the same offense ad infinitum so long as defendant is never acquitted.¹⁹⁹ Surely, the majority did not intend this. A counterargument is that while the acquittal test may not apply generally, it does apply when a defendant's conviction *or* sentence is vacated. But this is contrary to the traditional dichotomy between trials and sentencing.²⁰⁰ For double-jeopardy purposes, the ordeal of a trial "already is behind" the defendant when sentencing occurs.²⁰¹

Notwithstanding the results of the conceptual abstraction described above, does precedent, by way of analogy, support severing an aggravating factor from the underlying offense and retrying only the aggravating factor? The *Monge* majority said yes under any circumstances, including an acquittal, because sentencing hearings do not trigger double-jeopardy concerns.²⁰² But Justice Scalia's dissent argued that double jeopardy applies, at least in the case of an implied acquittal.²⁰³ Accordingly, the *Monge* dissent lends some support to Justice Page's argument. However, even if Scalia's *Monge* dissent has won the day as *Blakely* suggests, it can be distinguished from *Hankerson* because *Hankerson* was never acquitted of the aggravating factor.²⁰⁴ The majority can also rely on *Lockhart* to support its argument.²⁰⁵ The *Hankerson* majority stated

196. *Hankerson*, 723 N.W.2d at 236–41. See also *supra* Part III.

197. *Hankerson*, 723 N.W.2d at 250 (Page, J., dissenting). The sole exception is *Lockhart*, discussed below. See also *supra* Part III.

198. *Hankerson*, 723 N.W.2d at 238–39 (majority opinion).

199. *Id.* at 250 (Page, J., dissenting).

200. *United States v. DiFrancesco*, 449 U.S. 117, 136 (1980) (asserting that "the double jeopardy considerations that bar reprosecution after an acquittal do not prohibit review of a sentence").

201. *Id.*

202. *Monge v. California*, 524 U.S. 721, 730 (1998).

203. *Id.* at 741 (Scalia, J., dissenting).

204. *Hankerson*, 723 N.W.2d at 238–39.

205. *Lockhart v. Nelson*, 488 U.S. 33, 40 (1988) (holding that resentencing

that defendant Nelson's "sentence, but not his conviction, was reversed" in *Lockhart* just as in *Hankerson*.²⁰⁶ But the dissent interpreted *Lockhart* differently, stating that Nelson's "conviction as an habitual criminal" was reversed, unlike the situation in *Hankerson*.²⁰⁷ The answer as to whether recidivism is a separate offense or merely an enhancement lies in Arkansas state law (where Nelson was convicted),²⁰⁸ which holds that recidivism is not a separate offense.²⁰⁹

Thus, the *Hankerson* majority is correct: Nelson's sentence, but not his conviction, was reversed.²¹⁰ Indeed, it is from *Lockhart* that the *Hankerson* majority draws most of its support for its termination of jeopardy logic.²¹¹ In *Lockhart*, defendant's sentence was vacated, not for insufficient evidence, but for incorrectly admitted evidence.²¹² As the *Hankerson* majority's argument goes, the defendant's jeopardy never terminated and no double-jeopardy concerns were triggered.²¹³ Likewise, *Hankerson*'s sentence was vacated because the aggravating factors were not submitted to a jury, not because of insufficiency of evidence; and no acquittal means no termination of jeopardy.²¹⁴ Thus, *Lockhart* seems to strongly support the *Hankerson* majority.²¹⁵

Nevertheless, *Lockhart* and *Hankerson* are as similar as chalk and cheese.²¹⁶ *Lockhart* involved prior convictions, which are not

defendant after it was discovered that defendant's prior-conviction had been pardoned based on a different conviction did not violate double jeopardy).

206. *Hankerson*, 723 N.W.2d at 239.

207. *Id.* at 250 n.3 (Page, J., dissenting). Curiously, the majority states that the "dissent does not discuss *Lockhart*." *Id.* at 239.

208. *See* *Davis v. Bennett*, 400 F.2d 279, 281 (8th Cir. 1968) (holding that whether recidivism was a separate offense was a question of state law).

209. *Atkins v. State*, 701 S.W.2d 109, 112 (Ark. 1985) (interpreting the statute in effect when Nelson was sentenced).

210. *Lockhart*, 488 U.S. at 40.

211. *Hankerson*, 723 N.W.2d at 238.

212. *Lockhart*, 488 U.S. at 40.

213. *Hankerson*, 723 N.W.2d at 238.

214. *Id.*

215. *See id.*

216. "Chalk and cheese are opposed in various proverbial expressions as things differing greatly in their qualities or value, though their appearance is not unlike, and their names alliterate." 2 OXFORD ENGLISH DICTIONARY 1075 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989). *See also* *Blakely v. Washington*, 542 U.S. 296, 302 n.5 (2004) (arguing that two authorities were fundamentally different though they might appear similar at first glance, i.e., that the authorities were as "similar as chalk and cheese").

required to be submitted to a jury.²¹⁷ Retrying these issues does not involve the “hallmarks of a trial,” and does not involve the double-jeopardy concerns of jury-found aggravating factors.²¹⁸ Accordingly, *Lockhart* falls under the *Almendarez-Torres* exception.²¹⁹ This exception allows the fact of a prior conviction to be found by a judge, but not by a jury.²²⁰ Thus, *Lockhart* does not trigger the constitutional protections of jury review or double jeopardy.²²¹ *Hankerson* involved facts that must be decided by a jury in a proceeding that *will* have all of the “hallmarks of trial.” While remanding the question of recidivism to a trial court and leaving the underlying offense untouched was appropriate in *Lockhart*, it did not justify a second trial in *Hankerson*.²²²

The *Hankerson* majority also argued that jeopardy should not have been terminated because *Hankerson* still could have petitioned the United States Supreme Court for review.²²³ The court did not explain its reasoning, but the argument is probably that since the Supreme Court could have overturned *Hankerson*’s conviction, her jeopardy must not have terminated in order to allow for retrial. But why should jeopardy terminate with the possibility of direct review rather than with the possibility of collateral attack? After all, whether a conviction is overturned on direct or collateral attack does not enter into the double-jeopardy calculus.²²⁴ Following this logic to its end, double jeopardy would not protect, e.g., a defendant convicted of a lesser included offense from being prosecuted for the greater offense years after the first conviction,²²⁵ because jeopardy would not have terminated. The Minnesota Supreme Court’s termination of jeopardy analysis is reminiscent of the overly mechanical application of the waiver theory that led to the *Bryan* rule.²²⁶

217. *Lockhart*, 488 U.S. at 42.

218. *Monge v. California*, 524 U.S. 721, 726 (1998).

219. *Apprendi v. New Jersey*, 530 U.S. 466, 488 (2000) (citing *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)).

220. *Id.*

221. *See Monge*, 524 U.S. at 734.

222. *Lockhart*, 488 U.S. at 42.

223. *Hankerson v. State*, 723 N.W.2d 232, 239 (Minn. 2006).

224. *United States v. Tateo*, 377 U.S. 463, 466 (1964).

225. In *Tateo*, the defendant served seven years before overturning his appeal on collateral attack, and being retried. *See United States v. Tateo*, 214 F. Supp. 560, 562 (S.D.N.Y. 1963). In *Lockhart*, it was “several” years. *Lockhart*, 488 U.S. at 37.

226. *Bryan v. United States*, 338 U.S. 552, 559–60 (1950) (noting that where an

Instead of becoming mired in semantics, analyzing policy interests is mandated by the Supreme Court.²²⁷ Policy suggests that double jeopardy should apply in *Hankerson*. When Hankerson was resentenced, she was already tried and convicted of criminal sexual conduct.²²⁸ Society's interest in preventing the guilty from going free is thus minimal. Hankerson, on the other hand, endured a second trial.²²⁹ Moreover, the state did not indicate that it intended to seek a departure from the presumptive sentence until *after* Hankerson was convicted.²³⁰ In short, the state received the benefits of having honed its strategy during the first trial but bore no risk at the second trial because Hankerson always remained convicted. The state got a second bite of the apple after having already swallowed the first. Of course, the state has a legitimate interest in seeing that convicted criminals are punished according to the offense that they committed, including all aggravating factors.

The counter to this point regarding the state's interest is that the interest could be satisfied by overturning Hankerson's criminal sexual conduct conviction and retrying it and the aggravating factors. If a second trial would be too risky for the state, e.g., a key witness's testimony can no longer be obtained, the state could always reassess its position and elect that Hankerson remain convicted of the lesser offense. Instead, the Court implicitly endorsed the doctrine of retain and retry.²³¹ In other words, if aggravating factors are really the functional equivalent of traditional elements, this begs the question of whether the state may retain a conviction of a traditional lesser offense and retry just the overturned greater offense.

accused, after a verdict of guilty and within five days, renewed a motion for acquittal and for a new trial and both motions were denied, then the reviewing court on reversing the conviction for lack of evidence has power to order a new trial if it believes that justice would be best served).

227. See *Tateo*, 377 U.S. at 466 (analyzing various theories advanced to support the permissibility of a defendant's right to retrial).

228. *Hankerson*, 723 N.W.2d at 234.

229. *Id.* at 243-44.

230. *Id.* at 244 (Page, J., dissenting). Interestingly, the majority stated, "if the state in the first trial had not sought an aggravated sentence . . . double jeopardy might prevent retrial . . ." *Id.* at 238. Evidently, the *Hankerson* majority considered the post-jury-conviction sentencing hearing part of the "first trial." This argument is specious: double jeopardy primarily protects from the stress and rigors of a jury trial that decides guilt or innocence. See *United States v. DiFrancesco*, 449 U.S. 117, 136 (1980).

231. See *supra* Part IV.B for discussion of retain and retry doctrine.

C. *Offensive Collateral Estoppel*

1. *Basics and Supreme Court Precedent*

The second step in the *Hankerson* dance, offensive collateral estoppel, raises Sixth Amendment jury rights issues, Fourteenth Amendment due process rights issues, and, arguably, double-jeopardy issues.²³² *Hankerson's* resentencing involved the functional equivalent of offensive collateral estoppel: Hankerson could not challenge her conviction for criminal sexual conduct during the second trial.²³³

Collateral estoppel prohibits an identical issue from being relitigated when the issue has been decided in a previous litigation.²³⁴ Collateral estoppel, at least in civil proceedings, may operate offensively as well as defensively.²³⁵ The doctrine operates *defensively* when a party asserting a claim or prosecution is estopped from litigating an issue that the party lost in a prior litigation.²³⁶ The doctrine operates *offensively* when a party asserting a claim or prosecution uses it to *establish* an issue of the party's claim.²³⁷ Courts disfavor offensive collateral estoppel.²³⁸ In the past, civil collateral estoppel required that the party using it, and the party against whom it was used, both be parties to the prior litigation.²³⁹ In many jurisdictions, "strangers" to the prior litigation can use the prior litigation's results offensively or defensively.²⁴⁰ Finally,

232. U.S. CONST. amends. VI, XIV. *See, e.g.*, *United States v. Gallardo-Mendez*, 150 F.3d 1240, 1244 (10th Cir. 1998); *United States v. Pelullo*, 14 F.3d 881, 896 (3d Cir. 1994).

233. Presumably, Hankerson would have challenged the conviction during the second proceeding, because she continued to maintain her innocence after being sentenced in 2002. *Burroughs*, *supra* note 156, at 15.

234. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979). In most jurisdictions, collateral estoppel requires four elements: (1) the precluded issue is identical to the one in the prior litigation; (2) a final judgment on the merits; (3) the party against whom collateral estoppel is used was a party to or in privity with a party to the prior litigation; and (4) the estopped party had a full and fair opportunity to litigate the estopped issue. *Aufderhar v. Data Dispatch, Inc.*, 452 N.W.2d 648, 650 (Minn. 1990) (internal citations omitted).

235. *United States v. Mendoza*, 464 U.S. 154, 159-60 (1984).

236. *See Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 329 (1971).

237. *Parklane*, 439 U.S. at 329.

238. *See id.*

239. *Id.* at 347 (Rehnquist, J., dissenting).

240. *Aufderhar v. Data Dispatch, Inc.*, 452 N.W.2d 648, 651 (Minn. 1990) (allowing non-mutual defensive collateral estoppel); *Green v. City of Coon Rapids*,

offensive collateral estoppel can arise in two distinct procedural postures: (1) during retrial after a reviewing court has overturned a conviction; and (2) during a second, completely separate, prosecution.²⁴¹ The posture in *Hankerson* is of the first type.²⁴²

In *Ashe v. Swenson*,²⁴³ the United States Supreme Court held that collateral estoppel is inherent in the Fifth Amendment's protection against double jeopardy.²⁴⁴ Ashe was charged with robbing one of six poker players.²⁴⁵ The state's evidence did not convince the jury that Ashe was one of the robbers, and the jury acquitted Ashe.²⁴⁶ The prosecution admitted that this first trial was nothing more than a "dry run," and charged Ashe with robbing one of the other six poker players.²⁴⁷ Evidently, the state believed that it had six chances to convict Ashe, one for each poker player.²⁴⁸ In *Ashe*, the sole issue in dispute was whether Ashe was one of the robbers.²⁴⁹ The Court held that Ashe could estop the State from claiming that he was one of the robbers: the issue had already been decided by a jury, and the State could not relitigate it.²⁵⁰ Thus, *Ashe* is an example of defensive collateral estoppel.

The United States Supreme Court has not yet directly ruled on whether the prosecution may use offensive collateral estoppel.²⁵¹ In *Simpson v. Florida*,²⁵² however, the Court stated that "the prosecutor could not, while trying the case under review, have laid down the first jury verdict before the trial judge and demanded an instruction . . . that, as a matter of law" defendant was guilty of the

485 N.W.2d 712, 718 (Minn. Ct. App. 1992) (offensive collateral estoppel may be appropriate where it is not unfair to defendant).

241. Compare *State v. Scarbrough*, 181 S.W.3d 650 (Tenn. 2005) (holding that a state's offensive use of collateral estoppel at retrial would violate the defendant's right to a jury trial), with *Hernandez-Uribe v. United States*, 515 F.2d 20 (8th Cir. 1975) (holding that where the defendant had previously pled guilty to the same charge, he was precluded by collateral estoppel from relitigating an issue in a second prosecution).

242. *Hankerson v. State*, 723 N.W.2d 232, 234 (Minn. 2006).

243. 397 U.S. 436 (1970).

244. *Id.* at 445.

245. *Id.* at 437.

246. *Id.* at 439.

247. *Id.* at 447.

248. See *id.* at 441.

249. *Id.* at 438.

250. *Id.* at 446.

251. See Donald L. Catlett, Charles D. Moreland & Janet M. Thompson, *Collateral Estoppel in Criminal Cases: How and Where Does it Apply?*, 62 J. Mo. BAR 370, 372 (2006).

252. 403 U.S. 384 (1971).

particular offense.²⁵³ Notably, this comment was obiter dictum, because *Simpson* concerned defensive collateral estoppel.²⁵⁴ Also, as one commentator arguing for offensive collateral estoppel points out, the hypothetical in *Simpson* involved the use of offensive collateral estoppel in a subsequent, independent proceeding, not after a case had been remanded for retrial, as in *Hankerson*.²⁵⁵ Nevertheless, in dicta and dissents the Court has repeatedly condemned offensive collateral estoppel in criminal cases: “[A] conviction in the first prosecution would not excuse the Government from proving the same facts a second time.”²⁵⁶ Chief Justice Burger argued that if a defendant is “convicted at the first trial, presumably no court would then hold that he was thereby . . . foreclosed from litigating [an essential element of the first conviction] at the second trial.”²⁵⁷

2. *The Circuits’ and States’ Take*

With little guidance from the Supreme Court, most of the circuit courts have held that the Government may not use offensive collateral estoppel. The Third,²⁵⁸ Ninth,²⁵⁹ Tenth,²⁶⁰ and Eleventh²⁶¹ Circuits have prohibited it. In *United States v. Pelullo*, the Third Circuit based its prohibition on the Sixth Amendment’s right to a jury trial.²⁶² Offensive collateral estoppel “interferes with the power of the jury to determine every element of the crime, impinging upon the accused’s right to a jury trial.”²⁶³ This view is entirely consistent with the controlling Minnesota law: a defendant has a “right to a trial by jury and thus [is] entitled as a matter of constitutional due process to have all essential elements of the

253. *Id.* at 386.

254. *See id.* at 384.

255. Mitchell Keiter, *The Mauled Verdict: The Knoller Case Shows Why Res Judicata Should Protect Partial Convictions as Well as Acquittals*, 33 MCGEORGE L. REV. 493, 503 (2002).

256. *United States v. Dixon*, 509 U.S. 688, 710 n.15 (1993).

257. *Ashe v. Swenson*, 397 U.S. 436, 464–65 (1970) (Burger, C.J., dissenting).

258. *United States v. Pelullo*, 14 F.3d 881, 896 (3d Cir. 1994).

259. *United States v. Smith-Baltiher*, 424 F.3d 913, 920 (9th Cir. 2005).

260. *United States v. Gallardo-Mendez*, 150 F.3d 1240, 1244 (10th Cir. 1998).

261. *United States v. Harnage*, 976 F.2d 633, 636 (11th Cir. 1992).

262. *Pelullo*, 14 F.3d at 896.

263. *Id.* (citing *State v. Ingenito*, 432 A.2d 912, 915–16 (N.J. 1981)).

crime proven to the jury's satisfaction by proof beyond a reasonable doubt."²⁶⁴

Other circuits have based their holdings on the Due Process Clause.²⁶⁵ The Tenth Circuit balanced the interests of the two stakeholders—the defendant and the government—and found the defendant's stake weightier.²⁶⁶ While judicial economy justified the use of offensive collateral estoppel in civil cases, it did not justify its use in criminal proceedings.²⁶⁷ Minnesota's own Eighth Circuit is the only circuit to have endorsed the use of offensive collateral estoppel.²⁶⁸

The states have taken a similarly negative view of offensive collateral estoppel in criminal cases.²⁶⁹ The New Jersey Supreme Court held that when offensive collateral estoppel is used, "the jury's capacity to discharge fully its paramount deliberative and decisional responsibilities is irretrievably compromised."²⁷⁰ The Michigan Supreme Court emphasized the need to give the second jury the ability to make its own judgment on all elements of the offense.²⁷¹

3. *Argument Against Offensive Collateral Estoppel*

Notwithstanding the chorus of opinions prohibiting the use of offensive collateral estoppel in criminal cases, policy does lend some support to the practice. The first such policy rationale is

264. *State v. Bluhm*, 457 N.W.2d 256, 260 (Minn. Ct. App. 1990), *rev'd on other grounds*, 460 N.W.2d 22, 24 (Minn. 1990).

265. *E.g.*, *Gallardo-Mendez*, 150 F.3d at 1246 (arguing that the use of a guilty plea by the government to collaterally estop a defendant from relitigating an issue in a later proceeding violates the Due Process Clause).

266. *Id.* at 1244.

267. *Id.*

268. *Hernandez-Uribe v. United States*, 515 F.2d 20, 22 (8th Cir. 1975). *Hernandez-Uribe* is also notable because it involved a situation where the prosecution used collateral estoppel in a second prosecution completely separate from the prior prosecution rather than during the retrial of an overturned conviction. *Id.* at 21. One commentary has put forth a strong argument for allowing the prosecution to use offensive collateral estoppel. Keiter, *supra* note 255, at 503–04.

269. *Gutierrez v. Superior Court*, 29 Cal. Rptr. 2d 376 (Ct. App. 1994); *People v. Goss*, 521 N.W.2d 312 (Mich. 1994); *State v. Johnson*, 594 A.2d 1288 (N.H. 1991); *State v. Ingenito*, 432 A.2d 912 (N.J. 1981); *State v. Scarbrough*, 181 S.W.3d 650 (Tenn. 2005).

270. *Ingenito*, 432 A.2d at 916.

271. *Goss*, 521 N.W.2d at 316.

judicial economy.²⁷² Offensive collateral estoppel would free up court resources.²⁷³ Avoiding inconsistent jury verdicts, and the concomitant appearance of jackpot justice, is also a good reason for advocating offensive collateral estoppel.²⁷⁴ Proponents of offensive collateral estoppel in criminal cases have suggested that a court should balance various factors to determine whether to allow collateral estoppel in a particular instance.²⁷⁵ These factors include: (1) whether the issue and defendant are identical; (2) whether defendant had full and fair opportunity to litigate the issue; (3) whether the prior charge was a felony; (4) whether the sentence in the prior proceeding was serious enough to motivate the defendant to mount a full defense or appeal; and (5) whether the prosecution acted in bad faith.²⁷⁶

But, as discussed above, these policy concerns may not be enough when balanced against a criminal defendant's interests. In particular, the concern for consistent jury verdicts is moot in criminal cases where the jury, in spite of clear facts to the contrary, may find the defendant not guilty simply to quash the prosecution.²⁷⁷ On balance, judicial economy pales in comparison to a defendant's and society's stake in maintaining a judicial system that reasonably ensures innocent defendants are not convicted.

At least one commentator has suggested that the United States Supreme Court may have implicitly endorsed offensive collateral estoppel in criminal cases.²⁷⁸ This is probably not the case. In *Neder v. United States*,²⁷⁹ the trial court erroneously withheld an element of an offense from the jury.²⁸⁰ The Court held that the error of failing to submit an element to a jury was susceptible to harmless-error analysis.²⁸¹

So, as an example, return to the possession-with-intent hypothetical described above.²⁸² Assume that the judge fails to

272. *Scarborough*, 181 S.W.3d at 654.

273. *See id.* at 654–55.

274. *See id.* at 654 (stating that the doctrine of collateral estoppel “prevents inconsistent decisions”).

275. *Id.*

276. *Id.*

277. *See Amar, supra* note 84, at 1843–44 (discussing jury nullification in the context of double jeopardy).

278. Keiter, *supra* note 255, at 511.

279. 527 U.S. 1 (1999).

280. *Id.* at 6–7.

281. *Id.* at 15.

282. *See supra* Part IV.A.

submit the possession element to the jury, but the jury convicts anyway. A reviewing court is allowed to assume the jury's verdict concerning the intent element and to review the record to determine whether no reasonable jury could have failed to find possession. Functionally, the jury's verdict estops the reviewing court from considering the jury's findings. The argument goes as follows: if the defendant has no right to relitigate issues found by a jury when a reviewing court sits as a second fact finder, then such defendant should have no right to relitigate issues when a jury sits as the second fact finder.²⁸³

But why require that a single jury find every element of an offense? Simple, it makes it harder to convict. Consider the reasons for having double jeopardy, the right to a jury trial, the right to counsel, and the right to a grand jury: "They were, every one, intended to make it more difficult before the doors of a prison closed on a man because of his trial."²⁸⁴

Now consider how this works with offensive collateral estoppel. Go back to the possession-with-intent hypothetical, but assume that Vegas has called the odds: there is a fifty percent chance that the jury will find possession, a fifty percent chance that it will find intent, and that makes a twenty-five percent chance that a single jury will convict for possession with intent to distribute. The jury finds both elements, but the judge errs in instructing the jury on intent. If collateral estoppel is allowed, the State need only retry the intent element and now has a fifty percent chance of getting its

283. See Keiter, *supra* note 255, at 512.

284. The rest of Justice Black's quotation deserves reproduction:

Why did they write the Bill of Rights? They practically all relate to the way cases should be tried. And practically all of them make it more difficult to convict people of crime. What about guaranteeing a man a right to a lawyer? Of course that makes it more difficult to convict him. What about saying he shall not be compelled to be a witness against himself? That makes it more difficult to convict him. What about no unreasonable search or seizure shall be made? That makes it more difficult. They were written to make it more difficult. And what the Court does is to try to follow what they wrote, and say you've got to try people in this way. Why did they want a jury? They wanted it so they wouldn't be subjected to one judge that might hang them or convict them for a political crime, or something of that kind. And so they had juries. And they said the same thing about an indictment. That's what they put it in for. They were, every one, intended to make it more difficult before the doors of a prison closed on a man because of his trial.

The Supreme Court (PBS television broadcast Jan.-Feb. 2007), available at http://www.pbs.org/wnet/supremecourt/about/pop_transcript3.html.

possession with intent conviction. If it is not allowed, then the state is back to the twenty-five percent chance.

Such a case is the sporting theory of justice to an extreme, but it illustrates two points: (1) offensive collateral estoppel is inconsistent with the Fifth and Sixth Amendments' overarching goal of making conviction more difficult; and (2) *Neder* does not justify collateral estoppel. The first point is arguably obvious enough, so consider the second. *Neder* allows a reviewing court to depend on a jury's verdict in collateral estoppel fashion only if *no reasonable jury could not find the element*.²⁸⁵ That is, *Neder* only applies when Vegas says the odds are one hundred percent.²⁸⁶ In such a case, the element has no effect on defendant's total odds. In the example above, if intent is one hundred percent certain, and possession is fifty percent certain, then the chance of finding both intent and possession are the same as finding just the intent element: fifty percent. Thus, *Neder* is limited to the special circumstance in which submitting the element to a jury has no effect on a defendant's chances of being convicted, and does not justify offensive collateral estoppel.²⁸⁷

Unfortunately, the *Hankerson* court did not address any of these collateral estoppel issues. In a footnote, the court suggested the reason for this omission:

Hankerson also argues that on remand the state should have to retry all elements of the offenses for which she was convicted. But Hankerson did not seek review of this issue and she does not base this argument on double jeopardy grounds. Further, our own cases involving remands to correct erroneous sentences have limited the remand to resentencing, without a retrial on the underlying charges.²⁸⁸

Hankerson was arguably correct in not basing her argument on double-jeopardy grounds. None of the cases discussed above

285. *Neder v. United States*, 527 U.S. 1, 17 (1999) (holding that "where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless.").

286. *See id.*

287. *See id.* at 19 (stating that if the record contains no evidence that could rationally lead to a contrary finding with respect to the omitted element, no constitutional rights are denigrated by disallowing offensive collateral estoppel).

288. *Hankerson v. State*, 723 N.W.2d 232, 240 n.5 (Minn. 2006) (citations omitted).

rejected offensive collateral estoppel on double-jeopardy grounds. But, there is at least one double-jeopardy argument against offensive collateral estoppel in criminal cases. The Double Jeopardy Clause states “nor shall any *person*” be subject to double jeopardy.²⁸⁹ It grants rights to defendants, not to the state. If a defendant’s right to use collateral estoppel comes from the Double Jeopardy Clause, then from where does the prosecution’s right to use collateral estoppel come? One answer is that since the Fifth Amendment grants defendants the right to use collateral estoppel, it impliedly denies the state the right to use it, *expressio unius est exclusio alterius*.²⁹⁰ Or, to put it more figuratively, to draw from the Fifth Amendment a conclusion that so empowers the state at defendants’ expense borders on the perverse.

But even if *Hankerson* had sought review of the offensive collateral estoppel issue, the *Hankerson* court might well have rejected the argument based on the dichotomy between the sentencing elements and the elements of an offense.²⁹¹ Indeed, all of the case law on collateral estoppel cited above involved traditional elements of offenses, not *Blakely*-anointed elements of offenses.²⁹² But does this dichotomy withstand *Blakely*? Should offensive collateral estoppel be viewed differently when aggravating factors rather than traditional elements of an offense are retried? No, because aggravating factors are the functional equivalent of an offense, and offensive collateral estoppel involves the same Sixth Amendment jury right that was invoked in *Apprendi*.²⁹³ But what if the defendant has requested a bifurcated trial, and essentially waived her right to have a single jury find all elements in one sitting? Surely, a defendant should not be given the chance to undo this waiver. In any case, the Minnesota Supreme Court only hinted at its opinion concerning these issues in *Hankerson*.²⁹⁴

289. U.S. CONST. amend. V (emphasis added).

290. *Expressio unius est exclusio alterius* is an interpretive canon holding that to express or include one thing implies the exclusion of the other. BLACK’S LAW DICTIONARY 620 (8th ed. 2004).

291. See *Hankerson*, 723 N.W.2d at 240 n.5 (commenting that the previous cases “involving remands to correct erroneous sentences have limited the remand to resentencing, without a retrial on the underlying charges”).

292. See, e.g., *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Neder*, 527 U.S. at 16; *People v. Goss*, 521 N.W.2d 312 (Mich. 1994); *State v. Scarbrough*, 181 S.W.3d 650 (Tenn. 2005).

293. See *Apprendi*, 530 U.S. at 476.

294. See *Hankerson*, 723 N.W.2d at 237–40.

D. Avoided Issue: How Do Aggravating Factors Factor in Double Jeopardy?

Although the *Hankerson* court disposed of the double-jeopardy issue by holding that Hankerson's jeopardy had not terminated,²⁹⁵ it did not define the role of aggravating factors for same-offense analysis. For example, may the state re-prosecute an individual with an aggravating "vulnerable victim" factor after a prior jury has acquitted on that individual aggravating factor? What if the jury acquitted defendant of *all* aggravating factors? These situations are likely to occur when a reviewing court overturns a conviction.

The Washington Supreme Court addressed the issue in *State v. Benn*.²⁹⁶ The state charged defendant Benn with murder for shooting and killing Jack Dethlefsen and Michael Nelson.²⁹⁷ Along with murder, the state alleged two aggravating factors: the murders were a "single act" and the murders were "part of a common scheme or plan."²⁹⁸ The jury convicted, found the "common scheme" aggravating factor, but left the jury verdict form blank as to the "single act."²⁹⁹ The trial court sentenced Benn to death, but a federal district court granted a petition for a writ of habeas corpus and vacated the conviction.³⁰⁰

The state recharged Benn with murder and the "single act" aggravating factor.³⁰¹ The second jury found Benn guilty of murder and found the "single act" aggravating factor.³⁰² Benn appealed from the sentence, claiming that double jeopardy barred submitting the "single act" aggravating factor to the second jury.³⁰³ In particular, Benn argued that the first jury's blank verdict on the "single act" element was an implied acquittal and therefore double

295. *Id.* at 237–38 ("Where, as here, a defendant is convicted of murder and sentenced to life imprisonment, but appeals the conviction and succeeds in having it set aside, we have held that jeopardy has not terminated, so that the life sentence imposed in connection with the initial conviction raises no double-jeopardy bar to a death sentence on retrial.") (quoting *Sattazahn v. Pennsylvania*, 537 U.S. 101, 106 (2003)).

296. 165 P.3d 1232, 1233 (Wash. 2007).

297. *Benn v. Wood*, No. C98-5131RDB, 2000 WL 1031361, at *1 (W.D. Wash. June 30, 2000).

298. *Benn*, 165 P.3d at 1233.

299. *Id.*

300. *Id.* (citing *Benn*, 2000 WL 1031361, at *5).

301. *Id.* at 1234.

302. *Id.*

303. *Id.*

jeopardy barred retrial.³⁰⁴ The State argued that “double jeopardy does not apply to aggravating factors.”³⁰⁵ The Washington Court of Appeals held that double jeopardy barred retrying the “single act” aggravating factor.³⁰⁶

The Washington Supreme Court disagreed.³⁰⁷ The court held that double jeopardy does not apply to individual aggravating factors.³⁰⁸ The only way double jeopardy applies to aggravating factors is when the jury acquits on *all of the factors* submitted to it.³⁰⁹ The court based its reasoning on Scalia’s *Sattazahn* plurality opinion.³¹⁰ The court read “double-jeopardy protections attach to [an] ‘acquittal’ on the offense of ‘murder plus aggravating circumstance(s)’” to imply that double jeopardy only attaches when all “aggravating circumstance(s)” are acquitted.³¹¹ But the Washington Supreme Court ignored language that it quoted: if a jury acquits “of *one or more* aggravating circumstances, double-jeopardy protections attach.”³¹² It is difficult to understand how the *Benn* court interpreted acquittal of “one or more” factors to mean acquittal of “all” factors. The *Benn* dissent is correct: “*Sattazahn* works against the majority.”³¹³

Moreover, the analysis behind *Apprendi*, *Ring*, and *Blakely* strongly clash with the *Benn* rule. *Apprendi*, *Ring*, and *Blakely* were concerned with the legislature’s ability to label a fact an aggravating factor rather than an element of an offense, and in so doing legislatively label away a defendant’s right to have a jury decide that fact.³¹⁴ Imagine that Washington has only two aggravating factors

304. *Id.*

305. *Id.*

306. *Id.* (citing *State v. Benn*, 123 P.3d 484, 489 (Wash. Ct. App. 2005), *rev’d*, 165 P.3d 1232 (Wash. 2007) (affirming the conviction, vacating the “single act” special verdict, and remanding the case for resentencing without the aggravating factor)).

307. *Id.* at 1233.

308. *Id.* at 1236.

309. *See id.*

310. *Id.* *See, e.g.*, *Commonwealth v. May*, 898 A.2d 559, 570 (Pa. 2006) (“*Sattazahn* speaks to the situation where the original jury did not find any aggravating circumstances, and, thus, the sentence of life imprisonment was statutorily mandated.”) (emphasis omitted).

311. *Benn*, 165 P.3d at 1235 (quoting *Sattazahn v. Pennsylvania*, 537 U.S. 101, 112 (2003)).

312. *Id.* (quoting *Sattazahn*, 537 U.S. at 112) (emphasis added).

313. *Id.* at 1241 (Sanders, J., dissenting).

314. *See Blakely v. Washington*, 542 U.S. 296, 299–300 (2004); *Ring v. Arizona*, 536 U.S. 584, 604–05 (2002); *Apprendi v. New Jersey*, 530 U.S. 466, 494–97 (2000).

2008]

HANKERSON V. STATE

1553

for robbery: “vulnerable victim” and “involving a gun.” Assume that the jury finds the “vulnerable victim” factor but acquits on the “involving a gun” factor. Defendant appeals and the reviewing court overturns the conviction. This hypothetical is on all fours with *Benn*, and thus, double jeopardy does not bar re-prosecution of the “involving a gun” factor.

Now suppose that the Washington legislature defined two separate offenses: robbery of a vulnerable person, and robbery with a gun. If a jury acquits defendant of robbery with a gun, then double jeopardy clearly bars a second prosecution of robbery with a gun. The *Benn* rule produces the exact problem that cases such as *Apprendi* sought to correct: the legislature does not have the power to label away defendants’ constitutional rights, be it the right to jury review or the protection against double jeopardy.³¹⁵

V. CONCLUSION

The *Hankerson* court relied on precedent that is distinguishable in critical ways from the facts and legal issues in *Hankerson*. As a result, the court reached a conclusion that undercut double-jeopardy protection and one which endorsed the prosecution’s ability to retain and retry. The *Hankerson* holding also implicitly endorsed offensive collateral estoppel in criminal cases. In effect, the prosecution was allowed to try *Hankerson*’s case piecemeal, one element of the offense at one trial and another element at a second trial. Moreover, by avoiding the “same offense” issue, the court left a number of important questions unanswered. Most importantly, it avoided deciding whether aggravating factors factor in double-jeopardy analysis.

315. *Apprendi*, 530 U.S. at 494–97.