Separate Prosecutions for Continuous Criminal Possession of a Weapon In New York--Twice in Jeopardy? People v. Okafore

Patricia A. LaFroscia

Follow this and additional works at: https://scholarship.law.stjohns.edu/jcred

Recommended Citation
Available at: https://scholarship.law.stjohns.edu/jcred/vol4/iss1/5

This Article is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in Journal of Civil Rights and Economic Development by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact lasalar@stjohns.edu.
A major tenet of the American criminal justice system, the double jeopardy doctrine,\(^1\) protects an individual from being

\(^1\) U.S. Const. amend. V. The double or former jeopardy doctrine is encompassed in the fifth amendment of the United States Constitution. See id. The amendment provides in pertinent part: “[N]or shall any person be subject for the same offence [sic] to be twice put in jeopardy of life or limb; . . . .” Id. See generally Thomas, The Prohibition of Successive Prosecutions for the Same Offense: In Search of a Definition, 71 Iowa L. Rev. 323 (1986) (analysis of historical application of double jeopardy doctrine).

The doctrine is also embraced in the New York State Constitution. N.Y. Const. art. I, § 6. It reads in pertinent part that “No person shall be subject to be twice put in jeopardy for the same offense; . . . .” Id. New York has also enacted a statutory bar to a second prosecution for the same offense. See N.Y. Crim. Proc. Law § 40.20 (McKinney 1981 & Supp. 1988). It provides in relevant part:

1. A person may not be twice prosecuted for the same offense.
2. A person may not be separately prosecuted for two offenses based upon the same act or criminal transaction unless:
   (a) The offenses as defined have substantially different elements and the acts establishing one offense are in the main clearly distinguishable from those establishing the other; or
   (b) Each of the offenses as defined contains an element which is not an element of the other, and the statutory provisions defining such offenses are designed to prevent very different kinds of harm or evil; . . . .

Id.
placed twice in jeopardy for the same offense. This doctrine, while affording the accused party an extraordinary remedy, demands an exacting definition of discrete criminal conduct.

See *Brown v. Ohio*, 432 U.S. 161, 164 (1977). This prohibition dates back to early common law. *Id.* at 165. See *People v. Michael*, 48 N.Y.2d 1, 394 N.E.2d 1134, 420 N.Y.S.2d 371 (1979). The double jeopardy rule of law is so essential to a criminal proceeding that the failure to observe it can be raised at any time during the appellate process. *Id.* at 7, 394 N.E.2d at 1137, 420 N.Y.S.2d at 374. See also *Comment, Twice in Jeopardy*, 75 YALE L.J. 262 (1965) (discusses complexity of double jeopardy rules and exceptions).

The United States Supreme Court originally interpreted the Double Jeopardy Clause to include a protection against multiple punishment for the same offense. See *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 168-73 (1873). The *Lange* Court stated “[t]he argument seems to us irresistible, and we do not doubt that the constitution was designed as much to prevent the criminal from being twice punished for the same offense [sic] as from being twice tried for it.” *Id.* at 173. See also *Ball v. United States*, 470 U.S. 856, 861 (1985) (although defendant could be charged with both receiving and possessing firearm, Congress did not intend that he be subject to two convictions or sentences for same criminal act); *Brown*, 432 U.S. at 165 (Double Jeopardy Clause serves as constitutional restraint on courts and prosecutors). “This constitutional proscription serves primarily to preserve the finality of judgments in criminal prosecutions and to protect the defendant from prosecutorial overreaching.” *Garrett v. United States*, 471 U.S. 773, 795 (O'Connor, J., concurring), reh'g denied, 473 U.S. 927 (1985). But cf. *Note, Double Jeopardy, Due Process and the Breach of Plea Agreements*, 87 COLUM. L. REV. 142, 147-48 (1987) (Supreme Court has not set forth test for consistent application of Double Jeopardy Clause).

An analysis of legislative intent is required to determine whether a defendant can be punished twice for the same offense. See, e.g., *Garrett*, 471 U.S. at 779 (Congress intended the Continuing Criminal Enterprise offense to be separate crime punishable in addition to, not as substitute for, the predicate offense); *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 224 (1952) (single course of conduct does not constitute more than one offense under § 15 of the Fair Labor Standards Act); *Blockburger v. United States*, 284 U.S. 299, 303-04 (1932) (single sale of morphine creates two distinct offenses under the Narcotics Act: sale not in or from original stamped package and sale not pursuant to written order of person to whom drug is sold); *In re Snow*, 120 U.S. 274, 285 (1887) (cohabitation with more than one woman is a continuous crime subject to one prosecution per congressional act); *Crepps v. Durden*, 2 COWP. 640, 646 (K.B. 1777) (sale of 4 loaves of bread in violation of statute prohibiting “worldly labor . . . on the Lord's day” constitutes one offense).

See N.Y. CRIM. PROC. LAW § 40.10, commentary at 243-45 (McKinney 1981). “One of the great substantive advantages of this right is that if one is entitled to it, then the sanction . . . [or] the corrective action is dismissal of the charges and no prosecution.” *Id.* at 244.

A single persisting criminal enterprise or a continuous course of criminal conduct mandates a single prosecution. *Id.*

The offense [sic] of cohabitation, in the sense of this statute, is committed if there is a living or dwelling together as husband and wife. It is, inherently, a continuous offense [sic], having duration; and not an offense [sic] consisting of an isolated act.” *In re Snow*, 120 U.S. 274, 281 (1887). “A distinction is laid down in adjudged cases and in textwriters be-
court's perception of the nature of a crime, as well as its interpretation of the statutory language prohibiting that crime, is crucial to the identification of "same offense" within the meaning of the double jeopardy prohibition. The definition becomes more com-
tween an offence [sic] continuous in its character . . . and a case where the statute is aimed at an offence [sic] that can be committed une ictu." Id. at 286. See, e.g., Brown, 432 U.S. at 161. The crimes of joyriding and auto theft, as defined by the Ohio Court of Appeals, "constitute 'the same statutory offense' within the meaning of the Double Jeopardy Clause." Id. at 168. "The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units." Id. at 169; United States v. Universal CIT Credit Corp., 344 U.S. 218, 224 (1952) (corporation, division operation manager and two branch managers only prosecuted once for course of conduct violating Fair Labor Standards Act); Braverman v. United States, 317 U.S. 49, 53 (1942) (an agreement to commit multiple offenses constitutes only one act of conspiracy); Barber v. Plumadore, 86 App. Div. 2d 710, 710, 446 N.Y.S.2d 559, 540 (3d Dep't 1982) (illegal taking and possessing of wild deer constitutes single persisting criminal enterprise; prosecution on that charge bars separate charge for conspiracy); But cf. Garrett, 471 U.S. at 790 ("We have steadfastly refused to adopt the 'single transaction' view of the Double Jeopardy Clause."); Universal CIT Credit Corp., 344 U.S. at 226 (Douglas, J., dissenting) ("The Act does not speak of 'course of conduct.' That is the Court's terminology, not the Act's."); Ebeling v. Morgan, 237 U.S. 625, 629 (1915) (one who successively cut and opened six United States mail bags committed six distinct offenses which are separately punishable).

Criminal possession of a weapon in the third degree under N.Y. Penal Law § 265.02(4) is a continuing offense. See Johnson, 69 N.Y.2d at 152, 505 N.E.2d at 243, 512 N.Y.S.2d at 800. See generally N.Y. CRIM. PROC. LAW § 40.20, commentary at 247-49 (McKinney 1981) (discussing New York interpretation of discrete criminal conduct); CALLAGHAN, CRIMINAL LAW IN NEW YORK § 8:03 (5th ed. 1988) (same).

Separate prosecutions are warranted when distinct offenses have been violated. See Blockburger, 284 U.S. at 302. Successive sales of forbidden drugs constitute distinct offenses regardless of how closely they follow each other. Id. The distinction is evident "when the impulse is single, but one indictment lies, no matter how long the action may continue. If successive impulses are separately given, even though all unite in swelling a common stream of action, separate indictments lie." Id. (quoting WHARTON'S CRIMINAL LAW § 34 (11th ed.)); see United States v. Gugino, 6 F.2d 2 (2d Cir. 1988) (Congress intended separate prosecutions and punishments for fraudulent uses of counterfeit access devices and unauthorized access devices; two deemed not mutually exclusive). Cf. Universal CIT Credit Corp., 344 U.S. at 224 (Fair Labor Standards Act should be read to "treat[] as one offense all violations that arise from the singleness of thought, purpose or action which may be deemed a single 'impulse' "). See generally People v. Erickson, 302 N.Y. 461, 99 N.E.2d 240 (1951) (upholds separate and cumulative sentence on sixty counts of "bookmaking"); Thomas, A Unified Theory of Multiple Punishments, 47 U. Pitt. L. Rev. 1, 12-25 (1985) (author defines "same" conduct by "unitary conduct test").

* See Johnson, 69 N.Y.2d at 152, 505 N.E.2d at 243, 512 N.Y.S.2d at 800. In Johnson, the New York Court of Appeals indicated that if the statute does not define temporal parameters, none should be implied. Id. "Criminal outlawry" should not be derived from an ambiguous implication. See Universal CIT Credit Corp., 344 U.S. at 221-22. "Particularly is this so when we construe statutes defining conduct which entail stigma and penalties and prison." Id. at 221.

The double jeopardy doctrine dictates that a question regarding dual punishment for a single offense should be resolved in favor of leniency. Comment, supra note 2, at 913-17.
plex in instances where lesser included offenses are involved.⁶

Additionally, the ordinary rule of strict construction requires that doubts in the construction of a penal statute be resolved against including borderline conduct. Id. at 317. "Cumulative punishment should be permissible only when the legislature has clearly provided for it in order to serve some legitimate purpose, not because the ancient urge to punish smolders in a judge." Id. at 321. See also Garrett, 471 U.S. at 778-86 (analyzes legislative history and statute to define "same offense"); Thomas, supra note 1, at 337 (concludes that different concerns inherent in various procedural contexts sometimes require different definitions of "same offense").

* See N.Y. CRIM. PROC. LAW § 1.20 (37) (McKinney 1981). The Criminal Procedure Law of New York provides in relevant part:

> When it is impossible to commit a particular crime without concomitantly committing, by the same conduct, another offense of lesser grade or degree, the latter is, with respect to the former, a 'lesser included offense.' In any case in which it is legally possible to attempt to commit a crime, an attempt to commit such crime constitutes a lesser included offense with respect thereto.


For a criminal defendant to be entitled to a lesser included offense charge, he must make two showings. People v. Glover, 57 N.Y.2d 61, 63, 439 N.E.2d 376, 377, 453 N.Y.S.2d 660, 661 (1982). The Glover court defined a two-prong test:

> First, it must be shown that the additional offense . . . is a “lesser included offense,” i.e., that it is of lesser grade or degree and that in all circumstances, not only in those presented in the particular case, it is impossible to commit the greater crime without concomitantly, by the same conduct, committing the lesser offense. That established, the defendant must then show that there is a reasonable view of the evidence in the particular case that would support a finding that he committed the lesser offense but not the greater.

People v. Okafore

The New York Court of Appeals has struggled with the identification of a lesser included offense as it relates to the constitutional issue of double jeopardy. The question is particularly troublesome in the context of the state's statutory scheme for criminal possession of a weapon: Can the continuous possession of a firearm provide the basis for two separate prosecutions? If it can,

* supra note 1, at 357 (double jeopardy a more difficult issue when initial conviction is for lesser included offense of crime subsequently charged).

† See Llewelyn, 136 Misc. 2d at 551, 518 N.Y.S.2d at 887. There exist two definitions of a lesser included offense. Id. The first, a lesser included offense within the double jeopardy context, is governed by constitutional strictures. Id. The second is defined by the Criminal Procedure Law. Id. See Johnson v. Morgenthau, 69 N.Y.2d 148, 505 N.E.2d 240, 512 N.Y.S.2d 797 (1987). Criminal possession of a weapon in the fourth degree, N.Y. Penal Law § 265.01, is a lesser included offense of criminal possession of a weapon in the third degree, N.Y. Penal Law § 265.02. Further, it “constitutes the same crime for double jeopardy purposes.” Id. at 152, 505 N.E.2d at 243, 512 N.Y.S.2d at 800 (emphasis added). But see People v. Rodriguez, 115 App. Div. 2d 337, 343-48, 496 N.Y.S.2d 448, 452-55 (2d Dep't 1985) (Lazar, J., dissenting) (defendant's conviction for criminal possession of a weapon in the third degree should be reversed because an element of the offense not alleged and proved; indictment should be dismissed because defendant had not been charged with criminal possession of a weapon in fourth degree, a crime not considered a lesser included offense of crime charged) (emphasis added), rev'd, 68 N.Y.2d 674, 496 N.E.2d 682, 505 N.Y.S.2d 593 (1986). The N.Y. Court of Appeals reversed “for reasons stated in the dissenting opinion of Justice Leon D. Lazar at the Appellate Division.” Id. See generally Brown, 432 U.S. at 168 (fifth amendment forbids successive prosecution and cumulative punishment for greater and lesser included offense); Costarelli, 374 Mass. at —, 373 N.E.2d at 1188 (nature of charged offenses is critical to defining “same” within double jeopardy context).

* See N.Y. Penal Law §§ 265.01-265.03 (McKinney 1980 & Supp. 1989). The N.Y. Penal Law provides in relevant part:

A person is guilty of criminal possession of a weapon in the fourth degree when: (1) He possesses any firearm.

†† A person is guilty of criminal possession of a weapon in the third degree when: (1) He commits the crime of criminal possession of a weapon in the fourth degree . . . , and has been previously convicted of any crime;

‡‡ (4) He possesses any loaded firearm. Such possession shall not, except as provided in subdivision one, constitute a violation of this section if such possession takes place in such person's home or place of business.

§§ A person is guilty of criminal possession of a weapon in the second degree when he possesses a machine-gun or loaded firearm with intent to use the same unlawfully against another.

Id.

* See Johnson, 69 N.Y.2d at 152, 505 N.E.2d at 242-43, 512 N.Y.S.2d at 800. Unlawful possession of a weapon at different times and places during a six day period is a continuing offense. Id. Constitutional double jeopardy principles bar a second prosecution. Id. Possessory crimes are defined in terms of “dominion” and “control.” Id. at 152, 505 N.E.2d at 243, 512 N.Y.S.2d at 800 (quoting N.Y. Penal Law § 10.00(8)). See also People v. Al-
how does the lesser included jigsaw piece fit into the big puzzle? recently, in people v. okafore, the new york court of appeals held that criminal possession of a weapon in the second degree provided the basis for two separate prosecutions where the possession was uninterrupted and spanned a one-hour period. the court refused to recognize criminal possession of a weapon in the third degree as a lesser included offense of the second degree

modovar, 62 n.y.2d 126, 130, 464 n.e.2d 463, 465, 476 n.y.s.2d 95, 97 (1984) (unlawful use of weapon punishable as separate offense from unlawful possession of weapon). the illegal conduct defined in the penal law is the act of possessing a weapon unlawfully. id. (quoting n.y. penal law §§ 265.01-265.05). the possessory crime is complete once the unlawful possession of the weapon is established. id. cf. pemberton v. turner, 124 app. div. 2d 358, 340, 508 n.y.s.2d 294, 296 (3d dept' 1986) (defendant's retrieval and repossession of gun constituted new possessory crime separate from initial offense). see generally ball v. united states, 470 u.s. 856, 862 (1985) (while a defendant may be prosecuted for illegal receipt of firearm and illegal possession of same weapon, he may not suffer two convictions or sentences involving "the same criminal act"); united states v. jones, 533 f.2d 1387, 1390 (6th cir. 1976), cert. denied, 431 u.s. 964 (1977) (single prosecution for possession of firearm on three separate occasions).

"0 see johnson, 69 n.y.2d at 152, 505 n.e.2d at 243, 512 n.y.s.2d at 800 (1987). criminal possession of a weapon in the fourth degree is a lesser included offense of criminal possession of a weapon in the third degree and constitutes the same crime for double jeopardy purposes. id. prosecution's claim that the nature of defendant's possession was not continuous because he may have possessed the weapon in his home or place of business is rejected. id. at 152. see people v. perez, 128 app. div. 2d 410, 512 n.y.s.2d 695 (1st dept' 1987). "since it is impossible to possess a loaded firearm without concomitantly possessing a firearm, criminal possession of a weapon in the fourth degree is clearly a lesser included offense of criminal possession of a weapon in the third degree." id. at 411, 512 n.y.s.2d at 696. but see rodriguez, 68 n.y.2d at 674, 496 n.e.2d at 682, 505 n.y.s.2d at 594; people v. ali, 36 n.y.2d 880, 334 n.e.2d 11, 372 n.y.s.2d 212 (1975); people v. llewelyn, 136 misc. 2d 525, 518 n.y.s.2d 881 (sup. ct. kings county 1987).

criminal possession of a weapon in the third degree is a lesser included offense of criminal possession of a weapon in the second degree. see pons, 68 n.y.2d at 265, 501 n.e.2d at 11, 508 n.y.s.2d at 403; people v. tejada, 101 app. div. 2d 757, 475 n.y.s.2d 400 (1st dept' 1984); people v. cole, 127 misc. 2d 415, 416, 486 n.y.s.2d 633, 635 (1985), aff'd, 131 app. div. 2d 497, 516 n.y.s.2d 112 (1987), appeal denied, 71 n.y.2d 967, 524 n.e.2d 432, 529 n.y.s.2d 78 (1988); people v. jackson, 111 app. div. 2d 648, 490 n.y.s.2d 211 (1st dept' 1985). but see people v. mcgriff, 123 app. div. 2d 646, 646, 506 n.y.s.2d 910, 911 (2d dept' 1986) (criminal possession of a weapon in the third degree is not a lesser included offense of the second degree crime); people v. witherspoon, 120 misc. 2d 648, 466 n.y.s.2d 611 (sup. ct. kings county 1983) (same). criminal possession of a weapon in the fourth degree is a lesser included offense of the second degree crime. people v. vacaro, 44 n.y.2d 885, 886, 379 n.y.e.2d 159, 159-60, 107 n.y.s.2d 631, 632 (1978). see infra note 113 and accompanying text. see generally people v. green, 56 n.y.2d 427, 437 n.e.2d 1146, 452 n.y.s.2d 389 (1982) (lesser included analysis where both offenses involved require culpable mental states).

72 n.y.2d 81, 527 n.e.2d 245, 531 n.y.s.2d 762 (1988).

id. at 87, 527 n.e.2d at 248, 531 n.y.s.2d at 765.
People v. Okafore

crime.\textsuperscript{13} Okafore appeared inconsistent with another recent decision, \textit{Johnson v. Morgenthau},\textsuperscript{14} where separate prosecutions for the continuous possession of a firearm over a six day period were barred as violating constitutional double jeopardy principles.\textsuperscript{15} In \textit{Johnson}, criminal possession of a weapon in the third degree was found to be a continuing crime.\textsuperscript{16} Further, the court deemed criminal possession of a weapon in the fourth degree a lesser included offense of third degree possession.\textsuperscript{17} In its attempt to reconcile these holdings, the \textit{Okafore} court has demonstrated ambivalence by retrenching from the \textit{Johnson} position without definitively establishing a just alternative.\textsuperscript{18}

In \textit{Okafore}, the defendant, Charles Okafore, shot and killed his estranged wife in her Bronx apartment.\textsuperscript{19} Approximately one hour later, he was met by the police at his own apartment in Manhattan, where he had returned to kill himself.\textsuperscript{20} Okafore allegedly drew the same pistol used in the Bronx, now reloaded, and pointed it at the officers as he ran away.\textsuperscript{21} He was shot, dis-
armed, and arrested by the police.\textsuperscript{22}

Okafore was indicted in Bronx County for murder in the second degree, criminal use of a weapon in the second degree and criminal possession of a weapon in the second degree.\textsuperscript{23} His subsequent conviction for manslaughter in the second degree and criminal possession of a weapon in the second degree in connection with the killing of his wife\textsuperscript{24} was affirmed by the Appellate Division.\textsuperscript{25}

During the course of the Bronx County case, Okafore was indicted in New York County for second and third degree criminal possession of a weapon premised on the threatened use of the pistol against the police in Manhattan.\textsuperscript{26} Once convicted in the Bronx, he moved to dismiss the New York County prosecution, claiming it was barred by the double jeopardy protection of both the United States Constitution and the New York Criminal Procedure Law, article 40.\textsuperscript{27} His motion to dismiss was denied by the

81, 527 N.E.2d 245, 531 N.Y.S.2d 762 (1988). Okafore's gun was established as being the weapon used to kill his estranged wife. \textit{Id.} When arrested in Manhattan, it was fully loaded. \textit{Id.}

\textsuperscript{22} Brief for Appellant at 3.


\textsuperscript{24} \textit{Id.} See Brief for Appellant at 5. During his Bronx trial, Okafore testified extensively about his emotional turmoil due to his belief that his wife and son were intimately involved. \textit{Id.} at 4. The jury was instructed on the affirmative defense of extreme emotional disturbance as well as on the lesser included offense of manslaughter in the first degree. \textit{Id.} The trial court also charged the lesser included offense of manslaughter in the second degree. \textit{Id.} at 4-5. Okafore was sentenced to two concurrent indeterminate terms of from five to fifteen years imprisonment. \textit{Id.} at 5.

\textsuperscript{25} Okafore, 72 N.Y.2d at 84, 527 N.E.2d at 246, 531 N.Y.S.2d at 763.

\textsuperscript{26} \textit{Id.}

\textsuperscript{27} \textit{Id.} Okafore asserted that the double jeopardy guarantees of the federal constitution and Article 40 of the Criminal Procedure Law barred the New York County prosecution. \textit{Id.} Okafore maintained that "criminal possession of a weapon in the second degree was a continuing, single possessory crime, with the attendant aggravating element of intent to use . . . unlawfully against another." \textit{Id.} at 5-6. He argued that his possession of the weapon and his unlawful intent concerning the weapon were unbroken during the one-hour time period between the killing in the Bronx and the arrest in Manhattan. \textit{Id.}

\textit{Id.} at 6. Okafore urged the court to recognize that acts of use, or attempted use of the weapon were not necessary elements of the possessory offense. \textit{Id.} See People v. Ruzas, 54 App. Div. 2d 1083, 389 N.Y.S.2d 205 (4th Dept 1976). The Ruzas court adopted the language of the Supreme Court and maintained that the Criminal Procedure Law does not focus on separate examinations of offenses' components. \textit{Id.} at 1083, 389 N.Y.S.2d at 206. Rather, the approach requires "looking . . . at the nature of the transaction itself." \textit{Id.} This standard enforces the double jeopardy doctrine and additionally "promotes justice, economy and convenience" by consolidating all issues related to a single transaction into one action. \textit{Id.}
People v. Okafore

court. Okafore then pleaded guilty to the second degree weapon charge in New York County in accordance with the provisions of a plea agreement. The Appellate Division affirmed the conviction without opinion.

The New York Court of Appeals granted leave to appeal, and in a four to three decision, affirmed. The majority, noting that second degree possession may encompass a continuous course of conduct, nonetheless declined to apply the continuous offense doctrine to the facts of this case. Writing for the court, Judge Simons conceded that the defendant's possession of the handgun was uninterrupted throughout the critical one-hour period. He maintained, however, that Okafore's intent constantly changed during that time. Judge Simons concluded that a new intent provided a break in the continuing nature of the crime and created discrete offenses for which the defendant could be separately

(Quoting Ashe v. Swenson, 397 U.S. 436, 454 (1970)). See also supra note 1 (discusses applicable federal and state law).

Okafore, 72 N.Y.2d at 84, 527 N.E.2d at 246, 531 N.Y.S.2d at 763. Although the prosecution did not oppose Okafore's motion to dismiss, it was summarily denied nine days after he had been sentenced on the Bronx County charges. See Brief for Appellant at 6.

Brief for Appellant at 6. Okafore was sentenced to a two to six year term to run consecutively with the prior term of five to fifteen years for the Bronx County conviction. Okafore, 72 N.Y.2d at 84, 527 N.E.2d at 246, 531 N.Y.S.2d at 763. See also infra note 87 (interview with Okafore's attorney).

Because Okafore pleaded guilty to the second degree offense, he was unable to press his statutory claim under N.Y. Crim. Proc. Law § 40.20. See People v. Prescott, 66 N.Y.2d 216, 486 N.E.2d 813, 495 N.Y.S.2d 955 (1985), cert. denied, 106 S. Ct. 1084 (1986). But cf. Note, supra note 3, at 143 (plea agreements are "constitutionally sensitive contracts, involving not only the contractual rights of defendants, but their due process and double jeopardy interests as well.").


Okafore, 72 N.Y.2d at 84, 527 N.E.2d at 246, 531 N.Y.S.2d at 763.

Id. at 90, 527 N.E.2d at 250, 531 N.Y.S.2d at 767.

Id. at 83, 527 N.E.2d at 245, 531 N.Y.S.2d at 762. Judge Simons wrote the majority opinion, in which Chief Judge Wachtler and Judges Hancock and Bellacosa joined. Id.

Id. at 87, 527 N.E.2d at 248, 531 N.Y.S.2d at 765. The Okafore court analogized possession to intent in that it may be durational in nature. Id. However, the majority noted that second degree possession, unlike third degree, spans only the period during which the defendant possesses the weapon and harbors the unlawful intent to use it against another. Id. "If either element lapses, the crime is complete. A discrete crime is committed when the defendant, having retained possession of the weapon, later forms a new criminal intent." Id. See also supra note 4 (crimes defined as either continuous courses of conduct or discrete offenses).

Okafore, 72 N.Y.2d at 87, 527 N.E.2d at 248, 531 N.Y.S.2d at 765.

Id.
prosecuted.\textsuperscript{37} The court rejected application of its recent holding in \textit{Johnson} to the present case.\textsuperscript{38} It narrowed \textit{Johnson} by limiting its relevance to cases that only involved criminal possession of a weapon in the third degree.\textsuperscript{39} The \textit{Okafore} court stressed the specific intent element of second degree criminal possession that is absent from the third degree crime.\textsuperscript{40} Insisting that Okafore had multiple intents and various intended victims, the court refused to recognize that he was continually committing a possessory offense.\textsuperscript{41} The neces-

\textsuperscript{37} \textit{Id.} at 88, 527 N.E.2d at 248-49, 531 N.Y.S.2d at 765-66. The intent to commit suicide does not support a second prosecution because the statute requires an intent to use the weapon against another. \textit{Id.} The majority interpreted \textit{Okafore}'s suicide intent as terminating the former intent (killing his wife and son) and reasoned that his initial impulse had ceased. \textit{Id.} The court concluded that \textit{Okafore} manifested a new intent to use his weapon when he was confronted by the police in Manhattan. \textit{Id.}

\textsuperscript{38} \textit{Id.} at 87, 527 N.E.2d at 248, 531 N.Y.S.2d at 765. See also infra notes 56-61 (\textit{Okafore} court construes specific intent as temporal parameter) and 101-06 (\textit{Okafore} court rejects criminal possession of weapon in third degree as lesser included offense of second degree crime) and accompanying text.

\textsuperscript{39} \textit{Okafore}, 72 N.Y.2d at 88-89, 527 N.E.2d at 249, 531 N.Y.S.2d at 766-67.

\textsuperscript{40} \textit{Id.} The court maintained that the legislature intended for the second degree criminal possession of a weapon offense to be analyzed by its specific intent element. \textit{Id.} at 89, 527 N.E.2d at 249-50, 531 N.Y.S.2d at 766-67. To define the criminal conduct of the defendant, the \textit{Okafore} court applied Blockburger. \textit{Id.} at 86-87, 527 N.E.2d at 248, 531 N.Y.S.2d at 765. It concluded that two separate impulses corresponded to two different intents, and that discrete offenses necessarily occurred. \textit{Id.} at 87-88, 527 N.E.2d at 248-49, 531 N.Y.S.2d at 765. See supra notes 4 (separate prosecutions warranted for discrete offenses) and 37 (defendant's suicidal thoughts break continuous nature of his impulse and intent).

\textsuperscript{41} \textit{Okafore}, 72 N.Y.2d at 87-88, 527 N.E.2d at 248-49, 531 N.Y.S.2d at 765-66. During the course of oral arguments in \textit{Okafore}, the court of appeals expressed its concern about the interpretation of § 265.03 as it pertained to multiple intended victims. People v. \textit{Okafore} (NY-SCAN television broadcast # 121 of N.Y. State Ct. of Appeals oral argument, April 20, 1988) (transcript on file at N.Y. Ct. of Appeals Law Library).

\textit{Judge Bellacosa:} . . . the one discrete fact . . . that you have not identified to my satisfaction as yet is that you've got separate victims as the potential targets with respect to the wrong that's classified with different culpable mental states in this case as opposed to \textit{Johnson}, do you not?

\textit{Mr. Kartagener [attorney for defendant]:} . . . The intent to use unlawfully, just like the intent of reckless endangerment . . . is a state of mind, that doesn't require, I submit, a particular identifiable victim. . . .

\textit{Judge Bellacosa:} There is a break in the continuity here in two respects: not only the different culpable mental state, but the object of that culpable mental state, isn't that so?

\textit{Mr. Kartagener:} Well, your honor, there may well be. But if I could suggest that in \textit{Pons} the court was dealing with a situation where the defendant was acquitted based on a justification defense of the actual use of the weapon against the victim . . . [A]nd the court said that he still was not entitled to [the defense for] . . . the crime of criminal possession of a weapon in the second degree, because even if he was
People v. Okafore

People v. Okafore

sity to bar prosecution on constitutional double jeopardy grounds was not acknowledged. The dissent, noting that the majority ignored the premise of Johnson. The dissent argued that as long as possession of a weapon continued uninterrupted, it was one possessory offense subject to a single prosecution. The dissent further noted that the gist of the entire comprehensive statutory scheme for possession, including second degree criminal possession of a weapon, centered on unlawful dominion and control. Acknowledging that this possessory crime is aggravated because of justified with respect to that individual victim, during the continuum of time, . . . in which he possessed the weapon, it could have been with the intent to use it unlawfully against a different other . . .

Id. (emphasis in original)

"The essence of [the offense] is not possession but the intent to use the weapon against another and the offense should not be equated to simple possessory offenses for double jeopardy purposes to 'bridge' episodes of second degree possession into a single offense." Id. at 89, 527 N.E.2d at 249-50, 531 N.Y.S.2d at 767. "Thus, based on the statute, our own recent precedents and fundamental precepts of the criminal law, we would reverse defendant's conviction on grounds of double jeopardy." Id.

The bar to re-prosecution "[e]nsures that the State does not make repeated attempts to convict an individual, thereby exposing him to continued embarrassment, anxiety, and expense, while increasing the risk of erroneous conviction or an impermissibly enhanced sentence." Ohio v. Johnson, 467 U.S. 493, 498-99 (1984), reh'g denied, 468 U.S. 1224 (1986). See Justices of Boston Mun. Court v. Lydon, 466 U.S. 294 (1984). Additionally, the double jeopardy doctrine prevents a defendant "from being subjected to multiple punishments for the same offense." Id. at 307. See Crist v. Bretz, 437 U.S. 28 (1978). A primary purpose of the Double Jeopardy Clause is the preservation of the finality of judgments. Id. at 33. In this regard, the clause is "akin" to the doctrines of res judicata and collateral estoppel. Id.

The dissent noted that application of both Braverman and Blockburger supported a single prosecution for the continuous possession of a weapon. Id. at 91, 93-94, 527 N.E.2d at 251-52, 531 N.Y.S.2d at 768-69 (Kaye, J., dissenting). Judge Kaye wrote the dissenting opinion, joined by Judges Titone and Alexander. Id. (Kaye, J., dissenting).

Id. at 91, 93-94, 527 N.E.2d at 251-52, 531 N.Y.S.2d at 768-69 (Kaye, J., dissenting). The dissent noted that application of both Braverman and Blockburger supported a single prosecution for the continuous possession of a weapon. Id. at 93, 527 N.E.2d at 252, 531 N.Y.S.2d at 768. See supra note 4 (continuous course of conduct mandates single prosecution).

People v. Confoy, 138 Misc. 2d 1049, 526 N.Y.S.2d at 352-53 (N.Y.C. Crim. Ct. Bronx County 1988). In Confoy, the defendant was charged with driving under the influence of alcohol in Bronx County as well as criminally negligent homicide in New York County, where he was involved in a hit and run accident. Id. at 1050-51, 526 N.Y.S.2d at 352-53. The court rejected his claim that his conviction for the homicide barred prosecution for the vehicular charges. Id. at 1054-55, 526 N.Y.S.2d at 355. In distinguishing Brown v. Ohio and Johnson v. Morgenthau, the Confoy court insisted that possessory crimes were legislatively defined in terms of dominion and control. Id. Hence, the time span involved became irrelevant because the possession is a continuous criminal act. Id.
the specific intent element, the dissent stressed that its essence remains possessory. While recognizing that the crime may become more serious, and be punished accordingly, Judge Kaye indicated that multiple prosecutions for the continuous possessions were impermissible. The dissent addressed a concern expressed by the People that a defendant who has possessed a weapon with a certain unlawful intent may not be allowed to threaten others. Judge Kaye noted that any use, attempted use or threatened use of the handgun supported separate prosecutions and punishments and that these were chargeable along with criminal possession of a weapon in the second degree. The dissent maintained that the defendant’s possession of a weapon with the intent to use it unlawfully against a number of people was a single, continuous course of conduct. It concluded that this rationale was consistent with the basic premise of American criminal law that no crime can be committed by evil intent alone.

It is submitted that the Okafore court incorrectly focused on the specific intent element of the crime charged and minimized the importance of the crime’s possessory nature. It is suggested that the Okafore “object of intent” analysis disregarded a major pre-


48 Okafore, 72 N.Y.2d at 91, 527 N.E.2d at 250, 531 N.Y.S.2d at 767-68 (Kaye, J., dissenting); see supra note 9 (criminal possession of weapon is continuing crime subject to single prosecution; use may be separately prosecuted).

49 Okafore, 72 N.Y.2d at 94-95, 527 N.E.2d at 253, 531 N.Y.S.2d at 770 (Kaye, J., dissenting). The dissent addressed the issue of the defendant not being given a “free ride.” Id. at 95, 527 N.E.2d at 253, 531 N.Y.S.2d at 770. See infra note 87 and accompanying text (Okafore’s attorney observed court’s concern on this issue).

50 Okafore, 72 N.Y.2d at 95, 527 N.E.2d at 253, 531 N.Y.S.2d at 770 (Kaye, J., dissenting).

51 Id. at 93-94, 527 N.E.2d at 252, 531 N.Y.S.2d at 769 (Kaye, J., dissenting). See supra note 4 (continuous course of conduct mandates single prosecution). But see supra note 41 and accompanying text (majority concern about multiple intended victims).

52 Okafore, 72 N.Y.2d at 94, 527 N.E.2d at 252, 531 N.Y.S.2d at 769 (Kaye, J., dissenting). An act or omission is required before criminal liability may attach. Id. An evil intent “cannot transform what would otherwise constitute a single crime into multiple criminal offenses.” Id. See W. LAFAVE & A. SCOTT, CRIMINAL LAW § 3.2(b) (2d ed. 1986). Evil intent, standing alone, while possibly an aggravating factor of an offense, does not support a criminal conviction. Id. at 196. In his oral argument, Mr. Kartagener drew a distinction between “discrete acts” and “discrete thoughts.” People v. Okafore, NY-SCAN television broadcast, supra note 41.
mise of American criminal jurisprudence by attaching liability for the evil thoughts of a defendant. Additionally, it is suggested that the court wrongly rejected consideration of a lesser included offense. Finally, it is submitted that the constitutional guarantee of the double jeopardy doctrine did not prevail.

I. THE OKAFORE RULE: CONSTRUING A TEMPORAL PARAMETER

A. Intent as an Aggravating Element

The Okafore court has construed the aggravating element of second degree criminal possession of a weapon, intent to use unlawfully against another, as a temporal parameter of the offense. Although the statutory language and the legislative history of the offense are non-specific regarding such a parameter, the court has imposed a construction which rejects the rule of lenity. Although the Okafore court maintained that the Johnson holding was peculiar to the third degree offense, both second and third degree criminal possession represent portions of the same statutory scheme.

The Johnson court was critical of reading a temporal or spatial parameter into a statute. In Okafore, the majority has done pre-

---

88 Okafore, 72 N.Y.2d at 89, 527 N.E.2d at 249, 531 N.Y.S.2d at 766-67. See id. at 90, 527 N.E.2d at 250, 531 N.Y.S.2d at 767 (Kaye, J., dissenting).
89 See supra note 8. The relevant statute, N.Y. Penal Law § 265.03 does not set forth a temporal parameter; rather, it is the Okafore court that construes one. See supra note 55. Section 265.03, criminal possession of a weapon in the second degree, was a part of the 1974 recodification of former section 265.05. See N.Y. Penal Law § 265.03, commentary at 475 (McKinney 1988). The new offense was defined as a felony, conviction of which mandated the imposition of an indeterminate sentence. Id. “Its purpose, as part of the Governor’s legislative program, was to discourage criminal possession and use of handguns.” Id. See N.Y. Gov. Memo. Nos. 128, 129 (1974), reprinted in [1974] N.Y. Legis. Ann. 424 “In providing stiffer penalties for those convicted of illegally possessing handguns, ... these bills will help to reduce the availability and illegal use of handguns in this State.” Id.
90 See Okafore, 72 N.Y.2d at 90, 527 N.E.2d at 250, 531 N.Y.S.2d at 767 (Kaye, J., dissenting); supra note 5. See generally Comment, supra note 2, at 313 (rule of lenity, developed by United States Supreme Court for use in single statute context, states that doubts should be resolved against creation of multiple units of conviction).
91 Okafore, 72 N.Y.2d at 83, 527 N.E.2d at 246, 531 N.Y.S.2d at 763.
93 Johnson v. Morgenthaler, 69 N.Y.2d 148, 152, 505 N.E.2d 240, 243, 512 N.Y.S.2d 797, 800 (1987). The Court of Appeals, in Johnson, noted that the legislature is free to define criminal conduct in temporal units. Id. The court pointed out, however, that al-
ciscely that, asserting that multiple unlawful intents divide that which would otherwise be a continuing offense into a series of discrete crimes. The Okafore court maintained that the legislature sought to prohibit more than simple possession when it enacted Penal Law section 265.03. The court further suggested that, unlike third and fourth degree possession, the “essence” of the second degree offense was not possession, but rather intent.

The Okafore court’s reference to People v. Almodovar sought to substantiate the court’s contention by stressing that a crime may be made more serious when it involves an element of intent. Yet, the court of appeals in Almodovar pointedly stated that the essence of the illegal conduct defined in sections 265.01 through 265.05 of the Penal Law is the act of possession. The Almodovar court stressed that any unlawful use was punishable as a separate crime.

B. The Object of Intent

The Okafore construction of criminal possession of a weapon in the second degree includes an additional dimension. The defendant’s identification of an intended victim constitutes the formulation of a discrete intent. Under the Okafore view, every time though there are instances where the legislature has done so, such is not the case with respect to possessory crimes. Id. The court concluded that it was not the legislative intent to define the charged offense, third degree criminal possession of a weapon, temporally and refused to construe the statute accordingly. Id.

Okafore, 72 N.Y.2d at 87-88, 527 N.E.2d at 248, 531 N.Y.S.2d at 765; see supra note 34.

Okafore, 72 N.Y.2d at 89, 527 N.E.2d at 249, 531 N.Y.S.2d at 766. Id.


Okafore, 72 N.Y.2d at 89, 527 N.E.2d at 249, 531 N.Y.S.2d at 766.

Almodovar, 62 N.Y.2d at 130, 464 N.E.2d at 464, 476 N.Y.S.2d at 96 (emphasis added).


Okafore, 72 N.Y.2d at 87, 527 N.E.2d at 248, 531 N.Y.S.2d at 765. See infra notes 67-68 and accompanying text.

Okafore, 72 N.Y.2d at 87-88, 527 N.E.2d at 248, 531 N.Y.S.2d at 765; see supra note 41 and accompanying text. The Okafore court demonstrated this interpretation of the N.Y. Penal Law § 265.03 throughout the course of oral arguments. See People v. Okafore (NYSCAN television broadcast # 121 of N.Y. State Court of Appeals Oral Argument, April 20, 1988).

Chief Judge Wachtler: Let’s parce it out, though, with respect to how the proof has
People v. Okafore

a defendant who possesses a weapon contemplates a different intended victim, he is subject to a new prosecution for the second degree possessory crime.\(^8\) This interpretation is neither evidenced by the legislative history of the statute,\(^9\) nor is it consistent with the statutory presumption of possession.\(^7\) The presumption allows the fact finder to infer that the defendant intended to use the weapon unlawfully against another.\(^7\) The identity of an intended victim within the presumption is irrelevant.\(^7\) The language to come in. Is there not a requirement in connection with this [second] degree of possession that the People prove an intent with respect to a particular object?

Mr. Kartagener: Absolutely not, Your Honor. Not a particular individual. I would suggest to Your Honor that the crime of possession with intent to use unlawfully . . .

—there can be circumstances that will be indicative of an individual's willingness to use a gun unlawfully, without the People being able to prove that it was going to be used unlawfully against a particular individual. . . .

Id.

\(^8\) Okafore, 72 N.Y.2d at 87-88, 527 N.E.2d at 248, 531 N.Y.S.2d at 765. "[Okafore's] possession of the handgun was uninterrupted, but his intent constantly changed during that one-hour period. Initially he intended to kill his wife and after doing so, he left to shoot his son. He subsequently abandoned that plan and returned to his apartment with the intention of taking his own life." Id. The Okafore court demonstrated its conviction on this issue by referring to a single continuous intent as a hypothetical contention. Id. at 88, 527 N.E.2d at 248-49, 531 N.Y.S.2d at 765-66. "[E]ven if it be contended that defendant had but one intention, to use the gun against his wife, his son and anyone who tried to stop him, . . . ." Id. The court implicitly rejected this contention. Id. It is submitted the Okafore court's statement that a defendant would only commit one offense if his intent was directed to "one or more of a group of people" is not supported by its analysis. Id. at 89-90, 527 N.E.2d at 250, 531 N.Y.S.2d at 767.

\(^9\) See supra note 54 and accompanying text (legislative history of second degree criminal possession of weapon does not indicate intent to construe temporal parameter).

\(^7\) N.Y. PENAL LAW § 265.15(4) (McKinney 1980). The presumption of possession for unlawful intent provides in relevant part: "The possession by any person of any dagger, dirk, stiletto, dangerous knife or any other weapon, instrument, appliance or substance designed, made or adapted for use primarily as a weapon, is presumptive evidence of intent to use the same unlawfully against another." Id.


There are cases where the legal presumption is unnecessary and the circumstances of the possession necessitate the conclusion of imputability. Robinson, Imputed Criminal Liability, 95 YALE L.J. 609, 652 (1984); see CALLAGHAN, supra note 4, § 43:03. The validity of the legal presumptions for possession is tested by a reasonableness standard. Id. There must be a rational link between the facts proved and the inferences presumed. Id.

\(^7\) Robinson, supra note 71, at 652. A statutory presumption imputes a culpable mental state or a certain objective element of an offense in instances where additional facts indi-
guage of the presumption does not stipulate that "another" be specifically articulated.\(^7\) Even absent the presumption, if such an identity is known it is not construed as a temporal parameter that divides a continuous course of conduct into discrete crimes.\(^4\)

The Okafore construction is capable of rendering grossly inequitable results.\(^5\) In a prosecution for criminal possession of a weapon in the second degree, there is no burden on the People to prove that the defendant identified one or more specific victims.\(^7\) In a case where there is insufficient evidence regarding the defendant's intent, the fact finder may deem the statutory presumption of possession applicable and thereby infer defendant's unlawful intent against "an unknown other."\(^7\) Thus, absent proof of one or more specific intended victims, the defendant would be subject to a single prosecution.\(^7\) Alternatively, where there is
cate that these criteria are in fact satisfied. \textit{Id.} Such a legal presumption facilitates ease and efficiency of prosecution without risking the conviction of innocent parties. \textit{Id.} "Many possession offenses represent codified presumptions that where there is possession, there also probably exists the harm or evil that the possession offenses actually seek to prevent and punish." \textit{Id.} at 655. See \textit{generally} Robinson, \textit{supra} note 71, at 656-57 (discussion of balancing interests with presumptions). "Society must frequently choose between ineffective prosecution of dangerous offenders and unacceptably intrusive investigative methods or evidentiary advantages for prosecutors." \textit{Id.} at 656. This balance may be best achieved by a flexible approach where the significance and exigency of effective prosecution is weighed on an ad hoc basis. \textit{Id.} at 656-57. For instance, in a case of food adulteration, "it may be better to tolerate more intrusive investigative procedures rather than to tolerate more erroneous convictions." \textit{Id.}

\(^7\) See N.Y. PENAL LAW § 265.15(4) (McKinney 1980); \textit{supra} note 70 (provides relevant part of presumption of possession for unlawful intent).

\(^4\) See Braverman v. United States, 317 U.S. 49, 53 (1942). The Supreme Court rejected an analysis that equated the number of prosecutions with the quantity of criminal objects. \textit{Id.} "The rule of lenity further presumes that a statute proscribes the transaction itself and cannot be subdivided further into the number of victims injured by the conduct." Thomas, \textit{supra} note 4, at 15. The case law appears to create a presumption that "a criminal statute proscribes a course of conduct, rather than the discrete physical acts making up the course of conduct or the number of victims injured by the conduct." \textit{Id.} at 21. See also Okafore, 72 N.Y.2d at 93-94, 527 N.E.2d at 252, 531 N.Y.S.2d at 769 (Kaye, J., dissenting) (application of Braverman supports single prosecution).

\(^5\) Okafore, 72 N.Y.2d at 94, 527 N.E.2d at 255, 531 N.Y.S.2d at 770 (Kaye, J., dissenting). The dissent expressed concern that the new rule was unworkable. \textit{Id.}

\(^7\) See N.Y. PENAL LAW § 265.03 (McKinney 1980). The specific identity of a victim is not an essential element of the offense. \textit{Id.}

\(^7\) See N.Y. PENAL LAW § 265.15(4) (McKinney 1980); Okafore, 72 N.Y.2d at 94, 527 N.E.2d at 253, 531 N.Y.S.2d at 770 (Kaye, J., dissenting).

\(^7\) See N.Y. PENAL LAW § 265.15(4) (McKinney 1980). Because the legal presumption infers intent against "a singular other," there is no basis for multiple prosecutions. See N.Y. PENAL LAW § 265.03 (McKinney 1980).

112
People v. Okafore

proof that the defendant formulated intent toward specific victims, the Okafore analysis requires separate prosecutions of second degree criminal possession for each evil thought against "a different other." These two cases reveal a single common act: the possession of a firearm. The only distinction is the state of each defendant's mind with respect to his intended victims. Although each defendant committed the same act, the two situations would lead to dramatically different results. Assuming conviction in each case, one defendant would be subject to a single sentence while the other would accrue multiple punishments. It is even possible that the latter defendant could receive a cumulative sentence that would exceed the sentence given to an individual convicted of murder.

The American criminal justice system requires the minimum of a voluntary act on the part of the accused for criminal liability to attach. The Okafore construction conflicts with this basic premise

---

79 Okafore, 72 N.Y.2d at 90, 527 N.E.2d at 250, 531 N.Y.S.2d at 767. "But if the original unlawful intent is abandoned and subsequently a new intent is formed to use the weapon against others during the period of possession, more than one crime is committed." Id. Contra id. at 93-94, 527 N.E.2d at 252, 531 N.Y.S.2d at 769-70 (Kaye, J., dissenting).

80 Id. at 94, 527 N.E.2d at 252, 531 N.Y.S.2d at 769-70 (Kaye, J., dissenting). The New York Penal Code indicates the necessity of an "act" in the articulation of crimes. Id. A culpable mental state affects the degree of punishment, but is not a valid substitute for the requisite "act." Id.

81 Id. The dissent criticizes a rule that requires the probing of defendant's mind to determine his specific intent and intended objects. Id.


83 Okafore, 72 N.Y.2d at 94, 527 N.E.2d at 253, 531 N.Y.S.2d at 770 (Kaye, J., dissenting). "Theoretically, continued possession in a crowd now can support dozens of separate prosecutions; a defendant apprehended with a weapon after verbally expressing an intent to use it against a series of persons, without ever using it at all, could be subject to multiple prosecutions for second degree possession." Id.

84 Id. at 94, 527 N.E.2d at 253, 531 N.Y.S.2d at 770 (Kaye, J., dissenting). The legislature, in enacting § 265.15[4] of the Penal Law, did not intend to allow punishment for an uninterrupted possession to be more severe than that imposed for a homicide. Id.

85 See People v. Almodovar, 62 N.Y.2d 126, 464 N.E.2d 463, 476 N.Y.S.2d 95 (1984). Without the prescribed act or course of conduct, there is no crime. Id. at 130, 464 N.E.2d at 465, 476 N.Y.S.2d at 97.

A basic premise of American law is that a crime cannot be committed by evil intent alone. W. LaFave & A. Scott, supra note 52, at 196. "Something in the way of an act, or
in that the possibility of multiple prosecutions, convictions and sentences will exist solely because of the state of the defendant's mind.  

It is submitted that the Okafore court blurred its interpretation of the second degree offense with considerations of intent, use and victim. Circumstances surrounding the Manhattan incident may have factored into the court's decision. It is further submitted that this unworkable construction creates an inconsistency in the law which violates the double jeopardy doctrine.

II. LESSER INCLUDED OFFENSES IN THE POSSESSORY SCHEME

Because the prosecution for a lesser included offense bars the

of an omission to act where there is a legal duty to act is required too." In re Hitchler, The Physical Element of Crime, 39 Dick. L. Rev. 95 (1934) (discusses requirement of act in order for criminal liability to attach); supra notes 52 & 80 (requiring a complete act to attach criminal liability).

Okafore, 72 N.Y.2d at 94, 527 N.E.2d at 253, 531 N.Y.S.2d at 770 (Kaye, J., dissenting). "Evil intent — while possibly an aggravating factor or even a prerequisite to criminal liability — cannot, standing alone, support a criminal conviction, and it cannot transform what would otherwise constitute a single crime into multiple criminal offenses." Id. See W. LaFave & A. Scott, supra note 52, at 196. "A statute purporting to make it criminal simply to think bad thoughts would, in the United States, be held unconstitutional." Id. See also supra note 80 and accompanying text ("act" is what dictates a crime, culpable mental state only affects degree of punishment).

Interview with Steven R. Kartagener, Attorney for Defendant-Appellant, in New York City (Aug. 25, 1988). Mr. Kartagener noted that it was possible that the outcome in Okafore may have been determined in large part by the "flavor" of the case rather than on the court's technical analysis of the statutory scheme for criminal possession of a weapon. Id. He indicated that the Court of Appeals, during the course of oral arguments appeared quite concerned that the defendant could get a "free ride," that is, a barred prosecution for an incident with police in Manhattan because of another distinct incident in the Bronx where defendant killed his wife. Id. If Okafore was not convicted of the second degree offense in Manhattan County, it was feared that he might be getting a "bite of the apple." Id.

Additionally, Mr. Kartagener suggested that the emotionally charged nature of "an attack on police" was the likely reason for the vigorous Manhattan prosecution of Okafore, a prosecution that demanded consecutive sentencing with the prior Bronx convictions. Id. He noted that such a demand is somewhat unusual in this context; more typically, the sentences are concurrent. Id.

"The mere act of producing a weapon when police confronted [Okafore] is a step away from attempted murder." Id. In Mr. Kartagener's opinion, charges for attempted murder, attempted assault and reckless endangerment would not have succeeded given the facts of the Manhattan incident. Id. Menacing proved to be an unacceptable alternative to the prosecution because of its misdemeanor status. Id. Hence, the only felony with which Okafore could be charged was criminal possession of a weapon in the second degree. Id.
subsequent prosecution for a greater offense, the lesser included designation runs to the core of the constitutional double jeopardy issue. Once a mere procedural device, the lesser included offense doctrine has evolved into "a basic component of the due process right to a fair trial." If a jury believes a defendant is guilty of an uncharged offense it may find him guilty of the charged offense because of an unwillingness to allow him to "go free." Alternatively, society benefits from the doctrine in cases where the prosecution would otherwise fail because an element of the only crime charged was not proved. Absent the lesser in-
included offense doctrine, there may be cases where the stringencies of the criminal standard of proof and the defendant's right to be presumed innocent are disregarded. It is suggested that *Okafore* represents a case where a correlative constitutional right of the defendant has been thusly compromised. It is further suggested that an analysis of lesser included offenses, independent of the continuing crime issue, reveals this compromise.

In *Okafore*, the lesser included offense doctrine dictated that once the defendant was convicted of second degree possession in the Bronx proceeding, he was necessarily convicted of every lesser included offense as well. When Okafore left Bronx County, returning home to kill himself, he was no longer guilty of criminal possession of a weapon in the second degree; his intent was not "to use unlawfully against another." Rather, for that brief period, he was guilty of criminal possession of a weapon in the third degree. When Okafore subsequently encountered police, he regained the intent to use the weapon unlawfully against another,

---

*See* N.Y. CRIM. PROC. LAW § 300.10 (McKinney 1988). This section, which contains the "court's charges; in general," provides in relevant part:

1. At the conclusion of the summations, the court must deliver a charge to the jury.
2. In its charge, the court must state the fundamental legal principles applicable to criminal cases in general. Such principles include, but are not limited to, the presumption of the defendant's innocence, the requirement that guilt be proved beyond a reasonable doubt.

*See Beck v. Alabama, 447 U.S. 625, 634-35 (1979) (failure to provide jury with "third option" of conviction on a lesser included offense will threaten defendant's benefit of reasonable doubt standard).

gihan, supra note 4, § 8:07 (discusses lesser included and related offenses).

*See* N.Y. PENAL LAW § 265.05 (McKinney 1980) (emphasis added). *See supra* note 37. The intent to commit suicide does not satisfy the specific intent element of criminal possession of a weapon in the second degree because an intent to use the weapon against another is required. *See also* Okafore, 72 N.Y.2d at 88, 527 N.E.2d at 248, 531 N.Y.S.2d at 765 ("[I]ntent to commit suicide cannot support a prosecution for second degree criminal possession of a weapon").

*See* N.Y. PENAL LAW § 265.02(4) (McKinney 1980 & Supp. 1989). Okafore possessed a loaded firearm throughout the relevant time. *Okafore*, 72 N.Y.2d at 84, 527 N.E.2d at 246, 531 N.Y.S.2d at 763. His possession occurred neither in his home nor place of business.
the aggravating element of second degree possession. At that point, his crime was elevated back to the second degree level. Hence, Okafore’s unlawful possession of the handgun throughout the Bronx and Manhattan episodes included an interval when his offense lapsed from second degree to third degree possession.

In Johnson, the New York Court of Appeals deemed criminal possession of a weapon in the fourth degree to be a lesser included offense of the third degree crime when the defendant’s possession “lapsed down.” The defendant’s six-day possession of a weapon included periods when he took the weapon home. The People argued that two prosecutions were warranted: one for third degree criminal possession, an offense which excludes weapon possession in the defendant’s home, and the other for fourth degree criminal possession, an offense encompassing those periods in the home. Rejecting the prosecution’s claim, the Johnson court noted that “[b]oth statutes reflected the legislative goal to criminalize that [possessory] conduct although in different degrees depending on where it occurred.”

The Okafore court rejected criminal possession of a weapon in the third degree as a lesser included offense of the second degree crime notwithstanding Johnson. Irrespective of the Okafore

---

99 Okafore, 72 N.Y.2d at 88, 527 N.E.2d at 249, 531 N.Y.S.2d at 766. “When later confronted by the police in Manhattan, however, defendant became chargeable with another count of second degree criminal possession because while possessing the gun he manifested the newly formed intent to use it against them.” Id. See Johnson v. Morgenthau, 69 N.Y.2d 148, 505 N.E.2d 240, 512 N.Y.S.2d 797 (1987). The Johnson court acknowledged that the defendant’s criminal possession of a weapon may have “lapsed down” from third to fourth degree if he had taken the gun home during the six-day period. Id. at 152, 505 N.E.2d at 242, 512 N.Y.S.2d at 799.
100 See Okafore, 72 N.Y.2d at 88, 527 N.E.2d at 249, 531 N.Y.S.2d at 766. The majority stated that the interval of time in which Okafore intended to kill himself could not support a prosecution for criminal possession of a weapon in the second degree. Id. The court went on to note that the encounter with police in Manhattan made defendant chargeable with another count of second degree criminal possession. Id. See supra note 37.
102 Id.
103 Id.
104 See supra note 8 (relevant parts of comprehensive statutory scheme).
105 Okafore, 72 N.Y.2d at 88, 527 N.E.2d at 249, 531 N.Y.S.2d at 766 (emphasis added). The New York Court of Appeals in Okafore discussed its recent decision in Johnson as it related to lesser included offenses. Id.
106 Id. at 89 n.3, 527 N.E.2d at 249 n.3, 531 N.Y.S.2d at 766 n.3.
court's position on third degree possession, the issue of the fourth degree crime's status as a lesser included offense remained.107 “Naked possession,” the fourth degree offense,108 is a single continuing crime for double jeopardy purposes entitled to lesser included offense status.109 Its only element, to possess a firearm,110 is necessarily a part of all the greater degree offenses for criminal possession of a weapon.111 Therefore, Okafore implicitly committed fourth degree criminal possession of a weapon throughout the Bronx and Manhattan incidents, while he was additionally committing either second or third degree criminal possession depend-

We indicated in Johnson that the fourth degree offense was a lesser included crime of the third degree offense. Our point was simply that the two crimes should be deemed the same for double jeopardy purposes. We did not mean to suggest that fourth degree possession of a weapon constituted a lesser included offense of the third degree crime within the narrow definition of lesser included offenses set forth in N.Y. Crim. Proc. Law § 1.20(37). With respect to this appeal it should be noted that third degree possession of a weapon is not a lesser included of the second degree offense.

Id. But see id. at 92, 527 N.E.2d at 251, 531 N.Y.S.2d at 768 (Kaye, J., dissenting). The dissent was critical of the majority's "departure from, and inconsistency with, our own recent precedents. . . ." Id. at 89, 527 N.E.2d at 249-50, 531 N.Y.S.2d at 766-67. Although the Okafore court never specifically addressed the issue of fourth degree possession as a lesser included offense of the second degree offense, it alluded to it. Id. “[Second degree criminal possession of a weapon] should not be equated to simple possessory offenses for double jeopardy purposes to ‘bridge’ episodes of second degree possession into a single offense.” Id. See Brief for Appellant at 25. On appeal, Okafore argued that even if the court concluded that criminal possession of a weapon in the second degree was not a continuing crime, the Manhattan prosecution was barred on double jeopardy grounds because both second degree counts were linked by the lesser included offenses of criminal possession of a weapon in the third and fourth degree. Id. Okafore maintained that fourth degree criminal possession of a weapon was a “necessary building block” of the greater offense. Id. at 28.

107 See CALLAGHAN, supra note 4, § 43:19, at 37.

108 Johnson v. Morgenthau, 69 N.Y.2d 148, 152, 505 N.E.2d 240, 243, 512 N.Y.S.2d 797, 800 (1987). See People v. Glover, 57 N.Y.2d 61, 439 N.E.2d 376, 453 N.Y.S.2d 660 (1982); People v. Perez, 128 App. Div. 2d 410, 512 N.Y.S.2d 695 (1st Dep't 1987). The Perez court, concluding that criminal possession of a weapon in the fourth degree was a lesser included offense of third degree possession, reasoned that it was “impossible to possess a loaded firearm without concomitantly possessing a firearm . . . .” Perez, 128 App. Div. 2d at 411, 512 N.Y.S.2d at 696. But see Okafore, 72 N.Y. 2d at 89 n.3, 527 N.E. 2d at 249 N.3, 551 N.Y.S. 2d at 766 n.3. The Okafore court, with reference to Johnson, maintained that fourth degree possession of a weapon did not constitute a lesser included offense of the third degree crime. Id. Rather, “[t]he two crimes should be deemed the same for double jeopardy purposes.” Id. See also People v. Vaccaro, 44 N.Y.2d 885, 886, 379 N.E.2d 159, 159-60, 407 N.Y.S.2d 631, 632 (1978) (fourth degree criminal possession of a weapon is lesser included offense of second degree crime). See generally supra note 6 (basic lesser included offense discussion).


People v. Okafre

ing upon the specific interval of time. Hence, the lesser included offense doctrine dictated that defendant's Bronx prosecution and conviction for criminal possession of a weapon in the second degree encompassed a conviction for the continuing, lesser included offense, fourth degree possession. The Manhattan prosecution for second degree possession, a higher degree of the same offense, should have been barred by the double jeopardy doctrine.

CONCLUSION

The constitutional protection afforded by the double jeopardy doctrine is an indisputably essential premise of the American criminal justice system. In Okafre, the New York Court of Appeals has unwittingly failed to recognize the doctrine's applicability. Its denial of the continuous nature of criminal possession of a weapon in the second degree represents a setback when viewed in light of the court's recent decisions. The Okafre construction deprives some defendants of the minimum required voluntary act necessary for a criminal prosecution in attaching multiple liabilities for a single continuous possession. Moreover, by rejecting the

118 See Okafre, 72 N.Y.2d at 87, 527 N.E.2d at 248, 531 N.Y.S.2d at 765. Okafre's possession of the handgun was uninterrupted. Id. Therefore, he necessarily possessed a firearm when he concomitantly possessed a loaded firearm. Id. (emphasis added). See N.Y. Penal Law § 265.02 (McKinney 1980 & Supp. 1989). Additionally, Okafre necessarily possessed a firearm when he concomitantly possessed a loaded firearm with intent to use it unlawfully against another. See N.Y. Penal Law § 265.03 (McKinney 1980) (emphasis added).

119 See Vaccaro, 44 N.Y.2d at 886, 379 N.E.2d at 160, 407 N.Y.S.2d at 632. Fourth degree criminal possession of a weapon is a lesser included offense of the second degree crime. Id. The Vaccaro court held that the overlapping of elements in the second and fourth degree offenses did not render the statutes unconstitutional. Id. See also supra note 95 and accompanying text (lesser included offense doctrine dictated that once defendant was convicted of a crime, he was necessarily convicted of every lesser included offense as well).


"Given that the defendant is entitled to put before the jury every meritorious defense, it seems anomolous to proscribe the introduction of an ameliorative legal theory by denying the defendant of a right to a lesser included offense charge." Ettinger, supra note 6, at 216. The lesser included offense standard and the law of double jeopardy are "inextricably bound to each other": once a defendant has been prosecuted for either the lesser or greater offense he cannot subsequently be charged with the other crime. Id. at 219.

119
lesser included offense status of the third and fourth degree crimes, the court has created an anomaly in the law. The Okafore decision forces an "all or nothing" choice where a necessary alternative exists.

Patricia A. LaFroscia