NO.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 2008

ALVARO F.

Petitioner

v.

STATE OF CONNECTICUT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
CONNECTICUT SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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June 26, 2009

QUESTION PRESENTED

In mechanically applying Blockburger's elements test to the defendant's four felony convictions, did the Connecticut Supreme Court err in holding that there was no double jeopardy violation under the Fifth Amendment when it failed to follow the line of decisions flowing from Harris v. Oklahoma, 433 U.S. 682 (1977), which stands for the concept that the requirement of proving an additional fact in one statute which is not contained in a different but greatly overlapping statute constitutes a double jeopardy violation when both statutes are directed at one harm?

LIST OF PARTIES

The caption of the case contains the partially redacted name of the petitioner, Alvaro F. and the prosecuting authority, the State of Connecticut.*

* This is how the petitioner's name is referred to and captioned at the lower court. In accordance with Connecticut General Statute Section 54-86e and Connecticut Supreme Court Rules of Procedure, the petitioner's last name was redacted and all documents of record have certain similar redactions. The petitioner's full name is being filed under seal with this Court and appears on the sealed and unredacted Affidavit in Support of Motion for Leave to Proceed *In Forma Pauperis* filed herewith.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Alvaro F., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Connecticut Supreme Court which entered in the above-entitled proceeding on March 31, 2009 and became final on said date.

OPINION BELOW

The opinion below was from the Connecticut Supreme Court. It was published and filed on March 31, 2009. The case was styled *State of Connecticut v. Alvaro F., No. SC 18254*. It is published as State v. Alvaro F, 291 Conn. 1(2009). The entire text of this opinion is reproduced in the appendix (App. p. 1).

BASIS FOR JURISDICTION

The date the Connecticut Supreme Court's judgment entered was March 31, 2009.

The statutory provision believed to confer jurisdiction to review judgment in this matter on a writ of certiorari is 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

Article V of the Amendments to the Constitution of the United States:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentiment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in a Militia, when in actual service in time of War of public danger; nor shall a person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty , or property, without due process of law; nor shall private property be taken for public use, without compensation."

Article XIV of the Amendments to the Constitution of the United States:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SUPREME COURT RULES

United States Supreme Court, Rule 10. Considerations Governing Review on Writ of Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another Untied States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

STATUTES INVOLVED IN THIS CASE

Connecticut General Statutes:

Sec. 51-199. Jurisdiction..

(c) The Supreme Court may transfer to itself a cause in the Appellate Court. Except for any matter brought pursuant to its original jurisdiction under section 2 of article sixteen of the amendments to the Constitution, the Supreme Court may transfer a cause or class of causes from itself, including any cause or class of causes pending on July 1, 1983, to the Appellate Court. The court to which a cause is transferred has jurisdiction

Sec. 53-21. Injury or risk of injury to, or impairing morals of, children. Sale of children.

(a) Any person who (1) wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that the life or limb of such child is endangered, the health of such child is likely to be injured or the morals of such child are likely to be impaired, or does any act likely to impair the health or morals of any such child, or (2) has contact with the intimate parts, as defined in section 53a-65, of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child, or (3) permanently transfers the legal or physical custody of a child under the age of sixteen years to another person for money or other valuable consideration or acquires or receives the legal or physical custody of a child under the age of sixteen years from another person upon payment of money or other valuable consideration to such other person or a third person, except in connection with an adoption proceeding that complies with the provisions of chapter 803, shall be guilty of a class C felony for a violation of

subdivision (1) or (3) of this subsection and a class B felony for a violation of subdivision (2) of this subsection, except that, if the violation is of subdivision (2) of this subsection and the victim of the offense is under thirteen years of age, such person shall be sentenced to a term of imprisonment of which five years of the sentence imposed may not be suspended or reduced by the court.

(b) The act of a parent or agent leaving an infant thirty days or younger with a designated employee pursuant to section 17a-58 shall not constitute a violation of this section.

Sec. 53a-70. Sexual assault in the first degree: Class B or A felony. (a) A person is guilty of sexual assault in the first degree when such person (1) compels another person to engage in sexual intercourse by the use of force against such other person or a third person, or by the threat of use of force against such other person or against a third person which reasonably causes such person to fear physical injury to such person or a third person, or (2) engages in sexual intercourse with another person and such other person is under thirteen years of age and the actor is more than two years older than such person, or (3) commits sexual assault in the second degree as provided in section 53a-71 and in the commission of such offense is aided by two or more other persons actually present, or (4) engages in sexual intercourse with another person and such other person is mentally incapacitated to the extent that such other person is unable to consent to such sexual intercourse.

(b) (1) Except as provided in subdivision (2) of this subsection, sexual assault in the first degree is a class B felony for which two years of the sentence imposed may not be suspended or reduced by the court or, if the victim of the offense is under ten years of age, for which ten years of the sentence imposed may not be suspended or reduced by the court.

(2) Sexual assault in the first degree is a class A felony if the offense is a violation of subdivision (1) of subsection (a) of this section and the victim of the offense is under sixteen years of age or the offense is a violation of subdivision (2) of subsection (a) of this section. Any person found guilty under said subdivision (1) or (2) shall be sentenced to a term of imprisonment of which ten years of the sentence imposed may not be suspended or reduced by the court if the victim is under ten years of age or of which five years of the sentence imposed may not be suspended or reduced by the court if the victim is under sixteen years of age.

(3) Any person found guilty under this section shall be sentenced to a term of imprisonment and a period of special parole pursuant to subsection (b) of section 53a-28 which together constitute a sentence of at least ten years.

§53a-73a. Sexual assault in the fourth degree: Class A misdemeanor or class D felony.

(a) A person is guilty of sexual assault in the fourth degree when: (1) Such person intentionally subjects another person to sexual contact who is (A) under fifteen years of age, or (B) mentally defective or mentally incapacitated to the extent that such other person is unable to consent to such sexual contact, or (C) physically helpless, or (D) less than eighteen years old and the actor is such other person's guardian or otherwise responsible for the general supervision of such other person's welfare, or (E) in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over such other person; or (2) such person subjects another person to sexual contact without such other person's consent; or (3) such person engages in sexual contact with an animal or dead body; or (4) such person is a psychotherapist and subjects another person to sexual contact who is (A) a patient of the actor and the sexual contact occurs during the psychotherapy session, or (B) a patient or former patient of the actor and such patient or former

patient is emotionally dependent upon the actor, or (C) a patient or former patient of the actor and the sexual contact occurs by means of therapeutic deception; or (5) such person subjects another person to sexual contact and accomplishes the sexual contact by means of false representation that the sexual contact is for a bona fide medical purpose by a health care professional; or (6) such person is a school employee and subjects another person to sexual contact who is a student enrolled in a school in which the actor works or a school under the jurisdiction of the local or regional board of education which employs the actor; or (7) such person is a coach in an athletic activity or a person who provides intensive, ongoing instruction and subjects another person to sexual contact who is a recipient of coaching or instruction from the actor and (A) is a secondary school student and receives such coaching or instruction in a secondary school setting, or (B) is under eighteen years of age.

(b) Sexual assault in the fourth degree is a class A misdemeanor or, if the victim of the offense is under sixteen years of age, a class D felony.

§54-86e. Confidentiality of name and address of victim of sexual assault. Availability of information to accused. Protective order information to be entered in registry.

The name and address of the victim of a sexual assault under section 53a-70, 53a-70a, 53a-71, 53a-72a, 53a-72b or 53a-73a, or injury or risk of injury, or impairing of morals under section 53-21, or of an attempt thereof, shall be confidential and shall be disclosed only upon order of the Superior Court, except that (1) such information shall be available to the accused in the same manner and time as such information is available to persons accused of other criminal offenses, and (2) if a protective order is issued in a prosecution under any of said sections, the name and

address of the victim, in addition to the information contained in and concerning the issuance of such order, shall be entered in the registry of protective orders pursuant to section 51-5c.

United States Code

28 U.S.C. § 1257 State courts; certiorari;

(a) Final judgments or decrees rendered by the highest court of the State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the Untied States is drawn in question or where the validity of a statute of any State is drawn in question on the grounds of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under the United States.

STATEMENT OF THE CASE

A. INTRODUCTION

In May, 2007, the petitioner, Alvaro F., was convicted by a jury of two counts of sexual assault in the first degree in violation of Connecticut General Statutes § 53a-73(a)(1) A and two counts of risk of injury to a minor in violation of §53a- 21(a)(2). The petitioner was acquitted of two counts of sexual assault in the first degree in violation of Connecticut General Statutes § 53a-70 (a)(2).

The petitioner was then sentenced by the trial court to a term of incarceration of 10 years, execution suspended after six years, with 10 years probation with special conditions that he submit to DNA testing and that he register as a sex offender. (7-5-07 Tr. pp. 18-19, App. p. A121-A122). Specifically, the petitioner was sentenced to two six year concurrent sentences for the two risk of injury convictions and sentenced to two five year concurrent sentences for the sexual assault fourth degree convictions. Id.

The petitioner then took a direct appeal to the Connecticut Appellate Court. The Connecticut Supreme Court then transferred the appeal to itself pursuant to Connecticut General Statute § 51-199(c).

B. FACTS RELEVANT TO THIS PETITION

On August 3, 2006, the defendant was arrested as he returned home from work. (5-24-07 Tr. p. 189, App. p. A124). He was originally charged with two counts of sexual assault in the fourth degree and two counts of risk of injury to a minor. (Clerk of Court's Information File Entries, App. pp. A83-A90). On the first day of evidence, May 24, 2007, the State added two additional felony charges of sexual assault in the first degree in violation of C.G.S. § 53a-70(a)(2) without objection

by the defendant or the Court.[1] It appears that the defendant was charged with seven felonies as on May 24, 2007 a third risk of injury count appears to have been added. (App. p. A22.) However, pursuant to the Amended Information that the jury received, he was ultimately prosecuted for six felonies: two counts of sexual assault in the first degree in violation of C.G.S. § 53a-70(a)(2), two counts of sexual assault in the fourth degree in violation of C.G.S. § 53a-73a(a)(1)(A), and two counts of risk of injury to a minor in violation of C.G.S. § 53-21(a)(2).[2] The six felonies were alleged to have occurred in the early morning hours of one day, August 3, 2006. (Amended Information, App. pp. A80 - A82.) The specific facts were stated in the petitioner's Brief to the lower court as follows:

"The alleged victim was the defendant's 11 year old stepdaughter. The defendant was accused of twice digitally penetrating the alleged victim's vagina while the family was sleeping. A[3] testified that on a very hot night in August all of the defendant's family members decided to sleep in the one air conditioned room of their home, the living room. (5-24-07 Tr. p. 18.) The defendant and his wife Elba slept on a mattress on the floor. (5-24-07 Tr. pp. 18-19.) Elba's two daughters, one of whom was A, also slept in the living room. (5-24-07 Tr. p. 18.) A and her sister both slept on the couch. (Id.) The mattress that A's mother and the defendant slept on was close to the couch that A and her sister slept on. (5-24-07 Tr. p. 19.) A testified that the couch and the mattress were so close to each other that "they were touching." (Id.)

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[1] The first three pages of the Clerk of Court's Information File Entries prove that there were only four original charges. App. pp. A83–A85. The fourth page of the Clerk of Court's Information File Entries proves that the jurors and alternates were sworn in on May 24, 2007. The sixth page of the Clerk of Court's Information File Entries proves that the two additional sexual assault in the first degree charges were added on May 24, 2007, the same day that the jury was sworn. App. p. A89.

[2] These statutes are published in the appendix. C.G.S. § 53a-73a(a)(1)(A) turns into a class D felony by virtue of C.G.S. § 53a-73a(b) because the alleged victim was "under 16 years of age" at the time of the alleged crimes. Specifically, she was 11 years old at the time. The defendant was never specifically charged with violating C.G.S. § 53a-73a(b). (See Amended Information, App. pp. A80-A81.)

[3] In accordance with Connecticut General Statute §54-86e, the victim's name will not be mentioned and she will be referred to as "A" herein. References to her sibling's last name and her mother's last name will not be made. As the victim's mother has the same last name as the defendant, the defendant's last name has also been redacted.

A testified she woke up at one point that evening and "felt something touching me." (5-24-07 Tr. p. 20.) She testified that, "when I looked it was my stepfather's hand." (Id.) She testified that when she saw her stepfather's hand in her pajamas she "was laying on my side." (Id. at p. 21.) She testified she was facing the mattress where the defendant and her mother were sleeping. (Id.) She testified that the defendant's hand was touching her body where she went "to the bathroom." (Id. at p. 22.) She testified that her mother (on the mattress with the defendant) and her sister (on the same couch with A) slept through this alleged touching. She testified that the length of time the touching occurred "wasn't very long." (Id. at p. 25.) A testified that, "[i]t felt like he was going inside my skin." (Id. at p. 26.) After this happened, A testified that the touching stopped; she got up off the couch and she went to her sister's room. (Id. at 27.) She testified she watched television and then fell asleep. She testified that before she fell asleep her mom came in and she told her mom that she "didn't feel well." (Id., p. 29.) She testified that she fell asleep and woke in the morning when she "felt him touching me again." (Id. p. 30.) She testified that the defendant "was doing the same thing he did before." (Id., p. 31.) She testified that the defendant, with his hand, was "trying to go inside again." (Id., p. 32.) She testified that during this second touching, the defendant had his "work clothes on." (Id.) She testified he stopped touching her when the defendant's cell phone rang. This happened when his ride to work was outside and called him. (Id., p. 33.) When the cell phone rang, A testified that the defendant "then pulled [her] pants back up and left." (Id.) A testified that her sister and mother slept through all of this and that A then "wrote a letter to my mom telling her what happened." This letter was admitted into evidence as State's Exhibit 1A at the trial. (App. p. A27.) Her mother read the letter after she awoke. A also told her aunt that she was touched twice by the defendant and was touched "in the wrong place." (Id., p. 42.) At the trial, A pointed to her groin area. (Id.) A also told a female police officer what she said happened. (Id., p. 44.) A was taken to the Bridgeport hospital and she told the hospital personnel that the defendant touched her. (Id., p. 47.)

A admitted on cross-examination that she witnessed the defendant and her mother "fighting on many occasions." (Id., p. 54.) During cross-examination, A admitted that her mother asked the defendant to leave their home but he would not and instead "would stay." (Id., p. 56.) A admitted that in her note, State's Exhibit 1A, she wrote that she wanted the defendant gone. The exact words were: "Tell Papi to leave our life." (App. p. A27, 5-24-07 Tr. p. 56.) "Papi" was the defendant. A admitted that her mother "tried to get [the defendant] out of the house many times." (5-24-07 Tr. p. 58.)

The state called A's mother, a police officer and A's aunt. Without objection, these three witnesses were allowed to testify as constancy of accusation witnesses regarding what A told them about the defendant's touching of her. Elba, A's mother, without objection testified:

> "A Right after I called the cops she heard me crying and she woke up and I told her, I called the cops are you sure this is what happened, what did he do to you? And she told me, yes, mommy it did happen. I said remember I'm calling the cops they are going to take him, are you sure this happened to you? She said, yes.
> Q Okay. And did she tell you who -- did she tell you what happened to her?
> A She told me he touched her and I asked her where. She told me -- she said where he's not supposed. I said, "A" where? There's a lot of places where he shouldn't be touching you and she told me between my legs.

Q Okay. And what part of the body did she mean?
A Her vagina." (Id. at 79.)

On cross-examination, Elba admitted that she was a "light sleeper." (5-24-07 Tr. pp. 92-93.) She admitted that when her husband allegedly touched A on the couch, she felt no "movement on the bed at [sic] night." (5-24-07 Tr. p. 93.) Elba also admitted the following:

"Q Did Alvaro -- isn't it true that he did everything to help you and help your daughters in your life?
A Yes, he did.
Q And he sustained you, he fed the girls and took care of them and showed them love as if they were his own; am I right?
A Yes, he did.
Q And prior to this occasion isn't it safe to -- isn't it true that you never doubted or you never had a lack of confidence leaving your daughters with Alvaro?
A No." (Id. at 94-95.)

On May 24, 2007, the state rested its case. The defense moved for judgments of acquittal regarding the six charges based on insufficiency of the evidence. (5-24-07 Tr. p. 172.) The court denied the acquittal motions. (5-24-07 Tr. p. 176.)

The defendant testified in his own defense. He testified that he did not sexually touch A. (5-24-07 Tr. p. 180.) This testimony was consistent with the information he gave the only arresting officer who spoke Spanish.[4] One of the arresting officers, Sgt. Jesus Ortiz testified that he had asked the defendant, "did he touch his stepdaughter inappropriately." Sgt. Ortiz testified that the defendant replied, "Something like, before God I would never do something like that...." (5-24-07 Tr. p. 160.) When asked if the defendant had denied the allegations A had made, Sgt. Ortiz twice testified, "Yes, he did." (5-24-07 Tr. p. 161, p. 169.) Sgt. Ortiz also testified that the defendant was "extremely cooperative." (5-24-07 Tr. p. 169.)

After the defense rested, the trial court instructed the jury regarding the six felonies. The trial court gave the jurors a copy of the jury instructions without objection. (5-25-07 Tr. p. 59.) Neither side took any exceptions following the charge. After the jury began deliberating, they notified the court that they had a question. (5-25-07 Tr. p. 63, App. p. A30.) They requested that the direct and cross-examination testimony of A be read back. (Id.) It was. Following that, they announced that they had a verdict. The jury acquitted the defendant of the two sexual assault first degree charges and convicted him of the two sexual assault fourth degree charges and the two risk of injury charges exclusively based on the two sexual assault fourth degree charges.

The defendant maintained his innocence throughout the proceedings. Between the time of verdict and the time of sentencing, A's mother apparently had a change of heart about the defendant's guilt and the veracity of her own daughter, A. By the time of sentencing she publicly doubted her husband's guilt. The sentencing court reacted to this and stated the following on the record:

[4] The defendant is not fluent in English. Interpreters were used for the trial. (5-21-07 Tr. p. 2.)

"The mother came in and testified that she read the letter and that she believed the letter and yet the mother has mixed loyalties because even after this happened, she in the P.S.I. thinks that the daughter might have made it up. ... Then you have the mother of the children saying it couldn't have happened, and yet when it was presented to a jury it was found that it did happen. I find it troubling that the mother [sic] didn't have that constant support of her children [sic] who need it and it is no surprise to me that she does not have custody of the children at this time and for good reason." (7-5-07 Tr. p. 15.)

The defendant received six years incarceration time. The specific sentence was:

"THE COURT:...
So it is the sentence of the Court, ... that on the first count of risk of injury to a minor the defendant be committed to the custody of the Commissioner of Corrections for a period of 10 years, that's suspended after six years, he's placed on probation for 10 years.
INTERPRETER: Excuse me, Your Honor, could you please speak up?
THE COURT: The sentence of the Court the defendant be committed to custody of the Commissioner of Corrections for a period of 10 years, it is suspended after the service of six years, he is to be placed on probation for 10 years.
On the second count of risk of injury to a minor, it's the sentence of the Court the defendant be committed to the custody of the Commissioner of Corrections for a period of 10 years, it's suspended after the service of 6 years, 10 years probation to follow. They are concurrent sentences.
Sex assault in the fourth degree, it's the sentence of the Court the defendant be committed to the custody of Commissioner of Corrections for a period of five years. That's to run concurrent with the other two counts.
On the fourth count of sex assault in the fourth degree, it's the sentence of the Court the defendant be committed to the custody of Commissioner of Corrections for a period of five years.
Total effective sentence will be 10 suspended after six years, 10 years probation with the following conditions, that he submit his D.N.A. as required by law, that he be a sex offender –- that he register as a sex offender, that he have no contact with children or minors..." (7-5-07 Tr. pp. 18-19.)" (Defendant's Brief in Chief, pp. 1-7, App. pp. A43 - A49).

The sole issue raised on appeal was the double jeopardy violation. Finding none, the Connecticut Supreme Court affirmed. (App. p. 1.)

REASONS FOR GRANTING THE PETITION

A technical and strict application of Blockburger's elements test was utilized by the Connecticut Supreme Court to decide that the petitioner's Fifth Amendment right to be free from double prosecution and conviction under the Double Jeopardy Clause was not twice violated. Such a mechanical application of the elements test conflicts with Harris v. Oklahoma, 433 U.S. 682 (1997), conflicts with United States v. Gibson, 820 F.2d 692 (5th Cir. 1987) and conflicts with numerous state appellate court decisions which have not mechanically applied the elements test when the overlapping elements are consistent with the common purpose of both statutes. Accordingly, certiorari should be granted in order to resolve the conflict and bring greater uniformity to this area of constitutional law.

ARGUMENT

A. The Defendant's Federal Constitutional Right Against Double Jeopardy Was Twice Violated.

The defendant's two risk of injury convictions in violation of Connecticut General Statute § 53-21(a)(2) and the two sexual assault fourth degree convictions in violation of C.G.S. § 53a-73(a)(2) violated his constitutional right not to be placed in double jeopardy twice.

> "The fifth amendment to the United States constitution provides in relevant part: No personal shall...be subject for the same offense to be twice put in jeopardy of life or limb...The double jeopardy clause of the fifth amendment is made applicable to the states through the due process clause of the fourteenth amendment. Benton v. Maryland, 395 U.S. 784, 794, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969).

This Court has divided Double Jeopardy Clause protection into three categories. The first involves a second prosecution for the same offense after acquittal. The second involves a second prosecution for the same offense after conviction. The third category involves multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 717 (1969) *overruled on other grounds*

in Alabama v. Smith, 490 U.S. 794 (1989). It is the third category that is relevant to this petition. Within this third category the analysis branches into two further categories: a.) one course of conduct comprising repetitive acts causing multiple prosecutions under one statute and, b.) one act causing multiple prosecutions under different statutes. This latter subcategory pertains here. An example is found in Gore v. United States, 357 U.S. 386 (1958) where the defendant received consecutive sentences based on three different drug charges relating to a single sale of narcotics. As is well known, as regards multiple prosecutions under different statutes relating to one criminal act, the constitutional test which is applied is found in Blockburger v. United States, 284 U.S. 299 (1932). Blockburger was relied on in the case at bar.

> "Traditionally we have applied the [test set out in *Blockburger v. United States*, 284 U.S. 299, 304 52 S.Ct. 180, 76 L. Ed. 306 (1932)] to determine whether two statutes criminalize the same offense . . ." *State v. Kirsch,* 263 Conn. 390, 420, 820 A.2d 236 (2003). Under that test, "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger v. United States,* supra, 304. "This test is a technical one and examines only the statutes, charging instruments, and bill of particulars as opposed to the evidence presented at trial."

State v. Alvaro F., 291 Conn. 1 at 7, (2009), (App. p. A7).

The Connecticut Supreme Court concluded that there are factual elements of proof contained in each statute that are unique to each, i.e., that "each provision requires proof of a fact which the other does not. "Alvaro F., at 291 Conn. 1 at 7, (2009), (App. p. A7), citing Blockburger supra at 304. Relying on Blockburger, this elements analysis defeated the underlying defendant's double jeopardy argument. The Connecticut Supreme Court noted:

> "To convict the defendant of risk of injury to a child under § 53-21 [a] (2), the state must prove that (1) the defendant had contact with the intimate

> parts of, or subjected to contact with his intimate parts, (2) a child under the age of sixteen years, (3) in a sexually and indecent manner likely to impair the health or morals of such child.". . . By contrast, to convict the defendant of sexual assault in the fourth degree under General Statutes (Rev. to 2005) § 53a-73a (a) (1) (A), the state must prove that (1) the defendant intentionally subjected, (2) a person under the age of fifteen years, (3) to sexual contact. The term "'[s]exual contact'" for the purposes of § 53a-73a is further defined as "any contact with the intimate parts of a person not married to the actor *for the purpose of sexual gratification of the actor or for the purpose of degrading or humiliating such person* or any contact of the intimate parts of the actor with a person not married to the actor *for the purpose of sexual gratification of the actor or for the purpose of degrading or humiliating such person*." (Emphasis added.) General Statutes § 53a-65 (3)."

Alvaro F., at 291 Conn. 1 at 10, (2009), (App. p. A10).

The petitioner had argued that it was impossible for a perpetrator to only commit the crime of sexual assault fourth degree and not commit the additional crime of risk of injury as was charged in this case.

> "In comparing the elements of each offense, it is evident that the elements of one offense are included in the other. Or, as this Court stated in State v. Brooks, 88 Conn. App. 204 at 215 (2005), cert. denied 273 Conn. 933 (2005), quoting Aparicio v. Artuz, 269 F.3d 78 at 97 (2d Cir. 2001), for double jeopardy to apply, "'the relationship of the two offenses [must be] like that of concentric circles rather than overlapping circles.'" The statutory elements of fourth degree sexual assault charged were restricted to C.G.S. §53a-73a(a)(1)(A) which states that, "A person is guilty of sexual assault in the fourth degree when such person intentionally subjects another person to sexual contact who is (A) under fifteen years of age." Id. However, the defendant was sentenced based on C.G.S. §53a-73a(b) which states: "Sexual assault in the fourth degree is a Class A misdemeanor or, if the victim of the offense is under sixteen years of age, a Class D felony." The age criterion is therefore the same.
>
> The statutory element of risk of injury the defendant was charged with is C.G.S. §53-21(a)(2). It states:
>
> "Any person who... (2) has contact with the intimate parts, as defined in section 53a-65, of a child under the age of sixteen years or subjects a child

> under sixteen years of age to contact with the intimate parts of such a person, in a sexual and indecent manner likely to impair the health or morals of such a child.... shall be guilty of a... Class B felony for a violation of subdivision (2) of this section." Id.
>
> It is important to note that the double jeopardy test does not require congruent or identical circles. It requires concentric circles. Thus assuming arguendo that C.G.S. §53-21(a)(2) contains an additional piece not present in C.G.S. § 53a-73a(a)(1)(A) and 53a-73(b) (i.e., the "likely to impair the health or morals" part), if there are no elements of C.G.S. § 53a-73a(a)(1)(A) not also contained in § 53-21(a)(2) – then there is a double jeopardy violation and the defendant's two sexual assault fourth degree convictions must be vacated."

(Defendant-Appellant Brief to the Connecticut Supreme Court, pp. 12-13, App. pp. A54-A55).

Connecticut's highest court disagreed.

> "Put differently, and contrary to the defendant's assertions, it is possible to commit risk of injury to a child without also committing sexual assault in the fourth degree if, for example, either the contact was with a child between the ages of fifteen and sixteen or was not made for the specific purpose of providing sexual gratification to the perpetrator. By contrast, it is possible to commit sexual assault in the fourth degree without also committing risk of injury to a child if, despite the fact that the perpetrator desired and obtained sexual gratification from the touching, the contact was not made in a manner likely to impair the health or morals of the child."

Alvaro F., supra at 11, (2009), (App. p. A11). The petitioner respectfully questions this last iteration, namely that a fourth degree sexual assault perpetrator could sexually touch a child while deriving sexual pleasure yet somehow have the sexual contact occur in a manner not "likely to impair the health or morals of the child." Id. In attempting to explain its rather contradictory conclusion, the court noted that *"in practice it may be difficult for the state to prove the specific intent requirement under § 53a-73a (a) (1) (A) without also proving the 'sexual and indecent manner likely to impair the health or morals of such child' requirement under § 53-21(a) . . . ."* Id. at fn 12 (emphasis added), App. p. A11. Nevertheless, the Connecticut Supreme Court concluded that:

> "the two elements require proof of different facts, however, because the former focuses solely on the perpetrator's intent or purpose in performing the act, whereas the latter requires proof of a likely psychological or physical impact upon the victim, regardless of whether the perpetrator specifically intended such a result. . . . In other words, in contrast to the requirements of § 53a-73a (a) (1) (A), "[s]pecific intent is not an element of the crime defined in the second part of *§* 53-21 . . . . Only an intention to make the bodily movement which constitutes the act which the crime requires, which we have referred to as general intent, is necessary." Id.

In short, because the Connecticut Supreme Court found, in theory (and in practice), an excluded element and it further found that it is not impossible to violate § 53a-73a (a) (1) (A) without there also being a violation of § 53-21 (a) (2), § 53a-73a (a) (1) (A) was not a subset of the other statute. Thus, according to the Connecticut court, there was no Blockburger concern and thus there was no double jeopardy violation under the Fifth Amendment.

The petitioner is acutely aware that when state statutory offenses are analyzed by state appellate courts, the state court's analysis regarding whether or not one statute is a lesser-included offense of another statute has a binding and non-reviewable effect on this court. Illinois v. Vitale, 447 U.S. 410 (1980).[5] On the other hand, in cases involving federal criminal offenses, the United States Supreme Court may freely interpret congressional intent without the restraint that applies to state law cases.

This restraint on reviewability should not foreclose further constitutional analysis regarding the petitioner's double jeopardy claim. The petitioner submits that there is a line of decisions where the "lesser" offense was found to contain an element not strictly contained in the "greater" offense and

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[5] "We accept, as we must, the Supreme Court of Illinois' identification of the elements of the offenses involved here." Illinois v. Vitale, 447 U.S. 410 at 416 (1990). "As the Court itself recognizes, it is not the province of this or any other federal court to tell the State of Illinois what is or is not a lesser-included offense under state law." Id. at 424. (Dis. opinion, Stevens, J.)

federal courts nevertheless held that a fifth amendment double jeopardy violation had occurred.[6] A decision from the Fifth Circuit Court of Appeals is illustrative. United States v. Gibson, 820 F.2d 692 (5th Cir. 1987).

The defendant in Gibson, supra, was convicted on five counts of armed robbery which occurred at a Houston post office. As the decision notes, the defendant "was found guilty of robbery of mail, money or property of the United States in violation of 18 U.S.C. Sec. 2114. On counts three and four, she was found guilty of robbery of government property from two persons within the special territorial jurisdiction of the United States, in violation of 18 U.S.C. Sec. 2111. On count five, she was found guilty of possession and receipt of stolen postal money orders, in violation of 18 U.S.C. Sec. 500." Id., at 693-694. On appeal, the defendant claimed double jeopardy violations and the Fifth Circuit Court of Appeals analyzed Blockburger and its progeny. Id., at 696-700. It discussed this court's decision in Whalen v. United States, 445 U.S.G. 684 (1980).

> "Whalen involved statutes governing the District of Columbia: Congress had provided a penalty for rape and a penalty for felony murder, i.e., the killing of another person in the course of committing rape or robbery or kidnaping or arson, etc." Id. at 694, 100 S.Ct. at 1439. *The Court rejected the government's argument that "felony murder and rape are not the 'same' offense under Blockburger, since the former offense does not in all cases require proof of a rape.*" Id. *For, in the actual Whalen case, "proof of rape is a necessary element of proof of the felony murder,* and [the Court

[6] The petitioner is limiting his argument to the multiple punishment line of decisions and is intentionally excluding the successive multiple prosecution line of decisions from the analysis. Multiple prosecution cases perhaps more deeply implicate historical common law concerns over subjecting a defendant to the experience of a criminal jury trial for a second time. There is an ongoing doctrinal tension. See, e.g. Missouri v. Hunter, 103 S.Ct. 673, 459 U.S. 359 (1983) which involved two charges in one trial and was a multiple punishment case. The dissent of Justices Marshall and Stevens noted that, "I do not believe that the phrase, 'the same offense' should be interpreted to mean one thing for purposes of the prohibition against multiple prosecutions and something else for purposes of the prohibition against multiple punishment." Id., at 369.

> is] unpersuaded that this case should be treated differently from other cases in which one criminal offense requires proof of every element of another offense." Id. Gibson, supra at 696, (emphasis added).

Thus, even though in Whalen the "former offense" did not "in all cases" require proof of the latter or "lesser" offense, in the actual case, it did. The Gibson court also discussed Albernaz v. United States, 450 U.S. 331 (1981).

> "In *Albernaz v. United States*, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981), defendants challenged their convictions, on separate counts, of conspiracy to import marijuana and conspiracy to distribute marijuana. The violations arose from a single agreement or conspiracy, but with dual objectives. The Court held that the two "statutory provisions at issue here clearly satisfy the rule announced in Blockburger." Id. at 339, 101 S.Ct. at 1142. Moreover, the Court stated:
>
> The conclusion we reach today regarding the intent of Congress is reinforced by the fact that *the two conspiracy statutes are directed to separate evils presented by drug trafficking. "Importation" and "distribution" of marihuana impose diverse societal harms, and, as the Court of Appeals observed, serious as a conspiracy to do either object singly.*

Id. at 343, 101 S.Ct. at 1144. Gibson, supra, at 697, (emphasis added). Nevertheless, the Gibson court agreed with the defendant's argument that she could not "be convicted for the same action under both section 2111

> "proscribing robbery within the special maritime and territorial jurisdiction of the United States, and section 2114, proscribing robbery of one having lawful custody of mail or other property of the United States." Id., at 697.

In analyzing the relationship of the two statutes, the Fifth Circuit properly recognized that the "lesser" offense was not fully contained in the larger. It was instead noted that the:

> "relationship between sections 2111 and 2114, then, is not that of general to specific, nor does one define a lesser included offense of the other. Rather, *the two sections are like two circles that just barely overlap. Gibson's conduct places her at the point of overlap, for she has robbed two persons having custody of United States property and has done so within United States territory.*" Id., at 697-698, (emphasis added.)

This is central to the petitioner's argument. The two Connecticut statutes, taking Connecticut's statutory interpretation as binding, "are like two circles that just barely overlap." Id.[7] Importantly, it was held in Gibson that her "conduct places her at the point of overlap, for she has robbed two persons of United States property and has done so within United States territory." Id. Applying this rationale to the instant matter, it can easily be said that Mr. Alvaro F.'s conduct placed him "at the point of overlap" of the two Connecticut statutes because his sexual touching of the victim was done for his sexual gratification and it was done in a manner likely to impair the morals of the child victim. When the Gibson court observed that, "it is true that a mechanical application of the Blockburger rule may appear to dictate the conclusion that Gibson has committed two offenses" - one could easily substitute Alvaro F.'s name for Gibson's name and the statement would still be true. Id., at 698. The reason that Blockburger was not mechanically or blindly applied in Gibson is the reason it should not be mechanically applied here. The Gibson court did not believe *"that the differences here would satisfy the intended purpose of the Blockburger test."* Id., (emphasis added.) The intent of the two Connecticut statutes is to fight one evil, sexual abuse of children.

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[7] The petitioner interprets "just barely overlap" to mean that the two circles are largely concentric with the non-joining surface area being comparatively minimal or small. That is they look something like this and do not look like this . In the case at bar, the petitioner had argued that the two circles were completely concentric. (Def. Brief to the Conn. Supreme Court p. 14, App. p. A56). In holding that each statute had mutually exclusive elements, the Connecticut Supreme Court rejected the concentric circle argument.

Thus, Gibson's rationale applies here and the Fifth Amendment protects the petitioner from double jeopardy.

The "one evil" or "one harm" analysis has long been a component of double jeopardy jurisprudence post-Blockburger. Thus, it is well recognized that "[d]espite the divergence of elements under Blockburger, a decisive majority of jurisdictions that have addressed the issue have held that a trial court cannot impose multiple convictions and sentences for variations of murder when only one person was killed." Ex Parte Ervin, 991 S.W. 2d 804 at 807 (Tex. Crim. App. 1999).[8] This is also the

[8] "Alaska, Gray v. State, 463 P.2d 897, 911 (Alaska 1970)(premeditated murder and felony murder); Arizona, State v. Arnett, 760 P.2d 1064, 1068-1069 (Ariz. 1988)(same); Colorado, People v. Lowe, 660 P.2d 1261, 1269-1271 (Colo. 1983)(murder after deliberation and felony murder) and People v. Rodriguez, 914 P.2d 230, 284 (Colo. 1996)(reaffirming Lowe); Connecticut, State v. Chicano, 584 A.2d 425, 429-431 (Conn. 1990), cert. denied, 501 U.S. 1254 (1991)(felony murder and first degree manslaughter as a lesser included offense of intentional murder) and State v. Lewis, A.2d , 1998 W.L. 516147, *15-16 (Conn., August 4, 1998)(murder and felony murder; reaffirming Chicano); Florida, Gaskin v. State, 591 So.2d 917, 920 (Fla. 1991), vacated on other grounds, 505 U.S. 1244 (1992) (premeditated murder and felony murder); Georgia, Pressley v. State, 219 S.E.2d 418 (Ga. 1975)(malice murder and felony murder) and Hayes v. State, 453 S.E.2d 11, 13 (Ga. 1995)(same); Indiana, Martinez Chavez v. State, 534 N.E.2d 731, 739 (Ind. 1989)(murder and felony murder) and Kennedy v. State, 674 N.E.2d 966, 967 (Ind. 1996)(reaffirming Martinez Chavez); Illinois, People v. Pitsonbarger, 568 N.E.2d 783, 792-793 (Ill. 1990), cert denied, 502 U.S. 871 (1991)(knowing murder and felony murder) and People v. Oaks, 662 N.E.2d 1328, 1356 (Ill.), cert. denied, U.S. , 117 S. Ct. 191 (1996)(reaffirming Pitsonbarger); Iowa, Gilroy v. State, 109 N.W.2d 63, 68 (Iowa 1972)(premeditated murder and murder in perpetration of robbery); Kansas, State v. Sullivan, 578 P.2d 1108, 1111-1112 (Kan. 1978)(premeditated murder and felony murder) and State v. Thompkins, 952 P.2d 1332, 1340 (Kan. 1998)(reaffirming a previous case articulating the principle found in Sullivan); Maine, State v. Dechaine, 572 A.2d 130, 136 (Me. 1990)(intentional or knowing murder and depraved indifference murder)*fn5 and State v. Oeur, 711 A.2d 118, 119 n. 2 (Me. 1998)(reaffirming Dechaine and extending it to multiple theories of aggravated assault); Maryland, Wooten-Bey v. State, 520 A.2d 1090, 1092 (Md.), cert. denied, 481 U.S. 1057 (1987)(premeditated murder and felony murder) and Burroughs v. State, 594 A.2d 625, 633 (Md. App. 1991)(same); Michigan, People v. Densmore, 274 N.W.2d 811, 814 (Mich. App. 1978)(same) and People v. Bigelow, 571 N.W.2d 520, 520 (Mich. App. 1997), affirmed, 581 N.W.2d 744 (Mich. App. 1998)(reaffirming Densmore); Minnesota, State v. LaTourelle, 343 N.W.2d 277, 284 (Minn. 1984)(premeditated murder and felony murder) and State v. Grayson, 546 N.W.2d 731, 739 (Minn. 1996)(two variations of murder); Nebraska, State v. White, 577 N.W.2d 741, 746-748 (Neb. 1998)(premeditated murder and felony murder)*fn6; New Jersey, State v. Watson, 618 A.2d 367, 373 (N.J. Super. A.D. 1992), cert. denied, 627 A.2d 1145 (N.J.

law in Connecticut. State v. Chicano, 584 A.2d 425 (Conn. 1990), cert. denied 501 U.S. 1254 (1991). Connecticut's sister state of Pennsylvania considers a defendant's "conduct of the specific crime" as part of a relaxed version of the Blockburger test. *"Commonwealth v. Comer*, 716 A.2d 593, 598-599 (Pa. 1998)(involuntary manslaughter and homicide by vehicle – where both arise from a single automobile accident involving one death); *Commonwealth v. Houtz,* 437 A.2d 385, 387 (Pa. 1981)(same)." Ex Parte Ervin, supra.

At this juncture, it is appropriate to note that the plethora of exceptions to Blockburger's strict elements test were not germinated in arid state court soil. Rather, many sprang to life from a 1977 decision of this Court, Harris v. Oklahoma, 433 U.S. 682 (1977). Legal scholars have observed that Blockburger's elements test has created "uncertainties" that did not previously exist." Hoffheimer, M.H., The Rise and Fall of Lesser Included Offenses, 36 Rutgers L.J. 35 at 368 (2005). The Harris v. Oklahoma double jeopardy element's "problem" was explained as follows:

1993)(purposeful and knowing murder and felony murder); New Mexico, State v. Landgraf, 913 P.2d 252, 261-262 (N.M. App. 1996)(vehicular homicide [due to intoxication] and evading/eluding a police officer resulting in death)*fn7; North Carolina, State v. Wilson, 478 S.E.2d 507, 510 (N.C. 1996)(premeditated murder and felony murder); Ohio, State v. Huertas, 553 N.E.2d 1058, 1066 (Ohio 1990)(aggravated murder with prior calculation and design and aggravated murder in the course of aggravated burglary) and State v. Moore, 689 N.E.2d 1, 17 (Ohio 1998)(reaffirming Huertas); South Dakota, State v. White, 549 N.W.2d 676, 682 (S.D. 1996)(premeditated murder and felony murder); Tennessee, State v. Hurley, 876 S.W.2d 57, 69-70 (Tenn. 1993), cert. denied, 513 U.S. 933 (1994)(same); Virginia, Clagett v. Commonwealth, 472 S.E.2d 263, 273 (Va. 1996), cert denied, U.S. , 117 S. Ct. 972(1997)(4 deaths, 5 convictions: 4 capital murder convictions based upon murder in the course of robbery, one capital murder conviction for murder of multiple persons; "multiple murder" capital murder conviction vacated); District of Columbia, Byrd v. United States, 510 A.2d 1035, 1036-1037 (D.C. App. 1986, en banc)(premeditated murder and felony murder) and Page v. United States, 715 A.2d 890, 894 and 894 n. 6 (D.C. 1998)(reaffirming Byrd).

Many of these jurisdictions have expressly characterized punishment for two or more murder variations for a single death as a double jeopardy violation." Ex Parte Ervin, 991 S.W. 2d. 804 at 809.

> "The Supreme Court faced a simple form of the compound crime problem in Harris v. Oklahoma where a defendant was convicted both of felony murder and robbery. The felony murder statute required proof of homicide during the commission of a number of felonies including robbery. *But other listed felonies could also satisfy the felony element.* Accordingly, no single felony would ever satisfy an elements test definition of a lesser included offense that required that it be impossible to commit the charged offense without simultaneously committing the lesser included offense. Nevertheless, the Court held that robbery was a lesser included offense of felony murder. Though this results makes good sense, *commentators have difficulty reconciling it with the elements test because it is possible, analyzing the elements in the abstract, to commit the more serious crime (murder) without committing the less serious crime (robbery).* Id., at 369-370 (emphasis added).

In the instant matter, the Connecticut Supreme Court analyzed the elements of Connecticut's two statutes in the abstract and mechanically applied the Blockburger elements in rejecting a finding of double jeopardy.[9] Yet, as was just demonstrated, in hundreds of appellate decisions from numerous jurisdictions, a strict Blockburger elements test simply is not employed as the sine qua non of double jeopardy. This reflects a hodge-podge approach and, to a degree, conflicting double jeopardy jurisprudence among the states' appellate courts. Professor Hoffheimer's research revealed five different "escape devices for avoiding undesirable results of the elements test." 36 Rutgers L.J. supra, at 432.

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[9] The petitioner concedes that clear legislative intent to impose two punishments for the "same offense" may override the presumption that "where two statutory provisions proscribe the "same offense", a legislature does not intend to impose two punishments for that offense". Whalen v. United States, 445 U.S. 684 at 691-92 (1980). The presumption authorizing one punishment is then rebutted if there is a "clear indication of contrary legislative intent" or "unless elsewhere specially authorized by [the legislature.]" Missouri v. Hunter, 459 U.S. 359 at 366-67 (1983). Because the Connecticut Supreme Court found some elements of the offenses to be different, this next level of double jeopardy analysis was not reached. Alvaro F., Supra, pp. 10-12, (App. pp. A10-A12). However, if it had been, the petitioner pointed out that there was no such "clear indication of contrary legislative intent by the Connecticut legislature". (Def. Brief p. 17, App. p. A59).

> "Courts have expressed reservations about the elements test and have gone to great lengths to avoid reaching the conclusion that the elements test eliminates manslaughter as a lesser included offense of murder. Elements test jurisdictions have employed five different strategies to limit the overapplication of the test in order to preserve lesser included offenses. First, they have selectively refused to apply the elements test in some cases. Second, they have manipulated their characterization of elements of offenses in order to preserve crimes as lesser included offenses that do not readily qualify under the elements test. Third, they have supplemented the test with ad hoc determinations rooted in historical practice that prevailed under earlier definitions of lesser included offenses. Fourth, they have construed state constitutional provisions so as to provide greater limits on multiple prosecution than are currently found in the Double Jeopardy Clause. Fifth, they have reinvented the idea of lesser included offenses in another guise, holding that a less serious offense that does not satisfy the elements test must nevertheless be submitted to the jury and that a defendant may not be cumulatively punished for a closely related offense that has additional elements. In one state where the courts followed the elements test to the logical conclusion that manslaughter was not a lesser included offense of murder, the legislature intervened to mandate that manslaughter be a lesser included offense of murder." Id. at 432-433.

The petitioner's case at bar is a classic example of an "undesirable result" of a strict, theoretical and mechanical application of Blockburger's elements test. A potential sixth exception was noted in Professor Susan R. Klein's Review Essay, *Double Jeopardy's Demise*, 88 Calif. L.R. 1001 (2000). "[M]any states apply a 'cognate theory' to permit a lesser-included offense instruction even though all of the statutory elements of the lesser offense are not contained in the greater offense, so long as the 'overlapping elements relate to the common purpose of the statutes.' Id., at 1015.[10] Connecticut appears

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[10] The article cites State v. Curtis, 944 P.2d 119 (Idaho 1997) as one example. Some other examples are Commonwealth v. Jones, 416 N.E. 2d 502 (Mass. 1981) and State v. Church, 509 N.W.2d 638 (Wis. 1998). Wisconsin appears to have adopted a hybrid elements test. "The inquiry, then, becomes whether the facts underlying each of Church's enticement convictions are significantly different in nature. *Multiple offenses "are significantly different in nature if each requires a new volitional departure in the defendant's course of conduct."* Id., (emphasis added). Applying Wisconsin's interpretation of Blockburger's elements test to the defendant's conduct here, because there was "no violational departure," his Fifth Amendment right to be free from

not to be such a "cognate theory" state because the Blockburger elements test was strictly and mechanically applied. Had the same conduct occurred in Massachusetts or Idaho or Wisconsin, the Blockburger elements test would not have been applied to negate double jeopardy. Thus, certiorari should be granted so that these Fifth Amendment inconsistencies may be harmonized.

If it is called "one evil" or a "common purpose of the statutes" or cumulative punishment "for a closely related event", when the petitioner was found to have made sexual contact with the victim for his own sexual gratification under the "lesser statute", he necessarily also was likely to have impaired her health or morals under the "greater statute". The overlapping elements relate to the common purpose of the two Connecticut statutes, the protection of children from sexual abuse. The petitioner is not arguing that Missouri v. Hunter, 459 U.S. 359 (1983) must be overruled in order for him to prevail. Other than the mere existence of the two Connecticut statutes, there is nothing in the record that Connecticut's legislature specifically authorized cumulative punishment. It was noted in Hunter, supra, that, "the rule of statutory construction noted in Whalen is not a constitutional rule requiring courts to negate clearly expressed legislative intent." Hunter, supra at 368. Put another way, the mere fact that the state legislature created the new risk of injury statutory sexual offense subsection in 1995, in and of itself, does not mean it therefore specifically authorized multiple punishments under both state statutes.

The late Chief Justice Relinquist colorfully described Blockburger elements test as "a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator." Albernez v. United States, 450 U.S. 333 at 343 (1981). Professor Hoffheimer concludes his journal article as follows:

> "The rising popularity of the elements test has caused a significant decline in the procedural economies achieved by the doctrine of lesser included offenses. Reducing the number of crimes that qualify as lesser

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double jeopardy was violated.

> included offenses has deleterious consequences for both prosecutors and defendants. It prevents prosecutors from joining closely related charges without reindicting a defendant, and it subjects defendants to greater risks of multiple trials involving the same conduct.
>
> Growing judicial experience with the elements test demonstrates that the test fails to achieve the simplicity and ease of application promised by its promoters. The test is formally indeterminate, has no ready application to common crimes with alternative elements, and facilitates result-oriented manipulation of elements.
>
> Most courts adopting the test have avoided eliminating manslaughter as a lesser included offense of murder by abandoning, modifying or manipulating the test, further frustrating uniform results under the test. And the test's tendency to encourage radical deviations from deeply rooted legal practices renders it vulnerable to constitutional challenges." Hoffheimer M.H., *The Rise and Fall of Lesser Included Offenses*, 36 Rutgers L.J. 351 at 437 (Winter 2005).

The petitioner agrees. This petition represents yet one more constitutional challenge to the mechanical and rigid application of the Blockburger elements test.

CONCLUSION

Professor George C. Thomas made the following observations in his 1998 book, *Double Jeopardy. The History, The Law*.

> "Many commentators have recognized that trivial differences in statutes should not create different double jeopardy offenses. Where these efforts have been unavailing is in developing some way to distinguish what differences should count. Some early courts, and later commentators, adopted a 'gravamen of offense' test, seeking to identify the core or gist of the offense and to compare those core definitions. William Haddad and David Mullock, for example, argued that the 'relevant inquiry should not be whether an additional fact is required in the second prosecution but whether a *materially* different fact, enough to make a truly different offense, must be shown.' Otto Kirchheimer argued that the proper question was whether each statute was directed at the same harm or evil. At least two law student writers argued that same offense required only 'substantial identity' between offenses. While these verbal formulations are not wrong, they are too soft-edged to be doctrinally helpful."[11]

[11] Thomas, George C., New York University Press, 1998, pp. 168-169.

Blockburger's elements test needs to be modified by the creation of a newer formulation that is specific enough to be "doctrinally helpful." (Id.) The petitioner posits a hybrid test which combines the "materially different fact test" with the "same harm" or "one evil" approach. If certiorari is granted, some additional uniformity could then be achieved by addressing the plethora of exceptions to the strict and mechanical application of Blockburger's elements test. Applying such a hybrid test to the petitioner's case requires this Court to rule that the petitioner was twice put in double jeopardy.

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