Criminal Law - Totality of Circumstances Test Used in Conspiracy Defendants' Double Jeopardy Cases

Timothy R. Coyne

Follow this and additional works at: https://digitalcommons.law.villanova.edu/vlr

Recommended Citation
Available at: https://digitalcommons.law.villanova.edu/vlr/vol33/iss3/10

This Issue in the Third Circuit is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.
The fifth amendment to the United States Constitution specifically provides that no person "shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." This constitutional protection is most commonly referred to as the Double Jeopardy Clause. In order to invoke this constitutional guaranty, the United States Supreme Court has held that a criminal defendant must show the two offenses charged are in law and in fact the same offense. Conspiracy, however, presents a distinct double jeopardy problem because a court must determine "whether the defendants' conduct constituted one or several conspiracies." 

1. U.S. Const. amend. V.
3. United States v. Ewell, 383 U.S. 116 (1966). Appellees' (Ewell and Dennis) convictions were set aside because the indictments failed to allege the purchaser's name as required by federal statute. Id. at 118 (citing 26 U.S.C. § 4705(a) (1969)). Both were immediately reindicted for that offense. Id. at 118-19. Additionally, the appellees were charged with selling narcotics not in or from the original package and for dealing in illegally imported narcotics. Id. (citing 26 U.S.C. §§ 174, 4704(a) (1969)). The District Court for the Southern District of Indiana dismissed the indictments on the ground that they violated appellees' right to a speedy trial, but rejected their contention that the indictments subjected the appellees to double jeopardy. Id. The United States Supreme Court affirmed that portion of the district court's opinion. Id. at 124.
4. Id. at 124. Specifically, the Court stated that the double jeopardy clause will "[not] bar a second prosecution unless the 'same offence' is involved in both the first and second trials." Id. (quoting U.S. Const. amend. V).

The United States Supreme Court subsequently laid the cornerstone of modern conspiracy and double jeopardy law in Braverman v. United States, 317 U.S. 49 (1942). In Braverman, the defendants were indicted on seven counts, each charging a conspiracy to violate a separate and distinct internal revenue law of the United States. Id. at 50. The defendants' challenge asserted that the proof could not and did not establish more than one agreement. Id. at 51. The government conceded that it had proven only one single agreement (conspiracy). Id. at 52. Reversing the Court of Appeals for the Sixth Circuit, the Supreme Court held the alleged conspiracy was a single continuing agreement violating a single statute even though it had diverse objects. Id. at 54. See W. Lafave & A. Scott, Jr., Criminal Law § 6.5, at 550 (2d ed. 1986) (Braverman resolves dispute among courts on what to emphasize in criminal conspiracy charges: agreement rather than acts done pursuant to it).

The Braverman Court found that the nature and extent of a conspiracy is to be determined by reference to the agreement which embraces and defines the objects of the conspiracy because the agreement constitutes the conspiracy

(674)
Courts historically utilized two different approaches in determining whether certain conduct constituted one or several conspiracies. Traditionally, courts applied the “same evidence” test requiring the examination of each statutory offense charged to determine whether in light of the relevant statutory provisions, each requires proof of an additional fact which the other does not. However, more recently a majority of the circuits adopted the “totality of circumstances” approach which consists of a review of the relevant facts contained in multiple indictments so as to determine whether the defendant is being charged with one or more offenses. The Third Circuit recently was confronted with the

which the statute punishes. 317 U.S. at 55. When an agreement to commit one or more substantive crimes is evidenced by an overt act, the agreement which embraces and defines the objects of the conspiracy determines the conspiracy's nature and extent. Id. Therefore, “one agreement cannot be taken to be several agreements and hence several conspiracies [simply] because it envisages the violation of several statutes rather than one.” Id.


7. Traditionally, the Third Circuit applied the “same evidence” test: i.e., whether “the evidence required to support a conviction upon one of [the indictments] would have been sufficient to warrant a conviction upon the other.” United States v. Young, 503 F.2d 1072, 1075 (3d Cir. 1974) (quoting United States v. Pacelli, 470 F.2d 67, 72 (2d Cir. 1972) (citation omitted)).

The “same evidence” test was formulated in United States v. Blockburger, 284 U.S. 299 (1932). Blockburger was convicted of three counts of violating the Harrison Narcotics Act. Id. at 301 (citing 26 U.S.C. § 692). All three sales involved the sale of morphine to the same purchaser. Id. The Blockburger Court rejected the defendant's contention that since two of the sales charged as separate offenses were made to the same customer they constituted only one offense. Id. at 301-02.

In United States v. Sinito, the Sixth Circuit stated that “under Blockburger, offenses are deemed identical for purposes of the double jeopardy clause where the evidence required to support conviction in one of the prosecutions is sufficient to support conviction in the other prosecution.” United States v. Sinito, 723 F.2d 1250, 1256 (6th Cir. 1983), cert. denied, 469 U.S. 817 (1984).

8. Today, the majority of circuits have adopted the “totality of the circumstances” test. United States v. Lirotard, 817 F.2d 1074, 1078 (3d Cir. 1987). This test requires the trial court to consider certain factors when determining whether two conspiracies arise from a single agreement. Sinito, 723 F.2d at 1256. Generally these factors include: (1) time, (2) co-conspirators, (3) statutory offenses charged in the indictment, (4) the overt acts which define the nature and scope of the criminal activity, and (5) the geographic locations where events alleged as part of the conspiracy took place. Id. See also United States v. MacDougall, 790 F.2d 1135, 1144 (4th Cir. 1986) ("same evidence" test merely consists of facial comparison of indictments); United States v. Korfant, 771 F.2d 660, 662 (2d Cir. 1985) (describing the "totality of circumstances" test as "an apt and well-accepted approach given the nature of the crime of conspiracy. . ."); United States v. Phillips, 664 F.2d 971, 1006 n.50 (Former 5th Cir. Unit B, Dec. 1981) (considers these factors in determining if events charged to two indictments are part of a single agreement), cert. denied, 457 U.S. 1136.
question of which of the two tests to apply in the case of United States v.
Liotard.9 With respect to that issue, the court held that trial courts must
use the “totality of circumstances” test to evaluate the merits of a con-
spiracy defendant’s double jeopardy claim.10

On March 7, 1986, defendant, Russell Liotard, was acquitted in the
United States District Court for the Western District of Pennsylvania
(Pittsburgh) of one count of conspiracy to transport stolen goods in in-
terstate commerce and two counts of transporting stolen goods in in-
terstate commerce.11 One month later, Liotard pleaded not guilty to an
indictment handed down in the United States District Court for the Dis-
trict of New Jersey charging him with one count of conspiracy to steal
from an interstate shipment of goods, one count of theft from an inter-
state shipment of goods, and one count of receipt and concealment of

(1982); United States v. Jabara, 644 F.2d 574, 577 (6th Cir. 1981) (approving
the district court’s adoption of the “totality of circumstances” test); United States v.
Castro, 629 F.2d 456, 461 (7th Cir. 1980) (concluding that where several factors
are present “the alleged illegal combinations are not separate and distinct of-
fenses.”) (citations omitted); United States v. DeFillipo, 590 F.2d 1228, 1234-35
(2d Cir. 1979) (stating that court not restricted to “same evidence” test when
reviewing double jeopardy claims), cert. denied, 442 U.S. 920 (1979); United
States v. Tercero, 580 F.2d 312, 315 (8th Cir. 1978) (“totality of circumstances”
is proper double jeopardy test in criminal conspiracy cases); United States v.
Marable, 578 F.2d 151, 154 (5th Cir. 1978) (court incorporates “totality of cir-
cumstances” factors into “same evidence” test), aff’d sub nom., Albernaz v.

The “totality of circumstances” approach was proposed by the Fourth Cir-
circuit in United States v. Short, 91 F.2d 614 (4th Cir. 1937). The defendant
pleaded guilty to violating the internal revenue laws by conspiring to distill, sell,
remove and conceal spirits without paying taxes. Id. at 618. A second in-
dictment charged the same statutory violations, with the exception of the object
of the conspiracy. Id. at 619. The government argued that the indictments differed
in periods of time, places of crime, persons named as co-conspirators, and overt
acts and that the latter indictment charged an additional violation. Id. at 619-20.
Accepting the government’s argument as a matter of law, based on the face
of the indictments, the court specifically stated that “the gist of the [conspiracy] is
the unlawful agreement . . . and one conspiracy does not become several be-
because it may incidentally involve the violation of several statutes.” Id. at 622.
However, the court remanded the case because the pleas of former jeopardy
should have been submitted to a properly entrusted jury due to the generality of
the language used in the indictments. Id. at 620.

For a general discussion of the relevant facts contained in multiple in-
dictments, see Note, supra note 5.

9. 817 F.2d 1074 (3d Cir. 1987). The panel consisted of Circuit Judges
Weis, Becker and Hunter. Id. at 1076. Judge Hunter wrote the opinion of the
court. Id.

10. Id. at 1078. In adopting this test, the court stated that it “now make[s]
explicit what has long been implicit in our jurisprudence: reviewing courts must
use the totality of circumstances test to evaluate the merits of a conspiracy de-
fendant’s double jeopardy claim.” Id. (footnote omitted).

11. Id. at 1076 (citing 18 U.S.C. §§ 371, 2314 (1982)) [hereinafter the
“Pittsburgh” indictment]. For further discussion of these charges, see infra
notes 15-16 and accompanying text.
stolen goods.\textsuperscript{12} Both indictments referred to the fact that Liotard and his alleged co-conspirators were employed by the John J. Veteri Corporation, a trucking company engaged in interstate shipping.\textsuperscript{13} Similarly, both indictments focused on the same general criminal counts: the role of defendant in the alleged conspiracies and the purported goals of the conspiracies.\textsuperscript{14}

The Pittsburgh indictment charged Liotard, Albert Little and two others with participation in a conspiracy, lasting from September 27, 1985 to October 2, 1985, during which they transported three stolen trailers full of merchandise from Fairfield, New Jersey to Pittsburgh, Pennsylvania.\textsuperscript{15} The New Jersey indictment charged Liotard and two others with participation in a conspiracy, lasting from August 3, 1985, to December 30, 1985, during which they transported a stolen trailer load of electronic equipment from Fairfield, New Jersey to Elmer, New Jersey.\textsuperscript{16}

Liotard thereafter filed a motion to dismiss the New Jersey indictment on double jeopardy grounds.\textsuperscript{17} The trial court dismissed the mistrial motion and upon reconsideration\textsuperscript{18} Judge Stern of the United States District Court for the District of New Jersey ruled, after applying both the "same evidence" test and the "totality of circumstances" test, that the defendant had not made a sufficient showing of double jeopardy to entitle him to an evidentiary hearing on that issue and that he was not impermissibly subjected to multiple prosecutions.\textsuperscript{19} Accordingly,

\textsuperscript{12} Id. at 1076 (citing 18 U.S.C. §§ 371, 659, 2315 (1982) [hereinafter "New Jersey indictment"]). For a further discussion of these charges, see infra notes 15-16 and accompanying text.

\textsuperscript{13} Id. at 1076.

\textsuperscript{14} Id. at 1076-77. Both indictments alleged that Liotard and his co-conspirators conspired in the successful thefts of company trucks and merchandise from the Veteri lot in Fairfield, New Jersey. Id. The indictments further alleged that Liotard used his position as the company's dispatcher to determine which truckloads of merchandise his co-conspirators would steal. Id. at 1077. Additionally, both indictments claimed that the purported goals of both conspiracies were the personal enrichment of the participants and the financial ruination of the victim's trucking company. Id.

\textsuperscript{15} Id. The Pittsburgh indictment alleged that Little selected the trucks to be stolen from a list which Liotard prepared. Id. The preparation of the list was the only overt act with which the Pittsburgh indictment charged Liotard. Id. The actual interstate transportation of the goods was accomplished by the other co-conspirators. Id.

\textsuperscript{16} Id. At Liotard's suggestion, Little, an unindicted co-conspirator, allegedly removed the trailer from Veteri's lot. Id. Liotard allegedly participated in transporting the stolen trailer to Fairfield, New Jersey and in unloading of the electronic equipment from the trailer. Id.

\textsuperscript{17} Id. at 1076. At the time Liotard filed his motion to dismiss, a trial date of June 16, 1986, had been set. Id.

\textsuperscript{18} 638 F. Supp. 1101, 1102-03 (D.N.J. 1986), rev'd, 817 F.2d 1074 (3d Cir. 1987).

\textsuperscript{19} 638 F. Supp. at 1104. The district court found that under the "same evidence" test, no double jeopardy bar existed because the evidence required to
Liotard appealed to the Third Circuit.\textsuperscript{20} Support a conviction in the Pittsburgh indictment would not have led to a conviction in the New Jersey indictment. \textit{Id.} at 1103. The Pittsburgh indictment charged Liotard with conspiracy to transport three trailers interstate at the end of September 1985, while the New Jersey indictment charged defendant with conspiracy to steal a different trailer-load of goods in early August 1985. \textit{Id.} Additionally, the parties to the conspiracies were not identical. \textit{Id.} Although both conspiracies allegedly involved three people, one conspiracy involved as many as five co-conspirators. \textit{Id.} The trial court concluded that it was “self-evident that these indictments charge separate agreements.” \textit{Id.}

The district court denied the motion to dismiss, however, after an application of the “more intricate” “totality of the circumstances” test. \textit{Id.} The court used the concise summary of the “totality of circumstances” test described by Judge Adams in United States \textit{v.} Sargent Elec. Co., 785 F.2d 1123, 1138 (3d Cir. 1986) (Adams, J., dissenting). 638 F. Supp. at 1103-04. For a discussion of Judge Adams’ dissent in \textit{Sargent Electric}, see infra notes 26-27 and accompanying text. The factors considered by Judge Adams are the overlap between the two charged conspiracies among: (1) the criminal offenses charged in the successive indictments; (2) the participants; (3) the time period involved; (4) similarity of operation; (5) the overt acts alleged; (6) the geographic scope of the alleged conspiracies or locations where overt acts occurred; and (7) the objectives of the alleged conspiracies. 785 F.2d at 1139 (Adams, J., dissenting). Thereafter, perhaps anticipating the growing trend in law favoring the “totality of circumstances” test, the court analyzed the indictments under that doctrine noting it was in general, more favorable to criminal defendants. 638 F. Supp. at 1104.

The district court stressed that a majority of the factors described in its analysis may be present whenever professional criminals are involved without creating a double jeopardy problem. \textit{Id.} A professional “second-story man,” for example, might find himself charged in successive indictments with similar offenses (factor one), with the same participants (factor two), that are similar in operation (factor four), and in the same geographical area (factor six). The offenses may even be close in time (factor three). Yet no court would bar an indictment for burglary because of a prior trial for the burglary of a different house. In this hypothetical the absence of identical objectives (factor seven) and overt acts (factor five) is enough to defeat a claim of double jeopardy. \textit{Id.} Therefore, the majority of factors may be present in a given indictment, and still not create a double jeopardy claim, because there is no authority that each factor is equally weighed. \textit{Id.}

The court concluded that the indictments arose from two separate transactions. \textit{Id.} at 1103-04. While the district court found some degree of overlap between the two indictments, it attached little significance to the overlap. \textit{Id.} at 1104. The court reasoned that in order for the overlap to be significant, it would have to afford each factor in the “totality” analysis equal weight and it found no authority to support such a position. \textit{Id.} at 1104. The court admitted that there was some overlap regarding the participants and the time span of the alleged conspiracies. \textit{Id.} However, the district court found no overlap with regard to other factors, including the level of appellant’s involvement in the two conspiracies, the overt acts involved, the ‘locus’ of the conspiracies (the Pittsburgh conspiracy was essentially interstate while the New Jersey conspiracy was primarily intrastate), and the overall objectives of the two conspiracies. \textit{Id.} at 1104.

20. 817 F.2d at 1076. Liotard’s appeal from the trial court’s denial of his motion to dismiss was an interlocutory appeal. \textit{Id.} at 1077 n.4. The court exercised jurisdiction over the appeal citing Supreme Court precedent. \textit{Id.} (citing Abney \textit{v.} United States, 451 U.S. 651 (1977)). In \textit{Abney}, the Supreme Court held
Thus confronted with the issue of whether Liotard's "acquittal on the Pittsburgh conspiracy charge bar[red] the New Jersey conspiracy indictment under the double jeopardy clause," the Third Circuit held that reviewing courts must thereafter use the "totality of the circumstances" test. The Liotard court observed that the defendant had the burden of putting the double jeopardy claim in issue.

Judge Hunter noted that the Third Circuit previously utilized the "same evidence" test when evaluating a conspiracy defendant's double jeopardy claim. However, the court recognized that in conspiracy cases, "the same evidence test may not adequately protect the defendant's constitutional right against double jeopardy, unless it is 'tempered . . . with the consideration that a single conspiracy may not be arbitrarily subdivided for the purposes of prosecution.'" The court's rationale was based on a hypothesis that successive indictments against a defendant for participation in a single conspiracy might withstand "same evi-

that the district court's pretrial denial of the defendant's motion to dismiss an indictment on double jeopardy grounds was a "final decision" and thus appealable. Abney v. United States, 451 U.S. 651, 659 (1977) ("The court of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts. . . .") (citing 28 U.S.C. § 1291 (1976)). The Supreme Court noted that the pre-trial orders denying a motion to dismiss on double jeopardy grounds lacked the finality traditionally associated with reviewable orders and fit within the small "class of cases" beyond the purview of the finality of judgment rule. Id.

21. 817 F.2d at 1077 (footnotes omitted). This was defined as the question on appeal. Id. The court noted that acquittal of the Pittsburgh conspiracy charge barred only the subsequent prosecution of the conspiracy charge and did not bar prosecution on the substantive charges contained in the New Jersey indictment. Id. at 1077 n.6 (citing United States v. Inmon, 568 F.2d 326, 333 (3d Cir. 1977), cert. denied, 444 U.S. 859 (1979)).

22. Id. at 1078. The circuit court also held that Liotard made a non-frivolous showing of double jeopardy and hence, was entitled to a pretrial hearing on his double jeopardy claim. Id. at 1079. However, the Third Circuit concluded that the district court's refusal to exercise its supervisory powers in order to protect him from fragmentary prosecution was not a final order and not reviewable. Id. at 1079-80. See 28 U.S.C. § 1291 (1982). For the text of that statute, see supra note 20. Accordingly, the case was remanded. Id. at 1080.

23. 817 F.2d at 1077. The court noted that a defendant who makes a non-frivolous showing of double jeopardy has a right to a pretrial hearing to determine the merits of his claim. Id. See United States v. Inmon, 568 F.2d 326, 330 (3d Cir. 1977) (double jeopardy is a defense which must be pleaded by defendant), cert. denied, 444 U.S. 859 (1979). The court recognized that once the defendant had made a prima facie showing, the burden of persuasion shifts to the government to prove by a preponderance of the evidence that the two indictments charge the defendant with legally separate crimes. 817 F.2d at 1077. See also United States v. Felton, 753 F.2d 276, 278 (3d Cir. 1985) (once defendant places double jeopardy claim in issue, burden of persuasion shifts to government), cert. denied, 107 S. Ct. 3235 (1987).

24. For a discussion of the "same evidence" test, see supra note 5 and accompanying text.

25. 817 F.2d at 1078 (quoting United States v. Young, 503 F.2d 1072, 1075 (3d Cir. 1974)).
dence” scrutiny, particularly if a court places undue emphasis upon evidence used to prove the commission of the overt acts alleged.\(^6\)

Judge Hunter noted that while the Third Circuit never formally adopted\(^7\) the majority “totality of the circumstances” view,\(^8\) it did use

26. 817 F.2d at 1078. The court further stated that “[p]roper weight must be given to consideration of whether the overt acts alleged in the first conspiracy charge were carried out in furtherance of the broad agreement alleged in the second indictment or whether these acts were carried out in furtherance of a different agreement.” \textit{Id.} (quoting United States v. Young, 503 F.2d 1072, 1075 (3d Cir. 1974) (citations omitted)).

The primary concern of the courts in this regard is that prosecutors would be able to draft multiple conspiracy indictments based on the same agreement, by “skillfully choosing different sets of overt acts,” United States v. Thomas, 759 F.2d 659, 662 (8th Cir. 1985), \textit{petition for cert. filed}, Feb. 12, 1988. Since the essence of the “totality of circumstances” approach is determining whether there was agreement to commit several crimes or several agreements to commit several crimes, this test “provides a more accurate analysis in determining whether multiple conspiracies exist.” \textit{Id.} Therefore, it is submitted that this approach furthers the goals of increased accuracy in conspiracy determinations, and increases protection of a defendant’s right to not be put “twice in jeopardy.”

27. 817 F.2d at 1078. The court noted that Judge Adams’ dissenting opinion in \textit{United States v. Sargent Elec. Co.} encouraged the Third Circuit to adopt the “totality of circumstances” approach. \textit{Id.} (citing United States v. Sargent Elec. Co., 785 F.2d 1123, 1139 (3d Cir.) (Adams, J., dissenting), \textit{cert. denied}, 107 S. Ct. 82 (1986)). In \textit{Sargent Elec. Co.}, all four defendants moved to dismiss an indictment alleging violations of the Sherman Act because it was barred by the double jeopardy clause. 785 F.2d at 1124. The majority opinion concluded that since the two schemes were aimed at two different markets, the schemes constituted two separate conspiracies. \textit{Id.} at 1130. The court based its conclusion on the Sherman Act’s requirement that a “conspiracy must be identified in terms of an intended or achieved effect upon . . . a relevant market. . . .” \textit{Id.} at 1127 (construing 15 U.S.C. § 1 (1982)). Judge Adams noted that other courts had adopted the “totality of the circumstances” test because of the difficulties in applying the “same evidence” test. \textit{Id.} at 1139 (Adams, J., dissenting). In \textit{Sargent Elec. Co.}, Judge Adams concluded that under either the “same evidence” test or the “totality of the circumstances” test, the ultimate question is the same: whether there is more than one agreement. \textit{Id.} at 1139 (Adams, J., dissenting).

28. 817 F.2d at 1078. A majority of circuit courts have concluded that the “totality of circumstances” analysis is preferable to the “same evidence” test for evaluating the merits of a conspiracy defendant’s double jeopardy claim. \textit{Id.} \textit{See United States v. MacDougall,} 790 F.2d 1135, 1144 (4th Cir. 1986) (“same evidence” test is of limited value in double jeopardy claim involving successive conspiracy prosecutions); United States v. Korfant, 771 F.2d 660, 662 (2d Cir. 1985) (“totality of circumstances” approach is “an apt and well-accepted approach given the nature of the crime of conspiracy.”); United States v. Thomas, 759 F.2d 659, 662 (8th Cir. 1985) (“same evidence” test of questionable value in double jeopardy conspiracy cases), \textit{petition for cert. filed}, Feb. 12, 1988; United States v. Sinito, 723 F.2d 1250, 1256 (6th Cir. 1983) (inherent infirmities exist in applying “same evidence” test in conspiracy cases), \textit{cert. denied}, 469 U.S. 817 (1984); United States v. Puckett, 692 F.2d 663, 668 (10th Cir.) (“same evidence” test is “an inadequate measurement of double jeopardy when applied . . . [to] conspiracy charges”), \textit{cert. denied}, 459 U.S. 1091 (1982); United States v. Phillips, 664 F.2d 971, 1006 (Former 5th Cir. Unit B. Dec. 1981) (“same evidence” test not easily applied in complex conspiracy prosecutions); United States v. Castro, 629 F.2d 456, 461 (7th Cir. 1980) (“same evidence” test seldom prevents multi-
the test twice before when evaluating a conspiracy defendant's appeal of double jeopardy claim. For example, in United States v. Inmon, the defendant brought forward a *prima facie* non-frivolous claim that the two separate indictments charged him with the same conspiracy. The Inmon court concluded that once a defendant makes such a non-frivolous showing, the burden of establishing separate conspiracies shifts to the government. In its analysis, the Inmon court stressed that a court re-

ple prosecutions in narcotics conspiracy cases); United States v. Solano, 605 F.2d 1141, 1144 (9th Cir. 1979) ("same evidence" test not easily applied in complex conspiracy prosecutions), cert. denied, 444 U.S. 1020 (1980); United States v. Marable, 578 F.2d 151, 153 (5th Cir. 1978) ("same evidence" test allows possibility of "many separate prosecutions in all but most limited and precise short-term conspiracies.").


30. 568 F.2d 326 (3d Cir. 1977), cert. denied, 444 U.S. 859 (1979). Two indictments were returned on July 14, 1976. Id. at 328. The first indictment charged appellant and nine co-defendants with conspiracy to distribute and possess, with intent to distribute, heroin in violation of federal law. Id. (citing 21 U.S.C. § 841(a)(1) (1976)). The conspiracy allegedly lasted from September 1, 1975 to April 4, 1976. Id. The indictment specified twenty-three overt acts, all of which occurred between October 10, 1975 to April 3, 1976. Id. The appellant allegedly participated in twenty-one of them. Id.

The second indictment charged appellant with conspiracy to distribute and possess, with intent to distribute, heroin. Id. (citing 21 U.S.C. § 841(a)(1) (1976) (footnote omitted)). This alleged conspiracy involved seventeen other co-conspirators and continued from February 1, 1975 to July 14, 1976. Id. This indictment contained thirty-three overt acts, and charged appellant with participating in thirteen of them. Id. Appellant's participation allegedly began September 6, 1975 and ended July 13, 1976. Id.

31. Id. at 329. While there is a general consensus that a defendant's double jeopardy plea must be "non-frivolous," a definition of the phrase is illusive. The Fifth Circuit stated that a frivolous plea is one that is arbitrary and totally devoid of merit. United States v. Dunbar, 611 F.2d 985, 987 (5th Cir. 1980), cert. denied, 447 U.S. 926 (1980). In an earlier treatment of Dunbar, the Fifth Circuit suggested that if a " cursory examination of the offenses involved . . . reveals that they are not the same, the defendant has made a non-frivolous claim." United States v. Dunbar, 591 F.2d 1190, 1193 (5th Cir. 1979), cert. denied, 447 U.S. 926 (1980) (quoting United States v. Smith, 574 F.2d 308, 309-10 (5th Cir. 1978)). For the Third Circuit's position, see infra note 41 and accompanying text.

32. 568 F.2d at 329. The Third Circuit found that appellant made the necessary *prima facie* non-frivolous showing by demonstrating the similarities between the indictments, i.e., they had the same locus, same objects and several of the same participants. Id. Additionally, both indictments covered roughly the same time period and portrayed the appellant as the central figure in both conspiracies. Id.

33. Id. at 331-32. The Inmon court made this conclusion because of both
viewing a double jeopardy appeal should consider all relevant factors to
determine whether the government arbitrarily subdivided a single
conspiracy. 34

Similarly, in United States v. Felton, 35 the Third Circuit reversed and
remanded a denial of a motion to dismiss an indictment on double jeop-
dardy grounds, after finding that the defendant made a non-frivolous
claim, and the government failed to prove by a preponderance of the
evidence that there were separate conspiracies. 36 In determining that
the government had not met its burden, the Felton court examined the
time periods of the conspiracies charged and the specific activities al-
leged in the two indictments. 37 The court explicitly noted that under
either the “same evidence” test or the “totality of circumstances” ap-
proach, its conclusion would be the same. 38 Consequently, in Felton, the
Third Circuit succeeded in side-stepping the issue of choosing the most
appropriate approach for evaluating a conspiracy defendant’s double
jeopardy claim.

In Liotard, the Third Circuit formally adopted the “totality of cir-
cumstances” test to evaluate the merits of a conspiracy defendant’s

34. Id. at 330. The court supported this analysis by evaluating United
States v. Young, 503 F.2d 1072 (3d Cir. 1974). Id. at 330. In Young, the Third
Circuit reversed and remanded the defendant’s double jeopardy appeal because
the lower court failed to consider all relevant factors when determining whether
the government arbitrarily subdivided a single conspiracy. United States v.
Young, 503 F.2d 1072, 1074 (3d Cir. 1974).

first indictment, handed down in the Northern District of Florida, charged ap-
ellant with conspiracy to possess, with intent to distribute, marijuana. Id.
at 277 (citing 21 U.S.C. § 841 (1982)). Appellant pleaded guilty to this indictment.
Id. However, this indictment covered only the period between December 1,
1980 and March 24, 1981, even though available testimony showed that the co-
conspirators had operated a smuggling operation before and after these dates.
Id. at 279.

The second indictment charged appellant and another group of co-conspir-
ators with conspiracy to distribute and possession with intent to distribute mari-
juana. Id. at 277 (citing 21 U.S.C. § 841(a)(1) (1982)). This indictment covered
a period from the beginning of 1979 to May 13, 1981. Id. at 278.

36. Id. at 278. The Third Circuit found that the defendant made a non-
frivolous claim, because the two indictments shared common elements “from
which one could infer a continuing, albeit loosely organized, conspiracy . . . .” Id.
at 279. These common elements included personnel similarities, operational
similarities, geographic similarities, and similar overt acts. Id. at 279-80. Addi-
tionally, one could “infer a continuing conspiracy to smuggle marijuana by the
group which operated out of Atlanta, and that the subsequent distribution of the
marijuana was also out of the Atlanta area.” Id. at 280.

37. Id. at 278-81.

38. Id. at 281. The court noted that it was not necessary to devote exten-
sive treatment to either approach because the result of its analysis would be the
same under either approach. Id.
double jeopardy claim.\textsuperscript{39} The court adopted the "totality of circumstances" test which is similar to the majority view.\textsuperscript{40} In accord with the majority view, in order for a conspiracy defendant to make a non-frivolous showing of double jeopardy he must establish the following four factors: (1) the similarity of the 'locus criminis' of the two alleged conspiracies; (2) a significant degree of temporal overlap between the two conspiracies charged; (3) overlap of personnel between the two conspiracies; and (4) a similarity in the overt acts charged and the role played by the defendant.\textsuperscript{41} The court declined to include a fifth factor used in the "majority view," i.e., the similarity of the statutory offenses charged in the indictments.\textsuperscript{42} The \textit{Liottard} court rationalized that inclusion of the fifth factor might lead to irrational results in cases where different statutes are violated by similar acts.\textsuperscript{43}

The court then applied the newly adopted "totality of the circumstances" test to the facts presented in the case before it.\textsuperscript{44} First, the "locus criminis" of both the Pittsburgh and New Jersey conspiracies was the same.\textsuperscript{45} Second, the time periods of the two conspiracies over-

\textsuperscript{39} 817 F.2d at 1078. The court noted it was merely making "explicit what has long been implicit in our jurisprudence." \textit{Id}. For a discussion of the specific holding of the \textit{Liottard} court, see \textit{supra} note 10 and accompanying text.

\textsuperscript{40} For a list of circuits which have adopted the "totality of circumstances" approach, see \textit{supra} note 8. For a discussion of the Third Circuit's version of the "totality of circumstances" approach as similar but not identical to the "majority view," see \textit{infra} notes 41, 62, 64 and accompanying text.

\textsuperscript{41} 817 F.2d at 1078 (citing \textit{Felton}, 753 F.2d at 279-81; \textit{Inmon}, 568 F.2d at 328).

\textsuperscript{42} 817 F.2d at 1078 n.7. The "totality of circumstances" test adopted by the Second, Fourth, Fifth, Sixth and Eighth Circuits includes "statutory offenses charged in the indictments" as one factor in determining whether one or more conspiracies exist. \textit{Id}. See United States v. MacDougall, 790 F.2d 1135, 1144 (4th Cir. 1986) (one factor is statutory offense charged); United States v. Korfant, 771 F.2d 660, 662 (2d Cir. 1985) (one factor is criminal offenses charged in successive indictments); United States v. Thomas, 759 F.2d 659, 662 (8th Cir. 1985) (factor normally considered is statutory offense charged in indictment), \textit{petition for cert. filed}, Feb. 12, 1988; United States v. Sinito, 723 F.2d 1250, 1256 (6th Cir. 1983) (one element of test is statutory offenses charged in indictments), \textit{cert. denied}, 469 U.S. 817 (1984); United States v. Marable, 578 F.2d 151, 154 (5th Cir. 1978) (examine record to compare the statutory offenses charged in indictments).

\textsuperscript{43} 817 F.2d at 1078 n.7. The court used \textit{Liottard} to illustrate an example of such a potentially irrational result. \textit{Id}. The charges brought against appellant in the two conspiracy "indictments differ not because of the substance of the violations, but because of the interstate nature of the acts alleged in" one indictment compared to the intrastate nature of the acts alleged in another indictment. \textit{Id}. That difference, the court concluded, was "immaterial and fortuitous." \textit{Id}. For a discussion of other circuits' application of the "totality of circumstances" approach, see \textit{supra} note 8 and accompanying text.

\textsuperscript{44} \textit{Id}. at 1079-80.

\textsuperscript{45} \textit{Id}. at 1079. In both indictments, the trailers and merchandise were stolen from the employer's lot in Fairfield, New Jersey. \textit{Id}. The core of the indictments was the initial theft from the employer's lot; unloading the merchandise at different locations was immaterial. \textit{Id}.
Third, there was an overlap in personnel. Finally, the role of defendant and the overt act alleged in the two indictments were "nearly identical." The Third Circuit rejected the government's argument that Liotard's role in the New Jersey theft was more essential to the success of that scheme than was his role in the Pittsburgh heist. The court also rejected the government's argument that the two heists were arranged in distinct conversations. Therefore, the court concluded that appellant made a non-frivolous showing of double jeopardy, and hence, was entitled to a pretrial hearing on his double jeopardy claim.

Conspiracy indictments are an "important weapon in a prosecutor's armory." However, the charge of criminal conspiracy may also create a serious danger of unfairness to a criminal defendant. To militate

---

46. Id. The court noted that while the two indictments did cover two distinct periods of time, the conspiracy charged in the Pittsburgh indictment occurred within the time period established in the New Jersey indictment. Id.

47. Id. Liotard and Little were the principal co-conspirators in both indictments. Id. Little's girlfriend, Bernice Joan Marasco, was additionally found to have participated in both conspiracies. Id.

48. Id. Both indictments charged as an overt act the theft of trailers full of merchandise from the employer's lot by employees. Id. The court found it immaterial that the Pittsburgh theft involved a "mixed haul," whereas the New Jersey theft involved specific electronic recording equipment. Id. However, both indictments similarly charged Liotard's role in the conspiracies which was the determination of which trailers to steal from the victim's lot. Id.

49. Id. According to the "Pittsburgh" indictment, Liotard designated ten trailers for possible theft and Little chose three; however, in the New Jersey conspiracy, Liotard specified only one trailer. Id. Also, according to the "New Jersey" indictment, Liotard actually assisted in unloading the Elmer, New Jersey merchandise, whereas according to the "Pittsburgh" indictment he had no physical contact with the truckloads that ended up in Pittsburgh. Id.

50. Id. at 1079 n.8. "These separate agreements could easily have been sub-plots in the course of one over-arching conspiratorial enterprise . . . ." See W. LAFAVE & A. SCOTT JR., CRIMINAL LAW § 62 at 480 (1973) ("there is one conspiracy so long as such if the multiple crimes are the object of the same agreement or continuous conspiratorial relationship") (citing MODEL PENAL CODE § 5.03 (3) (1962)). The court stated that: "[I]t is absurd to think that, once the participants agreed to a general plan to steal from Vetrici, their actions would henceforth become automatic and that any additional meeting to organize the specific sub-plots of their overall scheme would be either superfluous or indicative of a separate conspiracy." Id. at 1079 n.8.

51. Id. at 1080. For a discussion of the specific holding of the Liotard court, see supra note 10 and accompanying text.

52. See Note, Development in the Law-Criminal Conspiracy, 72 HARV. L. REV. 920, 922 (1959). See also United States v. Korfant, 771 F.2d 660, 662 (2d Cir. 1985) (conspiracy is "that darling of the modern prosecutor's nursery") (quoting United States v. Cepeda, 768 F.2d 1515 (2d Cir. 1985) (quoting Harrison v. United States, 7 F.2d 259, 263 (2d Cir. 1925)). For a general discussion of the danger of unfairness to a criminal defendant, see infra notes 54-57 and accompanying text.

53. See Note, supra note 5, at 299-300. The author of this Note attributes this element of unfairness to the defendant to the flexibility and formlessness—both procedurally and substantively—of the criminal conspiracy charge. Id. at 295-96.
against this potential unfairness "a single conspiracy may not be subdivided arbitrarily for the purposes of prosecution."54 The major criticism of the "same evidence" test is that the government is capable of carving seemingly smaller separate agreements from evidence of a single conspiracy.55 To protect criminal conspiracy defendants from such prosecutorial unfairness, the double jeopardy clause of the fifth amendment prohibits the subdivision of a single criminal act into multiple violations of one criminal statute.56 In Liotard, the Third Circuit

54. See United States v. Young, 503 F.2d 1072, 1075 (3d Cir. 1974) (to avoid single conspiracy being subdivided arbitrarily by prosecutor, when construing indictments they must be tempered with).

It is important to note that judicial concern over arbitrary subdivision of an alleged conspiracy is rooted in the constitutional prohibition against double jeopardy. See Green v. United States, 355 U.S. 184, 187-88 (1957). The idea against being convicted twice for the same crime, which is underlying the double jeopardy clause, is one "deeply ingrained in ... Anglo-American ... jurisprudence." Id. at 187. See also United States v. Chagra, 653 F.2d 26, 29 (1st Cir. 1981) (well established principle that "prosecutor cannot divide a continuing crime into bits and prosecute separately for each."). cert. denied, 455 U.S. 907 (1982). The Chagra court refers to an eighteenth century case to support its position: "In 1777, ... Lord Mansfield held that a statute prohibiting working on Sunday allowed the Crown to convict a baker only once for baking four loaves of bread on one Sunday; it could seek only one penalty of five shillings; it could not convict him four times. ..." Id. (citing Crepps v. Durden, 2 Cowper's Rpts. 640, 98 Eng. Rep. 1283 (1777)).

55. For a discussion of the criticism by the Third Circuit of the "same evidence" test, see infra note 57 and accompanying text. See United States v. Cooper, 442 F. Supp. 1259, 1262 (D. Minn. 1978). In Cooper, the district court specifically noted that this danger exists when the alleged conspiracy is ongoing or widespread. United States v. Cooper, 442 F. Supp. 1259, 1262 (D. Minn. 1978). The court therefore concluded that the "same evidence" test was "less than wholly satisfactory." Id. The court reasoned that distinctions between the two conspiracies could be attributable to the way the government presents its evidence to the grand jury or the finder of fact. Id. Hence, the distinctions might be based not on the fact that the agreements themselves are separate and distinct. Id. See also United States v. MacDougall, 790 F.2d 1135, 1144 (4th Cir. 1986) (prosecutors could draft two different indictments by simply focusing on different overt acts, thus making one conspiracy appear to be two); United States v. Sinoto, 723 F.2d 1250, 1256 (6th Cir. 1983) (overzealous prosecutors are capable of carving up one conspiracy into two or more artificial offenses), cert. denied, 469 U.S. 817 (1984); United States v. Castro, 629 F.2d 456, 461 (7th Cir. 1980) (under guise of prosecutorial discretion prosecutors are capable of dividing one conspiracy into several prosecutions, each requiring different evidence); United States v. Marable, 578 F.2d 151, 153 (5th Cir. 1978) ("same evidence" test could result in multiple prosecutions in all but most limited and precise short-term conspiracies), aff'd sub. nom., Albernaz v. United States, 456 U.S. 333 (1981).

56. United States v. Thomas, 759 F.2d 659, 661 (8th Cir. 1985) ("double jeopardy clause of fifth amendment prohibits subdivision of single criminal conspiracy into multiple violations of one conspiracy statute"). See United States v. Braverman, 317 U.S. 49, 53 (1942). The United States Supreme Court stated that the "precise nature and extent of the conspiracy [charge] must be determined by reference to the agreement which embraces and defines its objects." 317 U.S. at 53.
recognized the inadequacies of the traditional "same evidence" test as applied to a conspiracy defendant's double jeopardy claim.\textsuperscript{57} Thus, the court adopted the "totality of circumstances" test for the resolution of future double jeopardy claims within the Third Circuit.\textsuperscript{58}

It is important to note that there is no one distinct set of criteria in this approach.\textsuperscript{59} In fact, the Eighth Circuit has submitted that the doctrine would be more appropriately entitled the "all the facts" test.\textsuperscript{60}

Because the application of the "totality of circumstances" test is consistent with Third Circuit precedent\textsuperscript{61} and is appropriately addressed to the facts of the \textit{Liotard} case itself, it is submitted that the court correctly applied the test in the particular factual setting before it.

\textsuperscript{57} 817 F.2d at 1078. "The danger is that successive indictments against a single defendant . . . might withstand same evidence scrutiny if the court places undue emphasis upon the evidence used to prove the commission of the overt acts alleged." \textit{Id. See also} United States v. MacDougall, 790 F.2d 1135, 1144 (4th Cir. 1986) (prosecutors are able to carefully draw two indictments by choosing different sets of overt acts and making one conspiracy appear to be two); United States v. Sinito, 723 F.2d 1250, 1254 (6th Cir. 1983) (overzealous prosecutors, when drafting indictments, could carve up one conspiracy into several artificial offenses by carefully slicing the overt acts charged in each indictment), cert. denied, 469 U.S. 817 (1984); United States v. Marable, 578 F.2d 151, 153 (5th Cir. 1978) ("same evidence" test most effective when the conspiracy is limited and short-term); W. \textsc{LaFave} & A. \textsc{Scott}, Jr., \textit{supra} note 6, \S 6.5 at 550 ("same evidence" test not appropriate in conspiracy cases).

\textsuperscript{58} For a discussion of the specific holding in \textit{Liotard}, see \textit{supra} note 10 and accompanying text.

\textsuperscript{59} 817 F.2d at 1078. For a discussion of the "totality of circumstances" test, see \textit{supra} notes 41, 51 and accompanying text. Generally, most courts examine five criteria as particularly relevant to this area of inquiry: (1) time; (2) persons acting as co-conspirators; (3) statutory offenses charged in the indictments; (4) overt acts charged by the government, or any other description of the offense charged which indicates the nature and scope of activity which the government seeks to punish; and (5) places where the alleged events of the conspiracy took place. \textit{See, e.g.}, MacDougall, 790 F.2d at 1144; \textit{Thomas}, 759 F.2d at 662; \textit{Sinito}, 723 F.2d at 1256; \textit{Marable}, 578 F.2d at 154. The Second Circuit considers three additional factors: similarity of operations, common objectives, and degree of interdependence between the alleged distinct conspiracies. United States v. Korfant, 771 F.2d 660, 662 (2d Cir. 1985). \textit{See also} Note, \textit{supra} note 5, at 311-17 (analysis of relevant factors in "totality of circumstances" approach).

\textsuperscript{60} \textit{Thomas}, 759 F.2d at 662 n.4. The phrase "totality of the circumstances" is used because it is a familiar term to lawyers and judges. \textit{Id.} The term stands not only for considering the indictments themselves, but also anything else beyond the scope of the indictments which seems relevant in the determination of whether one or more criminal conspiracies exists. \textit{Id.}


It is important to note that the Third Circuit, when adopting the "totality of circumstances" analysis, declined to consider the "similarity of statutory offenses" as a factor.62 The court reasoned that consideration of this factor as relevant could possibly lead to "irrational and fortuitous" results where the differences in the two offenses charged is due to the fact that different statutes are violated by similar acts.63 It is submitted that the "totality of circumstances" approach of the Third Circuit is the most logical and appropriate method of evaluating a conspiracy defendant's double jeopardy claim. Courts in other circuits have found both valid double jeopardy claims and unsuccessful double jeopardy claims when they have applied the statutory similarity factor in their "totality of circumstances" test in conspiracy cases.64 Therefore, the factor

62. 817 F.2d at 1078 n.7. The Liotard court reasoned that consideration of the statutory similarity factor could produce irrational results when the same criminal conduct of the defendant happens to violate different statutes. Id.

63. Id. The court used an example based on Liotard. Id. The charges against Liotard differ because of the intrastate nature of the "New Jersey" indictment and interstate nature of the "Pittsburgh" indictment. Id. Therefore, the two indictments do not differ because of the substance of the violations. Id. "[A]n agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one." Id. (citing Braverman v. United States, 317 U.S. 49, 53 (1942)).

64. Inclusion of the statutory similarity factor has produced varied results. Certain courts have found two separate conspiracies despite the charging of one offense, and hence no valid double jeopardy claim. See, e.g., United States v. MacDougall, 790 F.2d 1135, 1147-48 (4th Cir. 1986) (separate agreements where separate management structures pursued independent ventures, despite overlap in offenses charged, time periods involved, and limited overlap in locations); In re Grand Jury Proceedings, 797 F.2d 1377, 1381-84 (6th Cir. 1986) (while offenses charged tend to show single conspiracy, court concludes two separate conspiracies), cert. denied, 107 S. Ct. 876 (1987); Thomas, 759 F.2d at 669 (overlap in time periods, co-conspirators, and overt acts between indictments was insufficient to be "same" offense, where the ends of offenses charged were same and means to procure different); United States v. Korfant, 771 F.2d 660, 663 (2d Cir. 1985) (violations of same conspiracy statute were two separate and distinct conspiracies because success of one agreement was independent of corresponding success of other); United States v. Sinito, 723 F.2d 1250, 1258-59 (6th Cir. 1983) (different charges under same conspiracy statute, despite different underlying criminal statutes, overlap in time period, "tenuous" overlap in personnel and "minimum significance" of overlap in geography were two separate crimes, especially in light of analysis of overt acts involved), cert. denied, 469 U.S. 817 (1984); United States v. Booth, 673 F.2d 27, 29-30 (1st Cir. 1982) (similarity of offenses charged is insufficient to support claim of double jeopardy in view of significant differences in time periods, co-conspirators, geographical locations and actual evidence introduced at trial), cert. denied, 456 U.S. 978 (1982); United States v. West, 670 F.2d 675, 681 (7th Cir.) (while indictments charge same offense, because of differences in time periods, participants, places and overt acts, court held more than one conspiracy), cert. denied, 457 U.S. 1124 (1982); United States v. Buonomo, 441 F.2d 922, 925 (7th Cir.) (differences in underlying substantive offenses compelled court to find two conspiracies), cert. denied, 404 U.S. 845 (1971); United States v. Wilshire Oil Co., 427 F.2d 969, 975-76 (10th Cir. 1970) (where underlying offenses were different and, time periods and co-conspirators same, court held two conspiracies), cert. denied, 400 U.S. 829 (1970); Arnold v. United States, 336 F.2d 347, 349-52 (9th Cir. 1964)
is not seen as particularly relevant.

Thus, the decision in the *Liotard* case puts the Third Circuit at the forefront of the law concerning conspiracy defendants' double jeopardy claims. The court adopts the "totality of circumstances" approach over the traditional "same evidence" test. The "same evidence" test proves to be obsolete in double jeopardy claims concerning conspiracy charges because a prosecutor is able to allege different overt acts, thus meeting the criteria of each offense requiring proof of an additional fact which the other does not. The "totality of circumstances" test gives the conspiracy defendant a "shield" from the "prosecutor's armory" of multiple prosecutions. This approach allows an ex parte determination of the indictments under relevant factors to determine if the conspiracy defendant is "rightfully" subject to the same or distinct criminal agreements.

For example, A and B meet to organize a fraudulent mail order operation only on one occasion, in April 1988. A and B agree to start a business to sell non-existing real estate in Villanova, Pennsylvania in exchange for money orders of $100,000 to prospective buyers in Wilmington, Delaware. While business is bad, A and B only sell two plots of non-existing real estate, one in May 1988 and the other in December 1989.

(while offense charged in both indictments was same, analysis of record demonstrates only one large conspiracy), *cert. denied*, 380 U.S. 982 (1965); United States v. Crumpler, 636 F. Supp. 396, 404-10 (N.D. Ind. 1986) (where indictments charged same offense, except second indictment charged one additional offense, court held two conspiracies because few similarities between charges); United States v. Price, 533 F. Supp. 1183, 1189 (W.D.N.Y. 1982) (while both indictments charged same conspiracy offense, the agreements lacked cohesion of geography, time, participants and mode of operation necessary for double jeopardy claim).

However, other courts, using the "totality of circumstances" approach, have found one continuous conspiracy when the indictments allege the same offense. *See* United States v. Broce, 753 F.2d 811, 822 (10th Cir. 1985) (where two indictments charged violations of same criminal conspiracy statute, court held one conspiracy because indictments were facially distinguishable only by reference to overt acts); United States v. Nichols, 741 F.2d 767, 768-72 (5th Cir. 1984) (court found one conspiracy when two different indictments charged defendant with same crime, conspiracy to possess cocaine with intent to distribute, and there was continuity in personnel, consistency in method, identical base of operation and singleness of purpose), *cert. denied*, 469 U.S. 1214 (1985); United States v. Allen, 539 F. Supp. 296, 306 (C.D. Cal. 1982) (while both indictments alleged violation of same conspiracy statute, "totality of circumstances" approach favored finding only one conspiracy).

65. For a discussion of the Third Circuit's holding in *Liotard*, see *supra* note 10 and accompanying text.

66. For a discussion of the "same evidence" test, see *supra* note 5 and accompanying text. For a discussion of the inapplicability of the "same evidence" test in conspiracy double jeopardy claims, see *supra* notes 53-57 and accompanying text.

67. For a discussion of the charge of conspiracy as a "weapon," see *supra* note 53 and accompanying text.
The operations concerning the sale are almost identical, and take place from A's home. A and B solicit the property in a similar catalogue. They use the same bank to cash the money orders, and they use the proceeds to purchase summer homes in New Jersey. In January 1990, the offenders are apprehended. The prosecutor wishes to charge the defendants on two conspiracy counts of interstate travel, use of wire communications in furtherance of a scheme to defraud—a violation of 18 U.S.C. § 371—and substantive counts of unlawful transfer in commerce of a money order procured by fraud—a violation of U.S.C. § 2314.

Under the "same evidence" test, the prosecutor is capable of bringing two charges of conspiracy of causing transportation of a money order in a scheme to defraud, if the prosecutor is able to allege different overt acts in the indictments. The prosecutor could allege in the December 1989 sale that a different pen was used to address the catalogue, or a different mail service was used to send the catalogue to the buyer than the May 1988 sale. Therefore, if the prosecutor places undue emphasis on facts to prove additional facts or overt acts in one indictment and not the other, he or she would be "carving" one agreement into more than one artificial offenses.

However, applying the "totality of the circumstances" approach of the Third Circuit, a prosecutor is halted from arbitrarily dividing one agreement to charge two conspiracies. If the defendants made a non-frivolous double jeopardy claim at the time of the second charge, the reviewing court would probably determine that both fraudulent sales were from one agreement. The "locus criminis" of the indictments would be the same. The acts leading up to the fraudulent sale, and the fraudulent sale occurred at the same location, A's house. The time periods of the two indictments would probably differ. The first indictment would cover the time period from April 1988 to May 1988, while the second indictment would allege the activity took place from April 1988 to December 1989. However, the first indictment would be subsumed within the time period of the second indictment. The indictments would be identical with regard to the principal conspirators—A and B. Finally, a reviewing court would examine the overt acts charged. Depending on a close scrutiny of the circumstances of the overt acts, a court would determine if this factor weighs more heavily in favor of one criminal agreement or more. Most likely, under the facts in the hypothetical, a reviewing court would find one agreement despite the defendants' use of a different pen used to address the catalogue, or the defendants' use of different mail carrier service. The court would find a double jeopardy bar because, in reality, there was only one criminal agreement to defraud — the agreement of April 1988.

Notice the flexibility of the "totality of circumstances" approach when the facts of the example are altered. Assume that A and B meet in
November 1989 to agree to sell the fraudulent real estate in December of that year, after the success of the May 1988 sale. In April 1988, the defendants only agreed to use their defraud scheme on one prospective purchaser from Wilmington, Delaware. This time, C and D also join A and B in the scheme. The plan in November is “more extravagant” because now there are more people who want a “piece of the action.” The co-conspirators have a more elaborate catalogue which is mailed to all of Southern Florida. Also, the co-conspirators advertise in newspapers and on television, which they never did in the May 1988 sale.

Under the “same evidence” approach, the prosecutor would be able to bring two charges of conspiracy under 18 U.S.C. § 371 and substantive counts of 18 U.S.C. § 2314. The prosecutor would emphasize the different overt acts between the two transactions. For example, in November 1989, the mailings were sent to Florida, while in May 1989, the mailings were sent to Delaware. The two transactions used different catalogues and different forms of advertising. Therefore, appropriately, the prosecutor would prove additional facts in one indictment which the other indictment does not need, and hence, there would be no bar to double jeopardy.

Analysis under the Third Circuit’s “totality of circumstances” test would also discover no bar to double jeopardy for the defendants. The “locus criminis” of indictments would be different. In May 1988, the prospective purchasers were from Delaware, while in November 1989, the prospective market was Southern Florida. The time periods are arguably different because in November 1989 all four co-conspirators met to devise a “second scheme.” Therefore, one indictment would allege that the criminal activity occurred from April 1988 to May 1988, while the other indictment would allege criminal activities occurred from November 1989 to December 1989. A distinct difference in principal co-conspirators would exist. One indictment would allege two principal co-conspirators, A and B, while the other indictment would allege four principal co-conspirators, A, B, C and D. Finally, the overt acts alleged would vary. One indictment would emphasize the sales activities from Delaware, while the other would emphasize the different sales activities from Southern Florida. Thus, clearly the prosecutor could bring two indictments against A and B, because in reality there were two separate and distinct criminal agreements to defraud.

These examples demonstrate the need of reviewing courts to apply a scrutinized “totality of circumstances” approach used in the Third Circuit. It is clear that the *Liotard* approach best deals with the realities of criminal conspiracy, while it protects a conspiracy defendant from prosecutorial abuse of alleging two conspiracies when, in fact, only one exists. In conclusion, the “totality of circumstances” approach adopted by the Third Circuit in *Liotard* is the most appropriate analysis to resolve
conspiracy defendants' double jeopardy claims when evaluating successive indictments.

Timothy R. Coyne