NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* DIXON ET AL.

CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

No. 91–1231. Argued December 2, 1992—Decided June 28, 1993

Based on respondent Dixon's arrest and indictment for possession of cocaine with intent to distribute, he was convicted of criminal contempt for violating a condition of his release on an unrelated offense forbidding him to commit ``any criminal offense.'' The trial court later dismissed the cocaine indictment on double-jeopardy grounds. Conversely, the trial court in respondent Foster's case ruled that double jeopardy did not require dismissal of a five-count indictment charging him with simple assault (Count I), threatening to injure another on three occasions (Counts II–IV), and assault with intent to kill (Count V), even though the events underlying the charges had previously prompted his trial for criminal contempt for violating a civil protection order (CPO) requiring him not to ```assault . . . or in any manner threaten . . . ''' his estranged wife. The District of Columbia Court of Appeals consolidated the two cases on appeal and ruled that both subsequent prosecutions were barred by the Double Jeopardy Clause under *Grady* v. *Corbin,* 495 U. S. 508.

Held: The judgment is affirmed in part and reversed in part, and the case is remanded.

598 A. 2d 724, affirmed in part, reversed in part, and remanded.

JUSTICE SCALIA delivered the opinion of the Court with respect to Parts I, II, and IV, concluding that:

1. The Double Jeopardy Clause's protection attaches in nonsummary criminal contempt prosecutions just as it does in other criminal prosecutions. In the contexts of both multiple punishments and successive prosecution, the double jeopardy bar applies if the two offenses for which the defendant is punished or tried cannot survive the ``same-elements'' or ``*Blockburger*'' test. See, *e.g., Blockburger* v. *United States,* 284 U. S. 299, 304. That test inquires whether each offense contains an element not contained in the other; if not, they are the ``same offence'' within the Clause's meaning, and double

jeopardy bars subsequent punishment or prosecution. The Court recently held in *Grady* that in addition to passing the *Blockburger* test, a subsequent prosecution must satisfy a ``same-conduct'' test to avoid the double jeopardy bar. That test provides that, ``if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted,'' a second prosecution may not be had. 495 U. S., at 510. Pp. 4–8.

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2. Although prosecution under Counts II–V of Foster's indictment would undoubtedly be barred by the *Grady* ``same-conduct'' test, *Grady* must be overruled because it contradicted an unbroken line of decisions, contained less than accurate historical analysis, and has produced confusion. Unlike *Blockburger* analysis, the *Grady* test lacks constitutional roots. It is wholly inconsistent with this Court's precedents and with the clear common-law understanding of double jeopardy. See, *Grady, supra,* at 526 (SCALIA, J., dissenting). *In re Nielsen,* 131 U. S. 176, and subsequent cases stand for propositions that are entirely in accord with *Blockburger* and that do not establish even minimal antecedents for the *Grady* rule. In contrast, two post-*Nielsen* cases, *Gavieres* v. *United States,* 220 U. S. 338, 343, and *Burton* v. *United States,* 202 U. S. 344, 379–381, upheld subsequent prosecutions because the *Blockburger* test (and *only* the *Blockburger* test) was satisfied. Moreover, the *Grady* rule has already proved unstable in application, see *United States* v. *Felix,* 503 U. S. ___. Although the Court does not lightly reconsider precedent, it has never felt constrained to follow prior decisions that are unworkable or badly reasoned. Pp. 13–23.

JUSTICE SCALIA, joined by JUSTICE KENNEDY, concluded in Parts III–A and III–B that:

1. Because Dixon's drug offense did not include any element not contained in his previous contempt offense, his subsequent prosecution fails the *Blockburger* test. Dixon's contempt sanction was imposed for violating the order through commission of the incorporated drug offense. His ``crime'' of violating a condition of his release cannot be abstracted from the ``element'' of the violated condition. *Harris* v. *Oklahoma,* 433 U. S. 682 *(per curiam).* Here, as in *Harris,* the underlying substantive criminal offense is a ``species of lesser-included offense,'' *Illinois* v. *Vitale,* 447 U. S. 410, 420, whose subsequent prosecution is barred by the Double Jeopardy Clause. The same analysis applies to Count I of Foster's indictment, and that prosecution is barred. Pp. 8–11.

2. However, the remaining four counts of Foster's indictment are not barred under *Blockburger.* Foster's first prosecution for violating the CPO provision forbidding him to assault his wife does not bar his later prosecution under Count V, which charges assault with intent to kill. That offense requires proof of specific intent to kill, which the contempt offense did not. Similarly, the contempt crime required proof of knowledge of the CPO, which the later charge does not. The two crimes were different offenses under the *Blockburger* test. Counts II, III, and IV are likewise not barred. Pp. 11–13.

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JUSTICE WHITE, joined by JUSTICE STEVENS, concluded that, because the Double Jeopardy Clause bars prosecution for an offense if the defendant already has been held in contempt for its commission, both Dixon's prosecution for possession with intent to distribute cocaine and Foster's prosecution for simple assault were prohibited. Pp. 1, 12–14.

JUSTICE SOUTER, joined by JUSTICE STEVENS, concluded that the prosecutions below were barred by the Double Jeopardy Clause under this Court's successive prosecution decisions (from *In re Nielsen,* 131 U. S. 176, to *Grady* v. *Corbin,* 495 U. S. 508), which hold that even if the *Blockburger* test is satisfied, a second prosecution is not permitted for conduct comprising the criminal act charged in the first. Because Dixon's contempt prosecution proved beyond a reasonable doubt that he had possessed cocaine with intent to distribute it, his prosecution for possession with intent to distribute cocaine based on the same incident is barred. Similarly, since Foster has already been convicted in his contempt prosecution for the act of simple assault charged in Count I of his indictment, his subsequent prosecution for simple assault is barred. Pp. 19–21.

SCALIA, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and IV, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, and THOMAS, JJ., joined, and an opinion with respect to Parts III and V, in which KENNEDY, J., joined. REHNQUIST, C. J., filed an opinion concurring in part and dissenting in part, in which O'CONNOR and THOMAS, JJ., joined. WHITE, J., filed an opinion concurring in the judgment in part and dissenting in part, in which STEVENS, J., joined, and in which SOUTER, J., joined as to Part I. BLACKMUN, J., filed an opinion concurring in the judgment in part and dissenting in part. SOUTER, J., filed an opinion concurring in the judgment in part and dissenting in part, in which STEVENS, J., joined.