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DOUBLE PUNISHMENT FOR BURGLARIOUS OFFENSES

Whether a criminal defendant, who has embarked upon a single course of illegal conduct and in so doing has violated a number of provisions of law, should be subject to consecutive sentencing on each count is a complex problem. Such a defendant, within the strict meaning of the law, has in fact violated each provision. However, he has performed only one act with a single motivation.¹ The problem is most acute when a defendant is convicted of burglary² and the completed burglarious offense.³

In *People v. Hicks*,⁴ this difficulty was squarely faced. Hicks broke into a home and committed three felonious sex offenses against a 14-year-old girl.⁵ Four nights later he again broke into the same house but was frightened away by the girl's father. Indicted for both burglaries and the three sex offenses, Hicks was convicted on all counts and given consecutive sentences for each crime. He appealed, claiming that by being sentenced to consecutive terms for the sex offenses and the first burglary he was subject to double punishment⁶ in contra-

¹Use of the word "act" with this connotation is not unusual in criminal law. Examples which spring readily to mind include robbery, abortion, bigamy, contributing to delinquency, kidnapping, embezzling, and many types of assault.

²For purposes of this comment the term "burglary" will be used to describe common law burglary, statutory burglary, and breaking and entering. Common law burglary is the breaking and entering of the dwelling of another, in the night, with intent to commit a felony. Statutory burglary generally is the entry at any hour of any structure usable for storage of goods, with the intent to commit a felony or any theft. Breaking and entering is a variation of statutory burglary, usually of a less serious degree.

³"Burglarious offense" means any crime, the intent to commit which motivated a burglary.

Except as otherwise noted all cases cited herein will refer to burglary situations. It is beyond the scope of this comment to attempt a consideration of the other possible combinations of offense (e.g., felony-murder, kidnap-robbery, narcotics possession-sale, etc.)

⁴44 Cal. Rptr. 141 (Dist. Ct. App. 1965). This decision has been vacated in 48 Cal. Rptr. 139, 408 P.2d 747 (Sup. Ct. 1965), however, the new holding is apparently identical.

⁵The offenses were lewd and lascivious acts in violation of Cal. Pen. Code § 286 (infamous crime against nature) and § 288a (oral-genital copulation).

⁶The term "double punishment" should be restricted to situations in which consecutive sentences are given on counts charging necessarily included offenses. A necessarily included offense exists when certain constituent parts of a crime may be removed, leaving the elements of another complete offense. *State v. Marshall*, 206 Iowa 373, 220 N.W. 106 (1928). The courts, however, also use the term "double punishment" when they are speaking of consecutive sentencing for constituent elements of a course of conduct even though such elements are not necessarily included in one another.

Concurrent sentences are not considered to be double punishment, for when a

vention of California Penal Code section 654, which provides that any act punishable under the different provisions of the Penal Code may be *punished* under only one such provision.⁷ The California District Court of Appeals agreed with his contention and reversed the judgment relating to sentencing for the sex offenses,⁸ stating: "Insofar as only a single act is charged as the basis for the conviction . . . the defendant can be punished only once."⁹

Burglary is defined in part as an attempt to commit some other crime.¹⁰ As a separate offense, it arose as an effort to compensate for defects in traditional attempt law, which imposed significantly lighter penalties. Entry with criminal intent as an independent substantive offense pushes back the time at which the law can intervene effectively and provides an opportunity for imposition of more severe penalties.¹¹ Under early English common law, theft by burglary was a merged offense,¹² hence punishable as a single offense; but in the United States, although ordinarily attempt merges in the completed offense, such has not been the case with burglary.

Of the forty-five states which do not have a statute similar to California Penal Code section 654, the only major one still following the English rule is Illinois.¹³ A few other states apparently agree, but have made no recent reported decisions.¹⁴ A majority of the states agree that burglary is distinct from burglarious offenses for punish-

shorter sentence runs with a longer, "there is no punishment for the shorter; it does not inflict upon a defendant any additional restraint or detention." *People ex rel. Maurer v. Jackson*, 2 N.Y.2d 259, 268, 159 N.Y.S.2d 203, 210, 140 N.E.2d 282, 288 (1957), and cases cited therein at 287.

⁷Cal. Pen. Code § 654. "An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other."

⁸The maximum penalty for either sex crime or for burglary is life imprisonment, but the minimum sentence for burglary is 5 years, for the § 288a violation 3 years, and for violation of § 286 one year. Therefore, burglary is deemed the most serious of the three crimes. (The sentence for the second burglary was affirmed.)

⁹44 Cal. Rptr. at 143.

¹⁰*Perkins*, Criminal Law 166 (1957); 2 *Wharton*, Criminal Law and Procedure §§ 408-10 (1957).

¹¹Model Penal Code § 221.1, comment 1 (Tent. Draft No. 11, 1960).

¹²4 *Blackstone*, Commentaries 240-41 (15th ed. 1809).

¹³E.g., *People v. Squires*, 27 Ill. 2d 518, 190 N.E.2d 361 (1963); *People v. McMullen*, 400 Ill. 253, 79 N.E.2d 470 (1948); *People v. Fitzgerald*, 297 Ill. 264, 130 N.E. 720 (1921).

¹⁴*Kaufman v. State*, 189 Tenn. 315, 225 S.W.2d 75 (1949); *State v. McClung*, 35 W. Va. 280, 13 S.E. 654 (1891).

ment purposes,¹⁵ thus abandoning the English rule. But a number of these states maintain that if the offenses are not charged in separate counts of the indictment, only a single punishment may be awarded.¹⁶ The reason for allowing separate punishment is that one offense is not necessarily included in the other, hence no merger.¹⁷

Under federal law a single act may receive several punishments,¹⁸ and burglary may be punishable as a merged offense,¹⁹ depending upon

¹⁵E.g., *Williams v. State*, 205 Md. 470, 109 A.2d 89 (1954); *State v. Byra*, 128 N.J.L. 429, 26 A.2d 702 (Sup. Ct. 1942); *Wyatt v. Alvis*, 73 Ohio L. Abs. 21, 136 N.E.2d 726 (Ct. App. 1955); *Commonwealth ex rel. Moszczynski v. Ashe*, 343 Pa. 102, 21 A.2d 920 (1941); *Copeland v. Manning*, 234 S.C. 510, 109 S.E.2d 361 (1959); *Benton v. Commonwealth*, 91 Va. 782, 21 S.E. 495 (1895).

Separate punishment for burglary is *specifically* permitted by statute in four states: Ark. Stat. Ann. § 41-1005 (Repl. Vol. 1964); Nev. Rev. Stat. § 205.070 (1959); N.Y. Pen. Law § 406; and Tex. Pen. Code art. 1399 (1948). Kansas and Missouri *expect* separate punishments, but provide that if the burglarious offense is larceny the sentence imposed shall not be more than 5 years greater than the maximum for burglary alone. Kan. Stat. Ann. § 21-524 (1964); Mo. Rev. Stat. § 560.110 (1959).

A number of states have statutes which *permit* consecutive sentencing for *any* two offenses, one of which does not necessarily include the other: Fla. Stat. Ann. § 921.16 (1944); Iowa Code Ann. § 789.12 (1950); Mass. Ann. Laws ch. 279, § 8 (1956); Miss. Code Ann. § 2567 (1956); N.J. Stat. Ann. § 30:4-123.10 (1964); N.M. Stat. Ann. § 42-1-59 (Repl. Vol. 1964); Pa. Stat. Ann. tit. 19, § 897 (1964); Vt. Stat. Ann. tit. 13, § 7032 (1959); Va. Code Ann. § 19.1-294 (Repl. Vol. 1960); and some states even seem to *require* that sentencing be consecutive: Idaho Code Ann. § 18-308 (1948); Mo. Rev. Stat. § 546.480 (1959).

¹⁶E.g., *Williams v. State*, 205 Md. 470, 109 A.2d 89 (1954); *Benton v. Commonwealth*, 91 Va. 782, 21 S.E. 495 (1895).

¹⁷"The true test of whether one criminal offense has merged in another is *not* (as is sometimes stated) whether the two criminal acts are 'successive steps in the same transaction' but it is whether one crime *necessarily involves* another, as, for example, rape involves fornication, and robbery involves both assault and larceny." *Commonwealth ex rel. Moszczynski v. Ashe*, 343 Pa. 102, 21 A.2d 920, 921 (1941).

¹⁸*Gore v. United States*, 357 U.S. 386 (1958) (held that Congressional intent was to inflict multiple punishment for violations of narcotics law).

But see: Ladner v. United States, 358 U.S. 169 (1958) (held that a single discharge of a shotgun constituted only one violation of assault statute even though two federal officers were thereby wounded).

¹⁹Interpreting the Federal Bank Robbery Act, 18 U.S.C. § 2113, the Supreme Court held that "the gravamen of the offense is not in the act of entering [punishable by 10-20 years], which satisfies the terms of the statute even if it is simply walking through an open, public door during normal business hours. Rather the heart of the crime is the intent to steal. This mental element merges into the completed crime if the robbery is consummated." *Prince v. United States*, 352 U.S. 322, 328 (1957). Likewise, burglary and larceny from a post office have been held to be a single transaction meriting but a single punishment. *Munson v. McClaughry*, 198 Fed. 72 (8th Cir. 1912).

But see: Morgan v. Devine, 237 U.S. 632 (1915) in which forcibly breaking into a post office, in violation of 18 U.S.C. § 2113, was held to constitute a separate offense from a completed post office theft. But it should be noted that the question presented in *Morgan* was actually one of double jeopardy and not merely one of

the interpretation given to the statutes involved. When merger is allowed, it is on the basis that the transaction is tied together by an element essential to each of the offenses.²⁰

Four states have statutes essentially identical to that of California: Alabama,²¹ Arizona,²² New York,²³ and Utah.²⁴ These statutes seem to have anticipated the Model Penal Code,²⁵ whose drafters state that "since the severe penalties for burglary are devised largely to provide aggravated penalties for theft committed by lawless intrusion, it is irrational to *cumulate* theft and burglary penalties."²⁶

Alabama takes the California approach, at least in cases where the burglarious crime has involved theft.²⁷ California holds that if a

double punishment, although in *Smith v. United States*, 312 F.2d 119 (10th Cir. 1963), it was interpreted as allowing such punishment.

A discussion of the difference between double jeopardy and double punishment may be found in *People v. De Sisto*, 27 Misc. 2d 217, 14 N.Y.S2d 858, 874 (King's County Ct. 1961).

²⁰*Prince v. United States and Munson v. McClaughry*, supra note 19. Accord: *Stevens v. McClaughry*, 207 Fed. 18 (8th Cir. 1913), in which it was said that "two or more separate offenses which are committed at the same time and are parts of a single continuing criminal act, inspired by the same criminal intent which is essential to each offense, are susceptible to but one punishment." *Id.* at 20.

²¹"Any act or omission declared criminal and punishable in different ways by different provisions of law, shall be punished only under one of such provisions, and a conviction or acquittal under any one shall bar a prosecution for the same act or omission under any other provision." Ala. Code tit. 15, § 287 (1958).

²²"An act or omission which is made punishable in different ways by different sections of the laws may be punished under either, but in no event under more than one. An acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other." Ariz. Rev. Stat. Ann. § 13-1641 (1956).

²³"An act or omission which is made criminal and punishable in different ways, by different provisions of law, may be punished under any one of those provisions, but not under more than one; and a conviction or acquittal under one bars a prosecution for the same act or omission under any other provision." N.Y. Pen. Law § 1938).

²⁴"An act or omission which is made punishable in different ways by different provisions of this Code may be punished under any one of such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other." Utah Code Ann. § 76-1-23 (1935).

²⁵"A person may not be sentenced on the basis of the same conduct both for burglary and for the offense which it was his purpose to commit after the burglarious entry or for an attempt to commit that offense, unless the additional offense constituted a felony of the first or second degree." Model Penal Code § 221.1(3) (Tent. Draft No. 11, 1960).

²⁶*Id.*, Comment 6.

²⁷*Wade v. State*, 166 So. 2d 739 (Ala. App. 1964); *Wildman v. State*, 165 So. 2d 396 (Ala. App. 1963), cert. denied, 276 Ala. 708 165 So. 2d 403 (1964). The earlier case of *Lawson v. State*, 33 Ala. App. 333, 33 So. 2d 405 (1948), based the same rule on the prohibition against double jeopardy, apparently overlooking the existence of the state's statute against double punishment.

"course of criminal conduct" causes the commission of more than one offense,²⁸ the applicability of a statute prohibiting separate punishment should "depend upon whether a separate and distinct act can be established as the basis of each conviction, or whether a single act has been so committed that more than one statute has been violated.... It is the singleness of the act and not the offense that is determinative."²⁹ Whether such conduct is single or divisible "depends on the intent and objective of the actor."³⁰

People v. McFarland,³¹ the first case to adopt this reasoning in a burglary situation, held that when the evidence is sufficient to support convictions for burglary and larceny, the inference which the jury is permitted to make is that the theft was the defendant's objective when he committed the burglary. The only reasonable conclusion is that the crime intended was the crime actually committed, unless there is evidence to show that not only was there a burglary with the intent to commit one crime but that a second offense was decided upon after the entry was complete. Thus, "the burglary, although complete before the theft was committed, was incident to and a means of perpetrating the theft,"³² and such incidence makes the entire transaction a single "act" within the meaning of the statute.

The common law rule in New York would include larceny in the

²⁸*Neal v. State*, 55 Cal. 2d 11, 357 P.2d 839, 843, 9 Cal. Rptr. 607 (1960) (arson-attempted murder). See cases cited in *People v. Hicks*, 44 Cal. Rptr. at 143.

²⁹*People v. Knowles*, 35 Cal. 2d 175, 217 P.2d 1, 8 (1950) (kidnapping-armed robbery).

³⁰*Neal v. State*, supra note 28, at 843. The discussion of double punishment for a series of acts was dictum since the court decided that defendants had committed only a single physical act.

³¹58 Cal. 2d 748, 376 P.2d 449, 26 Cal. Rptr. 473 (1962).

³²*Id.* at 457. This problem arises often: *People v. Sipult*, 44 Cal. Rptr. 846 (Dist. Ct. App. 1965); *People v. Moore*, 44 Cal. Rptr. 184 (Dist. Ct. App. 1965); *People v. Hicks*, 44 Cal. Rptr. 141 (Dist. Ct. App. 1965); *In re Keller*, 42 Cal. Rptr. 921 (Dist. Ct. App. 1965); *People v. Gay*, 230 Cal. App. 2d 102, 40 Cal. Rptr. 778 (Dist. Ct. App. 1964); *People v. Niles*, 227 Cal. App. 2d 749, 39 Cal. Rptr. 11 (Dist. Ct. App. 1964); *People v. Collins*, 220 Cal. App. 2d 563, 33 Cal. Rptr. 638 (Dist. Ct. App. 1963); *People v. Frye*, 218 Cal. App. 2d 799, 32 Cal. Rptr. 699 (Dist. Ct. App. 1963); *People v. Kellert*, 219 Cal. App. 2d 57, 32 Cal. Rptr. 672 (Dist. Ct. App. 1963); *People v. Giffis*, 218 Cal. App. 2d 53, 32 Cal. Rptr. 215 (Dist. Ct. App. 1963); *People v. Keller*, 212 Cal. App. 2d 210, 27 Cal. Rptr. 805 (Dist. Ct. App. 1963) (burglary-conspiracy); *People v. Jones*, 211 Cal. App. 2d 63, 27 Cal. Rptr. 429 (Dist. Ct. App. 1962); *People v. Griffin*, 209 Cal. App. 2d 125, 25 Cal. Rptr. 667 (Dist. Ct. App. 1962) (burglary-possession of narcotics); *People v. Jaramillo*, 208 Cal. App. 2d 620, 25 Cal. Rptr. 403 (Dist. Ct. App. 1962); *People v. Dykes*, 198 Cal. App. 2d 75, 17 Cal. Rptr. 564 (Dist. Ct. App. 1961); *In re Dowding*, 188 Cal. App. 3d 418, 10 Cal. Rptr. 392 (Dist. Ct. App. 1961).

offense of burglary,³³ but such merger is now prohibited by a statute which makes burglary separately punishable from the crime for which entry was effected.³⁴ The New York Court of Appeals, however, apparently agrees in principle with the California interpretation of statutes forbidding such separate punishment, for it has said that "if there were merely a *single inseparable act* violative of more than one statute, or if there were an act which itself violated one statute and was a material element of the violation of another, there would have to be single *punishment*."³⁵ It is probable that should the legislature repeal the law requiring separate punishment for burglary that the common law rule would be reinstated by the New York Courts.³⁶

The courts in Arizona and Utah disagree with the California approach. Giving narrow interpretation to the word "act," they view the statute as prohibiting its application to the burglary situation,³⁷ and hold instead that by "act" is meant a single physical action or, at most, a series of actions having identical components.³⁸ A 1965 example of this approach is *State v. Green*,³⁹ which, like *Hicks*, the principal case, involved a burglary-sex offenses combination.

³³"But where there has . . . been a conviction for the burglary, a plea of *autre fois convict* would be a good answer and defense to a subsequent indictment for the larceny which was committed at the same time and by means of the burglary. It is all the same felony, and the lesser is merged and satisfied in the conviction of the greater." *People v. Smith*, 57 Barb. (N.Y.) 46, 55 (1870).

³⁴N.Y. Pen. Law § 406. *People v. Snyder*, 241 N.Y. 81, 148 N.E. 796 (1925). *United States ex rel. Bryant v. Fay*, 211 F. Supp. 812 (S.D.N.Y. 1962); *People ex rel. Ody v. Wallack*, 13 App. Div. 2d 556, 212 N.Y.S.2d 379 (1961); *People ex rel. Hardin v. Jackson*, 8 App. Div. 2d 575, 183 N.Y.S.2d 385 (1959); *People ex rel. Cannata v. Jackson*, 6 App. Div. 2d 919, 175 N.Y.S.2d 945 (1958); *People v. Oliver*, 4 App. Div. 2d 28, 163 N.Y.S.2d 235 (1957); *People ex rel. Alione v. Morhous*, 186 Misc. 912, 63 N.Y.S.2d 274 (Sup. Ct. 1946); *People ex rel. Patrek v. Ganter*, 61 N.Y.S.2d 572 (Sup. Ct. 1946).

³⁵*People ex rel. Maurer v. Jackson*, 2 N.Y.2d 259, 159 N.Y.S.2d 203, 140 N.E.2d 282, 285 (1957) (robbery-assault).

³⁶The statutes are self-defeating only as to burglary. "Transaction" or "course of conduct" crimes are recognized, but comparison of lower court decisions in N.Y. seems to indicate that confusion exists regarding application of § 1938. Compare *People v. Saravese*, 1 Misc. 2d 305, 114 N.Y.S.2d 816, 835-36 (Sup. Ct. 1952) with *People v. Zipkin*, 202 Misc. 552, 118 N.Y.S.2d 697, 698-99 (Monroe County Ct. 1952).

³⁷*State v. Green*, 403 P.2d 809 (Ariz. 1965); *State v. Hutton*, 87 Ariz. 176; 349 P.2d 187 (1960); *State v. Westbrook*, 79 Ariz. 116, 285 P.2d 161 (1955) (attempted burglary-conspiracy); *State v. Jones*, 13 Utah 2d 35, 368 P.2d 262 (1962); *Rogerson v. Harris*, 111 Utah 330, 178 P.2d 397 (1947). It should be noted regarding the Utah cases that although Jones purports to follow Rogerson, the statutes which they construed were not the same.

³⁸*State v. Boodry*, 96 Ariz. 259, 394 P.2d 196 (1964) (rape-incest); *State v. Huntsman*, 115 Utah 283, 204 P.2d 448 (1949) (rape-adultery-incest).

³⁹98 Ariz. 254, 403 P.2d 809 (1965).

Green's sentence included separate punishments for burglary and for the rape that motivated that burglary.⁴⁰ He appealed, claiming that by receiving consecutive sentences for both the burglary and the rape he was being doubly punished.⁴¹

The Supreme Court of Arizona affirmed the sentences, reasoning that "the crimes of burglary and rape do not have identical components. Their elements are entirely different, and therefore, A.R.S. § 13-1641 does not prohibit a sentence being meted out for each offense even though both were committed as part of appellant's plan to rape his victim."⁴² In other words, since burglary could in theory be committed without fulfilling the intent to rape, and a rape could be committed without a burglary preceding it, the two crimes are not necessarily merged.⁴³ This conclusion is true only to an extent. All states recognize that an offense committed after a burglary may be other than a burglarious offense; for example, in *Seiterle v. Superior Court*⁴⁴ the murders of two householders were held to be crimes separate from illegal entry, kidnapping, and robbery because the stabblings were "impulsive," whereas the other offenses were contemplated and therefore merged. The distinctness of offenses is a matter of proof, and to allow separate punishment on the mere possibility that the crimes were separate seems to be unnecessarily harsh.

Although it is true that any offense which can be committed without an unlawful entry is not necessarily merged with burglary, still it is possible that in a given situation a burglary would actually be essential to the intended crime. Thus, in both *Hicks* and *Green* the

⁴⁰First degree rape (8-10 yrs.), first-degree burglary (2 counts, 6-7 yrs. each). He was also sentenced for unlawful mask (2 counts, 2-3 yrs. each), lewd and lascivious acts (2-3 yrs.), and aggravated assault (4-5 yrs.) Total sentence, 30-38 years imprisonment.

⁴¹Sentences for lewd and lascivious acts were also appealed on a recordation technicality, but for tactical reasons the sentences for these acts and for unlawful mask were not appealed as double punishment.

⁴²403 P.2d at 811.

⁴³The same reasoning was used to affirm consecutive sentences in the other appeals which sought to apply Ariz. Rev. Stat. § 13-1641 and Utah Code § 76-1-23 to burglary situations:

"Burglary and theft are two separate and distinct acts. To constitute burglary it is not necessary that theft be committed To consummate theft, it is essential that after the burglary is completed, the additional act of actually stealing be committed The elements constituting burglary and theft are entirely different. One may be committed without the other." *State v. Hutton* 87 Ariz. 176, 349 P.2d 187, 188-89 (1960).

"In the instant case the facts show 1) a breaking and entering and 2) a larceny. The entering did not include the larceny and the larceny independently was something else." *State v. Jones*, 13 Utah 2d 35, 368 P.2d 262, 263 (1962).

⁴⁴57 Cal. 2d 397, 369 P.2d 297, 20 Cal. Rptr. 1 (1962).

defendant's intent was to perpetrate a sex crime upon a particular individual, and in each case it was *actually* necessary to commit a burglary in order to reach the victim. Dividing this felonious sequence into a number of crimes for the purpose of punishing each separately would appear to be sophistry, for almost any situation can be abstractly fragmented. The punishment for the more serious crime gave the court adequate punitive opportunity.⁴⁵ The California court sentenced for the punitively more serious offense; the Arizona court's minimum sentence of thirty years was a cumulation of punishments for separate offenses. An essential difference between the two approaches is that the Arizona court tied the hands of the parole board, whereas if it had given an equivalent, or even greater sentence for only the more serious crime of rape, then there would have been a possibility of a parole at an earlier date should Green be thought rehabilitated.

Another reason advanced for not interpreting burglary and the subsequent crime as merged is the possibility that a felon might intend several crimes at the time of the burglary, one of which he conceals until after jeopardy would ordinarily attach.⁴⁶ Thus, it is argued, it would be possible that several crimes could be committed as part of a single course of conduct and some of them go unpunished because not discovered early enough. The answer to this seems to be the double jeopardy proposition that trial and punishment for burglary do not bar trial for crimes not charged or necessarily included in the burglary indictment.

Chief Justice Warren, dissenting in *Gore v. United States*,⁴⁷ suggests that the elements of the offenses sought to be merged be examined, and that a judgment be applied which is based as much on common sense as on strict juridical logic. He urges that caution be taken against quick application of stereotyped formulas, for it is "too easy and too arbitrary to apply a presumption for or against multiple punishment in all cases or even to do so one way in one class of cases and the other way in another."⁴⁸

The majority rule is clear that burglary and the subsequent bur-

⁴⁵Ariz. Rev. Stat. § 13-614 (1956) and Cal. Pen. Code § 264 set punishment for first degree rape at 5 and 3 years to life, respectively.

⁴⁶Schauer, J., concurring and dissenting in *People v. McFarland*, 58 Cal. 2d 748, 376 P.2d 449, 466, 26 Cal. Rptr. 473, 490 (1962), suggests that a burglar could commit a murder and a less serious crime as part of a single course of conduct, then by confessing to the less serious crime and serving his sentence bar punishment for the murder.

⁴⁷357 U.S. 386 (1958).

⁴⁸Id. at 394.