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The New Mexico Supreme Court's Jurisdictional Exception to the Bar on Double Jeopardy: State v. Manzanares

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THE NEW MEXICO SUPREME COURT'S "JURISDICTIONAL EXCEPTION" TO THE BAR ON DOUBLE JEOPARDY: *STATE V. MANZANARES*

I. INTRODUCTION

In *State v. Manzanares*,[1] the New Mexico Supreme Court interpreted the double jeopardy clause of the United States Constitution. The court addressed the issue of whether successive prosecutions in magistrate and district court for related offenses arising from a fatal auto accident violate the double jeopardy clause.[2]

The defendant was tried first in magistrate court on several traffic misdemeanors.[3] He subsequently stood trial in district court for homicide by vehicle.[4] The supreme court found that driving while intoxicated (DWI) and homicide by vehicle are the same offense for double jeopardy purposes.[5] That holding should have disposed of the case in Manzanares' favor. The court, however, went on to hold that jeopardy could not attach at the first trial on the misdemeanor charges, because the magistrate court had no jurisdiction over felonies. The court held that since the magistrate court lacked the power to try felonies, it could in no case have placed the defendant in jeopardy for homicide by vehicle, a felony.[6] Because of

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EDITOR'S NOTE: During the time that this Note was being written, the New Mexico Supreme Court decided State v. Fugate, 101 N.M. 58, 678 P.2d 686 (1984) on the basis of the State v. Manzanares, 100 N.M. 621, 674 P.2d 511 (1983), *cert. denied*, 105 S.Ct. 2123 (1985), holding and rationale. The facts in *Fugate* were very similar to the facts in *Manzanares*. Although the United States Supreme Court denied certiorari in *Manzanares*, 105 S.Ct. 2123 (1985), it granted certiorari in *Fugate*, 105 S.Ct. 81 (1985). The United States Supreme Court summarily affirmed *Fugate* in a per curiam, four-to-four decision. While this affirmance undermines some of the arguments in this Note, an editorial decision was made to print this Note for the following reasons: (1) "summary affirmances have considerably less precendential value than an opinion on the merits," Illinois State Board of Elections v. Socialist Worker's Party, 440 U.S. 173, 180-81 (1979); (2) this summary affirmance was a four-to-four decision (Justice Powell not participating), suggesting that a nine-person panel might decide the issue differently in the future; and (3) within this context, the arguments in this Note are valuable.

1. 100 N.M. 621, 674 P.2d 511 (1983), *cert. denied*, 105 S.Ct. 2123 (1985).

2. The double jeopardy clause states: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . ." U.S. Const. amend. V. The double jeopardy clause was applied to the states via the due process clause of the fourteenth amendment in Benton v. Maryland, 395 U.S. 784 (1969).

3. 100 N.M. at 622, 674 P.2d at 512.

4. *Id.* at 621, 674 P.2d at 511.

5. *Id.* at 622, 674 P.2d at 512. The DWI statute states: "It is unlawful for any person who is under the influence of intoxicating liquor to drive . . . any vehicle within this state." N.M. Stat. § 66-8-102(A) (1978). "Homicide by vehicle is the killing of a human being in the unlawful operation of a motor vehicle." *Id.* § 66-8-101(A).

6. 100 N.M. at 623, 674 P.2d at 513.

a "jurisdictional exception" to the bar on double jeopardy, the supreme court held that the trial on the felony charge before the district court did not violate the double jeopardy clause.[7]

Manzanares was wrongly decided, as the jurisdictional exception has been discountenanced by the United States Supreme Court.[8] The New Mexico Supreme Court should have found that the second prosecution of Manzanares was barred by the double jeopardy clause. This Note will examine the *Manzanares* holding in light of the controlling precedents of the United States Supreme Court.

II. STATEMENT OF THE CASE

On June 13, 1982, Heraldo Manzanares was involved in an auto accident in Rio Arriba County.[9] The accident resulted in a death.[10] On June 24, Manzanares was charged in Rio Arriba County Magistrate Court with DWI, failure to remain at the scene of an accident involving death or personal injury, failure to give information and to render aid, reckless driving, and failure to have a driver's license.[11] On July 8, a grand jury returned an indictment charging Manzanares with homicide by vehicle, stating "that he killed a human being while unlawfully operating a motor vehicle under the influence of an intoxicating liquor."[12] On August 12, the defendant pled guilty in magistrate court to all the traffic offenses.[13] On August 26, Manzanares filed a motion in district court to dismiss the indictment for homicide by vehicle on double jeopardy grounds.[14] The district court denied the motion.[15]

Manzanares appealed the denial of his double jeopardy claim to the New Mexico Court of Appeals. The court of appeals held that the second prosecution violated the double jeopardy clause of the United States Constitution and that the indictment for homicide by vehicle must be dismissed with prejudice.[16] The court viewed DWI and vehicular homicide as the same crime for double jeopardy purposes, because prosecution for the latter requires proof of all the elements of the former.[17] The New Mexico Supreme Court granted the state's petition for certiorari and reversed on the ground of the "jurisdictional exception."[18]

7. *Id.*
8. *See* Illinois v. Vitale, 447 U.S. 410 (1980); Waller v. Florida, 397 U.S. 387 (1970).
9. Manzanares v. State, 22 N.M. St. B. Bull. 954, 955 (Ct. App. 1983).
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* at 957.
17. *Id. See infra* notes 27-40 and accompanying text.
18. 100 N.M. at 621, 674 P.2d at 511.

III. ANALYSIS AND DISCUSSION

A. *The New Mexico Supreme Court's Rationale*

The supreme court in *Manzanares* stated that a claim of double jeopardy must be evaluated in light of the "same evidence" test.[19] The test asks "whether the facts offered in support of one [offense], would sustain a conviction of the other."[20] The supreme court held without discussion that DWI and homicide by vehicle are identical under the same evidence test.[21] The court then launched directly into a discussion of the "jurisdictional exception" to the same evidence rule.

The *Manzanares* court adopted an ancient federal definition of the jurisdictional exception, namely, that jeopardy "cannot extend to an offense beyond the jurisdiction of the court in which the accused is tried. . . ."[22] Manzanares argued, as the court of appeals had held, that the jurisdictional exception no longer exists in light of the United States Supreme Court's decisions in *Illinois v. Vitale*[23] and *Waller v. Florida*.[24] The *Manzanares* court responded that neither case involved a claim that the court hearing the lesser charge lacked jurisdiction over the greater. Thus, the court concluded, the United States Supreme Court had not addressed the vitality of the jurisdictional exception, and Manzanares' indictment for vehicular homicide did not violate the double jeopardy clause.[25]

B. *Analysis*

The same evidence test—also known as the "additional facts" test[26]—affords only minimum constitutional protection against double jeopardy.[27] Nevertheless, it is clearly the law in the United States.[28] What the New Mexico Supreme Court styles the "jurisdictional exception": (1) does not conform to the same evidence test; (2) has been implicitly discountenanced by the Supreme Court of the United States; and (3) would, if it were the law, effect an erosion of the protection against double jeopardy afforded under the same evidence test. Particularly in light of *Waller* and *Vitale*, the New Mexico Supreme Court should have overruled its cases

19. *Id.* at 622, 674 P.2d at 512.

20. *Id.*

21. *See id.* The court did not explicitly state whether DWI and vehicular homicide were the same under the same evidence rule. Because the conclusion that the offenses were *not* the same would have defeated Manzanares' double jeopardy claim without recourse to the "jurisdictional exception," the court necessarily concluded that DWI and homicide by vehicle are identical for double jeopardy purposes.

22. *Id.* at 622, 674 P.2d at 512 (citing Diaz v. United States, 223 U.S. 442 (1912)).

23. 447 U.S. 410 (1980).

24. 397 U.S. 387 (1970).

25. 100 N.M. at 623, 674 P.2d at 513.

26. The phrases are used interchangeably in the courts and denote the same analysis. *See infra* text accompanying notes 31-32.

27. *See infra* notes 76-85 and accompanying text.

28. *See infra* note 30 and accompanying text.

relying on the jurisdictional exception and affirmed the judgment of the court of appeals.[29]

1. The Same Evidence Test

The Supreme Court of the United States has measured the similarity of offenses for double jeopardy purposes by the same evidence test since 1889.[30] The test holds that if proof of one offense necessitates the "same evidence" required for proof of the other, then the offenses are the same.[31] Stated negatively, if conviction for one offense requires proof of an "additional fact" and the other does not, then the offenses are not the same.[32]

Moreover, the United States Supreme Court has consistently held that greater and lesser included offenses are the same for double jeopardy purposes.[33] This doctrine follows axiomatically from the application of the same evidence test. A lesser included offense requires no proof beyond that required for the greater.[34] It makes no difference that the greater included offense will require proof of a fact or facts beyond those required for proof of the lesser.[35] In order to avoid double jeopardy, *each* of the two offenses must require proof of some fact not required by the other.[36] Finally, because by hypothesis the greater and lesser offenses are the same, it makes no difference which offense is tried first; the double jeopardy clause will bar a second trial for the remaining offense.[37] To be

29. The *Manzanares* court noted New Mexico's adoption of the jurisdictional exception doctrine in State v. Goodson, 54 N.M. 184, 217 P.2d 262 (1950), and the application of the doctrine to DWI/vehicular homicide procedural patterns in State v. Tanton, 88 N.M. 333, 540 P.2d 813 (1975).

30. *See In re* Nielsen, 131 U.S. 176 (1888). *See also Vitale*, 447 U.S. 410; Whalen v. United States, 445 U.S. 684 (1980); Harris v. Oklahoma, 433 U.S. 682 (1977); Brown v. Ohio, 432 U.S. 161 (1977); Ashe v. Swenson, 397 U.S. 436 (1970); *Waller*, 397 U.S. 387; Blockburger v. United States, 284 U.S. 299 (1932); Gavieres v. United States, 220 U.S. 338 (1911).

The case most often cited for the same evidence test is *Blockburger*, 284 U.S. 299. The defendant was tried successively for "selling any of the forbidden drugs except in or from the original stamped package" and "selling any of such [forbidden] drugs not in pursuance of a written order of the person to whom the drug is sold." *Id.* at 303-04. The Supreme Court held that because each of the offenses required proof of a fact that the other did not, double jeopardy would not attach. *Id.*

31. *Blockburger*, 284 U.S. at 304.

32. *Id.*

33. *See Vitale*, 447 U.S. 410. *See also Whalen*, 445 U.S. 684; *Harris*, 433 U.S. 682; *Brown*, 432 U.S. 161; *Waller*, 397 U.S. 387; Green v. United States, 355 U.S. 184 (1957); Diaz v. United States, 223 U.S. 442 (1912); *Nielsen*, 131 U.S. 176.

34. Assault and robbery illustrate the principle. In New Mexico, assault is "any unlawful act, threat or menacing conduct which causes another person to reasonably believe that he is in danger of receiving an immediate battery." N.M. Stat. Ann. § 30-3-1(B) (Repl. Pamp. 1984). Robbery is "the theft of anything of value from the person of another or from the immediate control of another, by use or threatened use of force or violence." *Id.* § 30-16-2. Robbery "includes" assault, the lesser offense. Assault will never require proof of a fact that robbery does not. The same evidence that will sustain conviction for robbery will always sustain conviction for assault, if not for battery as well.

35. *See supra* note 33.

36. *Id.*

37. Brown v. Ohio, 432 U.S. 161, 168 (1977).

tried in a second trial for the greater included offense is to be tried a second time for the lesser.[38]

Applying the same evidence test, the New Mexico Supreme Court found that DWI (for which Manzanares had been convicted) and homicide by vehicle (for which he was subsequently indicted) were identical for double jeopardy purposes. Manzanares was charged in district court with homicide by vehicle in that he "killed a human being while unlawfully operating a motor vehicle under the influence of an intoxicating liquor."[39] He had already pled guilty in magistrate court to operating a motor vehicle under the influence of intoxicating liquor.[40] In Manzanares' case, DWI did not require proof of a fact that vehicular homicide would not also require. The same evidence that would sustain conviction for vehicular homicide sustained his conviction for DWI.

2. "Compound and Predicate" Offenses

Application of the same evidence test becomes more complex when a defendant is charged with "compound and predicate" offenses. In New Mexico, homicide by vehicle does not *necessarily* include DWI, but may be predicated as well on reckless driving.[41] Thus, homicide by automobile is a "compound" offense, because it may be "predicated" upon, and so "include," either DWI or reckless driving.[42] In order for included offenses to be the same on the face of the statutes, the lesser included offense must be necessarily included in the greater.[43] The doctrine of compound and predicate offenses generates two questions in *Manzanares*. First, did it matter that Manzanares was convicted in magistrate court for both DWI and reckless driving? Second, although conviction for vehicular homicide does not necessarily require proof of DWI, did it matter that the prosecution in Manzanares' case predicated its indictment for vehicular homicide on DWI?

The New Mexico Supreme Court did not answer these questions, but simply found there was no double jeopardy because of the jurisdictional exception. The New Mexico Supreme Court should have addressed these questions, because cases like *Manzanares* cannot be rationally decided otherwise. Indeed, both questions have given rise to controversy in the United States Supreme Court.[44]

Two views exist where the greater offense may be predicated on two

38. *Id.*
39. Manzanares v. State, 22 N.M. St. B. Bull. at 955.
40. *Id.*
41. *Id.* at 957.
42. *See Whalen*, 445 U.S. at 708. In order for included offenses to be necessarily included in one another, the lesser and the greater offenses must be the same on the face of the statute. *Id.*
43. *Id.*
44. *See infra* note 45.

or more lesser offenses. The first view holds that if the offenses are not the same on their face—if the language of the statute provides two or more predicates for the greater included offense—then the offenses are not the same for double jeopardy purposes.[45] Under this view, homicide by vehicle and DWI would not be the same for double jeopardy purposes in New Mexico, because DWI is not necessarily included in the greater offense: homicide by vehicle can also be predicated on reckless driving.

The second and better view holds that the greater and lesser offenses will be the same in either of two circumstances: (1) where, on the face of the statute, the lesser offense is the only predicate for the greater (*e.g.*, assault and robbery); or (2) where in the actual prosecution the state did *in fact* predicate the greater charge on the lesser charge.[46] Double jeopardy attaches *regardless of whether other lesser charges could have provided the predicate*.[47] In either case, the defendant is being haled into court a second time for the lesser offense. The United States Supreme Court stated in *Illinois v. Vitale* that under these circumstances a "substantial claim" of double jeopardy arises.[48]

Under *Vitale*, if the state, as would appear either from its second indictment or from the proceedings themselves, tries a defendant for the same *actus reus* elements a second time, the defendant has, in fact, been

45. The leading proponent of this view is Justice Rehnquist, who has declared that the same evidence test cannot analyze "compound and predicate" offenses for double jeopardy purposes. *See Whalen*, 445 U.S. at 708 (Rehnquist, J., dissenting). Justice Rehnquist argues that only the actual trial of compound and predicate offenses can show whether trial on the greater charge will be based on the same evidence as trial on the lesser. *Id.* The purpose of the same evidence test is simply to determine whether the legislature *intended* the two offenses to be the same. *Id.* This purpose can only be fulfilled by looking at the face of the criminal statutes, and not at the actual prosecutions. *Id.* The same evidence test thus has no bearing on actual prosecutions. *Id.*

Justice Rehnquist took up this theme again in his dissent to the recent decision in Thigpen v. Roberts, 104 S.Ct. 2916, 2921 (1984) (Rehnquist, J., dissenting). He rejected the principle set forth in *Vitale* that if the state tries a defendant first for reckless driving and in a second trial for vehicular homicide—*depending in the second trial upon evidence of reckless driving*—it makes no difference that evidence of DWI *could* have supplied the predicate for the homicide prosecution. *Vitale*, 447 U.S. 421. The defendant has a "substantial claim" of double jeopardy. *Id.* Dissenting in *Thigpen*, Justice Rehnquist remarked: "Until the present case, the relevant question to be answered by any court is whether the evidence required to prove the statutory elements of crime is the same, not whether the evidence actually used at trial is the same." 104 S.Ct. at 2921. Though this is strictly true, the short answer is that, prior to *Vitale*, the Supreme Court never had occasion to examine a "compound and predicate" offense in light of the same evidence test. Once presented with the question in *Vitale*, the Court decided that double jeopardy attaches if the second prosecution is to be based on the same evidence as the first. 447 U.S. at 421.

46. *Vitale*, 447 U.S. at 421.

47. Heraldo Manzanares was tried for both the possible predicates for vehicular homicide: DWI and reckless driving. *See* 100 N.M. at 622, 674 P.2d at 512. This procedural pattern illustates the potential for absurd results under Justice Rehnquist's view. *See supra* note 45. Though Manzanares had been tried for both the lesser offenses underlying the greater offense of vehicular homicide, Justice Rehnquist would hold that double jeopardy should not attach, because neither of the lesser offenses is *necessarily* included in the greater.

48. 447 U.S. at 421.

put twice in jeopardy for the same offense.[49] The possibility that the prosecution may have relied upon another predicate for the greater, "compound" charge is irrelevant.[50] Stated otherwise, under these procedural facts the same evidence test has no independent role to play. Double jeopardy has *in fact* occurred. There is no reason to inquire whether it *must,* given the language of the statutes.

When the State of New Mexico charged Heraldo Manzanares with homicide by vehicle "in that he killed a human being while unlawfully operating a motor vehicle under the influence of an intoxicating liquor,"[51] it clearly predicated the prosecution for vehicular homicide on the DWI for which Manzanares had already been tried. Furthermore, the state could not possibly have based the vehicular homicide charge on a predicate crime for which Manzanares had not already been tried, for Manzanares had been tried for reckless driving as well. These procedural facts point up the absurdity of the view that when the greater charge can be predicated on two or more lesser charges, double jeopardy cannot attach. Even though, by the terms of the statute, none of the lesser charges is necessarily included in the greater, DWI was necessarily included in the homicide *by the terms of the indictment.*[52]

Vitale teaches that no matter how many lesser offenses may provide the predicate for prosecution of the greater, double jeopardy attaches where the prosecution predicates trial of the greater charge on a lesser charge for which the defendant has already been tried. In short, two offenses may constitute the same offense for double jeopardy purposes if one is a lesser included offense on the face of the statute or if one is a lesser included offense in fact.

3. The Jurisdictional Exception

a. The United States Supreme Court has overruled the jurisdictional exception.

The *Manzanares* court proceeded to find that a jursidictional exception to the bar on double jeopardy exists and then applied it to the case.[53] The court based this finding upon the fact that the Rio Arriba County Magistrate Court lacked jurisdiction to hear the vehicular homicide charge against Manzanares.[54] The court found, therefore, that when Manzanares was tried in district court for vehicular homicide, he was put in jeopardy

49. *Id.*
50. *Id.*
51. Manzanares v. State, 22 N.M. St. B. Bull. at 955.
52. *See id.* at 957 (double jeopardy attaches where defendant tried for both possible predicates for the greater offense).
53. 100 N.M. at 621, 674 P.2d at 511.
54. *Id.*

for that crime for the first time.[55] In reaching this conclusion, the *Manzanares* court cited New Mexico case law relying on dictum in the United States Supreme Court case of *Diaz v. United States*.[56]

The Supreme Court's subsequent decision in *Waller v. Florida*[57] rendered invalid the jurisdictional exception of *Diaz*. In *Waller*, the state conceded that the offenses charged in consecutive prosecutions were the same offense under the same evidence test.[58] Yet, the first prosecution had been in St. Petersburg municipal court, while the second occurred in state district court.[59] The state, therefore, argued the theory of "dual sovereignty": like the federal jurisdiction in relation to the states, the municipalities and the states are separate sovereignties for double jeopardy purposes.[60] Although the misdemeanor offense and felony offense were identical, the state asserted that the sovereignty of Florida had never put Waller in jeopardy of anything prior to the filing of its grand larceny information.[61]

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55. *Id.*

56. 223 U.S. at 442. *Diaz* is the United States Supreme Court decision on which the New Mexico Supreme Court continues to base its "jurisdictional exception." *See Manzanares*, 100 N.M. 621, 674 P.2d 511; *see also Tanton*, 88 N.M. 333, 540 P.2d 813; *Goodson*, 54 N.M. 184, 217 P.2d 262.

In 1906, Gabriel Diaz, a Filipino, assaulted a fellow citizen in San Carlos. The following day, he was charged before a justice of the peace with assault and battery. He was found guilty of a misdemeanor and fined fifty pesetas. A month later, Diaz's victim died, allegedly of the injuries Diaz had dealt him. The same justice of the peace then charged Diaz with homicide and bound him over for trial at "The Court of First Instance." Diaz pled former jeopardy. 223 U.S. at 444.

In *Diaz* the Court held that, though the assault and battery and homicide charges were the same for double jeopardy purposes, double jeopardy did not attach. *Id.* at 448-49. The Court based its holding on the fact that, at the time of Diaz's trial for assault and battery, homicide had simply not yet been committed, because the death of a human being is a necessary element of homicide. *Id.* at 448-49.

Having explained this "necessary facts" exception to the double jeopardy rule, the *Diaz* court added by way of dictum:

> Besides, under the Philippine law, the justice of the peace, although possessed of jurisdiction to try the accused for assault and battery, was without jurisdiction to try him for homicide; and, of course, the jeopardy incident to the trial before the justice did not extend to an offense beyond his jurisdiction.

Id. at 449. This language sets forth both the first and last plain assertion in Supreme Court annals of what the New Mexico Supreme Court styles the "jurisdictional exception."

Discussing the origins of the double jeopardy rule in Green v. United States, 355 U.S. 184 (1957), Justice Frankfurter, in his dissent, quoted Blackstone: "[W]hen a man is once fairly found not guilty upon any indictment, or other prosecution, *before any court having competent jurisdiction of the offense*, he may plead such acquittal in bar of any subsequent accusation. . . ." *Id.* at 200 (emphasis added). Justice Frankfurter quoted this and much else in support of the proposition that retrial may lie after reversal of conviction on appeal. *Id.* In any case, *Green* is the closest thing in the post-*Diaz* era to a reassertion of the jurisdictional exception.

57. 397 U.S. 387 (1970). The defendant Waller and others removed a mural from the city hall of St. Petersburg, Florida, and carried it through the streets. Following a scuffle, the police recovered the mural in damaged condition. Waller was found guilty in municipal court of two misdemeanors—destruction of city property and disorderly breach of the peace. Subsequently, the State of Florida charged him with grand larceny. He pled former jeopardy. *Id.* at 388.

58. *Id.* at 389.

59. *Id.*

60. *Id.* at 391-92.

61. *Id.*

The United States Supreme Court flatly rejected this theory, pointing out that the judicial power of the municipal courts and the state courts of general jurisdiction springs from the same organic law.[62] The Court stated that the Florida courts erred in holding that "even if a person has been tried in a municipal court for the identical offense with which he is charged in a state court, this would not be a bar to the prosecution of such person in the proper state court."[63]

The state courts have split in their interpretations of *Waller*. One group, including the New Mexico Supreme Court, has held that *Waller* did not affect the jurisdictional exception, because *Waller* was limited to a rejection of the "dual sovereignty" theory;[64] it made no mention of the respective jurisdictions of the two courts.[65] The holding of the New Mexico Court of Appeals represents the reasoning of courts that have held that *Waller* overruled the jurisdictional exception: "The basis of *Waller* is, quite simply, that one sovereign cannot put a person twice in jeopardy for the same crime, no matter where or how the charges are brought."[66] This is the correct interpretation of *Waller*.

The Florida Supreme Court had held that trial in municipal court for an offense does not bar trial in state court for the same offense.[67] The United States Supreme Court's holding to the contrary in *Waller* overruled the jurisdictional exception. It did not fail to overrule the jurisdictional exception merely because the state put its hopes in the phrase "dual sovereignty" rather than in the phrase "jurisdictional exception." The United States Supreme Court expressly acknowledged that the St. Petersburg municipal court had no jurisdiction over grand larceny.[68] Had the Supreme Court merely rejected the "dual sovereignty" theory, as such and alone, the jurisdictional exception would have constituted a valid and complete justification for the State of Florida's subsequent prosecution in district court. Yet the Court stated that the second prosecution for grand larceny had *"no valid basis."*[69] *Waller* thus extinguished the jurisdictional exception.

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62. *Id.* at 393.

63. *Id.* at 395.

64. 100 N.M. at 623, 674 P.2d at 513.

65. *Id.*

66. 22 N.M. St. B. Bull. at 956. *See also* Culberson v. Wainwright, 453 F.2d 1219 (5th Cir. 1972), *cert. denied*, 407 U.S. 913 (1972); State v. Trivisonno, 112 R.I. 1, 307 A.2d 539 (1973); Benard v. State, 481 S.W.2d 427 (Tex. Crim. App. 1972). Robinson v. Neil, 366 F. Supp. 924 (E.D. Tenn. 1973), *aff'd*, 409 U.S. 505 (1973), discountenanced the jurisdictional exception, but on other grounds. *See infra* text accompanying notes 91-92.

67. 397 U.S. at 389-90.

68. *Id.* at 388.

69. *Id.* at 395 (emphasis added). In *Robinson*, 366 F. Supp. 924, the Supreme Court granted certiorari to consider the retroactivity of *Waller* and decided that it was fully retroactive. 409 U.S. 505. The facts of the case clearly gave rise to a claim of the jurisdictional exception. Samuel Robinson was tried and convicted on three counts of assault and battery in violation of a Chattanooga, Tennessee, city ordinance. 366 F. Supp. at 925. He was later indicted by a grand jury for assault

While it has rejected the jurisdictional exception relied on in *Manzanares*, the United States Supreme Court has upheld two other jurisdictional exceptions. Neither would preserve the judgment in *Manzanares*.

First, where new facts come to light after a prosecution on a lesser offense and the new facts effectively fill out the state's case on a greater offense, the state may proceed on the greater charge; double jeopardy will not attach.[70] Thus, for example, if the victim in the *Manzanares* case had not died until after Manzanares' trial on the misdemeanor traffic offenses, the state could have charged the defendant in district court with vehicular homicide without running afoul of the double jeopardy clause. The United States Supreme Court has repeatedly upheld this "necessary facts" exception to the bar on double jeopardy.[71] It has no application, however, to the facts in *Manzanares*.

Second, the United States Supreme Court has suggested that another kind of jurisdictional exception may exist where no one court has jurisdiction to hear all the charges arising from a single criminal episode.[72] This variant of the jurisdictional exception likewise does not apply to the facts of *Manzanares*, because the New Mexico District Courts are courts of general jurisdiction.[73] Thus, the Rio Arriba County District Court could have heard all of the charges against Manzanares, including the misdemeanor charges.[74]

The jurisdictional exceptions retained by the United States Supreme Court do not apply to the facts in *Manzanares*. The New Mexico Court of Appeals held that the jurisdictional exception, as applied by the New Mexico Supreme Court to the facts in *Manzanares*, "no longer exists."[75] The court of appeals should have been affirmed.

b. The jurisdictional exception erodes the protection of the double jeopardy clause.

Under both the common law and early criminal codes in the United States, offense categories were relatively distinct and few in number.[76]

with intent to commit murder. *Id.* The state conceded that the offenses were the same for double jeopardy purposes. *Id.* Robinson argued that the second prosecution was barred by *Waller*, which, the district court held, had decided that "state and municipal convictions derive from the same sovereignty and are therefore indistinguishable for double jeopardy purposes." *Id.* The district court expressly rejected the jurisdictional exception for policy reasons discussed *infra* text accompanying note 89. The United States Supreme Court then rejected the state's argument that *Waller* did not apply because Robinson had been tried for all the offenses prior to the decision in *Waller*.

70. *See* Diaz v. United States, 223 U.S. 442, 448 (1912).

71. *See, e.g., Brown* 432 U.S. at 169 n.7.

72. *Ashe*, 397 U.S. at 453 n.7.

73. N.M. Const. art. VI, § 13.

74. *Manzanares*, 22 N.M. St. B. Bull. at 957.

75. *Id.*

76. *Ashe*, 397 U.S. at 453.

Over the past century, the number of crimes that prosecutors can spin out of a single criminal episode has increased dramatically.[77] As the number of offenses that may arise from a single criminal episode grows, so does the potential for multiple trials.[78] The same evidence test, developed late in the nineteenth century, is a relatively artificial means of determining which offenses arising from a single criminal episode will be deemed identical for double jeopardy purposes.[79]

In *Green v. United States*,[80] the Supreme Court set forth the policy underlying the constitutional prohibition against double jeopardy. The Court said that the state with all its resources and power may not make repeated attempts to convict a person for an alleged offense, thereby subjecting him to the endless embarrassment, cost, and ordeal of additional trials, and compelling him to "live in a continuing state of anxiety," as well as multiplying the danger of false conviction.[81] The policy responds to the predicament of the accused. An individual charged with breaking the law reasonably expects one trial for the misdeed. No matter how many "offenses" the prosecutor can spin out of the incident giving rise to arrest, the defendant has some right, deeply ingrained in Anglo-American jurisprudence and embodied in the double jeopardy clause, to expect repose after one ordeal in court.[82]

Under the same evidence test, however, a defendant may be tried twice for closely related offenses arising out of the same criminal episode. Reckless driving and speeding, for example, each require proof of a fact that the other does not.[83] Successive trials for the two charges would not

77. *Id.* at 452. A criminal, intent simply on pilfering the silverware, cannot achieve his purpose without violating a number of criminal statutes, as for example, criminal trespass, breaking and entering, destruction of private property, and burglary or attempted burglary. The same course of conduct at common law would probably have resulted in one infraction only—burglary—and one trial only (punishment: hanging or, worse, transportation to America).

In the above hypothetical, breaking and entering, for instance, and burglary are clearly the same offense under the same evidence test. Burglary always involves unauthorized entry, the gravamen of an indictment for breaking and entering. Destruction of private property—the broken window or augered door lock—would not be the same as any of the other offenses. Burglary requires unlawful entry with intent to commit a felony. Destruction of private property requires only that. Each offense, then, requires proof of an element that the other does not; the evidence that will sustain conviction for destruction of private property will not sustain conviction for burglary. Double jeopardy would not attach. Hence, in most jurisdictions the state could prosecute the accused for destruction of private property and, whatever the outcome, institute proceedings on any or all of the other charges. This consequence is dubious given the policy underlying the double jeopardy rule. *See infra* text accompanying notes 80-82.

78. *Ashe*, 397 U.S. at 452-53. The application of the double jeopardy rule at common law is comprehensively examined in M. Friedland, Double Jeopardy (1969).

79. 397 U.S. at 451-53.

80. 355 U.S. 184 (1957).

81. *Id.* at 187-88.

82. *See id.*

83. *See* N.M. Stat. Ann. § 66-8-113 (1978) (reckless driving); *and* N.M. Stat. Ann. § 66-7-301 (1978) (speed regulation).

violate the double jeopardy clause under the same evidence test, even though the charges arose out of the same episode. Thus, the protection afforded against double jeopardy under the same evidence test is not excessive.[84] The same evidence test, in itself, affords only minimal protection against double jeopardy. Nevertheless, the same evidence test is at least clearly the law in the United States.[85] The New Mexico Supreme Court's "jurisdictional exception" is not. In fact, the jurisdictional exception constitutes an erosion of the protection afforded under the same evidence test.

The jurisdictional exception became possible when New Mexico created magistrate courts, limiting their jurisdiction in the criminal law to misdemeanors.[86] The Supreme Court of New Mexico then ruled that because these courts lack jurisdiction over felonies, no jeopardy for felonies can attach.[87] By means of this procedural sleight-of-hand, the State

84. A stronger standard, the "same transaction" test, has been proposed both by the American Law Institute and by Justice Brennan. *Ashe*, 397 U.S. at 453-54; ALI, Model Penal Code, Proposed Official Draft Sections 1.07(2), 1.09(1)(b) (1962). Under the same transaction test, the double jeopardy clause would require the state, in Justice Brennan's words, "to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction." 397 U.S. at 453-54. Only the same transaction test enforces "the ancient prohibition against vexatious multiple prosecutions embodied in the Double Jeopardy Clause. . . ." *Id.* at 454.

Justice Brennan concedes that the phrase "same transaction" is not self-defining. *Id.* at 454 n.8. In *Blockburger*, 284 U.S. 299, the Supreme Court recommended a test based on the question whether the criminal acts done resulted from a single criminal impulse: "[W]hen the impulse is single, but one indictment lies, no matter how long the action may continue." *Id.* at 302 (citing Wharton's Criminal Law, 11th ed. § 34). Under this test, the burglar who takes time out to poison the dog has clearly committed a crime outside the impulse to burglarize. His destruction of a window—which could be prosecuted in a second trial under the same evidence test—would have to be joined by the prosecution in the same trial as the burglary count under the "single impulse" test. While it is unclear whether the *Blockburger* court believed this test to be coterminous with the same evidence test for which the case is cited, it appears that the Supreme Court has never embraced a "single criminal impulse" approach to double jeopardy questions.

A species of "same transaction" test obtains in most jurisdictions in the civil law to determine whether a second trial is barred by res judicata. *See, e.g.*, Three Rivers Land Co. v. Maddoux, 98 N.M. 690, 652 P.2d 240 (1982). If the cause of action in the second suit arises from facts constituting a "transaction" that was the subject of the first suit, res judicata applies. *Id.* at 695, 652 P.2d at 245. What facts make up a "transaction" is measured by "whether the facts are related in time, space, origin or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." *Id.* at 695, 652 P.2d at 245.

It is not hard to imagine a slightly adjusted version of the *Three Rivers* rule supplying the guidelines for Justice Brennan's "same transaction" test. But the important question that arises from *Three Rivers* is: Why should the circumstances that bar a second trial be *broader* in the civil law than in the criminal, where due process considerations are presumably more pressing? Two points are clear: (1) the "same transaction" test of *Three Rivers* bars more second trials than the same evidence test—with the "jurisdictional exception"—of *Manzanares;* and (2) *Three Rivers* and *Manzanares* are both decisions of the New Mexico Supreme Court.

85. *See supra* note 30 and accompanying text.

86. *See* N.M. Stat. Ann. § 35-3-4 (1978).

87. State v. Goodson, 54 N.M. 184, 217 P.2d 262 (1950).

of New Mexico has evaded the mandate of the double jeopardy clause.[88]

Moreover, the New Mexico Supreme Court's position defies the reasoning of the same evidence test in the first instance. The point is not that Manzanares was "not in jeopardy" for vehicular homicide before the magistrate court, but either: (1) that when he was indicted for vehicular homicide, the state was attempting to try him for *DWI* a second time; or (2) that DWI and homicide by vehicle are, as the supreme court seemed to hold, the same offense, and *the State of New Mexico* wished to try him for it twice: once in its magistrate court and once again in its district court. What the court calls the "jurisdictional exception" is irrelevant. Once the court decided that DWI and homicide by vehicle were the same offense, it had but one task remaining, namely, to summarily affirm the court of appeals.

IV. CONCLUSION

In *State v. Manzanares* the New Mexico Supreme Court stated that, absent the jurisdictional exception, defendants charged in connection with fatal traffic accidents could routinely take advantage of the lack of coordination between prosecutors by pleading guilty to petty traffic offenses in magistrate court and then interposing double jeopardy challenges when charged with vehicular homicide in district court.[89] The court granted that prosecutors could avoid this consequence by "a modicum of cooperation," but that the courts could only encourage such cooperation, not enforce it.[90]

The court's remarks give rise to two observations. First, if the court wished to encourage prosecutors to coordinate their activities so as not to vex defendants with multiple prosecutions in violation of the double jeopardy clause, its decision in *State v. Manzanares* was an eccentric way of going about it. Second, though a decision in favor of Manzanares may have gone some uncertain distance in enforcing prosecutorial cooperation, its primary impact would have been clear: the enforcement of the fifth amendment to the United States Constitution.

Rejection of the jurisdictional exception doctrine merely requires that prosecution of defendants be managed so that defendants need not "climb a ladder of multiple criminal prosecutions" from the least included offense

88. In *Robinson*, 366 F. Supp. at 928, the federal trial court rejected the argument that the jurisdictional exception had been overruled in *Waller*. Nonetheless, the *Robinson* court rejected the idea that the states "by the device of creating courts of limited jurisdiction, [could] avoid the constitutional mandate against placing a person twice in jeopardy for the same offense." *Id.* at 929.

89. 100 N.M. at 624, 674 P.2d at 514.

90. *Id.*

to the greatest.[91] The failure of prosecutors to communicate does not justify depriving the defendant of his double jeopardy plea.[92]

The state will employ various expedients in its salutory zeal to rid our highways of drunk drivers. These are not the subject of this Note, which has focused on the double jeopardy clause. The state may not dilute the protection of the double jeopardy clause in the pursuit of drunk drivers. The New Mexico Supreme Court should have held that the prosecution of Heraldo Manzanares for vehicular homicide was barred by the double jeopardy clause.

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91. *Robinson*, 366 F. Supp. at 929.
92. *Id.*