DOUBLE JEOPARDY: THE CIVIL FORFEITURE DEBATE

Preface: Double Jeopardy in Washington and Beyond

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Nemo debet bis puniri pro uno delicto.[1]
No one ought be punished twice for one offense.[2]

I. INTRODUCTION

The prohibition against double jeopardy is of ancient lineage in western civilization. In a ringing and scholarly dissent that rewards reflection, Justice Hugo Black said:

> Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization. Its roots run deep into Greek and Roman times. Even in the Dark Ages, when so many other principles of justice were lost, the idea that one trial and one punishment were enough remained alive through the canon law and the teachings of the early Christian writers. By the thirteenth century it seems to have been firmly established in England, where it came to be considered as a "universal maxim of the common law." It is not surprising, therefore, that the principle was brought to this country by the earliest settlers as part of their heritage of freedom, and that it has been recognized here as fundamental again and again. Today it is found, in varying forms, not only in the Federal Constitution, but

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1. *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 169 (1873).
2. *Id.*

> in the jurisprudence or constitutions of every State, as well as most foreign nations. It has, in fact, been described as a part of all advanced systems of law and as one of those universal principles "of reason, justice, and conscience, of which Cicero said: 'Nor is it one thing at Rome and another at Athens, one now and another in the future, but among all nations it is the same.'" While some writers have explained the opposition to double prosecutions by emphasizing the injustice inherent in two punishments for the same act, and others have stressed the dangers to the innocent from allowing the full power of the state to be brought against them in two trials, the basic and recurring theme has always simply been that it is wrong for a man to "be brought into Danger for the same Offence more than once." Few principles have been more deeply "rooted in the traditions and conscience of our people."[3]

Because the prohibition against placing someone in double jeopardy is so deeply rooted in our jurisprudence, double jeopardy challenges have been prevalent throughout our nation's history. This Preface highlights some of the major themes involved in such double jeopardy challenges.

Section II of this Preface briefly describes the protections offered by the Double Jeopardy Clause. Section III touches upon one of the key issues in double jeopardy cases—the determination of what actions constitute the "same offense." Section IV addresses some recent developments in double jeopardy law and introduces a rapidly-growing question in modern double jeopardy cases: Whether the double jeopardy protections apply in the context of parallel criminal prosecutions and civil forfeiture actions.

II. THE DOUBLE JEOPARDY PROTECTIONS

The Double Jeopardy Clause of the federal constitution provides that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb."[4] The Washington Constitution states, "No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense."[5] The Washington Supreme Court recently settled a long-standing issue by holding that "Const. art. 1, § 9 is given the same interpretation the

3. Bartkus v. Illinois, 359 U.S. 121, 151-55 (1959) (Black, J., dissenting) (numerous footnotes citing biblical, canonical, ancient, medieval English, and American colonial law omitted).

4. U.S. CONST. amend. V.

5. WASH. CONST. art. I, § 9.

[United States] Supreme Court gives to the double jeopardy clause in the Fifth Amendment."[6]

Both double jeopardy clauses provide three different protections.[7] First, they protect against a second prosecution for the same offense after acquittal.[8] Second, they protect against a second prosecution for the same offense after conviction.[9] And third, they protect against multiple punishments for the same offense.[10]

III. "SAME OFFENSE"

In most double jeopardy cases, the key issue is what actions constitute the "same offense." As the Washington Supreme Court said in *State v. Laviollette*,[11] in double jeopardy determinations, "perhaps one of the most vexing issues has been to determine what 'the same offense' means."[12] The United States Supreme Court has found the problem of determining the meaning of same offense no less troubling and difficult. In *United States v. Dixon*,[13] a fractious 5-4 decision in which only Justice Kennedy fully joined Justice Scalia's majority opinion and four other Justices wrote separately to concur and dissent, the Court overruled a decision it had made just three years earlier regarding the proper test for evaluating the same offense requirement.[14] *Dixon* reestablished the *Blockburger*[15] test as the appropriate test for analyzing the double jeopardy same offense issue.[16] The *Blockburger*, or "same elements," test provides where the same act violates two distinct statutory provisions, if each provision requires

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6. State v. Gocken, 127 Wash. 2d 95, 109, 896 P.2d 1267, 1274 (1995). In *Gocken*, the defendant's subsequent conviction for possession of marijuana with intent to deliver was not barred by his prior plea to a drug paraphernalia charge, nor was the second defendant's conviction for felony theft barred by a prior plea to criminal conspiracy. *Id.* at 108, 896 P.2d at 1273.

7. *See* Comment, *Twice in Jeopardy*, 75 YALE L.J. 262, 265-66 (1965).

8. Green v. United States, 355 U.S. 184, 188 (1957); United States v. Ball, 163 U.S. 662, 671 (1896).

9. *See Ex parte* Nielsen, 131 U.S. 176, 183 (1889).

10. United States v. Benz, 282 U.S. 304, 308 (1931); *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 173 (1873); *cf.* North Carolina v. Pearce, 395 U.S. 711, 717-19 (1969) (holding that protection against multiple punishments for the same offense requires that credit for time served on original sentence be credited after retrial and conviction), *overruled on other grounds by* Alabama v. Smith, 490 U.S. 794 (1989).

11. 118 Wash. 2d 670, 826 P.2d 684 (1992).

12. *Id.* at 674, 826 P.2d at 686.

13. 113 S. Ct. 2849 (1993).

14. *Id.* at 2860 (overruling "same conduct" test in Grady v. Corbin, 495 U.S. 508 (1990), and adopting "same elements" test for analyzing double jeopardy same offense issue).

15. Blockburger v. United States, 284 U.S. 299 (1932).

16. *Dixon*, 113 S. Ct. at 2860.

proof of an additional fact the other does not, then the double jeopardy same offense requirement has not been met.[17]

Washington courts employ the "same evidence" test,[18] which follows the *Blockburger* test the United States Supreme Court reestablished in *Dixon*.[19]

Employment of the *Blockburger* test, however, offers no guarantee of an easy solution to the same offense issue. The proliferation of separate writings by the Justices of the United States Supreme Court in *Dixon* is one measure of the difficulties that arise in the application of the *Blockburger* test. Perhaps an even more trenchant example of these difficulties is two Florida court of appeals cases decided late in 1994: *State v. Miranda*[20] and *State v. Johnson*.[21] In each of those cases, a person was convicted of criminal contempt for violating a domestic violence injunction.[22] Subsequent to the criminal contempt convictions, the State attempted to prosecute both individuals for the Florida crime of aggravated stalking, based on the same set of facts that constituted the violations of the domestic violence injunctions.[23] The trial courts in both cases dismissed the aggravated stalking charges on double jeopardy grounds. In each case the State appealed.[24] Two divisions of the Florida court of appeals reached opposite results based on differing applications of the *Blockburger* test.

In *State v. Johnson*, a per curiam decision, the three-judge panel had little difficulty in affirming the dismissal after applying the *Blockburger* test:

> In this case, as in *Dixon*, the substantive charge was subsumed under the language of the injunction. There is no conceivable way in which [Johnson] could have committed aggravated stalking against the victim without also violating the terms of the injunction, a crime for which he had already been convicted. In the language of *Dixon*, aggravated stalking is "a species of lesser-included offense"

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

18. *See* State v. Calle, 125 Wash. 2d 769, 777, 888 P.2d 155, 159 (1995).

19. *See id.*; *accord* State v. Gocken, 127 Wash. 2d 95, 107, 896 P.2d 1267, 1273 (1995). The first Washington case to discuss double jeopardy issues was State v. Reiff, 14 Wash. 664, 45 P. 318 (1896). There, the Washington Supreme Court held a successive prosecution for false pretenses under § 234 of the Penal Code was not barred by WASH. CONST. art. I, § 9, after defendant's motion to dismiss a larceny charge under § 53 of the Penal Code was granted. *Id.* at 666-68, 45 P. at 319. As the supreme court pointed out in *Gocken*, the test the court used in *Reiff* was the *Blockburger* test. 127 Wash. 2d at 104, 896 P.2d at 1271.

20. 644 So. 2d 342 (Fla. Dist. Ct. App. 1994).

21. 644 So. 2d 1028 (Fla. Dist. Ct. App. 1994), *review granted*, 654 So. 2d 131 (Fla. 1995).

22. *Miranda*, 644 So. 2d at 343; *Johnson*, 644 So. 2d at 1028.

23. *Miranda*, 644 So. 2d at 343; *Johnson*, 644 So. 2d at 1029.

24. *Miranda*, 644 So. 2d at 343; *Johnson*, 644 So. 2d at 1028.

> of the contempt charge; the rule against double jeopardy thus barred the subsequent prosecution for aggravated stalking.[25]

In *State v. Miranda*, the court took a different view of the same facts. Employing a closer analysis of the *Blockburger* test, the court reasoned as follows:

> We now examine the charges before us. Miranda was charged with aggravated stalking under section 784.048(4). Therefore, both the aggravated stalking charge and the contempt charge require proof that an injunction for protection has been issued pursuant to section 741.30. However, we must compare the elements of the violated conditions of the injunction to the remaining elements of aggravated stalking. Aggravated stalking requires proof that a person "knowingly, willfully, maliciously, and repeatedly follows or harasses another person." "Harasses" means "to engage in a course of conduct directed at a specific person that causes substantial emotional distress in such person and serves no legitimate purpose." A definition is also provided for "course of conduct" which includes a requirement that there be a "series of acts over a period of time." No such requirements are contained in the elements of the violated conditions of the injunction. The condition that Respondent not "harass the Petitioner, either directly or indirectly, at any time or place whatsoever," may be violated by a single act of "harassment" as defined by its plain meaning since no statutory definition is provided. Thus, the aggravated stalking charge includes elements not included in the contempt charge. The fact that evidence of repeated phone calls may constitute the proof to be adduced at both the contempt trial and the aggravated stalking trial does not render these charges the same offense. The focus in doing a Blockburger analysis is on the statutory elements of the offenses and not on the accusatory pleadings or proof to be adduced at trial in a particular case.[26]

Remarkably, the courts decided these cases within seven days of each other. It seems manifest that the *Blockburger* test, rather than illuminating difficult questions of double jeopardy analysis, can lead to widely varying results that more often than not are sui generis because of their unique fact patterns.

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25. *Johnson*, 644 So. 2d at 1029 (citations omitted).
26. *Miranda*, 644 So. 2d at 345 (footnotes omitted).

IV. DOUBLE JEOPARDY AND CIVIL FORFEITURES

Double jeopardy challenges have increased in recent years and are likely to continue multiplying. The author's recent computer search revealed the words "double jeopardy" or "former jeopardy" have appeared in Washington cases 456 times since 1902. Notably, 273, or sixty percent, of those occurrences have been in the last fifteen years, with only 183 occurrences in the previous seventy-eight years. Criminal defendants have not become more resourceful, nor have prosecutors become more oppressive. Rather, the most likely reason for the increase in double jeopardy cases is the law of double jeopardy has undergone a change in recent years as old assumptions have been discarded. Many policymakers had assumed, for example, double jeopardy did not apply where the conduct could be the subject of both a criminal prosecution and a civil proceeding. Thus, civil forfeitures had been immune from double jeopardy considerations because the forfeitures were thought to be *in rem* actions against inanimate objects, rather than actions against a person who might thereafter be subject to a double punishment if prosecuted criminally.[27] The United States Supreme Court in *Austin v. United States*,[28] and the Washington Supreme Court following *Austin* in *State v. Clark*,[29] however, have dispensed with such a neat distinction by holding that civil forfeiture proceedings are generally punitive in nature.[30]

One example of issues that have arisen only recently and that exemplify the difficulties in enforcing the law while abiding by the strictures of double jeopardy is civil forfeiture in the context of drug prosecutions. Washington's forfeiture statute provides the state may seize all conveyances, money, negotiable instruments, and securities used or intended to be used to facilitate the sale of a controlled substance in violation of Washington's Uniform Controlled Substances Act.[31] Additionally, it allows the state to seize property furnished or intended to be furnished in exchange for a controlled substance in violation of the Act and all personal property acquired in whole or in

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27. The legal fiction that civil forfeiture is an *in rem* proceeding that does not punish the possessor of the property forfeited was regarded with some degree of contempt by Judge Pratt of the Second Circuit Court of Appeals, who noted that civil forfeiture is "a doctrine historically based on animism." George C. Pratt & William B. Petersen, *Civil Forfeiture in the Second Circuit*, 65 ST. JOHN'S L. REV. 653, 654 (1991).

28. 113 S. Ct. 2801 (1993).

29. 124 Wash. 2d 90, 875 P.2d 613 (1994).

30. *Austin*, 113 S. Ct. at 2810; *Clark*, 124 Wash. 2d at 101, 875 P.2d at 618.

31. WASH. REV. CODE § 69.50.505(a)(4), (7) (1994).

part with proceeds traceable to such an exchange.[32] This provision is civil, not criminal, and the person whose property has been seized may contest the forfeiture before either the chief law enforcement officer of the seizing agency or an administrative law judge.[33] Because, depending on the nature of the property seized, such forfeitures may be punishment,[34] jeopardy attaches. As a result, subsequent criminal convictions for the substantive drug offense charged at the time of the seizure may be barred by double jeopardy. These difficulties are not limited to the context of drug prosecutions—we can expect to see cases in many other areas of law where separate criminal and civil or administrative sanctions are imposed on a party for the same conduct.

To avoid the double jeopardy bar in the area of civil forfeiture, prosecutors can conduct the forfeiture hearing and criminal case in the same proceeding.[35] This is because multiple punishments are permissible if imposed in the same proceeding—they are barred only if imposed in separate proceedings.[36]

V. CONCLUSION

In conclusion, the prohibition against placing someone in double jeopardy is deeply rooted in our jurisprudence, and observation and enforcement of the prohibition have created some thorny problems for courts to resolve. The Articles that follow this Preface will identify and discuss these problems in the context of parallel criminal prosecutions and civil forfeiture proceedings, and will propose some possible means of ensuring that well-intentioned efforts to tackle our nation's many ills do not violate the ancient ban against double jeopardy.

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32. *Id.* § 69.50.505(a)(7).

33. *See id.* § 69.50.505(e).

34. *See Clark*, 124 Wash. 2d at 101, 875 P.2d at 618.

35. United States v. McCaslin, 863 F. Supp. 1299, 1307 (W.D. Wash. 1994).

36. United States v. Halper, 490 U.S. 435, 450-51 (1989); Missouri v. Hunter, 459 U.S. 359, 368-69 (1983).