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DOUBLE JEOPARDY PROBLEMS IN THE DEFINITION OF THE SAME OFFENSE: STATE DISCRETION TO INVOKE THE CRIMINAL PROCESS TWICE*

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> No one currently questions the great worth of the constitutional safeguard against double jeopardy. It justly assures that the state with its great resources will not be permitted to harass and oppress the individual by multiple prosecution or punishment for the same offense. The difficulty arises in determining just when we are dealing with the same offense within the contemplation of the safeguard.
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> State v. Currie, 41 N.J. 531, 534, 197 A.2d 678, 681 (1963) (Jacobs, J.)

There is a widely held, if erroneous, assumption that the double jeopardy provision is "self-executing," in the sense that determination of whether one has been in jeopardy for the same offense is relatively easy. Application of the double jeopardy provision, however, often presents complex problems and comprises a rather intricate area of the criminal law. Moreover, double jeopardy problems recur so often that they merit more detailed scholarly attention.

The complexity of the double jeopardy prohibition is reflected in such issues as waiver, identification of the point when jeopardy attaches, and determination of whether a subsequent trial will be allowed after jeopardy has attached in a former incomplete trial. However, most of the complexity results from the problems involved in defining "the same offense." Although the problems are related, they will be isolated in this analysis. Text writers as well as the courts have created confusion by combining dissimilar situations under the heading of "identity of offenses." Hopefully, identifying various categories and analyzing them separately will produce a more *comprehensive* view of the double jeopardy problems involved.

The situations dealt with involve possibilities of multiple prosecution and punishment for essentially the same act or transaction. Problems arise because, while the constitutional provisions prohibit double jeopardy for "the same offense,"[1] an *offense* is not usually considered synonymous with *act*.[2] Although the state's discretion *not* to invoke the criminal process may have a greater

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* A Table of Headings and Subheadings is appended at the end of this article.

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1. U.S. CONST. amend. V: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ."; FLA. CONST. Decl. of Rights §12: "No person shall be subject to be twice put in jeopardy for the same offense . . . ."

2. *See* 1 WHARTON'S CRIMINAL LAW AND PROCEDURE §145 (R. Anderson ed. 1957).

societal impact,[3] the power of multiple prosecution is patently of greater concern to defense attorneys since abuse of this power has a greater impact on their clients.[4]

This article focuses on the law of Florida to concentrate primarily on one system of double jeopardy law, although the method of analysis used is relevant to the double jeopardy law of other jurisdictions. The double jeopardy provision has finally been applied to the states via the fourteenth amendment.[5] In part, the long delay may have resulted from a tendency to minimize problems raised by the application of the prohibition.

THE "SAME OFFENSE" AND THE "EXTENDED ACT"

Double jeopardy problems may arise because of the inherent difficulty in deciding whether separate offenses are committed by an individual who precipitates relatively continuous activity involving a sequence of physiological action. While dealing with conspiracy, assault, attempt, or continuing crimes the recurring question is essentially the same: When, for double jeopardy purposes, does one transaction begin and end? Under what circumstances, if any, are conspiracy, attempt, and assault separate from the completed "substantive" crime so as to permit prosecution for both? The concept of continuing crimes presents the analogous problem of separating crimes of the same type committed proximate in time and under similar circumstances.

Conspiracy

Conspiracy and the crime that is the object of the conspiracy are generally considered separate substantive offenses, and in Florida are made so by statute.[6] Since double jeopardy principles apply only to multiple prosecution for the "same" offense, it follows that:[7]

> (1) Conviction or acquittal of conspiracy to commit a particular crime does not bar a subsequent prosecution for the crime.

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3. THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 18-25 (1967); J. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY ch. 8 (1966); Goldstein, *Police Discretion Not To Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543 (1960).

4. This article concerns the power of multiple prosecution, not the motives that lead to multiple prosecution in any given case. Frequently where the power exists, it is not exercised. Various reasons for not invoking the criminal process are advanced in note 3 *supra*. Speculation as to why the power of multiple prosecution is invoked will not be attempted here.

5. Benton v. Maryland, 392 U.S. 925 (1968). This case overruled Palko v. Connecticut, 302 U.S. 319 (1937).

6. FLA. STAT. §833.01 (1967) is the general conspiracy statute. *But see* FLA. STAT. §§833.03-.05, which seem to supersede §833.01, making conspiracy itself a felony or misdemeanor, depending on the object of the conspiracy.

7. *See* 1 WHARTON'S CRIMINAL LAW AND PROCEDURE §151 (R. Anderson ed. 1957).

(2) Conviction or acquittal of a particular crime does not bar a subsequent prosecution for conspiracy to commit the crime.

Florida law conforms to these general principles. In *Wallace v. State*[8] a city official was indicted for extortion from Marie A., a brothel operator. He pleaded in bar a prior conviction of conspiracy to extort from Melissa Z., similarly employed, upon an information charging conspiracy to extort from Melissa, Mary R., *and* Marie A. He also pleaded a former acquittal upon an information charging extortion from Mary. The court held that neither the former conviction nor the former acquittal was for the same offense:[9]

> While the conspiracy may have been single, and therefore subject to one indictment only, yet the felonies accomplished by means of the conspiracy were separate and distinct, depending on different acts, provable by different evidence, and accomplished by distinct though similar means.

Brown v. State[10] involved an information charging kidnaping and conspiracy to kidnap. The trial court directed a verdict on the conspiracy count, but during the trial on the kidnaping charge evidence tending to show a conspiracy was admitted. The appellate court reversed the conviction holding it error to admit evidence tending only to prove an offense of which the accused was not guilty by law. By way of dictum, the court stated that, before the trial court directed the verdict on the conspiracy count, the accused could have been convicted or acquitted of conspiracy to kidnap, kidnaping, or both, apparently in the same trial. This is still the prevailing rule in Florida.[11]

Double jeopardy problems of a more complex character appear in two other conspiracy situations. The first arises if the substantive offense is the overt act necessary to sustain conviction on the conspiracy. If that is the case, according to Wharton, "an acquittal of the substantive offense operates as an acquittal of the conspiracy count, if the acquittal of the substantive offense constitutes a determination that the overt act was not committed."[12] Although the statement appears in a discussion of former jeopardy, the operative principle is in fact collateral estoppel; that is, a bar to subsequent prosecution of an act necessary for conviction because the first case decided as a matter *of fact* that the act did not occur.[13]

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8. 41 Fla. 547, 26 So. 713 (1889).

9. *Id.* at 558, 26 So. at 717.

10. 128 Fla. 762, 175 So. 515 (1937), *clarifying* opinion appearing in 130 Fla. 479, 178 So. 153 (1938).

11. *See* Sheldon v. State, 178 So. 2d 34 (3d D.C.A. Fla. 1965).

12. *See* 1 WHARTON'S CRIMINAL LAW AND PROCEDURE 374 (R. Anderson ed. 1957).

13. The two cases cited by Wharton both employ language suggesting collateral estoppel. *Ex parte* Johnson, 3 Cal. App. 2d 32, 43 P.2d 541 (1935); Oliver v. Superior Court, 92 Cal. App. 94, 267 P. 764 (1928).

Editor's Note: In Ashe v. Swenson, 397 U.S. 436 (1970), the United States Supreme Court held that the doctrine of collateral estoppel, which bars relitigation between the same parties of issues actually determined at a previous trial, is embodied in the fifth amendment prohibition of double jeopardy. The decision reversed the conviction

A different problem is posed when a conspiracy or agreement is the gravamen of the substantive offense. In this circumstance a charge of conspiracy in fact charges conspiracy to conspire. In a real sense, prosecution for both would be multiple prosecution for the same offense. The double jeopardy prohibition should thus bar prosecution for the reason that the conspiracy and its object are virtually identical.[14]

A variation of the conspiracy problem arises when an attempt is made to bring multiple prosecutions for a single conspiracy that has more than one criminal object. Although separate prosecution for the completed offenses is permissible, the single conspiracy spawning those offenses would support only one prosecution.[15]

Assault

Florida statutes proscribe various types of assault,[16] which may be either completely unrelated to other crimes, or so inextricably interwoven with another crime as to imply that prosecution for both would be prosecution "for the same offense." For example:

> (1) *X*, fleeing the scene of a bank robbery, assaults a policeman with a deadly weapon (but without intent to kill).
> (2) *Y* assaults a policeman with a deadly weapon (without intent to kill). The policeman dies from the assault.

Clearly, committing two separate offenses, *X* could be prosecuted for, and convicted of, both robbery and aggravated assault. In the second example, however, the aggravated assault and murder are part of a logically continuous sequence, the assault being an included offense. As such, the murder prosecution would bar a subsequent prosecution for the aggravated assault and vice versa.[17]

The Florida statute that makes assault with intent to commit a felony itself a felony[18] complicates double jeopardy. What are the consequences when the felony is consummated? Can there be prosecutions for the assault to commit the felony as well as the felony itself? In most cases the assault

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of a defendant for participating in the robbery of one victim in a multi-victim robbery after a prior jury had found that he was not guilty of robbing another victim.

14. *Accord*, Pereira v. United States, 347 U.S. 1 (1954); Scalfon v. United States, 332 U.S. 575 (1948); State *ex rel.* Zirk v. Muntzing, 122 S.E.2d 851 (W. Va. 1961).

15. Brown v. State, 128 Fla. 762, 175 So. 515 (1937); Trafficante v. State, 136 So. 2d 264 (2d D.C.A. Fla. 1961). Of course, the state may always attempt to show more than one conspiracy.

16. *See* FLA. STAT. §§784.02 (1967) (assault), 784.03 (assault and battery), 784.04 (aggravated assault), 784.06 (assault with intent to commit felony).

17. A possible exception, when the victim of the assault dies from the assault but not until after prosecution for the assault is discussed in text accompanying notes 101-109 *infra*. *See* Southworth v. State, 98 Fla. 1184, 125 So. 345 (1929).

18. FLA. STAT. §784.06 (1967).

would be a lesser included offense of the felony, governed by principles discussed below that would generally prohibit multiple prosecution.

Attempt

Another aspect of the "extended act" concerns criminal sanctions for both attempted and corresponding completed crimes. The Florida statute makes an attempt to commit "an offense prohibited by law" itself an offense.[19]

Clearly, one cannot be convicted of both the attempt and the completed crime if they arise out of the same act or set of circumstances. The very concept of attempt contemplates failure to complete the substantive crime.[20] Thus, prior jeopardy principles are not needed to bar a subsequent trial for the attempt or the substantive crime after conviction of the other since the two crimes are by definition mutually exclusive.

However, if tried *and acquitted* of attempt, can one then be tried for the completed substantive crime, or vice versa? By definition, a guilty verdict in the second trial would not be inconsistent with the result in the first trial. If the second prosecution is to be barred, resort must be made to the double jeopardy provision. In reality, attempt is no more than a special case of a necessarily lesser included offense. Just as the accused may be convicted of an included offense on a trial for the greater offense, he may also be convicted of attempt on a trial for the greater offense.[21] Accordingly, double jeopardy principles discussed below should govern and bar a prosecution for either the attempt or the substantive crime after an acquittal (or conviction) of the other.

"Continuing" Crimes

Complex double jeopardy problems arise with offenses that continue over a period of time. The operative definition of "continuing" crimes, for the purposes of this discussion, includes crimes that are *in the last analysis* separate, sequential crimes, but that raise an issue as to whether one continuing crime or several consecutive crimes are involved. Also included in the definition are true continuing crimes.

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19. FLA. STAT. §776.04 (1967). This statute does not purport to cover attempts made unlawful by specific statutes. *See, e.g.*, attempted arson, which is proscribed by the fourth degree arson statute, FLA. STAT. §806.04 (1967).

20. *See, e.g.*, Gustine v. State, 86 Fla. 24, 97 So. 207 (1923); Morton v. State, 72 Fla. 265, 73 So. 187 (1916); Groneau v. State, 201 So. 2d 599 (4th D.C.A. Fla. 1967). The definition of "attempt" in FLA. STAT. §776.04 (1967) sensibly lists failure as an element of an attempt crime, albeit in common parlance one can attempt and succeed.

21. FLA. STAT. §919.16 (1967). Although Brown v. State, 206 So. 2d 377 (Fla. 1968), separates attempts from included offenses, it treats them no differently. The trial judge must instruct on attempts at the trial for the greater offense, regardless of whether the accusatory writ charges the attempt. Moreover, an attempt generally meets the *Brown* test of a necessarily included offense: attempt is an "essential aspect" of the greater crime, without which it cannot be proved. *See* text accompanying notes 83-109 *infra*.

Two distinguishable double jeopardy problems in relation to "continuing" crimes present the following questions:

> (1) What may a second accusatory writ validly charge, given a prior prosecution on an accusatory writ that covered a somewhat extended period of time?
> (2) Assuming a prosecutor wanted to charge as many crimes as possible and was willing to make each indictment as time-specific as possible, how many prosecutions can legitimately be maintained in any given time span (that is, when does one separate and distinct "continuing" crime end and another begin)?

Concerning the first problem, the validity of a second indictment for the same series of "continuing" crimes depends on the terms of the prior indictment (or other accusatory writ). Although an accusatory writ must include the particular time when the alleged offense was committed, "such time need not be stated accurately, except in those cases where the allegation of the precise time is material. . . ."[22] When time is not material, the indictment or information will sustain a conviction if the proof shows the offense to have been committed at any time prior to the indictment, within the statute of limitations.[23] The effective period of such an accusatory writ would thus be two years for most, if not all, "continuing" crimes. Any subsequent prosecution for similar offenses within that period of time would be barred.[24]

An accusatory writ may also be drafted to name a certain period of time within which the offense is alleged to have been committed. Again, the terms of the initial accusatory writ are material to any subsequent prosecution. In *Bizzell v. State*,[25] an initial information charged embezzlement from January through October 1952. The accused was found not guilty, whereupon a second information was filed charging embezzlement in September 1952. The second prosecution was held barred because the facts charged in the second information, if found true, warranted a conviction under the first information. The court reasoned that the appellant had been placed in jeopardy for embezzlement in September in the first trial; therefore, the jury necessarily found that he was not guilty of the offense during any time included in the information. Likewise, this result should obtain if defendant is convicted in the first trial. In both cases, defendant was in jeopardy of being convicted of any offenses charged during the time covered by the indictment in the first trial.

In the problems discussed above, the number of possible prosecutions was limited solely by the breadth of the accusatory writ. A prosecutor has discretion to draft an accusatory writ in such a way as to limit the extent of

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22. Alexander v. State, 40 Fla. 213, 215, 23 So. 536, 537 (1898).

23. *Id. See also* 17 FLA. JUR. *Indictments and Informations* §39 (1956) and cases cited therein.

24. No Florida cases on point have been found. The result suggested above is well stated in dicta in Morgan v. State, 119 Ga. App. 964, 968, 47 S.E. 567, 568 (1904).

25. 71 So. 2d 735 (Fla. 1954).

protection rendered by double jeopardy principles. The second question raises this problem: What are the double jeopardy limits imposed when a prosecutor in fact drafts an accusatory writ that covers a short span of time? This presents no problem if the crime involved is clearly not part of a series. For example, if a prosecutor drafted an information specifying one hour of a three-hour robbery, a subsequent prosecution for the balance of time would clearly be prohibited because only one offense had been committed. However, if the offenses are of an allegedly continuing nature, the question then arises as to how many offenses have been committed.

The question is posed, for example, in gambling cases. A Kentucky case[26] held that a conviction for playing one hand of stud poker did not bar a subsequent prosecution for playing another, even though both hands were played during the same sitting. Finding that each hand constituted a separate offense, the court stressed that winnings were distributed after each hand and that a new wager was made when the cards were dealt again. In an Alabama gambling case[27] reaching the same result, the court emphasized that a lapse of some hours between sittings made for separate offenses. These cases seem to turn on the easily disputed existence of an identifiable physical termination of the criminal activity for which the initial accusatory writ was brought. For example, would the Kentucky court have reached the same result if the card game were of the type requiring several hands to determine who won? Probably not, since the court stressed that a completed wager was the determining element of a separate offense. Application of the physical termination test does not appear to violate double jeopardy principles, which prohibit multiple prosecutions only for the "same" offense, although the test would produce unjust results in certain cases. In the Kentucky gambling case, for instance, there were seventy-five hands played in the four-hour game. Conceivably, therefore, appellant had committed seventy-five separate "offenses" for which he could be cumulatively tried, convicted, and sentenced. A possible remedy for this situation, apart from a humane use of the prosecutor's discretion, would be a statutory limitation on the number of prosecutions allowed for such relatively continuous (but separate) offenses.

It appears elementary, therefore, that only one prosecution can result from a single, uninterrupted, continuing offense even though only part of the time is specified in the accusatory writ. However, one authority implies that multiple prosecutions may be brought for various specified chronological segments of a continuing offense.[28] Some of the cases supporting the black letter rule in that work allow reprosecution not because a different time is

26. Johnson v. Commonwealth, 256 S.W. 388 (Ky. 1923).

27. Whatley v. State, 17 Ala. App. 330, 84 So. 860 (1920).

28. 22 C.J.S. *Criminal Law* §281 (1961). The black letter heading to that section states: "A prosecution for *a* continuing offense is a bar to a subsequent prosecution for the same offense charged to have been committed at any time previous to the institution of the first prosecution, *unless the specific date or time is alleged and the state confines its proof thereto.*" (Emphasis added.) The emphasized portion of the above statement of the law, in all fairness supported by some of the cases cited in C.J.S., is unsound. Even if a specific date is alleged, there should be only prosecution for "a continuing offense."

specified in the first accusatory writ, but because there was a series of separate, interrupted offenses, not a single continuing offense. If only one continuing offense exists, the double jeopardy clause should permit but one prosecution.

Initially, therefore, there can be no reprosecution for any offenses included in the time period of the first accusatory writ, regardless of whether one continuing offense or multiple, interrupted offenses are involved. Second, if an arguably continuous violation of law is involved and the prosecutor specifies only part of the time span, the possibility of prosecution for another segment depends on whether there are separate, repetitive offenses or a single continuous offense. The existence of physical interruptions, which break continuity, seems to be decisive in close cases. If one true continuing offense is found, reprosecution would be for the "same" offense, regardless of how time-specific the accusatory writ was, and should thus be prohibited.

THE "SAME OFFENSE" AND "COOPERATIVE FEDERALISM"

Even if one were satisfied with the comprehensiveness of Austin's definition of law as "commands issued by a sovereign," one would be forced to ask, in respect to law in the United States: *Which* sovereign? Criminal jurisprudence is based on federal law, statutes of various states, and municipal ordinances. When concurrent jurisdiction over a particular offender is present, double jeopardy problems arise. Moreover, the problems concern the definition of "the same offense," since the rationale for allowing multiple prosecution in such cases is that one criminal act may, simultaneously, constitute separate offenses against different sovereigns. The separate sovereignty problem is dealt with as only one case in which multiple prosecution is possible for essentially the same act.[29]

Prosecutions by Different States

A Florida court faced the question of prosecution by two states in *Strobhar v. State*.[30] There, an employee of an interstate railroad was convicted of embezzlement in Florida after having been acquitted in Georgia of larceny after trust. The defendant appealed the striking of his plea of *autrefois acquit*, averring that the two offenses required virtually identical proof and should be considered the same. Ruling that the defense was unavailable, the court based its decision on the procedural ground that the defendant failed to plead with sufficient particularity the former indictment and acquittal in a court having jurisdiction. The court then proceeded to state that, even if defendant's plea were interpreted as averring a continuous offense committed in both states, "a conviction or acquittal in the state of Georgia for a violation

29. The writers were especially helped in the preparation of the sections on the separate sovereignty problem by two articles. *See* Harrison, *Federalism and Double Jeopardy: A Study in the Frustration of Human Rights*, 17 U. MIAMI L. REV. 306 (1963); Note, *Multiple Prosecution: Federalism vs. Individual Rights*, 20 U. FLA. L. REV. 355 (1968).

30. 55 Fla. 167, 47 So. 4 (1908).

of its laws would not prevent a prosecution in the state of Florida for the act in violation of the laws of the latter state."[31]

Apparently, *Strobhar* has not been cited as authority for the proposition that prosecutions by two states for the same crime is not a violation of double jeopardy principles. However, this result agrees with the holdings of other state courts that have been faced with the question,[32] although the statutes of nineteen other states preclude prosecution when the crime involved is within the jurisdiction of another state or a territory, and the defendant has been convicted in one of those jurisdictions.[33]

Prosecutions by Federal and State Authorities

The doctrine of dual sovereignty permits successive prosecutions for the same crime by federal and state authorities.[34] This doctrine has received the sanction of the United States Supreme Court in *Bartkus v. Illinois.*[35] In *Bartkus,* petitioner was first acquitted on a federal charge of robbing a federally insured bank, then convicted on a state charge of bank robbery. In upholding the subsequent prosecution, Justice Frankfurter quoted from an early case:[36]

> Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offence or transgression of the laws of both.
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> That either or both may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable. He could not plead punishment by one in bar to a conviction by the other.

The primary practical consideration noted by the Court in approving the dual sovereignty theory was the differing interests of the respective governments in punishing the same behavior. The court cited *Screws v. United States,*[37] in which petitioners were tried under federal statutes carrying maximum combined sentences of three years, while the state crime was a capital offense.

Abbate v. United States,[38] decided with *Bartkus,* involved the reverse situation: a successful prosecution in an Illinois court for conspiracy to destroy property, followed by a successful federal prosecution for conspiracy to destroy

31. *Id.* at 180, 47 So. 4, 9 (1908).
32. *See* 22 C.J.S. *Criminal Law* §296 (c) (1961).
33. *See* Note, *supra* note 29, at 360 n.57.
34. The leading case is United States v. Lanza, 260 U.S. 377 (1922).
35. 359 U.S. 121 (1959).
36. *Id.* at 131-32. The early case quoted from was Moore v. Illinois, 55 U.S. (14 How.) 13 (1852).
37. 325 U.S. 91 (1945).
38. 359 U.S. 187 (1959).

a portion of the communications system of the United States. The Court again held that petitioners were not placed twice in jeopardy for the same offense, as the statutes of each sovereign protected a distinct social interest. At the federal trial, for example, the Government introduced proof that certain military agencies used some of the facilities that petitioners conspired to destroy. Presumably, the Illinois statute involved was not drafted to protect the military communications system. Even if each sovereignty had both statutes, however, it is unlikely that multiple prosecution could have been brought by either sovereignty alone since the difference in proof required would be minimal. Thus, the determining factor was the dual sovereignty doctrine.

The dual sovereignty theory, as applied by the Supreme Court to successive federal and state prosecutions, conforms to the rulings of twenty-seven out of the twenty-eight state courts that had faced the question before *Bartkus*. The only exception noted in *Bartkus* was in *Burrows v. Morgan*,[39] a Florida case that held the eighteenth amendment conferred concurrent authority to enforce the various prohibitions:

> [S]uch power in particular cases [is] to be exercised by either one, but only by one of the two sovereignties, to the end that violations of the specified prohibitions shall be redressed by one if the other fails to act, or by the first one to attain jurisdiction in any case.

However, as suggested in *Bartkus*, this case should be limited to the interpretation given the eighteenth amendment and its enabling legislation. Other Florida cases expressly adopt the dual sovereignty theory and suggest its application in the federal-state reprosecution context.[40]

Prosecutions by State and Municipal Authorities

Theisen v. McDavid[41] represents the Florida approach to prosecutions by both state and municipal authorities. Petitioner, on trial for violation of a municipal ordinance prohibiting open stores on Sunday, pleaded double jeopardy on the ground that a state statute proscribed the same offense. The court dismissed the argument with a straightforward explanation of dual sovereignty, analogizing the multiple prosecution to the federal-state context:[42]

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39. 81 Fla. 662, 666, 89 So. 111, 112 (1921). *See also* Bartkus v. Illinois, 359 U.S. 121 n.24 (1959).

40. *See* Sligh v. Kirkwood, 65 Fla. 123, 127-28, 61 So. 185, 187 (1913): "[W]here both the acts of Congress and of the State make a defined act an offence, the commission of the act may be an offence against each, and punishable by each."; quotation from Theisen v. McDavid, 34 Fla. 440, 16 So. 321 (1894) in text accompanying note 41 *infra*. Although *Theisen* was a state-municipal case, it expressly assumed that the same rationale permitted multiple prosecution in the federal-state context.

41. 34 Fla. 440, 16 So. 321 (1894).

42. 34 Fla. 440, 443-44, 16 So. 321, 322 (1894).

> [T]he question is assimilated to the dual trials and punishments, the one in the Federal courts, the other in the State tribunals, that follow the same act when it infracts both a State law and congressional legislation. Instead of its resulting in two trials and punishments for the same offense within the contemplation of the constitutional inhibition, it is regarded as two distinct offenses growing out of the same act; the one being a transgression of the State law, the other an infraction of the municipal law.

Unlike situations involving successive prosecutions by different states, or by state and federal governments, the problem of prosecutions by both state and municipal governments arises frequently, and abuse is therefore more likely. *Theisen* has been relied upon by an unbroken line of Florida cases, including two very recent cases that have refused to depart from its holding.[43]

The Rationale of Dual Sovereignty

If crime is considered a transgression against a sovereign, then a single act may constitute more than one crime in any system that recognizes more than one sovereign. However, the concept that a crime is an offense against the sovereign antedates the concept of federalism and should not necessarily have survived the advent of federalism. It has been suggested that crime be redefined as a transgression against a social interest, as defined by criminal statutes of several sovereignties.[44] The number of allowable prosecutions would depend on the number of social interests trangressed by a single act. A literal adoption of the standard would result in a broadening of the potential areas of multiple prosecution, however, in that a single act could transgress many social interests even within the same sovereign. Under well established double jeopardy principles, one sovereign cannot reprosecute for the same act based on the same evidence, even if different social interests are involved; use of the same evidence would amount to reprosecution of the same offense.[45] The social interest test, if ever adopted, should be applied solely as a limit to multiple prosecution brought under the dual sovereignty theory. Thus, in *Abbate v. United States*[46] the state statute concerned the preservation of property in general, while the federal statute protected the federal communications system. Arguably, the two statutes pertained to separate social interests, violation of which would constitute separate offenses against separate sovereigns. In contrast, *Bartkus*, where petitioner was tried for robbing a bank and then tried for robbing a federally insured bank, involved essentially the same offense in that similar interests were involved.

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43. Hilliard v. City of Gainesville, 213 So. 2d 689 (1968); Waller v. State, 213 So. 2d 623 (2d D.C.A. Fla. 1968). Since the writing of this article, *Waller* has been overturned by the United States Supreme Court. *See* note 49 *infra*.

44. Harrison, *Federalism and Double Jeopardy: A Study in the Frustration of Human Rights*, 17 U. MIAMI L. REV. 306, 330 *et seq.* (1963).

45. *See* text accompanying notes 73-82 *infra*.

46. 359 U.S. 187 (1959).

If the dual sovereignty theory is awkward when applied to prosecutions by a state and federal government, its application to prosecutions by municipal and state governments is even less satisfactory. Florida has long recognized that municipalities derive all their powers from the state government and are in no sense sovereign.[47] The United States Supreme Court in *Grafton v. United States*[48] rejected the dual sovereignty theory in an analogous situation. In that case, the Court held that successive prosecutions by a court-martial and a territorial court were barred because the authority of both emanated from the federal government. Whether the court will apply this reasoning to the state-municipal context is a question that may be answered in a pending case.[49]

THE "SAME ACT" AS MULTIPLE "NONRELATED" OFFENSES

What is essentially one act can give rise to several offenses in various ways, even with the same jurisdiction and even when no aspects of an "extended act" are present. Problems raised by these possibilities are discussed in the balance of the article, although a basic distinction between "related" and "nonrelated" offenses must be made. "Nonrelated" offenses are those that, although they may be similar, are not included offenses or degrees of the same crime ("related" offenses). Although courts occasionally purport to apply the same tests to both types of offenses, different double jeopardy consequences may result; therefore, the two categories have been treated separately.

The "Same Act" as Both a Criminal and a "Noncriminal" Offense

Since the double jeopardy provision is applicable to "criminal" prosecutions only, the same act may therefore give rise to similar offenses, one criminal and the other noncriminal, for each of which a proceeding may be brought and a punishment assessed. The classic case justifying the distinction involves a criminal offense and the resulting offense against an individual:[50]

47. *See* 23 FLA. JUR. *Municipal Corporations* §§4, 62 (1956). This is generally in accord with the governmental structure in other states. *See* 2 E. MCQUILLIN, MUNICIPAL CORPORATIONS §4.03 (3d ed. 1946).

48. 206 U.S. 333 (1907).

49. Waller v. State, 213 So. 2d 623 (2d D.C.A. Fla. 1968), *rev'd sub nom.*, Waller v. Florida, 397 U.S. 389 (1970).

Editor's Note: In Waller v. Florida, 397 U.S. 387 (1970), the United States Supreme Court ruled that if a person has been convicted in a municipal court, a subsequent trial for the *identical offense* in a state court is violative of the fifth and fourteenth amendment guarantees against double jeopardy. The rationale for the decision was that since municipal and state courts are part of the same judicial system the "dual sovereignty" exception to the double jeopardy rule did not apply. The Court expressly relied on Grafton v. United States, 206 U.S. 333 (1907), as support for the result reached. The *Waller* Court did indicate, however, that if acts are committed that are not included in the municipal court charges, the offender may be subject to further prosecution in the state courts.

50. Smith v. Bagwell, 19 Fla. 117, 123-24 (1882). The distinction is not so clear when punitive damages are assessed in the civil case. In *Smith* the Florida court, although recog-

> The word *jeopardy* is therefore used in the Constitution in its defined, technical sense at the common law. And in this use it is applied only to strictly criminal prosecutions by indictment, information or otherwise. . . . Of course the same act may be an offense [in the sense of crime] against the State and an offense [in the sense of a tort] against a private person.

In two other situations, however, offenses are designated noncriminal with less reason. The first situation arises if a defendant is punished for contempt and a crime because of exactly the same act. The following situation, raised in a Florida case,[51] is illustrative. *A* is convicted of contempt of court because he attempted to bribe a juror. He is then successfully prosecuted for the crime of attempting to bribe a juror, on the same facts, and given an additional sentence. The Florida supreme court held that the prior sentence did not raise a legitimate double jeopardy question:[52]

> It is too well settled to require any citation of authorities here that the punishment of conduct as a contempt of court will not bar the criminal prosecution of the accused for the substantive offense committed by such conduct.

The rationale for such a distinction is not elucidated in the cases or the texts, but seems to be a combination of the following reasoning: (a) different offenses are committed simply because one is contempt and the other is a particular substantive crime with a different name, and (b) contempt is not a criminal offense. The first rationale is totally subversive of the double jeopardy principle requiring different elements of proof. Although the same act may give rise to different offenses, mere difference in title or name given the offense is not enough.[53] The second rationale is itself ambiguous, in that it is used apparently to mean two different things. First, it sometimes means that contempt actions are "civil" and, *ipso facto,* cannot constitute jeopardy. Aside from the fact that some contempts are criminal,[54] this argument is weak for the same reasons given below in the discussion of administrative punishments. Furthermore, the argument that contempt is not a criminal offense alleges that contempt is only an offense against the court. Thus, no double jeopardy ensues because the same act gives rise to a similar offense but against different entities. In the above, illustration, for example, tampering with the jury was an offense against both the state and the court.[55] This rationale apparently provides a sound basis for allowing double prosecution in such a case, provided contempt was limited to more or less direct offenses against the court and the power was not abused.

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nizing some state authority to the contrary, held that the double jeopardy clause would not prohibit civil action punitive damages after a criminal fine or sentence.

51. Wilson v. State, 122 Fla. 54, 164 So. 846 (1935).
52. *Id.* at 57, 164 So. at 847.
53. *See* discussion of this principle in text accompanying notes 73-82 *infra.*
54. *See* 6 FLA. JUR. *Contempt* §4 (1956).
55. Wilson v. State, 122 Fla. 54, 164 So. 846 (1935).

The same rationale does not apply to contempts for violations against injunctions, which also constitute criminal offenses. There the offender, while not directly disturbing the peace or dignity of the court, has been put under a second obligation not to commit a certain out-of-court act. The first obligation is the criminal law and the second is the injunction. If defendant were prosecuted for both, when they were in effect coterminous, he would be prosecuted for the same act, constituting the same offense and against the same entity. Apparently, however, no double jeopardy cases have distinguished direct contempt of court from the indirect type of contempt of court that is exemplified by violation of an injunction.[56] In Florida,[57] as in many other jurisdictions, double jeopardy does not prohibit proceedings for violation of an injunction in addition to a criminal prosecution for the same act.

Similar problems are presented by the imposition of "civil" penalties by administrative agencies. Frequently exactly the same act, on exactly the same proof, is punishable under criminal statutes. Generally, both the civil and criminal violations may be proceeded against and punished.[58] Such a result is not desirable, for defendant arguably is being punished twice for "the same offense." Rather than imposing an automatic test, a determination of whether the administrative punishment is really penal in nature should be made,[59] considering such factors as whether the proof requirements are the same, the nature of the punishment assessed, and the purposes of the sanctions. Admittedly, this type of test would not be easy to apply in every case. However, a clear distinction exists between the revocation of a license for an act that is also a violation of a criminal statute,[60] and the agency's

56. It may well be argued that violation of an injunction is also an offense against the court. The contempt power is necessary in the enforcement of injunctions, even those duplicative of criminal statutes. The point here is that when the injunction is merely duplicative, the violator should not be subject to a contempt proceeding *and* a criminal trial for the same act.

57. *See* Pompano Horse Club v. State, 93 Fla. 415, 111 So. 801 (1927). In that case, the court held that the maintenance of a gambling house could constitute a contempt for violation of an injunction and a substantive crime itself, in the court's words: "[T]he same criminal act thereby giving rise to both punishments." *Id.* at 434, 111 So. 808.

58. *See* 22 C.J.S. *Criminal Law* §240(b) (1961). Although beyond the scope of this article, the whole area of "administrative crimes" is now receiving much attention. The double jeopardy problems, of course, are only a small aspect; delegation, due process, and numerous other problems are also involved. *See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE §213 (1951), for delegation problems relating to penalties.

59. Such a determination was made, for example, in *In re* Gault, 387 U.S. 1 (1967). *See also* Kent v. United States, 383 U.S. 541 (1966). In these cases the court went beyond the "civil" designation of juvenile court cases and found that they were essentially "criminal." Thus, certain rights of defendants in criminal cases also pertained to juveniles subject to certain juvenile court proceedings. These cases did not expressly deal with the protection against double jeopardy. Cases are split on the question of whether double jeopardy is applicable to juvenile court proceedings. *See* 22 C.J.S. *Criminal Law* §240, at 629 (1961).

60. The penalty powers given to the new Florida Air and Water Pollution Control Commission are illustrative. *See* Fla. Laws 1967, ch. 67-436, §§15-17. The provision allowing the state to collect actual damages to waters and aquatic life caused by polluters is clearly compensatory and is justifiably "civil" for double jeopardy purposes.

assessment of a penal fine duplicating the corresponding criminal penalty.[61]

It is highly probable that some of the punitive functions performed by administrative agencies would formerly have been considered within the purview of the criminal law. These penal functions should not be used for multiple prosecution purposes.

The "Same Act" and Multiple Victims

Just as one act may give rise to several different types of offenses, so may it give rise to several offenses of the same type by creating multiple victims. The oft-stated rule, and that generally adhered to in Florida, is that "when two or more persons are injured by a single act, there is a corresponding number of distinct offenses. . . ."[62] This rule permits as many prosecutions as there are victims. Some Florida cases allowing multiple prosecutions in such situations recite the "same evidence" test, contending that a different victim represents an additional fact requiring different proof.[63]

However, various types of multiple victim situations present different considerations as to the applicability of the double jeopardy provision. In certain circumstances some jurisdictions bar successive prosecutions for multiple victims.[64] Florida does not bar such reprosecution, except possibly in the case of larceny.

An initial hypothetical leaves little doubt that multiple offenses may be committed and that multiple prosecution should result. *A* robs *B* and *C* at the same time and place, using the same methods; or *A* kills *B* and *C* by shooting both of them with successive shots, fired within a few seconds of each other. Besides the mechanical "multiple victims-multiple offenses" test there is another reason why multiple offenses have occurred in these examples. *A* has actually and consciously committed two different acts, albeit in close sequence. In the second example the two killings are no less two offenses than a case in which *A* killed *B* and *C* by shooting the same two bullets, but a year apart and at different places.

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61. In the latter case, double jeopardy should be a bar to multiple prosecution. Such is not the case, however. In the leading case of Helvering v. Mitchell, 303 U.S. 391 (1938), collection of a penalty for a tax deficiency was permitted after defendant was acquitted of tax evasion. Revocation of a license, on the other hand, is as much an "administrative" device for the public good as a penal measure. License revocation may be as severe a penalty as a given penal fine, but the severity of the measure should not be a touchstone of its "criminal" nature.

62. *See* 1 WHARTON'S CRIMINAL LAW AND PROCEDURE §143 (R. Anderson ed. 1957).

63. *See, e.g.*, Peel v. State, 150 So. 2d 281, 297-98 (2d D.C.A. Fla. 1963). The court concluded: "[T]he murder of Mrs. Chillingworth was a separate crime from that of Judge Chillingworth, requiring proof of a separate corpus delicti which negatives any finding of double jeopardy."

64. *See* 22 C.J.S. *Criminal Law* §298, at 785 (1961): "[N]o question has given rise to more difficulty or conflict than that which presents itself when two or more persons are injured in person or in property by a single act, and on this question there are two divergent lines of authority."

A further example presents slightly more substantial double jeopardy questions. *A* throws a bomb in a crowd killing *B* and *C*; or *A* poisons the town's water supply and kills *B* and *C*. As far as *A*'s committing separate acts is concerned, there might appear to be a substantial difference between pulling the trigger twice and throwing one bomb. But in the second situation, arguably *A* has committed multiple acts by knowingly setting in motion forces that would affect different individuals. A case in which *A* pulls the trigger several times, thereby killing several people in a crowd, can only superficially be distinguished from a situation in which *A* simply pulls the trigger once on an automatic rifle and kills several people. In both cases *A* has set in force numerous missiles that serve as instruments in the commission of multiple criminal acts.

A harder question is posed by the following hypothetical: *A* is culpably negligent in driving his car, and in a collision *B* and *C* are killed. Can *A* be separately tried for manslaughter of each? Here it cannot plausibly be argued that *A* committed several different acts or that he consciously set in motion multiple forces. Possibly for these reasons state courts are divided on the double jeopardy question.[65] Florida courts have been faced with the issue several times and have held that multiple prosecutions present no double jeopardy problem.[66] This appears to be a sound result, for two different offenses were committed against the public. Not only must an added fact (causing the death of another individual) be proved in each trial, but, on a broader level, two feloniously caused deaths should be considered two offenses against the public regardless of whether caused by the same act. Because two offenses are involved, a prior jeopardy defense should not be permitted on a subsequent trial for the other killing, regardless of whether the first trial resulted in a conviction or an acquittal. However, if the first trial results in an acquittal, the defendant can make a strong case for collateral estoppel at the second trial.[67] In a recent multiple victim manslaughter case in Florida,

65. *Compare* Windham v. State, 41 Ala. App. 280, 129 So. 2d 338 (1961) *and* State v. Cosgrove, 103 N.J.L. 412, 135 A. 871 (1927), *with* Burton v. State, 226 Miss. 31, 79 So. 2d 242 (1955) *and* People v. Allen, 368 Ill. App. 368, 14 N.E.2d 397 (1937).

66. *See* McHugh v. State, 160 Fla. 823, 36 So. 2d 786 (1948); Hanemann v. State, 221 So. 2d 228 (1st D.C.A. Fla. 1969); State v. Lowe, 130 So. 2d 288 (2d D.C.A. Fla. 1961). Perhaps the single act-multiple victim question is presented so often in automobile manslaughter cases because that is the most prevalent form of mass homicide.

67. If defendant wishes to use the first acquittal to estop the state from contending, for instance, that he was culpably negligent in the second prosecution concerning a different victim, he must show that the acquittal *could only* have been based on a finding that he was not culpably negligent. If there was an issue as to cause of death of victim *A*, in the first trial, for example, it would be possible that the first jury acquitted because of lack of causation as to *A*'s death only; this would not be inconsistent with a finding that defendant was culpably negligent when he ran over *A* and *B*, and caused the death of *B* (*A* dying of other causes). The problem of collateral estoppel in criminal cases is thus the general verdict, but this problem should not always be considered insurmountable. Sometimes what was necessarily decided in the first trial can be determined if the pleading, proof, and instructions are examined. Nevertheless, it is unlikely that Florida courts would accept collateral estoppel in multiple victim cases, since in expressly rejecting double jeopardy arguments they do so in terms broad enough to include collateral estoppel, which they

the majority followed Florida precedent in allowing multiple prosecution.[68] Although both the majority and dissent relied on double jeopardy, in light of the acquittal in the first case collateral estoppel was the strongest argument available to the dissent.

A possible exception to the multiple victim-multiple offense rule in Florida is larceny of similar property from the same place and at the same time, but which belongs to different victims. In *Hearn v. State*[69] defendant stole several cattle belonging to different owners, from the same range, at the same time, and using the same truck to haul them off. The Florida court held that only one offense was involved and defendant could not be reprosecuted for cattle stolen from the other owner. Although *Hearn* concentrated on continuity of the larceny and did not expressly deal with the multiple victim question, it constitutes an exception to the rule that each victim represents a separate offense.[70]

The pending case of *Ashe v. Swenson*[71] may provide a Supreme Court pronouncement on the multiple victim question. Before *Benton* applied the double jeopardy prohibition to the states, Supreme Court cases held that multiple prosecution did not offend basic due process.[72]

The "Same Act" and Different Criminal Statutes

This section deals mainly with multiple prosecutions based upon separate statutes of a single jurisdiction for similar nonrelated offenses committed in the course of one criminal action. Several tests have been applied in determining whether more than one offense is involved in a given transaction. The most restrictive test purports to allow only one prosecution for "the same act" or "same transaction." The drawback to this approach is that it begs the question by changing the problem of defining "offense" to one of defining "act" or "transaction." Jurisdictions that employ the purportedly strict same transaction test sometimes reach results that allow as many prosecutions as other jurisdictions.[73] Some of the few jurisdictions employing the same transaction test do so, not on a direct constitutional basis, but

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may have lumped together. Finally, should collateral estoppel also be applied in favor of the state when there is a conviction in the first case?

68. Hanemann v. State, 221 So. 2d 228 (1st D.C.A. Fla. 1969).

69. 55 So. 2d 559 (Fla. 1951). This was a 4-3 decision, but since the dissents were without opinion, it is not clear whether they perceived the multiple victim problem.

70. No subsequent cases directly on point have been found, although several cases are at least comparable. Where the state prosecutes for larceny of the same property from an owner it is barred from reprosecution for larceny from the bailee. Wilcox v. State, 183 So. 2d 555 (3d D.C.A. Fla. 1966); Russell v. State, 107 So. 2d 801 (2d D.C.A. Fla. 1958). *But see* Le Rea v. Cochran, 115 So. 2d 545 (Fla. 1959); State v. Anders, 59 So. 2d 776 (Fla. 1952). In the latter cases reprosecution was allowed when the state first attempted to prosecute for the wrong owner.

71. 397 U.S. 436 (1970), *rev'g* 399 F.2d 40 (8th Cir. 1965).

Editor's Note: *See* note 13 *supra*.

72. *See* Ciucci v. Illinois, 356 U.S. 571 (1958); Hoag v. New Jersey, 356 U.S. 464 (1958).

73. Note, *Twice in Jeopardy*, 75 YALE L.J. 263, 267-77 (1965).

rather on the basis of "statutes which provide that an act or omission made punishable by different provisions of the criminal law may be punished under any one provision, but not under more than one."[74]

By far the more widely accepted means of ascertaining the identity of offenses is the same evidence test. In *Gavieres v. United States*,[75] petitioner was convinced of rude and indecent behavior in public, and subsequently was prosecuted for insulting a public official. The court held that the first prosecution was not a bar:[76]

> A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes, and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and conviction under the other.

Clearly, under this test, even one act or transaction can constitute more than one offense.

Florida courts generally apply the same evidence test[77] but the failure to adhere strictly to this test suggests the presence of other factors deserving consideration. Minor changes in the description of an offense in the accusatory writ will not justify a second indictment. In *Driggers v. State*,[78] the accused was charged with stealing a calf after he had been acquitted of stealing a cow. The court found that the offenses were the same, and that the second prosecution should have been barred under double jeopardy principles.

Judicial qualification of the same evidence test in Florida does not end with refusal to tolerate different descriptions of the same offense in the accusatory writ. *Deal v. Mayo*[79] did not allow a multiple prosecution for the

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74. *Id.* at 276 n.62.

75. 220 U.S. 338 (1911). *See also* McElroy, *Double Jeopardy: The Ephemeral Guarantee*, 5 CRIM. L. BULL. 375 (1969).

76. 220 U.S. 338, 342 (1911).

77. *See* State v. Bacom, 159 Fla. 54, 30 So. 2d 744 (1947), *aff'd*, 39 So. 2d (Fla. 1949), *cert. denied*, 338 U.S. 835 (1949); *appeal on writ of habeas corpus denied*, Bacom v. Sullivan, 200 F.2d 76, *cert. denied*, 345 U.S. 910 (1953) (where it was held that a plea of guilty to driving while intoxicated and reckless driving does not bar prosecution for manslaughter by culpable negligence in the operation of an automobile); State v. Bowden, 154 Fla. 511, 18 So. 2d 478 (1944) (in which the court held that a prosecution for rape does not bar a prosecution for unlawful intercourse with an unmarried female of previously chaste character under eighteen); King v. State, 145 Fla. 286, 199 So. 38 (1940) (where it was held that acquittal of aiding and abetting arson did not bar prosecution for aiding and abetting arson with intent to defraud an insurer).

78. 137 Fla. 182, 188 So. 118 (1939). *See also* Presley v. State, 61 Fla. 46, 54 So. 367 (1911), where dictum states that acquittal of breaking and entering a commissary will bar a trial on breaking and entering a warehouse where they are the same building.

79. 76 So. 2d 275 (Fla. 1954).

offenses of desertion of children and withholding support, both proscribed by one statute, even though somewhat different proof was required. The court did not elaborate on its decision, but clearly the opinion did not rely on the same evidence test. A possible explanation of these cases is that the courts sometimes adopt an actual evidence test instead of the required evidence test they espouse. Thus, although proof of an additional fact may be necessary for a similar offense, whether the proof actually adduced at the first trial was the same as that sought as the second trial would be decisive.

In the more common situation, involving different statutes, Florida again does not always adhere strictly to the same evidence test and requires more than mere difference in title or name of the offenses. In *Faulkner v. State*,[80] the court held that the separate statutory offenses of indecent exposure and of being a lewd, wanton and lascivious person "are closely related to such an extent" that prosecution for one would bar prosecution for the other under the same set of facts. In a similar case[81] a prosecution for unlawfully offering a public officer a reward was barred by a previous acquittal on a bribery charge arising out of the same facts. The court reasoned that the offenses "are so closely related that a conviction or acquittal under one constitutes former jeopardy and a defense to a subsequent prosecution under the other for the same act."[82]

This type of approach seems more satisfactory than the rigid same evidence test as a means of determining the identity of offenses. The relevant inquiry should not be whether any additional fact is required in the second prosecution, but whether a *materially* different fact, enough to make a truly different offense, must be shown.

The "Same Act" as Multiple "Related" Offenses

Background: The Concept of Included Offenses

The above discussion dealt with the situation in which one act constituted two or more unrelated statutory offenses against the same sovereign. Multiple prosecution was said to be possible if the offenses required different proof. This section is likewise concerned with the situation in which one act constitutes different statutory offenses against the same sovereign. Here, however, the offenses are so "related" that the double jeopardy provision often applies to prohibit multiple trials, even when the offenses require substantially different proof. The term "related" offenses comprehends either included offenses or different degrees of the same offense.

Although not all included offenses under Florida law will be delineated, a brief analysis of the Florida definition of included offenses is necessary.[83]

80. 146 Fla. 769, 1 So. 2d 857 (1941).

81. State v. Carroll, 189 So. 2d 273 (2d D.C.A. Fla. 1966).

82. *Id.* at 274.

83. Included offenses are not designated as such in the statutes, in contrast to offenses divided into degrees.

In *Brown v. State*[84] the Florida supreme court supplied a lucid definition of included offenses, dividing them into two classes: those necessarily included and those that may be included.[85]

Necessarily included offenses are those that form an essential aspect of the major offense. Thus, larceny is a necessarily included offense of robbery because there must be some taking in a robbery. Robbery is a larceny plus something more. The *Brown* court held that defendant was entitled to an instruction on necessarily included offenses (and lesser degrees) even if the accusatory writ did not charge the included offense. The court reasoned that if the evidence was sufficient to go to the jury on the greater offense, it was *ipso facto* sufficient to go to the jury on the necessarily included offense.

The court also dealt with "offenses which may be included," depending on the accusatory pleadings and the evidence at trial. If an offense is actually included, even though not necessarily included in the offense charged, defendant has a right to an instruction on it. The example given in *Brown* is illuminating. Simple assault is a necessarily lesser included offense of assault with intent to commit robbery; aggravated assault is not. However, aggravated assault could become an included offense in a given case if the accusatory writ charged use of a deadly weapon in the assault with intent to commit robbery, and if use of a deadly weapon was proved at trial.

Brown does not involve double jeopardy questions. It does, however, affect the law of double jeopardy by defining the scope of included offenses that must be submitted to the jury.[86] The *Brown* court observed:[87]

> Actually, we think the requirement [of instructions on included offenses] comports with logic, within the confines of our adversary system, because it enables the state to have adjudicated in one trial all aspects of a criminal charge arising out of one transaction. Similarly, it protects a defendant against a "splitting of accusations with resultant multitudinous prosecutions and trials."

The manner in which the included offenses doctrine, as well as the concept of degrees of the "same" crime, relate to the double jeopardy protection is the subject of the remainder of this section.

Tried for Higher — Convicted of Higher Related Offense

(1) *A* is prosecuted for, and convicted of, the first degree murder of *B*. Can the state then bring a second degree murder case against *A* for the killing of *B*?

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84. 206 So. 2d 377 (Fla. 1968).

85. The specific examples in the text are taken from Brown v. State, 206 So. 2d 377 (Fla. 1968). Subsequent cases have dealt with other offenses in applying *Brown* and should be examined in determining whether an offense is an included one, since the results do not always follow from the *Brown* rules.

86. *See* FLA. STAT. §919.16 (1967); FLA. R. CRIM. P. 1.510.

87. 206 So. 2d 377, 382-83 (1968).

(2) *A* is prosecuted for, and convicted of, the robbery of *B*. Can the state subsequently prosecute *A* for the lesser included offense of larceny arising out of the same incident?

It is well settled that a conviction of the higher offense bars prosecution for lower included offenses or for lower degrees of the higher offense.[88] The obvious rationale in such cases is that the accused has actually been put in jeopardy for the lower offense in the first trial.[89]

However, even if the defendant was not actually in danger of conviction for the lesser offense, the conviction of the higher should bar a prosecution for the lower. The higher crime requires the same proof as the lower "plus some." On conviction for the higher included offense, therefore, the defendant has, in effect, already been tried and convicted for the lower crime plus some, even though the jury never considered the lower crime.[90] Correspondingly, prosecution for the lesser degree after conviction for the greater may be barred, even though the first trial presented no actual danger of conviction for the lesser offense. In this case it can be argued that the lesser crime is a degree of the same offense for which defendant was convicted.

Tried for Higher — Convicted of Lower Related Offense

(1) *A* is prosecuted for first degree murder and convicted of second degree murder. Can *A* subsequently be prosecuted for first degree murder of the same victim?

(2) *A* is prosecuted for robbery and convicted of larceny. Can there be a subsequent prosecution for robbery, arising out of the same incident?

It is equally well settled that a conviction of a lower offense, on a trial for the higher, bars a subsequent prosecution for the higher.[91] Conviction of the lower offense implies an acquittal of the higher; any retrial for the higher would, thus, run afoul of the *autrefois acquit* aspect of the double jeopardy prohibition.

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88. 1 WHARTON'S CRIMINAL LAW AND PROCEDURE §148 (R. Anderson ed. 1957). *See also* 22 C.J.S. *Criminal Law* §283 (b) (1961).

89. Under Florida law, for example, defendant has a right to an instruction on a lower included offense; the lower offense may also be submitted to the jury at the request of the prosecutor.

90. *See* State *ex rel.* Glenn v. Klein, 184 So. 2d 904 (3d D.C.A. Fla. 1966). In that case appellant was charged with felony-murder (although he did not kill the victim) arising out of a robbery. He was subsequently informed against for robbery. The court of appeal granted a writ of prohibition, on double jeopardy grounds, although the first jury did not have a robbery charge before it, and it is probable that it was not instructed on robbery. However, the court's reasoning seemed to be that any time a higher offense was charged the lower included offense is also necessarily being tried.

91. *E.g.*, Bowden v. State, 152 Fla. 715, 12 So. 2d 887 (1943); West v. State, 55 Fla. 200, 46 So. 93 (1908); Johnson v. State, 27 Fla. 245, 9 So. 208 (1891).

Tried for Lower — Convicted of Lower Related Offense

(1) *A* is indicted for second degree murder in the killing of *B*, and is convicted of second degree murder. Can *A* subsequently be tried for first degree murder of *B*?

(2) *A* is indicted for larceny and convicted of larceny. Can *A* subsequently be tried for robbery, arising out of the same incident?

The jury in this situation did not, either expressly or impliedly, acquit the defendant of the higher offense by convicting him of the lower, for the jury did not have the higher offense before it and could not have legally convicted of the higher offense. Thus, defendant was not in actual jeopardy of being convicted of the higher offense in the first trial.

If a trial is to be prohibited in such a case, as it is in many states[92] including Florida,[93] it must be on a basis other than actual jeopardy. Here, the underlying basis for applying the double jeopardy prohibition would seem to be that the lower offense for which defendant was convicted was so related to the higher offense (even though proof may differ) that a subsequent conviction for the higher would be a conviction of the lesser offense again.[94] This reasoning is not always expressed; rather, as discussed below, the cases contain rationales that indirectly suggest the reasoning.

Tried for Lower — Acquitted of Lower Related Offense

(1) *A* is charged with and acquitted of second degree murder. Can the state then try him for first degree murder for the same killing?

(2) *A* is charged with, and acquitted of, larceny. Can the state then try him for robbery arising out of the same incident?

Here again defendant was not in actual jeopardy of being convicted of the higher offense, yet many jurisdictions hold that subsequent trial for the higher would violate double jeopardy.[95] The Florida court was faced with substantially this situation in *Sanford v. State*.[96] In *Sanford* defendant was

92. *E.g.*, People v. Blue, 161 Cal. App. 2d 1, 326 P.2d 183 (1958); Burnett v. Commonwealth, 284 S.W.2d 654 (Ky. 1955); State v. Franklin, 139 W. Va. 43, 79 S.E.2d 692 (1953).

93. *See* 9 FLA. JUR. *Criminal Law* §204, at 231 (1956), which states that Florida follows the general rule that "an acquittal or conviction of a lesser offense operates as a bar to a subsequent prosecution for the higher offense . . . ." However, cases cited in that section concern the situation where defendant was convicted of the lesser offense when charged on the higher offense. Nonetheless, dicta in these cases suggest that even when not charged with the higher, conviction of the lower would bar a subsequent prosecution for the higher.

94. *See* People v. Greer, 30 Cal. App. 2d 589, 597, 184 P.2d 512, 517 (1947): "A conviction of the lesser is held to be a bar to prosecution for the greater on the theory that to convict of the greater *would be to convict twice of the lesser.*" (Emphasis added.) This is one of the few cases directly expressing the rationale.

95. *E.g.*, People v. Krupa, 64 Cal. App. 2d 592, 149 P.2d 416 (1944); Dotye v. Commonwealth, 289 S.W.2d 206 (Ky. 1956); Commonwealth v. Thatcher, 364 Pa. 326, 71 A.2d 796 (1950).

96. 75 Fla. 393, 78 So. 340 (1918).

first charged with assault with intent to commit rape, but was convicted of assault and battery, which implied an acquittal of assault with intent to commit rape. Later, defendant was charged with the higher offense of rape and convicted of assault with intent to commit rape. Because the facts supporting the second indictment for rape might have convicted defendant under the first charge of assault with intent to commit rape, the second trial was barred. In barring the subsequent prosecution, the court first offered the following rationale:[97]

> If the first indictment or information were such that the accused might have been convicted under it on proof of the facts by which the second is sought to be sustained, then the jeopardy which attached on the first must constitute a protection against the trial on the second.

Although the result in *Sanford* is correct for other reasons, this rationale is excessively broad in attempting to state a general double jeopardy test that fails when applied to nonrelated offenses (offenses not included or related by degrees). For instance, a conviction for drunken driving may result from the proof of facts that permit a subsequent prosecution for the nonrelated offense of manslaughter by culpable negligence. However, a subsequent prosecution is allowed because the general test applies only in cases concerning related offenses. Furthermore, its whole validity as a rule is doubtful since the results obtained in its application to related offense cases can be obtained by principles expressly limited to cases involving related offenses. Such principles were proposed as alternate rationales in *Sanford.*[98]

Quoting Wharton, the *Sanford* court next contended that: "A conviction of a lesser offense bars a subsequent prosecution for a greater offense in all those cases where the lesser offense is included in the greater."[99] The court then, applying the principle to the facts in *Sanford,* asserted that "an *acquittal* of the lesser offense precludes a conviction of the greater." The court reasoned that the first offense charged was an *essential part* of the higher offense and "it would be unreasonable to assume that a man could be guilty of rape and not guilty of an assault with intent to rape." This approaches a collateral estoppel argument, but in tying the collateral estoppel theory into the included offense concept the court was, in effect, holding that these offenses were so related that they must be considered "the same offense" for double jeopardy purposes.

Another rationale used in *Sanford* was that on a subsequent prosecution for the higher offense defendant could be convicted of the very same lesser (included) crime for which he was previously acquitted. Indeed, that was what actually happened to Sanford.

Regardless of the rationale, the *Sanford* holding was broad enough "to prohibit the state, which has the right to elect the charge, from first prosecut-

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97. *Id.* at 341.

98. Other double jeopardy principles essentially irrelevant to the case were also advanced.

99. Sanford v. State, 75 Fla.393, 78 So.340, 341 (1918).

ing the lower offense necessarily included in a higher and then prosecuting for the higher."[100] This would seem to apply whether defendant was convicted or acquitted of the lower offense in the first trial.

Tried for Higher—Acquitted of Higher Related Offense

(1) *A* is tried for, and acquitted of, first degree murder. Can he subsequently be tried for second degree murder for the same killing?
(2) *A* is tried for, and acquitted of, robbery. Can he subsequently be tried for larceny arising out of the same incident?

As should be apparent from the above sections, a second trial in the above hypotheticals would constitute double jeopardy for at least two reasons. One reason, actual jeopardy, is not applicable to the two immediately preceding sections, but is a factor here. Thus, an even stronger case exists for applying the double jeopardy prohibition in these hypotheticals.

A Justified Exception: The "Same Act" and the "Subsequent Event"

A assaults and grievously wounds *B*. *A* is then successfully prosecuted for assault with intent to commit murder. Subsequently, within a year and a day of the assault,[101] *B* dies from the wounds caused by the assault. Could *A* then be prosecuted for murder?

It is established that, if *A* had been tried and convicted of assault with intent to commit murder after *B*'s death, the conviction of assault with intent to commit murder as a lesser included offense would bar a subsequent prosecution for murder. Otherwise, as the *Sanford* court pointed out, the prosecution could start at the lowest included offense and secure convictions and sentences for every higher related offense. The state should have to prosecute for the highest offense of which *A* may be guilty, and in so doing it may secure a conviction in the same trial of a lesser included offense or a lesser degree of the highest crime charged if it fails to convince the jury of the guilt of the higher.

But if the highest possible related offense *at the time of the first prosecution* was chosen by the state, and subsequent events (such as the death of the victim in our hypothetical) make a greater offense possible, the state has a legitimate motive for reprosecution. This is the first time the state has an opportunity to try the defendant for his highest offense. At the time of the first trial, the higher offense simply had not yet been committed. Accordingly, some authority[102] allows a subsequent prosecution if the higher

100. *Id.* at 400-01, 78 So. at 342.

101. In many jurisdictions when a period more than a year and a day intervenes between the injury and the death of the victim "the injury is not legally deemed the cause of the death, and the person who inflicted it is not criminally responsible for the homicide." 40 C.J.S. *Homicide* §12, at 856 (1944).

102. Some of this authority, for reasons discussed *infra* is questionable.

offense was "completed" after the trial of the lesser offense.[103] This distinction appears sound and does not contravene any compelling double jeopardy policy except in one limited respect. Since an included offense is considered the same as a higher offense for double jeopardy purposes, the defendant is being twice punished for the "same" offense, because of the double jeopardy policy against double punishment for the same offense. This objection is only to the double punishment; the second trial seems unobjectionable. Because the higher offense matured only after the first trial, the state should have a chance to secure a conviction for the higher offense. However, in the event of a conviction at the second trial the first conviction and punishment should be set aside. A possible solution would be to provide for compulsory credit time on the second sentence,[104] although no cases applying the above suggestion are extant.

The only Florida case that has dealt at length with the issue of subsequent events, *Southworth v. State*,[105] cites with approval a leading case[106] that allowed a subsequent prosecution "[w]hen after the first prosecution, a new fact supervenes, for which the defendant is responsible, which changes the character of the offense."[107] However, the *Southworth* court was not squarely faced with the subsequent events question. Southworth had robbed and assaulted an assembly of at least seven people. He was convicted of assaulting (and robbing) two victims. Subsequently, a *different* victim died from wounds inflicted by Southworth. Clearly, this case should have been decided on the multiple victim-multiple offense theory, which would also have permitted the subsequent trial.[108] Other cases citing the relevance of subsequent death to the double jeopardy question should have been decided on the ground that different, nonrelated offenses or different victims were involved.[109] Had the cases been decided on such grounds, the date of death would have been irrelevant.

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103. *See* 1 WHARTON'S CRIMINAL LAW AND PROCEDURE, *supra* note 62, at 353; Annot., 11 A.L.R.3d 834 (1967) and cases cited therein.

104. Completely nullifying the first sentence might raise some problems because, in Florida: "As a general rule, after a trial court has regularly imposed a sentence and the term at which it was imposed has passed, the power of the trial court over such sentence is at an end, except for the purpose of its enforcement. Tucker v. State, 100 Fla. 1440, 1445, 131 So. 327, 328 (1930).

105. 98 Fla. 1184, 125 So. 345 (1929).

106. State v. Littlefield, 70 Me. 452, 35 Am. R. 335 (1880).

107. *Id.* at 458, 34 Am. R. at 337.

108. *See* text accompanying notes 62-82 *supra*. *Southworth*, nonetheless, was cited in an attorney general's opinion for the proposition that the subsequent death was what kept the second prosecution from constituting double jeopardy. The attorney general, unlike the *Southworth* court, was faced with a true subsequent event question, since the subsequent prosecution in question was for the murder of the same person of whom defendant was originally convicted of assaulting. *See* [1951-1952] FLA. ATT'Y GEN. BIENNIAL REP. 774.

109. For example, the cases cited in Annot., 11 A.L.R.3d 834 for the subsequent events theory could have been decided on the above grounds, although this is not pointed out by the annotator.

THE "SAME ACT," "RELATED" OFFENSES, AND APPEALS

Reversal Because of Legal Error

The application of the double jeopardy provision to related offenses is further complicated by a successful appeal. Suppose, for example, that:[110]

> *A* is tried for first degree murder and convicted of second degree murder. *A* then appeals the judgment, asserting reversible legal error. The case is reversed and remanded for a new trial. Can *A* be retried for the offense of first degree murder?

Initially, there has been at least an implied acquittal of the highest offense charged. However, a second trial on remand would not be as much a "different" case from the first as where multiple prosecutions are brought under separate accusatory writs. There is also an element of waiver presented by the defendant's appealing the conviction of the lower offense. Are these additional factors sufficient to allow a retrial for the higher crime following a successful appeal?

In the leading federal case, *Green v. United States*,[111] the Supreme Court was faced with the above hypothetical and held that the double jeopardy prohibition barred retrial for first degree murder on remand.[112] The leading Florida case[113] encountered exactly the same hypothetical and similarly held that retrial for first degree murder was barred. The Florida court does not follow overwhelming state precedent. Justice Frankfurter, dissenting in *Green*, pointed out that, as of 1957, thirty-six states had considered the question; of these, nineteen permitted retrial for the greater offense and seventeen (Florida among these) prohibited such retrial.

The rule as adopted in Florida and the federal courts has two facets. On retrial the accused may not be charged for a higher offense than that for which he was convicted. The corollary to this, however, is that the accused may be retried for the offense of which he was convicted and for lesser related offenses. This is contrary to the English practice; as mentioned in *Green*, the English Court of Criminal Appeals ordinarily does not have the power to order a new trial after conviction.

Thus, there is a continuum of three rules regarding double jeopardy on reversal and remand for a new trial:

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110. The principles discussed in this section are also applicable in part when a new trial is granted by the trial judge because of legal error either on a motion for new trial or a motion to vacate, set aside, or correct the trial sentence. *See* FLA. R. CRIM. P. 1.850.

111. 355 U.S. 184 (1957).

112. In effect, this overruled Trono v. United States, 199 U.S. 521 (1905), although *Trono* was distinguished as an insular possession case, which involved only a statutory double jeopardy protection.

113. Johnson v. State, 27 Fla. 245, 9 So. 208 (1891). This case has been followed by an unbroken line of decisions holding the same way. *E.g.*, Bowden v. State, 152 Fla. 715, 12 So. 2d 887 (1943); West v. State, 55 Fla. 200, 46 So. 93 (1908); Golding v. State, 31 Fla. 262, 12 So. 525 (1893).

(1) The English rule that a retrial for any "related" offense of which defendant was put in jeopardy in the first trial, after reversal on appeal, violates double jeopardy.

(2) The rule in the federal courts and in many states (including Florida) that, after reversal, defendant may be retried only for the offense for which he was convicted and lower "related" offenses.

(3) The rule in many other states that after reversal, defendant may be retried for all "related" offenses, including higher offenses of which he was impliedly acquitted. (This rule is now subject to question in light of *Benton v. Maryland*,[114] which may make *Green* applicable to the states.)

The rule permitting a new trial for even those higher crimes of which defendant was expressly or impliedly acquitted is based on two questionable rationales. The basic rationale is the waiver theory: by appealing the conviction the defendant waives the prior jeopardy defense, not only as to the lesser crime for which the conviction resulted but also as to the higher offense of which he was acquitted. This theory was advanced by Justice Peckham in *Trono v. United States*:[115]

> [I]n appealing from the judgment, the accused necessarily appeals from the whole thereof, as well that which acquits as that which condemns; that the judgment is one entire thing, and that, as he brings up the whole record for review, he thereby waives [the double jeopardy protection] . . . the reversal of the judgment of conviction opens up the whole controversy, and acts upon the original judgment as if it had never been.

However, the waiver theory was effectively criticized by Justice McKenna, dissenting in the same case:[116]

> [S]uch a result is said to arise from the consent of the accused, deemed to be given by taking an appeal. An accused would not purposely and consciously appeal from an acquittal of a grave crime, and cast from himself the immunity that such an acquittal gives him. Should such consent be imputed? Let it be remembered that we are dealing with a great right . . . a constitutional right . . . . [A] defendant should not be required to give up the protection of a just (it must be so regarded for the sake of the argument) acquittal of one crime as the price of obtaining a review of an unjust conviction of another crime.

The second rationale for allowing retrial for the higher crime was put forth by Justice Holmes. Recognizing the weakness of the waiver rationale, he regarded appeal and retrial as a continuation of the first trial.[117] The weakness of this position is that it is true in only a limited sense. The appeal is in reality taken from the conviction of the lower offense; the appellate court is not empowered to consider the higher offense of which appellant

114. 392 U.S. 925 (1969).
115. 199 U.S. 521, 531-33 (1905).
116. *Id.* at 539 (McKenna, J., dissenting).
117. Kepner v. United States, 195 U.S. 100, 136-37 (1904) (Holmes, J., dissenting).

was acquitted.[118] On reversal, the conviction of the lower offense is set aside, but the acquittal of the higher should not even be considered. The acquittal was not, and could not, be appealed; it should sustain a plea of *autrefois acquit.*

If the waiver theory and Justice Holmes' "continuing jeopardy" theory are invalid as allowing retrial for the higher offense, can the middle position, which allows a retrial for the offense of which appellant was convicted and lesser related offenses, be defended? In short, why allow *any* retrial? The answer given in most Florida cases is a sort of modified waiver theory. Defendant has appealed his conviction or asked the trial judge to grant him a new trial, thereby waiving his jeopardy in a limited sense.[119] This theory is stronger than the full-blown waiver theory because defendant *is* appealing the conviction. However, Justice McKenna's second objection, that waiver of a constitutional right should not be imputed, still holds and makes this a rather unsatisfactory ground for allowing even limited retrial.

The soundest rationale is only hinted at in most of the decisions. Holmes' continuing jeopardy theory is not adequate to allow retrial for the higher offense of which defendant was acquitted. But the concept is basically sound as applied to what was actually appealed, that is, the conviction, rather than the acquittal. Since the prior conviction has been set aside, *autrefois convict* does not apply, although *autrefois acquit* does apply to the acquittal of the higher offense (not set aside on appeal). Although prior jeopardy may exist without a prior conviction or acquittal, this does not bar a continuation of the very same case. Defendant is in jeopardy after the jury is sworn (in a jury trial) or after the first witness is called (in a nonjury trial), but it would be absurd to argue that this bars a continuation of the same case after jeopardy has attached. This is analogous to the retrial situation. On remand, after reversal for legal error, the trial is a continuation of the original case, insofar as the offense for which defendant was convicted and lesser offenses are concerned. These offenses were litigated, appealed, and considered on appeal in continuous fashion, and are the proper subject of remand, although defendant must stand forever acquitted of the higher offense.

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118. However, in Florida the appellate court may consider and direct a conviction of *lower* offenses if sustained by the proof. *See* FLA. STAT. §924.34 (1967). The original conviction of a "middle" offense is an acquittal of higher offenses because the additional elements of the higher offense were not found by the jury. But the conviction cannot be said to be even an implied acquittal of lower offenses since all the elements of the lower offense may have been found by a jury, which opted to convict defendant of some "middle" offense. Therefore, the same considerations that apply to the offense of which defendant was actually convicted apply also to lower related offenses on remand.

119. *See* 9 FLA. JUR. *Criminal Law* §210 (1956). The leading case appears to be Gibson v. State, 26 Fla. 109, 7 So. 376 (1890). Another ground relied on by Florida courts is that the first conviction, from which defendant was granted a new trial, will not sustain a double jeopardy plea because it was "a nullity" (or so defective that no judgment can be rendered upon it). *See* Little v. Wainwright, 161 So. 2d 213 (Fla. 1964); Lovett v. State, 33 Fla. 389, 392, 14 So. 837, 838 (1894). But this theory ignores the fact that whether or not the conviction was ultimately valid, defendant was validly put in jeopardy.

Reversal Because of Insufficiency of the Evidence

If the reversal is on the ground of insufficiency of evidence rather than reversible legal error, a strong argument is available against a new trial even for the same offense for which appellant was convicted.

To illustrate: *A* is convicted of first degree murder. On appeal,[120] the court reverses for insufficency of evidence. In so reversing, the appellate court in effect determines that the jury could not legally convict appellant of first degree murder even with all the prosecution's evidence before it. If the jury could not legally convict for first degree murder, it should have acquitted of first degree murder. Of course, if it had actually acquitted of first degree murder, the defendant could not be tried again for first degree murder. In effect, the jury has no alternative except to acquit (or the trial judge to grant a directed verdict of acquittal). As the New Mexico supreme court held:[121]

> The effect of a reversal for lack of sufficient evidence to support a conviction is not different from an acquittal by the jury and requires that the defendant be discharged.

Arguably, a reversal for lack of sufficient evidence demands the application of double jeopardy even more than an actual acquittal. In the former case, the jury could not legally convict, regardless of the importance given to the evidence and witnesses and the permissible inferences drawn. The state's evidence was simply insufficient to support one or more of the necessary elements of the crime charged. In the latter case, the jury actually acquitted but may not have been under a duty to do so.[122] The evidence may have been legally sufficient to have permitted a finding of guilt but the jury may have entertained a reasonable (or unreasonable) doubt.

Even if the above analysis is accepted, a new trial for some offense arising out of the same act is by no means ruled out. Suppose *A*'s conviction of first degree murder was reversed (or a new trial granted) because of insufficiency of the evidence of premeditation. Apparently, defendant can subsequently be tried for second degree murder or lesser offenses.[123] The jury did

120. This analysis is equally applicable where a motion for new trial is granted by the trial judge for lack of sufficient evidence, pursuant to FLA. R. CRIM. P. 1.600 (a) (2). It should be noted that the rule refers to "weight" of the evidence rather than "insufficiency" of evidence. A granting of a new trial based merely on "weight" of the evidence does not present the reason to apply the double jeopardy provision if, at the same time, the evidence is legally sufficient for guilt. Of course, the weight of evidence can be so weak concerning guilt that there is a legal insufficiency of evidence.

121. State v. Moreno, 69 N.M. 113, 114, 364 P.2d 594, 595 (1961).

122. Once a juror makes findings of fact and inferences that lead to a reasonable doubt in his own mind, he is under a duty, perhaps as much moral as legal, to acquit even if the evidence would support a conviction. The point here is that where a jury actually acquits, the evidence may be strong enough for conviction; where a jury's conviction is validly reversed for insufficient evidence, the evidence is never strong enough for conviction.

123. FLA. STAT. §924.34 (1967) authorizes an appellate court, when reversing for insufficient evidence, to direct the trial court to enter judgment for a lesser necessary offense that was sufficiently proved at trial. *See also* FLA. R. CRIM. P. 1.620 authorizing a

not actually acquit him and was under no duty to acquit him of the lesser offense. Since his conviction was reversed, he is not subject to double punishment for the same act.

Returning again to whether defendant may be retried for the same offense for which he was convicted on insufficient evidence, a countervailing consideration exists that makes the question a closer one than is apparent from the above reasoning. The countervailing argument may be supported if one assumes that there are degrees of "insufficiency" of evidence. Perhaps some of the reversals "for insufficient evidence" are granted when the appellate judges merely have substantial doubt about the actual guilt of the accused.[124] In that case, the appellate judges may want another jury to consider the evidence in a new trial. Yet if the court were faced with a choice between affirmance or an absolute discharge, it might choose to affirm since by objective criteria the evidence may be legally sufficient if every jury prerogative of credibility, judgment, and inference were indulged. Thus, the adoption of the double jeopardy prohibition may actually increase affirmances in those questionable cases in which there is barely sufficient evidence to sustain a conviction. This argument is somewhat weakened, however, if a new trial were allowed for some lesser offense even if the double jeopardy prohibition applied. In addition, the prohibition would be applied only when the reversal was for "pure" insufficiency.

At least two state courts apply the double jeopardy prohibition in such cases[125] and a 1954 Supreme Court decision offers some support.[126] Although many Florida appellate cases reversing for lack of sufficient evidence have routinely remanded for new trial, the double jeopardy question generally has not been considered.[127]

CONCLUSION

Benton v. Maryland has finally applied the federal double jeopardy provision to state prosecutions. However, the incorporation does not solve the troublesome identity of offense problems that constitute the main basis

trial court to adjudge the defendant guilty of a lesser included offense or degree on a motion for a new trial if the evidence does not sustain the original verdict.

124. One possible distinction here is between a lack of evidence supporting a material element of the crime charged and evidence that is inherently weak or seriously contradicted so as to raise reasonable and strong doubt as to guilt. It can be argued that appellate judges sometimes reverse on the latter grounds when the evidence is technically sufficient. *See, e.g.*, Lowe v. State, 154 Fla. 730, 19 So.2d 106 (1944); Skiff v. State, 107 Fla. 90, 144 So. 323 (1932). *Query*: Do appellate judges have the power to reverse in such a case?

125. People v. Brown, 99 Ill. App. 2d 281, 241 N.E.2d 653 (1968); State v. Moreno, 69 N.M. 113, 364 P.2d 594 (1961).

126. *See* Sapir v. United States, 348 U.S. 373 (1955), apparently receding from Bryan v. United States, 338 U.S. 552 (1950). In the latter case a waiver theory was applied. *Sapir*, however, is a short per curiam opinion without analysis, except for the concurring opinion of Justice Douglas.

127. *See, e.g.*, Kilbee v. State, 53 So. 2d 533 (Fla. 1951); Lowe v. State, 154 Fla. 780, 19 So. 2d 106 (1944); Johnson v. State, 118 So. 2d 806 (2d D.C.A. Fla. 1960). *But see* dicta in State v. Bowden, 154 Fla. 511, 513, 18 So. 2d 478, 481 (1944). Since the mandates in these

for determining the scope of double jeopardy protection in specific cases. As the preceding discussions have shown, these problems have not always been satisfactorily resolved. Even though the solutions may be satisfactory, the reasoning is sometimes confused through the failure to recognize the number of different identity of offense problems that exist.

Moreover, the potential areas of multiple prosecution for essentially the same act are quite numerous, prompting an extensive and intricate body of case law. This case law, far from having been settled, is constantly in a process of change. The outcome of pending cases still affects the vitality of the double jeopardy protection, which depends primarily upon the interpretation given the words "the same offense."

cases reversed "for a new trial" without specifying, the new trial might have been for a lesser offense. The closest a Florida court has come to deciding the question is in Sosa v. Maxwell, 234 So. 2d 690 (2d D.C.A. Fla. 1970). The court concluded that the double jeopardy protection did not obtain since the reversal was not really for *lack* of sufficient evidence. The court expressly did not decide what result would follow if that had been the case.

TABLE OF HEADINGS AND SUBHEADINGS