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STATE V. GONZALES: REINVIGORATING CRIMINAL JOINDER IN NEW MEXICO

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I. INTRODUCTION

In *State v. Gonzales*,[1] the New Mexico Supreme Court held that New Mexico's compulsory criminal joinder rule prohibits the State from pursuing charges of vehicular manslaughter following a reversal of a conviction for child abuse by endangerment resulting in death when the state elects not to try the vehicular manslaughter charge as part of its initial prosecution.[2] *Gonzales* gives teeth to New Mexico's compulsory joinder rule[3] and will have the salutary effect of furthering the dual purposes of compulsory joinder: preserving judicial resources and saving defendants from the unnecessary stress and expense of defending a second prosecution arising from the same criminal episode.

While there is much to praise in *Gonzales*, the abrupt change leaves prosecutors and courts with inadequate guidance about how to actually apply the compulsory joinder rule. Although New Mexico's compulsory joinder rule has been on the books for over three decades, *Gonzales* was the first case to dismiss charges based on the prosecution's failure to join all applicable charges in a single prosecution.[4] As a result, New Mexico's compulsory joinder rule is strikingly underdeveloped by comparison to the compulsory joinder provisions of other states, which have explicitly recognized the remedy embodied in the *Gonzales* decision for decades and have restricted its application to situations in which the policies behind the rule are best served without punishing legitimate prosecutorial conduct. Absent clear guidance from the New Mexico Supreme Court imposing equivalent restrictions on New Mexico's compulsory joinder

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1. 2013-NMSC-016, 301 P.3d 380.
2. *Id.* ¶ 24.
3. Rule 5-203 NMRA.
4. *Gonzales*, 2013-NMSC-016, ¶ 30 ("Until today, we have not considered the proper remedy when the prosecution fails to join charges under Rule 5-203(A).").

rule, prosecutors and judges will lack the guidance needed to engage in a principled and uniform application of the *Gonzales* rule. Moreover, unless the supreme court sets forward the circumstances under which a prosecutor's failure to join charges should be excused, whether and to what extent restrictions on the *Gonzales* rule should be imposed will necessarily develop case-by-case in the appellate courts, undermining the rule's efficiency rationale. In other words, the supreme court needs to clarify the scope of its sweeping new compulsory joinder rule if it wants to avoid the very evils the rule seeks to prevent.

This Note will proceed in four parts. Part II will detail the New Mexico Supreme Court's holding in *Gonzales*, with special attention paid to the novel legal theories articulated by the State in the district court and the New Mexico Court of Appeals. Part III reviews the history of criminal joinder in the context of the Double Jeopardy Clause and the prosecutorial function, with particular attention paid to how compulsory joinder may affect prosecutorial decision-making under New Mexico case law. In Part IV, the Note will compare compare New Mexico's compulsory joinder rule with similar provisions in other states, demonstrating how *Gonzales* fails to give needed specificity to New Mexico's compulsory joinder rule. Finally, in Part V, the Note will discuss the implications of *Gonzales* and proposes an amendment to the rule through the New Mexico Supreme Court's rule-making process in order to more clearly define the contours of compulsory joinder in criminal cases.

II. STATEMENT OF THE CASE

In *State v. Gonzales*, the New Mexico Supreme Court addressed the role that New Mexico's compulsory joinder rule should play in safeguarding defendants in criminal cases from piecemeal prosecutions for a single criminal episode. This subsection will discuss the facts behind the case, its procedural pathway to the New Mexico Supreme Court and will summarize the supreme court's unanimous opinion.

A. Facts

"After an evening of heavy drinking, Alicia Gonzales (Defendant) got into her car and began to drive to the Albuquerque International Sunport to pick up her husband."[5] Defendant violently collided with one vehicle and then smashed into another in the middle of Interstate 25 near the Avenida Cesar Chavez exit.[6] One of the cars involved in the accident

5. *Id.* ¶ 1.
6. *Id.*

contained two young children, Manuel Delfino and Deandre Fortune, and their parents.[7] Although the parents in the front seat left the scene unscathed, Deandre was injured and Manuel was killed.[8]

Defendant was charged with one count of intentional child abuse (or negligent child abuse in the alternative),[9] one count of intentional (or negligent) child abuse not resulting in death or great bodily harm,[10] one count of aggravated DWI[11] and one count of leaving the scene of an accident.[12] The prosecution did not charge Defendant with vehicular homicide[13] despite the fact that she had taken Manuel's life by operating her vehicle contrary to law.

B. Procedural History

1. Trial Court Proceedings

Prior to trial, Defendant filed a motion to dismiss both child abuse charges. Under New Mexico law, child abuse "consists of a person knowingly, intentionally or negligently, and without justifiable cause, causing or permitting a child to be: (1) placed in a situation that may endanger the child's life or health. . . ."[14] Defendant argued that in order to be convicted for child abuse, the prosecution was required to prove that she was aware that her actions endangered a "known, particular child."[15] Put another way, Defendant essentially argued that since the children did not suffer harm as passengers in her car and since she had no reason to know at the time of the accident that the cars she struck contained children, she did not possess the criminal intent required by the child abuse statute.[16]

The state argued that the statute did "not require[ ] [the state] to show that the [D]efendant had the specific intent of harming a particular child" but rather only required the State to prove that "the [D]efendant acted with reckless disregard."[17] However, the State made clear that even if the judge found for Defendant on the issue of intent, it would present

7. *Id.*
8. *Id.*
9. NMSA 1978, § 30-6-1(F), (H) (2009).
10. NMSA 1978, § 30-6-1(E) (2009).
11. NMSA 1978, § 66-8-102 (2010).
12. NMSA 1978, § 66-7-202 (1978) & NMSA 1978 § 66-7-203 (1989).
13. NMSA 1978, § 66-8-101 (2004).
14. NMSA 1978, § 30-6-1(D) (2009).
15. State v. Gonzales, 2013-NMSC-016, ¶ 4, 301 P.3d 380.
16. *Id.* (citing State v. Castañeda, 2001-NMCA-052, ¶ 22, 130 N.M. 679, 30 P.3d 368).
17. *Id.* ¶ 5.

testimony from other motorists that they saw children sitting in the back seat of Defendant's car.[18]

The district court held a hearing on the motion in which it ultimately found for the State, explaining that "the current statute as it stands under child abuse does not necessitate . . . an awareness factor."[19] At the hearing, the district court judge asked the prosecutor why the State had not also charged Defendant with vehicular homicide.[20] Though the prosecutor initially replied that she "wish[ed] they had charged the alternative vehicular homicide just to be safe," the State argued on appeal that the omission was a legitimate strategic decision by the prosecutor.[21]

After the district court denied Defendant's renewed motion to dismiss at the close of the State's case, the jury found Defendant guilty of one count of negligent child abuse resulting in death, one count of child abuse not resulting in death or great bodily harm, aggravated DWI, and leaving the scene of an accident.[22] The State did not request an instruction on vehicular homicide.[23]

2. The Court of Appeals

Defendant raised two issues on appeal. First, the Defendant argued that the legislature did not intend Section 30-6-1(D) to punish conduct that does not endanger a particular, known child.[24] Second, Defendant argued that reversal of her conviction of negligent child abuse resulting in death would preclude subsequent prosecution for vehicular homicide on double jeopardy grounds.[25] The court of appeals noted that before *Gonzales*, every child abuse by endangerment case involving a defendant's operation of a motor vehicle while under the influence of alcohol was based on the child's placement inside of the defendant's car, not in the victim's.[26]

The court of appeals found for Defendant. First, the court held that negligent child abuse by endangerment requires a showing that the defendant acted with a reckless disregard for the safety or health of a known

18. *Id.*
19. *Id.* ¶ 7.
20. *Id.* ¶ 6.
21. *Id.*
22. *Id.* ¶ 9.
23. *Id.*
24. State v. Gonzales, 2011-NMCA-081, ¶ 1, 150 N.M. 494, 263 P.3d 271. This decision was not reviewed by the supreme court. State v. Gonzales, 2013-NMSC-016, ¶ 11, 301 P.3d 380.
25. *Gonzales*, 2013-NMSC-016, ¶ 3.
26. *Gonzales*, 2011-NMCA-081, ¶ 10.

child.[27] Specifically, the court found that the "should have known" criminal negligence standard embodied in Section 30-6-1 requires the defendant to have identified both the child and the risk to that child before it can be said that the defendant disregarded that risk with indifference as to the consequences.[28] The court further opined that under the State's logic, punishment under Section 30-6-1 would depend on the "incidental age of the [victim][,]" essentially reading out the statute's mens rea element.[29]

Second, the court found that under the facts presented, double jeopardy precluded subsequent prosecution of Defendant for vehicular homicide.[30] The court concluded that vehicular homicide is a lesser-included offense of negligent child abuse resulting in death under New Mexico's cognate approach to Double Jeopardy issues, which looks to whether the legislature intended to impose multiple punishments for the same harm.[31] The court took care to note that had the jury been instructed on vehicular homicide, it could have rationally found Defendant guilty on that charge.[32] However, because the prosecution pursued an "all or nothing" litigation strategy, the court refused to abandon "the very essence of fairness at the core of the Double Jeopardy Clause" by permitting the state to escape the consequences of its tactical choices.[33]

3. The New Mexico Supreme Court

The New Mexico Supreme Court granted certiorari to decide whether vehicular homicide qualifies as a lesser-included offense of negligent child abuse by endangerment resulting in death in the context of the *Gonzales* facts.[34] Contrary to expectation, the court declined to answer this question and instead determined *sua sponte* that New Mexico's compulsory joinder rule precludes subsequent prosecution for a charge that the prosecution was required to join as part of its initial indictment.[35]

The Court began its discussion by noting that the compulsory joinder rule is mandatory—"it is not a discretionary or permissive rule; it

27. *Id.* ¶ 21.
28. *Id.* ¶ 31.
29. *Id.* ¶ 28.
30. *Id.* ¶ 33.
31. *Id.* ¶ 31.
32. *Id.* ¶ 37.
33. *Id.* ¶ 38.
34. State v. Gonzales, 2013-NMSC-016, ¶ 3, 301 P.3d 380.
35. *Id.* ¶ 25–26.

demands that the State join certain charges."[36] Rule 5-203(A) NMRA reads:

> Two or more offenses shall be joined in one complaint, indictment or information with each offense stated in a separate count, if the offenses, whether felonies or misdemeanors or both:
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> (1) are of the same or similar character, even if not part of a single scheme or plan; or
>
> (2) are based on the same conduct or on a series of acts either connected together or constituting parts of a single scheme or plan.

Noting that the two crimes involved in Defendant's appeal were "based on the same conduct,"[37] the court found that the rule applied to the case and that the prosecution "had no choice" but to bring the two charges into one indictment if it wanted to prosecute them both.[38]

Although the supreme court initially made New Mexico's joinder rule mandatory with a 1979 order,[39] *Gonzales* was the court's first consideration of what the proper remedy for violations of the Rule should be. In other words, the *Gonzales* court sought to give the joinder provision with the force needed to truly operate as a "mandatory" rule.[40] Given the mandatory nature of the Rule, the Court found that a bar to subsequent prosecution was the "only effective remedy" to ensure that the rule would operate as envisioned by the Court's 1979 order.[41]

To underscore the importance of the compulsory joinder rule, the Court noted that "compulsory joinder and double jeopardy are closely related—two sides of the same coin."[42] Joinder "protect[s] a defendant's double jeopardy interests" by barring subsequent prosecution arising out of the same criminal episode where the state elects to prosecute some charges while 'saving back' others.[43]

The court took note that in this case the State enjoyed a number of opportunities to join the offenses of child abuse resulting in death and

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36. *Id.* ¶ 25 (quotation omitted).
37. *Id.*
38. *Id.*
39. Rule 5-203 NMRA cmt. ("The 1979 supreme court order provides as follows: 'When a person is charged with more than one crime and the crimes can be incorporated in one information or indictment in separate counts, this practice shall be followed.'").
40. State v. Gonzales, 2013-NMSC-016, ¶ 30, 301 P.3d 380.
41. *Id.*
42. *Id.* ¶ 26.
43. *Id.* ¶¶ 26, 28 n.1 (citations omitted).

vehicular homicide but instead decided to pursue a risky all-or-nothing prosecution strategy.[44] In the court's view, all-or-nothing prosecution strategies should not be further incentivized by giving the State a second bite at the apple where it first does not succeed.[45] Agreeing with New Jersey courts that have found such all-or-nothing prosecutions to be unduly coercive on jury deliberations,[46] the court enforced the mandatory joinder rule to ensure that both parties to a criminal case share the benefits and burdens "of their respective trial strategies."[47]

III. BACKGROUND LAW

Criminal joinder is a relatively new solution to an old problem: multiple prosecutions stemming from the same criminal episode.[48] Repeat prosecutions are criticized for squandering public resources and harassing defendants with multiple trials.[49] As the New Mexico Supreme Court noted in *Gonzales*, "compulsory joinder and double jeopardy are closely related—two sides of the same coin."[50]

Due in large part to unrestrained expansion of both state and federal criminal codes, the Double Jeopardy Clause has become a woefully ineffective means to protect a citizen's freedom from serial prosecution for the same bad act.[51] Amidst growing outcry from legal scholars and practitioners that something needed to be done to prevent serial prosecutions, the American Bar Association, the American Law Institute and the National Conference of Commissioners on Uniform State Laws (NCCUSL) independently proposed model codes that each included comprehensive joinder provisions. Several states in turn adopted their own

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44. *Id.* ¶ 32.

45. *Id.* ¶ 33.

46. *Id.* (citing State v. Christener, 362 A.2d 1153, 1162 (N.J. 1976), *overruled on other grounds by* State v. Wilder, 939 A.2d 781, 792 (N.J. 2008)).

47. *Id.*

48. The term "duplicative" prosecution as used in this Note will be used interchangeably with the terms "serial" and "multiple" prosecutions. These terms all refer to government attempts to gain independent convictions for crimes committed during a single criminal episode.

49. *See, e.g.*, State v. Tijerina, 1973-NMSC-105, ¶ 21, 86 N.M. 31, 519 P.2d 127 (explaining that piecemeal prosecutions "involve a myriad of problems that which threaten the existence of our judicial system").

50. State v. Gonzales, 2013-NMSC-016, ¶ 26, 301 P.3d 380.

51. *See* Allan D. Vestal & Douglas J. Gilbert, *Preclusion of Duplicative Prosecutions: A Developing Mosaic*, 47 MO. L. REV. 1, 9 (1982) ("When fewer criminal prohibitions existed, the distinction in defining 'offense' often was not of great importance; when a defendant engaged in wrongful conduct he probably violated only one criminal prohibition." (footnote omitted)).

joinder rules, many of which mimic the approach taken by model rules published by the ABA, ALI, and NCCUSL.

The purpose and effect of the model joinder provisions was to expand the preclusive effect of double jeopardy to situations where the prosecutor could have (but chose not to) incorporate all potential charges arising from a single criminal transaction into the same prosecution.[52] Although mandatory joinder rules prevent piecemeal prosecutions, they increase the risk of juror confusion and misuse of evidence.[53] While states manage these risks in a number of different ways, the various approaches all allow the trial court to hear separate trials where the risk of prejudice to the defendant is too high.[54] Of course, trial judges need to weigh a number of factors before separating charges into different trials—a process which consumes valuable judicial resources. Therefore, the best approach will maximize the benefits of compulsory joinder while reducing prejudice to criminal defendants and minimizing inefficiencies.

A. Duplicative Prosecutions and the All-or-Nothing Trial Strategy

The rule of criminal joinder is implicated when one or more individuals engage in criminal conduct that violates more than one criminal statute.[55] A criminal can perpetrate multiple crimes during a given criminal

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52. *See Gonzales*, 2013-NMSC-016, ¶ 28 (explaining that compulsory joinder applies to "multiple prosecutions to which the Double Jeopardy Clause [does] not apply" (*quoting* State v. Tanton, 1975-NMSC-057, 88 N.M. 333, 540 P.2d 813)).

53. For a comprehensive quantitative assessment of joinder prejudice in the federal system, *see* James Farrin, *An Analysis of the Empirical Research and its Implications for Justice*, 52 LAW & CONTEMP. PROBS. 325, 327 (identifying four primary sources of prejudice that may affect a defendant when related charges are joined for a single criminal trial: "(1) the jury may become confused by the evidence across charges and fail to compartmentalize the evidence properly; (2) The jury may accumulate the evidence across charges, giving the evidence greater weight on one charge as a result of hearing evidence on other charges; (3) The jury may infer that the defendant has a criminal disposition and find him guilty because of this disposition; and (4) The defendant may become embarrassed or confounded in presenting separate defenses." (footnotes omitted)).

54. *See* Rule 5-203(C) NMRA ("If it appears that the defendant or the state is prejudiced by a joinder of offenses . . . the court may order separate trials of offenses.").

55. Criminal joinder rules also cover the very common situation where two or more individuals engage in a common criminal enterprise. *See, e.g.*, Fed. R. Crim. P. 8(b) ("Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses."). Though joinder of criminal defendants continues to present some of the most intractable challenges known to the criminal law, this subject exceeds the scope of this case note and will only be addressed as it relates to joinder of offenses.

episode by committing several crimes against one individual, by committing multiple crimes against different individuals, or by violating the criminal laws of different jurisdictions.[56] In each of these scenarios, a prosecutor may (and arguably should) vindicate the public's interest in justice by pursuing a conviction for each crime that is supported by probable cause. However, the prosecutor immediately faces a host of dilemmas which may ultimately lead to an inclination to try joinable offenses separately.[57]

The prosecutor must first decide whether criminal charges are appropriate. The decision to prosecute involves a number of factors.[58] Once the prosecutor has determined that prosecution is appropriate, he must then select which charges to bring. This decision is necessarily fluid and should ideally be made at the point in the investigation where all relevant information necessary to determine which charges should be brought against a defendant has been collected and analyzed.[59] This decision too is based on a number of factors[60] but is also subject to extraneous considerations, such as budgetary constraints and law enforcement priorities dictated by the community in which the prosecutor works.[61]

These informal (and often inconsequential) restraints aside, prosecutors may select from a vast array of criminal statutes in charging the defendant.[62] For example, under New Mexico law, the act of breaking into a home with the intent of dispossessing the home's owners of their property may be punished under at least five different statutes, including

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56. Vestal & Gilbert, *supra* note 51, at 44.

57. Much has been written on the dearth of formal constraints on prosecutorial authority, particularly with regard to the charging decision. *See* Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393 (2000–2001) (comparing the breadth of authority formerly enjoyed by the office Independent Counsel, established in 1978 by the Ethics in Government Act and abolished in 1999, to that of the offices of average state and federal prosecutors); James Vorenber, Comment, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1980–81) (discussing scope of prosecutorial discretion).

58. *See* NATIONAL DISTRICT ATTORNEYS ASSOCIATION, *National Prosecution Standards* § 4-1.3 (3d ed. 2009) (listing factors a prosecutor should consider before bringing charges).

59. *See id.* § 4-1.5 ("The prosecutor should attempt to gather all relevant information that would aid in rendering a sound screening decision.").

60. *See id.* § 4-2.4 (3d ed. 2009) (listing factors).

61. *See, e.g.*, Wayte v. United States, 470 U.S. 598, 607 (1985) (explaining that the government's enforcement priorities requires courts to give deference to prosecutorial charging decisions).

62. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 514–23 (2001–2002) (discussing the origins and effects of the "overcriminalization" of American criminal law).

burglary,[63] larceny,[64] criminal trespass,[65] criminal damage to property[66] and possession of burglary tools.[67] If the evidence suggests that the defendant was in possession of a firearm and entered the house when its owners were home, the number of statutes under which charges may be brought increases to at least eight.[68]

Under most circumstances, many of these crimes would be considered lesser-included offenses of one another.[69] Since the Fifth Amendment's Double Jeopardy Clause treats a lesser-included offense as the "same offense" as its greater included counterpart,[70] the prosecutor in such a situation must decide whether to instruct the jury on the lesser-included offense or whether to forego the instruction and pursue an "all-or-nothing" trial strategy.[71] The decision-making process undertaken by the prosecutor at this stage of the criminal proceeding can hardly be described as straightforward, especially under New Mexico's "cognate" approach to determining whether a charge is included in another, which requires a prosecutor to anticipate the evidence that will be introduced and the likelihood that a jury would convict the defendant on one charge and acquit on another.[72]

Under New Mexico's "cognate" approach, a court determines whether an offense is a lesser-included offense by examining both the accusatory instrument and the evidence developed at trial in determining whether the "statutory elements of the lesser crime are a subset of the statutory elements of the charged crime."[73] While such an approach may indeed be more "realistic" given that the evidence evaluated by the court will be the same evidence that the jury will weigh in deciding whether and

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63. NMSA 1978, § 30-16-3 (1963).

64. NMSA 1978, § 30-16-1 (2006).

65. NMSA 1978, § 30-14-1 (1995).

66. NMSA 1978, § 30-15-1 (1963).

67. NMSA 1978, § 30-16-5 (1963).

68. *See* NMSA 1978, § 30-16-4 (1963) (aggravated burglary); NMSA 1978, § 30–16–2 (1973) (robbery); NMSA 1978, § 30-7-2 (2001) (unlawful carrying of a deadly weapon); NMSA 1978, § 30-3-2 (1963) (aggravated assault).

69. *See* State v. Meadors, 1995-NMSC-073, ¶ 12, 121 N.M. 38, 908 P.2d 731 (discussing New Mexico's "cognate" approach for determining when an offense is "lesser included" as one which looks to the charging instrument and the evidence adduced at trial to determine whether, under the facts of the specific case, an offense is a "lesser included" of another offense charged).

70. Brown v. Ohio, 432 U.S. 161, 169 (1977).

71. *See* Catherine L. Carpenter, *Article: The All-or- Nothing Doctrine in Criminal Cases: Independent Trial Strategy or Gamesmanship Gone Awry?*, 26 AM. J. CRIM. L. 257, 258 (1998–99) (discussing the "All-or-Nothing Doctrine").

72. *See* State v. Meadors, 1995-NMSC-073, ¶ 12, 121 N.M. 38, 908 P.2d 731.

73. *Id.*

on what charges to find the defendant guilty, it necessarily gives the prosecutor a tough choice because in many cases, whether two offenses are sufficiently "related" will not be clear until after trial has commenced.

The dilemma posed by the cognate approach is likely to aggravate the duplicative prosecution problem by encouraging prosecutors to "hold back" charges when law enforcement priorities demand a conviction for the higher (although not necessarily greater) offense and the evidence establishing that offense is not strong. The temptation springs from the very real possibility that the jury, acting out of compassion for the defendant or some other improper motive, will issue a compromise verdict convicting the defendant of the lesser offense.[74] Where there is a legitimate question as to whether two offenses share a 'lesser-greater' relationship, law enforcement objectives would be better served if the jury were able to consider *only* the greater offense, with the prosecutor saving the lesser offense for another day.[75]

Consider the facts of *Gonzales*.[76]Alicia Gonzales, the defendant, had rammed her vehicle into a car carrying her young victim, Manuel.[77] The collision killed Manuel, leaving the prosecutor to consider whether to charge Mrs. Gonzales with vehicular manslaughter, negligent child abuse resulting in death, or both. The prosecutor chose to pursue only the more serious child abuse charge (a first degree felony), even though the charge presented a serious question of law as to whether the defendant's lack of knowledge with regard to the child's presence in the car could trigger the statute's criminal negligence requirement.[78] The prosecutor could have chosen this route in order to send a strong message to the public regarding the seriousness of driving while intoxicated on public roads.

Alternatively, the prosecutor could have elected to charge both the child abuse and the vehicular homicide charges, with vehicular homicide

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74. Carpenter, *supra* note 71, at 272 (1999) (discussing the "[g]reat concern . . . over the order by which the jury must deliberate" greater– and lesser–included offense instructions due to the risk that the jury will issue a compromise verdict based on sympathy).

75. That law enforcement objectives are better served when the jury considers only the greater offense is plausible in light of the modern trend of using the criminal justice system to send signals. *See* Stuntz, *supra* note 62, at 520–21 (discussing the view that "signal-sending is the most important thing criminal law does. It communicates with the regulated population (and particularly with those portions of the population who are most inclined to do things that the rest of us find bad or dangerous), and thereby seeks to reinforce good conduct norms and attack bad ones." (footnote omitted)).

76. 2013-NMSC-016, 301 P.3d 380.

77. *Id.* ¶1.

78. *Id.* ¶¶ 4–6.

charged either independently or as a lesser-included offense to negligent child abuse. Had the prosecutor chosen the lesser-included route, however, the jury could have convicted only on the vehicular homicide charge.[79] On the other hand, had the prosecutor charged both offenses independently of each other, the jury could still have opted for only the less serious vehicular homicide offense or the jury could have convicted on both charges, opening the door to an appeal under the Fifth Amendment's prohibition on double punishment.[80]

Given this level of uncertainty regarding the status of offenses at the indictment stage, it makes sense that a savvy prosecutor would elect to "hold back" charges for later prosecution. Absent an enforceable joinder rule, the prosecutor in cases like *Gonzales* could enjoy the benefits of an "all-or-nothing" trial strategy by charging only the most serious charges. Then, pending the outcome of each charge at the first trial, the savvy prosecutor could initiate a subsequent prosecution under different statutes, so long as double jeopardy principles would permit subsequent conviction as lesser-included offenses.[81] This is exactly what New Mexico's compulsory joinder rule is designed to prevent.[82]

B. Ashe v. Swenson*, the "Same Transaction" Test and the Model Codes*

One very common scenario in which a defendant is likely to encounter the threat of successive prosecutions for one criminal episode is where the criminal act results in injury to two or more victims.[83] The Double Jeopardy Clause generally does not protect defendants under these circumstances because most criminal statutes that are modeled around preventing harm to another person's interests focus on the harm caused to the single victim. Therefore, a defendant whose conduct has harmed six different victims during the course of a single criminal episode could be tried six different times.

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79. *Gonzales*, 2011-NMCA-081, ¶ 37, 150 N.M. 494, 263 P.3d 271.

80. *See, e.g.*, State v. Swick, 2012-NMSC-018, ¶ 10, 279 P.3d 747 (discussing the Double Jeopardy Clause's ban on multiple punishments for the same crime under different statutory provisions).

81. Since New Mexico courts only look to the substance of the evidence adduced at trial after finding that the statutes have distinct requirements under a strict elements analysis, *Gonzales*, 2011-NMCA-081, ¶ 35, the risk for duplicative prosecutions is highest where a comparison of bare statutory elements does not end the double jeopardy analysis.

82. *See* State v. Gonzales, 2013-NMSC-016, ¶ 33, 301 P.3d 380 (citing State v. Villa, 2004-NMSC-031, ¶ 14, 136 N.M. 367, 98 P.3d 1017).

83. *See, e.g.*, Ashe v. Swenson, 397 U.S. 436 (1970); State v. Tijerina, 1973-NMSC-105, 86 N.M. 31, 519 P.2d 127.

Such was the case in *Ashe v. Swenson*, a landmark decision in which the United States Supreme Court confronted the issue of whether a second prosecution based on harm to a second victim arising out of a single course of criminal conduct offended the Double Jeopardy Clause of the Fifth Amendment. *Ashe* involved a defendant charged with six counts of armed robbery after he allegedly broke into the victim's home where six people sat around a table playing poker.[84] The defendant was initially tried for the robbery of only one of the victims.[85] The evidence at his first trial left no question that an armed robbery had occurred but there was significant doubt as to whether the defendant was one of the robbers.[86] The judge instructed the jury that if it found that the defendant had participated in the robberies, it was to find him guilty.[87] Although not permitted to elaborate on its verdict, the jury acquitted the defendant of the armed robbery charge due to insufficient evidence.[88]

The defendant was again brought to trial six weeks later to answer for the robbery of a different victim that occurred during the same criminal incident.[89] Following the denial of defendant's motion to dismiss based on his prior acquittal, the defendant was found guilty of armed robbery,[90] a decision which the Missouri Supreme Court upheld. After the Eighth Circuit Court of Appeals affirmed the United States District Court for the Western District of Missouri's denial of federal habeas relief, the Supreme Court granted certiorari to determine whether the doctrine of collateral estoppel precluded the defendant's subsequent conviction.[91]

In *Ashe*, the Supreme Court held for the first time that the concept of collateral estoppel was implicit in the Fifth Amendment's protection against double jeopardy. The principle of collateral estoppel stands for the proposition that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit."[92] The doctrine of collateral estoppel proved to be an adequate remedy for the defendant in *Ashe* because (1) armed robbery was the only charge for which the defendant stood trial a second time and (2) the defendant's identity as one of the

84. *Ashe*, 397 U.S. at 437–38.
85. *Id.* at 438.
86. *Id.*
87. *Id.* at 439.
88. *Id.*
89. *Id.*
90. *Id.* at 439–40.
91. *Id.* at 442–43.
92. *Id.* at 443.

robbers was the only fact in issue. Since the jury in the defendant's first trial had already passed upon the "ultimate fact" of identity, the constitutional principles underlying the Double Jeopardy Clause would be contravened should the defendant be forced to "run the gantlet [sic] a second time."[93]

Yet, for most criminal defendants in situations similar to that in *Ashe*, the issues will not be so straightforward and the protections of collateral estoppel not nearly so accessible. This is primarily due to the fact that the doctrine of collateral estoppel is by its own terms very narrow and because the widespread use of the general verdict precludes meaningful appellate review of the factual basis upon which the fact finder based its verdict.[94] Cognizant as to the inapplicability of collateral estoppel to a majority of successive prosecution cases resulting from the same criminal transaction, Justice Brennan issued a concurring opinion that helped lay the foundation for broader double jeopardy protection in the form of the "same transaction test."[95]

Justice Brennan's concurring opinion in *Ashe* advocated a broader application of the Double Jeopardy Clause. Though he agreed with the majority that collateral estoppel was implicit in the Double Jeopardy Clause, Justice Brennan believed that the Double Jeopardy Clause should preclude subsequent prosecution even where collateral estoppel does not necessarily apply.[96] After explaining that the 'same evidence' test of the 'same offence' provided inadequate double jeopardy protection in light of "the tendency of modern criminal legislation to divide the phrases of a criminal transaction into numerous separate crimes,"[97] Justice Brennan argued for a new interpretation of the Double Jeopardy Clause that would "require the prosecution, except in most limited circumstances, to

93. *Id.* at 443, 446 (quoting Green v. United States, 355 U.S. 184, 190 (1957)).

94. *See id.* at 444 (explaining that when a previous prosecution ended in an acquittal, "as is usually the case, the approach requires a court to examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter and conclude whether a rational jury could have grounded its verdict upon an issue other than that which defendant seeks to foreclose from consideration" (footnote omitted) (internal quotation marks omitted)); *see also* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 17.4(a) (4th ed. 2000) ("[a]lthough *Ashe* represents an important principle, it must be recognized at the outset that this collateral estoppel defense 'will not often be available to a criminal defendant' for 'it is not often possible to determine with precision how the judge or jury has decided any particular issue" (citing Walter v. Schaefer, *Unresolved Issues in the Law of Double Jeopardy: Waller and Ashe*, 58 CAL. L. REV. 391, 394 (1971)).

95. *See Ashe*, 397 U.S. at 448–60 (Brennan, J. concurring).

96. *Id.* at 448–49.

97. *Id.* at 452.

join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction."[98]

Although the "same transaction" test has never been endorsed by a majority of justices on the U.S. Supreme Court,[99] the test was incorporated into the model codes of criminal procedure promulgated by the American Bar Association,[100] the American Law Institute,[101] and National Conference of Commissioners on Uniform State Laws.[102] While the approaches taken by the ABA, ALI, and NCCUSL are similar—they each preclude successive trials based on the same criminal episode—they vary in ways that could affect radically different results in application.

The three provisions take different approaches in defining the scope of criminal conduct that is sufficient to trigger the mandatory joinder of offenses. While all three provisions require joinder when related crimes are "based on the same conduct" or arise from the "same criminal episode," only Uniform Rule 471 extends to related crimes that are based upon a "common plan."[103]

Model Penal Code § 1.07(2) makes joinder automatic. Under this scheme, the prosecutor or the trial court has the responsibility to ensure that joinable offenses are tried together. Due to the automatic nature of joinder under the Model Penal Code approach, should a defendant oppose the joinder of offenses (which is often the case) a court would hold a severance hearing to determine whether the ends of justice require charges to be tried separately.[104]

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98. *Id.* at 453–54 (Brennan, J. concurring).

99. WAYNE R. LAFAVE ET. AL., *supra* note 94, § 17.4(c).

100. ABA STANDARDS RELATING TO JOINDER AND SEVERANCE § 1.3 (1968). Note that the ABA Standards have since been amended to provide for mandatory joinder. *See* ABA STANDARDS FOR CRIMINAL JUSTICE 13-2.1 (1980).

101. MODEL PENAL CODE § 1.07(2)–(3) (1967)

102. UNIFORM RULE OF CRIMINAL PROCEDURE 471 (1987).

103. UNIFORM RULE OF CRIMINAL PROCEDURE 471(a), (b) (1987); Vestal & Gilbert, *supra* note 51, at 16–17 (noting that the proposed version of the Model Code provision, which required joinder for offenses "motivated by a common purpose or plan," is much broader than the provision actually adopted, which had no such provision).

104. MODEL PENAL CODE § 1.07(3) (providing that "[w]hen a defendant is charged with two or more offenses based on the same conduct or arising from the same criminal episode, the Court, on application of the prosecuting attorney or of the defendant, may order any such charge to be tried separately, if it is satisfied that justice so requires"); *see also* State v. Gallegos, 2007-NMSC-007, ¶ 9, 141 N.M. 185, 152 P.3d 828 ("The issue of joinder is not so inextricably linked with the issue of severance such that a prosecutor's separate exercise of the former means that a court never abuses its discretion when it refuses to exercise the latter."); *cf.* Vestal & Gilbert, *supra* note 51, at 18 (arguing that the approach utilized by the ABA and the Uniform Rule, which

The ABA, NCCUSL, and the ALI versions each incorporate a number of limiting principles that obviate the necessity for joinder under specific circumstances. The first such principle is the element of prosecutorial knowledge. The model codes take the sensible position that if the prosecuting attorney lacks sufficient evidence regarding offenses that might otherwise be joinable, the interests of justice excuse joinder as to that offense and allow the prosecutor to try the offense separately when the necessary evidence develops.[105] The problem can manifest in a number of ways, such as when an assault victim later dies of her injuries or a victim is not immediately forthcoming about the severity of the injuries caused by the defendant.[106]

The second limiting principle limits the scope of joinable offenses to those "within the jurisdiction of the same court[.]"[107] The purpose of this limitation is to prevent the defendant from escaping a felony prosecution simply because he was already prosecuted for a joinable misdemeanor in a different court of limited jurisdiction.

Third, both the ABA Standards and the Model Penal Code permit a subsequent prosecution following a defendant's plea of guilty or nolo contendere to less than all of the joinable charges arising out of the same criminal episode.[108] This limitation is meant to prevent the defendant from pleading guilty to more minor offenses when more serious offenses have yet to be charged in order to avoid trial for the more serious offenses.[109]

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require the defendant to move for joinder, are preferable to the Model Penal Code approach in that the former approach correctly places the burden on the defendant as the party seeking the benefit of joinder and avoids the costs associated with needless severance hearings)

105. ABA STANDARDS OF CRIMINAL JUSTICE §13-2.3(a) (1980) [hereinafter ABA STANDARDS]; MODEL PENAL CODE § 1.07(2) (1962); UNIFORM RULE OF CRIMINAL PROCEDURE 471(b).

106. Vestal & Gilbert, *supra* note 51, at 25–26 (noting common scenarios in which a dearth of prosecutorial awareness as to the existence of joinable offenses may excuse successive prosecutions arising from a solitary criminal episode).

107. ABA STANDARDS §13-2.3(a); MODEL PENAL CODE § 1.07(2); UNIFORM RULE OF CRIMINAL PROCEDURE 471(a).

108. ABA STANDARDS 13-2.3(d) ("Entry of a plea of guilty or nolo contendere does not bar the subsequent prosecution of any additional offense based upon the same conduct or same criminal episode."); MODEL PENAL CODE § 1.11(2) ("A prosecution is not a bar [when] . . . the former prosecution was procured by the defendant without the knowledge of the appropriate prosecuting officer and with the purpose of avoiding the sentence that might otherwise be imposed.").

109. *See* ABA STANDARDS 13-2.3(d) cmt. ("The primary reason for excluding dispositions by plea is the concern that defendants might rush to plead to minor offenses that have been filed before investigation and evaluation of greater companion of-

IV. ANALYSIS

A number of states have adopted compulsory joinder provisions through statute[110] or court rule.[111] Regardless of the means employed, the overwhelming majority of states that have embraced a criminal joinder rule have imposed limitations similar to those contained in ABA, ALI, and NCCUSL approaches in order to mitigate the potential effects of a rigid application of the "same transaction" test. Indeed, as one court noted:

> The absurdity of the "same transaction" standard can be easily illustrated. Assume that one breaks and enters a building to commit larceny of an automobile, does thereafter in fact steal the automobile and drive away, killing the night watchman in the process, and two blocks away runs a red light which brings about his arrest by the municipal police. Could it be said with any logic that a plea of guilty to breaking and entering would bar a subsequent prosecution for murder? If so, presumably a plea of guilty to the traffic offense would likewise, since all arise out of the "same transaction."[112]

Despite these concerns, the limitations on criminal joinder found in other jurisdictions' rules are conspicuously absent from New Mexico's compulsory joinder rule. Though the New Mexico Supreme Court has at times implied that such limitations are relevant to the joinder rule's application, they have not been given the treatment needed to make them truly useful without the need for case-by-case development.[113] The analysis that follows discusses the development of New Mexico's joinder rule, describes and identifies the various limitations in other states' rules and will make a case for a refined joinder rule that adopts the best parts of other jurisdictions' approaches.

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fenses have been completed. Thus the standard removes any possibility that the defendant can 'sandbag' the prosecution through a quick plea.").

110. *See, e.g.*, COLO. REV. STAT. § 18-1-408(2) (2014); 720 ILL. COMP. STAT. 5/3-3 (1991); GA. CODE ANN. § 16-1-7 (1982).

111. *See, e.g.*, Rule 5-203 NMRA; FLA. R. CRIM. P. 3.151; WASH. SUPER. CT. CRIM. R. 4.3.

112. State v. Conrad, 243 So.2d 174, 177 (Fla. Dist. Ct. App. 1971).

113. *Cf.* State v. Goodson, 1950-NMSC-023, ¶ 18, 54 N.M. 184, 217 P.2d 262 ("Reason and logic do not support a rule whereby one guilty of the crime of rape may escape a possible sentence of 99 years in the penitentiary by the expedient of pleading guilty to a charge of assault and battery in a justice court where the penalty may be as low as a fine of $5.00."); *see also Gonzales*, 2013-NMSC-016, ¶ 32, 301 P.3d 380 (stating that "this is not a case in which the charge that the State now seeks to bring, vehicular homicide, was unknown at the time the Defendant was indicted").

A. Criminal Joinder in New Mexico

The supreme court's concern over serial prosecution is by no means new. As early as 1973, the New Mexico Supreme Court expressed its contempt for the practice in *State v. Tijerina*,[114] which involved a defendant who had been acquitted on charges of assaulting a jail and the kidnapping and false imprisonment of a male victim.[115] Though arising out of the same incident, the prosecutor brought a second prosecution on charges of assault with intent to commit a felony and for false imprisonment of two different victims. The New Mexico Supreme Court ultimately rejected the defendant's argument that collateral estoppel precluded the jury from considering the charges based on the U.S. Supreme Court's ruling in *Ashe v. Swenson*.[116] Nevertheless, the court made clear that the strategy selected by the prosecution was clumsy at best and unconscionable at worst:

> It should not be inferred from this opinion that this Court intends to encourage or approve piecemeal prosecution. Such disorderly criminal procedures involve a myriad of problems that threaten the existence of our judicial system. The risk of prejudice to the accused, and the waste of time inherent in multiple trials, both perpetuate delays in the judicial process and unconscionable expenditures of public funds, all of which could be avoided by prosecutors getting their facts straight, their theories clearly in mind and trying all charges together.[117]

The New Mexico Supreme Court reiterated and refined this sentiment in *State v. Tanton,*[118] in which the court confronted the issue of whether the Double Jeopardy Clause of the New Mexico Constitution[119] prohibits conviction for vehicular homicide following a conviction in municipal court for driving while intoxicated, where both crimes arose out of the same transaction.[120] After rejecting defendant's arguments that subsequent prosecution was barred under the lesser-included offense doctrine and collateral estoppel,[121] the court rejected the defendant's argument that the "same transaction" test from *Ashe* should be applied to preclude

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114. 1973-NMSC-105, 88 N.M. 31, 519 P.2d 127.

115. *Id.* ¶ 8.

116. *Id.* ¶ 20 ("Taking into consideration the test established by *Ashe v. Swenson*, we believe that a rational jury could have found [defendant] guilty of assault . . . and false imprisonment [of a different victim], had such charges been alleged in the first trial. However, they were not so alleged in the first trial.").

117. *Id.* ¶ 21.

118. 1975-NMSC-057, 88 N.M. 333, 540 P.2d 813.

119. N.M. CONST. art. II, § 15.

120. *Tanton*, 1975-NMSC-057, ¶5.

121. *Id.* ¶¶ 7–12.

his prosecution for vehicular homicide.[122] The court nonetheless acknowledged its continued adherence to the policy against piecemeal prosecutions expressed in *Tijerina*.[123] Importantly, the court made clear that its contempt for piecemeal prosecutions "referred to multiple prosecutions to which the Double Jeopardy Clause did not apply" but that *Tijerina* merely announced "a statement of judicial policy rather than a rule of law."[124]

Four years after *Tanton*, the Court exercised its supervisory authority by issuing an order that transformed its "judicial policy" into a mandatory court rule.[125] The 1979 supreme court order provided: "When a person is charged with more than one crime and the crimes can be incorporated into one information or indictment in separate counts, this practice shall be followed."[126] The rule provides:

> Two or more offenses shall be joined in one complaint, indictment or information with each offense stated in a separate count, if the offenses, whether felonies or misdemeanors or both: (1) are of the same or similar character, even if not part of a single scheme or plan; or (2) are based on the same conduct or on a series of acts either connected together or constituting parts of a single scheme or plan.[127]

Two observations: First, the rule is notably broad. This is particularly so with regard to the rule's application to acts "constituting parts of a single scheme or plan."[128] Second, and most critically, the rule is devoid of any of the important limiting principles expressed in the model codes promulgated by the ABA, ALI, and NCCUSL. Examples include the knowledge of the prosecutor as to uncharged crimes supported by insuffi-

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122. *Id.* ¶¶ 13–15.

123. *Id.* ¶ 17 (citing State v. Tijerina, 1973-NMSC-105, ¶ 20).

124. *Id.* ¶ 17.

125. *See* Rule 5-203 cmt. (providing that a 1979 order made joinder in criminal cases mandatory); *see also Gonzales*, 2013-NMSC-016, ¶ 29, 301 P.3d 380 ("Some four years [after *Tanton*] we went further, transmuting this 'judicial policy' into a court rule, when this Court made it mandatory to join offenses arising out of the same occurrence or transaction.").

126. Rule 5-203 NMRA cmt.

127. The rule derives from the American Bar Association Standards Relating to Joinder and Severance, Section 1.1 (Approved Draft 1968).

128. *Compare* Rule 5–203(A) NMRA, *with* COLO. REV. STAT. § 18–1–408(2) (2000) (requiring multiple offenses to be "prosecuted by separate counts in a single prosecution if they are based on the same act or series of acts arising from the same criminal episode.") *and* TENN. R. CRIM. P. 8(A) ("Two or more offenses shall be joined . . . if the offenses are . . . based on the same conduct or arise from the same criminal episode.").

cient or developing evidence, the effect of a plea of guilty or nolo contendere to less than all offenses arising out of the same criminal transaction, or whether the requirements of the compulsory joinder rule are limited to charges arising within the jurisdiction of the same court.[129] In this regard, New Mexico's approach to criminal joinder is radically ambiguous.[130]

B. Limitations on Criminal Joinder

There are two reasons for the criminal joinder requirement: (1) "to ensure finality [of criminal prosecutions] without unduly burdening the judicial system by repetitious litigation" and (2) to protect criminal defendants from the stress and expense of twice defending against charges arising out of the same criminal transaction.[131] However, strict adherence to the language contained in criminal joinder rules generally (and New Mexico's broad joinder rule in particular) risks placing an unfair burden on prosecutors' authority to structure and conduct criminal prosecutions in the way they believe best serves the ends of justice.[132] Seen in this light,

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129. *See* ABA STANDARDS § 13-2.3(a) ("[Defendant's] motion to dismiss . . . should be granted unless the court determines that because the prosecuting attorney did not have sufficient evidence to warrant trying this offense at the time of the first trial, or for some other reason, the ends of justice would be defeated if the motion were granted."); MODEL PENAL CODE § 1.07(2) ("[A] defendant shall not be subject to separate trials for multiple offenses based on the same conduct or arising from the same criminal episode, if such offenses are known to the appropriate prosecuting officer at the time of the commencement of the first trial and are within the jurisdiction of a single court."); UNIFORM RULE OF CRIMINAL PROCEDURE 471(b) (providing that the court upon motion by defendant, the court must join related charges "unless it determines that because the prosecuting attorney does not presently have sufficient evidence to warrant trying one or more of the charges, or for some other reason, the joinder would defeat the ends of justice").

130. *See, e.g.*, COLO. REV. STAT. § 18-1-408(2) (2000) (providing that separate charges based on the same act or series of acts arising from the same criminal episode must be prosecuted in a single prosecution if "[t]he several offenses are actually known to the district attorney at the time of commencing the prosecution and were committed within the district attorney's judicial district . . . ."); TENN. R. CRIM. P. 8(a)(1)(B), (C) (Providing that "two or more offenses shall be joined . . . if they are . . . within the jurisdiction of a single court" and are "known to the appropriate prosecuting official at the time of the return of the [charging instrument.]"); FLA. R. CRIM. P. 3.151(c) (providing for the dismissal of related offenses after trial "unless the prosecution has been able, by due diligence, to obtain sufficient evidence to warrant charging the other offense or offenses.").

131. *Gonzales*, 2013-NMSC-016, ¶ 26, 301 P.3d 380 (citing Commonwealth v. Fithian, 961 A.2d 66, 75–76 (Pa. 2008)).

132. *Cf.* ABA STANDARDS § 13-2.3(c), (d) cmt. (explaining that limitations on the protection from subsequent prosecutions for common plan offenses and prosecutions

the purpose behind the various restrictions on criminal joinder rules serve a separate but related interest: to protect the "ethical and diligent prosecutor . . . from technical, arbitrary bans to subsequent prosecution of companion offenses"[133] that arise from unavoidable run-ins with joinder provisions' broad and often mushy standards.

Nearly every state to embrace compulsory joinder has imposed various limitations in order to temper the results from its strict application. Three such restrictions are most prevalent: (1) companion offenses must have been known to the prosecutor at the time of commencement of the first prosecution; (2) companion offenses must fall within the jurisdiction of a single court; and (3) entry of a plea of guilty or nolo contendere to one offense does not then bar the prosecution of other offenses arising from the same criminal transaction.[134]

Not every state has adopted all of the above limitations as part of its compulsory joinder regime and, depending upon the framework a given state has established for the operation of its joinder rules, it may be superfluous to do so.[135] Further, while each restriction serves a separate purpose, the overall effect that they have on the state's compulsory joinder rules depends on finer distinctions that courts have drawn through case-by-case development. In order to fully understand why New Mexico's under-developed joinder rule is bound to frustrate the operation of the criminal law in this state and to make sound suggestions for future amendment, it is necessary to briefly discuss each of the limitations listed above in light of its purpose and the various approaches that states have taken with regard to its application.

1. Prosecutorial Knowledge

By far the most common and nuanced limitation on criminal joinder rules, the prosecutorial knowledge restriction permits successive prosecution for a joinable offense when the prosecutor lacked a sufficient basis in knowledge as to the existence of the offense at the time of the initial

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following initial disposition by plea is to prevent undue burden on the prosecutor and to "remove[ ] any possibility that the defendant can 'sandbag' the prosecution through a quick plea.").

133. ABA STANDARDS §13-2.3(c) cmt.

134. For a comprehensive list of the various limitations envisioned by the joinder rules of different states *see* LAFAVE ET AL., *supra* note 94, § 17.4(c).

135. In a state that places the burden of moving for joinder of related offenses on the defendant, for example, there is no genuine need to limit joinder's preclusive effects to those charges filed within the jurisdiction of a single court. Even if a defendant did move for consolidation of charges, consolidation would be impossible and, of course, his failure to do so would constitute a waiver of his statutory right to joinder and the protections that accompany it.

prosecution.[136] The purpose behind the limitation is to permit the diligent and ethical prosecutor to pursue a valid charge that would otherwise be barred by compulsory joinder provisions where, due to circumstances beyond his control, he was not aware of the facts giving rise to the charge at the time the first prosecution was initiated.[137] Given that a primary purpose of any compulsory joinder rule is to encourage prosecutors to "get[ ] their facts straight, [and] their theories clearly in mind"[138] so that all charges can be tried together, a rule that strictly prohibits a successive prosecution for a joinable companion offense where the prosecutor never had the opportunity to form a theory in the first place makes little sense. A prosecutorial knowledge limitation thus acts as an important safeguard against arbitrary bans on valid prosecutions where there is little danger that they are motivated by tactical considerations.[139]

As with most legal rules, this exception is more easily stated than applied. The typical prosecutorial knowledge exception is wrought with ambiguities that, in many states, have been clarified on a case-by-case basis. In determining the scope of the exception in any such state, two interrelated questions must be asked: (1) what is a "prosecuting official"; and (2) when does the limitation kick in?

As to the first question, the laws of most states limit the application of joinder to the "proper prosecuting official."[140] The question of who exactly falls within this category is not as straightforward as the label would suggest. Indeed, under principles of agency law, the rule could theoretically extend to police officers and non-attorney staff who have knowledge of the underlying facts. At the other end of the spectrum, a limited rule could only apply to prosecuting attorneys who are personally involved in or have primary responsibility over the case. The policy that a state adopts in this context typically represents a compromise between

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136. Many states have enacted a compulsory joinder rule that explicitly applies to successive prosecutions where the prosecutor lacked knowledge as to the joinable offense at the time of the initial prosecution. *See, e.g.*, COLO. REV. STAT. § 18-1-408(2) (2000); GA. CODE ANN. § 16-1-7(b) (1982); HAW. REV. STAT. § 701-109(2) (1984); 720 ILL. COMP. STAT. 5/3-3(b) (1962); ME. REV. STAT. tit. 17-A, § 14 (1976).

137. *See supra* note 133 and accompanying text.

138. *Gonzales*, 2013-NMSC-016, ¶ 28 (citing *Tijerina*, 1973-NMSC-105, ¶ 21).

139. *Cf.* TENN. R. CRIM. P. 8 cmt. (explaining that the purpose of the compulsory joinder statute is "meant to stop the practice by some prosecuting attorneys of 'saving back' one or more charges arising from the same conduct or the same criminal episode").

140. *See, e.g.*, ARK. R. CRIM. P. 21.3; GA. CODE ANN. § 16-1-7(b) (1982); HAW. REV. STAT. § 709-109(2) (1984); 720 ILL. COMP. STAT. 5/3-3(b) (1962); ME. REV. STAT. tit. 17-A § 14 (1976); OR. REV. STAT. § 131.515(2) (1997); 18 PA. CONS. STAT. § 110(1)(ii) (2002); TENN. R. CRIM. P. 8(C).

the interest in efficient criminal prosecution on the one hand and a desire to incentivize due diligence by prosecutors in fact discovery and evidence collection on the other.[141]

Courts are substantially in agreement that the phrase "proper prosecuting official" should not be interpreted to include the police[142] or non-attorney staff employed within a state district attorney's office[143] on the general ground that doing so would torture the plain meaning of "prosecutor" and would create the type of highly-technical and arbitrary bar to pursuing valid prosecutorial interests that the ABA guidelines counsel against. Such harmony is not found, however, with regard to prosecuting attorneys within the general umbrella of a state's district attorney department. While many courts have held that the knowledge of a district attorney is imputable to all other DA's within the department,[144] others insist on a more limited definition that attributes knowledge only to those prosecutors actually handling the case.[145]

Even further disagreement exists over exactly *when* a prosecutor's knowledge as to the existence of joinable offenses following the commencement of the initial prosecution should be excused or punished under a compulsory joinder rule. Most states' mandatory joinder provisions prohibit subsequent prosecution for joinable offenses only if they

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141. There are a number of ways in which a prosecuting attorney involved in a case might lack the facts necessary to conclude that an additional offense arising out of the same criminal episode had been committed: (1) a victim of physical attack could die from his injuries in the course of a trial for assault; (2) a victim of crime may conceal from police and prosecuting attorneys the nature and extent of the harms inflicted against her; (3) a defendant herself could conceal evidence of crimes committed in the course of a single criminal episode; or (4) the incomplete knowledge could result from communication deficiencies between the police and the DA's office or from within the DA's office itself.

142. *See* State v. Solomon, 596 P.2d 779, 782 (Haw. 1979) (police not "prosecuting officers" within the meaning of state's compulsory joinder statute); State v. Knowles, 618 P.2d 1245, 1250 (Or. 1980) (knowledge of the police officer filing the criminal charge does is not imputable to the district attorney who prosecutes the charge); People v. Pohl, 197 N.E.2d 759, 766 (Ill. App. Ct. 1964) (same).

143. *See* Zipse v. Cnty. Court for Cnty. of Jefferson, 917 P.2d 331, 334–35 (Colo. App. 1996) (holding that "the actions and knowledge of non-attorney members of the district attorney's office . . . [are not] imputable to the district attorney for purposes of the mandatory joinder requirement").

144. *See, e.g.*, *id.* at 334 (Colo. App. 1996) (explaining that "[t]he official actions and knowledge deputy, chief deputy, and assistant district attorneys are imputable to the district attorney for the purposes of the compulsory joinder requirement").

145. *See* Simmons v. State, 587 S.E.2d 312, 313 (Ga. Ct. App. 2003) (compulsory joinder rule only applies to "such crimes which are *actually* known to the prosecuting officer *actually* handling the proceedings" (citation omitted) (internal quotation marks omitted)).

were known to the appropriate prosecuting official "at the time of the commencement" of the first prosecution.[146] Such a statement is ambiguous, as the "commencement of the prosecution" could refer to any number of points between arrest and conviction. Possible reference points include the filing of an indictment, the return of an indictment, arraignment, the empaneling of a jury or the point at which filing a continuance motion would be manifestly unreasonable.[147] When faced with interpreting language such as this, courts tend to look first to the law of criminal procedure in the relevant state to determine if and in what way the "commencement" of criminal proceedings is defined.[148] If this approach fails to yield a satisfactory solution, courts look to the policy rationale behind compulsory joinder, seeking to further the purposes of compulsory joinder without penalizing legitimate prosecutorial conduct.

By contrast, a small minority of states deal with this problem by framing the issue as whether the prosecutor had sufficient evidence at the time of the initial prosecution to try the companion offense.[149] While such a rule has the benefit of flexibility and may be tailored to effectively protect the prosecutor's interest in achieving justice and the defendant's interest in the finality of a single proceeding for related offenses, it risks subverting the purposes of compulsory joinder by providing an incentive to prosecutors to hold back otherwise ripe charges until they have enough evidence to assure a conviction. Nor does this approach entirely escape having to determine at which point the accrual of sufficient evidence requires the prosecutor to join the later companion offense in an already-commenced criminal proceeding.[150]

Regardless of the approach, a clear trend points toward limiting the doctrine's application to situations where the relevant prosecuting official actually had the opportunity to try joinable offenses but, through a con-

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146. GA. CODE ANN. § 16-1-7(b) (1982); HAW. REV. STAT. § 701-109(2) (1984); 720 ILL. COMP. STAT. 5/3-3(b) (1962); ME. REV. STAT. tit. 17-A, § 14 (1976); MONT. CODE ANN. § 46-11-503(1) (1999); OR. REV. STAT. § 131.515(2) (1997).

147. ABA STANDARDS 13-2.3(c) comm. cmt. (asserting that "a companion offense known to the prosecution at a time when a motion to continue the first trial is a viable and reasonable alternative would be barred").

148. *See* State v. Blair, 705 P.2d 752, 754 (Or. 1985) (stating that "'[a] prosecution is commenced when a warrant or other process is issued without unreasonable delay'" for compulsory joinder purposes (quoting OR. REV. STAT. § 131.135 (1973)).

149. *See* ARK. R. CRIM. P. 21.3(b); FLA. R. CRIM. P. 3.151(c); N.C. GEN. STAT. § 15A–926(c)(1) (1975); WASH. SUPER. CT. CRIM. R. 4.3.1(b)(2).

150. The ABA Standards, for example, suggest that when a prosecutor has sufficient evidence to try a companion offense at the time "when a motion to continue the first trial is a viable and reasonable alternative," the subsequent prosecution should be barred. *See* ABA STANDARDS 13-2.3(c) cmt.

scious decision or negligence, failed to do so.[151] Yet, in spite of this trend, New Mexico's joinder rule lacks any limiting principle. Nor does the rule contain any guidance as to how these deficiencies ought to be addressed should the occasion arise. If *Gonzales*' newly minted rule is taken seriously, defendants and prosecutors are bound to litigate these issues sooner or later. And in the absence of any clear guidance, they will have to be resolved on a case-by-case basis in the appellate courts.

Perhaps aware of this deficiency and attuned to the importance of this limitation to disciplined application of joinder principles, the New Mexico Supreme Court made a few perfunctory notes about the issue in *Gonzales*:

> This is not a case in which the charge the State now seeks to bring . . . was unknown at the time Defendant was indicted. The state had at least three different opportunities to join these offenses. The first was in the original indictment, but it chose to ask the grand jury to indict only on charges of child abuse. The second was at the hearing on the motion to dismiss. The State was made fully aware that the charge was available and admitted at that hearing that it knew it was taking a risk when it decided on this particular trial strategy. Finally, . . . the State could have asked for a vehicular homicide instruction notwithstanding its omission from the indictment, but again the State elected not to do so.[152]

Though this language indicates that the Supreme Court is inclined to limit application of the *Gonzales* remedy when the prosecutor lacked knowledge of a joinable offense, the passage does more to confuse than to clarify. Without the benefit of guidance from the compulsory joinder rule itself, the court's reasoning could be applied to reach three inconsistent conclusions: (1) that subsequent prosecution for a joinable offense of which the prosecutor lacks knowledge is barred upon the return of the indictment;[153] (2) that subsequent prosecution for a joinable offense is not barred until the commencement of trial; and (3) that subsequent prosecution for a joinable offense for which the prosecutor lacked knowledge is not barred even after a jury is empaneled and jeopardy has attached, so

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151. Vestal & Gilbert, *supra* note 51, at 26.

152. *Gonzales*, 2013-NMSC-016, ¶ 32, 301 P.3d 380 (citation omitted).

153. This approach has been explicitly adopted in Tennessee. TENN. R. CRIM. P. 8(a)(1)(C) (requiring joinder of related offenses when they are "known to the appropriate prosecuting official at the time of the return of the indictment(s), presentment(s), or information(s)") and was favorably cited by the New Mexico Supreme Court in *Gonzales*. *See Gonzales*, 2013-NMSC-016, ¶ 28 n.1.

long as the prosecutor is correct in his belief that the joinable offense is not a lesser-included offense under the *Meadors* cognate approach.[154]

Nor is it clear *who* should qualify as a "prosecutor" within the meaning of New Mexico's compulsory joinder rule. The practical import of this problem is of special significance in New Mexico, where peace officers are given explicit authority to "file criminal complaints against persons in the metropolitan court that has jurisdiction over the alleged offense."[155] Further refinement is in order before New Mexico's compulsory joinder rule is able to provide clear and consistent advice to prosecutors (or peace officers, as the case may be) in preparing their cases for adjudication.

2. Offenses within the Jurisdiction of the Same Court

The primary focus of the limitation restricting the operation of criminal joinder to those offenses within the jurisdiction of the same court is to excuse joinder's application to the complicated problems associated with a single criminal episode that transgresses the jurisdictional boundaries of two or more sovereigns.[156] The limitation also addresses the problems that arise when, during a single, intra-state criminal episode, a defendant commits multiple offenses that fall into the exclusive jurisdiction of different courts.[157] Such a situation gives rise to the very real possibility that legitimate prosecutorial efforts could be short-circuited when a prosecution for a misdemeanor offense in a court of limited jurisdiction occurs before the prosecution for more serious offenses gets under way in the "higher" court.

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154. *But cf.* King v. State, 717 S.W.2d. 306, 308 (Tenn. Crim. App. 1986) (applying compulsory joinder rule to bar subsequent prosecution for joinable offense where trial judge erroneously concluded during the initial proceeding that the subsequently barred companion offense, which the prosecutor included in the initial indictment in good-faith, was a lesser-included offense to the offense initially charged).

155. Rule 7-108(A) NMRA; *see also* State v. Rivera, 2012-NMSC-003, ¶ 14, 268 P.3d 40 (explaining that Rule 7-108 NMRA "allows both peace officers and employees of governmental entities acting on behalf of that entity to prosecute certain criminal actions [in metro court]").

156. The complex issues that arise when a defendant engages in a single course of conduct that violates the laws of multiple sovereigns are beyond the scope of this Note. For a comprehensive treatment of this issue, see ADAM HARRIS KURLAND, SUCCESSIVE CRIMINAL PROSECUTIONS: THE DUAL SOVEREIGNTY EXCEPTION (ABA ed. 2001).

157. *See* ABA Standard 13-2.3(a) cmt. (noting that the requirement that offenses be within the jurisdiction of a single court "also recognizes the problems that occur when otherwise joinable offenses are charged within the same state but are not all cognizable by any single court").

Not surprisingly, this problem arises most frequently in judicial systems with jurisdiction divided between misdemeanor and felony offenses or type of offense.[158] Bifurcated criminal justice systems are vulnerable to this problem because felony offenses take longer to prosecute than misdemeanors. Often, a prosecution for a misdemeanor offense will be commenced and completed in a court of limited jurisdiction before an indictment issues for the more serious offense in a court of general jurisdiction. Absent some explicit limitation that takes this vulnerability into account, prosecutors would be expected to forestall prosecuting misdemeanor offenses that are joinable with their felony counterparts, thereby delaying the administration of justice and imperiling defendants' right to a speedy trial under the Sixth Amendment.

Cognizant of these implications, courts overwhelmingly hold that completed prosecutions in courts of limited jurisdiction do not bar subsequent prosecution for other joinable offenses filed in separate courts.[159] Similarly, courts routinely refuse to apply compulsory joinder rules to bar multiple prosecutions for offenses arising out of a single criminal episode that stretches across multiple judicial districts because such offenses cannot generally be tried together under relevant jurisdictional rules.[160] These cases make it clear that the compulsory joinder rule should not be applied to bar multiple prosecutions arising out of the same criminal episode if the prosecutor did not have the opportunity or ability to pursue all charges at once, regardless of the defendant's interests to the contrary.

The reluctance of courts to apply compulsory joinder where the prosecuting attorney lacks the ability to file all charges together within the same court helps explain the ABA and some courts' hesitancy to address a related question: whether compulsory joinder should bar successive prosecutions for crimes arising from the same criminal episode where the prosecutor has the opportunity to file all charges within the same

158. *See* Vestal & Gilbert, *supra* note 51, at 25 n. 148 (citing cases).

159. *See, e.g.*, People v. Wright, 742 P.2d 316, 321 (Colo. 1987) (en banc); State v. Tamburro, 347 A.2d 796, 798 (N.J. Super. Ct. App. Div. 1975); Parker v. State, 317 S.E.2d 209, 211 (Ga. Ct. App. 1984); *see also* Vestal & Gilbert, *supra* note 51, at 25.

160. *See, e.g.*, Stephens v. Hopper, 247 S.E.2d 92, 95 (Ga. 1978) (compulsory joinder does not apply where defendant kidnapped and inflicted bodily injury to victim in one county and then abducted and killed victim in another county); People v. Taylor, 732 P.2d 1172, 1180 (Colo. 1987) (compulsory joinder statute did not bar subsequent prosecution for unlawful possession of a controlled substance where defendant was previously prosecuted in a different judicial district for conspiracy to distribute cocaine because all charges could not have been filed by the district attorney within the same court at the time of the first prosecution).

court but chooses not to.[161] Since the core policy rationale behind criminal joinder is the prevention of multiple criminal prosecutions for offenses arising from the same criminal transaction, a rule that allows the prosecutor to voluntarily sidestep the criminal joinder rule by filing joinable offenses in different courts does not make sense. This is especially true given that such a policy serves neither the defendant's interest in avoiding multiple criminal prosecutions, nor society's interest in preserving financial resources. Therefore, where the prosecutor could have joined all offenses together within the same court but chose not to, courts should (and generally have) prevented the subsequent prosecution from going forward.[162]

Indeed, the New Mexico Supreme Court has itself implicitly endorsed the view that the compulsory joinder rule should apply in cases where the prosecutor elected to separately file joinable offenses in different courts. In *State v. Tanton*,[163] the New Mexico Supreme Court held that neither the Double Jeopardy Clause nor collateral estoppel as outlined by the U.S. Supreme Court in *Ashe v. Swenson*[164] precluded defendant's prosecution for vehicular homicide in district court following his completed conviction for DWI in municipal court.[165] Though the Court ultimately rejected defendant's arguments on both fronts, it noted that "the situation . . . could easily have been avoided by a modicum of cooperation between the respective prosecutors" and that "proceedings pending in an inferior court ought to be abated when charges are instituted in district court in relation to the same episode."[166] Notably, the New Mexico Supreme Court's holding in *Tanton* predated its adoption of compulsory joinder by four years, leaving open the question of whether the result in *Tanton* would have been different had the court decided the case in light of New Mexico's compulsory joinder rule.[167]

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161. *See* ABA STANDARDS 12-2.3(a) cmt. ("Where the offenses are cognizable by one court but the prosecutor elects to try one offense in a court that cannot hear all of the offenses, paragraph (c) may bar a subsequent prosecution of the remaining offenses.").

162. State v. McGilchrist, 657 P.2d 681, 683 (Or. 1983) (per curiam) (explaining that because the subsequent "misdemeanor charge . . . could have been tried in the municipal court as well as the district court. There was no legal obstacle to carrying out the statutory objective of consolidating charges arising out of the same criminal episode").

163. 1975-NMSC-057, 88 N.M. 333, 540 P.2d 813.

164. *See supra* notes 83–98 and accompanying text.

165. *Tanton*, 1975-NMSC-057, ¶ 5, 8.

166. *Id.*; *accord McGilchrist*, 657 P.2d at 683.

167. *See supra* note 39 and accompanying text.

In spite of the consistency with which states have explicitly limited the application of compulsory joinder to those offenses within the jurisdiction of a single court, New Mexico's compulsory joinder rule is devoid of any such restriction. Given the supreme court's attitude toward the issue in *Tanton*, it is far from clear exactly how such issues will be handled in future cases seeking to apply the principles outlined in the *Gonzales* case. As with the issue of prosecutorial knowledge discussed above, further guidance from the New Mexico Supreme Court is needed to avoid contradicting the economy-based purposes behind compulsory joinder by requiring case-by-case development in New Mexico's appellate courts.

3. Effect of a Plea of Guilty or Nolo Contendere to Less Than All Joinable Offenses

Whenever a prosecutor charges a defendant with more than one offense, the possibility arises that the defendant will enter a plea of guilty or nolo contendere to less than all of the offenses charged. Ordinarily, when all such offenses arise out of the same criminal episode, prosecution for all charges will commence simultaneously and within the same court. Occasionally, however, due to circumstances such as protracted investigations of more serious crimes or a lack of communication between prosecutors at different levels of government, not all charges are commenced at the same time and in the same court. When this happens, it may be possible for a defendant to enter a plea of guilty or nolo contendere to a minor offense filed at an earlier point in time than a more serious offense arising from the same criminal episode, thereby barring subsequent prosecution for the more serious offense under an unrestrained application of compulsory joinder principles.

Aware of this potential outcome, the model codes and most states avoid a bar on subsequent prosecution when the first prosecution was disposed of by way of a plea of guilty or nolo contendere and have done so in a variety of ways. Generally, the various approaches fall into three categories: (1) explicitly denying preclusive effect to those charges that are disposed of by way of a plea of guilty or nolo contendere;[168] (2) defining joinder to prohibit multiple "trials" as opposed to successive "prosecutions;"[169] and (3) characterizing the issue in terms of one of the other

168. ABA STANDARDS 13-2.3(d); MODEL PENAL CODE § 1.11(2).

169. *Compare* HAW. REV. STAT. § 701-109(2) (1984) ("a defendant shall not be subject to separate *trials* for multiple offenses based on the same conduct or arising from the same episode" (emphasis added)), *with* OR. REV. STAT. §131.515(2) (1997) ("No person shall be separately *prosecuted* for two or more offenses based on the same criminal episode . . . ." (emphasis added)).

limitations discussed above and permitting the subsequent prosecution to proceed on that basis.[170]

Proponents of a "no-bar"[171] rule emphasize the irrationality of ceding control of the prosecution to the defendant and the damage that may befall the criminal justice system if important and otherwise legitimate prosecutorial objectives are upended because a defendant "rush[ed] to plead to minor offenses that [were] filed before investigation and evaluation of greater companion offenses [were] completed."[172] Under the ABA Standards, the primary motivation behind the no-bar policy is to "remove[ ] any possibility that the defendant can 'sandbag' the prosecution through a quick plea."[173] Moreover, disposition by plea generally does not burden judicial resources to the extent that full-blown trials do, adding support to the position that compulsory joinder rules should apply only to prevent the threat of "multiple trials" arising from the same criminal episode.[174]

Although a bar to subsequent prosecution following disposition of a companion offense by way of a plea of guilty or nolo contendere may indeed create unwelcome results, this situation is only a realistic possibility in states with bifurcated criminal justice systems or where prosecutors are not indispensable agents in the consideration of plea agreements.[175] Such systems are vulnerable to sandbagging because cunning defendants can plead guilty to a lesser charge without giving notice or control to the prosecutor in charge of pursuing a conviction for the more serious offenses. However, as indicated above, such situations may often be effectively dealt with under the prosecutorial knowledge limitation or the restriction limiting application of mandatory joinder to charges that fall within the jurisdiction of the same court.

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170. Recasting the problem presented when a defendant pleads guilty to less than all offenses charged according to some other limitation is a viable tactic because the problem most frequently arises in situations where other limitations are implicated. *See, e.g.*, State v. Tamburo, 347 A.2d 796, 798 (N.J. Super. Ct. App. Div. 1975) (holding that defendant's plea of guilty in prosecution for misdemeanor traffic offense did not bar subsequent prosecution for felony narcotics charge because the two charges were not within the jurisdiction of the same court).

171. Vestal, *supra* note 51, at 24 (describing a "no-bar" rule as one where a court refuses to bar a subsequent prosecution for a joinable offense when the defendant disposed of the initially prosecuted offense by way of a plea of guilty or nolo contendere).

172. ABA STANDARDS 13-2(d) cmt.

173. *Id.*

174. *See, e.g.*, HAW. REV. STAT. §701-109(2) (1984).

175. Vestal & Gilbert, *supra* note 51, at 24–25.

Some courts have embraced the application of criminal joinder in barring a subsequent prosecution where the defendant entered a plea of guilty or nolo contendere to the initial, joinable charge. These courts rely on the policy justifications for criminal joinder rules and emphasize that neither the burden on judicial economy nor the psychological effect of multiple prosecutions on the defendant are mitigated simply because the first prosecution did not end in a verdict of guilty.[176] Moreover, these courts argue, a "no-bar" rule would severely undermine the purposes of compulsory joinder by actually incentivizing prosecutors to file joinable offenses in separate courts where possible.[177]

Unfortunately, there is no clear answer as to whether a policy barring a subsequent prosecution following a plea of guilty or nolo contendere to a joinable offenses is preferable to one that does not.[178] Given the ubiquity of the plea bargain and the waning frequency of guilt by conviction in America's modern criminal justice system,[179] limiting the application of compulsory joinder rules to disposition by trial seriously jeopardizes their ability to protect defendants from the threat of repetitious prosecution in the majority of cases in which it arises. Nevertheless, for jurisdictions with bifurcated criminal justice systems or procedural rules that exclude prosecutors from the plea bargaining process involving various crimes, the risk that a defendant may escape prosecution may be too great to tolerate. Ultimately, the bottom line must be drawn with a view toward the inevitable compromise that must be made between giving credence to the policy values embodied in criminal joinder provisions, on the one hand and closing the window to the possibility that a clever defendant could escape prosecution for serious offenses by "rush[ing] to plead to minor offenses . . . before investigation and evaluation of greater companion offenses [are] completed"[180] on the other.

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176. *See, e.g.*, State v. Johnson, No. W2008-01593-CCA-R3-CD, 2009 WL 4263653 (slip. op.), *rev'd on other grounds*, State v. Johnson, 342 S.W.3d 468 (Tenn. 2011).

177. People v. Robinson, 774 P.2d 884, 887 (Colo. 1989) (en banc) ("Prosecutors would exercise less care in filing cases if they knew that an accused who is named a defendant in duplicative cases and who fails to inform in some timely manner the trial court or the prosecutor of that circumstance will be deemed to have waived any right to object to the People's failure to comply with the statute.").

178. Vestal & Gilbert, *supra* note 51, at 24 ("Determining whether a bar or no-bar policy rule is best is not simple; policies favoring a bar do not clearly outweigh those against a bar.").

179. The U.S. Supreme Court recently commented on the remarkable shift toward plea bargaining, noting "the reality that criminal justice today is for the most part a system of pleas, not a system of trials." Lafler v. Cooper, 132 S.Ct. 1376, 1388 (2012).

180. ABA STANDARDS 13-2.3(d) cmt.

New Mexico's compulsory joinder rule fails to give clear guidance as to whether a plea of guilty should bar a subsequent prosecution for a joinable offense and, if so, under what circumstances. Given that Rule 5-203(A) does not explicitly provide for the dismissal of charges for failure of the prosecutor to join related offenses, it is not readily apparent whether the rule was intended to apply to "prosecutions" generally or "trials" specifically.[181] Certainly, either interpretation is entirely plausible on the face of the rule.

On the one hand, the Rule requires the prosecutor to join related offenses in one complaint, indictment or information.[182] Since these procedural devices are typically among the first issued in the course of a criminal prosecution, it could be argued that the Rule applies at the very first stages of the process. On the other hand, the Committee Commentary to Rule 5-203 states that the provision requiring joinder of related offenses was derived from the ABA Standards, which specifically refuses to enjoin a subsequent prosecution when a companion offense was resolved by way of a plea of guilty or nolo contendere.[183]

Nor is case law particularly helpful. In *State v. Goodson*,[184] the New Mexico Supreme Court refused to bar the state's prosecution of a defendant for rape following his plea of guilty for assault and battery in a different court, even though the two offenses arose out of the same criminal episode. The court sternly disapproved of the practice of dismissing serious charges in light of a defendant's guilty plea to less serious, related offenses, stating:

> Reason and logic do not support a rule whereby one guilty of the crime of rape may escape a possible sentence of 99 years in the penitentiary by the expedient of pleading guilty to a charge of assault and battery in a justice court where the penalty may be as low as a fine of $5.00.[185]

Despite the *Goodson* court's clear ambivalence toward a bar on subsequent prosecution for more serious crimes following a defendant's guilty plea of a lesser companion offense, its authoritative value stands on shaky ground given subsequent developments in the law of criminal joinder, including the model codes and New Mexico's adoption of a compulsory joinder rule. More important, however, is the New Mexico Supreme

181. *Compare* TENN. R. CRIM. P. 8(a)(2) (specifically prohibiting separate trials of offenses falling within compulsory joinder provision) *with* Rule 5-203(A) NMRA.

182. Rule 5-203(A) NMRA.

183. Rule 5-203 NMRA cmt.; ABA STANDARDS 13-2.3(d) cmt.

184. 1950-NMSC-023, 54 N.M. 184, 217 P.2d 262.

185. *Id.* ¶ 18.

Court's policy-driven analysis in *Gonzales*, which endorses the importance of compulsory joinder in protecting defendants from the trauma of multiple prosecutions for offenses arising out of the same criminal episode. Given *Gonzales*' strong emphasis on the need to protect defendants from piecemeal prosecution, it is far from clear whether the reasoning advanced in *Goodson* would control in a post-*Gonzales* world.

Finally, even if *Goodson*'s endorsement of a "no bar" rule is taken seriously in the wake of *Gonzales*, the question still remains whether its holding should be limited to situations in which the subsequent (and often more serious offense) with which a defendant is charged is not triable in the same court as the offense for which the defendant pleads guilty. As discussed extensively above, such a situation may appropriately be regulated through a limitation that restricts compulsory joinder's application to offenses within the jurisdiction of the same court. With such a limitation in place, there seems little reason not to extend the joinder rule to subsequent prosecutions after a defendant pleads guilty to a charge in the same court, initiated by the same prosecutorial entity for crimes arising out of the same criminal episode.

Given the ubiquity of plea bargains in today's criminal justice system, the question of whether the remedy supplied by *Gonzales* should be applied to a second prosecution following a defendant's plea of guilty to a joinable offense remains an open question that is bound to arise. Much like the other restrictions on the application of compulsory joinder rules discussed above, whether and under what circumstances a defendant's plea will act as a bar to subsequent prosecution to a companion offense will need to be developed on a case-by-case basis in the appellate courts absent further guidance from the New Mexico Supreme Court.

V. IMPLICATIONS

New Mexico courts have long discouraged piecemeal prosecutions.[186] Citing the tendency of the practice to prejudice the accused and to "both perpetuate delays in the judicial process" and to effect "unconscionable expenditures of public funds," the New Mexico Supreme Court embraced a judicial policy that urged prosecutors to "get[ ] their facts straight [and] their theories clearly in mind" by trying all related charges together.[187]

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186. *Gonzales*, 2013-NMSC-016, ¶ 28, 2012-NMSC-003 ("Years ago, even before adopting a compulsory joinder rule, this Court expressed its 'distaste for piecemeal prosecutions.'" (quoting State v. Tijerina, 1973-NMSC-105, ¶ 21, 86 N.M. 31, 519 P.2d 127)).

187. *Tijerina*, 1973-NMSC-105, ¶ 21.

Before *Gonzales*, New Mexico's mandatory joinder rule's effectiveness was largely determined by the good faith of prosecutors who decided which offenses to prosecute and when to prosecute them. *Gonzales* put an end to the uncertain force of the rule by supplying a sharp remedy to be applied when its mandates go unheeded. In doing so, the Supreme Court realigned New Mexico's compulsory joinder rule with those of other states that have long been invoked to preclude multiple prosecutions for related offenses. However, unlike the compulsory joinder provisions of other states, New Mexico's rule does not feature any of the restrictions are needed to prevent the undisciplined and inconsistent application of the *Gonzales* remedy.

Absent further clarification from the New Mexico Supreme Court as to what restrictions (if any) should be placed on the application of the rule's remedy, limitations must necessarily be determined on a case-by-case basis in the appellate courts. Such incremental development of the compulsory joinder rule would drastically undercut one of the rules principal purposes—the conservation of judicial resources and public funds.[188] Moreover, until such limitations are fashioned, district courts interpreting *Gonzales* risk inconsistent application of the remedy, which would pose unwarranted risks to prosecutors and defendants alike.

Given the New Mexico Supreme Court's clear intention of enforcing the mandatory nature of the compulsory joinder rule with the drastic remedy of a bar to subsequent prosecution for failure to properly join related charges, the time is ripe for a comprehensive review of the rule to ensure that prosecutors are given clear notice of the boundaries of their discretion in initiating criminal charges for different offenses arising from the same criminal episode. Ideally, changes would follow a thorough review by the Committee on the Rules of Criminal Procedure for the District Courts of the restrictions imposed by other states with similar joinder provisions with special attention paid to the case law interpreting those restrictions.[189]

The New Mexico Supreme Court would also benefit from the opportunity to solicit commentary from the legal community and other stakeholders. Public commentary on any proposed amendment will aid

188. *Gonzales*, 2013-NMSC-016, ¶ 26, 301 P.3d 380 ("'The purpose of [a] compulsory joinder statute, viewed as a whole, is twofold: (1) to protect a defendant from the governmental harassment of being subjected to successive trials for offenses stemming from the same criminal episode; and (2) to ensure finality without unduly burdening the judicial process by repetitious litigation.'" (alteration in original) (quoting Commonwealth v. Fithian, 599 Pa. 180, 961 A.2d 66, 75–76 (2008)).

189. *See* Rule 23-106(L) NMRA (describing the responsibilities of Rules Committees in the rulemaking process).

the Committee in shaping its ultimate proposal to the court by ensuring that the particular interests and idiosyncrasies of New Mexico's criminal justice system are not ignored. Though solicitation for commentary inevitably slows the rulemaking process,[190] the value that it would add to the court's consideration of the committee's ultimate recommendation outweighs its costs, given the relative infrequency with which the situation raised by the *Gonzales* case arises.[191]

Consistent with the foregoing discussion, the remainder of this section will propose various restrictions that may aid the Advisory Committee in considering whether and how to modernize New Mexico's joinder rule so as to maximize its utility in light of its stated purposes. The recommendations that follow will track the three limitations discussed above, taking into consideration the purposes behind the compulsory joinder rule as well as New Mexico's distinct characteristics. Ultimately, the recommendations are intended to provide an analytical framework around which future debate and modification may be based.

A. Prosecutorial Knowledge

Ideally, the prosecutorial knowledge limitation should function to protect diligent and ethical prosecutors from arbitrary bans on otherwise valid prosecutions that could result from the simple unavailability of necessary evidence.[192] A rule that stretches broadly to encompass the entire prosecutorial arm of the government, including police, investigators and prosecutors alike runs the risk of paralyzing prosecutorial objectives whenever inadequate communication between law enforcement and prosecuting attorneys results in imperfect information at the time of the initial prosecution. On the other hand, narrowing the rule so as to apply to only the prosecuting attorney to whom a case has actually been assigned could undermine the objectives of compulsory joinder by permitting piecemeal prosecution whenever the prosecuting attorney alleges that he never received actual notice of other joinable offenses.[193]

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190. Rule 23-106(K)(2)(b) NMRA ("Any proposed rule change that a committee recommends publishing for comment that is submitted to the Court after January 1 in an odd-numbered year shall not be considered by the Court for publication for comment until January 1 of the next odd-numbered year unless the Court declares emergency circumstances to exist.").

191. *See* Cara Micklesen, *Note and Comment: Adding Charges on Retrial: Double Jeopardy, Interstitialism, and Sate v. Lynch*, 34 N.M. L. REV. 539, 558 (2004) (noting that "generally, the State will charge all applicable offenses at once").

192. *See* supra note 133 and accompanying text.

193. For an example of a similar limitation, *see* Simmons v. State, 587 S.E.2d 312, 313 (Ga. Ct. App. 2003) (explaining that the state's compulsory joinder requirement

The best approach will thus strike the middle ground by taking into account the imperfections of law enforcement and the reality that attorneys working within the same organization often share confidential information with one another. Undeniably, neither police officers nor criminal investigators are invariably privy to all of the information needed to prosecute every crime arising out of a given criminal episode at the same time. Since evidence of different offenses is often uncovered by several different law enforcement officials at different times, the costs of attributing prosecutorial knowledge to the police outweighs the possible benefit of encouraging more complete, timely communication between law enforcement officials and prosecuting attorneys. Therefore, the prosecutorial knowledge prong should not be structured so broadly as to include non-attorney law enforcement officials.

Conversely, the rule should at least be wide enough to encompass all attorney staff within a given prosecutorial department.[194] Under this model, constructive knowledge of joinable offenses would run from the newest assistant attorney to the most senior supervisor. Such an approach would operate to protect prosecutors from inadvertent gaps in evidentiary or factual information while promoting the purposes of the compulsory joinder rule by baring piecemeal prosecution when the facts necessary to try joinable offenses together have reached the appropriate prosecutorial agency.

Finally, the prosecutorial knowledge restriction should be applied at the time of the return of the initial charging instrument. Although the ABA Standards urge states to employ a "flexible time factor,"[195] flexibility comes at the expense of clear guidance to prosecutors and higher transaction costs. Given the importance of the criminal joinder principle and the strong penalty that attaches when it is violated, a bright line rule is preferable to a fuzzy standard. An additional problem with the flexible time factor advocated by the ABA Standards is that it presumes that a prosecutor's failure to join companion offenses should result in a bar to subsequent trials, not prosecutions generally, as evidenced by its reluctance to apply the restriction when a motion for a continuance would be

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applies "only to such crimes which are *actually* known to the prosecuting officer *actually* handling the proceedings" (internal citation omitted).

194. *See, e.g.*, Jeffry v. District Court In and For Eighth Judicial Dist., 626 P.2d 631, 639 (Colo. 1981) (en banc) ("Deputy district attorneys have all the powers of the district attorney and matters within the knowledge of those deputies are imputed to the district attorney.").

195. ABA STANDARDS 13-2.3(c) cmt. ("The operation of the bar to subsequent prosecutions depends upon a flexible time factor.").

unreasonable.[196] Though such a standard may be a viable option in a jurisdiction where disposition by plea of guilty or nolo contendere does not constitute a "prosecution" for purposes compulsory joinder provisions, it has virtually no utility outside of that context. Moreover, a rule that permits subsequent prosecution for companion offenses where the prosecutor learns of essential facts or evidence only after the return of the charging instrument is consistent with New Mexico's current mandatory joinder provision, which requires the prosecutor to join all offenses "in one complaint, indictment or information."[197]

B. Offenses Within the Jurisdiction of the Same Court

Restrictions that limit the application of joinder and its attendant remedy to only those offenses that are cognizable within a single court are both common and uncontroversial. Amending New Mexico's criminal joinder rule to explicitly reflect its limited application to offenses cognizable by the district courts would effectively eliminate the risk that *Gonzales* would be interpreted to bar a valid prosecution for offenses arising in district court following a prosecution in municipal or magistrate court for different offenses arising out of a common factual nucleus. Limiting joinder's requirements to offenses that fall within the purview of a single court prevents the state from being arbitrarily deprived of its opportunity to prosecute offenses within the proper court when investigation of more serious felony charges prevents consolidation with their less serious counterparts at the time that the misdemeanor charges are ready for prosecution in the municipal court.

The best rule, however, will provide for a minor degree of flexibility to accommodate the rare situation where all offenses *could* be joined together in a single charging instrument for disposition in the same court but are deliberately filed in separate courts for the purpose of avoiding mandatory joinder requirements.[198] As noted above, the New Mexico Supreme Court implicitly endorsed such an approach in *State v. Tanton*,[199] where it suggested that "proceedings pending in an inferior court ought

196. *Id.* ("[A] companion offense known to the prosecution at a time when a motion to continue the first trial is a viable and reasonable alternative would be barred.").

197. Rule 5-203(A) NMRA.

198. Such a rule would prove workable, as courts routinely evaluate prosecutorial motives in assessing procedural rights, such as reasons for delay in speedy trial claims. *See, e.g.*, Barker v. Wingo, 407 U.S. 514, 530–33 (1972) (establishing the following four-part test used to determine whether a defendant's speedy trial rights have been violated: (1) the length of the delay; (2) the reason for the delay; (3) whether the defendant attempted to exercise speedy trial right; (4) prejudice to the defendant).

199. *Tanton*, 1975-NMSC-057, 88 N.M. 333.

to be abated when charges are instituted in district court in relation to the same episode."[200] Allowing an escape hatch under such circumstances promotes the interests of compulsory joinder in the context of bifurcated judicial systems without unduly burdening the prosecutorial process given the rarity with which they ordinarily arise.

C. Pleas of Guilty and Nolo Contendere

Whether a defendant's plea of guilty or nolo contendere to less than all offenses arising out of a single criminal episode should preclude subsequent prosecution for the remaining companion offenses turns on difficult policy preferences. On the one hand is fidelity to the principles underlying the compulsory joinder rule, including conservation of public resources and saving defendants from the trauma of multiple prosecutions. On the other is the legitimate concern that a calculating defendant could, in limited circumstances, successfully bar prosecution for pending companion offenses by pleading guilty to (presumably) less serious charges.[201] Here, the best compromise may be struck by taking into consideration the relationship between the district courts and courts of limited criminal jurisdiction, such as municipal courts, as well as the presence and effectiveness of other restrictions in preventing the problems that could arise in the absence of a strict no-bar rule.

In amending the compulsory joinder provision, the New Mexico Supreme Court need not adopt a no-bar rule in order to prevent defendants from upending legitimate prosecutorial objectives by pleading guilty to less than all chargeable offenses arising out of a single criminal episode. Although the bifurcated relationship between New Mexico's district and municipal courts does give rise to a plausible threat that a defendant could strategically bar a second prosecution for pending offenses in district court by pleading guilty to misdemeanor offenses in municipal court, any such risk may be substantially mitigated through the operation of other restrictions on the application of the joinder requirement. First, by restricting the application of joinder to offenses cognizable within the same court, the law would prevent a defendant from pleading guilty to offenses in one court in order to bar later prosecution for joinable offenses in another. Second, under the limitation restricting application of joinder to companion offenses known to the prosecutor at the time of the initial prosecution, it is extremely unlikely that a defendant would suc-

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200. *Id.* ¶ 18.

201. *See* Vestal & Gilbert, *supra* note 51, at 23 (noting that an inherent risk of same transaction joinder in criminal cases is that "a defendant who committed theft and murder in the same episode may plead guilty to the theft charge and claim a bar to subsequent prosecution on the murder charge").

ceed in suppressing a later prosecution for otherwise joinable offenses by virtue of pleading guilty to filed charges before sufficient evidence to try all offenses together has arisen.

Given that other limitations on joinder principles may readily prevent problems frequently associated with a defendant's plea of guilty or nolo contendere to less than all joinable offenses, the need to restrict application of the *Gonzales* remedy to trials alone is not significant. By construing the compulsory joinder rule broadly to preclude multiple "prosecutions," as opposed to "trials," following the prosecution's failure to join all related offenses into a single charging instrument, the law correctly recognizes that any criminal prosecution, whether disposed of by way of a plea of guilty or through verdict by a fact finder, imposes substantial costs on defendants and society alike. Since the threat that a defendant may game the compulsory joinder rule by pleading guilty to less than all offenses arising out of the same criminal episode is both slight and entirely preventable through judicious application of other limiting principles, the benefits of interpreting *Gonzales* to preclude only multiple trials following a prosecutor's failure to properly join companion offenses is not worth the costs it imposes on effective enforcement of the compulsory joinder rule.

VI. CONCLUSION

In *State v. Gonzales*, the New Mexico Supreme Court gave teeth to the long-standing compulsory joinder rule by holding that a prosecutor's failure to properly join related offenses for disposition in a single proceeding would result in a bar to subsequent prosecution of unconsolidated companion offenses. In attaching a sharp remedy to New Mexico's compulsory joinder provision, the court reinforced the mandatory nature of the rule and brought it up to speed with those adopted and rigorously enforced in other states. However, in the absence of further guidance from the New Mexico Supreme Court through formal amendment of the rule with committee commentary, prosecutors will lack the guidance needed to dutifully discharge their charging discretion and district courts will lack the tools they need to engage in a uniform and disciplined application of the remedy supplied by *Gonzales*. The rule should therefore be comprehensively reevaluated and modernized through the New Mexico Supreme Court's rule-making process following a judicious evaluation of the joinder provisions and related case law from other states, as well as a thorough review of commentary from New Mexico's legal community and the public at large.