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Two-Tiered Test for Double Jeopardy Analysis in New Mexico

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TWO-TIERED TEST FOR DOUBLE JEOPARDY ANALYSIS IN NEW MEXICO

Protection against double jeopardy is secured by the fifth amendment of the United States Constitution, which provides that no one shall "be subject for the same offense to be twice put in jeopardy of life or limb."[1] The double jeopardy clause is enforceable against states through the fourteenth amendment,[2] and a similar clause is embodied in the New Mexico Constitution.[3] The United States Supreme Court has defined the policy underlying double jeopardy protection as the protection of an individual from repeated attempts to convict him—attempts which would compel him to live in a continuing state of anxiety and insecurity.[4]

THE CASE

With its decision in *State v. Tanton (Tanton II)*,[5] the New Mexico Supreme Court established a two-tiered test designed to meet the policy underlying the double jeopardy clauses of both the United States and New Mexico Constitutions. The issue involved in *Tanton* was whether the defendant was being subjected to double jeopardy. Tanton had hit and killed a small child with his car. On the day of the accident, he was charged in municipal court with violation of municipal traffic ordinances.[6] Several days later, in district court, Tanton was charged by criminal indictment with homicide by

1. U.S. Const. amend. V.
2. Benton v. Maryland, 395 U.S. 784 (1969).
3. N.M. Const. art. 2, §15. The section provides, "nor shall any person be twice put in jeopardy for the same offense . . . ."
4. Green v. United States, 355 U.S. 184, 187 (1957).
5. 88 N.M. 333, 540 P.2d 813 (1975).
6. The following day a criminal complaint charging Tanton with vehicular homicide was filed in magistrate court, but no further action was taken on that particular charge. *Id.* at 334, 540 P.2d at 814.

vehicle[7] while driving recklessly,[8] or alternatively, homicide by vehicle while driving under the influence of alcohol.[9]

Tanton was subsequently convicted in municipal court of violation of several municipal ordinances, including driving under the influence of intoxicating liquors, failing to report an accident and leaving the scene of an accident involving injuries or death.[10] After the municipal court verdict was rendered, the defendant moved to dismiss the district court indictment. He alleged that, in light of the municipal court verdict, a district court prosecution for vehicular homicide would violate constitutional prohibitions against double jeopardy.[11]

The district court denied Tanton's motion. The New Mexico Court of Appeals granted an interlocutory appeal and reversed the district court.[12] The court of appeals held that the vehicular homicide prosecution in district court was barred by the constitutional prohibition against double jeopardy.[13] The New Mexico Supreme Court granted *certiorari* and, on review, held that the district court prosecution did not violate the double jeopardy clauses of either the United States or New Mexico Constitutions.[14]

With its decision in *State v. Tanton,* the New Mexico Supreme Court established a two-tiered test for double jeopardy analysis.[15] This note will discuss the supreme court's decision, the two-part double jeopardy analysis established by the court, and the effect of *Tanton* on future double jeopardy cases in New Mexico. In order to better evaluate the future impact of this decision, this note will also give a brief history of double jeopardy analysis in the United States and New Mexico.

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7. The actual charge was a violation of N.M. Stat. Ann. §66-8-101 (1978) (original version at N.M. Stat. Ann. §64-22-1 (1953)), which provides:

A. Homicide by vehicle is the killing of a human being in the unlawful operation of a motor vehicle.

B. Any person who commits homicide by vehicle while violating Section 66-8-102 or 66-8-113 NMSA 1978 is guilty of a felony.

8. N.M. Stat. Ann. §66-8-113 (1978) (original version at N.M. Stat. Ann. §64-22-3 (1953)) is the particular statute alleged to have been violated by the accused. This section in pertinent part defines reckless driving.

9. N.M. Stat. Ann. §66-8-102 (Supp. 1979) (original version at N.M. Stat. Ann. §64-22-2 (1953)) is the other statute alleged to have been violated by the accused. This section, *inter alia,* prohibits the operation of a vehicle by a person under the influence of intoxicating liquor.

10. 88 N.M. at 334 n.4, 540 P.2d at 814 n.4.

11. *Id.* at 334, 540 P.2d at 814.

12. State v. Tanton, 88 N.M. 5, 536 P.2d 269 (1975).

13. *Id.*

14. State v. Tanton, 88 N.M. 333, 540 P.2d 813 (1975).

15. *See* text accompanying notes 44-52 *infra.*

HISTORICAL DEVELOPMENT OF DOUBLE JEOPARDY ANALYSIS

State and federal courts have used three major methods to analyze double jeopardy problems. The three methods are the "same offense" analysis, the "lesser included offense" doctrine, and the "collateral estoppel" doctrine.

The same offense analysis arises from language contained in the fifth amendment, which specifies that no person should be subject to prosecution more than once for the same offense.[16] Two distinct definitions of same offense have emerged. The earlier and more popular definition is the "same evidence" test.[17] This test has been stated by the New Mexico Supreme Court as "whether the facts offered in support of one .... [offense] would sustain a conviction of the other."[18] If the same facts would sustain a conviction of the defendant in two separate trials, the second trial is barred by the constitutional prohibition against double jeopardy.

The "same transaction" test is the other means by which same offense is defined.[19] This test has also been applied by the New Mexico Supreme Court.[20] Where "the several offenses are the same, as where they arise out of the same transaction, and were committed at the same time, and were part of a continuous criminal act, ... they are susceptible of only one punishment."[21] If several separate crimes are committed as part of one criminal act, the same transaction test requires that all such crimes be tried together to prevent an infringement of double jeopardy protection.

The doctrine of lesser included offenses is the second method used by the courts to analyze double jeopardy questions. The New Mexico Supreme Court has defined this test to mean that a conviction or acquittal of a lesser offense necessarily included in a greater offense bars a subsequent prosecution for the greater offense.[22] The doctrine of lesser included offenses prevents prosecutors from making "trial runs" by prosecuting lesser offenses first, thereby perfecting the case for prosecution of the greater offense in a subsequent trial.[23]

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16. U.S. Const. amend. V; *see* N.M. Const. art. 2, §15.
17. Comment, *Twice in Jeopardy*, 75 Yale L.J. 262, 269-70 (1965).
18. Owens v. Abram, 58 N.M. 682, 684, 274 P.2d 630, 631 (1954), *cert. denied*, 348 U.S. 917 (1955).
19. *Supra* note 17, at 275-76.
20. State v. Quintana, 69 N.M. 51, 364 P.2d 120 (1961).
21. *Id.* at 57, 364 P.2d at 124.
22. *Ex parte* Williams, 58 N.M. 37, 265 P.2d 359 (1954).
23. *Supra* note 17, at 286-88. The doctrine of lesser included offenses must now be considered in analyzing all double jeopardy questions because the United States Supreme

The courts have adopted the collateral estoppel doctrine as the third method by which to analyze double jeopardy problems. The collateral estoppel doctrine emerged as a cornerstone in double jeopardy analysis when the United States Supreme Court held, in *Ashe v. Swenson,*[24] that collateral estoppel is a constitutional requirement of double jeopardy protection. The doctrine must, therefore, be considered by courts when they are confronted with any double jeopardy question.

COLLATERAL ESTOPPEL

Under the collateral estoppel doctrine, "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 law suit."[25] The doctrine was originally borrowed by the federal courts from civil law.[26] It was not widely used by state courts, however, until the United States Supreme Court's decision in *Benton v. Maryland.*[27]

In *Benton v. Maryland,* the Supreme Court held that the fifth amendment guarantee against double jeopardy is enforceable against the states through the fourteenth amendment.[28] Until that time, states had been free to establish their own standards for double jeopardy protection as long as the accused was not subjected to "fundamental unfairness."[29] In *Benton,* the Court required states to meet federal standards of double jeopardy protection in the future.[30]

Court recently held, in Brown v. Ohio, 432 U.S. 161 (1977), that a doctrine of lesser included offenses analysis is required by the fifth amendment double jeopardy protection. *See* note 65 *infra.*

24. 397 U.S. 436 (1970). *See* text accompanying notes 28-29 *infra.*

25. *Id.* at 443.

26. *Id.*

27. 395 U.S. 784 (1969).

28. The Court held that the fourteenth amendment incorporated the fifth amendment's provision against double jeopardy. *Id.* at 794.

29. This standard of "fundamental unfairness" was enunciated in Hoag v. New Jersey, 356 U.S. 464 (1958). In *Hoag,* the Court reviewed a claim that the petitioner had been subjected to double jeopardy in terms of whether he was deprived of fourteenth amendment due process. This was the standard of review for all claimed violations of double jeopardy against the state until *Benton v. Maryland,* because fifth amendment double jeopardy was not incorporated in the fourteenth amendment until *Benton.* If the state process could not be said to be "fundamentally unfair" to the defendant, the process did not violate the fourteenth amendment's guarantee of due process. 356 U.S. at 467.

30. Since the federal courts were already applying the collateral estoppel doctrine in criminal cases, the state would have to utilize it. At the time *Benton v. Maryland* was decided, however, collateral estoppel had not been declared a constitutional requirement of the fifth amendment double jeopardy protection.

A major problem remained after *Benton.* State courts were not sure which tests should be applied to meet the federal standards for double jeopardy protection. The United States Supreme Court resolved some of the confusion by holding, in *Ashe v. Swenson,*[31] that the elements of the collateral estoppel doctrine must be met to ensure compliance with the double jeopardy protection.[32] State courts no longer had discretion as to whether they would apply the collateral estoppel doctrine. They were now required to apply the doctrine as it was stated in *Ashe,* and were given some guidance in deciding double jeopardy questions.

NEW MEXICO'S STRUGGLE WITH DOUBLE JEOPARDY ANALYSIS

The New Mexico Supreme Court had an opportunity to apply the collateral estoppel doctrine in *State v. Tijerina.*[33] The court concluded that the only test adopted by the United States Supreme Court in *Ashe* for analyzing double jeopardy questions was the collateral estoppel doctrine.[34] This test was one "that looked to all the relevant matters of the trial, and sought to determine whether or not the jury, in reaching its verdict in the first trial, necessarily or actually determined the same issues which the State attempts to raise in the second trial."[35] Although the New Mexico Supreme Court stated that it would utilize the collateral estoppel standard set out in *Ashe,*[36] application of the standard proved to be troublesome.

Confusion over the application of the *Ashe* standard to multiple prosecutions of a defendant arising out of a single incident became

31. 397 U.S. 436 (1970).

32. The Court held, "The ultimate question to be determined, then, in the light of *Benton v. Maryland,* . . . is whether [collateral estoppel] is embodied in the Fifth Amendment guarantee against double jeopardy. We do not hesitate to hold that it is. For whatever else that constitutional guarantee may embrace, . . . it surely protects a man who has been acquitted from having to 'run the gantlet' a second time." 397 U.S. at 445-46 (footnote omitted). *See also* State v. Tanton, 88 N.M. 5, 536 P.2d 269 (1975).

33. 86 N.M. 31, 519 P.2d 127 (1973), *cert. denied,* 417 U.S. 956 (1974). In his first trial, defendant Tijerina was acquitted of charges which included (1) kidnapping a deputy sheriff, (2) false imprisonment of that deputy, and (3) assault on the Rio Arriba County Courthouse and jail. In the second trial, Tijerina was convicted of assault with intent to commit a violent felony (to kill or commit mayhem) and false imprisonment of another person. A violation of double jeopardy did not arise because Tijerina did not use an alibi defense and "when the jury acquitted Tijerina of all three charges [in the first trial], it did not necessarily conclude that he was not present at the jail that day, and thus did not commit any crimes. The jury simply concluded that he was not guilty of the crimes alleged." *Id.* at 34, 519 P.2d at 130.

34. *Id.* at 33, 519 P.2d at 129.

35. *Id.*

36. *Id.*

apparent in *State v. Maestas,*[37] decided by the court of appeals shortly after *State v. Tijerina.* In *Maestas,* the defendant was arrested and charged with unlawful possession of heroin and marijuana. He was convicted of unlawful possession of marijuana in magistrate court and was subsequently convicted of unlawful possession of heroin in district court. The defendant claimed that the subsequent conviction placed him in double jeopardy. The New Mexico Court of Appeals cited *State v. Tijerina* as the controlling authority on the double jeopardy claim, holding that the same evidence and same transaction tests had been abandoned in that case.[38] The court concluded that the collateral estoppel doctrine was to be used in lieu of the same evidence or same transaction test.[39] The court stated that in applying the collateral estoppel doctrine it would look to "whether the conviction in the first trial, necessarily or actually determined the same issues which the state raised in the second trial."[40] After applying the collateral estoppel doctrine to the facts of the case in *Maestas,* the court of appeals held that the issues presented in the first trial were the same as would be raised in the second trial. Therefore, the second prosecution was held to be barred.[41]

Foreshadowing later New Mexico case law, Chief Judge Wood dissented in *Maestas* on the ground that the collateral estoppel doctrine had been incorrectly applied.[42] He believed that the collateral estoppel standard would not bar a second prosecution in that case. He also advocated the use of other tests when collateral estoppel would not operate to bar a subsequent prosecution. One test he advocated was the same evidence test.[43]

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37. 87 N.M. 6, 528 P.2d 650 (Ct. App.), *cert. denied,* 87 N.M. 5, 528 P.2d 649 (1974). In this case the defendant was arrested for illegal possession of heroin and marijuana on November 21, 1972. On December 7, 1972, a grand jury indictment was filed charging the defendant with unlawful possession of a controlled substance, heroin. On April 17, 1973, the defendant moved to dismiss the indictment because on January 24, 1973, he had been convicted of unlawful possession of less than one ounce of marijuana.

38. It is clear from a reading of the case that the court of appeals relied on language in *State v. Tijerina* which said, "Therefore, the test proposed in *Ashe v. Swenson* . . . will be utilized by this Court . . . ." 86 N.M. at 33, 519 P.2d at 129.

39. 87 N.M. at 8, 528 P.2d at 652.

40. *Id.*

41. *Id.* at 10, 528 P.2d at 654.

42. *Id.* (Wood, J., dissenting).

43. *Id.* In reaching this decision, the Chief Judge discussed several New Mexico cases which applied the same transaction test. Concluding that, with exception of State v. Anaya, 83 N.M. 672, 495 P.2d 1388 (Ct. App. 1972), the cases that applied that test limited it to necessarily included offenses. A necessarily included offense is one in which two offenses are involved, but proof of the lesser offense is necessary to proof of the greater offense.

The defendant in *Maestas* petitioned the New Mexico Supreme Court for a writ of

One year later, Chief Judge Wood wrote the majority opinion for the court of appeals in *State v. Tanton (Tanton I).*[44] After considering each test that has been used to analyze double jeopardy questions, and applying each test to the specific facts of *Tanton,* the court held that the prosecution in the second trial would not be barred under any of those tests. The second prosecution was, however, barred by the courts' policy against piecemeal prosecutions.[45]

THE NEW MEXICO SUPREME COURT DECISION IN *STATE v. TANTON (TANTON II)*

In the process of making its decision in *State v. Tanton (Tanton II),*[46] the New Mexico Supreme Court set out the methods by which New Mexico courts should analyze double jeopardy questions. The supreme court held that both the constitutionally-required doctrine of collateral estoppel and the doctrine of lesser included offenses must be considered at the outset of any double jeopardy analysis.[47] The court held that collateral estoppel is a constitutional defense which can be raised by a defendant in a second trial only after an *acquittal* in the first trial on the same issue.[48] On the facts of the case, the court held that collateral estoppel was not applicable in *Tanton* because the defendant was *convicted* in municipal court.[49] Therefore, collateral estoppel was not available to Tanton as a defense.

The court also discussed the doctrine of lesser included offenses. It stated that "a *conviction* or *acquittal* of a lesser offense necessarily included in a greater offense bars a subsequent prosecution for the greater offense."[50] The court held that the doctrine of lesser in-

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certiorari, but *certiorari* was denied. Since less than a year later State v. Tanton, 88 N.M. 333, 540 P.2d 813 (1975), expressly overruled *Maestas,* it is unclear why *certiorari* was denied.

44. 88 N.M. 5, 536 P.2d 269 (1975).

45. 88 N.M. at 10, 536 P.2d at 274. The court specifically held that collateral estoppel, the same evidence test, the lesser included offense doctrine and the merger of offenses doctrine, when applied, would not bar the second trial for vehicular homicide. The court did not apply the same transaction test because of the difficulties in defining "act" or "transaction." It seems clear that if the court had applied the same transaction test, the second trial would have been barred because all charges against Tanton arose from one transaction, namely, hitting and killing a young girl with his car. Indeed, the New Mexico Supreme Court assumed that the trial court was correct in holding that the charges were all based on the same occurrence.

46. 88 N.M. 333, 540 P.2d 813 (1975).

47. *Id.* at 335, 540 P.2d at 815.

48. *Id.*

49. *Id.*

50. *Id.* (emphasis added).

cluded offenses would not bar the second trial in *Tanton.* There was no bar because the indictment to be used in the second trial charged Tanton with vehicular homicide while driving recklessly, or alternatively, vehicular homicide while driving under the influence of intoxicating liquor.[51] The court reasoned that the lesser offense of driving while under the influence of intoxicating liquor is not necessarily included in the greater offense of homicide by vehicle due to reckless driving.[52]

The court also held that if neither the collateral estoppel doctrine nor the doctrine of lesser included offenses applies, then the same offense analysis must be used.[53] The court indicated that the same evidence test rather than the same transaction test should be applied to determine whether the defendant is being tried twice for the same offense.[54] After applying the same evidence test to the facts in *Tanton,* the court concluded that the defendant was not being tried twice for the same offense, because "the facts offered in municipal court to support a conviction for driving while under the influence of intoxicating liquors would not necessarily sustain a conviction for homicide by vehicle in district court."[55]

The supreme court also reviewed the holding of *State v. Maestas,* where the court of appeals had concluded that the same evidence test and the same transaction test had been abandoned.[56] In *Tanton II,* the New Mexico Supreme Court held that the same evidence test had not been abandoned and that it should have been applied in *State v. Maestas.*[57] On this issue, the court expressly overruled *State v. Maestas.*[58] The supreme court agreed with the court of appeals' rejection of the same transaction test. Since neither test had been held to be constitutionally-required, the court concluded that the same transaction test "has little or nothing to recommend it over the same

51. If the charge had not been in the alternative, the conviction in municipal court for driving under the influence of alcohol would have barred prosecution for vehicular homicide due to reckless driving.

52. 88 N.M. at 335, 540 P.2d at 815.

53. *Id.*

54. In reaching this conclusion, the court said, "The generally accepted rule and the one which we approve and apply today is the 'same evidence' test which was first stated in New Mexico as 'whether the facts offered in support of one [offense], would sustain a conviction of the other.' *Owens v. Abram,* 58 N.M. 682, 274 P.2d 630 (1954), *cert. denied,* 348 U.S. 917 (1955) . . . ." *Id.* (footnotes omitted).

55. 88 N.M. at 335, 540 P.2d at 815.

56. *Id.* The New Mexico Court of Appeals held that the same evidence and same transaction tests had been abandoned by the United States Supreme Court in *Ashe v. Swenson.* State v. Maestas, 87 N.M. at 8, 528 P.2d at 652.

57. 88 N.M. at 335, 540 P.2d at 815.

58. *Id.*

evidence test, and in practice it is so vague and obscure as to be far more difficult to apply."[59]

In *Tanton II,* the supreme court reversed *Tanton I* saying that the prohibition against piecemeal prosecutions was merely a judicial policy, not a rule of law. Although the court stated that it adhered to this policy, it nevertheless refused to apply it to bar the district court prosecution. It can be inferred from the court's opinion that it felt *Tanton* was not a proper case in which to apply this judicial policy.[60]

After *Tanton II,* New Mexico has a two-tiered double jeopardy analysis. The first consideration in any double jeopardy challenge is whether the constitutionally-required doctrine of collateral estoppel and the doctrine of lesser included offenses apply.[61] If neither of these doctrines apply to the facts of the case under consideration, then the same evidence test must be applied to determine if the defendant is being tried twice for the same offense.[62]

THE IMPACT OF *TANTON II*

Ashe v. Swenson left unanswered the question of whether double jeopardy protection exists when collateral estoppel does not bar a subsequent prosecution.[63] In *Tanton II,* the New Mexico Supreme Court answered the question affirmatively by holding that the doctrine of lesser included offenses must also be considered.[64] The United States Supreme Court has since held, in *Brown v. Ohio,*[65]

59. *Id.* at 336, 540 P.2d at 816. The court went on to agree with Chief Judge Wood in his dissenting opinion in *State v. Maestas,* that all of the New Mexico cases, except State v. Anaya, 83 N.M. 672, 495 P.2d 1388 (Ct. App. 1972), which applied the same transaction test, were cases involving lesser and necessarily included offenses in the first trial, which would bar a second prosecution anyway. *State v. Anaya* was expressly overruled insofar as it applied the same transaction test.

60. The supreme court cited State v. Goodson, 54 N.M. 184, 217 P.2d 262 (1950) as an example of when this judicial policy should not apply. The court did not, however, cite an example of a case where the judicial policy should apply.

61. Since in Brown v. Ohio, 432 U.S. 161 (1977), the United States Supreme Court held the concept of lesser included offenses to be a constitutional requirement of the double jeopardy protection, both this concept and collateral estoppel are constitutionally-required. Therefore, these tests must always be made at the onset of all courts' considerations of double jeopardy questions.

62. 88 N.M. at 335, 540 P.2d at 815.

63. State v. Maestas, 87 N.M. 6, 528 P.2d 650 (Ct. App. 1974), contains an example of such an interpretative problem. There, the New Mexico Court of Appeals interpreted the *Ashe* collateral estoppel doctrine as replacing the same evidence and same transaction tests. In *Maestas,* the court of appeals held that the collateral estoppel doctrine was to be applied instead of these tests and the court therefore refused to consider them.

64. 88 N.M. at 335, 540 P.2d at 815.

65. 432 U.S. 161 (1977). The Supreme Court stated, "Whatever the sequence may be, the Fifth Amendment forbids successive and cumulative punishment for a greater and lesser included offense." *Id.* at 169.

that the doctrine of lesser included offenses is also a constitutional requirement of double jeopardy protection.[66] Therefore, courts must now consider that doctrine in addition to the collateral estoppel doctrine when confronted with a double jeopardy question.

In *Tanton II,* the New Mexico Supreme Court held that the same evidence test must be applied to determine whether the defendant is being tried twice for the same offense if neither the collateral estoppel doctrine nor the doctrine of lesser included offenses bars a subsequent prosecution.[67] Since the United States Supreme Court has not held that the same offense analysis is required in double jeopardy cases by the fifth amendment, it is not clear whether courts outside New Mexico must make that analysis when considering double jeopardy questions.

The same evidence test virtually annuls the constitutional guarantee against double jeopardy.[68] The danger of using the same evidence test in double jeopardy analysis can be seen where a single criminal act involves several victims. Under the same evidence test, a separate prosecution may be brought for each victim because different evidence as to each victim will be required in each case.

It is difficult to imagine a situation in which the same evidence test will bar a subsequent prosecution except when the same defendant is charged with the same violation of the same statute against the same victim.[69] For example, when a person is charged with unlawful possession of the controlled substances of heroin and marijuana, the evidence required to prove unlawful possession of heroin is different from that required to prove unlawful possession of marijuana. The difference in proof is in proving possession of marijuana rather than possession of heroin. If the doctrine of collateral estoppel or lesser included offenses does not apply, the accused could be prosecuted as many times as there are charges of unlawful possession of different controlled substances. This would subject the defendant to unnecessary prosecutorial harassment—the very conduct the double jeopardy clause seeks to prevent.[70] It is difficult to see how

66. The purpose of holding a test or doctrine to be "constitutionally-required" is to assure that each defendant is offered the same protection. Determining what the United States Constitution requires is a matter of constitutional interpretations of the protections afforded.

67. 88 N.M. at 335, 540 P.2d at 815.

68. 397 U.S. at 451 (Brennan, J., concurring). Mr. Justice Brennan was joined in his concurring opinion by Mr. Justice Douglas and Mr. Justice Marshall. Mr. Justice Douglas is no longer on the Court, but Justices Brennan and Marshall continue to support the same transaction test.

69. *See* Ashe v. Swenson, 397 U.S. 436, 451 (1970) (Brennan, J., concurring).

70. Green v. United States, 355 U.S. 184, 187 (1955).

this policy is served by the same evidence test, even if this test is applied in addition to the collateral estoppel doctrine and the doctrine of lesser included offenses.[71]

Two shortcomings exist in the application of the collateral estoppel doctrine to double jeopardy questions: it will not bar a subsequent prosecution where any issue not raised in the first trial is presented in the second trial, and it will not bar a subsequent prosecution when the first trial ends in a verdict of guilty.[72] The concept of lesser included offenses is too narrow to provide adequate protection, since it bars second prosecutions only where they necessarily include proof required for conviction of a lesser offense for which the defendant has already been tried.[73]

The constitutional prohibition against double jeopardy should embody the collateral estoppel doctrine and the doctrine of lesser included offenses, and it should also include the same transaction test as a constitutionally-required means of defining same offense. The same transaction test provides the maximum protection against multiple prosecutions by requiring that all criminal charges against a defendant which arise out of one criminal transaction be brought at one trial.[74] Justice Brennan agrees with this position. He has stated, "[C]orrection of the abuse of criminal process should not in any event be made to depend on the availability of collateral estoppel .... That evil will be most effectively avoided, and the Clause can thus best serve its worthy ends, if 'same offence' is construed to embody the 'same transaction' standard."[75]

The principal shortcoming of the same transaction test is in defining the word "transaction."[76] The utility of the test depends on how clearly the term "same transaction" is defined. The definition of "transaction" should, however, follow logically from the goals underlying the policy of prohibiting multiple prosecutions.[77] "Trans-

71. *See* Comment, *Twice in Jeopardy*, 75 Yale L.J. 262 (1965). The commentator states, "[A]s we shall see, none of the [same evidence] tests is adequate to implement the basic policies of double jeopardy. Bishop aptly describes the same evidence approach as one 'which, if fully adopted, could render practically void the constitutional inhibition.' 1 Bishop, Criminal Law §1048 (9th ed. 1923)...." *Id.* at 275.

72. 397 U.S. at 459 & n.13 (Brennan, J., concurring).

73. *See generally Ex parte* Williams, 58 N.M. 37, 265 P.2d 359 (1954).

74. 397 U.S. at 453 n.7 (Brennan, J., concurring). The same transaction test would allow for exceptions to mandatory joinder of all crimes which arise out of the same transaction. One exception would allow a separate trial where a crime is not completed or discovered until after the commencement of a prosecution for other crimes arising out of the same transaction. Another exception is where joinder would be prejudicial to either the prosecution or defense.

75. 397 U.S. at 459-60 (Brennan, J., concurring).

76. *Twice in Jeopardy, supra* at 276.

77. *Id.* at 277 & n.70.

action" should be defined to prohibit only those multiple prosecutions which the constitutional prohibition against double jeopardy was intended to prohibit, namely those which subject a defendant to undue harrassment and compel him to live in a state of continuing anxiety.[78] Rule 13 of the Federal Rules of Civil Procedure deals effectively with this problem by making compulsory all counterclaims arising out of the same transaction or occurrence from which the plaintiff's claim arose.[79] Surely such a definition of same transaction could be successful in criminal cases as well.

CONCLUSION

In *State v. Tanton,* the New Mexico Supreme Court established a two-tiered test for double jeopardy analysis. The court held that the first inquiry to be made is whether the constitutionally-required doctrines of collateral estoppel or lesser included offenses prohibit a second prosecution of the same defendant. If neither of these doctrines bars a second prosecution, the court must apply the same evidence test to determine whether the defendant is being tried twice for the same offense. The underlying fifth amendment policy protecting defendants from exposure to double jeopardy would, however, be best served if same offense is defined by use of the same transaction test.

J. RANDY TURNER

78. 355 U.S. at 187.

79. Fed. R. Civ. P. 13 states: "A pleading shall state as a counterclaim any claim . . . the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim . . . ."