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Double Jeopardy and the Identity of Offenses

The maxim "nor shall any person be twice put in jeopardy of life or liberty for the *same offense*" is incorporated into Article I, Section 9, of the Louisiana Constitution.¹ (Emphasis added.) Although the phraseology may differ,² this maxim is accepted in all federal³ and state⁴ courts. The underlying theory supporting the immunity from more than one prosecution for the same offense is the belief that repeated prosecutions result in persecution by the state. The wisdom of the guarantee against double jeopardy is not questioned, but the precise meaning of the maxim, particularly the scope of the term "same offense," has been at issue with diversity of opinion since its beginning before the common law.⁵ A variety of criteria are employed with a resulting discrepancy in the degree of protection afforded. To illustrate, a New Jersey court⁶ concluded that where a defendant ignited a building and in the resulting fire a victim was fatally burned, a prosecution for arson barred a subsequent prosecution for murder because both offenses emanated from the same criminal transaction. Compare, however, the approach taken by the United States Supreme Court in *Ebeling v. Morgan*.⁷ There separate convictions were upheld where a defendant cut into and opened six mail sacks with the intent to rob. Each successive entry into a different mail sack resulted in a separate robbery

1. LA. CONST. art. I, § 9. LA. CODE OF CRIM. PROC. art. 274 (1928) provides: "No person shall be twice put in jeopardy of life or liberty for the same offense."

2. *E.g.*, it is sometimes phrased that a person shall not be twice placed in jeopardy of *life or limb* and one construction placed thereon has been that the constitutional prohibition is limited to offenses punishable as felonies. BEALE, CRIMINAL PLEADING AND PRACTICE § 67 (1899).

3. U.S. CONST. amend. V provides: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." This provision applies only to proceedings in federal courts. *United States v. Lanza*, 260 U.S. 377 (1922).

4. It is applied through either constitutional provisions, statutes, or as a part of the general body of common law applicable within the state. 1 BISHOP, CRIMINAL LAW §§ 980-981 (9th ed. 1923). In *Holt v. State*, 160 Tenn. 366, 371, 24 S.W.2d 886, 887 (1929), the court observed that "[w]hile the words of the Constitution confine the guarantee to cases involving life or limb, underlying principles of the common law go beyond, and where the protection against second jeopardy is not given by the Constitution, it is secured by the common law."

5. *Ibid.* The doctrine was expressed in the Magna Charta and followed by common law courts. *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873). In *State v. Yokum*, 155 La. 846, 874, 99 So. 621, 631 (1924), the court declared: "While the doctrine that no one shall be twice put in jeopardy for the same offense has always been embedded in the common law of England, as well as the Roman law, 'Nemo bis punitur pro eodem delicto,' it is impossible to trace the doctrine to any distinct origin, as it is part of the universal law of reason, justice, and conscience."

6. *State v. Cooper*, 13 N.J.L. 361, 25 Am. Dec. 490 (1833).

7. 237 U.S. 625 (1915).

offense. These two decisions, the first affording a maximum of protection and the second a minimum, can be explained only by their employment of different tests for determining what is the "same offense."

Before considering the several tests used by Louisiana and other jurisdictions in determining double jeopardy, it is necessary to define and distinguish certain terms. Initially, a distinction is drawn between acts, transactions, and the criminal offense which attaches to legally proscribed conduct. A single *act* may result in the commission of several crimes. For example, *A*, entrusted with *B*'s cotton, represents himself as the owner to *C*, who purchases the cotton. Here, *A* has, in a single act, committed theft of (embezzled) *B*'s cotton and also committed theft of (obtained by false pretenses) *C*'s money.⁸ Although *A* has performed only one physical act, he has committed two separate and distinct thefts from different persons. A closer case is presented where there is only a single injury to one victim. For example, an act of sexual intercourse with a child under the age of twelve and related to the offender in the second degree of consanguinity will result in the commission of the distinct crimes of aggravated rape⁹ and incest.¹⁰ Moreover, this one *act* has violated several statutes proscribing offenses affecting the public morals, particularly those relating to juveniles.¹¹ A continuous, unlawful *transaction* will often result in the commission of several crimes. For example, a defendant enters a grocery store bent on robbery and kills two persons in successive order. A Louisiana court found this, while being a single transaction, to be two distinct criminal homicides and, thus, conviction for one did not bar subsequent prosecution for the other.¹² Similarly, it has been held that a gambler, participating in seventy-five hands of poker at one sitting, commits a separate prosecutable offense by playing each hand.¹³

TESTS OF IDENTITY AT COMMON LAW

A majority of jurisdictions apply the so-called "same evidence" test or a variation thereon. As originally stated in

8. *State v. Faulkner*, 39 La. Ann. 811, 2 So. 539 (1887). See LA. R.S. 14:67 (1950), and comments following.

9. LA. R.S. 14:41, 42 (1950).

10. *Id.* 14:78.

11. *E.g.*, *id.* 14:92, 81, and accompanying comments.

12. *State v. Roberts*, 170 La. 727, 129 So. 144 (1930).

13. *Johnson v. Commonwealth*, 201 Ky. 314, 256 S.W. 388 (1923).

The King v. Vandercomb and Abbott,¹⁴ "unless the first indictment were such as the prisoner might have been convicted upon by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second." That is, the defendant is not being twice placed in jeopardy for the same offense. The "same evidence" inquiry purports to shield the defendant from the risk of being prosecuted for a lesser or included offense and, subsequently, for the greater or major offense. In other words, it insures against a splitting of the offense to facilitate multiple prosecutions.¹⁵ But, where the first indictment requires proof of an element not necessary for conviction on the second indictment, multiple prosecutions for seemingly the same offense have been permitted.¹⁶ Some jurisdictions apply the "same evidence" test in reverse so as to question whether evidence necessary to support the first indictment would have sustained a conviction of the offense charged in the second indictment.¹⁷ Still other jurisdictions apply the test both ways and inquire into whether the evidence necessary to support either indictment would have sustained a conviction for the offense charged in the other indictment.¹⁸ The "same evidence" test works an injustice when applied to a situation where seventy-five hands of poker are played at one sitting. A Kentucky court stated that a separate prosecution would be allowed for each hand because evidence necessary to

14. 2 Leach 708, 720, 168 Eng. Rep. 455, 461 (1796).

15. The test has been variously stated. *E.g.*, "If the evidence which is necessary to support the second indictment was admissible under the former, was related to the same crime and was sufficient if believed by the jury to have warranted a conviction of that crime, the offenses are identical, but if the facts which will convict on the second prosecution would not necessarily have convicted on the first, the first will not be a bar." *Medlock v. Commonwealth*, 216 Ky. 718, 720, 288 S.W. 670, 671 (1926).

16. *E.g.*, *Hall v. State*, 134 Ala. 90, 32 So. 750 (1902) (for a single act of sexual intercourse, prosecutions for both rape and seduction were allowed because conviction for either crime required proof of one or more elements not required for conviction of the other crime); *State v. Bowden*, 154 Fla. 511, 18 So.2d 478 (1944) (for a single act of sexual intercourse, prosecutions for both rape and unlawful carnal intercourse with an unmarried female of previous chaste character under the age of 18 years were upheld because the elements of lack of consent and force were not necessary proofs for conviction of the latter offense); *State v. Jacobson*, 197 Iowa 547, 197 N.W. 638 (1924) (two prosecutions allowed, one for assault with intent to commit rape, the other for lewd, immoral, and lascivious acts with a child). See *Rodrigues v. Superior Court*, 27 Cal.2d 500, 165 P.2d 1 (1946); *State v. Rose*, 89 Ohio St. 383, 106 N.E. 50 (1914).

17. *Price v. State*, 78 Ga. 108, 45 S.E.2d 84 (1947); *State v. Brownrigg*, 87 Me. 500, 33 Atl. 11 (1895).

18. *E.g.*, *Medlock v. Commonwealth*, 216 Ky. 718, 288 S.W. 670 (1926); *State v. Thompson*, 241 Minn. 59, 62 N.W.2d 512 (1954); *State v. Shoopman*, 11 N.J. 333, 94 A.2d 493 (1953); *Owens v. Abram*, 58 N.M. 682, 274 P.2d 630 (1954); *Huffman v. Smith*, 34 Wash.2d 914, 210 P.2d 805 (1949).

support an indictment for playing one hand would not be sufficient to procure a conviction for playing any other hand at the same sitting.¹⁹ Moreover, this test presents the question of whether the evidence on the second indictment means only the necessary proofs to sustain a conviction under that indictment, all of the allegations contained in the indictment, or all of the evidence to be introduced in the second prosecution. It would appear that under a proper application of the test, evidence supporting the second indictment does not mean all of the facts which might have been alleged, rather it should include only the *essential* facts to support the indictment, i.e., to sustain a conviction for the last charged offense.²⁰ Otherwise, the plea could conceivably be determined by the existence of surplusage in the alleged facts.

A minority of jurisdictions look to the criminal transaction giving rise to the several offenses and conclude that where multiple crimes result from a single transaction, the state is allowed to prosecute for only one of the crimes committed.²¹ This inquiry concerns the physical transaction of the defendant rather than the resulting crimes, any number of which may be composed of elements uncommon to the other resulting crimes.²² The leading case of *State v. Cooper*²³ is illustrative of this approach. There, the defendant ignited a building in which a victim was fatally burned. The New Jersey court disallowed a prosecution for murder following an earlier prosecution for arson. Some jurisdictions have applied the "same transaction" test when the "same evidence" test appeared to render harsh results.²⁴ Still other jurisdictions have used the two tests interchangeably.²⁵

19. *Johnson v. Commonwealth*, 201 Ky. 314, 256 S.W. 388 (1923).

20. See Note, 40 YALE L.J. 462 (1931).

21. *Trawick v. Birmingham*, 23 Ala. App. 308, 125 So. 211 (1929); *Ruffin v. State*, 29 Ga. App. 214, 114 S.E. 581 (1922); *Mullins v. Commonwealth*, 216 Ky. 182, 286 S.W. 1042 (1926); *People v. Johnson*, 81 Mich. 573, 45 N.W. 1119 (1890); *Beaman v. State*, 69 Okla. Cr. 455, 104 P.2d 260 (1940); *Whitten v. State*, 94 Tex. Cr. Rep. 144, 250 S.W. 165 (1923); *State v. Houchins*, 102 W.Va. 169, 134 S.E. 740 (1926).

22. "These courts proceed upon the theory that a single physical act can be the basis of only one offense, and the practical effect of this theory is to interpret 'same offense' in the double jeopardy prohibition as 'same transaction.'" Comment, 19 IOWA L. REV. 596, 597 (1934).

23. 13 N.J.L. 361, 25 Am. Dec. 490 (1833).

24. *Roberts v. State*, 14 Ga. 8, 58 Am. Dec. 528 (1853) (defendant convicted of burglary and subsequently prosecuted for robbery. The court discussed the "same evidence" test and then used the "same transaction" test to uphold a plea of double jeopardy).

25. *Estep v. State*, 11 Okla. Cr. 103, 143 Pac. 64 (1914); *Barton v. State*, 26 Okla. Cr. 150, 222 Pac. 1019 (1924); *Hochderffer v. State*, 34 Okla. Cr. 215,

Some courts determine double jeopardy on the basis of degrees of the offenses. Where the first prosecution was for an element of or the whole of the offense charged in the second indictment, the defendant is being twice put in jeopardy for the same offense.²⁸ This has been termed the "essential element" test.

TESTS OF IDENTITY IN LOUISIANA

Separate Prosecutions for one Act; Same Transaction

In an early Louisiana case, *State v. Cheevers*,²⁷ the Louisiana Supreme Court stated that a person shall not be "punished twice for the *same criminal act*" (as distinguished from the same criminal offense). There, the defendant was prosecuted under separate indictments, first for assault and battery and subsequently for maiming. In upholding the plea of double jeopardy, the court did not elaborate on the possibility of multiple crimes arising from a single act. But, several years later, in *State v. Faulkner*,²⁸ the Louisiana Supreme Court stated: "It has been held, in numerous case, that where a particular act is of such a character as to constitute two distinct crimes, conviction for one will not bar prosecution for the other . . . *though both offenses arise out of the same act.*"²⁹ (Emphasis added.) It appears that *Cheevers* has not been followed in subsequent Louisiana cases, and the courts have adopted the approach taken in *Faulkner*.³⁰

Moreover, Louisiana courts have not accepted the "same transaction" test as illustrated by the approach taken in *State v. Leslie*.³¹ There the defendant was charged with several personal injury crimes arising from a "general family row," and

245 Pac. 902 (1926); *Worley v. State*, 42 Okla. Cr. 240, 275 Pac. 399 (1929); *King v. State*, 73 Okla. Cr. 411, 121 P.2d 1021 (1942); *Beaman v. State*, 69 Okla. Cr. 455, 104 P.2d 260 (1940). These cases vacillate between "same evidence" and "same transaction" tests. See Comment, 8 OKLA. L. REV. 223 (1955).

26. *Gladden v. State*, 24 Ala. App. 188, 132 So. 435 (1931); *Sanford v. State*, 75 Fla. 393, 78 So. 340 (1918); *Usary v. State*, 172 Tenn. 305, 112 S.W.2d 7 (1937). See Note, 2 DE PAUL L. REV. 263, 266 (1953) for discussion of decisions determining double jeopardy on the basis of degrees of offenses.

27. 7 La. Ann. 40, 41 (1852).

28. 39 La. Ann. 811, 2 So. 539 (1887).

29. *Id.* at 812, 2 So. at 540.

30. *State v. Calvo*, 240 La. 75, 121 So.2d 244 (1960); *State v. Montrieffe*, 165 La. 296, 115 So. 493 (1928). See *Slovenko, The Law on Double Jeopardy*, 30 TUL. L. REV. 409 (1956). *But see State v. Augustine*, 29 La. Ann. 119 (1877), where the court reverted to the language expressed in *Cheevers*.

31. 167 La. 967, 120 So. 614 (1929).

the court observed: "The several offenses grew out of the same difficulty and were so closely linked and connected as to form a *single transaction*. . . . It is a well settled rule of law that a person may commit separate and distinct crimes at the same time or in immediate connection and be indicted for each of said crimes."³² This view is expressed throughout later Louisiana cases.³³

The "Same Evidence" Test

As stated by the Louisiana Supreme Court in *State v. Foster*,³⁴ the "same evidence" test in Louisiana questions "whether the evidence necessary to support the second indictment would have been sufficient to have procured a legal conviction on the first."³⁵ As thus phrased, it appears that Louisiana courts would follow the view that evidence on the second indictment means only that evidence necessary to sustain a conviction and not all of the allegations contained in the indictment, or all of the evidence to be introduced in the second prosecution.³⁶ It is noted, however, that the issue has never been clearly raised so as to afford a definitive explanation of what evidence the test as applied in Louisiana contemplates. In *State v. Barrett*,³⁷ because the statute required proof of an additional element for conviction on the first indictment, two prosecutions were upheld, the first for forgery and the second for publishing a forged instrument. Also because of an additional element required for conviction under the first indictment, even where both offenses arise from a single transaction, the "same evidence" test will allow separate prosecutions for attempted arson and assault

32. *Id.* at 972, 120 So. at 615.

33. *State v. Calvo*, 240 La. 75, 121 So.2d 244 (1960); *State v. Montrieffe*, 165 La. 296, 115 So. 493 (1928); *State v. Roberts*, 152 La. 283, 93 So. 95 (1922); *State v. Hill*, 122 La. 711, 48 So. 160 (1909); *State v. Barrett*, 121 La. 1058, 46 So. 1016 (1908). The foregoing cases evidence the refusal of the courts to apply the "same transaction" test in Louisiana. The distinction between single and separate transactions has been made, however, although the "same transaction" test was not applied. *State v. Lopez*, 169 La. 247, 125 So. 65 (1929); *State v. Weeden*, 164 La. 713, 114 So. 604 (1927); *State v. Xenos*, 138 La. 113, 70 So. 55 (1915); *State v. Anderson*, 135 La. 326, 65 So. 478 (1914); *State v. Heard*, 107 La. 60, 31 So. 384 (1902). A determination of whether the several offenses arose out of a single act or transaction is often necessary for purposes of ascertaining the number of indictments permissible.

34. 156 La. 891, 101 So. 255 (1924).

35. *Id.* at 897, 101 So. at 258.

36. Numerous charges in Louisiana may be included in so-called "short-form indictments" which do not contain specific factual allegations, and it is suggested that evidence under such indictments should include only those elements necessary to sustain a conviction for the crime charged. See Note, 40 *YALE L.J.* 462 (1931).

37. 121 La. 1058, 46 So. 1016 (1908).

and battery;³⁸ larceny and burglary;³⁹ cattle stealing and carrying a concealed weapon;⁴⁰ manufacturing, selling and disposing of liquor and possession of liquor;⁴¹ prohibited sale of beer to one person and prohibited sale of liquor to another;⁴² obtaining one person's money by false pretenses (theft) and embezzling another's cotton (theft);⁴³ successive murders of different persons;⁴⁴ and assault and battery upon different persons.⁴⁵

The "Responsive Verdict" Test

In *State v. Foster*⁴⁶ a second criterion was used to determine whether the defendant was being twice tried for the same offense. This test supplements the "same evidence" test and questions "whether on the former trial the accused could have been convicted of the crime charged against him on the second trial."⁴⁷ This is essentially a question of whether a verdict of guilty of the crime charged in the second indictment would have been responsive to the first indictment.⁴⁸ If so, and if the court in the first trial had jurisdiction to render the verdict, the defendant is being twice placed in jeopardy for the same offense. In *Foster*, the defendant could not have been convicted of assault and battery in the first trial for attempted arson and, therefore, the "responsive verdict" test proved unavailing in the attempt to establish double jeopardy. In a 1960 case, *State v. Calvo*,⁴⁹ the defendants were first prosecuted for murder predicated upon the felony-murder doctrine⁵⁰ and, subsequently, for simple robbery. The Louisiana Supreme Court found that since a verdict of guilty of simple robbery would not have been responsive to the indictment for murder in the first prosecution, the defend-

38. *State v. Foster*, 156 La. 891, 101 So. 255 (1924).

39. *State v. Shaw*, 5 La. Ann. 342 (1850).

40. *State v. Lopez*, 169 La. 247, 125 So. 65 (1929).

41. *State v. Yokum*, 155 La. 846, 99 So. 621 (1924).

42. *State v. Heard*, 170 La. 60, 31 So. 384 (1902).

43. *State v. Faulkner*, 39 La. Ann. 811, 2 So. 539 (1887).

44. *State v. Vines*, 34 La. Ann. 1079 (1882).

45. *State v. Ysasi*, 222 La. 902, 64 So.2d 213 (1953).

46. 156 La. 891, 101 So. 255 (1924).

47. *Id.* at 898, 101 So. at 258. This test had been applied in earlier cases. See *State v. Hill*, 122 La. 711, 48 So. 160 (1909). In *State v. Terry*, 128 La. 680, 683, 55 So. 15, 16 (1911), the court stated: "The test of once in jeopardy is whether on the former trial the accused could have been convicted of the crime charged against him on the second trial."

48. LA. R.S. 15:386 (1950) provides responsive verdicts for numerous indictments. However, this article does not cover all offenses. In such cases, Articles 405 and 406 apply.

49. 240 La. 75, 121 So.2d 244 (1960).

50. It was alleged by the prosecution that the killing resulted from the perpetration or attempted perpetration of simple robbery upon the victim.

ants were not being twice placed in jeopardy for the same offense.⁵¹

The "Substantial Identity" Test

A third formula for determining the identity of offenses was discussed in *State v. Foster*. The court observed: "While formal, technical, and absolute identity of the offenses is not necessary, yet *substantial identity* is an essential element."⁵² This reasoning was used in finding a lack of substantial identity between attempted arson and assault and battery. It was stated that the existence of overlapping elements between the several crimes does not render the offenses substantially identical. Louisiana courts have found that substantial identity does not exist between the crimes of burglary and larceny;⁵³ separate murders in successive order;⁵⁴ nor between the selling of beer illegally to one person and whiskey illegally to another.⁵⁵ The inquiry into substantial identity does not appear to be an independent test of what constitutes double jeopardy for the same offense and the courts have not supplied any definite criteria for making the determination. It is suggested that a finding of "substantial identity" is nothing more or less than a showing that the "same evidence" and "responsive verdict" tests render a conclusion favorable to the defendant's plea.

Article 279, Louisiana Code of Criminal Procedure

A legislative determination of what constitutes a second prosecution for the same offense was adopted in 1928 and is contained in Article 279 of the Louisiana Code of Criminal Procedure.⁵⁶ It is provided that for double jeopardy to result, the charges must be either (1) identical, (2) different grades of the same offense, or (3) such that one offense is necessarily included in the other. Notwithstanding the statutory criteria of Article 279, the *Foster* case is still being relied upon⁵⁷ and it appears that the courts consider Article 279 to be a codification

51. LA. R.S. 15:386 (1950) provides that only the following verdicts are responsive to a murder indictment: (1) guilty as charged, (2) guilty without capital punishment, (3) guilty of manslaughter, and (4) not guilty.

52. *State v. Foster*, 156 La. 891, 897, 101 So. 255, 258 (1924).

53. *State v. Fradella*, 164 La. 752, 114 So. 641 (1928).

54. *State v. Roberts*, 170 La. 727, 129 So. 144 (1930).

55. *State v. Heard*, 107 La. 60, 31 So. 384 (1902).

56. LA. R.S. 15:279 (1950).

57. See *State v. Calvo*, 240 La. 75, 121 So.2d 244 (1960). The court cited LA. CODE OF CRIM. PROC. art. 279 (1928) and proceeded to discuss the tests used in *Foster* in reaching its decision. See also *State v. Ysasi*, 222 La. 902, 64 So.2d 213 (1953).

of the prior existing law on identity of offenses. Generally, the court-announced tests will lead to the same conclusion as will an application of Article 279. To illustrate, Article 279 provides that double jeopardy results when both charges are based on "different grades of the same offense" or where "one offense is necessarily included in the other." The "same evidence" test will, in some cases, lead to the same conclusion. Where the most serious form of a graded offense is charged in the second indictment, and the first indictment is based upon a lesser grade of the same offense, the objectionable result envisioned by the "same evidence" test and Article 279 is reached. Both the court test and Article 279 will prevent two prosecutions in this situation.⁵⁸ Similarly, where a necessarily included offense (although not always a lesser grade of the same offense) is charged in the first indictment, and the second indictment is based on the major offense, the "same evidence" test will render the same results as will an application of Article 279. Here, evidence necessary to prove commission of the major offense charged in the second indictment will, perforce, be sufficient to obtain a legal conviction on the necessarily included offense charged in the first indictment. This is because all of the elements of the necessarily included offense are included within the definition of the major offense.⁵⁹

Where the prosecution attempts to split an offense into several lesser offenses by charging the major or completed crime in the first indictment, and the lesser or included offense(s) in a second indictment, Article 279 provides that this will amount to double jeopardy. The "responsive verdict" test will lead to the same conclusion if the court in the first trial had jurisdiction to render a verdict on the crime charged in the second indictment.⁶⁰

58. *E.g.*, *A* is prosecuted for simple robbery and jeopardy attaches; subsequently *A* is prosecuted for armed robbery upon the same facts and he pleads double jeopardy for the same offense. The charges are clearly based on different grades of the same offense, *i.e.*, robbery. Also, evidence necessary to support the second indictment (for armed robbery) would have been sufficient to have procured a legal conviction on the first (for simple robbery). See LA. R.S. 14:64, 65 (1950). See also *id.* 14:5.

59. *E.g.*, *A* is prosecuted for simple assault and jeopardy attaches; subsequently *A* is prosecuted for aggravated battery upon the same facts and he pleads double jeopardy for the same offense. The charges are clearly such that one offense is necessarily included in the other, *i.e.*, simple assault is included in aggravated battery. Also, evidence necessary to support the second indictment (for aggravated battery) would have been sufficient to have procured a legal conviction on the first (for simple assault). See *id.* 14:34, 36, 38. See also *id.* 14:5.

60. *E.g.*, *A* is prosecuted for aggravated arson and jeopardy attaches; subsequently *A* is prosecuted for simple arson upon the same facts and he pleads double

Although the statutory criteria and court tests for determining the identity of offenses will usually achieve the same result, there are situations where dissimilar conclusions may be forthcoming. For example, the defendant commits a criminal homicide and is prosecuted and acquitted for murder. Subsequently, the defendant is indicted and tried for negligent homicide and he pleads double jeopardy for the same offense. This plea would be properly overruled under an application of both the "same evidence" and "responsive verdict" tests. Evidence necessary to support the second indictment charging negligent homicide would not have been sufficient to have procured a legal conviction on the first indictment charging murder.⁶¹ Moreover, on the former trial for murder the accused could not have been convicted of the crime charged against him on the second, negligent homicide. This is because a verdict of guilty of negligent homicide is not responsive to an indictment for murder.⁶² Prior to adoption of Louisiana's Responsive Verdict Statute⁶³ in 1948, a verdict of guilty of negligent homicide was responsive to indictments for murder, manslaughter, or negligent homicide.⁶⁴

jeopardy for the same offense. The charges are clearly based on different grades of the same offense, *i.e.*, arson. Also, on the former trial for aggravated arson the defendant could have been convicted of the crime charged against him on the second (simple arson). See *id.* 14:51, 52. *Id.* 15:386 provides that a verdict of guilty of simple arson is responsive to an indictment for aggravated arson. See also *id.* 14:5.

61. See *id.* 14:30, 32.

62. Louisiana's 1948 Responsive Verdict Statute, *id.* 15:386, enumerates those verdicts responsive to a murder indictment. They are (1) guilty as charged, (2) guilty without capital punishment, (3) guilty of manslaughter, and (4) not guilty. Neither is a verdict of guilty of negligent homicide responsive to an indictment for manslaughter. Thus, the same conclusion would be reached had the defendant been first prosecuted for manslaughter and subsequently for negligent homicide. In *State v. Neal*, 169 La. 441, 125 So. 442 (1929), it was stated that a prosecution for a lesser and included offense will not be barred by a former acquittal for the greater offense *if the court in the first trial lacked jurisdiction to render a verdict on the lesser and included offense.*

63. *Id.* 15:386. This legislation does not attempt to provide responsive verdicts for all indictments; the criteria set out in *id.* 15:405, 406 is followed where the Responsive Verdict Statute is inapplicable. In *State v. Poe*, 214 La. 606, 620, 38 So.2d 359, 363 (1948), the court stated that "the test is whether the *definition* of the greater offense *necessarily* includes all the elements of the lesser. Stated in another way for practical application, this merely means that, if any reasonable state of facts can be imagined wherein the greater offense is committed without perpetration of the lesser offense, a verdict for the lesser cannot be responsive." See *State v. Clayton*, 236 La. 1093, 110 So.2d 111 (1959) (good development of tests for responsiveness and latest case in point); *State v. Latiolais*, 225 La. 878, 74 So.2d 148 (1954); *State v. Roberts*, 213 La. 559, 35 So.2d 216 (1948); Comment, 5 LOUISIANA LAW REVIEW 603 (1944); Note, 11 LOUISIANA LAW REVIEW 464, 469 (1951).

64. *State v. Love*, 210 La. 11, 26 So.2d 156 (1946). Under an indictment for murder, verdicts of guilty of manslaughter or negligent homicide are responsive; under an indictment for manslaughter, verdicts of guilty of manslaughter, not guilty, and guilty of negligent homicide are responsive. *State v. Gueringer*, 209 La. 118, 24 So.2d 284 (1945).

One author has suggested that due to the collateral effects of the Responsive Verdict Statute upon the substantive law of double jeopardy, a defendant may be prosecuted for both manslaughter and negligent homicide on the basis of a single criminal homicide.⁶⁵ It is submitted, however, that under an application of Article 279 of the Code of Criminal Procedure, this double prosecution for a single criminal homicide would be prohibited. To illustrate, Article 279 provides that double jeopardy results when the two charges are based on "different grades of the same offense." Article 29 of the Louisiana Criminal Code provides: "Homicide is the killing of a human being by the act, procurement or culpable omission of another. *Criminal homicide is of three grades: (1) Murder (2) Manslaughter (3) Negligent homicide.*"⁶⁶ (Emphasis added.) Thus, it is clear that each crime is a different grade of the same offense,⁶⁷ that offense being criminal homicide, and Article 279 of the Code of Criminal Procedure applies to limit the state to a prosecution for only one of the grades. Responsive verdicts may be restricted for reasons of public policy and the administration of justice, but this is not to say that such changes should have a collateral effect upon the substantive law of double jeopardy and a basic immunity granted by the Louisiana Constitution.⁶⁸

Another example where the "same evidence" and "responsive verdict" tests will be fatal to the defendant's plea of double jeopardy, although an application of Article 279 of the Code of Criminal Procedure will not, is the case of a defendant being first prosecuted for simple battery⁶⁹ and, subsequently, for aggravated battery.⁷⁰ Clearly on the former trial for simple battery the defendant could not have been convicted of the crime

65. See Slovenko, *The Law on Double Jeopardy*, 30 TUL. L. REV. 409, 421 (1956).

66. LA. R.S. 14:29 (1950).

67. *Ibid.* The reporter's comments on Article 29 say, in part, that "[M]urder, manslaughter and negligent homicide are specifically designated as *different grades of homicide*. Under an indictment for murder, verdicts of *the lesser offenses of manslaughter and negligent homicide* will be proper." (Emphasis added.)

68. See Note, 11 LOUISIANA LAW REVIEW 464, 470 (1951). The author concludes: "However, it should be recognized that this application of the responsive verdict statute subjects a defendant to the possibility of two trials for a single homicide, and it may be argued that the second prosecution is contrary to the real spirit of the constitutional guarantee against double jeopardy. Had there been a conviction for manslaughter, surely the defendant could not have been subsequently tried for negligent homicide. Thus it is apparent that two distinct offenses have not been committed in the same act—either there has been manslaughter or a negligent homicide."

69. LA. R.S. 14:35 (1950).

70. *Id.* 14:34.

charged against him on the second trial (aggravated battery).⁷¹ Moreover, evidence necessary to support the second indictment (for aggravated battery) would not have been sufficient to have procured a legal conviction on the first indictment (for simple battery). The definition of simple battery requires that a battery be committed "without the consent of the victim,"⁷² but consent is of no importance in a prosecution for aggravated battery.⁷³ Therefore, want of the victim's consent is not "evidence necessary to support the second indictment," and this additional element required for a conviction on the first indictment will render the "same evidence" test unavailing to the defendant. Under Article 279, however, simple battery and aggravated battery should be contemplated in the phrase "different grades of the same offense" which will establish double jeopardy for the same offense.⁷⁴

CONCLUSION

Article 279 of the 1928 Code of Criminal Procedure sets forth three relationships between the charges which will establish double jeopardy for the same offense. However, court-announced tests as stated in *Foster* are being applied today. While the *Foster* tests will lead to the same conclusion as will an application of Article 279 in most fact situations, this is not always the case. Louisiana's 1948 Responsive Verdict Statute may render the "responsive verdict" test undesirable where responsive verdicts have been restricted for reasons of public policy. In that event, application of the clearer statutory formula of Article 279 will provide a sound solution and avoid any infringement upon a basic constitutional immunity against double jeopardy for the same offense.

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71. A verdict of guilty of aggravated battery is not responsive to an indictment for simple battery. *Id.* 15:386.

72. *Id.* 14:35 provides: "Simple Battery is a battery, without the consent of the victim, committed without a dangerous weapon."

73. *Id.* 14:34 provides: "Aggravated Battery is a battery committed with a dangerous weapon." *Id.* 14:33 provides the definition of a battery: "Battery is the intentional use of force or violence upon the person of another; or the intentional administration of a poison or other noxious liquid or substance to another." It is pointed out that want of the victim's consent is not a necessary element within the definition of either offense.

74. Turn this hypothetical case around and prosecute first for aggravated battery and then for simple battery and the "responsive verdict" test will lead to the conclusion that the defendant is being twice tried for the same offense. That is, on the former trial (for aggravated battery) the accused could have been convicted of the crime charged against him on the second trial (simple battery). A verdict of guilty of simple battery is responsive to an indictment for aggravated battery. *Id.* 15:386.