

Garden State CLE Presents:

# DWI and the New Double Jeopardy Law



Lesson Plan

# I. Introduction



## 1.) Constitutional Principles

**i.) 5th Amendment: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence [sic] to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."**

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### **Analysis:**

**[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty. *Green v. United States*, 355 U.S. 184, 187-88 (1957).**

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**ii.) Article 1, paragraph 11 New Jersey Constitution of 1947:**

**"No person shall, after acquittal, be tried for the same offense"**

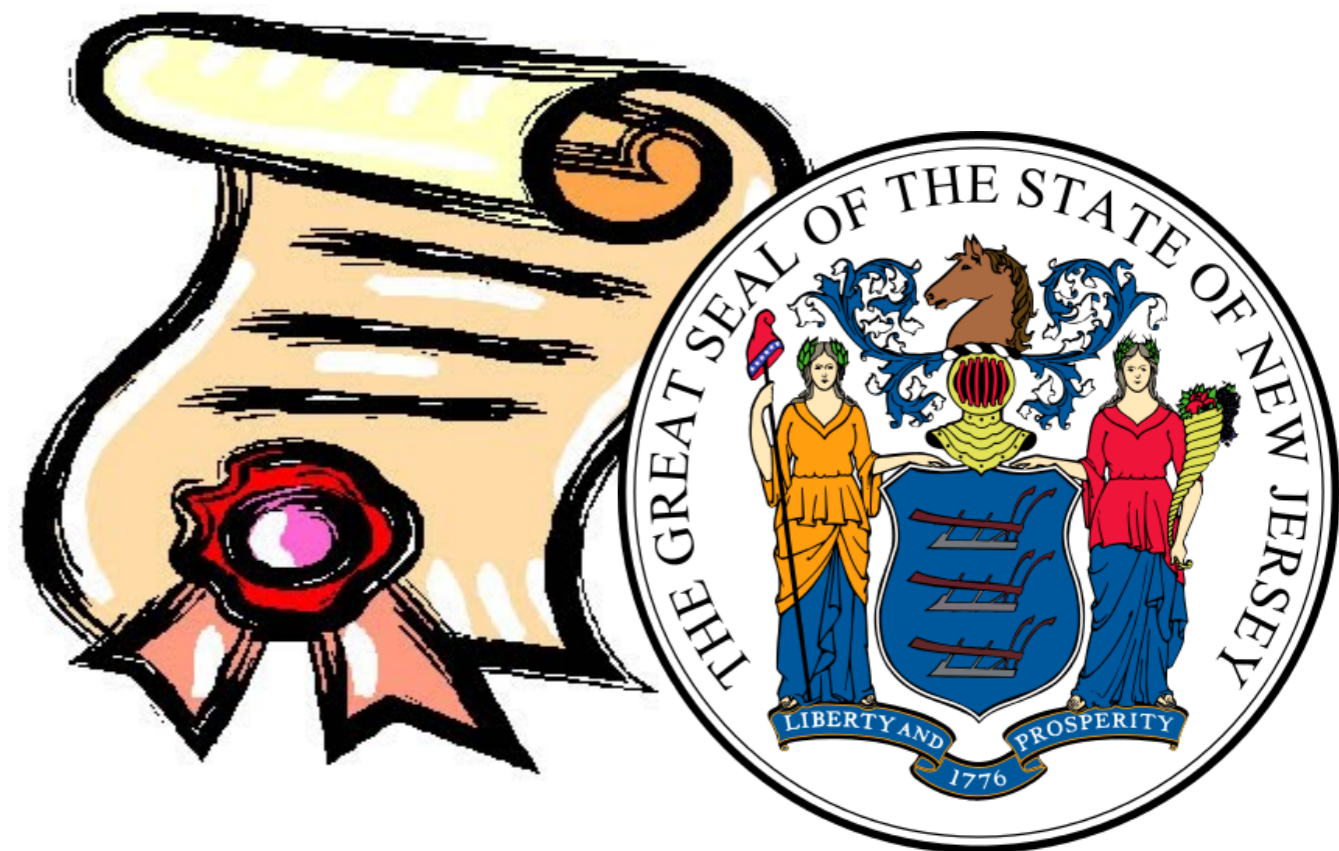
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**Analysis:**

**Despite the difference in wording, the New Jersey Supreme Court has consistently interpreted our State Constitution's double-jeopardy protection as coextensive with the guarantee of the federal Constitution.<sup>1</sup> In any event, the double jeopardy clause applies to the states by virtue of the due process clause of the 14th Amendment. [See *Benton v. Maryland*, 395 U.S. 784 (1969)].**

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<sup>1</sup> *State v. Schubert*, 212 N.J. 295, 304, 53 A.3d 1210 (2012).



### **iii.) Specific protections under the Constitution:**

**In *North Carolina v. Pearce*, 395 US 711, 717 (1969), the Supreme Court held that the Double Jeopardy Clause contains three distinct protections for defendants. It protects against:**

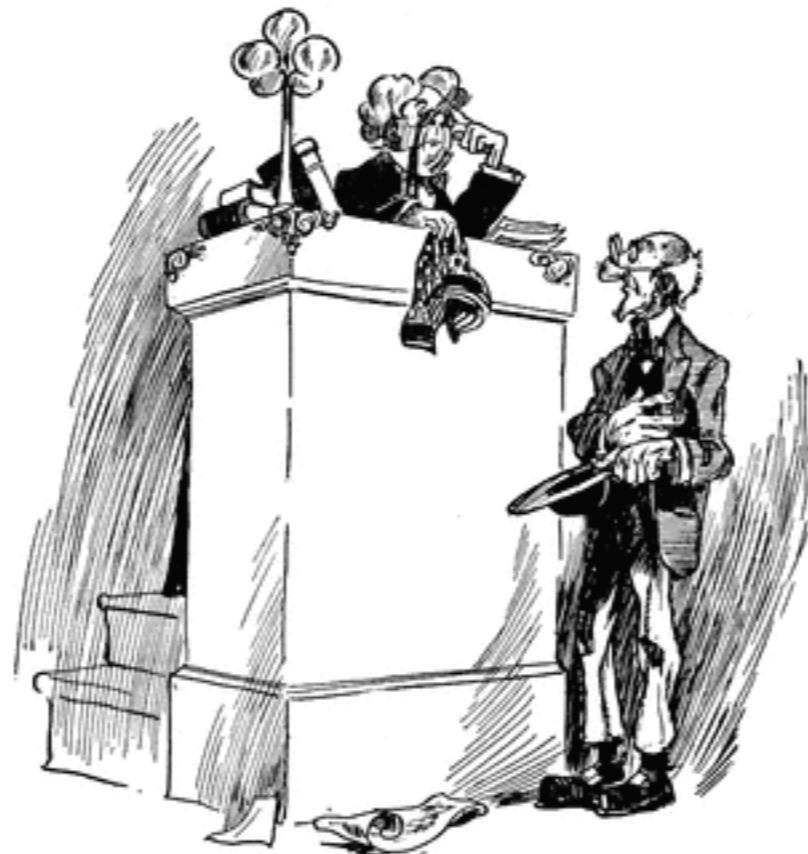
- (1) a second prosecution for the same offense after an acquittal,**
- (2) a second prosecution for the same offense after a conviction, and**
- (3) imposition of multiple punishments for the same offense.**



## II. Development of modern double jeopardy law - SCOTUS

**i.) 1932 - The "same-elements" test [United States v. Blockburger, 284 U.S. 299 (1932)].**

**The Court stated that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." In other words, if each statute at issue requires proof of an element that the other does not, they do not constitute the same offense and a second prosecution may proceed. This test has come to be known as the same-elements test.**



## Same elements - Examples

**NJSA 2C:40-26** - It shall be a crime of the fourth degree to operate a motor vehicle during the period of license suspension in violation of NJSA.39:3-40, if the actor's license was suspended or revoked for a second or subsequent violation of NJSA. 39:4-50 or NJSA 39:4-50.4a.

**NJSA 39:3-40** - No person to whom a driver's license has been refused or whose driver's license or reciprocity privilege has been suspended or revoked, or who has been prohibited from obtaining a driver's license, shall personally operate a motor vehicle during the period of refusal, suspension, revocation, or prohibition.

**Note that 2C:40-26 requires an underlying suspension for 39:4-50. That element is not in 39:3-40. However, 39:3-40 has no independent elements that are not in 2C:40-26. Thus, the two statutes are the same for double jeopardy purposes.**



**ii.) The same elements test includes Lesser or greater included offenses**

**Offenses are the same when one is a lesser-included or greater included offense of the other. This rule was established in *Brown v. Ohio*, 432 U.S. 161 (1977), where the Court held that “[t]he greater offense is therefore by definition the ‘same’ for purposes of double jeopardy as any lesser offense included in it.”**

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**The theory that when the greater offense includes the lesser, prosecution for either bars a subsequent prosecution for the other has been the settled law of our State since at least 1951. See *State v. Wolf*, 46 N.J. 301, 303, 216 A.2d 586 (1966); *State v. Williams*, 30 N.J. 105, 114, 152 A.2d 9 (1959); *State v. Mark*, 23 N.J. 162, 168-69, 128 A.2d 487 (1957); *State v. Labato*, 7 N.J. 137, 144-46, 80 A.2d 617 (1951).**

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**Lesser-included offense defined in NJSA 2C:1-8(d)**

**d. Conviction of included offense permitted. A defendant may be convicted of an offense included in an offense charged whether or not the included offense is an indictable offense. An offense is so included when:**

- (1) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or**
- (2) It consists of an attempt or conspiracy to commit the offense charged or to commit an offense otherwise included therein; or**

**(3) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission.**

**Examples of Lesser/Greater included offenses:**

**Theft and robbery State v. Ingram, 196 N.J. 23, 39 (2008);**

**Careless and reckless driving, State v. Muniz, 118 NJ 319 (1990);**

**Harassment (offensive touching) and simple assault, State v. Berka, 211 NJ Super. 717 (Law Div. 1986)**

**DWI and School-zone offenses - State v. Wheatley, 447 NJ Super. 532 (App. Div. 2016)**



### iii.) Similar Offenses

**Contrast NJSA 2C:35-7 (School-zone drug distribution) with NJSA 2C:33-2.1(b) Loitering to distribute drugs.**



**NJSA 2C:35-7(a) Any person who violates subsection a. of N.J.S.2C:35-5 by distributing, dispensing or possessing with intent to distribute a controlled dangerous substance or controlled substance analog while on any school property used for school purposes which is owned by or leased to any elementary or secondary school or school board, or within 1,000 feet of such school property or a school bus, or while on any school bus, is guilty of a crime of the third degree**



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**NJSA 2C:33-2.1(b) - A person, whether on foot or in a motor vehicle, commits a disorderly persons offense if (1) he wanders, remains or prowls in a public place with the purpose of unlawfully obtaining or distributing a controlled dangerous substance or controlled substance analog; and (2) engages in conduct that, under the circumstances, manifests a purpose to obtain or distribute a controlled dangerous substance or controlled substance analog.**

**Note that the school zone statute requires a distribution within 1000 feet of a school, an element not in the loitering statute. By contrast, the loitering statute requires wandering, remaining or prowling in a public place, an element that is not contained in the school zone statute.**



**Each statute has an element that the other does not have. Thus they are not the same for double jeopardy purposes. These were the precise statutes at issue in State v. Miles, \_\_\_ NJ \_\_\_ (2017).**

**iv.) 1980 - Advent of the same evidence - Illinois v. Vitale, Illinois v. Vitale, 447 U.S. 410, 421 (1980).**

**The Supreme Court indicated that facts could possibly require more than a mechanical analysis of the elements of the two statutes. The United States Supreme Court contemplated that a second prosecution could be barred if it relied on the same evidence used to prove an earlier charge. These dicta created controversy among state and federal courts over whether the traditional *Blockburger* test had been expanded.**

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**v.) 1990 - The Court officially adopts the "same evidence" test from *Vitale* as an adjunct to double jeopardy jurisprudence. *Grady v. Corbin*, 495 U.S. 508, 510 (1990).**

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**NJ Example of same evidence test - *State v. Hand*, 416 NJ Super. 622 (App. Div. 2010).**

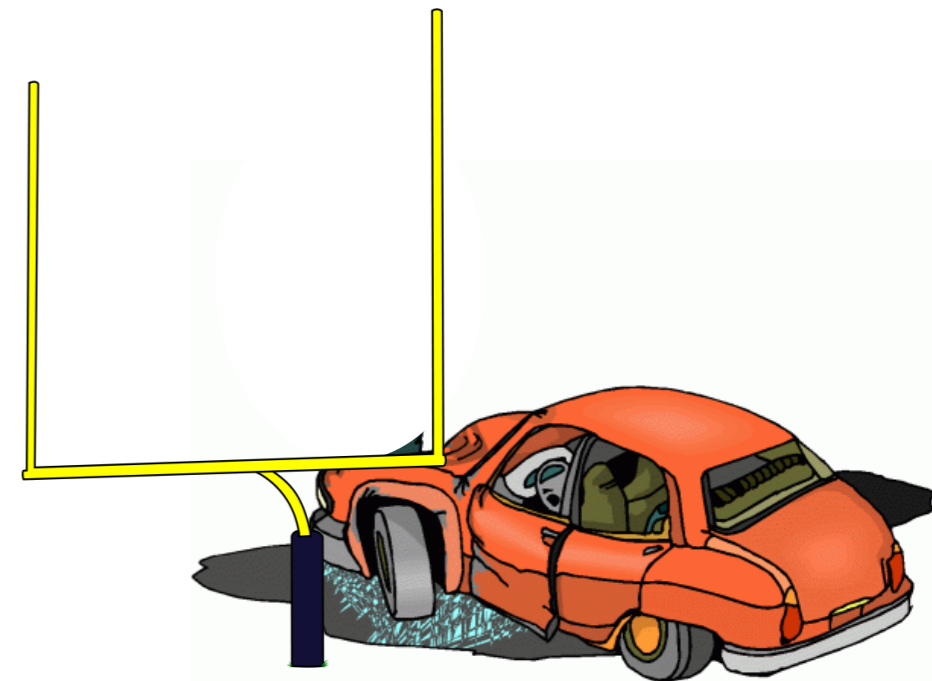
**Defendant operated a motor vehicle while highly intoxicated and endangered a large number of people in a public park. He was indicted for NJSA 2C: 17-2(c), recklessly creating a risk of widespread injury or damage, by operating a motor vehicle in an intoxicated state on a populated athletic field. Defendant entered a plea of guilty in Superior Court. Subsequently, his companion DWI ticket was remanded to municipal court where he interposed a double jeopardy defense based upon the "same evidence" argument. His motion was granted in the Law Division and affirmed on appeal. The foundation for his guilty plea had included his admission that his recklessness stemmed from his intoxicated operation of a motor vehicle.**

**Other examples:**

***State v. Dively*, 92 NJ 573 (1983)**

***State v. DeLuca*, 108 NJ 98 (1987)**

***In re Seelig*, 180 NJ 234 (2004)**



**vi.) 1993 - Same evidence test abolished. - United States v. Dixon, 509 U.S. 688, 704 (1993).**

**In 1993, the Justices reevaluated and revised the Court's position, and held that the same-evidence test was wholly inconsistent with earlier Supreme Court precedent and with the clear common-law understanding of double jeopardy. Deeming the same-evidence test unworkable, the Court reinstated the *Blockburger* same-elements test as the sole measure of whether two offenses constitute the same offense for double jeopardy purposes.**

**The Court specifically rejected its dicta in *Vitale*, which suggested a same-evidence test.**

**It had taken a mere three years for the United States Supreme Court to steer away from the same-evidence test.**

**Why? The Court had quickly learned that the test would be unworkable without crafting a number of exceptions to supplement it. Accordingly, it abandoned the same evidence test and adopted the same elements test as the exclusive method of determining double jeopardy.**

**The New Jersey Supreme Court was slow to respond to this ruling. This caused confusion among New Jersey courts and set the stage for the Supreme Court's 2017 ruling in *State v. Miles*, \_\_\_ NJ \_\_\_ (2017).**

### III. Development of modern double jeopardy law - New Jersey Supreme Court

#### i.) State v. Dively, 92 NJ 573 (1983)

**Statement of Facts:** Defendant involved in a fatal accident as operator. Entered a plea of guilty to DWI and was sentenced. Subsequent indictment for death by auto subject to an initial plea that was withdrawn the following day due to the publication of *Vitale*.

**New Jersey Supreme Court held:**

- 1.) Double jeopardy protections in New Jersey apply to traffic offenses;**
- 2.) The "same evidence" test set forth in *Vitale* applies in New Jersey;**
- 3.) Double jeopardy protects against a subsequent trial for a greater-included offense (death by auto) following a plea of guilty to a lesser-included offense (DWI with a merged reckless);**
- 4.) Required administratively in municipal court the bundling of indictable charges with petty offenses, all to be sent to the county prosecutor.**



**ii.) State v. DeLuca, 108 NJ 98 (1987)**



**Can a DWI prosecution in municipal court proceed following an acquittal of a related death by auto charge in Superior Court?**

**1.) Death by auto and DWI are not the same offense for double jeopardy purposes under the traditional "same elements" test in *Blockburger*.**

**2.) Under the "same evidence" double jeopardy rule in *Vitale*, a second prosecution would be barred if the sole proof of recklessness was the defendant's intoxication.**

**3.) In the future, DWI and death by auto cases are to be tried simultaneously in Superior Court with the judge deciding the guilt on the DWI ticket. If the only evidence of recklessness is the drunk driving, the defendant cannot be convicted of the DWI on *Vitale* double jeopardy grounds. [See *State v. Muniz, 118 NJ 319 (1990)*.]**



## IV. The impact of State v. Miles, NJ (2017)



### i.) Statement of Facts:

**In October 2010, the Camden County police arrested defendant for selling marijuana to an undercover police officer on the corner of 27th and Washington Streets in Camden, New Jersey. Defendant was charged in a warrant complaint with possession of marijuana with intent to distribute, in violation of [N.J.S.A. 2C:35-5\(b\)\(12\)](#), and possession of a controlled dangerous substance (CDS) with intent to distribute on or within 1000 feet of a school property, in violation of [N.J.S.A. 2C:35-7](#).**

**In a separate municipal summons, defendant was charged with the disorderly-persons offense of possession of fifty grams or less of marijuana, in violation of [N.J.S.A. 2C:35-10\(a\)\(4\)](#). Those charges arose from the same attempted sale.**

**A Camden County grand jury returned an indictment charging defendant with the offenses in the warrant complaint. Defendant then appeared pro se in municipal court to resolve the disorderly-persons offense charged in the municipal summons. Defendant appeared via video conference from the county jail, where he was being held on an unrelated child-support charge.**



**At some point before that video proceeding, the original municipal charge was amended to a different disorderly-persons offense—loitering to possess marijuana, in violation of [N.J.S.A. 2C:33-2.1\(b\)\(1\)](#). Confusion ensued as evidenced by the following colloquy between the judge and defendant at the municipal court proceeding:**

**Q. All right. You're charged on October 15, 2010, with loitering to possess marijuana at 27th and Washington Street in Camden.**

**A. Yes, sir.**

**Q. Do you wish to have an attorney in this matter?**

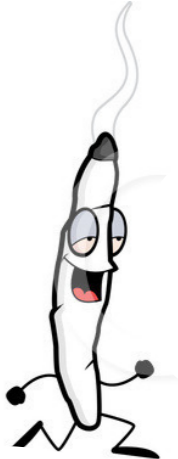
**A. No, sir. What—they got me—can I ask you something? This is a municipal charge, right, Your Honor?**

**Q. Yes.**

**A. Well, why they got me going to Superior Court for this, Your Honor? That's why I said I don't understand.**

**Q. No, no, you're not going to Superior Court for this. You're going to Superior Court for child support, sir.**

**A. No, no, no, they had me—**





**Q. Sir.**

**A. Okay.**

**Q. Trust me. I am not going to argue with you.**

**A. No, I'm not arguing.**

**Q. I'm not going to argue with you.**

**A. Oh, okay.**

**Q. You're charged with loitering to possess marijuana in Camden, October 15, 2010. It'll be a \$500 fine plus mandatory costs. Do you understand the penalties?**

**A. Yes, sir.**

**Defendant then pled guilty to the charge of loitering to possess marijuana.**

**Thereafter, defendant moved to dismiss the Superior Court indictment on double-jeopardy grounds, arguing that prosecution on the possession charges was barred because he had already pled guilty to an offense that arose from the same conduct. Despite some puzzlement as to why the municipal court had amended the disorderly-persons offense, the Superior Court denied defendant's motion to dismiss.**

**Defendant appealed again, arguing that because the remand hearing revealed no definitive information on the circumstances of the amendment, the municipal court had jurisdiction over the disorderly-persons offense and, as a result, double jeopardy barred prosecution on the school-zone charge.**

**The Appellate Division found that, although the second prosecution was not barred under the same-elements test, it was barred under the same-evidence test.**



## **ii.) Legal Analysis of *Miles*:**

**1.) It is the intention of the New Jersey Supreme Court once again construe State double jeopardy protections as co-extensive those announced by the United States Supreme Court. The New Jersey Constitution provides no additional protections for double jeopardy.**

**2.) New Jersey will henceforth decline to follow the "same evidence" test for double jeopardy and will utilize "same elements" as the exclusive test in our State. As a result, the split among Appellate Division panels on this issue is now resolved.**

**3.) The date of the decision is May 16, 2017. "Because our decision establishes a new rule of law, we apply the new singular same-elements standard prospectively to offenses committed after the date of this opinion." "[G]oing forward, for offenses committed after the issuance of this opinion, we hold that the same-elements test will serve as the singular framework for determining whether two charges are in fact the same offense for purposes of double-jeopardy analysis."**

**4.) Removal of the "same evidence" tests abrogates the previous rulings in a large number of important substantive and procedural cases, including:**

**State v. Dively, 92 NJ 573 (1983);**

**State v. DeLuca, 108 NJ 98 (1987);**

**State v. Hand, 416 NJ Super. 622 (App. Div. 2010);**

**In re Seelig, 180 NJ 234 (2004).**

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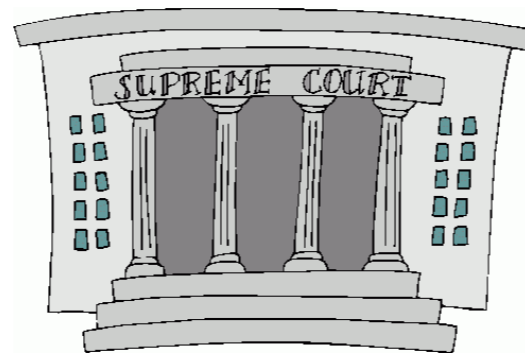
## V. Other surviving double jeopardy protections following *Miles*

**i.) Mandatory Joinder - Rule 3:15-1(b): [A] defendant shall not be subject to separate trials for multiple criminal offenses based on the *same conduct* or arising from the same 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 and venue of a single court.**

**Analysis: To invoke the mandatory joinder rule a defendant must satisfy all four of the following criteria:**

- (1) the multiple offenses are criminal;**
- (2) the offenses are based on the same conduct or arose from the same episode;**
- (3) the appropriate prosecuting officer knew of the offenses at the time the first trial commenced; and**
- (4) the offenses were within the jurisdiction and venue of a single court.**

**The Supreme Court has long held that if the offenses are not joined under Rule 3:15-1(b), the omitted offense may not be further prosecuted.” [\*State v. Williams, 172 N.J. 361, 368 \(2002\)\*](#) The rule bars subsequent prosecutions for indictable offenses. Nothing in *Miles* changes that joinder requirement**



**Commentary: This could allow a subsequent trial for a disorderly persons offense following an acquittal of an indictable matter related to the same conduct. According to the Court, "As the State noted at oral argument, these situations are admittedly rare, because the State has little incentive to pursue a disorderly persons offense after acquittal on an indictable offense predicated on the same facts."**

**ii.) Joinder of indictable and related petty offenses for trial. Rule 3:15-3**

**(a) Joinder of Criminal Offense and Lesser Related Infraction.**

**(1) Except as provided in paragraph (b), the court shall join any pending non-indictable complaint for trial with a criminal offense based on the same conduct or arising from the same episode.**

**(2) Regardless of whether a jury sits as the finder of facts with respect to the criminal offense, and unless the complaint charges a disorderly persons offense or a petty disorderly persons offense that must be submitted to the jury in accordance with the provisions of N.J.S.A.2C:1-8(e), the Superior Court judge shall sit as a municipal court judge on the complaint and shall render the verdict with respect to the complaint on the proofs adduced in the course of trial.**



**(b) Relief From Joinder. If for any reason it appears that a defendant or the State is prejudiced by the joinder required by paragraph (a), the court may decline to join or may grant other appropriate relief. A defendant's request to avoid joinder shall constitute a waiver of any claim against twice being placed in jeopardy that would not have arisen had the defendant's request been denied.**

**(c) Consequence of Failure to Join. In no event shall failure to join as required in paragraph (a) be deemed to constitute grounds for barring a subsequent prosecution of the complaint except as required by statute or by the Federal or State Constitutions.**



### **iii.) Statutory Double Jeopardy Bar - NJSA 2C:1-10**

**A prosecution of a defendant for a violation of a different provision of the statutes or based on different facts than a former prosecution is barred by such former prosecution under the following circumstances:**

**a. The former prosecution resulted in an acquittal or in a conviction as defined in [section 2C:1-9](#) and the subsequent prosecution is for:**

**(1) Any offense of which the defendant could have been convicted on the first prosecution; or**

**(2) Any offense for which the defendant should have been tried on the first prosecution under [section 2C:1-8](#) unless the court ordered a separate trial of the charge of such offense; or**

**(3) The same conduct, unless (a) the offense of which the defendant was formerly convicted or acquitted and the offense for which he is subsequently prosecuted each requires proof of a fact not required by the other and the law defining each of such offenses is intended to prevent a substantially different harm or evil, or (b) the second offense was not consummated when the former trial began.**

#### **iv.) Fundamental Fairness:**

**Secondary prosecutions that are not banned by constitutional or statutory provisions, may still be terminated based upon fundamental fairness issues.**

**The doctrine of fundamental fairness, at least in the context of double-jeopardy and mandatory-joinder cases, is derived from the policy interests underlying those doctrines.**

**The questions to be considered are:**

**Will a second prosecution involve elements of oppression or harassment or violate the reasonable expectations of the defendant? By contrast, will barring the second prosecution be grossly unfairness to the State?**

**Leading New Jersey Supreme Court cases discussing fundamental fairness are:**

**State v. Currie, 41 N.J. 531 (1964)**

**State v. Gregory, 66 NJ 510 (1975)**

**State v. Yoskowitz, 116 NJ 679 (1989)**



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