DOUBLE JEOPARDY – Conviction of a lesser-included offense bars prosecution for greater offense; exceptions – Revised 11/2009

The double jeopardy clause usually precludes prosecution of a defendant for a greater offense once he has been convicted of a lesser-included offense.[1] See *State v. Mounce*, 150 Ariz. 3, 721 P.2d 661 (App. 1986); *State v. Harvey*, 98 Ariz. 70, 402 P.2d 17 (1965); *State v. Laguna*, 124 Ariz. 179, 602 P.2d 847 (App. 1979). In *Brown v. Ohio*, 432 U.S. 161 (1977), the Supreme Court explained that the Double Jeopardy Clause's ban against multiple prosecutions for the same offense prohibits a state from trying a defendant for both a greater offense and a lesser-included offense, regardless of which comes first. **"**[If] two offenses are **'**the same**'** for double jeopardy purposes**. . .** it follows that the sequence of the two trials for the greater and the lesser offense is immaterial, and trial on a greater offense after conviction on a lesser ordinarily is just as objectionable under the Double Jeopardy Clause as the reverse order of proceeding." *Jeffers v. United States*, 432 U.S. 137, 151 (1977). In cases where the lesser offense is tried first, a finding of guilt on the lesser-included offense "implies an acquittal on the greater offense" and bars any retrial on the greater offense. *State v. Hernandez,* 191 Ariz. 553, 561, 959 P.2d 810, 818 (App. 1998).

Yet this general rule barring subsequent prosecutions for the greater offense does have some exceptions. "One commonly recognized exception is when all the events necessary to the greater crime have not taken place at the time the prosecution for the lesser is begun." *Jeffers v. United States*, 432 U.S. 137, 151 (1977).

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[1] "A lesser included offense is one 'composed solely of some but not all of the elements of the greater crime so that it is impossible to have committed the crime charged without having committed the lesser one' [citation omitted]." *State v. Woods*, 168 Ariz. 543, 544, 815 P.2d 912, 913 (App. 1991). *See also State v. Chabolla-Hinojosa*, 192 Ariz. 360, 363, 965 P.2d 94, 97 (App. 1998) (holding that a defendant convicted of transporting marijuana for sale could not then be prosecuted for possessing the same marijuana for sale as possession was a lesser-included offense for purposes of the Double Jeopardy Clause).

See also Brown v. Ohio, 432 U.S. at 169 n. 7 (1977); *Blackledge v. Perry*, 417 U.S. 21, 28-29 and n. 7 (1974); *Diaz v. United States*, 223 U.S. 442 (1912). The usual situation in which this exception applies is when the defendant assaults the victim and is prosecuted for assault, and the victim subsequently dies from the assault.

For example, in *State v. Wilson*, 85 Ariz. 213, 335 P.2d 613 (1959), the defendant shot his wife in July 1957. Wilson was charged with assault with intent to kill. In November 1957 he pleaded guilty to assault with a deadly weapon and was sentenced to a term of imprisonment. In April 1958 the wife died from meningitis caused by the gunshot wound, and Wilson then was charged with murdering her. The Arizona Supreme Court held that Wilson's plea to assault did not constitute former jeopardy and did not bar a subsequent prosecution for murder. Because the victim was still alive when he was charged with and convicted of assault, he could not have been convicted of murder yet; therefore**,** the offenses were "not identical, nor different grades of the same offense." 85 Ariz. at 217, 335 P.2d at 615. Rather, the Arizona Supreme Court noted that “[t]he rule seems to be firmly established that in order for a former conviction or acquittal to be a bar to a subsequent prosecution, the two offenses must be the same both in law and in fact.” 85 Ariz. at 215, 335 P.2d at 614.

The facts in *Wilson* are similar to those in *Diaz, supra*. 223 U.S. 442 (1912). In *Diaz*, the defendant was found guilty of assault and battery on May 30, 1906. On June 26, 1906, the victim of the defendant's actions died, and the defendant **then** was charged with the homicide of the victim. The Supreme Court held that double jeopardy did not bar the homicide action. *Id*. at 448-449.

Another exception to this rule arises when a defendant opposes the State's motion to consolidate, or moves for and receives severance of, two connected cases. Since it is the defendant's own choice to have the two cases tried separately, he cannot then complain that he is subjected to double jeopardy when the State presents evidence of the same acts at the separate trials. *Jeffers v. United States*, 432 U.S. 137, 152 (1977). In *Jeffers*, the defendant was indicted on two separate occasions for conspiracy and for conducting a criminal enterprise. He opposed the prosecution's motion to consolidate the indictments for trial and was separately tried and convicted of the conspiracy charge. He then sought to dismiss the criminal enterprise case, arguing that the two indictments arose out of the same transaction, and that therefore the second trial should be barred because he had already been convicted of the lesser-included offense of conspiracy. The trial court refused to dismiss, and defendant was tried and convicted of the criminal enterprise charge. On appeal, the defense argued that because he was convicted of a lesser-included offense, the double jeopardy clause was violated by his subsequent prosecution for the greater offense. The Supreme Court disagreed, noting that "although a defendant is normally entitled to have charges on a greater and a lesser offense resolved in one proceeding, there is no violation of the Double Jeopardy Clause when he elects to have the two offenses tried separately and persuades the trial court to honor his election." *Jeffers v. United States*, 432 U.S. 137, 152 (1977). In *Jeffers*, the defendant “was solely responsible for the successive prosecutions” and his refusal to try the offenses in a single proceeding “deprived him of any right that he might have had against consecutive trials.” *Id*. at 154.