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COMMENTS

HOW DOES OKLAHOMA INTERPRET DOUBLE PUNISHMENT?

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I. INTRODUCTION

Oklahoma has a statutory provision that prevents the accused from conviction of multiple crimes that may have occurred during one transaction.[1] This is an additional analysis that must occur prior to any discussion of a possible double jeopardy violation.[2] Oklahoma has a history of struggling to announce and follow a specific double punishment analysis.[3] In 1999, the Oklahoma Court of Criminal Appeals somewhat unexpectedly rejected a test it previously announced just a few years earlier.[4] In this Case Comment, I will summarize the case that sparked this inquiry into Oklahoma's double punishment statute, *Bivens v. State*.[5] Next,

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1. OKLA. STAT. tit. 21, § 11 (2011). *See also* 2019 Okla. Sess. Law Serv. 748 (the relevant language went into effect in November 2019).
2. Barnard v. State, 2012 OK CR 15, ¶ 26, 290 P.3d 759, 767.
3. *See* Hale v. State, 1995 OK CR 7, ¶ 3, 888 P.2d 1027, 1028-29.
4. Davis v. State, 1999 OK CR 48, ¶¶ 9-11, 993 P.2d 124, 126.
5. Bivens v. State, 2018 OK CR 33, 431 P.3d 985.

I will review the history of Oklahoma's double punishment analysis and determine whether the Court in *Davis v. State* was correct to overrule the previous analysis.[6] Finally, I will discuss whether the Court in *Bivens* appropriately applied the double punishment analysis in its opinion.

II. *BIVENS V. STATE*

A. The Facts of the Case

Mr. Bivens, the appellant, was a passenger in a truck which was stopped by a police officer for the City of Watonga, a small town roughly an hour northwest of Oklahoma City.[7] The officer conducted a warrant check and found that the back-seat passenger had an outstanding warrant.[8] The officer continued with the traffic stop, and the opinion states that all four occupants in the vehicle acted nervous during the progression of the traffic stop.[9] The appellant was reportedly on his phone, smelled of alcohol, and continued to get in and out of the truck several times during the course of the traffic stop.[10] While the officer was taking inventory of the inside of the truck, the appellant asked the officer to give him a tool bag that was "lying on the front passenger floorboard."[11] The officer asked if the bag belonged to the appellant, to which he responded that it did not.[12] Eventually, the appellant left the scene of the traffic stop as the officer directed.[13]

Inside the tool bag was an orange power tool and a bottle of vodka, all in the front passenger floorboard. Underneath the front passenger seat was a bag that contained:

> $280.00 cash, a silver spoon containing a crystal like residue, a digital scale with residue, and three clear baggies of a white, crystal-like substance which tested as methamphetamine in quantities of 205.01 grams, 13.13 grams and 2.91 grams. Also found inside the nylon bag were 3 baggies of a green leafy

6. *Davis*, ¶ 11, 993 P.2d at 126.
7. *Bivens*, ¶ 4, 431 P.3d at 991.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*

> substance that tested as marijuana in the quantities of 4.25 grams, 0.43 grams, and 0.91 grams. A small jewelry bag was also found containing 10 tablets which tested to be Xanax. Three days later an arrest warrant was obtained for Appellant and he was taken into custody.[14]

The appellant was charged and convicted on four counts:

> Trafficking in Illegal Drugs (Count I) (63 O.S.Supp.2014, § 2-415); Possession of a Controlled Dangerous Substance (Count II) (63 O.S.Supp.2012, § 2-402); Unlawful Possession of Drug Paraphernalia (Count III) (63 O.S.2011, § 2-405); and Possession of a Dangerous Drug Without a Prescription (Count IV) (59 O.S.2011 § 353.24(A)(7)), all counts After Former Conviction of Two or More Felonies, in the District Court of Blaine County, Case No. CF-2015-97.15

The trial court sentenced the appellant in accordance with the recommended jury punishment (fifty years in prison and a $500,000 fine for Count I, and one year in prison and a $1,000 fine for Counts II, III and IV).[16]

B. The Majority's Opinion

In appellant's second proposition of error, he asserts that his "separate convictions for Possession of a Controlled Dangerous Substance in Counts I, II and IV violate his constitutional protection against Double Punishment and Double Jeopardy"[17] (hereinafter referred to as "double punishment" and "double jeopardy"). Under Count I (Trafficking in Illegal Drugs), it is unlawful to "possess a controlled substance specified in subsection A."[18] Subsection A may apply to the appellant's possession of both marijuana and methamphetamine.[19] The appellant's conviction under Count II (Possession of a Controlled Dangerous Substance) likely applies to his possession of Xanax, as it is not a drug within the scope of Count I.

14. *Id.* ¶ 5, 431 P.3d at 991.
15. *Id.* ¶ 1, 431 P.3d at 990.
16. *Id.*
17. *Id.* ¶ 2, 431 P.3d at 991.
18. OKLA. STAT. tit. 63, § 2-415(B)(1) (2011 & Supp. 2019).
19. Tit. 63, § 2-415(A)(1)-(4).

Under Count II, it is unlawful to "knowingly or intentionally [] possess a controlled dangerous substance."[20] A controlled dangerous substance within the provisions of Count II means any substance that is a schedule I-V drug of the Uniform Controlled Dangerous Substance Act.[21] In Count IV (Possession of a Dangerous Drug Without a Prescription), the statute provides that it is unlawful for a person to "[i]nterfere, refuse to participate in, impede or otherwise obstruct any inspection, investigation or disciplinary proceeding authorized by the Oklahoma Pharmacy Act."[22]

The Oklahoma Court of Criminal Appeals reviewed Appellant's proposition under the plain error test.[23] All three counts are separate statutes, and each require proof of an element not required in the others; thus, "each offense required proof of a fact which the other did not."[24] The Court concluded this difference meant that the legislature did not intend "to treat the offenses as parts of a single criminal transaction for punishment purposes."[25] Thus, the appellant's separate convictions for Counts I, II and IV did not violate double punishment.[26] As to the appellant's assertion that his constitutional protection against double jeopardy had been violated, the Court concluded each of the convictions "were for three separate and distinct offenses requiring dissimilar proof."[27] Therefore, there was no double jeopardy violation, and the Court found "no plain error."[28]

III. DOUBLE PUNISHMENT

A. The Difference Between Double Punishment and Double Jeopardy

The Fifth Amendment of the United States Constitution provides no individual shall "be subject for the same offence to be twice put in jeopardy of life or limb."[29] This is applicable to the States by the Fourteenth Amendment of the United States Constitution.[30] Oklahoma has

20. Tit. 63, § 2-402(A)(1).
21. Tit. 63, § 2-415(8).
22. Tit. 59, § 353.24(A)(7).
23. Bivens v. State, 2018 OK CR 33, ¶ 11, 431 P.3d 985, 992.
24. *Id.* ¶ 12, 431 P.3d at 992.
25. *Id.*
26. *Id.*
27. *Id.* ¶ 13, 431 P.3d at 992.
28. *Id.* ¶ 13, 431 P.3d at 993.
29. U.S. CONST. amend. V.
30. Brown v. Ohio, 432 U.S. 161, 164 (1977).

adopted this double jeopardy clause into its constitution as well.[31] Double jeopardy serves as a check on prosecutors, rather than the legislature.[32] Although a state legislature is free to enact laws that may punish an offense in multiple ways, its prosecutors and courts may not impose these multiple punishments on the accused for the same offense.[33]

> Double jeopardy protects against (a) a second prosecution for the same offense after acquittal; (b) a second prosecution for the same offense after conviction; and (c) multiple punishments for the same offense. In the latter context, the Double Jeopardy Clause prevents a sentencing court or courts from imposing a greater punishment for a single offense than authorized by the legislature.[34]

Meaning, if multiple crimes would punish the accused for the same offense, the accused may only be convicted of one of those overlapping or simultaneously occurring crimes.[35]

The State of Oklahoma applies a traditional double jeopardy approach when determining whether multiple crimes charged against the accused violates the Double Jeopardy Clause of the United States and Oklahoma Constitutions.[36] Oklahoma's double jeopardy analysis focuses on the offense itself and the accused's acquittal or conviction of the offense, rather than the act itself.[37] The Court follows the rule as announced by the United States Supreme Court in *Blockburger v. United States*.[38] "Under the *Blockburger* test, this Court asks whether each offense requires proof of an additional fact that the other does not."[39] The Court looks at both the elements of each crime and the facts alleged to determine whether the proof of each crime is "distinctly different," so as not to offend the constitutional provision against double jeopardy.[40] Additionally, "[t]wo

31. OKLA. CONST. art. II, § 21.
32. *Brown*, 432 U.S. at 165.
33. *Id*.
34. Mack v. State, 2008 OK CR 23, ¶ 4, 188 P.3d 1284, 1287.
35. *Brown*, 432 U.S. at 165.
36. Mooney v. State, 1999 OK CR 34, ¶ 17, 990 P.2d 875, 884.
37. Shackelford v. State, 1971 OK CR 49, ¶ 4, 481 P.2d 163, 165.
38. Logsdon v. State, 2010 OK CR 7, ¶ 19, 231 P.3d 1156, 1165.
39. *Id.* ¶ 19, 231 P.3d at 1165. *See* Watts v. State, 2008 OK CR 27, ¶ 16, 194 P.3d 133, 139).
40. *Watts*, ¶¶ 17-19, 194 P.3d at 139-40.

distinct acts of the same offense, carried out against the same victim, will not violate double jeopardy where the acts are interrupted and separate in time."[41]

In *Watts v. State*, the appellant was charged and convicted of trafficking illegal drugs and maintaining a dwelling where a controlled dangerous substance was kept.[42] These convictions appear somewhat related; and consequently, the appellant argued that his convictions for both counts violated the constitutional provisions prohibiting double jeopardy.[43] The Court in *Watts* found that, in addition to maintaining a dwelling in connection to distributing drugs, the State's evidence showed the appellant illegally stored drugs for a period of time and made various sells within the house.[44] This proof of separate facts served to establish distinctly different elements required for each conviction.[45] When each conviction requires proof of "entirely different facts," as was required in *Logsdon v. State* for a conviction of both fraudulent sales of securities and forgery, no violation of the constitutional prohibition against double jeopardy occurs.[46]

However, the *Blockburger* double jeopardy analysis is not the first step the court shall apply when the accused/appellant posits that his multiple convictions are in violation of the constitutional protections against double jeopardy and double punishment.[47] This is because Oklahoma has an additional statutory provision that prohibits a single act from being punished multiple times under different statutes.[48] Analysis of this statutory requirement, referred to as double punishment, precedes any double jeopardy analysis.[49] If the court determines that the statute is not applicable, thus Oklahoma's specific ban against double punishment has not been violated, then the court may proceed with its traditional double jeopardy analysis.[50]

41. Rousch v. State, 2017 OK CR 7, ¶ 3, 394 P.3d 1281, 1282 (citing Grant v. State, 2009 OK CR 11, ¶ 37, 205 P.3d 1, 17).

42. *Watts*, ¶ 1, 194 P.3d at 135.

43. *Id.* ¶ 16, 194 P.3d at 138.

44. *Id.* ¶ 19, 194 P.3d at 139-40.

45. *Id.* ¶¶ 18-19, 194 P.3d at 139-40.

46. Logsdon v. State, 2010 OK CR 7, ¶¶ 1, 19, 231 P.3d 1156, 1156, 1165.

47. Mooney v. State, 1999 OK CR 34, ¶¶ 14, 17, 990 P.2d 875, 882-83.

48. Shackelford v. State, 1971 OK CR 49, ¶ 4, 481 P.2d 163, 164. *See also* OKLA. STAT. tit. 21, § 11 (2011 & Supp. 2019).

49. Irwin v. State, 2018 OK CR 4, ¶ 5, 424 P.3d 657, 676 (citing *Mooney*, ¶ 14, 990 P.2d at 882).

50. Barnard v. State, 2012 OK CR 15, ¶ 27, 290 P.3d 759, 767.

Oklahoma's statute prohibiting double punishment (hereinafter referred to as Section 11) provides in relevant part:

> [A]n act or omission which is made punishable in different ways by different provisions of this title may be punished under any of such provisions . . . but in no case can a criminal act or omission be punished under more than one section of law; and an acquittal or conviction and sentence under one section of law, bars the prosecution for the same act or omission under any other section of law.[51]

The current Section 11 test, or analysis, is "to focus on the relationship between the crimes. If the crimes truly arise out of one act . . . then Section 11 prohibits prosecution for more than one crime."[52] However, Oklahoma courts have struggled through the years in determining what properly constitutes "arising out of one act."[53] The Court in *Sanders v. State*, which is the authority the *Bivens* Court relied on,[54] announced three factors that are weighed when making such a determination under an appellant's Section 11 violation claim: "1) the particular facts of each case; 2) whether those facts set out separate and distinct crimes; and 3) the intent of the Legislature."[55] According to *Davis v. State*, Section 11 is not meant to "bar the charging and conviction of separate crimes which may only tangentially relate to one or more crimes committed during a continuing course of conduct."[56] There appears to be a strong emphasis on time as it relates to separate and distinct acts.[57]

Although this double punishment analysis seems simplistic, there has been confusion as to its application since its announcement in *Davis*, as

51. Tit. 21, § 11.
52. Davis v. State, 1999 OK CR 48, ¶ 13, 993 P.2d 124, 126.
53. *See* Sanders v. State, 2015 OK CR 11, ¶¶ 6, 8, 358 P.3d 280, 283-84.
54. Bivens v. State, 2018 OK CR 33, ¶ 12, 431 P.3d 985, 992.
55. *Sanders*, ¶ 8, 358 P.3d at 284.
56. *Davis*, ¶ 13, 993 P.2d at 127.
57. *See Sanders*, ¶ 11, 358 P.3d at 284 (the crimes were not separate and distinct because there was no "temporal break" between them); Littlejohn v. State, 2008 OK CR 12, ¶ 20, 181 P.3d 736, 743 (the appellant's conspiracy crime was committed well before the other criminal act); Jones v. State, 2006 OK CR 5, ¶ 65, 128 P.3d 521, 543 (the agreement to commit the felony that served as the basis for conspiracy was completed before the felony); Pavatt v. State, 2007 OK CR 19, ¶ 24, 159 P.3d 272, 281 (the appellant had made a plan and acted on it several times before committing the other crime).

the *Sanders* Court points out.[58] This may be attributable to the manner in which *Davis* overturned Oklahoma's previous precedent on the matter.

B. The Evolution of Oklahoma's Double Punishment Analysis

Prior to the majority's 1999 opinion in *Davis*, the determinative authority on Section 11 analysis was *Hale v. State*.[59] The Court in *Hale* noted the inconsistencies and confusion in the Courts' opinions on the matter since "Section 11 was promulgated in 1970."[60] In fact, the Court seemed to have conflated the double jeopardy clause and the statutory prohibition against multiple punishment or simply disregarded the statutory analysis completely.[61] However, the *Hale* Court based its interpretation of the Section 11 analysis on the Court's opinions from the early 1970s, just after Section 11 was enacted.[62]

The Court in *Hale* provided that where offenses arise from the same transaction are separate and distinct, requiring dissimilar proof, Section 11 is not violated.[63] However, the statutory prohibition against multiple punishments for the same act is violated "where an offense arose from an act which is (1) a mere means to some other ultimate objective, (2) a lesser offense included in some other offense, or (3) merely a different incident or facet of some primary offense."[64] This analysis is sometimes referred to as the "same transaction" test.[65] These three factors were first announced in the Court's 1971 decision *Shackelford v. State*, just after the adoption of the current version of Section 11.[66] The Court in *Shackelford* relied heavily on a California court's interpretation of an identical statutory provision against multiple punishments for the same act.[67] The California court held "[i]f all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more

58. *Sanders*, ¶ 8, 358 P.3d at 284.

59. 2A STEPHEN JONES, ET AL., VERNON'S OKLAHOMA FORMS 2D, CRIMINAL PRACTICE & PROCEDURE § 11.15 (1999 & Supp. 2019). *See generally* Hale v. State, 1995 OK CR 7, 888 P.2d 1029.

60. *Hale* ¶ 3, 888 P.2d at 1028.

61. *Id.* ¶ 3, 888 P.2d at 1029. *See also* 2A JONES, ET AL., *supra* note 59.

62. *Hale*, ¶ 3 n.1, 888 P.2d at 1028 n.1.

63. *Id.* ¶ 4, 888 P.2d at 1029.

64. *Id.* ¶ 3, 888 P.2d at 1028 (citing Clay v. State, 1979 OK CR 26, ¶ 5, 539 P.2d 509, 510).

65. 2A JONES, ET. AL., *supra* note 59.

66. Shackelford v. State, 1971 OK CR 49, ¶ 4, 481 P.2d 163, 165.

67. *Id.* ¶ 5, 481 P.2d at 165.

than one."[68] The Court in *Hale* noted that Kansas, Utah, and Arizona were all influenced by the California interpretation as well.[69] Under this test, the defendant in *Hale* could not be convicted of both Rape in the First Degree[70] and Incest[71] for the same sexual act, despite no violation of double jeopardy due to each offense requiring dissimilar proof.[72]

Judge Lumpkin concurred with the result of *Hale* but took special issue with the historical accuracy of the Court and its statement that "Section 11 complements double jeopardy . . . ."[73] However, Judge Lumpkin appeared to agree with the notion that the legislative intent of Section 11 is to prevent the defendant from being "punished twice for one criminal course of conduct where his offenses were incident to one objective."[74] Judge Lumpkin noted that this language is almost identical to the Court's previous opinion in *Richmond v. State*.[75] His concurrence—which did cite precedent containing the ultimate objective language—is important to note because of the Court's basis in *Davis v. State* for overturning this language.[76] In that opinion, the *Davis* Court stated that the "ultimate objective"[77] language from *Hale* was not founded on prior precedent and that the legislature did not give the court the power to enact such an interpretation of Section 11.[78]

According to *Davis*, the actual proper analysis of a Section 11 claim is to specifically "focus on the relationship between the crimes . . . [t]his analysis does not bar the charging and conviction of separate crimes which may only tangentially relate to one or more crimes committed during a continuing course of conduct."[79] The Court in *Davis* found no violation of Section 11, as "Larceny from a House and Larceny of an Automobile [are] separate and distinct crimes . . . ."[80] For its proposition that this language exceeds the legislative intent of Section 11, and the Court of Criminal

68. *Id.* (citing Neal v. State, 357 P.2d 839, 853-54 (Cal. 1960)).
69. *Id.* ¶ 7, 481 P.2d at 166.
70. OKLA. STAT. tit. 21, § 1114 (2011 & Supp. 2019).
71. Tit. 21, § 885.
72. Hale v. State, 1995 OK CR 7, ¶ 6, 888 P.2d 1029, 1030.
73. *Id.* ¶¶ 4-6, 888 P.2d at 1031-33 (Lumpkin, J., concurring).
74. *Id.* ¶ 6, 888 P.2d at 1031-32.
75. *Id.* ¶ 4, 888 P.2d at 1031 (citing Richmond v. State, 1971 OK CR 427, ¶ 4, 492 P.2d 349, 350-51).
76. Davis v. State, 1999 OK CR 48, ¶ 11, 993 P.2d 124, 126.
77. *Id.* ¶ 11, 993 P.2d at 126.
78. *Id.*
79. *Id.* ¶ 13, 993 P.2d at 126-27.
80. *Id.* ¶ 14, 993 P.2d at 127.

Appeals' authority to announce such an interpretation, the Court in *Hale* provided no authority or precedent for such a claim. Instead, the Court relied on its own hypotheticals.[81] The Court did provide that "[w]e have clear precedent holding that where there are a series of separate and distinct crimes, Section 11 is not violated."[82] The Court in *Ziegler v. State* did not address the appropriateness of the "ultimate purpose" language, instead noting that the defendant's convictions were for three separate acts; albeit occurring during a three-hour period of time.[83] This holding is consistent with the *Hale* Court in that the "ultimate purpose" language would not apply to separate and distinct acts.[84] While I do not disagree with the outcome of *Davis*, it is because of its lack of authority and the apparent consistency with *Hale*'s analysis in the *Davis* Court's sole precedent that I am skeptical of the Court's reasoning for overturning the "ultimate objective" language of *Hale*.

IV. ANALYSIS

A. Was it Correct to Overturn Hale v. State*?*

Due to the lack of authority cited in *Davis*' reasoning for overturning *Hale*, the appropriateness of the Court's 1998 ruling should be viewed in light of the authority found to be persuasive by the Court in *Hale* and other surrounding jurisdictions. The purpose of reviewing these other jurisdictions is to see whether their courts' analyses of double or multiple punishment claims currently consider the intent and/or purpose of the accused's actions. The Court in *Hale* noted several cases from the 1970s that established Section 11 inquiries as separate from the traditional double jeopardy analysis.[85] As previously noted, the *Hale* Court cited *Shackelford*, which is one of the earlier opinions on the matter.[86] The Court in *Shackelford* looked to the courts in California for guidance in its reasoning because California had a fairly identical statute.[87] Because the Court in *Davis* did not cite much Oklahoma authority or other

81. *Id.* ¶¶ 10-11 nn.2-3, 993 P.2d at 126 nn.2-3.
82. *Id.* ¶ 12, 993 P.2d at 126 (citing Ziegler v. State, 1980 OK CR 23, ¶ 9, 610 P.2d 251, 254).
83. *See Ziegler*, ¶ 10, 610 P.2d at 254.
84. *See* Hale v. State, 1995 OK CR 7, ¶ 3, 888 P.2d 1029, 1028-29.
85. *Id.* ¶ 3 n.1, 888 P.2d at 1028 n.1.
86. *Id.* ¶ 3, 888 P.2d at 1028.
87. CAL. PENAL CODE § 654 (Deering 2019).

jurisdictions, it is appropriate to start with a review of California's application of their identical double punishment statute.

The relevant California statutory provision states:

> An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision . . . .[88]

The California opinion cited in the *Shackelford* case was *Neal v. State*.[89] The court in *Neal* announced that the statutory provision's applicability will "depend upon whether a separate and distinct act can be established as the basis of each conviction, or whether a single act has been so committed that more than one statute has been violated."[90] The proper analysis focuses on the singleness of the act itself.[91] The provision applies "also where there is a 'course of conduct' which violates more than one statute and comprises an indivisible transaction punishable under more than one statute."[92] "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor."[93] Under this analysis, if multiple individual criminal acts occurred during a course of conduct, but none of the acts served as a means of perpetrating the other, then the statutory provision is not violated.[94] This was the specific scenario in the case on appeal in front of the *Neal* court: "[T]he arson was the means of perpetrating the crime of attempted murder . . . . The conviction for both arson and attempted murder violated Penal Code section 654, since the arson was merely incidental to the primary objective of killing . . . ."[95]

In 2012, the Supreme Court of California overruled language within

88. *Id.*

89. Shackelford v. State, 1971 OK CR 49, ¶ 4, 481 P.2d 163, 165.

90. Neal v. California, 357 P.2d 839, 843 (Cal. 1960) (quoting California v. Knowles, 217 P.2d 1, 14 (Cal. 1950)) (overruled in part by People v. Correa, 278 P.3d 809, 336 (disapproving footnote 1 of *Neal*)).

91. *Neal*, 357 P.2d at 843.

92. People v. McFarland, 376 P.2d 449, 456 (Cal. 1962).

93. *Neal*, 357 P.2d at 843.

94. *Id.* at 844 (citing *Ex Parte Chapman*, 27 P.2d 817, 818 (Cal. 1954) ("[W]hen the assault is not a means of perpetrating the robbery but is an act that follows after the robbery is completed the defendant is guilty of two punishable acts.")).

95. *Neal*, 357 P.2d at 844.

Neal's footnote, which stated that section 654 precludes double punishment of one act that gives rise to multiple violations of the "*same Penal Code section* or to multiple violations of the criminal provision of other codes . . . *the basic principle it enunciates precludes double punishment in such cases also*."[96] The court did not overrule *Neal*'s double punishment analysis as it pertains to punishing a single act multiple times under different laws.[97] The court did so specifically because this analysis was used for three decades at the time, and no change had been provided by the legislature.[98] The court in *People v. Correa* specifically focused on "multiple violations of the *same* statute," rather than multiple violations of different statutes.[99] The court further stated that "'[t]o overrule them now would result in a sentencing scheme intended by no one . . . [a]ny changes must be made by the Legislature, not this court.'"[100] Accordingly, the "ultimate objective" or "single intent" language from *Neal* is still the accepted rule in California.[101]

The Court in *Shackelford* noted that Alabama was another state with a similar statute that adopted California's interpretation.[102] In Alabama, when a single transaction is used as the "foundation" for multiple charges, the accused may only be convicted for one crime.[103] Alabama announced its interpretation of the state's double punishment statute in *Wildman v. State* when it specifically adopted *Neal's* approach: focusing on the intent and objective of the accused in determining the divisibility of the transaction.[104] The court in *Wildman* held that when the accused broke into the home to steal, the basis for the crime of burglary, he could not also be convicted of larceny because this was a single act with a singular

96. *See* People v. Correa, 278 P.3d 809, 813 (quoting *Neal*, 357 P.2d at 843 n.1) (emphasis in original).

97. *Correa*, 278 P.3d at 813.

98. *Id*. at 812.

99. *Id.* at 813. (emphasis in original).

100. *Id.* at 812 (quoting People v. Latimer, 858 P.2d 611, 612 (Cal. 1993)).

101. People v. Hester, 992 P.2d 569, 571 (Cal. 2000). *See also* 22 JOHN BOURDEAU ET AL., CALIFORNIA JURISPRUDENCE CRIMINAL LAW: POSTTRIAL PROCEEDINGS § 224 (3d 2019) ("The statutes purpose is to ensure that a defendant's punishment will be commensurate with culpability.").

102. Shackelford v. State, 1971 OK CR 49, ¶ 7, 481 P.2d 163, 165.

103. *See* Canyon v. State, 218 So. 3d 871, 873 (Ala. Crim. App. 2016) (quoting Vason v. State, 574 So. 2d 860, 862 (Ala. Crim. App. 1990)).

104. Wildman v. State, 165 So. 2d 396, 401 (Ala. App. 1963) (citing Neal v. State, 357 P.2d 839, 843 (Cal. 1960)).

purpose.[105] Convictions for multiple crimes that are the same "kindred of crimes" committed during the singular act is a violation of the statutory prohibition against double punishment.[106] It appears that there may be an implied factor of time as it relates to the singleness of the transaction and the conclusion of an act within Alabama's interpretation.[107] In *Canyon v. State,* the State argued that the pistol used as the basis for a conviction for second-degree-theft was taken separately from the other items in the burglary that were the basis for the first-degree-theft charge.[108] The Alabama Court of Criminal Appeals still held that conviction for both was a violation of the statutory prohibition against double punishment.[109]

Our neighbors in Texas, although lacking a separate statutory prohibition against double punishment, consider both the timing and purpose of the accused's actions during the course of his conduct.[110] Texas' ban against multiple punishments for the same, singular act is encompassed in a traditional *Blockburger* analysis of a double jeopardy claim.[111] The first focus of this analysis is whether the legislature intended multiple punishments, as opposed to one.[112] To determine whether the legislature intended to apply multiple punishments for an act that violates multiple offenses in one act, Texas courts have adopted an approach that views the elements of each offense.[113] However, the elements that are of importance to this analysis are not simply the statutory elements of the alleged offense, but the elements alleged in the facts of the pleadings.[114] Therefore, "double-jeopardy challenges can be made even against offenses that have different statutory elements, if the same facts required to convict are alleged in the indictment."[115] Based on what is pleaded, "the 'focus' or 'gravamen' of a penal provision should be regarded as the best indicator of legislative intent when determining whether a multiple-punishments violation has occurred."[116] Thus, if the gravamen—or purpose—of the crimes alleged in the pleadings differs from each other,

105. *Wildman,* 165 So. 2d at 403.
106. *Id.* at 397.
107. *See Canyon*, 218 So. 3d at 873.
108. *Id.* at 873-74.
109. *Id.* at 874.
110. Aekins v. State, 447 S.W.3d 270, 275 (Tex. Crim. App. 2014).
111. Garfias v. State, 424 S.W.3d 54, 58 (Tex. Crim. App. 2014).
112. *Aekins*, 447 S.W.3d at 274.
113. *Garfias*, 424 S.W.3d at 58.
114. *Id* at 58-59.
115. *Id*.
116. *Id*.

then there is no violation of double jeopardy for multiple punishments; alternatively, if the gravamen—or purpose—was the same, then there is a violation of double punishment for double jeopardy purposes.

The court in *Aekins v. State* supported such a conclusion in its discussion of the "merger doctrine" or "single impulse doctrine."[117] The court in *Aekins* stated "[i]f more than one statutory offense is necessarily committed by that single criminal act and impulse, then the offenses merge and the defendant may be punished only once."[118] As the *Aekins* court alluded to, this concept of a single impulse—or purpose—for the multiple crimes committed during a singular transaction is not a concept that is exclusive to a particular state: "This 'single impulse' aspect of *Blockburger* is United States Supreme Court law, not some peculiar doctrine thought up by Texas judges. We are not permitted to ignore or denigrate it. As a lower court, we are bound by Supreme Court reasoning on federal constitutional issues."[119] Still, the accused may be convicted and punished for multiple acts, even if they occur within the relatively same time, if each act is considered separate and distinct.[120] "The key is that one act ends before another act begins."[121] If one act or offense cannot occur without the other, then there is no completion of an act which can be said to be separate from the other:

> That one continuing act, the result of a single impulse, may violate three separate Penal Code provisions, but in *Patterson*, we held that the Legislature intended only one conviction for that one completed sexual assault. This means that multiple convictions for one complete, ultimate sexual assault violate the Double Jeopardy Clause.[122]

Colorado is another neighboring state that does not have a separate statutory prohibition against double or multiple punishments, but Colorado does hold a constitutional prohibition against multiple

117. Aekins v. State, 447 S.W.3d 270, 275 (Tex. Crim. App. 2014) (citing People v. Garcia, 2012 COA 79, ¶¶ 57-59, 296 P.3d 285, 293; Blockberger v. United States, 284 U.S. 299, 302-05 (1932)).
118. *Id.* at 275.
119. *Id*.
120. *Id.*
121. *Id.* at 278.
122. *Id.* at 279.

punishments stemming from the same act or offense.[123] Colorado courts focus their analysis around a concept referred to as "multiplicity," which is "the charging of multiple counts and the imposition of multiple punishments for the same criminal conduct."[124] What constitutes a "same offense" is dependent on whether the legislature intended to impose multiple crimes for the offense,[125] which is similar to Texas. When "a series of repeated acts . . . are charged as separate crimes even though they are part of a continuous transaction and therefore actually one crime . . . the inquiry is whether the General Assembly has defined the crime as a continuous course of conduct."[126] Colorado is different from Oklahoma and other jurisdictions discussed because its legislature has specifically provided that the accused may be convicted of each offense committed during the course of his conduct, unless it is a lessor-included offense.[127] A discussion of whether this legislative act comports with the protections against the United States' constitutional provision against double jeopardy is for a separate review and will not be discussed here.

This brief review of multiple jurisdictions is impactful in determining whether the *Davis* Court's ruling was justified. As just previously mentioned, some of the jurisdictions found to be persuasive by the *Shackelford* Court still use some form of this "ultimate objective" language.[128] The *Davis* Court's overruling of *Hale*'s "ultimate objective" language is abrupt when viewed in light of the legislature's decades of silence as to its use.[129] This abrupt change may itself be an unconstitutional overextension of the Court's authority.[130] Even a state like Texas, which does not have a comparable statutory provision against multiple punishments, gives great emphasis to the intent of the accused in carrying out his course of conduct.[131] Consideration of the accused's objective or purpose may very well be a requirement imposed by the United States

123. Patton v. People, 35 P.3d 124, 128-29 (Colo. 2001).
124. Woellhaf v. People, 105 P.3d 209, 214 (Colo. 2005).
125. Anne Bowen Poulin, *Double Jeopardy and Multiple Punishment: Cutting the Gordian Knot*, 77 U. COLO. L. REV. 595, 601 (2006).
126. *Woellhaf*, 105 P.3d at 214-15.
127. *See* COLO. REV. STAT. ANN. § 18-1-408 (West 2019).
128. *See* discussion *supra* pp. 11-17.
129. Davis v. State, 1999 OK CR 48, ¶ 11, 993 P.2d 124, 126.
130. *Id.*
131. *See* Garfias v. State, 424 S.W.3d 54, 59 (Tex. Crim. App. 2014) ("gravamen" or "purpose"). *See also* Aekins v. State, 447 S.W.3d 270, 275 (Tex. Crim. App. 2014) ("single impulse doctrine").

Constitution which Oklahoma may not be able to avoid applying anyway.[132] Given this requirement, absent any express legislative action or intent,[133] the Oklahoma courts should still consider the *ultimate objective* of the accused/appellant in its double punishment analysis.

B. Did the Court in Bivens v. State *Correctly Apply the Double Punishment Analysis?*

As a reminder, Count I and Count II are convictions for possession of a drug.[134] The appellant's conviction for Count I appears to apply to the appellant's possession of Marijuana and/or Methamphetamine.[135] The appellant's conviction for Count II appears to be specifically for the appellant's possession of Marijuana or Xanax, as the statute applies to any controlled dangerous substance.[136] Although the *Bivens* Court states the appellant's conviction for Count IV was for Possession of a Dangerous Drug Without a Prescription,[137] the specific section number provided does not concern his possession of the various drugs.[138] Instead, the section that he was convicted of violating provides: "A. [i]t shall be unlawful for any licensee or other person to . . . 7. Interfere, refuse to participate in, impede or otherwise obstruct any inspection, investigation or disciplinary proceeding authorized by the Oklahoma Pharmacy Act . . . ."[139]

I believe this is likely a typographical error, given the very next section of that statute provides that it shall be unlawful to "possess dangerous drugs without a valid prescription or a valid license to possess such drugs."[140] For the purposes of the Oklahoma Pharmacy Act, "dangerous drugs" means: "A drug: a. for human use subject to 21 U.S.C. 353(b)(1), or b. is labeled 'Prescription Only', or labeled with the following statement: 'Caution: Federal law restricts this drug except for use by or on the order of a licensed veterinarian.'"[141] The drugs described in 21 U.S.C. § 353(b)(1) refer to:

132. *See Aekins*, 447 S.W.3d at 275.
133. *See* COLO. REV. STAT. ANN. § 18-1-408 (West, 2019).
134. Bivens v. State, 2018 OK CR 33, ¶ 1, 431 P.3d 985, 990.
135. OKLA. STAT. tit. 63, § 2-415(a)(1)–(4) (2011 & Supp. 2019).
136. Tit. 63, § 2-402(A)(1).
137. *Bivens*, ¶ 1, 431 P.3d at 990.
138. *Id*.
139. Tit. 59, § 353.24(A)(7).
140. Tit. 59, § 353.24(A)(8).
141. Tit. 59, § 353.1(10).

> (1) A drug intended for use by man which–(A) because of its toxicity or other potentiality for harmful effect, or the method of its use, or the collateral measures necessary to its use, is not safe for use except under the supervision of a practitioner licensed by law to administer such drug; or (B) is limited by an approved application under section 355 of this title to use under the professional supervision of a practitioner licensed by law to administer such drug . . . .[142]

So it would appear that Count IV was used to convict the appellant for his possession of Xanax. Therefore, the purpose for each charge was to convict the appellant for each individual drug that was determined to be in his possession at the moment of the officer's inspection of the vehicle.

If the *Hale* analysis of a Section 11 claim was still in effect, the appellant's multiple convictions stemming from the single search of the vehicle potentially violates Section 11's double punishment provisions. The appellant was found to be in possession of each drug, used as the basis for each of the three offenses, at the same time. Although the likely purpose of the appellant was to possess the drugs, his possession of each does not appear to be separate and distinct.[143] Even this language from *Hale* has been cited by the Oklahoma courts following *Davis*.[144] Importantly, the Court does not explicitly state when the appellant came into possession of each drug.[145] It just so happened that the appellant was later found in possession of all three drugs at the same time.[146] This is similar to the appellant in the *Shackelford* case.[147] There, the appellant robbed an Oklahoma City pharmacy with a gun stealing several narcotics.[148] A police officer later pulled over a vehicle the appellant was a passenger in and discovered the stolen narcotics.[149] The appellant was convicted of both robbery with a firearm and possession of narcotics.[150] The Court noted the appellant came into possession of the narcotics

142. 21 U.S.C. § 353(b)(1)(A)(B) (2012).
143. Hale v. State, 1995 OK CR 7, ¶ 4, 888 P.2d 1029, 1029.
144. Jones v. State, 2006 OK CR 5, ¶ 63, 128 P.3d 521, 543.
145. Bivens v. State, 2018 OK CR 33, ¶ 5, 431 P.3d 985, 991.
146. *Id.*
147. Shackelford v. State, 1971 OK CR 49, ¶ 2, 481 P.2d 163, 164.
148. *Id*.
149. *Id.*
150. *Id.*

because of the robbery, therefore, creating one singular act.[151] As such, the appellant could only be properly convicted of one crime, but not both.[152] This differs from the appellant in the *Watts* case because the Court found separate pieces of evidence of numerous possessions and sales of drugs needed for the trafficking convictions that occurred prior to the act needed to convict the appellant for maintaining a dwelling in connection to the distribution of drugs.[153]

Although each of the appellant's charges in *Bivens* required proof of an element not required in the others, there were no separate facts used to convict the appellant so his multiple convictions violates Section 11.[154] These separate possessions of the drugs would appear to be merely "different incidents or facets" to the primary offense for possession of drugs.[155] We are unable to discern from the Court's summary of the facts when or if possession of each ceased before the other. Although he was in possession of multiple drugs, if these possessions were found during a single transaction and *were not complete* prior to each other, then Section 11 is violated.[156] Additionally, because there is no completion or separation stated, these violations of multiple statutes that arise from the same criminal act and effectively merge can only be punished under one conviction.[157]

Notwithstanding the outcome under *Hale*'s analysis, the Court in *Bivens* incorrectly applied the Section 11 analysis as announced in *Davis*.[158] The Court referenced *Sanders v. State* to proclaim that Section 11 has not been violated by Appellant's multiple convictions because each crime requires proof of elements that the other does not.[159] But this is not quite the full test as established in *Davis* and further applied in *Sanders*. Separate proof for each element is, however, the appropriate analysis to apply in reviewing the convictions for a violation of double jeopardy.[160]

The focus of a Section 11 inquiry is on the relationship between the

151. *Id.* ¶ 2, 481 P.2d at 165.
152. *Id.* ¶ 9, 481 P.2d at 165-66.
153. Watts v. State, 2008 OK CR 27, ¶ 19, 194 P.3d 133, 139-40.
154. Hale v. State, 1995 OK CR 7, ¶ 6, 888 P.2d 1029, 1029-30.
155. Clay v. State, 1979 OK CR 26, ¶ 5, 539 P.2d 509, 510.
156. *See* Jones v. State, 2006 OK CR 5, ¶ 65, 128 P.3d 521, 543. *See also* Littlejohn v. State, 2008 OK CR 12, ¶ 20, 181 P.3d 736, 743.
157. Irwin v. State, 2018 OK CR 21, ¶ 6, 424 P.3d 675, 677.
158. Bivens v. State, 2018 OK CR 33, ¶ 24, 431 P.3d 985, 994.
159. *Id.* ¶ 12, 431 P.3d at 992.
160. Logsdon v. State, 2010 OK CR 7, ¶ 19, 231 P.3d 1156, 1165 (citing Watts v. State, 2008 OK CR 27, ¶ 16, 194 P.3d 133, 139-40).

crimes.[161] The Court is to consider three factors when doing so: "1) the particular facts of each case; 2) whether those facts set out separate and distinct crimes; and 3) the intent of the Legislature."[162] The facts of each case must still show that the appellant committed separate and distinct acts.[163] Still, "[t]his analysis does not bar the charging and conviction of separate crimes which may only tangentially relate to one or more crimes committed during a continuing course of conduct."[164] While the required elements for each conviction may assist in guiding the comparison amongst the crimes and may provide insight as to the legislative intent, the elements are only part of the total Section 11 analysis as it stands today. In addition, the requirements of Counts II and IV overlap: Count II encompasses any of the drugs within Schedules I-V of the C.S.A.[165] while Count IV could also cover Xanax or Marijuana.[166] Therefore, the Court is technically incorrect in its statement that each offense contains different elements, as there is an overlap. This overlap may suggest that the crimes are not separate and distinct.[167]

The *Bivens* Court used the same facts for each conviction and did not provide evidence to show that there was a "temporal break between" the appellant obtaining possession of each drug needed for the applicable convictions.[168] However, what we do know is that the appellant was in possession of each drug during one transaction. Regardless, these multiple crimes seem to be tangentially related for the purposes of the *Davis* analysis. The appellant was in possession of several items which were used for separate convictions, as opposed to a single item used as the basis for multiple convictions stemming from one act.[169] In addition, there were no multiple convictions for either of the drugs.[170] The appellant's possession of each drug, or completion of each offense, would not also give rise to other crimes he was charged with.[171] The facts provided suggest that the

161. Davis v. State, 1999 OK CR 48, ¶ 13, 993 P.2d 124, 126.
162. Sanders v. State, 2015 OK CR 11, ¶ 8, 358 P.3d 280, 284.
163. State v. Kistler for Payne County, 2017 OK CR 24, ¶ 8, 421 P.3d 889, 901.
164. *Davis*, ¶ 13, 993 P.2d at 127.
165. OKLA. STAT. tit. 63, § 2-402(A)(1) (2011 & Supp. 2019). *See* Tit. 63, § 2-101(A)(8) (definitions).
166. Tit. 59, § 353.24(A)(8). *See* Tit. 59, § 353.1(8) (definitions).
167. Ziegler v. State, 1980 OK CR 23, ¶ 10, 610 P.2d 251, 254.
168. Sanders v. State, 2015 OK CR 11, ¶ 11, 358 P.3d 280, 284.
169. *Id.*
170. 2A JONES, ET AL., *supra* note 59 (discussing Head v. State, 2006 OK CR 44, 146 P.3d 1141).
171. *See* Irwin v. State, 2018 OK CR 21, ¶ 6, 424 P.3d 675, 677 (willful stalking also

appellant would have come into possession of each drug at some point prior to the transaction with the police officer that proved the appellant was in possession of them.[172] Under the *Davis* analysis, these are separate and distinct acts that are only tangentially related; thus, Section 11 is not violated.

V. CONCLUSION

While I do not disagree with the outcome of *Bivens*, it is important for the Court to consistently apply the test as it announced. In the decades leading up to *Hale* and *Davis*, the courts in Oklahoma did not uniformly follow a particular analysis for Section 11 claims.[173] This caused confusion,[174] which may happen again if the Court does not routinely follow its own analysis.[175] The Court in *Hale* relied upon decisions from the early 1970s, following the adoption of Oklahoma's current statutory prohibition against double punishment.[176] The Court in *Davis* found this to be an erroneous interpretation of the statute just a few years later.[177] But the decisions cited in *Hale* largely relied upon other jurisdictions that already had over a decade of interpretation of an identical statute.[178] Some of those jurisdictions, as well as others that neighbor Oklahoma, still apply such an interpretation as announced in *Hale*. Therefore, it seems that the *Hale* Court's reasoning has greater support when compared to *Davis*' own hypothetical.[179] When applying the *Hale* analysis, the appellant's multiple convictions in *Bivens* potentially violated Section 11 because they were a part of the appellant's ultimate objective, and there was no evidence provided to show a separation between the acts of possession. The Court in *Bivens* announced it would rely on the decision in *Sanders*, which applied the *Davis* analysis. But the Court in *Bivens* instead applied the traditional *Blockburger* analysis for double jeopardy claims. Still, this was a harmless error because the Court reached the correct outcome as if they

violated the previously imposed restraining order, so only one conviction allowed).

172. *Sanders*, ¶¶ 7-8, 358 P.3d at 283-84.

173. *Hale*, ¶ 3, 888 P.2d at 1068.

174. Davis v. State, 1999 OK CR 48, ¶ 9, 993 P.2d 124, 126 (stating *Hale* was unclear).

175. Jones v. State, 2006 OK CR 5, ¶ 63, 128 P.3d 521, 543 (citing *Hale*, 1995 OK CR 7, ¶ 4, 888 P.2d at 1029).

176. *Hale*, ¶ 3 nn.1-2, 888 P.2d at 1029 nn.1-2.

177. *Davis*, ¶ 11, 993 P.2d at 126.

178. *Hale*, ¶ 5 n.7, 888 P.2d at 1037 n.7.

179. *Davis*, ¶¶ 10-11, 993 P.2d at 126 nn.2-3.

had applied the *Davis* analysis.