

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

THE SUPREME COURT OF THE UNITED STATES

ORIGINAL

DKT/CASE NO. 83-6663

TITLE CHARLES FUGATE, Petitioner v. NEW MEXICO

PLACE Washington, D. C.

DATE February 19, 1985

PAGES 1 - 41

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IN THE SUPREME COURT OF THE UNITED STATES

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CHARLES FUGATE, :

Petitioner, :

V. : No. 83-6663

NEW MEXICO :

- - - - -x

Washington, D. C.

Tuesday, February 19, 1985

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 11:11 o'clock a.m.

APPEARANCES:

J. THOMAS SULLIVAN, ESQ., Dallas, Texas; on behalf of
Petitioner.

PAUL G. BARDACKE, Attorney General of New Mexico,
Santa Fe, New Mexico; on behalf of Respondent.

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C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
J. THOMAS SULLIVAN, ESQ.	
On behalf of the Petitioner	3
PAUL G. BARDACKE, ESQ.	
On behalf of the Respondent	21
J. THOMAS SULLIVAN, ESQ.	
On behalf of the Petitioner - Rebuttal	36

1 injured in that accident died, apparently as a result of
2 those injuries, and the State commenced a felony
3 prosecution for vehicular homicide.

4 The Defendant was tried and convicted. His
5 first conviction was set aside by the New Mexico Court
6 of Appeals on an unrelated ground, and on remand his
7 newly-retained defense counsel filed a motion to
8 dismiss, arguing that based upon double jeopardy
9 principles, the prior convictions for lesser included
10 offenses in the Carlsbad Municipal Court barred a
11 subsequent State prosecution for the greater offense of
12 vehicular homicide.

13 QUESTION: What did the second constitution
14 have to establish that was not necessary to be shown in
15 the first?

16 MR. SULLIVAN: The State was required to prove
17 either that as a result of unlawful operation of a
18 vehicular and resulting accident, that a person had
19 either been injured and sustained great bodily injury,
20 or had died as a result of that accident.

21 The State was required further, in order to
22 establish the felony offense, that the accused was
23 either operating the vehicular while driving while
24 intoxicated or under the influence of drugs, or that he
25 was operating the vehicular recklessly.

1 After his second conviction, the New Mexico
2 Court of Appeals reversed, applying double jeopardy law,
3 principles enunciated in decisions in this Court, to
4 hold that the prior convictions in municipal court for
5 lesser included offenses barred the subsequent vehicular
6 homicide prosecution.

7 In so doing, the Court of Appeals made four
8 distinct important findings. First, it rejected the
9 argument advanced by the State that the necessary or
10 essential facts exception of *Diaz v. United States*
11 applied, to hold that the State was justified in waiting
12 to commence its vehicular homicide prosecution until
13 after that injured person had died.

14 The Court of Appeals looked to the wording of
15 the New Mexico statute which permits the State to
16 commence a felony prosecution.

17 QUESTION: Mr. Sullivan, it's the judgment of
18 the Supreme Court of New Mexico that's being reviewed
19 here, isn't it?

20 MR. SULLIVAN: Yes, Your Honor. But the
21 threshold of the decision in the New Mexico Supreme
22 Court critically relies on what the Court of Appeals did
23 in this case and what it didn't do.

24 QUESTION: So you say it's necessary for us to
25 understand the Court of Appeals' reasoning in order to

1 understand the Supreme Court's reasoning?

2 MR. SULLIVAN: I believe it's necessary to
3 understand the Court of Appeals' reasoning to understand
4 why we believe that we're entitled to the bar of double
5 jeopardy when the decisions of this Court were applied.

6 The necessary and essential facts exception of
7 Diaz were rejected by the Court of Appeals because the
8 State could have prosecuted because the injury, causing
9 great bodily injury to the victim of that accident was
10 available, was known to the State at the time the
11 traffic offenses were prosecuted.

12 Second, the Court of Appeals held that the
13 reckless driving and careless driving offenses are
14 greater and lesser included offenses for double jeopardy
15 purposes. That's been conceded by the State throughout
16 the litigation.

17 Third, the Court of Appeals held essentially
18 that DWI and reckless driving are lesser included
19 offenses under every case of the felony offense of
20 vehicular homicide. They are included because the
21 vehicular homicide statute defines the offense in terms
22 of a prior commission of one of three modes of driving
23 unlawfully: driving while intoxicated, driving while
24 under the influence of drugs, or driving recklessly.

25 What the Court of Appeals finally rejected was

1 the State's argument that the jurisdictional exception
2 which was noted by this Court in Diaz would apply as an
3 exception to the double jeopardy bar. As I understand
4 it, the jurisdictional exception applies where a court
5 does not have jurisdiction over an offense and therefore
6 could not have adjudicated an offense.

7 And the New Mexico Court of Appeals held that
8 by implication, Waller. v. Florida, Robinson v. Neil,
9 had overruled the applicability of the jurisdictional
10 exception when you're looking at municipal court
11 convictions for lesser included offenses of a felony
12 prosecution which is later commenced in a court of
13 general jurisdiction in the State.

14 This morning, I believe we are focusing on the
15 Supreme Court decision, the decision of the Supreme
16 Court of New Mexico, which held that Diaz v. United
17 States is still applicable with respect to the
18 jurisdictional exception.

19 The Court essentially held that because the
20 Carlsbad Municipal Court had no jurisdiction over the
21 felony offense of vehicular homicide, its judgments on
22 the lesser included traffic offenses could not serve to
23 bar prosecution for that felony offense in the State
24 District Court, which is a court of general jurisdiction
25 in New Mexico.

1 The State has argued in its brief to this
2 Court an alternative theory which it suggests would have
3 supported the judgment of the New Mexico Supreme Court,
4 arguing a different lesser included offense analysis
5 than was ever argued in the New Mexico courts.

6 And we would argue, for purposes of our
7 petition and for purposes of decision of this Court,
8 that the real issue to be focused upon is whether or not
9 the jurisdictional exception of Diaz remains valid in
10 light of Waller v. Florida and Robinson v. Neil.

11 In fact, in those cases, strikingly similar
12 facts to those presented in the instant case resulted in
13 reversals of subsequently obtained convictions --

14 QUESTION: Was Diaz even mentioned in either
15 of those cases?

16 MR. SULLIVAN: Your Honor, I don't believe
17 either opinion mentions Diaz.

18 QUESTION: And neither in Vitale.

19 MR. SULLIVAN: I don't believe it's mentioned
20 in Illinois v. Vitale. I believe the New Mexico Supreme
21 Court decision in Manzanares expressly notes -- and
22 Manzanares is a pivotal decision because the subsequent
23 decisions in Padilla, companion cases, were predicated
24 on the --

25 QUESTION: I've forgotten. What happened in

1 Manzanares? Wasn't that filed here?

2 MR. SULLIVAN: That's filed and is still
3 pending, Your Honor.

4 QUESTION: It's still pending here?

5 MR. SULLIVAN: Still pending.

6 IN Manzanares, the New Mexico Supreme Court
7 held that this Court had not directly addressed the
8 jurisdiction exception issue in either Waller or
9 subsequent decisions.

10 QUESTION: But, nevertheless, what?

11 MR. SULLIVAN: But, nevertheless, it applied
12 in New Mexico; that New Mexico still recognized that
13 there was a jurisdictional exception emanating from Diaz
14 v. United States which would excuse the application of
15 the double jeopardy bar where a court of limited
16 jurisdiction could not have heard or tried or convicted
17 on the greater offense.

18 QUESTION: Your argument is that Diaz could
19 not possibly have survived Waller and Brown.

20 MR. SULLIVAN: Not with regard to questions
21 that focus on a preliminary municipal court conviction,
22 followed by prosecution in a court of general
23 jurisdiction of the State.

24 I think there is an argument to be made that
25 the jurisdictional exception is really what you have in

1 successive State and Federal prosecutions because
2 neither court would have jurisdiction over the other's
3 offenses, but not with regard to municipal State
4 prosecutions because the jurisdictional exception in
5 those cases hinges upon the notion of dual sovereignty
6 which was what was expressly rejected by the court in
7 Waller, and then applied retroactively in Robinson v.
8 Neil.

9 In other words, without a concept of dual
10 sovereignty backing the jurisdictional exception, you
11 don't have another theory upon which the jurisdiction of
12 the municipal court is limited such that it cannot --
13 all charges could not be brought in a single prosecution.

14 The New Mexico statute --

15 QUESTION: If at the time of the municipal
16 action the person wasn't dead, it would be hard to bring
17 at all in the municipal court.

18 MR. SULLIVAN: That would be true, Your Honor,
19 if in fact the felony statute required proof of the
20 death. It does not in New Mexico require proof of the
21 death. It requires either proof of death or proof of a
22 great bodily injury.

23 And the Court of Appeals was very explicit in
24 holding that the evidence available to the State at the
25 time that the initial charges were filed would have

1 supported a finding of great bodily injury. There is no
2 distinction in punishment between vehicular homicide
3 predicated on death or great bodily injury, and
4 therefore the State was compelled to bring all of its
5 charges in one prosecution and at the same time.

6 QUESTION: Does double jeopardy involve itself
7 in punishment aspects of the case?

8 MR. SULLIVAN: I think it is involved in the
9 sense that we have successive or multiple punishments
10 imposed in this case, Your Honor. The Defendant served
11 part of his sentence initially imposed, and after the
12 conviction in State court, another sentence, the term of
13 imprisonment was imposed. I believe that's multiple
14 punishments for the same offense.

15 For our purposes and I think, as I understand
16 the rulings of this Court, the lesser included offenses,
17 the traffic offenses, were clearly lesser included under
18 New Mexico law and under the decisions of this Court,
19 and thus prior conviction on those charges would have
20 barred both a second trial, a second conviction, or the
21 infliction of a great punishment, assuming as we must in
22 New Mexico, because of the statutory language, the State
23 had no reason not to bring the felony charge at the same
24 time it charged and prosecuted the Defendant for --

25 QUESTION: Aren't we bound by the construction

1 of the State law, by the highest court of the State
2 here?

3 MR. SULLIVAN: I think, Your Honor, that the
4 Supreme Court decision in New Mexico implicitly excepted
5 the Court of Appeals' finding on the necessary or
6 essential facts exception of Diaz. It seems to me that
7 in the decision itself, the Court recognized that the
8 Court of Appeals was correct; that the State could have
9 brought the felony prosecution on the theory of great
10 bodily injury. It didn't have to wait until there was a
11 death, but that --

12 QUESTION: And also that it was a lesser
13 included offense.

14 MR. SULLIVAN: And it was a lesser included
15 offense.

16 QUESTION: Well, Mr. Sullivan, could both the
17 traffic offense and the felony charge been tried in the
18 upper court?

19 MR. SULLIVAN: Yes, Your Honor, I believe they
20 could. The State law also defines DWI and reckless
21 driving. The New Mexico Supreme Court has expressly held
22 in Manzanares that the District Court in New Mexico is
23 accorded general jurisdiction, and in fact the Joinder
24 Rule, Rule 10 of the Rules of Criminal Procedure for the
25 District Courts, expressly directs that in a prosecution

1 the State should bring all the felonies and misdemeanors
2 which arise from the same transaction or occurrence.

3 In this case there was really no reason why
4 the State should not have commenced its felony
5 prosecution at the same time that the Defendant was
6 tried on the lesser included offenses of DWI and
7 reckless driving.

8 QUESTION: But you agree, I take it, or you
9 don't challenge the ruling that the municipal court or
10 whatever it was in Eddy County, did not have
11 jurisdiction to try the felony.

12 MR. SULLIVAN: No, it had no jurisdiction to
13 try the felony, Your Honor. Just as in Waller and
14 Robinson v. Neil, as I understand those decisions, the
15 Defendant in each case was tried on municipal
16 ordinances, violations of municipal ordinances in the
17 municipal court. Those were deemed to have been the
18 same offense, and if they were the same offense, in fact
19 and in law, then the prior conviction on the lesser
20 included offenses which were violations of ordinances
21 would bar the subsequent State prosecution in a court of
22 general jurisdiction.

23 I think that's very clear from the decisions
24 in Waller and Robinson, and particularly from the
25 District Court's decision on remand in Robinson, where

1 the --

2 QUESTION: What did Waller hold?

3 MR. SULLIVAN: Well, Waller rejected the
4 notion, as I understand it, that because of a doctrine
5 of dual sovereignty --

6 QUESTION: Right. That's all it rejected was
7 the dual sovereignty theory.

8 MR. SULLIVAN: That's correct. But the
9 express language of the opinion, Your Honor, was that
10 the court rejects the Florida court's conclusion that an
11 individual could twice be charged for the same offense
12 and tried for the same offense, both in the municipal
13 court or a court of limited jurisdiction and then in a
14 court of general jurisdiction.

15 Those are exactly the facts presented in this
16 case.

17 QUESTION: Well, that may be, but all they
18 based it on, all they rejected was the dual sovereignty
19 theory. They didn't address the jurisdiction.

20 MR. SULLIVAN: But, Your Honor, I think the
21 jurisdictional exception in that case would have to flow
22 from dual sovereignty. There would be no other basis
23 for considering the limitation.

24 QUESTION: But there is nothing in Diaz that
25 talks about dual sovereignty. Diaz just talks about the

1 different jurisdiction of courts in the same system.

2 MR. SULLIVAN: That's correct Your Honor.

3 QUESTION: So I don't think it's right to say
4 that the jurisdictional exception depends on the
5 exception of the dual sovereignty here. The dual
6 sovereignty theory that Florida sought to defend in
7 Waller was an attempt to apply a body, the Federal/State
8 thing, and Florida said just like you applied it to the
9 Federal versus State prosecution, applied in State
10 versus municipal prosecution. We said no.

11 But that's not the same as the jurisdiction.

12 MR. SULLIVAN: I agree, Your Honor, that there
13 is a distinguishing feature between them.

14 QUESTION: Well, Robinson v. Neil didn't add
15 anything to that.

16 MR. SULLIVAN: No, but on remand when the
17 District Court of the Eastern District of Tennessee
18 considered the jurisdictional exception that was then
19 argued, the court said it was untenable to accept that
20 exception.

21 QUESTION: When the New Mexico disagrees with
22 the District Court for Tennessee, that's what we are
23 here about it.

24 MR. SULLIVAN: Well, Your Honor, I believe the
25 facts in Waller and Robinson v. Neil are virtually

1 indistinguishable from the facts in this case.

2 You have municipal court convictions for
3 violations of municipal ordinances, you have subsequent
4 prosecution for a State-based charged before the general
5 jurisdiction --

6 QUESTION: Well, if the argument in Waller had
7 been that there's a jurisdictional exception in double
8 jeopardy, the case might have come out differently.

9 MR. SULLIVAN: Well, I think, Your Honor,
10 that's possibly true.

11 QUESTION: Well, you can't say, then, that
12 Waller implicitly or necessarily overruled Diaz.

13 MR. SULLIVAN: Well, Your Honor, whether it
14 necessarily or implicitly overruled it in all cases, it
15 seems to me fair to say that where you're talking about
16 municipal prosecutions followed by State prosecutions,
17 implied at least, Waller rejects the notion that this
18 Defendant could have been tried in municipal court for
19 DWI, which is defined both under State statute and under
20 municipal ordinance, and then tried for an offense, a
21 greater offense requiring proof of DWI in a State court
22 of general jurisdiction.

23 It seems to me that that's exactly the same
24 type of situation that --

25 QUESTION: Do you think it appears anywhere in

1 the record in Waller or in the arguments as what the
2 jurisdiction of the municipal court was?

3 MR. SULLIVAN: I think that it's clear that --

4 QUESTION: You'd have to go and look at
5 Florida law, wouldn't you?

6 MR. SULLIVAN: It was clear that there was a
7 violation of a municipal ordinance.

8 QUESTION: That may be. That may be, but how
9 do we know what the jurisdiction -- how did we know even
10 then what the jurisdiction of the municipal court was?

11 MR. SULLIVAN: Well, I assume that that issue
12 was before the court --

13 QUESTION: Well, you assume. But show me
14 where it was.

15 MR. SULLIVAN: Well, Your Honor, the essential
16 fact is that parallel facts are presented in that case
17 and in this case. Whether Waller expressly or
18 implicitly overruled Diaz, there is no question that
19 looking at the pattern of double jeopardy decisions of
20 this Court, including Illinois v. Vitale, conviction on
21 lesser included offenses in a court of limited
22 jurisdiction -- and I believe that's also the situation
23 in Brown v. Ohio -- serves to bar a subsequent
24 conviction for a greater offense in a court of general
25 jurisdiction.

1 Whether or not the New Mexico Supreme Court
2 was correct in saying there's still something called the
3 jurisdictional exception -- and there may be, and I
4 would concede that -- I don't think it can withstand the
5 application of the principles of Illinois v. Vitale or
6 Brown v. Ohio in this particular case, because here --

7 QUESTION: Mr. Sullivan, I gather the Court of
8 Appeals treated the municipal charges as lesser included
9 offenses, did they not?

10 MR. SULLIVAN: Yes, the Court of Appeals did.

11 QUESTION: And your Supreme Court didn't
12 disturb that, did it?

13 MR. SULLIVAN: It didn't address that in the
14 Fugate opinion.

15 QUESTION: But it didn't disturb that, did
16 it?

17 MR. SULLIVAN: No, not at all.

18 QUESTION: It didn't have any occasion to
19 disturb it, did it, because it went off on a different
20 line of reasoning.

21 MR. SULLIVAN: I think you're correct. It
22 went off on the jurisdictional exception, the
23 applicability.

24 QUESTION: Yes, but for our purposes, we treat
25 the case, don't we, the way the State Supreme Court and

1 the Court of Appeals treats it.

2 MR. SULLIVAN: I believe so. And, Your Honor,
3 that's why we refer back continually to the opinion of
4 the New Mexico Supreme Court in State v. Manzanares,
5 because in Fugate the Supreme Court itself relied on the
6 reasoning of Manzanares.

7 In Manzanares, I believe the court recognized
8 that these were lesser included offenses of the greater
9 offense.

10 QUESTION: Well, didn't we do exactly that in
11 Waller?

12 MR. SULLIVAN: I believe it's a parallel
13 situation, Your Honor.

14 QUESTION: In other words, the intermediate
15 public court treated it as a lesser included offense.
16 It wasn't disturbed, and we reversed.

17 MR. SULLIVAN: And then on remand, the Florida
18 court was permitted to review whether or not it was, in
19 fact, a lesser included offense.

20 QUESTION: Whether we intended to overrule
21 Diaz or not, you certainly asked us to do so.

22 MR. SULLIVAN: Well, we do ask you to do so,
23 Your Honor, and we would point out that Diaz has been
24 virtually unfollowed for the proposition, except in New
25 Mexico, that there is a jurisdictional exception which

1 somehow allows a State to avoid the double jeopardy bar
2 in cases exactly like this.

3 The history of New Mexico decisions is that
4 the jurisdictional exception is well-recognized in New
5 Mexico to say that a conviction on a lesser included
6 offense in a court of limited jurisdiction does not bar
7 a subsequent prosecution of the greater offense.

8 And I believe that there are numerous cases
9 cited in both briefs in which the New Mexico Supreme
10 Court has held exactly that position. It's not a
11 question of whether or not, in this isolated case, these
12 facts gave rise to that. But that's a position that's
13 been generally held by the New Mexico Supreme Court.

14 The parallel situation is that the Carlsbad
15 municipal ordinance is virtually identical to the State
16 state defining the same offense. The State had
17 jurisdiction over the offense of DWI or over the offense
18 of reckless driving. There is no question that this is
19 not a case where one court had jurisdiction over some
20 type of conduct that --

21 QUESTION: In which court would the State
22 prosecute?

23 MR. SULLIVAN: The State would prosecute the
24 DWI either in a magistrate court, or could have brought
25 all those charges in a district court as felonies and

1 misdemeanors under the Joinder Rule.

2 The Carlsbad Municipal Court did not have
3 jurisdiction, obviously, to consider prosecution for the
4 felony offense.

5 Thank you.

6 CHIEF JUSTICE BURGER: Mr. Attorney General.

7 ORAL ARGUMENT OF PAUL G. BARDACKE, ESQ.

8 ON BEHALF OF THE RESPONDENT

9 MR. BARDACKE: Mr. Chief Justice, may it
10 please the Court, I've listened to Petitioner's argument
11 carefully and I do not see why it is fair for the
12 Defendant Fugate to have killed someone while driving
13 recklessly, and then to turn and say to the State, to
14 society, and the victim's family, that because the very
15 next morning he rushed into municipal court, pled no
16 contest to careless driving and DWI, that he then cannot
17 be brought to justice for the later vehicular homicide.

18 QUESTION: Could the State have declined to
19 proceed against him until it knew the outcome of the
20 injuries?

21 MR. BARDACKE: Justice O'Connor, the injury
22 occurred the evening before. It was in a town. It's
23 unclear whether the district attorney even knew. But,
24 yes, had they known and had they known that the injury
25 that Lily May Upton suffered, which was only an arm

1 injury and a rib injury which she was subsequently
2 released from the hospital for, constituted great bodily
3 harm at that time, they could have not prosecuted at
4 that time.

5 QUESTION: And, Mr. Attorney General, could
6 the State have superseded the municipality in the
7 magistrate court?

8 MR. BARDACKE: Not on the municipal charges,
9 Justice Brennan, but they could have on similar charges
10 that are violations of State crimes.

11 QUESTION: Well, are they the same?

12 MR. BARDACKE: Almost identical, although the
13 punishments under the municipal statutes and the State
14 statutes are different.

15 QUESTION: Are you telling me, then, that the
16 municipal prosecution, even over the State's objection,
17 would have to proceed?

18 MR. BARDACKE: It would not have to proceed.
19 What the fact is is that the municipal charges could
20 have been dropped, and the State could have proceeded on
21 State charges which are similar.

22 But the fact is in this case, is that we are
23 dealing with different offenses. These are not the same
24 offenses. I quarrel with only one fact mentioned by
25 Petitioner's counsel, and that is that the Court of

1 Appeals ruled that reckless driving and DWI were
2 necessarily lesser included offenses of vehicular
3 homicide.

4 The Court of Appeals did no such thing, nor
5 did the Supreme Court reach that issue. Clearly, if you
6 apply --

7 QUESTION: You say the Court of Appeals did
8 not treat them --

9 MR. BARDACKE: No, they did not. The Court of
10 Appeals treated reckless and careless driving as the
11 same offense and lesser included in vehicular homicide,
12 but the Court of Appeals did not treat DWI and reckless
13 as lesser included of vehicular homicide.

14 And if it had, it would have been in violation
15 of the controlling law of the State. There are clearly
16 two cases cited in the brief, where the Supreme Court of
17 the State of New Mexico ruled that DWI and reckless were
18 not lesser included offenses of vehicular homicide, and
19 those are State. Trujillo and State v. Tanton.

20 QUESTION: Is there a case that says they
21 can't be tried together?

22 MR. BARDACKE: There are cases saying that
23 they can be tried together.

24 QUESTION: That's what I thought.

25 MR. BARDACKE: But I think the analysis in

1 this case is clearly that they are not the same
2 offense. If you apply the Blockburger test as further
3 enunciated in Vitale, you can see that it meets the
4 stringent requirements of Blockburger --

5 QUESTION: Well, that's a different rationale
6 for affirming the court below.

7 MR. BARDACKE: But I think it's the most
8 persuasive rationale.

9 QUESTION: Well, that may be, but that isn't
10 the word we have from the New Mexico courts in this
11 case.

12 MR. BARDACKE: But I think it's clear under
13 New York Telephone and Dandridge, that you're entitled
14 to argue any matter before this Court that could sustain
15 the lower court.

16 QUESTION: Let's assume we said that the
17 jurisdictional exception does not apply. Diaz is a dead
18 letter. We certainly would remand to see if these are
19 really lesser included offenses.

20 MR. BARDACKE: If this Court felt that there
21 was any question as to whether or not they were the same
22 offense under State law, then remand would be
23 appropriate. But I think it's clear --

24 QUESTION: Well, we would just have to take
25 your word or what the New Mexico cases say for what the

1 law is, rather than the Court of Appeals of your State.

2 MR. BARDACKE: Well, the Supreme Court has two
3 clear cases on this issue, Tanton and Trujillo, in which
4 they say specifically that DWI and vehicular homicide
5 are not necessarily included. And a careful reading of
6 the Court of Appeals decision --

7 QUESTION: Well, that may be. That may be.
8 But the standard or their analysis as to how you go
9 about deciding whether something is a lesser included
10 offense or not may not be consistent with federal law.

11 MR. BARDACKE: I quite agree. This Court is
12 the one that should say what test New Mexico should
13 follow, and then New Mexico should follow that test and
14 this Court be bound by the interpretations --

15 QUESTION: You are following the statutory
16 elements analysis.

17 MR. BARDACKE: Justice White, that is what I'm
18 doing, and that's what Blockburger requires us to do.
19 It is a case of statutory analysis, and you should look
20 at the two statutes and we see in New Mexico that the
21 legislature --

22 QUESTION: You think that's the only answer
23 you find in our cases?

24 MR. BARDACKE: Well, I think we find many
25 answers in your cases, but I think that is the answer,

1 however, that you should follow in this case. We should
2 look at the statutory analysis. And clearly in
3 Blockburger, it says whether each provision requires
4 proof of a fact that the other does not.

5 And in this case, vehicular homicide can be
6 proven without ever proving reckless driving or DWI.
7 And it is likewise clear that in this case you can prove
8 reckless driving and prove DWI, and you haven't proved
9 the death that is required.

10 QUESTION: I think that you're still defending
11 your Supreme Court's judgment that Diaz is still good
12 law.

13 MR. BARDACKE: Well, I don't think you need to
14 reach an exception if you're dealing with the same
15 offenses. But if this Court were to determine that they
16 were the same offenses, which I think would be contrary
17 to New Mexico law, then I would argue that in fact the
18 Diaz exception is still alive and well in New Mexico.
19 The Waller holding -- very narrow.

20 QUESTION: I think what Justice White is
21 intimating is that we tend to review a question that is
22 decided by the State Supreme Court, rather than trying
23 to find some other grounds for affirming its judgment
24 that may be dependent on State law.

25 MR. BARDACKE: Well, I don't believe that the

1 State law can really be in dispute with respect to the
2 lesser included offense issue. However, just as in the
3 case argued before this, it is often times -- and that's
4 what Dandridge and New York Telephone are often about --
5 that a Respondent comes to this Court and asks you to
6 affirm a judgment of the lower court, based on a
7 different ground, and I think it is, on further
8 reflection, a much more persuasive ground, and the Court
9 need not get to the exception.

10 The exception is easier analysis, but should
11 this Court determine that there is question about
12 whether they are the same offense or not, then remand
13 might be appropriate. I don't think that question
14 exists.

15 And, furthermore, I think --

16 QUESTION: The additional fact is driving
17 under the influence of drugs.

18 MR. BARDACKE: Well, there are many additional
19 drugs. As Petitioner's counsel pointed out, he was
20 charged under an open charge, Justice Stevens, of
21 vehicular homicide, which amounts to the unlaw operation
22 of a vehicle. And unlawful operation of a vehicle in
23 State v. Barela in our case can be failure to stop,
24 speeding, crossing the double line, two of which, by the
25 way, were present in the Fugate case.

1 At the testimony in the trial and part of the
2 record in this case, he was speeding and he ran a stop
3 sign. Both of those could give rise to vehicular
4 homicide, the exact same statute with which he was
5 charged in this case.

6 QUESTION: Can they also give rise to the
7 reckless driving charge?

8 MR. BARDACKE: It depends under the facts of
9 reckless driving. He would have been charged -- if it
10 showed intent and willful and wantonness, the failure to
11 stop and the speeding could amount to recklessness, but
12 not in all cases.

13 I think that if this Court were, however,
14 convinced that it's either the jurisdictional exception
15 or nothing, I think it's clear that the Waller case is a
16 very, very narrow holding. It merely held that the
17 Florida court was in error for trying the same Defendant
18 for the identical charge in two cases.

19 We're not dealing with the identical charge in
20 this case.

21 QUESTION: May I ask, if we were -- following
22 up on Justice Brennan's question earlier -- if the
23 reckless driving charge had been brought in the court of
24 general jurisdiction after it had been brought in the
25 court of limited jurisdiction, would that have been

1 permissible in your view?

2 MR. BARDACKE: Not permissible. That is the
3 identical offense, and it could not have been brought in
4 the subsequent --

5 QUESTION: The dual jurisdiction exception
6 would not apply in that event.

7 MR. BARDACKE: I quite agree.

8 QUESTION: What is the scope of the -- the
9 jurisdictional exception, then, does not apply if the
10 offenses are the same. You would concede that, I
11 gather.

12 MR. BARDACKE: That's correct, if the offenses
13 are identical.

14 QUESTION: If you're wrong on the major
15 argument you're making, you concede you lose.

16 MR. BARDACKE: No, I do not concede we lose.

17 QUESTION: If it's the same offense -- I don't
18 understand. Why is one the same -- I know you don't
19 agree with this, but if the homicide charge, vehicular
20 homicide charge, were the same offense, why would the
21 jurisdictional exception analysis be any different than
22 if they had charged him for reckless homicide in the
23 court of general jurisdiction?

24 MR. BARDACKE: I understand the Court's point,
25 and perhaps it wouldn't. And perhaps it wouldn't.

1 I think that what is clear in this case also
2 is that the original circumstances which powered the
3 rule of double jeopardy do not exist in this case. I
4 mean double jeopardy is founded in -- has its roots in
5 the harshness of penalties in the British system. And I
6 think it was intended to come to a point where mere
7 traffic citations in a complex society could raise to a
8 constitutional level.

9 This gentleman went in the next morning, pled
10 no context, went to DWI school for 21 days before
11 completing the weekly session in the evening --

12 QUESTION: Do I understand you, that this man
13 voluntarily went in and made them give him 21 days?

14 MR. BARDACKE: Yes. He went in the next
15 morning.

16 QUESTION: Do you know of any other place
17 where somebody has gone in and made them give him 21
18 days?

19 MR. BARDACKE: No, but I think 21 days --

20 QUESTION: Well, isn't it strange?

21 MR. BARDACKE: No. Twenty-one days is a very
22 minor penalty for drunk driving and for careless
23 driving.

24 QUESTION: Well, do you know of anybody else
25 who has volunteered to take 21 days?

1 MR. BARDACKE: Well, if someone was injured in
2 the accident and he was clever, he might very well have
3 gone in the next morning and volunteered.

4 QUESTION: Do you have any other cases in New
5 Mexico?

6 MR. BARDACKE: Where he volunteered?

7 QUESTION: Is New Mexico different from all
8 other States?

9 MR. BARDACKE: No, it is not.

10 QUESTION: Are the people in New Mexico just
11 the kind that want to go to 21 days?

12 MR. BARDACKE: We have a two-tier system there
13 where people routinely are supposed to go in and clear
14 themselves of traffic citations. That's what traffic
15 citations are about. We have a different societal
16 purpose in dealing with traffic citations, prosecuting
17 people for them, as many as we have resources for,
18 processing them quickly, and getting these people off
19 the street.

20 That is different than vehicular homicide
21 where society and our legislature, in defining a
22 separate statutory --

23 QUESTION: But did you get him off the
24 streets? You didn't. He just went to a school.

25 MR. BARDACKE: Well --

1 QUESTION: He didn't go to jail.

2 MR. BARDACKE: I think, Justice Marshall,
3 that's why in this case, this man didn't run the
4 gauntlet twice. He didn't have two trials. He didn't
5 have two punishments that were unreasonable. He had
6 just what our legislature intended when it proscribed
7 this kind of criminal activity.

8 And in Brown v. Ohio, this Court said it is
9 within the legislature's domain, within the
10 legislature's domain to describe crimes and to fix
11 penalties. And we described two different crimes and
12 two different penalties --

13 QUESTION: Couldn't you have made it three?

14 MR. BARDACKE: It could have been three, if in
15 fact --

16 QUESTION: In fact, there is no limit to it,
17 is there?

18 MR. BARDACKE: Well, it depends what the
19 legislature intends. And I think in this case they
20 clearly describe two separate penalties, two separate
21 crimes, and that is what is within the legislature's
22 domain in this case.

23 And I think that if this case were reversed,
24 there would be horrible consequences for both society
25 and drivers like Mr. Fugate, because if this case were

1 reversed, it would require the police officer in the
2 field to charge the maximum consequences of the act of a
3 driver. If there were a minor injury, that police
4 officer in one of the 98 municipalities of New Mexico
5 that is often far away from any court of general
6 jurisdiction, far away from any district attorney, would
7 be out there and say, well, this may be vehicular
8 homicide or great bodily harm, even though it's a minor
9 injury.

10 And if you have to charge like that to avoid
11 the consequences of perhaps a constitutional claim of
12 double jeopardy, then what you have is, you have lots of
13 people being overcharged.

14 You are requiring them to stay in jail longer,
15 to have higher bail set. You require the process to be
16 clouded, while later on, a district attorney has to
17 separate the wheat from the chaff, the meritorious case
18 from the meritless case.

19 QUESTION: Has that happened in any other
20 State yet that doesn't have the New Mexico rule?

21 MR. BARDACKE: Which New Mexico rule?

22 QUESTION: The one that you say that you can
23 try him any time you get ready to try him. Or do you
24 have to put the maximum on him? I mean every other
25 State has gotten along with this without the thing you

1 have in New Mexico.

2 MR. BARDACKE: Well, I don't think so. I
3 think most States have a two-tier system. And I think
4 the --

5 QUESTION: They aren't in this case. They
6 aren't interested in it.

7 MR. BARDACKE: I think the two-tier system is
8 important and it's important in a complex society where
9 we have lots of cars, lots of drunk drivers, lots of
10 reckless drivers, and lots of people being killed.

11 I think the purposes that a legislature
12 directs itself to when it describes crimes different and
13 penalties different, recognizes the fact that we have a
14 desperate need for an almost administrative system to
15 handle traffic citations and a more serious, formal,
16 criminal mode in which to handle a death case, because
17 in that case the legislature intends to serve the public
18 interest in punishing people for the consequences of the
19 transaction that gave rise to the death.

20 I think that in this case, it is clear that we
21 are not dealing with the same offense, and in not
22 dealing with the same offense, we don't yet reach the
23 issue of the jurisdictional exception. But if we do
24 reach the issue of the jurisdictional exception, I think
25 it's viable.

1 Interestingly enough, the day this Court
2 decided Waller, it also decided Ashe, and in footnote 7
3 of Ashe you continued the jurisdictional exception. And
4 in fact, in continuing that jurisdictional exception in
5 Ashe, decided the same day, you have given it vitality.
6 It is alive, and I think it is a perfect kind of
7 exception to deal with traffic citations, in recognizing
8 that the society has an interest in handling almost
9 administratively, traffic citations, and in a separate
10 criminal way handling vehicular homicide.

11 I would urge this Court to affirm the Supreme
12 Court of the State of New Mexico.

13 Thank you.

14 QUESTION: May I just ask one other question?
15 You said in footnote 7 of Ashe, we confirm the
16 jurisdictional exception?

17 MR. BARDACKE: I believe it was footnote 7 of
18 Ashe.

19 QUESTION: I've got it in front of me. It's
20 just got a lot of cases cited.

21 MR. BARDACKE: Well, doesn't it -- isn't it at
22 footnote -- I'm sorry. It's in footnote 7 of the
23 concurring opinion of Justice Brennan, I believe.

24 QUESTION: So it's not the Court's opinion.

25 MR. BARDACKE: No, it was a concurring opinion

1 of Justice Brennan.

2 QUESTION: That makes a difference.

3 MR. BARDACKE: Yes, it does make a
4 difference.

5 QUESTION: Which way?

6 (Laughter.)

7 MR. BARDACKE: Yes, I think it makes a
8 difference, it's more in favor of my case.

9 (Laughter.)

10 MR. BARDACKE: Thank you.

11 CHIEF JUSTICE BURGER: Do you have anything
12 further, Mr. Sullivan?

13 MR. SULLIVAN: Just a few points. Your Honor.

14 ORAL ARGUMENT OF J. THOMAS SULLIVAN, ESQ.

15 ON BEHALF OF THE PETITIONER - REBUTTAL

16 MR. SULLIVAN: The Court of Appeals in its
17 decision held under New Mexico statute 66A-101C,
18 vehicular homicide can be committed only by reckless
19 driving or DWI.

20 If you look at the statute that defines the
21 felony offense of reckless -- of vehicular homicide,
22 it's predicated on a finding of either DWI or driving
23 while under the influence of drugs or a finding that the
24 Defendant drove recklessly. They are, by statute and by
25 the decisions of the court, lesser included offenses of

1 vehicular homicide.

2 With respect to the argument that Defendant
3 received a relatively minor sentence and for that reason
4 we should not apply the double jeopardy clause, the
5 Defendant subjected himself at trial in the Carlsbad
6 Municipal Court to a potential punishment of 90 days
7 confinement in jail.

8 If there's a problem in this case, the problem
9 results from the State legislature's decision in setting
10 penalties, which the attorney general now apparently
11 argues are their grant of concurring jurisdiction to
12 municipalities to penalize DWI. If that's the problem,
13 if 98 municipalities cannot seem to have the police
14 officers correctly assess the merits of a prosecution at
15 the time, the simple solution to that is for the
16 legislature to withdraw from the municipality the power
17 to try DWI as a traffic ticket offense, to provide only
18 that the District Court, upon review by the district
19 attorney, and presentment of an indictment or filing of
20 the criminal information, should have the power to
21 assess which charges should be brought.

22 QUESTION: Do you really regard that as a
23 simple solution?

24 MR. SULLIVAN: I think that's a relatively
25 simple solution if the problems the attorney general

1 says are of the magnitude he claims that they are. It
2 seems to me that the Petitioner's punishment in this
3 case was appropriate, and the legislature determined it
4 was appropriate to fit a first offense DWI situation.

5 It might have been appropriate whether there
6 was a death or not. The trial court certainly was
7 within its jurisdiction at the district court level to
8 probate the entire sentence.

9 The Defendant was placed on a period of
10 probation for six months after a 21-day confinement in
11 an alcohol care unit. I believe that's something more
12 than DWI school. But nevertheless, he was subjected to
13 punishment, and he discharged at least the majority of
14 that punishment before the State came back and charged
15 him with the greater offense in District Court.

16 It seems to me that this kind of multiple
17 prosecution is exactly what the double jeopardy clause
18 protects against, the filing of a relatively minor
19 charge in a court of limited jurisdiction, and then the
20 subsequent filing of a greater charge with a minor
21 charge was clearly the lesser included offense.

22 To follow the attorney general's reasoning,
23 all significant or felony charges could be broken down
24 into constituent elements, could be prosecuted in courts
25 of limited jurisdiction; the State could evaluate the

1 merits of its case and proceed to felony prosecution
2 later.

3 That's the kind of thing that it seems to me
4 the double jeopardy clause has protected against
5 traditionally, and it seems to me that the opinions in
6 Illinois v. Vitale and Brown v. Ohio implicitly
7 recognize there is no question in this case but that
8 these are lesser included offenses, that the Petitioner
9 discharged his duty in going to court, pleading no
10 contest, accepting his punishment, and then in
11 discharging that punishment.

12 For that reason, we believe that the decision
13 in the New Mexico Supreme Court in applying a
14 jurisdictional exception, which I still think is rooted
15 in the notion of dual sovereignty where you're talking
16 about municipal and subsequent State prosecutions, was
17 simply incorrect.

18 And this Court should reverse the judgment of
19 the New Mexico Supreme Court.

20 Thank you.

21 QUESTION: Mr. Sullivan --

22 MR. SULLIVAN: Yes, Your Honor.

23 QUESTION: I don't know what it has to do with
24 this case, but is there any other crime that this man
25 could have been tried for in New Mexico if the victim

1 had not died?

2 MR. SULLIVAN: He could have been tried for
3 vehicular homicide, Your Honor.

4 QUESTION: If he hadn't died.

5 MR. SULLIVAN: If he hadn't died, he still
6 could have been tried under the New Mexico statute for
7 vehicular homicide.

8 QUESTION: You mean in the first instance?

9 MR. SULLIVAN: In the first instance --

10 QUESTION: How can he be convicted of homicide
11 if there's no one dead?

12 MR. SULLIVAN: Under the New Mexico statute,
13 the offense is complete if an individual sustains a
14 great bodily injury in the course of an accident while
15 the Defendant is driving unlawfully.

16 QUESTION: Yes, but --

17 MR. SULLIVAN: It's a misnomer to call it a
18 homicide because the statute encompasses both a serious
19 injury case and a death case.

20 Thank you.

21 CHIEF JUSTICE BURGER: Thank you, gentlemen.
22 The case is submitted.

23 We'll hear arguments next in Williamson County
24 v. Hamilton Bank.

25 (Whereupon, at 11:51 o'clock a.m., the case in

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the above-entitled matter was submitted.)

CERTIFICATION

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#83-6663 - CHARLES FUGATE, Petitioner v. NEW MEXICO

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