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COURT OF APPEALS OF NEW YORK

In re Suarez[1]

(decided June 3, 2008)

Santos Suarez stabbed Jovana Gonzalez, his live-in girlfriend, in the throat, chest, and abdomen, and fled the scene without summoning assistance while she bled to death.[2] Suarez was found six days later in Rhode Island, where he told police officers that he slapped Gonzalez during an argument; that Gonzalez pulled a knife on him; and that with the knife in hand, she scratched his chest.[3] Suarez claimed he retrieved the knife from her, lunged at her, and fled once he realized she was bleeding from her neck.[4] Thus, a question of "[w]hether he intended to kill her or merely to cause her serious injury" arose.[5]

Suarez was charged with second-degree murder, first-degree manslaughter, and fourth-degree criminal possession of a weapon.[6] At trial, Suarez raised the defense of justification and extreme emotional disturbance ("EED"), which resulted in the trial judge submitting the following four crimes, in order, for the jury to consider: "intentional murder, first-degree manslaughter (intentional murder reduced by virtue of an EED), depraved indifference murder, and

[1] 890 N.E.2d 201 (N.Y. 2008).

[2] *Id.* at 203.

[3] People v. Suarez, 844 N.E.2d 721, 724 (N.Y. 2005).

[4] *Id.*

[5] *Id.* at 732.

[6] *Suarez*, 890 N.E.2d at 203.

first-degree manslaughter (intentional manslaughter)."[7] The jury was instructed of New York's "acquit first" rule in which a jury must acquit or convict the defendant on each count in the order of their verdict sheet.[8] Therefore, first, the jury was to decide whether the defendant was guilty of intentional murder. If the jury found him guilty, then they were to move on to consider his defense of EED. If they acquitted him of intentional murder, then they must move on to consider depraved indifference murder, and so forth. The judge made it very clear that once they found him guilty of one count they must "[s]top and go no further."[9] The jury was firmly instructed that they were not to consider first-degree manslaughter unless they first acquitted Suarez of depraved indifference murder.[10] The jury acquitted Suarez of intentional murder, after which they considered depraved indifference.[11] The jury found Suarez guilty of depraved indifference murder, and accordingly, the judge requested that they affirm their verdict and neglect to consider the last count of first-degree manslaughter.[12]

Suarez appealed, contending that his conviction was legally insufficient because his conduct was "intentional and therefore could not have been reckless."[13] However, the Appellate Division, First

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[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.* at 204.

[11] *Suarez*, 890 N.E.2d at 204.

[12] *Id.* at 204-05.

[13] *Id.* at 205. A person commits depraved indifference murder when "[u]nder circumstances evincing a depraved indifference to human life, he recklessly engaged in conduct which creates a grave risk of death to another person, and thereby causes the death of another person." *Suarez*, 844 N.E.2d at 726 (citing N.Y. PENAL LAW § 125.25 (2) (McKinney

Department upheld the trial court's conviction, stating that a reasonable jury could have found that Suarez's conduct satisfied the elements of depraved indifference murder.[14] Subsequently, the Court of Appeals reversed Suarez's conviction and held that Suarez's actions, as a matter of law, did not meet the elements required to satisfy a conviction of depraved indifference murder.[15] The court remitted back to the appellate division to address: "whether, given [Suarez's] acquittal of intentional murder and the Court of Appeals' reversal of [his] conviction of depraved indifference murder, the Double Jeopardy Clauses of the Federal and State Constitutions, . . . bar [Suarez] from now being tried for intentional manslaughter in the first degree."[16]

On remittitur, the appellate division held that the Double Jeopardy Clauses under the United States Constitution,[17] and the New York State Constitution,[18] did not bar the prosecution from retrying Suarez for first-degree manslaughter, also known as intentional manslaughter.[19] The appellate division reasoned that because of the "acquit first" rule, the jury never reached the charge of intentional manslaughter, which was included in the original indictment.[20] But for the trial judge's erroneous instruction on depraved indifference, the

2008)).

[14] *Suarez*, 890 N.E.2d at 205.

[15] *Id.*

[16] *Id.* at 205-06.

[17] U.S. CONST. amend V, states, in pertinent part: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

[18] N.Y. CONST. art I, § 6, states, in pertinent part: "[n]o person shall be subject to be twice put in jeopardy for the same offense."

[19] *Suarez*, 890 N.E.2d. at 206.

[20] *Id.*

jury would have been given a full opportunity to deliberate on the charge of intentional manslaughter.[21] The court reasoned that the outcome at trial was similar to a mistral situation, and because a verdict on the charge of manslaughter one was not rendered, a future prosecution on that charge was permissible.[22]

Suarez appealed, but the Court of Appeals affirmed, holding that Suarez "may be reprosecuted for intentional manslaughter."[23] First, the court reasoned that the situation was similar to a mistrial.[24] Accordingly, a retrial of Suarez will unquestionably include the identical offense of the first trial: first-degree manslaughter. However, even though "the jury was charged with intentional manslaughter in the first trial, [it] did not have a full opportunity to consider it."[25] Therefore, constitutional double jeopardy was not an obstacle to retrying Suarez for manslaughter in the first degree.[26] In addition, the court noted that "[t]he major justification for permitting a retrial after . . . a[n] appellate reversal of a conviction is . . . 'the practical importance of preventing every trial defect from conferring immunity upon the accused.' "[27]

Secondly, the "Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insuffi-

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[21] *Id.*
[22] *Id.* (quoting People v. Suarez, 832 N.Y.S.2d 532 (App. Div. 1st Dep't 2007)).
[23] *Id.* at 203.
[24] *Suarez*, 890 N.E.2d at 211.
[25] *Id.* at 212.
[26] *Id.*
[27] *Id.* at 211 (quoting James F. Ponsoldt, *When Guilt Should Be Irrelevant: Government Overreaching as a Bar to Re-Prosecution Under the Double Jeopardy Clause After* Oregon v. Kennedy, 69 CORNELL L. REV. 76, 87-88 (1983)).

cient."[28] As a result, the Court of Appeals concluded that Suarez "is to be retried for intentional manslaughter, not depraved indifference murder, the only count [this court] reversed for evidentiary insufficiency."[29] On appeal, the court concluded that as a matter of law, the evidence was insufficient to convict Suarez for depraved indifference; since he was acquitted by the jury for intentional murder, he may not be retried for this crime either.[30]

Finally, the Court of Appeals dismissed Suarez's claim that the jury necessarily had implicitly acquitted him of intentional manslaughter as a result of finding him guilty of depraved indifference murder.[31] The court concluded that in this case there is "no basis for implying an acquittal from silence, because the instruction forced the jury to resolve the counts in a particular order and to cease deliberations upon finding Suarez guilty."[32] Also, "implied acquittal presupposes that the first jury 'was given a full opportunity to return a verdict' on the charge at issue, and that did not happen" in *Suarez*.[33]

Further, the court concluded that "two mental states are not mutually exclusive when applied to different outcomes."[34] Therefore, Suarez's first conviction for "depraved indifference murder would not be inconsistent with a subsequent conviction for intentional manslaughter," because intentionally inflicting serious physical

[28] United States v. Burks, 437 U.S. 1, 18 (1978).

[29] *Suarez*, 890 N.E.2d at 212.

[30] *Id.*

[31] *Id.*

[32] *Id.* at 213.

[33] *Id.* (qouting United States v. Green, 355 U.S. 184, 191 (1957)).

[34] People v. Trappier, 660 N.E.2d 1131, 1132 (N.Y. 1995).

injury could apply to a separate outcome.[35] The court determined that Suarez "could have recklessly caused a grave risk of death while intentionally inflicting serious physical injury."[36]

In practice, protections under the New York Criminal Procedure Law double jeopardy jurisprudence parallels and vitalizes the traditional federal approach under the United States Constitution. Under the Fifth Amendment to the United States Constitution, the Double Jeopardy Clause establishes the fundamental principle that a person cannot be tried twice for the same crime.[37] In *Blockburger v. United States*,[38] the Supreme Court concluded that to establish that a single act constitutes one or two statutory offenses depends on whether one offense requires proof of an element in which the other does not.[39] "The petitioner was charged with violating provisions of the Harrison Narcotic Act," because of alleged sales of morphine hydrochloride to the same purchaser.[40] The jury returned a verdict convicting the petitioner for the second, third and fifth counts of his indictment.[41] The convictions included the sale of ten grains of a drug on one day and eight grains on the following day, in which the latter

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[35] *Suarez*, 890 N.E.2d at 214.

[36] *Id.*

[37] *Green*, 355 U.S. at 187-88.

> [T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Id.

[38] 284 U.S. 299 (1984).

[39] *Id.* at 304.

[40] *Id.* at 300.

[41] *Id.* at 301.

was not in compliance with statutory provisions.[42]

The petitioner argued that

> (1) . . . upon the facts, the two sales charged in the second and third counts as having been made to the same person, constitute a single offense; [and the second and third counts were to the same purchaser, which constitutes a single offense]; and (2) that the sale charged in the third count as having been made not from the original stamped package, and the same sale charged in the fifth count as having been made not in pursuance of a written order of the purchaser, constitute but one offense for which only a single penalty lawfully may be imposed.[43]

The Court held that the contentions were unsound because the distinctions between the offenses were clear under the Narcotic Act.[44] The successive sale of drugs constitutes a distinct and separate offense, no matter how closely they may follow each other.[45] Each transaction created a separate offense which required the proof of different elements.[46] In addition, prosecution of one offense is not barred by acquittal or conviction of another offense when the defendant's single act is applicable to two separate offenses.[47]

In *Ball v. United States*,[48] the Supreme Court held that "a general verdict of acquittal upon the issue of not guilty to an indictment undertaking to charge murder . . . is a bar to a second indictment for

[42] *Id.*
[43] *Blockburger*, 284 U.S. at 301.
[44] *Id.* at 302.
[45] *Id.*
[46] *Id.* at 304.
[47] *Id.* at 304 (quoting Morey v. Commonwealth, 108 Mass. 433, 433 (1871)).
[48] 163 U.S. 662 (1896).

the same killing."[49] In *Ball*, three defendants were charged with murder, to which they all plead not guilty.[50] At trial, the jury found defendant Ball not guilty, but found the other two defendants guilty as charged.[51] Ball was discharged and the other two defendants were committed to county jail but appealed their convictions.[52] The Court, on writ of error, found that the indictment was "fatally defective, and would not support a sentence for murder" because the indictments never stated where and when the victim died.[53] The Court reversed the judgments against the two defendants and remanded the case with directions to amend the indictment.[54]

However, the prosecution again charged all three defendants with the corrected indictment for murder.[55] Ball moved to dismiss the new indictment because of double jeopardy concerns since he was formally acquitted.[56] The trial court overruled Ball's plea, and the jury in the second trial found all three defendants guilty.[57] On appeal, the Supreme Court reasoned that as long as a court had jurisdiction over the claim and the party, a jury's verdict could not be held void, but only voidable.[58] The trial jury acquitted Ball, which means he had the right to enjoy the protections of the Double Jeopardy Clause. He could not be deprived of this right because of the other defen-

[49] *Id.* at 669.
[50] *Id.* at 663.
[51] *Id.* at 663-64.
[52] *Ball*, 163 U.S. at 664.
[53] *Id.*
[54] *Id.*
[55] *Id.* at 665.
[56] *Id.*
[57] *Ball*, 163 U.S. at 665-66.
[58] *Id.* at 669-70.

dants' appeal and writ of error which only applied to them.[59] The Court concluded that the acquittal was final, and reprosecution would violate the Constitution by putting the defendant twice in jeopardy.[60]

In *United States v. Green*,[61] the Supreme Court held that the petitioner, in his second trial for first-degree murder, was placed in "jeopardy twice for the same offense in violation of the Constitution."[62] In *Green*, the defendant was indicted on two counts of arson and murder in the first degree.[63] After the presentation of evidence concluded, the trial judge instructed the jury that they could find the petitioner guilty of arson and of either murder in the first degree or second degree.[64] The jury found Green guilty of arson and second-degree murder.[65] The jury was silent on the charge of first-degree murder.[66] Green appealed his conviction of second-degree murder and the Court of Appeals D.C. Circuit reversed and remanded because, in light of the evidence, the charge of second-degree murder should have never been submitted to the jury.[67] On remand, the

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[59] *Id.* at 670.

[60] *Id.* at 671.

[61] 355 U.S. 184 (1957).

[62] *Id.* at 190.

[63] *Id.* at 185.

[64] *Id.*

> The trial judge treated second degree murder, which is defined by the District Code as the killing of another with malice aforethought and is punishable by imprisonment for a term of years or for life, as an offense included within in the language charging first degree murder in the second count of the indictment.

Id.

[65] *Id.* at 186.

[66] *Green*, 355 U.S. at 186.

[67] *Id.* There was ample evidence in the record to show that the victim's death was caused by the fire. If the defendant was found to have committed arson which resulted in the death of the victim, then under the D.C. criminal code, the defendant could be found guilty of first degree murder alone. The elements of second degree murder are not relevant to the facts pre-

prosecution indicted the petitioner under the original indictment for arson and first-degree murder.[68] Green raised the defense of former jeopardy, but the court overruled his plea and the second jury found Green guilty of arson and first-degree murder.[69] On appeal, the court of appeals affirmed.[70]

The Supreme Court reviewed Green's claim and cited the *Ball* Court, stating that the "prohibition is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial."[71] The Court noted that a verdict of guilt or innocence is not essential for the protection of jeopardy to commence.[72] A defendant cannot be tried again after he has been tried by a jury and the jury has been discharged of their duty without offending the principles of jeopardy.[73] The jury was given a full opportunity to return a verdict, but was discharged without rendering a verdict as to first-degree murder and without Green's consent.[74] Green's jeopardy attached for first-degree murder when the jury was discharged, and thus he could not be retried for that offense.[75]

Further, the argument that the petitioner voluntarily "waived"

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sented at trial. U.S. v. Green, 218 F.2d 856, 859 (D.C. Cir. 1955). *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.* at 186.

[71] *Green*, 355 U.S. at 186 n.5 (citing *Ball*, 163 U.S. at 669).

[72] *Id.* at 188 (stating that once a defendant has been put "to trial before a jury so that if the jury is discharged without his consent he cannot be tried again"). The Court also noted that "jeopardy is not regarded as having to come to an end so as to bar a second trial in those cases where 'unforeseeable circumstances . . . making [the] completion [of trial] impossible.' " *Id.*

[73] *Id.*

[74] *Id.* at 190-191.

[75] *Id.* at 191.

his plea of former jeopardy when he appealed to have his conviction set aside is "wholly fictional."[76] It is fictional to assume that the petitioner chose "to forego his constitutional defense of former jeopardy on a charge of murder in the first degree in order to secure a reversal of an erroneous conviction of [a] lesser offense."[77] The law does not intend to deny a prisoner of his constitutional protection of jeopardy just so that he may appeal his conviction for error.[78]

In *United States v. Burks*,[79] the Supreme Court held that the "Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding."[80] The Court clarified the effect of jeopardy in an appellate reversal of a conviction due to insufficient evidence and trial error. In *Burks*, the defendant was tried for "robbing a federally insured bank by use of a dangerous weapon."[81] As a defense, Burks claimed insanity, and produced three expert witnesses who testified that he suffered from mental illness at the time of the robbery and was substantially incapable of conforming to the law.[82] The government produced two experts who claimed that the defendant suffered from a character disorder and was not mentally ill.[83] One expert gave ambiguous testimony as to Burks' ability to conform his conduct to the requirements of the law and the

[76] *Green*, at 191-92.
[77] *Id.*
[78] *Id.* at 192.
[79] 437 U.S. 1 (1978).
[80] *Id.* at 11.
[81] *Id.* at 2.
[82] *Id.* at 2-3.
[83] *Id.* at 3.

other testified that Burks was capable of functioning normally.[84] Burks moved for a judgment of acquittal, but the trial court denied his motion and the "jury found Burks guilty as charged."[85] Burks moved for a new trial, "maintaining . . . '[the] evidence was insufficient to support the verdict,' " but the motion was denied.[86]

On appeal, the "Court of Appeals [Sixth Circuit] agreed with petitioner's claim that the evidence was insufficient to support the verdict and reversed his conviction."[87] The court of appeals reasoned that the government did not meet its burden of proving sanity beyond a reasonable doubt.[88] Since Burks had requested a new trial at the close of his original trial, the court "remanded to the District Court for the Middle District of Tennessee "for a determination of whether a directed verdict of acquittal should be entered or a new trial ordered."[89] Burks appealed to the Supreme Court arguing that a second trial would violate the Double Jeopardy Clause.[90]

On appeal, the Supreme Court found that the Court of Appeals' decision represented a resolution that the evidence was insufficient to support the conviction.[91] The decision was analogous to the court determining that the district court "erred in failing to grant a judgment of acquittal."[92] Distinguishable from *Ball*, the *Burks*' Court found that a new trial was needed to rectify trial error. " 'The princi-

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[84] *Burks*, 437 U.S. at 3.
[85] *Id.*
[86] *Id.* (internal quotations omitted).
[87] *Id.*
[88] *Id.* at 3-4.
[89] *Burks*, 437 U.S. at 4 (internal quotations omitted).
[90] *Id.* at 5.
[91] *Id.* at 10.
[92] *Id.* at 11.

ple that [the Double Jeopardy Clause] does not preclude the Government's retrying a defendant whose conviction is a set aside because of an *error in the proceedings* leading to a conviction is well-established part of our constitutional jurisprudence.' "[93]

The New York Constitution prescribes the same protections as the federal government, that "[n]o person shall be subject to be twice put in jeopardy for the same offense."[94] Analogous to protections of the United States Constitution, the New York Constitution and the New York legislature established common law and statutory provisions that vitalize federal jeopardy jurisprudence.[95] New York Criminal Procedure Law section 40.20 prohibits "[a] person [from being] separately prosecuted for two offenses based upon the the same act or criminal transaction."[96] When an offense requires the proof of an element or proof of a fact that the other does not, then they are not considered the same offense for double jeopardy purposes.[97]

In *People v. Biggs*,[98] the Court of Appeals held that the "dismissal of a count due to insufficient evidence is tantamount to an acquittal . . . and protects a defendant against additional prosecution."[99] In *Biggs*, the defendant was originally indicted of murder in the first degree, murder in the second degree, consisting of both intentional murder and depraved indifference murder, and criminal possession of

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[93] *Id.* at 14 (citing United States v. Tateo, 377 U.S. 463, 465 (1964)).
[94] N.Y. CONST. art I, § 6.
[95] N.Y. CRIM. PROC. § 40.20 (McKinney 2008).
[96] *Id.* § 40.20 (2).
[97] *Blockburger*, 284 U.S. at 304.
[98] 803 N.E.2d 370 (N.Y. 2003).
[99] *Id.* at 372.

a weapon.[100] The court refused to submit the charge of intentional murder to the jury because of insufficient evidence and only submitted the two counts of second-degree depraved indifference murder and two counts of second-degree manslaughter.[101] The jury found the defendant not guilty of murder but was unable to return a verdict on the manslaughter charges, which resulted in a mistrial.[102] In his second trial, the defendant was indictedon on two counts of manslaughter in the first and second degrees.[103] Although the defendant moved to dismiss the charges on first-degree manslaughter as unauthorized under double jeopardy, the court denied his motion stating that the first jury had not considered this charge under the original indictment.[104] The second jury returned a guilty verdict for manslaughter in the first degree and, as advised, never reached the issue of manslaughter in the second degree.[105] The Appellate Division, Second Department affirmed.[106]

On appeal, the Court of Appeals stated that the dismissal of the counts of intentional murder due to insufficient evidence had the effect of an acquittal.[107] Further, the court emphasized that the issue of double jeopardy rests on whether the determination of the judge was a resolution of the factual elements that constituted an acquittal

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[100] *Id.* at 371.
[101] *Id.* at 371-72.
[102] *Id.* at 372.
[103] *Biggs*, 803 N.E.2d at 372.
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.* at 372–73.

of the offense.[108] In addition, applying the traditional federal *Blockburger* same elements test, the court concluded that the lesser offense of first-degree manslaughter required no proof beyond that which is required for the conviction of intentional murder in the second degree.[109] Therefore, the two crimes are the "same offense" and "precluded defendant's subsequent indictment and prosecution for first-degree manslaughter."[110]

In *People v. Mayo*,[111] the Court of Appeals held that "the trial court's decision to withdraw a first degree robbery count . . . on the ground of insufficient evidence was equivalent to an acquittal and therefore operated as a bar to any further prosecution of that charge."[112] In *Mayo*, the defendant was charged with a single count of first-degree robbery.[113] However, the trial court removed the count from the jury's consideration because of insufficient evidence.[114] The defendant moved to dismiss the charges, but the judge refused to completely dismiss the indictment and indicated to the jury that they may only consider the lesser charges of second- and third-degree robbery.[115] Ultimately, there was a mistrial, and the prosecutors in the second trial elected to charge the defendant under the original indictment of first-degree robbery.[116] During the second trial, the jury was

[108] *Biggs*, 803 N.E.2d at 373 (citing Unites States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977)).
[109] *Id.* at 374.
[110] *Id.*
[111] 397 N.E.2d 1166 (N.Y. 1979).
[112] *Id.* at 1168.
[113] *Id.* at 1167.
[114] *Id.* at 1167-168.
[115] *Id.*
[116] *Mayo*, 397 N.E.2d at 1168.

once again instructed not to consider the charge of first-degree robbery, and it returned a verdict finding the defendant guilty of second-degree robbery.[117] The Appellate Division, Third Department "determined that the trial court had erred in permitting the defendant to be tried a second time for first degree robbery," but that it was harmless error.[118]

The Court of Appeals agreed, holding that the defendant's rights had been violated under the Double Jeopardy Clause, but disagreed that it was harmless error.[119] The court determined that an indictment charging the defendant of second- and third-degree robbery would have been proper under the principles of double jeopardy.[120] The first court's determination that the first-degree robbery count was insufficiently supported by evidence was sufficient to place the defendant in jeopardy. Although the jury was not given an opportunity to fully consider the crime of first-degree robbery, the court implicitly acquitted him of this charge.[121] Lastly, the court concluded that the traditional "harmless error" approach could not apply because the mere charge to the jury is more than likely to have prejudiced the defendant in the second trial.[122]

In *People v. Robinson*,[123] the Fourth Department held that a defendant could not be convicted of both manslaughter, which requires intent to cause serious physical injury, and . . . depraved mind

[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.* at 1169.
[121] *Mayo*, 397 N.E.2d at 1169.
[122] *Id.* at 1170.
[123] 538 N.Y.S.2d 122 (App. Div. 4th Dep't 1989).

murder, which requires recklessness, at the same time.[124] In *Robinson*, the defendant was charged with "intentional murder in the second degree and depraved indifference murder in the second degree."[125] The defendant allegedly "punched and kicked the victim into a state of unconsciousness, bound him with electrical cord, transported him to a public park and abandoned him there on the snow-covered ground," where the victim died of hypothermia.[126] The trial judge did not charge the jury with the counts in the alternative, and the jury found the "defendant guilty of manslaughter in the first degree . . . and also found him guilty of depraved mind murder."[127] On appeal, the Fourth Department concluded that the "two second degree murder counts charged in the indictment are inconsistent counts" and may be submitted to the jury only in the alternative in a single homicide charge.[128] Subsequently, the case was reversed and a new trial was granted only on the count of depraved mind murder because the jury had previously acquitted him of intentional murder in the second degree.[129]

In contrast, in *People v. Trappier*,[130] the Court of Appeals held that "two mental states are not mutually exclusive when applied to different outcomes."[131] In *Trappier*, the defendant was indicted for "attempted murder in the second degree, . . . attempted assault in the

[124] *Id.* at 123.
[125] *Id.* at 122.
[126] *Id.*
[127] *Id.*
[128] *Robinson*, 538 N.Y.S.2d at 123.
[129] *Id.*
[130] 660 N.E.2d 1131 (N.Y. 1995).
[131] *Id.* at 1132.

first degree, . . . criminal possession of a weapon in the second degree . . . and reckless endangerment in the first degree."[132] Following a dispute with the victim, Trappier fired three shots in the victim's direction, hitting the victim's pant leg, with another bullet going past the victim's ear.[133] The attempted assault charge required proof of specific intent to cause serious physical injury to the victim, and the reckless endangerment count required proof of recklessly creating a grave risk of death to the victim.[134] Trappier was "acquitted of attempted second degree murder but convicted of the remaining counts."[135] Trappier moved to set aside the verdict, arguing that he had been "found . . . guilty of acting both recklessly and intentionally," which were inconsistent states of mind.[136] The trial court rejected the defendant's motion, but on appeal the conviction for attempted assault and reckless endangerment were reversed as legally inconsistent counts.[137]

The Court of Appeals found that the defendant could have intended "one result-serious physical injury-while recklessly creating a grave risk that a different, more serious result—death—would ensue from his actions."[138] The jury's finding of specific intent to cause serious physical injury did not necessarily negate a finding of reckless endangerment because the counts contain two separate results.[139] The

[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *Trappier*, 660 N.E.2d at 1133.
[136] *Id.*
[137] *Id.*
[138] *Id.* at 1133-134.
[139] *Id.* at 1134.

court noted that this decision was not contrary to *Robinson*, because, in that case, the defendant was "convicted for acting intentionally and recklessly to *the same result*."[140]

The New York Court of Appeals has "never suggested that state constitutional double jeopardy protection differs from its federal counterpart."[141] The double jeopardy clauses under both the New York State and Federal constitutions provide nearly identical protections.[142] Under federal and state interpretations, it is well established that the double jeopardy protection attaches after an appellate reversal of conviction due to insufficient evidence.[143] The state legislature has simply supported and reemphasized the federal protections of double jeopardy.[144] Further, New York's "acquit first" rule, which requires juries to deliberate offenses in a decreasing order of culpability, protects against double jeopardy.[145] When an appellate court overturns a conviction because of legal insufficiency, the defendant cannot be retried for counts that the jury has deliberated on and rendered an acquittal. In New York, the defendant may only be retried for the counts in which the juries were not given a full opportunity to consider.[146]

The right to a fair trial in criminal prosecutions is well settled law under the Sixth Amendment.[147] When a verdict is not rendered

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[140] *Trappier*, 660 N.E.2d at 1134.
[141] *Suarez*, 890 N.E.2d at 209.
[142] *Id.*
[143] *Burks*, 437 U.S. at 18; *Biggs*, 803 N.E.2d at 373.
[144] *Suarez*, 890 N.E.2d at 209.
[145] *Id.*
[146] *Id.*
[147] U.S. CONST. amend VI, states, in pertinent part: "In all criminal prosecutions, the ac-

on the charge as a result of a mistrial or partial verdict, a retrial may be ordered without offending the principles of double jeopardy.[148] The right to a retrial serves the interests of both the defendant and society.[149] However, alongside a criminal defendant's right to a fair trial is society's interest in punishing criminals who have been given a fair trial and clearly found guilty under the law.[150] The New York Court of Appeals evaluates factors of fairness before subjecting the defendant to re-prosecution, even if double jeopardy technically has not attached.[151] Alternatively, a judge's decision to bar re-prosecution will not be justified squarely on the interest of fairness and inconvenience to the defendant.[152] Although the defendant is entitled to fairness, the notion of fairness would not justify an awkward or expansive alternative to a retrial of the case.[153] The result of a mistrial, due to a substantive or procedural defect, shall neither bar reprosecution nor confer immunity on the accused.[154]

Malaika Makembe

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cused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed."

[148] *Suarez*, 890 N.E.2d at 206.

[149] *Id.* at 208 (citing, United States v. Tateo, 377 U.S. 463, 466 (1964)).

[150] *Id.*

[151] *Suarez*, 890 N.E.2d at 213.

[152] George C. Thomas, DOUBLE JEOPARDY: THE HISTORY 255 (New York University Press) (1998).

[153] *Id.*

[154] *Suarez*, 890 N.E.2d at 211.

RIGHT TO NOTICE

United States Constitution Amendment VI:

In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation. . . .

New York Constitution article I, section 6:

[T]he party accused . . . shall be informed of the nature and cause of the accusation . . . .