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Supreme Court, New York County, Hughes v. Farrey

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SUPREME COURT OF NEW YORK
NEW YORK COUNTY

Hughes v. Farrey[1]
(decided January 26, 2006)

Paul Farrey pled guilty to recklessly assaulting his wife by stabbing her.[2] In exchange for his plea, the state dismissed two other charges against him,[3] at least one of which the court concluded was predicated upon the allegation that Farrey tried to force her to ingest sleeping pills.[4] Farrey's wife, Linda Hughes, commenced a civil action against Farrey, in which she asserted his attempt to force pills into her mouth entitled her to damages for battery.[5] Farrey claimed that if subjected to a deposition, his answers could incriminate him in a subsequent prosecution, and his constitutionally protected right to be free from compulsory self incrimination[6] entitled him to a protective order that would vacate a previous order that he be deposed.[7] Hughes countered that both the constitutional[8] and

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[1] No. 04-101633, 2006 N.Y. Misc. LEXIS 542, at *1 (Sup. Ct. Jan. 26, 2006) *modified* 2006 N.Y. App. Div. LEXIS 8040 (App. Div. 1st Dep't June 15, 2006).

[2] *Id.*, at *2.

[3] *Id.*

[4] *Id.*, at *4.

[5] *Id.*, at *2.

[6] U.S. CONST. amend. V states in pertinent part: "[no person] shall be compelled in any criminal case to be a witness against himself."; N.Y. CONST. art. I, § 6 states, in pertinent part: "nor shall he or she be compelled in any criminal case to be a witness against himself or herself."

[7] *Hughes*, 2006 N.Y. Misc. LEXIS 542, at *1.

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

statutory[9] prohibitions on double jeopardy eliminated the possibility of a subsequent prosecution based on the same criminal transaction, and therefore Farrey should not be permitted to avoid compliance with court ordered discovery on account of the Fifth Amendment privilege.[10]

The court denied Farrey's cross motion for a protective order, holding that the right against self incrimination in civil proceedings could only be invoked in response to specific questions, not blanket refusals.[11] A refusal to answer was not justified unless there was a realistic possibility that a response could tend to accuse the witness of a crime.[12] The court held that Farrey's contention that he was entitled to invoke this privilege to avoid being deposed was neither constitutionally nor statutorily supported.[13] The court granted Hughes' motions to compel Farrey's deposition, answers to interrogatories, and document requests.[14] In doing so, the court found that there was no realistic possibility that Farrey's compliance with discovery requests would tend to incriminate him because any further prosecution was barred by double jeopardy.[15]

On June 17, 2002, the police responded to a domestic dispute

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[9] *Hughes*, 2006 N.Y. Misc. LEXIS 542, at *2; N.Y. CRIM. PROC. LAW § 40.20(1) (McKinney 2006) states in pertinent part: "A person may not be twice prosecuted for the same offense."

[10] *Hughes*, 2006 N.Y. Misc. LEXIS 542, at *2.

[11] *Id.*, at **3, 5.

[12] *Id.*, at *4.

[13] *Id.*, at *5.

[14] *Id.*, at *6.

[15] *Hughes*, 2006 N.Y. Misc. LEXIS 542, at *4 ("[E]ven under a reasonable possibility standard, any further prosecution of the instant defendant for his alleged criminal conduct toward plaintiff in their apartment on June 17, 2002 is barred by the double jeopardy rule.").

at an apartment shared by Paul Farrey and his wife Linda Hughes.[16] Hughes made a statement alleging that Farrey not only stabbed her repeatedly, but also attempted to force her to swallow muscle relaxants, and he was taken into police custody as a result.[17] A felony complaint was filed in criminal court, commencing the prosecution which culminated in his plea of guilty to reckless assault on December 11, 2002.[18] This charge required Farrey to concede in his guilty plea that his conduct resulted in serious bodily injury to Hughes, and was so reckless that it "evinc[ed] a depraved indifference to human life."[19] Since the mens rea for this offense did not require actual intent, Farrey conceded none at his plea allocution and admitted that he stabbed Hughes but made no reference to forcing her to swallow pills.[20] The court imposed a definite term of five years imprisonment.[21]

Hughes commenced a civil lawsuit against Farrey claiming battery, intentional and negligent infliction of emotional distress, and negligence.[22] The court granted Hughes' motion for summary judgment with regard to the first two causes of action on March 9,

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[16] *Id.*, at *1.

[17] *Id.*, at **1-2.

[18] *Id.*, at **1, 2. This charge also was contained in the superior court information, which additionally charged Farrey with attempted murder in the second degree, in violation of N.Y. PENAL LAW §§ 110, 125.25(1) (McKinney 2006), and intentionally committing assault in the first degree, in violation of § 120.10(1). All of the charges were satisfied by his plea of guilty. *Hughes*, 2006 N.Y. Misc. LEXIS 542, at *2.

[19] *Hughes*, 2006 N.Y. Misc. LEXIS 542, at *2 (quotation omitted); *see* N.Y. PENAL LAW § 120.10(3).

[20] *Hughes*, 2006 N.Y. Misc. LEXIS 542, at *2; *see* N.Y. PENAL LAW § 120.10(3).

[21] *Hughes*, 2006 N.Y. Misc. LEXIS 542, at *2.

[22] *Id.*

2005.[23] It held that as a result of his guilty plea, Farrey was collaterally estopped from denying the conduct that supported those claims.[24] The court ordered discovery to proceed on the battery claim that pertained to his conduct with regard to the pills, and upon Farrey's refusal to comply with discovery requests, Hughes filed motions to compel the discovery order, and to compel Farrey's submission to a deposition at an examination before trial.[25] Farrey responded with a cross motion for a protective order to vacate the notice of deposition.[26]

Farrey argued in support of his cross motion that his testimony was privileged under the Fifth Amendment because Hughes sought to prove facts in the battery claim that could subject him to criminal prosecution.[27] Thus, he contended that any depositional testimony he provided prior to the expiration of the statute of limitations for potential crimes could be self incriminatory because it could accuse him of prosecutable offenses.[28]

Hughes argued that there was no danger Farrey could be

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[23] *Id.*

[24] *Id.* The court held that the third cause of action, battery, was not subject to summary judgment because it alleged Farrey attempted to force Hughes to swallow muscle relaxants; the charge he pled guilty to related only to Hughes' injuries resulting from Farrey's conduct with a knife. *Id.* The court's holding that he was collaterally estopped from litigating the merits of the other battery claim, which pertained to the stabbing, was modified on appeal. *Hughes*, 2006 N.Y. App. Div. LEXIS 8040, at *1. The appellate division held that the element of intent required to prevail in a cause of action for battery was not satisfied by the reckless conduct required to support the only offense of which Farrey was convicted. *Id.*, at *4.

[25] *Hughes*, 2006 N.Y. Misc. LEXIS 542, at *1.

[26] *Id.*

[27] *Id.*, at *2. The theory he proceeded upon specifically asserted that since he had pled guilty to reckless assault with a knife, but not intentional assault, or any other crime alleging he forced sleeping pills into Hughes' mouth, he could be prosecuted for intentional assault at any time until the five year statute of limitations on felony assault expired. *Id.*

[28] *Id.*

prosecuted for any offense arising out of the conduct for which she sought damages because the prohibition against double jeopardy prevented a subsequent prosecution for those acts.[29] Specifically, Hughes contended she was on the floor nearly unconscious, immediately after the stabbing, when Farrey placed pills into her mouth and attempted to force her to ingest them.[30] Hughes asserted that these events were all a part of the same criminal transaction[31] as defined by article 40 of the New York Criminal Procedure Law,[32] which bars two prosecutions based on the same criminal transaction.[33]

The court held that Farrey's assertion was fundamentally flawed in that he "erroneously focuse[d] on his guilty plea rather than on the nature of the previous prosecution. . . . [D]efendant ignore[d] the definition of a previous prosecution found in *CPL § 40.30* for purposes of determining the propriety of the second proceeding . . . ."[34] The New York Criminal Procedure Law specifically provides that where a person is charged with an offense or offenses by an accusatory instrument filed in any New York State or United States

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[29] *Id.*

[30] *Hughes*, 2006 N.Y. Misc. LEXIS 542, at *2.

[31] *Id.*

[32] N.Y. CRIM. PROC. LAW § 40.10(2) defines "criminal transaction" as:

> [C]onduct which establishes at least one offense, and which is comprised of two or more or a group of acts either (a) so closely related and connected in point of time and circumstance of commission as to constitute a single criminal incident, or (b) so closely related in criminal purpose or objective as to constitute elements or integral parts of a single criminal venture.

[33] *Hughes*, 2006 N.Y. Misc. LEXIS 542, at *2; N.Y. CRIM. PROC. LAW § 40.20(1) ("A person may not be twice prosecuted for the same offense.").

[34] *Hughes*, 2006 N.Y. Misc. LEXIS 542, at *4.

court, and the action brought by the instrument terminates upon a plea of guilty, that person is deemed to have been prosecuted according to New York law.[35] A "[s]uperior court information and a felony complaint" are both accusatory instruments.[36] The court concluded that Farrey was incorrect in his assertion that he could be subjected to a subsequent prosecution, as he had already been prosecuted for each of the charges contained in the felony complaint.[37]

Having concluded that Farrey could not be prosecuted for the conduct underlying his claim of privilege, the court then assessed whether any statutory exceptions would permit his being charged with a crime based on deposition testimony.[38] The court first addressed section 40.20(2)(a)[39] of the New York Criminal Procedure Law, that allows for subsequent prosecutions for acts containing substantially different elements that are predicated upon acts clearly distinguishable from those contained in the previous prosecution.[40] This was not an applicable exception because the allegation that

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[35] *Id.* *See* N.Y. CRIM. PROC. LAW § 40.30(1)(a)-(b) stating in pertinent part:

> [A] person "is prosecuted" for an offense, within the meaning of section 40.20, when he is charged therewith by an accusatory instrument filed in a court of this state or of any jurisdiction within the United States, and when the action either: (a) Terminates in a conviction upon a plea of guilty; or (b) Proceeds to the trial stage and a jury has been impaneled and sworn or, in the case of a trial by the court without a jury, a witness is sworn.

[36] *Hughes*, 2006 N.Y. Misc. LEXIS 542, at *4; *see* N.Y. CRIM. PROC. LAW § 1.20(1) (defining "Accusatory instrument" as "an indictment . . . an information, a simplified information, a prosecutor's information, a superior court information, a misdemeanor complaint or a felony complaint.").

[37] *Hughes*, 2006 N.Y. Misc. LEXIS 542, at **4-5.

[38] *Id.*, at *5.

[39] N.Y. CRIM. PROC. LAW § 40.20(2)(a).

[40] *Hughes*, 2006 N.Y. Misc. LEXIS 542, at *5.

Farrey attempted to force Hughes to swallow sleeping pills was the identical conduct underlying the attempted murder charge that was previously prosecuted and terminated, regardless of whether it was clearly distinguishable from the act of stabbing Hughes that provided the foundation for Farrey's guilty plea.[41]

The second exception addressed by the *Hughes* court is contained in section 40.20(2)(b)[42] of the New York Criminal Procedure Law.[43] Under this section, an offense could be permissibly charged after the termination of a previous prosecution if "[e]ach of the offenses as defined contains an element which is not an element of the other, and the statutory provisions defining such offenses are designed to prevent very different kinds of harm or evil . . . ."[44] This section contains an extra element of protection by adding a second prong to what would otherwise be an identical analysis to that applied under the Fifth Amendment pursuant to *Blockburger v. United States*.[45] The court pointed out that the facts of the case would permit a charge of reckless endangerment in the first degree[46] under the first prong.[47]

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[41] *Id.*

[42] N.Y. CRIM. PROC. LAW § 40.20(2)(b).

[43] *Hughes*, 2006 N.Y. Misc. LEXIS 542, at *5.

[44] N.Y. CRIM. PROC. LAW § 40.20(2)(b).

[45] Blockburger v. United States, 284 U.S. 299, 304 (1932) ("The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."). *See infra* notes 65, 67-68.

[46] N.Y. PENAL LAW § 120.25. The elements of this charge are: (1) recklessly engaging in conduct which creates a grave risk of death to another, and; (2) doing so under circumstances evincing a depraved indifference to human life. *Id.*

[47] *Hughes*, 2006 N.Y. Misc. LEXIS 542, at *5.

The *Hughes* court essentially concluded that there was no reasonable possibility a subsequent prosecution for reckless endangerment would be permitted under the second prong of New York Criminal Procedure Law section 40.20, because both statutes seek to criminalize the risk created by the actor's conduct and both address the same harm or evil through their focus on preventing grave injury and death.[48] The court held that deposition testimony could not place Farrey in a perilous position of potential prosecution and granted Hughes' motion to compel Farrey's submission to an examination before trial.[49]

In *Hoffman v. United States*,[50] the United States Supreme Court held that where it was evident from the question in a civil or criminal proceeding that there was a realistic possibility a witness's response could furnish law enforcement with a link needed to effect a prosecution of that witness for a crime, the witness had a cognizable privilege not to answer.[51] The defendant in *Hoffman* was a subpoenaed witness charged with criminal contempt on the basis of his refusal to answer questions in front of a grand jury.[52] The Court acknowledged that seemingly innocuous questions to a law abiding citizen could place a citizen whose occupation "involves evasion of

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[48] *Id.* The extra protection afforded by New York's statutory prohibition of double jeopardy is illustrated by the fact that a subsequent prosecution for this charge is conceivably permissible under the *Blockburger* analysis used for interpretation of the Federal Constitution. *Id.*

[49] *Id.*

[50] 341 U.S. 479 (1951).

[51] *Id.* at 486.

[52] *Id.* at 480, 488. The questions inquired as to the nature of the defendant's business, his relationships with associates, and the whereabouts of others he was known to be in contact with. *Id.*

federal criminal laws" in a position of peril.[53] The Court held that it was unconstitutional to deny a witness the protections from self incrimination afforded to him by the Fifth Amendment unless it is " '*perfectly clear*, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] *cannot possibly* have such tendency' to incriminate."[54] The broad array of questions that could have elicited incriminating responses from the defendant in *Hoffman* was indicative of the great deference that must be afforded in order for the Fifth Amendment to protect the "right it was intended to secure."[55]

In *Malloy v. Hogan*,[56] the Supreme Court held that the Fifth Amendment right to be free from compulsory self incrimination was applicable to the states through the Fourteenth Amendment.[57] The defendant in *Malloy* had been previously convicted of gambling charges, and later refused to answer questions in a state inquiry investigating a variety of illegal activities, claiming that the answers

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[53] *Id.* at 487-88. The defendant was a reputed gangster, known racketeer, and convicted participant in the distribution if illegal narcotics whose police record spanned over twenty years. *Id.* at 489.

[54] *Id.* at 488 (quoting Temple v. Commonwealth, 75 Va. 892, 898 (Va. 1881)).

[55] *Hoffman*, 341 U.S at 486, 488. The facts of this case differ from one where the witness seeks to invoke the Fifth Amendment in response to specific questions about previously prosecuted acts because in that event, the potential for incrimination can be determined by the court using a concise analysis that will demonstrate whether further prosecution is barred by double jeopardy. *Id.*

[56] 378 U.S. 1 (1964).

[57] *Hughes*, 2006 N.Y. Misc. LEXIS 542, at *3 (citing Malloy v. Hogan 378 U.S. 1, 6 (1964)); U.S. CONST. amend. XIV which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the

could tend to incriminate him.[58] The state court held that the right against self incrimination was not available to witnesses in state proceedings in the manner proscribed by the United States Constitution's Fifth Amendment.[59] In determining that the court erred, the Supreme Court explained that " 'personal rights safeguarded by the first eight amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law.' "[60] The Court concluded that the Fifth Amendment right against self incrimination was applicable to witnesses in state proceedings, and the same standard must be used to determine the "validity of a claim of privilege based on the same feared prosecution," irrespective of whether the court was one of federal or state jurisdiction.[61] Thus, in holding that the Fourteenth Amendment prevented states from abridging rights made available to citizens under the Fifth Amendment, *Malloy* ensured that witnesses in state actions would be afforded the same protection from state invasion as they had from infringement by the federal government.[62]

In *Blockburger v. United States*,[63] the Supreme Court articulated a test to determine whether a defendant's conduct constituted a single offense, or two separate offenses.[64] Under

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equal protection of the laws.

[58] *Malloy*, 378 U.S. at 3.

[59] *Id.*

[60] *Id.* at 4-5 (citing Twining v. New Jersey, 211 U.S. 78, 99 (1908)).

[61] *Id.* at 11.

[62] *Id.* at 8.

[63] 284 U.S. 299 (1932).

[64] *Hughes*, 2006 N.Y. Misc. LEXIS 542, at *3; *Blockburger*, 284 U.S. at 304.

Blockburger, a defendant's act or transaction is deemed to constitute two separate offenses when " 'each provision requires proof of a fact which the other does not.' "[65] The Court explained further that " '[a] single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.' "[66] Thus, where the *Blockburger* analysis demonstrates that a subsequent prosecution for acts arising out of the same criminal transaction is barred by the Double Jeopardy Clause of the Federal Constitution, the Fifth Amendment privilege against self incrimination cannot be invoked because there exists no danger that a witness' response to a question could be self incriminatory.[67]

People v. Biggs[68] established applicable guidance to the court's analysis of Farrey's case.[69] *Biggs* held that for the purposes of double jeopardy, the termination of an intentional murder prosecution precluded a subsequent intentional manslaughter prosecution.[70] *Biggs* explained that since the lesser offense required no more proof beyond what would be required to sustain a conviction of the greater offense, the greater offense is the same as any lesser

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[65] *Hughes*, 2006 N.Y. Misc. LEXIS 542, at *3. (quoting *Blockburger*, 284 U.S. at 304).

[66] *Blockburger*, 284 U.S. at 304 (quoting Morey v. Commonwealth, 108 Mass. 433, 434 (1871)).

[67] *Hughes*, 2006 N.Y. Misc. LEXIS 542, at *3.

[68] 803 N.E.2d 370 (N.Y. 2003). This New York State case was decided pursuant to the federal standard using the *Blockburger* test because the state statutory double jeopardy contentions were not preserved for appellate review. *Id.* at 374.

[69] *Hughes*, 2006 N.Y. Misc. LEXIS 542, at *5 n.1.

[70] *Biggs*, 803 N.E.2d at 374.

offense included in it.[71]

The New York State Constitution contains similar language to that contained in the Fifth Amendment, but the state's double jeopardy prohibition is applied by statute.[72] Article 40 of the New York Criminal Procedure Law, affords citizens significantly greater protection then the interpretation of the Federal Constitution under *Blockburger*.[73] The statute prohibits both a second prosecution for the same offense,[74] and subsequent prosecution for two offenses based on "the same act or criminal transaction."[75] Thus, for a second prosecution to be lawful, it must be permissible under "New York's heightened protective standard regardless of whether such prosecution would otherwise pass muster under *Blockburger*."[76]

In *Steinbrecher v. Wapnick*,[77] the New York Court of Appeals drew a clear distinction between the right of a defendant in a criminal case, and that of a witness in a civil case.[78] If the question asked to a witness in a civil case may be answered in a nonincriminatory manner, the witness is obligated to provide such an answer.[79] However, "so long as the answer to the question could still have a possible incriminating effect, the [witness] could not be compelled to

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[71] *Id.* at 373.

[72] *Hughes*, 2006 N.Y. Misc. LEXIS 542, at *4; *see* N.Y. CRIM. PROC. LAW § 40.20.

[73] *Hughes*, 2006 N.Y. Misc. LEXIS 542, at *4; *see* N.Y. CRIM. PROC. LAW § 40.20.

[74] *Hughes*, 2006 N.Y. Misc. LEXIS 542, at *4; *see* N.Y. CRIM. PROC. LAW §40.20(1) ("A person may not be twice prosecuted for the same offense").

[75] *Hughes*, 2006 N.Y. Misc. LEXIS 542, at *4; *see* N.Y. CRIM. PROC. LAW §40.20(2) ("A person may not be separately prosecuted for two offenses based upon the same act or criminal transaction....").

[76] *Hughes*, 2006 N.Y. Misc. LEXIS 542, at *4.

[77] 248 N.E.2d 419 (N.Y. 1969).

[78] *Id.* at 424.

[79] *Id.*

speak."[80] If the witness chooses to answer a question, regardless of whether the answer could be incriminatory, the privilege is not waived and may be invoked in response to a subsequent potentially incriminatory question.[81] A criminal defendant is not required to provide any testimonial evidence, however if the accused chooses to testify, he may be compelled to testify to any matter relevant to the case.[82] The Court explained that a criminal defendant is deemed to have waived this Fifth Amendment privilege upon providing testimony of any kind.[83]

In *Brahm v. Hatch*,[84] the defendant was convicted of conspiracy, and acquitted of homicide charges in the deaths of four people, as well as a charge of illegally possessing a weapon.[85] The defendant sought to avoid being deposed in a wrongful death action brought against him while he was incarcerated on the conspiracy conviction by attempting to invoke the Fifth Amendment on several grounds.[86] The court held that the defendant could not properly invoke the Fifth Amendment privilege to avoid being deposed on matters that could no longer result in prosecution because of the

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[80] *Id.* at 425.

[81] *Id.* at 424.

[82] *Steinbrecher*, 248 N.E.2d at 424.

[83] *Id.*

[84] 572 N.Y.S.2d 395 (App. Div. 3d Dep't 1991).

[85] *Id.* at 396.

[86] *Id.* The defendant claimed that his testimony was privileged because deposition testimony would contradict his previously written police statements, answers to plaintiffs' questions could elicit statements of his crimes, and depositional testimony could adversely affect his prospects of prevailing on a pending motion to vacate his judgment of conviction. *Id.* The pending motion was made pursuant to Article 440 of the New York Criminal Procedure which enables a judgment of conviction to be challenged on the basis of newly discovered evidence. *Id.*; N.Y. CRIM. PROC. LAW § 440.

expiration of the statute of limitations or the prohibition of double jeopardy.[87] Additionally, in civil matters where the defendant seeks to avoid disclosure of information, he bears the burden of establishing that the "information sought is privileged or not otherwise subject to disclosure."[88] The court assessed the defendant's contention that deposition testimony could have compromised a pending motion to vacate the judgment of conviction, and concluded his testimony could not be compelled because he had satisfied the required burden.[89] The court reasoned that statements made by the defendant in a deposition could be used against him at a subsequent trial which could be ordered if his motion were granted.[90] Therefore, the defendant was permitted to invoke the privilege because it could not be said that it was "perfectly clear that [the] defendant's answers could not possibly be incriminating."[91]

To conclude, the Double Jeopardy Clause provides three significant protections: "against a second prosecution for the same offense after acquittal, against a second prosecution [for the same offense] after a conviction, and against multiple punishments for the same offense."[92] The heightened protections afforded by the codification of New York's provision may incidentally afford greater protection to plaintiffs seeking discovery in civil actions against defendants who have previously stood trial for the acts alleged to

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[87] *Brahm*, 572 N.Y.S.2d at 396.
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.* (quotation omitted).
[92] *Hughes*, 2006 N.Y. Misc. LEXIS 542, at *3 (citing Grady v. Corbin, 495 U.S. 508, 516 (1990)).

have caused damages. The decreased range of crimes that allow lawful subsequent prosecutions naturally reduces defendants' ability to avoid discovery obligations by invoking Fifth Amendment privilege.

Upon the termination of a prosecution for specific acts, the attachment of double jeopardy allows a precise conclusion that testimony regarding those acts cannot incriminate a witness. This is evidenced by the *Hughes* court's rejection of Farrey's contention after a careful analysis of Article 40 of the New York Criminal Procedure Law.[93] The opposing arguments amply illustrate the manner in which the concepts of double jeopardy, and the right against self incrimination are intertwined. The relationship between these two clauses of the Fifth Amendment pivots at least in part on the logical conclusion that where there is an inability to prosecute, there is an inability to incriminate.

The provisions in the federal and state constitutions are virtually identical, and while the federal provision is applied by a test articulated by judicial interpretation, and New York State's provision is applied through a legislatively enacted statute, it appears that adequate mechanisms exist in both systems to ensure that the intended objectives are achieved. Thus, the primary distinction between double jeopardy in the federal and state systems appears to be only in the method of implementation, not the resulting degree of justice or injustice. New York's incorporation of this constitutional concept into its statutory scheme provides an important advantage;

[93] *Id.*, at *5.

modern values may be implemented alongside an age old protection that can be amended accordingly to reflect current interpretation and linguistic clarity.

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