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# Double Jeopardy, Court of Appeals: People v. Vasquez

As discussed, once a plea has been offered and a sentence issued, the judgment is final and cannot be collaterally attacked for want of facts or lack of knowledge.[45] In addition, New York courts have not recognized, with respect to double jeopardy, a defense for a person who foregoes the opportunity to challenge an indictment before admitting guilt to those charges. Notwithstanding the New York courts' position on double jeopardy, an exception has been established and recognized by the Supreme Court.[46] In situations "'where the state is precluded by the United States Constitution from haling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty.'"[47] Again, there are no significant or distinguishing factors between the United States and New York Constitutions with respect to the courts' disposition of a double jeopardy issue.

## People v. Vasquez[48]
## (decided March 20, 1997)

In February 1994, Vasquez was incarcerated at the Elmira Correctional Facility.[49] During a routine metal detector search, corrections officer's saw Edwin Vasquez throw a metal object into a laundry basket.[50] The object that was recovered by the correction officers was a sharpened piece of metal, commonly known as a shank.[51] During the time of the incident, "Vasquez was serving an indeterminate sentence of five to ten years for criminal possession of a controlled substance and a concurrent

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[45] *Latham*, 90 N.Y.2d at 798-99, 689 N.E.2d at 527-28, 666 N.Y.S.2d at 557-58.

[46] *See Broce*, 488 U.S. at 574.

[47] *Id.* at 575 (citing Blackledge v. Perry, 417 U.S. 21 (1974) (quoting Menna v. New York, 423 U.S. at 62 (1975)).

[48] 89 N.Y.2d 521, 678 N.E.2d 482, 655 N.Y.S.2d 870 (1997).

[49] *Id.* at 525, 678 N.E.2d at 484, 655 N.Y.S.2d at 872.

[50] *Id.*

[51] *Id.*

indeterminate sentence of two and a half to five years for criminal possession of a weapon."[52]

Vasquez was charged by a prison official with a "Tier III violation of the Standards of Inmate Behavior."[53] Following a Superintendent's Hearing, Vasquez was found guilty[54] and received a disciplinary penalty of 145 days in the Special Housing Unit.[55]

Subsequently, Vasquez was indicted by the Chemung County Grand Jury for the same prison infraction[56] where he was charged with promoting prison contraband, in violation of New York Penal Law § 205.25.[57] Vasquez moved to dismiss the indictment on double jeopardy grounds but the trial court denied his motion.[58] Eventually, Vasquez was convicted by a jury and sentenced to three to six years as a second felony offender.[59] The Appellate Division affirmed the trial court's decision and Vasquez then appealed to the Court of Appeals.[60]

In *Cordero v. Lalor*,[61] *Vasquez's* companion case, Jose Cordero was similarly charged with using a shank in a prison setting.[62] As a result of his attempt to stab a fellow inmate, Cordero was

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[52] *Id.*

[53] N.Y. COMP. CODES R. & REGS. tit. 7, § 270.2 (1995). A Tier III violation subjects the inmate to a superintendent's hearing under N.Y. COMP. CODES. R. & REGS. tit. 7, § 254 (1995). *Id.*

[54] *Vasquez*, 89 N.Y.2d at 525, 678 N.E.2d at 484, 655 N.Y.S.2d at 872. The opinion mentions that Vasquez's record did not reflect the specific section of the Standards of Inmate Behavior that he violated. *Id.* at 525 n.1, 678 N.E.2d at 484 n.1, 655 N.Y.S.2d at 872 n.1.

[55] *Id.* at 525, 678 N.E.2d at 484, 655 N.Y.S.2d at 872.

[56] *Id.*

[57] *Id.* *See* N.Y. PENAL LAW § 205.25 (McKinney 1992). Penal Law § 205.25 states that: "A person is guilty of promoting prison contraband in the first degree when: (1) [h]e knowingly and unlawfully introduces any dangerous contraband into a detention facility; or (2) being a person confined in a detention facility, he knowingly and unlawfully makes, obtains or possesses any dangerous contraband." *Id.*

[58] *Vasquez*, 89 N.Y.2d at 525, 678 N.E.2d at 484, 655 N.Y.S.2d at 872.

[59] *Id.*

[60] *Id.* at 526, 678 N.E.2d at 484, 655 N.Y.S.2d at 872.

[61] *Id.* at 525, 678 N.E.2d at 482, 655 N.Y.S.2d at 870.

[62] *Id.* at 526, 678 N.E.2d at 484, 655 N.Y.S.2d at 872.

charged with four violations of the Standards of Inmate Behavior.[63] The charges included: assault on an inmate, fighting, possession of a weapon, and refusing to obey a direct order.[64] After a Superintendent's Hearing (Tier III disciplinary hearing), he was found guilty on all charges[65] and given 18 months in a special housing unit with a one year loss of good time.[66]

Following the discipline hearing and sentence, Cordero was indicted one week later by the Greene County Grand Jury.[67] Cordero was indicted for assault, criminal possession of a weapon, and promotion of prison contraband.[68] Cordero pled guilty to the assault charge in full satisfaction of all charges.[69] He did, however, preserve his appeal of the judgment against him on double jeopardy grounds, his guilty plea was made subject to retaining this appealable issue.[70] As with Vasquez's case, the trial court held a hearing and found that Cordero's indictment by the County Grand Jury and his subsequent plea on those charges did not violate double jeopardy protections.[71] The trial court determined that although the prison disciplinary action was a form of punishment, the subsequent hearing and sentence by the County Grand Jury did not violate the Double Jeopardy Clause of either the Fifth Amendment of the United States Constitution[72]

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[63] *Id.*

[64] *Id.* Cordero was charged with violating: N.Y. COMP. CODES R. & REGS. tit. 7, § 270.2 rule 100.10 (1992) (assault); N.Y. COMP. CODES R. & REGS. tit. 7, § 270.2 rule 100.13 (1992) (fighting); N.Y. COMP. CODES R. & REGS. tit 7, rule 113.10 (1992) (possession of a weapon); N.Y. COMP. CODES R. & REGS. tit. 7, § 270.2 rule 106.10 (1992) (refusal to obey a direct order). *Id.*

[65] *Vasquez*, 89 N.Y.2d at 526, 678 N.E.2d at 484, 655 N.Y.S.2d at 872.

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] U.S. CONST. amend. V. The Double Jeopardy Clause provides in part: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life and limb . . . ." *Id.*

nor the New York State Constitution Article I, section 6[73] because the court concluded that the first prison proceeding did not preclude a subsequent prosecution of Cordero.[74]

Cordero, after the trial court denied his double jeopardy motion, commenced an Article 78 proceeding[75] in the nature of a writ of prohibition in the Appellate Division, arguing that criminal prosecution by the County Grand Jury should be prohibited on double jeopardy grounds under both the Fifth Amendment of the United States Constitution, Article I, section 6 of the New York State Constitution, as well as under Article 40 of the Criminal Procedure Law [hereinafter "CPL"].[76] The

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[73] N.Y. CONST. art. I, § 6. Which states in part: "[n]o person shall be subject to be twice put in jeopardy for the same offense." *Id.* The Vasquez court notes that since the New York State Constitution provides no more protection than the Fifth Amendment of the United States Constitution that the Fifth Amendment provision will control in this opinion. *Vasquez*, 89 N.Y.2d at 526 n.2, 678 N.E.2d at 485 n.2, 655 N.Y.S.2d at 873 n.2.

[74] *Vasquez*, 89 N.Y.2d at 526, 678 N.E.2d at 484, 655 N.Y.S.2d at 872.

[75] N.Y. C.P.L.R. 7803 (McKinney 1992). Section 7803 limits the scope of Article 78 to the following questions:

> (1) Whether the body or officer failed to perform a duty enjoined upon it by law; or (2) whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or (3) whether a procedure was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or (4) whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.

N.Y. C.P.L.R. 7803. *See also Vasquez*, 89 N.Y.2d at 526, 678 N.E.2d at 485, 655 N.Y.S.2d at 873.

[76] *Id.* *See* N.Y. CRIM. PROC. LAW § 40.20 (McKinney 1992). CPL 40.20 states that a person cannot be twice prosecuted for the same offense. *Id.* While it is true that CPL 40 does give "additional protections beyond what the normal dual sovereign would require," the court in *Vasquez* notes they do not apply here and that CPL 40 clearly excludes prison disciplinary hearings from protection under it because they are an administrative action, not a criminal one. *Id.* *See also* N.Y. CRIM. PROC. LAW § 40.30 (McKinney 1992). CPL 40.30 defines what a previous prosecution is under the statute. *Id.* It is defined as:

Appellate division dismissed his motion and Cordero appealed to the Court of Appeals.[77]

The New York Court of Appeals consolidated the appeals of Edwin Vasquez and Jose Cordero's appeals since both prison infractions were factually similar and presented an identical issue.[78] The issue that was to be decided by these consolidated actions was whether the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution or Article I, section 6 of the New York State Constitution bars the criminal prosecution of an inmate who has previously been sanctioned by an inmate disciplinary hearing.[79] The Court of Appeals, held that the sanctions imposed upon the defendants through the prison disciplinary hearing did not constitute criminal punishment, which would have triggered double jeopardy.[80]

There are two prongs to the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution.[81] The first offers the criminal defendant protection from multiple prosecutions for the same crime.[82] The second protects against multiple punishments for the same crime.[83] Both Vasquez and Cordero claimed before the Court of Appeals that it was the second protection, that of a prohibition on multiple punishments for the same offense of the Double Jeopardy Clause that was violated.[84]

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> Being charged with an accusatory instrument filed in a court of this state or any jurisdiction with in the United States, and when the action: (a) [t]erminates in a conviction upon plea of guilty; or (b) proceeds to trial 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.

*Id. Vasquez*, 89 N.Y.2d at 526, 678 N.E.2d 485, 655 N.Y.S.2d at 873.

[77] *Id.* at 526-27, 678 N.E.2d at 485, 655 N.Y.S.2d at 873.

[78] *Id.*

[79] *Id.* at 525, 678 N.E.2d at 484, 655 N.Y.S.2d at 872

[80] *Id.*

[81] *Id.* at 527, 678 N.E.2d at 485, 655 N.Y.S.2d at 873.

[82] *Id.*

[83] *Id.*

[84] *Id.*

The Court in *Vasquez* initially focused on the primary function of the Double Jeopardy Clause.[85] The court looks at *Helvering v. Mitchell*,[86] where the United States Supreme Court concluded that "Congress may impose both a criminal and a civil sanction in respect to some act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally for the same offense."[87] According to *Mitchell*, a court must engage in statutory interpretation to find out what the statute calls for in terms of punishment; whether it calls for a criminal sanction.[88] It was in *Mitchell* that the United States Supreme Court alluded to the fact that double jeopardy may be called into play in proceedings which were not criminal in nature.[89] The Court in *Mitchell* did not decide specifically on this issue of whether the Double Jeopardy Clause could be called into play in a proceeding which was not criminal in nature, rather, the Court remarked that "[u]nless this sanction was intended as [criminal] punishment . . . the double jeopardy clause . . . is not applicable."[90]

The United States Supreme Court case that tackled the question of whether Double Jeopardy Clause would be extended to noncriminal proceedings was *United States v. Halper*.[91] In *Halper*, defendant, a manager of a company who provided medical benefits, had put in 65 false claims for reimbursement of certain medical expenses to Blue Cross and Blue Shield.[92] He

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[85] *Id.*

[86] 303 U.S. 391 (1938). The Court held that an acquittal of a charge of willful attempt to evade taxes under the Revenue Act of 1928, Title I, does not bar assessment and collection of 50% of the total amount of the deficiency plus fine and imprisonment. *Id* at 405. The 50% addition to the tax is not primarily punitive but is a remedial sanction imposed as a safeguard for protection of the revenue and to reimburse the Government for expense and loss resulting from the taxpayer's fraud, thus is civil in nature and double jeopardy does not apply *Id.*

[87] *Id.* at 399.

[88] *Id.*

[89] *Id.* at 398-99.

[90] *Id.*

[91] 490 U.S. 435 (1989).

[92] *Id.* at 437.

was found guilty and fined $5,000 and sentenced to two years in prison.[93] After his criminal trial, the government sued him civilly in the United States District Court in the Southern District of New York.[94] The civil penalties under the statute for this type of fraud were $2,000 per violation.[95] Halper had 65 false claims, totaling $130,000 in fines under the statute's computations.[96] The United States Supreme Court held that when a civil penalty rises to the level that becomes so extreme and so divorced from the government's actual damages and expenses, this punishment could trigger double jeopardy protections.[97] In *Halper*, the fine given to the defendant was so disproportionate to the crime committed the Court concluded this was a double jeopardy violation.[98] However, the case was remanded to the district court to allow the Government to demonstrate that the original district court's assessment of the Government's injuries was incorrect.[99] The district court had assessed the Government's actual injuries at approximately $16,000, a figure that the Government never disputed, as compared with Halper's asserted liability of $130,000.[100]

In *Halper*, the rule was laid out by the Court as:

> Where a defendant previously has sustained a criminal penalty and the civil penalty in the subsequent proceeding bears no rational relation to the goal of compensating the government for its loss, but rather appears to qualify, as punishment in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if

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[93] *Id.*
[94] *Id.* at 438.
[95] *Id.*
[96] *Id.*
[97] *Id.* at 442.
[98] *Id.* at 452.
[99] *Id.*
[100] *Id.*

> the penalty sought in fact constitutes a second punishment.[101]

Vasquez and Cordero both contend the rule enumerated in *Halper* should be applied to their cases because they argued that the penalties "imposed upon them are so disproportionate that they must be viewed as constituting . . . criminal punishment."[102] The Court in *Halper* also wrote that its holding was a limited one, because it was a "rule for the rare case".[103]

The court in *Vasquez*, disagreeing with the defendants, explained that the test enumerated in *Halper* is not the test to use in order to determine whether a civil punishment triggers double jeopardy protections.[104] In explaining why it rejected the Halper test, the *Vasquez* court, cited *United States v. Ursery*.[105] In *Ursery*, the issue before the United States Supreme Court involved civil forfeiture statutes.[106] The statutes covered forfeitures relating to drugs and money laundering in relation to the sale of drugs.[107] The Supreme Court rejected the Halper test for use in civil forfeiture cases because "[i]t is impossible to quantify . . . the nonpunitive purposes served by a particular civil forfeiture."[108] *Ursery* sets forth a two part test to determine whether a forfeiture is punishment for double jeopardy

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[101] *Id.* at 449-50.

[102] People v. Vasquez, 89 N.Y. 2d 521, 529-30, 678 N.E.2d 482, 486-87, 655 N.Y.S.2d 870, 874-75 (1997).

[103] *Halper*, 490 U.S. 435 at 449. The Court stated that since the damages in Halper were easily calculatable the test laid out was essentially an accounting of what the government had lost.

[104] *Vasquez*, 89 N.Y.2d at 531-32, 678 N.E.2d at 488, 655 N.Y.S.2d at 876.

[105] 116 S. Ct. 2135 (1996). The Supreme Court dealt with a forfeiture proceeding that was against the property allegedly used to manufacture marijuana in a case where the defendants had already been convicted of drug conspiracy and money laundering charges. *Id.* The Court of Appeals reversed citing double jeopardy grounds. Certiorari was granted. *Id.* The United States Supreme Court held that the forfeitures in this case were civil in rem forfeitures and were not punishment for double jeopardy purposes. *Id.*

[106] *Id.* at 2138-39.

[107] *Id.* at 2139.

[108] *Id.* at 2145.

purposes.[109] The first part of the test calls for the court to look to the Congressional intent of the forfeiture statute to see whether it was designed as a remedial civil sanction.[110] The second part of the test requires the court to look to the statute and determine whether it is so punitive as to negate Congress' intent to establish a civil remedy.[111] The Court in *Ursery* concluded that Congress did intend the forfeiture statute to be civil in nature and therefore the Double Jeopardy Clause was inapplicable.[112]

In coming to its conclusions, the *Vasquez* court, cites *United States v. Hernandez-Fundora*,[113] in which the Second Circuit stated that the Government's interest is to maintain social order within the prison setting.[114] The court in *Fundora* opines that it is a well established fact that punishment imposed by prison authorities for breaking prison rules does not necessarily prohibit subsequent criminal prosecution for the same activity.[115]

The court in *Vasquez* holds that they "are satisfied that prison disciplinary rules are intended to serve legitimate noncriminal

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[109] *Id.* at 2142.

[110] *Id.* (quoting United States v. One Assortment of 89 Firearms, 465 U.S. 354, 363 (1984)).

[111] *Id.*

[112] *Id.*

[113] 58 F.3d 802 (2d Cir. 1995). Defendant, while incarcerated at a federal correctional facility struck another inmate with a table leg, breaking his jaw. *Id.* at 804. Following the incident, defendant was placed in a special housing unit for disciplinary segregation for 45 days. *Id.* at 805. A Grand Jury then indicted defendant with assault within the territorial jurisdiction of the United States (since the defendant was in a federal corrections facility at the time of the incident). *Id.* Defendant was found guilty by a jury and was subsequently sentenced to a 60 month prison sentence. *Id.* The Court of Appeals held that the 45 day disciplinary segregation was related to government remedial interest in maintaining prison order and discipline that did not constitute punishment for double jeopardy protections. *Id.* at 806. The court went on to state that only in rare circumstances in which the disciplinary sanction imposed in a prison context is grossly disproportionate to the government's interest in maintaining prison order and discipline will subsequent prosecutions be barred by double jeopardy. *Id.* at 807.

[114] *Id.* at 807.

[115] *Id.* at 806.

objectives."[116] The *Vasquez* court also stated that in the defendants circumstances, the prison disciplinary sanctions did not increase the length of time of their original convictions, rather, the disciplinary sanctions were aimed at deterring their actions to maintain order within the prison setting.[117] In its decision, *Vasquez* stated that when a prisoner breaks rules within the prison setting, he may be breaking rules that are applicable outside of prison as well.[118] Upon breaking both sets of rules, the prisoner may be sanctioned both criminally and institutionally by society and prison.[119] The *Vasquez* court stated that "so long as the disciplinary sanction does not stray so far beyond the bounds of the separate states interest in maintaining prison order and safety, it will not constitute criminal punishment."[120]

The court in *Vasquez* held that the prison disciplinary rules at issue here were not criminal punishments that would call into effect Double Jeopardy Clause protections, therefore defendants claim of a Fifth Amendment violation of the Double Jeopardy Clause was unfounded.[121] However, the court left open the possibility that a prison disciplinary sanction could be so harsh as to constitute a criminal punishment thus invoking double jeopardy protections.[122]

Defendants had one remaining contention, which was that even if there was no double jeopardy violation, Article 40 of the New York States Criminal Procedure Law[123] barred their criminal convictions.[124] The court in *Vasquez* responded by explaining that Article 40 does, in fact, afford additional protections but they

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[116] People v. Vasquez, 89 N.Y.2d 521, 532, 678 N.E.2d 482, 488, 655 N.Y.S.2d 870, 876 (1997).

[117] *Id.*

[118] *Id.* at 529, 678 N.E.2d at 486, 655 N.Y.S.2d at 874.

[119] *Id.*

[120] *Id.*

[121] *Id.* at 532-33, 678 N.E.2d at 488-89, 655 N.Y.S.2d at 876-77.

[122] *Id.* at 533, 678 N.E.2d at 489, 655 N.Y.S.2d at 877.

[123] N.Y. CRIM PROC. LAW § 40.30. The section states in pertinent part: "[A] person is 'prosecuted' for an offense . . . when he is charged . . . and when the action . . . terminates in a conviction . . . ." *Id.*

[124] *Id.*

are not implicated in this case.[125] The Court of Appeals looked to the Appellate Division's decision below in *Cordero v. Lalor*,[126] in which that court stated that the definition of a "second proceeding" under Article 40 does not include a prison disciplinary hearing for double jeopardy purposes.[127]

The rights protected by the Double Jeopardy Clauses of the United States Constitution and the New York State Constitution are the same.[128] The court in *Vasquez* notes that there was no claim here that either clause provided more protections than the other.[129] The court found that the prosecution of both Vasquez and Cordero was permissible and not violative of double jeopardy protections.[130] The prison disciplinary hearings and subsequent punishments in the two cases were civil in nature, thus, not rising to the level of criminal punishment that would invoke double jeopardy.[131] The Court of Appeals demonstrated that a person can be criminally and civilly punished for the same action without invoking the protections of the Double Jeopardy Clause, as long as the civil punishment that is sought is not so disproportionate to the violation as to constitute criminal punishment.[132] In *Vasquez*, the court found that the disciplinary sanctions imposed did "not constitute criminal punishment triggering double jeopardy protections."[133]

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[125] *Id.*

[126] 227 A.D.2d 848, 642 N.Y.S.2d 399 (3d Dep't 1996). Cordero brought an Article 78 proceeding to bar his prosecution on charges arising out of his stabbing incident after he had already been disciplined by prison for the same incident. *Id.* The court held that the disciplinary hearing in prison was administrative and does not bar a subsequent criminal conviction based upon the same conduct. *Id.*

[127] *Id.* at 848-49, 642 N.Y.S.2d at 399-400.

[128] People v. Vasquez, 89 N.Y.2d 521, 527 n.2, 678 N.E.2d 482, 485 n.2, 655 N.Y.S.2d 870, 873 n.2 (1997).

[129] *Id.*

[130] *Id.* at 532-33, 678 N.E.2d at 489, 655 N.Y.S.2d at 876-77.

[131] *Id.*

[132] United States v. Halper, 116 S. Ct. 2135, 2142 (1996).

[133] *Vasquez*, 89 N.Y.2d at 532-33, 678 N.E.2d at 488-89, 655 N.Y.S.2d at 876-77.