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A DEFENDANT'S FIFTH AMENDMENT RIGHT AND DOUBLE JEOPARDY IN CONTEMPT CASES

COURT OF APPEALS OF NEW YORK

People v. Sweat¹
(decided Oct. 28, 2014)

I. INTRODUCTION

Our Constitution provides that certain individual rights must be preserved and protected.² One of those rights is provided in the Double Jeopardy Clause of the Fifth Amendment, which states that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.”³ Specifically, when a defendant has been convicted or acquitted of a crime, the double jeopardy clause prohibits charging the defendant again for the same offense—it would be a violation of his constitutional rights.⁴ Moreover, double jeopardy bars multiple criminal punishments for the same offense.⁵

In *People v. Sweat*, the New York Court of Appeals considered the issue of whether the Double Jeopardy Clause barred the defendant's contempt charge.⁶ The People had appealed this case because both the Buffalo City Court and Buffalo County Court held that the Double Jeopardy Clause barred the defendant's contempt charge on the grounds that the previous contempt proceeding was criminal in nature and stemmed from the same offense.⁷

¹ People v. Sweat, 23 N.E.3d 955 (N.Y. 2014).

² U.S. CONST. amend. V.

³ *Id.*

⁴ *Id.* See U.S. CONST. amend. IV; see also *Benton v. Maryland*, 395 U.S. 784, 787 (1969) (holding that the “Double Jeopardy Clause of the Fifth Amendment is applicable to the States through the Fourteenth Amendment.”).

⁵ *Hudson v. United States*, 522 U.S. 93, 99 (1997) (“The Clause protects only against the imposition of multiple criminal punishments for the same offense.”) (quoting *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938)).

⁶ *Sweat*, 23 N.E.3d at 957.

⁷ *Id.*

The New York Court of Appeals reversed the Buffalo County Court's decision and reasoned that the Double Jeopardy Clause did not bar the defendant's subsequent contempt prosecution because the defendant's prior contempt charge was "remedial" only for the purpose of coercing the defendant to testify.⁸ In reaching its holding, the court relied on the United States Supreme Court's decision in *Shillitani v. United States*,⁹ where it provided a test to resolve the correct contempt determination for the purposes of double jeopardy.¹⁰

Under *Shillitani*, the governing question was "what does the court primarily seek to accomplish by imposing this sentence?"¹¹ Many courts, including the New York Court of Appeals in *Sweat*, have relied on *Shillitani* to assess the proper contempt determination of whether the Double Jeopardy Clause bars a subsequent contempt charge.¹² While *Shillitani* has provided the courts with guidance to resolve the proper contempt determination in analyzing the underlying purpose for which the contempt charges were brought, this test is still too broad.

This Note proposes a more clearly defined *Shillitani* test because, although it is applied consistently in courts across the country, it yields inconsistent results.¹³ Thus, if the United States Supreme Court were to revisit *Shillitani*, it should provide more guidance to the lower courts to distinguish between remedial and punitive contempt sentences to prevent a violation of a defendant's Constitutional rights.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On February 23, 2012, the defendant, Tyrone Sweat, was unwilling to testify at his brother's trial in Erie County Supreme Court.¹⁴ The prosecution granted the defendant transactional immunity so he was unable to waive his right to testify at his brother's trial.¹⁵ When the defendant continually refused to testify, the court warned

⁸ *Id.* at 957, 964-65.

⁹ 384 U.S. 364 (1966).

¹⁰ *Sweat*, 23 N.E.3d at 962.

¹¹ *Id.* at 959-60.

¹² *Id.*

¹³ See *infra* Section VII. for a discussion of *Shillitani*.

¹⁴ *Sweat*, 23 N.E.3d at 957.

¹⁵ *Id.*

the defendant about the possibility of being held in contempt.¹⁶ The People expressed, “[w]e’ll ask that [defendant] be cited for civil contempt and confined until he agrees to testify or until the end of the proceeding, and also we’ll charge him with criminal contempt for refusing to be sworn and testify.”¹⁷ Accordingly, the defendant was cited for contempt for failure to testify and placed in custody.¹⁸

After being placed in custody and assigned an attorney, the defendant continued to refuse to testify.¹⁹ The court repeatedly requested that he do so, and made clear that if he did not, he would be obstructing the proceedings and contempt charges would be imposed.²⁰ When the defendant did not change his mind, the court issued a “mandated commitment.”²¹ The defendant was also told that he would remain in confinement until the proceedings were completed, and that criminal charges would be filed as well.²² Subsequently, the defendant’s brother’s trial resulted in an acquittal and the defendant was released from custody.²³

However, soon after the defendant’s release, he was charged with two counts of criminal contempt in the second degree for failing to testify at his brother’s trial.²⁴ The defendant filed a motion to dismiss the charges on double jeopardy grounds and the city court granted the motion and dismissed the charges.²⁵

The Buffalo City Court found that the county court previously held the defendant in criminal contempt.²⁶ Thus, it concluded that because the contempt adjudication at trial and the charges subsequently filed under the New York Penal Law Section 215.50 were based on identical conduct, the Double Jeopardy Clause barred the

¹⁶ *Sweat*, 23 N.E.3d at 957.

¹⁷ *Id.* at 957-58.

¹⁸ *Id.* at 958.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Sweat*, 23 N.E.3d at 958. *See also* N.Y. JUD. § 752 (defining “mandated commitment” as “[w]here a person is committed for contempt, as prescribed in section seven hundred fifty-one [up to \$1,000 fine and/or up to 30 days in jail], particular circumstances of his offense must be set forth in the mandate of commitment. Such mandate, punishing a person summarily for a contempt committed in the immediate view and presence of the court, is reviewable by a proceeding under article seventy-eight of the civil practice law and rules.”).

²² *Sweat*, 23 N.E.3d at 958.

²³ *Id.*

²⁴ *Id.*; *see also* N.Y. PENAL LAW § 215.50 (McKinney 2016).

²⁵ *Sweat*, 23 N.E.3d at 958.

²⁶ *Id.* at 958-59.

charges.²⁷ The Erie County Supreme Court, the intermediate appellate level court at the time, affirmed the Buffalo City Court's decision.²⁸ Although the county court reasoned that the contempt proceedings were a "hybrid combination of both criminal and civil characteristics," it found them to be primarily criminal because the defendant was confined and the actions of the court were in accord with the criminal contempt provisions of the Judiciary Law Section 750.²⁹ The People appealed this decision and the New York Court of Appeals granted leave to appeal.³⁰

III. THE COURT'S REASONING

The issue on appeal to the New York Court of Appeals was whether the Double Jeopardy Clause barred the defendant, Sweat's, subsequent contempt prosecution.³¹ Sweat alleged that because he had already been held in criminal contempt of court and punished accordingly, double jeopardy prevented him from being charged again for the same offense under New York Penal Law Section 215.50.³² Conversely, the People argued that because Sweat was only conditionally imprisoned, and not prosecuted or tried for the crime, double jeopardy would not bar a subsequent contempt charge against him.³³

The New York Court of Appeals accepted the People's argument.³⁴ It reversed the Erie County Supreme Court's ruling and concluded that double jeopardy did not bar the defendant's subsequent contempt prosecution.³⁵ In resolving the issue, the New York Court of Appeals first determined the county court's purpose for holding Sweat in contempt of court.³⁶ In doing so, the New York Court of Appeals analyzed the prior contempt charge in order to cross-reference it with the subsequent contempt charge brought against Sweat.³⁷ If the subsequent prosecution charge was of the "same

²⁷ *Id.* at 959.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Sweat*, 23 N.E.3d at 959.

³¹ *Id.* at 957.

³² *Id.* at 959.

³³ *Id.*

³⁴ *Id.*

³⁵ *Sweat*, 23 N.E.3d at 965.

³⁶ *Id.* at 964.

³⁷ *Id.*

character and purpose” as the first, double jeopardy would bar it.³⁸ Ultimately, the New York Court of Appeals reasoned that because the defendant’s prior punishment was “conditional imprisonment,” and only remedial to coerce the defendant to testify at his brother’s trial, a subsequent criminal contempt charge was not barred.³⁹

IV. THE FEDERAL APPROACH

The Fifth Amendment, which provides that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb,” has been rooted in our history since the Bill of Rights was added to the United States Constitution in 1791.⁴⁰ Since that time, the Fifth Amendment has been one of our basic fundamental rights and it safeguards against double jeopardy to prevent an individual from being put in jeopardy twice for the same offense.⁴¹ However, despite this provision, there is still ambiguity within the courts in determining when double jeopardy should apply to ensure a proper double jeopardy analysis is carried out.⁴² While this area of the law is still inconclusive, there are two major federal court decisions, *Blockburger v. United States*⁴³ and *Shillitani v. United States*,⁴⁴ that have provided the standards for a double jeopardy analysis.

Blockburger provided one of the first tests to guide courts in preventing double jeopardy.⁴⁵ In *Blockburger v. United States*, the defendant was charged with three counts in violation of the Harrison Narcotics Act for selling drugs not in their original packaging and without a written order.⁴⁶ The petitioner argued that because the two charges were made to the same person during a specific time period, it constituted a single, not multiple, offenses.⁴⁷

³⁸ *Id.*

³⁹ *Id.* at 965.

⁴⁰ See U.S. CONST. amend. V; see also David S. Rudstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy*, 14 WM. & MARY BILL RTS. J. 193, 242 (2005).

⁴¹ See Rudstein, *supra* note 40.

⁴² Anne Bowen Poulin, *Double Jeopardy and Multiple Punishment: Cutting the Gordian Knot*, 77 U. COLO. L. REV. 595, 619 (2006).

⁴³ 284 U.S. 299 (1932).

⁴⁴ *Shillitani*, 384 U.S. at 364.

⁴⁵ *Blockburger*, 284 U.S. at 304.

⁴⁶ *Id.* at 300-01.

⁴⁷ *Id.* at 301-02.

The case was appealed to the United States Supreme Court.⁴⁸ The Court held that although the two drug sales were made to the same person, the elements of each drug sale were different.⁴⁹ Therefore, the two sales constituted two separate offenses under the law.⁵⁰ As a result, under *Blockburger*, the government was permitted to separately try and punish the defendant for two crimes as long as the elements of each crime were different.⁵¹

The Court strictly applied the test to determine if the defendant's offenses related to one another or contained different elements in each offense.⁵² Although the defendant argued that because he sold the drugs during a continuous time period, he could only be penalized once under the law and not charged with multiple punishments for the same offense, the Court held otherwise.⁵³ The Court reasoned that the defendant could be punished separately for the two offenses because he violated two sections of the law: Section 1 of the Narcotics Act for selling drugs not in their original stamped package, and Section 2 of the Narcotics Act for selling the drugs without a written order.⁵⁴ Since these were two different statutory sections, where each crime contained an element the other did not, the defendant could be prosecuted for both under the Narcotics Act section without violating the Double Jeopardy Clause.⁵⁵ Thus, under *Blockburger*, only if the act relates to the "same offense," does double jeopardy bar additional punishment and successive prosecution.⁵⁶ The decision and resulting test in this case gave courts the guidance needed to analyze double jeopardy.

*Shillitani v. United States*⁵⁷ is another landmark case that made a distinction between two types of contempt sentences: "civil" and "criminal" contempt to determine the correct contempt determi-

⁴⁸ *Id.* at 299.

⁴⁹ *Id.* at 303-04.

⁵⁰ *Blockburger*, 284 U.S. at 304.

⁵¹ *Id.* See also *People v. Bryant*, 699 N.E.2d 910, 913 (N.Y. 1998) (holding that "[the charges are not barred by Double Jeopardy where] each of the Federal crimes committed by defendants contained an element that is not an element of any of the State crimes for which defendants were prosecuted.")

⁵² *Blockburger*, 284 U.S. at 304.

⁵³ *Id.* at 301-02.

⁵⁴ *Id.* at 303-05.

⁵⁵ *Id.* at 304.

⁵⁶ *Id.* at 304.

⁵⁷ 384 U.S. at 365-72 (1966).

nation for the purposes of double jeopardy.⁵⁸ The petitioner was a prosecution witness at a grand jury proceeding and at issue were potential violations of the Narcotic Control Act of 1956.⁵⁹ When the petitioner was asked to respond to certain questions, he invoked his Fifth Amendment privilege against self-incrimination.⁶⁰ The district court granted him immunity, but he continued to refuse to answer the questions.⁶¹ Consequently, he was charged with contempt and sentenced to two years in prison, with an early release should he choose to answer the questions.⁶²

The petitioner appealed the decision to the Second Circuit Court of Appeals, arguing that he had a constitutional right to a trial by jury for the criminal contempt sentence imposed.⁶³ However, the government argued that the defendant was not entitled to a trial by jury because his release was contingent on his willingness to testify.⁶⁴ The court agreed with the government and affirmed the defendant's sentence, noting that the defendant had the "right to be released if and when he obeyed the order to testify."⁶⁵ The United States Supreme Court granted certiorari to determine whether the appropriate sentence had been imposed upon the defendant.⁶⁶ The Court affirmed the Second Circuit's decision, which marked a turning point in distinguishing between "civil" and "criminal" contempt.⁶⁷

The Court emphasized that rather than characterizing the type of contempt, the governing test was "what does the court primarily seek to accomplish by imposing [this] sentence?"⁶⁸ Here, the primary purpose of the Court in imposing this sentence was to coerce the defendant to testify before the grand jury.⁶⁹ Furthermore, the Court held that, although the petitioner's conduct was referenced as "criminal contempt," it was more "civil" in nature because the petitioner himself could avoid confinement if he obeyed the court order and tes-

⁵⁸ *Id.* at 368.

⁵⁹ *Id.* at 365.

⁶⁰ *Id.* at 365-66.

⁶¹ *Id.* at 366.

⁶² *Shillitani*, 384 U.S. at 366.

⁶³ *Id.*

⁶⁴ *Id.* at 366-67.

⁶⁵ *Id.*

⁶⁶ *Id.* at 365.

⁶⁷ *Shillitani*, 384 U.S. at 369.

⁶⁸ *Id.* at 370.

⁶⁹ *Id.*

tified.⁷⁰ This determination was further evidenced by the district court judge, who at the time of sentencing said to the defendant, “I want to make it clear that the sentence of the [c]ourt is not intended so much by the way of punishment as it is intended solely to secure for the grand jury answers to the questions that have been asked of you.”⁷¹ Therefore, this case set a precedent that even though the court may characterize a sentence a certain way, the most important factor is the “character and purpose” of the court in what it seeks to accomplish when it imposes the sentence.⁷²

In sum, the federal courts are subject to the *Blockburger* and the *Shillitani* tests, which serve to protect the defendant’s Fifth Amendment right under the Double Jeopardy Clause to ensure justice is preserved and a defendant’s constitutional rights are not violated. The *Blockburger* test provides the necessary guidance in correctly analyzing a double jeopardy claim.⁷³ Specifically, in a double jeopardy analysis, if the act relates to the same offense, double jeopardy will automatically bar additional punishment by successive prosecution.⁷⁴ Similarly, the *Shillitani* test assesses the nature of the two charges to prevent double jeopardy, and in the event the charges are the same, the Double Jeopardy Clause would bar the successive prosecution by determining the “character and purpose” of the sentence.⁷⁵

V. CONTEMPT CASES AND PRECLUSION OF A SECOND TRIAL TO COMPLY WITH DOUBLE JEOPARDY UNDER STATE LAW

As is the case with the Federal Constitution, the New York State Constitution guarantees that when a defendant has committed a crime, he may not be charged twice for the same offense under the Double Jeopardy Clause.⁷⁶ This is codified in the New York Criminal Procedure Law Section 40.20, which provides that a person may not be twice prosecuted for the same offense based upon the same act

⁷⁰ *Id.* at 368-70.

⁷¹ *Id.* at 368.

⁷² *Shillitani*, 384 U.S. at 368. *See also* *Gompers v. Buck Stove & Range Co.*, 221 U.S. 418, 441 (1911) (“It is not the fact of punishment, but rather its character and purpose, that often serve to distinguish civil from criminal contempt.”).

⁷³ Poulin, *supra* note 42, at 602.

⁷⁴ *Id.*

⁷⁵ *Shillitani*, 384 U.S. at 369.

⁷⁶ N.Y. CONST. art. I, § 6 (“No person shall be subject to be twice put in jeopardy for the same offense.”)

or criminal transaction.⁷⁷ It also specifies the criteria in determining whether a second prosecution is barred due to the nature of the first offense.⁷⁸

A. New York State Contempt Statutes

The New York Judiciary Law article 19 and the New York Penal Law Section 215.50 are similar because both laws are able to hold a defendant for contempt.⁷⁹ However, they differ in the manner in which each enforces a contempt sentence and the distinctly separate purposes of the court in imposing one over the other.⁸⁰

Under Article 19 of the Judiciary Law, the court may hold a defendant accountable for either civil or criminal contempt and will determine under which part of the Act to punish the defendant based on his conduct.⁸¹ Specifically, Section 750 of the Judiciary Law provides that a person is guilty of criminal contempt if he resisted or disobeyed a lawful mandate by the court or disrupted court proceedings by “disorderly, contemptuous, or insolent behavior . . . in [the court’s] immediate view and presence.”⁸² The court’s punishment for criminal contempt is imprisonment and/or a fine and there is no opportunity for the defendant to redeem himself because the court’s punishment is final.⁸³ Under this section, the judge must issue an order “stating the facts which constitute the offense and which bring the case within the provisions of this section, and plainly and specifically prescribing the punishment to be inflicted thereof.”⁸⁴

Conversely, Section 753 of the Judiciary Law provides that

⁷⁷ N.Y. CRIM. PROC. § 40.20 (McKinney 2016).

⁷⁸ *Id.* As codified in the New York Criminal Procedure Law Section 40.20:

A person may not be separately prosecuted for two offenses based upon the same act or criminal transaction unless: (a) The offenses as defined have substantially different elements and the acts establishing one offense are in the main clearly distinguishable from those establishing the other; or (b) Each 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 harms or evil.

Id.

⁷⁹ Lawrence N. Gray, *Criminal and Civil Contempt: Some Sense of a Hodgepodge*, 72 ST. JOHN’S L. REV. 337, 355 (1998).

⁸⁰ *Id.*

⁸¹ N.Y. JUD. art. 19 (McKinney 2003) (containing contempt laws).

⁸² N.Y. JUD. § 750 (McKinney 2016).

⁸³ *Id.* at § 751.

⁸⁴ *Id.* at § 755.

when a defendant is guilty of civil contempt, such contempt benefits the plaintiff in the action because it provides compensation or forces testimonial coercion.⁸⁵ It forces a reluctant defendant to comply with a court order.⁸⁶ It is considered “remedial” and not a punishment by the court because, when the defendant is imprisoned for non-compliance with a court’s order, the defendant can still be released upon complying with the mandate of the court.⁸⁷ The courts often refer to this as “conditional contempt” because the defendant is only temporarily imprisoned until he adheres to the requested mandate, or he may pay a fine to be released for failing to comply with the court order.⁸⁸

In New York, criminal contempt can also be punished under the New York Penal Law Section 215.50.⁸⁹ A defendant can be charged for disobedience to the court or court proceedings, specifically for “[d]isorderly, contemptuous, or insolent behavior, committed during the sitting of a court”;⁹⁰ “[i]ntentional disobedience or resistance to the lawful process or other mandate of a court”;⁹¹ or “[c]ontumacious and unlawful refusal to be sworn as a witness in any court proceeding or, after being sworn, to answer any legal and proper interrogatory.”⁹²

This section of the New York Penal Law is similar to the language of the Judiciary Law.⁹³ However, under the New York Penal Law, when a defendant is charged under this section, he is not able to remedy the situation by complying with the court order or mandate, whereas under the Judiciary Law he can.⁹⁴

VI. THE NEW YORK STATE APPROACH

The New York State Constitution provides that “No person shall be subject to be twice put in jeopardy for the same offense” and New York State courts have adhered to the *Blockburger* test that fed-

⁸⁵ *Id.* at § 753.

⁸⁶ *Id.*

⁸⁷ N.Y. JUD. § 753 (McKinney 2016).

⁸⁸ Gray, *supra* note 79, at 343.

⁸⁹ N.Y. PENAL LAW § 215.50 (McKinney 2016).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ Gray, *supra* note 79, at 339.

⁹⁴ *Id.* at 343.

eral courts apply to prevent double jeopardy in contempt cases.⁹⁵ In *People v. Wood*,⁹⁶ the New York Court of Appeals held that a defendant could not be charged with contempt on two different orders of protection that related to one offense.⁹⁷ The defendant's ex-wife obtained two orders of protection against the defendant and filed one in Monroe County Family Court and another in Rochester City Court.⁹⁸ The orders of protection stated that the defendant was to have "no contact whatsoever" with his ex-wife.⁹⁹ However, the defendant prank-called his former wife eleven times.¹⁰⁰ When the calls were traced to the defendant's home, his former wife commenced a contempt proceeding against the defendant in Family Court due to his failure to comply with the order of protection that was filed against him.¹⁰¹

The defendant was found guilty in Family Court for violating the order of protection and was sentenced to six months imprisonment.¹⁰² Subsequently, the defendant was also charged with criminal contempt and harassment.¹⁰³ The charges were based on the defendant's violation of the order of protection filed with the Rochester City Court and stemmed from his previous conduct of prank-calling his former wife.¹⁰⁴

The defendant filed a motion to dismiss the charge in Monroe County Supreme Court based on a double jeopardy claim, but the motion was dismissed because the court held that "the Family Court contempt proceeding was based upon the violation of a different order of protection than that which served as a basis for the criminal contempt charge."¹⁰⁵ The defendant was found guilty of all five counts of criminal contempt and harassment.¹⁰⁶ However, the Appellate Division for the Fourth Department reversed the defendant's

⁹⁵ N.Y. CONST. art. I, § 6. *See also supra* Section II. for a discussion of the *Blockburger* test.

⁹⁶ 742 N.E.2d 114 (N.Y. 2000).

⁹⁷ *Id.* at 114.

⁹⁸ *Id.* at 115.

⁹⁹ *Id.* at 115-16.

¹⁰⁰ *Id.* at 116.

¹⁰¹ *Wood*, 742 N.E.2d at 116.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Wood*, 742 N.E.2d at 116.

conviction on all counts because the court held that the Double Jeopardy Clause of the Fifth Amendment barred the criminal prosecution because both court orders of protection were violated by the defendant's conduct of prank-calling.¹⁰⁷ Therefore, because the violations of the two different orders of protection were based on the same conduct, the Double Jeopardy Clause barred the criminal prosecution.¹⁰⁸

The People appealed the decision and the New York Court of Appeals granted leave to appeal.¹⁰⁹ The New York Court of Appeals affirmed the decision and in its reasoning addressed the difficulty of concurrent jurisdiction between family courts and criminal courts when individuals seek relief by way of an order of protection against a family member for certain criminal acts.¹¹⁰ The court determined that since each court is able to issue an order of protection, double jeopardy issues might present themselves, as in the case here.¹¹¹ But the New York Court of Appeals took a resolute stance and applied the *Blockburger* test.¹¹²

In its application, the court held that the Double Jeopardy Clause should have barred the defendant's subsequent charge.¹¹³ Because the conduct was one event that violated two different statutory provisions, the court had to determine whether each provision contained "an additional fact which the other [did] not."¹¹⁴ If each of the offenses included an element, which the other did not, they were separate offenses and not barred for double jeopardy purposes.¹¹⁵ In applying the *Blockburger* test to the facts of this case, the court held that since the same act violated both orders of protection and each statutory provision did not contain an additional element which the other did not, the Double Jeopardy Clause should have barred the de-

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Wood*, 742 N.E.2d at 116.

¹¹² *Id.* at 117-18.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 117. *See supra* note 44 ("[W]here the same act or transaction constituted a violation of two distinct statutory provisions" and if there are two offenses, if each of the offenses contain an element which the other does not, they are not the 'same offense' and double jeopardy would not apply). *See also* *McGovern v. United States*, 280 F. 73, 76 (7th Cir. 1922) (holding a second order void on double jeopardy grounds due to "double prosecution of the same offense, or the imposition of double punishment for one offending against the order thus twice pronounced.").

fendant's subsequent prosecution.¹¹⁶ Furthermore, under *Blockburger*, successive prosecutions that are based on the same conduct are barred by double jeopardy; a lesser-included offense is treated the "same" as a greater offense.¹¹⁷ Therefore, when the defendant was charged under the Family Court contempt provision, a lesser-included offense than that of criminal contempt in the first degree under the New York Penal Law Section 215.51(c), the subsequent offense should have been barred since both orders of protection "had one and the same purpose."¹¹⁸

The New York Court of Appeals has also applied the *Shilitani* test used in federal courts to bar a subsequent contempt charge for the same offense under the New York Penal Law where the evidence showed that the defendant was charged with a previous contempt prosecution that was also criminal in nature.¹¹⁹ In *People v. Colombo*,¹²⁰ the petitioner refused to answer questions before a grand jury in defiance of a court order to do so.¹²¹ The Kings County Supreme Court held the defendant in criminal contempt under Section 750 of the Judiciary Law, the governing law for contempt of court, and sentenced him to thirty days in prison and ordered him to pay a two hundred and fifty dollar fine.¹²² In other words, by confining the defendant, the court was not coercing the defendant to testify, but rather punishing him for his conduct.¹²³ Subsequently, the petitioner was indicted for the same offense under the New York Penal Law Section 600.¹²⁴ The Kings County Supreme Court dismissed the indictment.¹²⁵ However, the New York Appellate Division for the Second Department reversed and held that the indictment was warranted due to the defendant's failure to testify at the grand jury proceeding.¹²⁶ The defendant appealed to the New York Court of Appeals.¹²⁷

The New York Court of Appeals held that the Fourteenth

¹¹⁶ *Wood*, 742 N.E.2d at 118.

¹¹⁷ *Id.*

¹¹⁸ *Id.* See also *Brown v. Ohio*, 432 U.S. 161, 166–68 (1977).

¹¹⁹ *People v. Colombo*, 293 N.E.2d 247, 247–48 (N.Y. 1972).

¹²⁰ *Id.*

¹²¹ 254 N.E.2d at 340.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Colombo*, 254 N.E.2d at 340.

¹²⁷ *Id.*

Amendment and the Double Jeopardy Clause of the Fifth Amendment did not bar the indictment because the petitioner had committed two acts of contempt on two different occasions of the trial court proceedings.¹²⁸ Furthermore, the court held that because the defendant was previously confined for contempt under Section 750 of the Judiciary Law, the proceeding was civil in nature, not part of a criminal prosecution, and double jeopardy did not apply.¹²⁹

The defendant appealed the decision to the United States Supreme Court.¹³⁰ The Court needed to resolve the issue of whether the two contempt charges were the same.¹³¹ If indeed the two charges were the same, the defendant could not be indicted for the second charge.¹³² The Court considered the definite sentence and fine imposed upon the defendant to determine if he had previously been sentenced for criminal contempt.¹³³

Ultimately, the United States Supreme Court remanded the case to the New York Court of Appeals.¹³⁴ On remand, the New York Court of Appeals followed the United States Supreme Court's recommendation, and in accord with *Shillitani*, held that since the nature of the offenses was the same, as he was punished under the criminal provisions of both the Judiciary Law and Penal Law for criminal contempt, he could not be indicted again because it would be offensive to the Double Jeopardy Clause.¹³⁵ This decision established a precedent that the Double Jeopardy Clause would bar a subsequent charge for contempt for the same offense under Section 600 of the Penal Law following punishment under Section 750 of the Judiciary Law.¹³⁶

In conclusion, New York State courts apply the federally recognized *Blockburger* test to determine whether a defendant's rights under the New York State Constitution have been violated so as to preclude a second contempt trial and remain in compliance with the doctrine of double jeopardy.¹³⁷ Furthermore, under New York State

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Colombo v. New York*, 405 U.S. 9 (1972).

¹³¹ *Id.* at 10.

¹³² *Id.* at 10-11.

¹³³ *Id.* at 11.

¹³⁴ *Id.*

¹³⁵ *Colombo*, N.E.2d at 247-48.

¹³⁶ *Id.*

¹³⁷ *Wood*, 742 N.E.2d at 117.

law, as well as *Shillitani*, an individual may be held in contempt under either Section 750 of the New York Judiciary Law or the New York Penal Law, but not under both, as per *Colombo*.¹³⁸

VII. ANALYSIS

In *People v. Sweat*, the Erie County Supreme Court exercised its authority under the criminal provisions of Judiciary Law Section 750 to hold the defendant in criminal contempt when he obstructed the proceedings by his failure to testify.¹³⁹ Further, in accord with Judiciary Law Section 750, the court issued a mandated commitment and sent him to confinement.¹⁴⁰ The court also advised that it “[m]ight be a good idea to give [defendant] a lawyer if you’re going to charge him with a criminal charge” and the People agreed.¹⁴¹ This is sufficient evidence that the defendant was adjudicated under criminal contempt proceedings, thus barring any subsequent charge under New York Penal Law Section 215.50.¹⁴²

The Buffalo City Court and the Erie County Court were correct in referencing *Colombo v. People*, because just as the defendant in *Colombo* was cited for criminal contempt and held in confinement, so was the defendant here.¹⁴³ In both cases, the lower courts held that the subsequent charge was barred for double jeopardy purposes.¹⁴⁴ However, the New York Court of Appeals held that double jeopardy did not bar the subsequent prosecution for criminal contempt under New York Penal Law Section 215.50 because the defendant’s first charge was “remedial” rather than punitive.¹⁴⁵ The court failed to take into account that the trial court judge imposed an actual contempt mandate.¹⁴⁶ Therefore, to say that the defendant was subject to “conditional contempt” was contrary to what was cited in the record or indicated by the actions of the court.¹⁴⁷

Furthermore, the fact that the court repeatedly asked the de-

¹³⁸ *Colombo*, 293 N.E.2d at 247-48.

¹³⁹ *Sweat*, 23 N.E.3d at 957-58.

¹⁴⁰ *Id.* at 958-59.

¹⁴¹ *Id.* at 958.

¹⁴² *Id.* at 958-59.

¹⁴³ *Id.* at 962-63.

¹⁴⁴ *Sweat*, 23 N.E.3d at 958-64.

¹⁴⁵ *Id.* at 959.

¹⁴⁶ *Id.* 958-59.

¹⁴⁷ *Id.*

fendant if he had changed his mind and was willing to testify was of no consequence to the People's argument since the defendant made it clear that he was morally opposed to testifying against his brother.¹⁴⁸ The court was not giving the defendant an opportunity to be released by complying with the order when the defendant could not avail himself of the opportunity presented.¹⁴⁹ Therefore, the original contempt charge was punitive, and when the prosecution brought a subsequent charge against the defendant for the same offense under the New York Penal Law, the Double Jeopardy Clause should have barred it.¹⁵⁰

However, the difficulty before the New York Court of Appeals was determining the proper characterization of the contempt charge to make a correct ruling for double jeopardy purposes.¹⁵¹ The New York Court of Appeals misjudged the "character and purpose" of the lower court for confining the defendant.¹⁵² In *Colombo*, the court sought to punish the defendant for his consistent reluctance to testify.¹⁵³ Since the lower state courts and the New York Court of Appeals in *Sweat* and *Colombo* both applied the *Shillitani* test yet ruled inconsistently based on the same set of facts, the *Shillitani* test should be more clearly defined to provide courts with a better understanding of its proper application. Specifically, the *Shillitani* test should narrow its purpose, similar to the New York Criminal Procedure Law Section 40.20, to provide a more clearly outlined principle that the federal and New York State courts can practically apply. Thus, should the United States Supreme Court revisit the *Shillitani* test, the Court should outline the distinction between remedial and punitive contempt sentences so that lower courts are aware of the notable differences and can uniformly apply the test correctly to reach consistent results.

As it stands now, the test is too broad and leads to inconsistent decisions by courts. Specifically, the *Shillitani* test should not simply ask, "what does the court primarily seek to accomplish by imposing this sentence?" but, like the New York Criminal Procedure Law Section 40.20, it should provide a context where, under certain

¹⁴⁸ *Id.*

¹⁴⁹ *Sweat*, 23 N.E.3d at 957-59.

¹⁵⁰ *Id.* at 958-59.

¹⁵¹ *Id.* at 959.

¹⁵² *Id.* at 964.

¹⁵³ *Colombo*, 293 N.E.2d at 247.

circumstances, a defendant's charge would be considered either remedial or punitive for purposes of contempt sentences to correctly apply a double jeopardy analysis. The result will ensure uniformity in its application, so that a defendant's rights are protected against the harms of double jeopardy.

VIII. CONCLUSION

A court's power to impose contempt sanctions when necessary preserves the order of the court and protects the rights of individuals.¹⁵⁴ However, these sanctions may also be arbitrarily enforced when it is within the court's discretion to determine if an individual's previous contempt charge was remedial or punitive, which would then either bar or not bar a subsequent prosecution for contempt on double jeopardy grounds.¹⁵⁵ When a defendant's Fifth Amendment right is violated on double jeopardy grounds, a flaw exists in our system.

A newly developed bright-line test will ensure that the test is not only applied consistently, but results in consistent holdings by courts to ensure justice and fairness for all accused. Since the Fifth Amendment's Double Jeopardy Clause is one of our most basic and fundamental rights, it is critical to make a correct contempt determination in successive prosecutions to determine whether or not there would be a double jeopardy bar. Therefore, the test must not be overbroad because "there are no 'equities' to be balanced, for the Clause has declared a constitutional policy, based on grounds which are not open to judicial examination."¹⁵⁶ By reworking the *Shillitani* test to provide more guidance to the lower courts to distinguish between remedial and punitive contempt sentences, the courts can carry out a proper double jeopardy analysis and reach consistent holdings to protect the Fifth Amendment right of all accused.

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¹⁵⁴ Gray, *supra* note 79, at 339.

¹⁵⁵ Poulin, *supra* note 42, at 647.

¹⁵⁶ *Burks v. United States*, 437 U.S. 1, 11 n.6 (1978).

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