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## Double Jeopardy

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## DOUBLE JEOPARDY

*U.S. CONST. amend. V:*

*No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb . . . .*

*N.Y. CONST. art. I, § 6:*

*No person shall be subject to be twice put in jeopardy for the same offense . . . .*

### SUPREME COURT BRONX COUNTY

People v. Mercado<sup>1</sup>  
(Decided July 6, 1999)

Defendant, Anthony Mercado was charged with several crimes: intentional murder in the second degree, manslaughter in the first degree, reckless endangerment in the first degree, endangering the welfare of a child, criminal use of a firearm in the first degree, criminal possession of a weapon in the second and third degrees and manslaughter in the second degree.<sup>2</sup> The jury acquitted Mercado of the murder charge and manslaughter in the first degree.<sup>3</sup> At the close of its case, the People dismissed the charges pertaining to reckless endangerment, endangering the welfare of a child and the criminal use of a firearm, criminal possession of a weapon and the jury was unable to return a verdict on the final charge of manslaughter in the second degree.<sup>4</sup>

After the verdict from the first trial was rendered, the prosecution presented the matter to a grand jury who immediately

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<sup>1</sup> 695 N.Y.S.2d 676 (1999).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

returned a second indictment.<sup>5</sup> In the instant action the indictment charged the defendant with murder in the second degree under a different subsection of Penal Law 125, and charged the defendant with depraved indifference to murder.<sup>6</sup>

Anthony Mercado seeks a dismissal based on a claim that both his New York State Constitutional<sup>7</sup> as well as his Federal Constitutional Rights<sup>8</sup> have been violated under the Double Jeopardy Clause. The 5<sup>th</sup> Amendment to the Constitution in defining the Double Jeopardy Clause states, “Nor shall any person be subject for the same offence to be put twice in jeopardy of life or limb . . . .”<sup>9</sup> New York State’s Constitution has followed the example set by the Federal Constitution and has adopted a Double Jeopardy Clause into its Constitution, “[n]o person shall be subject to be twice put in jeopardy for the same offense . . . .”<sup>10</sup> Although the court acknowledged the importance of the Double Jeopardy Clause, it recognized that it could not end its evaluation of depraved indifference to murder and intentional murder in the second degree based upon the federal guidelines. The court chose to focus its attention on New York Criminal Procedure Law section 40.20<sup>11</sup> which sets guidelines for barring a second prosecution.<sup>12</sup> In this case, the application of section 40.20 is what guides the court’s reasoning.

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<sup>5</sup> *Mercado* at 678.

<sup>6</sup> *Id.* In the first action the defendant was charged with violating Penal Law Section 125.10 which describes murder in the first degree. In the instant indictment the defendant was charged with violating Penal Law Section 125.20. This section defines manslaughter in the first degree.

<sup>7</sup> N.Y. CONST. art. I, § 6 which states in pertinent part: “[n]o person shall be subject to be twice put in jeopardy for the same offense . . . .”

<sup>8</sup> U.S. CONST. amend. V which states in pertinent part: “[n]or shall any person be subject for the same offence to be put twice in jeopardy of life or limb . . . .”

<sup>9</sup> N.Y. CONST amend. V.

<sup>10</sup> *Mercado*, 695 N.Y.S.2d at 678.

<sup>11</sup> N.Y. CRIM. PROC. LAW § 40.20 (McKinney 1999). Section 2 (b) provides: “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 harm or evil.” *Id.*

<sup>12</sup> *Id.*

In *People v. Mercado*, the defendant appeals the charge of depraved indifference murder in the second degree based on his belief that it violates his Constitutional right of not being put in double jeopardy for the same offense.<sup>13</sup> He claims that trying him for depraved indifference to murder in the second degree after his previous acquittal of intentional murder in the second degree violates the Double Jeopardy Clause because depraved indifference is a lesser charge than intentional murder in the second degree.<sup>14</sup> The court found for the defendant and dismissed his charge of depraved indifference stating, “[t]he crime of intentional murder charged in the first indictment and the crime of depraved indifference murder charged in the second indictment unquestionably arise out of the same criminal transaction . . . .”<sup>15</sup>

In this instance, both indictments arise out of a common act. Under the United States Constitution, in order for the Double Jeopardy clause to apply, the charges must contain the same requisite mental states but the same is not true under the New York Constitution. The court acknowledged that if just deciding this issue solely on Constitutional grounds, the court would have upheld the second prosecution of Mercado because the charges require separate mental states.<sup>16</sup>

In its analysis, the court first analyzed the double jeopardy claim made by Mercado, and looked to a decision of the Second Circuit for guidance. In *Knapp v. Leonardo*, the defendant was charged with two counts of murder in the second degree and one count of intentional murder.<sup>17</sup> At the conclusion of the trial, the jury found Knapp guilty of reckless murder and acquitted him of intentional murder.<sup>18</sup> On appeal, the decision was reversed and remanded and at the second trial the defendant was charged with reckless murder but convicted of the lesser offense of second degree manslaughter.<sup>19</sup> Knapp again appealed and claimed his conviction

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<sup>13</sup> *Mercado*, 695 N.Y.S.2d at 677.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 681.

<sup>16</sup> *Id.*

<sup>17</sup> *Knapp v. Leonardo*, 46 F.3d 170, 173 (2d Cir. 1995).

<sup>18</sup> *Id.* at 174.

<sup>19</sup> *Id.* at 175.

violated the Double Jeopardy Clause but the court concluded, “[t]he Double Jeopardy Clause is not violated as long as the two prosecutions of Knapp each required proof of an element which the other prosecution did not require proof.”<sup>20</sup>

The *Mercado* court’s analysis of the Double Jeopardy Clause relied on the reasoning set forth in *Knapp*. Where the court stated, “[b]ecause the mental states of these crimes differ, no double jeopardy violation resulted from defendant’s retrial . . . . [e]ven though there was an ‘overlap of proof’ between the first trial and retrial.”<sup>21</sup> The instant case is similar to *Knapp* because the Second Circuit was forced to decide whether intentional murder and reckless murder constituted the same offense in order to determine if the Double Jeopardy Clause should apply.<sup>22</sup> If the court were to have construed the Double Jeopardy Clause in its narrow sense, namely “the same offense in fact and in law,”<sup>23</sup> then the court would have found for the prosecution because depraved indifference to murder and intentional murder are not the same crime if read literally. Each crime possesses different underlying mental states. If the court had ended its inquiry here, the second prosecution would not have been prohibited under the United States Constitution.

The court analyzed the two indictments based upon §40.20 to determine whether the prosecution of depraved indifference to murder should be barred. The court looked to the intent of the legislature when enacting Criminal Procedure Law §40.20.<sup>24</sup> It appears that the New York State legislature was unhappy with the application and broad interpretation of the federal Double Jeopardy Clause so they codified their broader interpretation in §40.20.<sup>25</sup> In doing so, the federal government’s interpretation has been

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<sup>20</sup> *Id.* at 178.

<sup>21</sup> *Mercado*, 695 N.Y.S.2d at 679.

<sup>22</sup> *Id.*

<sup>23</sup> *People v. Bokun*, 145 Misc. 2d 860, 863, 548 N.Y.S. 2d 604, 606 (1989).

<sup>24</sup> *Mercado*, 695 N.Y.S.2d at 679.

<sup>25</sup> *Abraham v. New York*, 37 N. Y. 2d 560, 565, 338 N.E.2d 597, 600 (1975).  
See also *Mercado*, 695 N.Y.S. 2d at 679.

extended<sup>26</sup> and in its broadest sense applies to “offenses not identical but included within each other.”<sup>27</sup>

The application of §40.20 differs from that of the Article V of the United States Constitution and Article I section 6 of the New York Constitution. In its analysis of the two indictments, the *Mercado* court focused its attention on the broad, underlying facts of depraved indifference to murder and to murder in the second degree. The court recognized that even though the two offenses are based upon the same criminal activity, the prosecution of the second offense was not automatically barred.<sup>28</sup> The court focused its attention on the exceptions noted in §40.20(2).<sup>29</sup> Section 40.20(2)(a) provides, “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.”<sup>30</sup>

In the instant case, the two criminal charges operate out of a common nucleus of acts. The People do not agree, claiming that it was the defendant’s testimony at the first trial, which gave rise to the second indictment. This argument is rejected by the court as having no factual basis because the second grand jury relied on substantially the same evidence as the first grand jury.<sup>31</sup> The court therefore in its decision held for Mercado and dismissed the depraved indifference to murder charge.<sup>32</sup>

The separate interpretation by the federal government of the Double Jeopardy Clause in contrast to the interpretation by the New York State legislature produces significantly different results. In the instant case the defendant’s second indictment of depraved indifference to murder was dismissed after the court applied §40.20. If however the Federal Constitutional standard were applied, the defendant would have been prosecuted. The Double

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<sup>26</sup> *People v. Abbamonte*, 43 N.Y. 2d 74, 81-82, 371 N.E.2d 485, 488 (1977). See also *People v. Bokun*, 145 Misc. 2d 860, 863, 548 N.Y.S.2d 604, 606 (1989).

<sup>27</sup> *Bokun*, 145 Misc. 2d at 863, 548 N.Y.2d at 606.

<sup>28</sup> *Mercado*, 695 N.Y.S.2d at 679.

<sup>29</sup> *Id.*

<sup>30</sup> N.Y. CRIM. PROC. LAW § 40.20 (McKinney 1999).

<sup>31</sup> *Mercado*, 695 N.Y.S.2d at 679.

<sup>32</sup> *Id.*

Jeopardy Clause provides a limited room for interpretation of “same offense” while the New York Criminal Procedure Law has in §40.20 expanded the meaning of double jeopardy that results in a broader application.

While the New York Constitution examines the elements of the two crimes to determine whether a prosecution is barred under double jeopardy, the United States Constitution will only bar a prosecution for double jeopardy if the two crimes are literally the same. The New York legislature’s interpretation of the Double Jeopardy Clause, therefore, “provides a far more comprehensive protection against separate prosecutions for ‘two offenses based upon the same act or criminal transaction.’”<sup>33</sup>

*Robyn Mendelson*

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<sup>33</sup> *Id.*