Expert Analysis

CRIMINAL LAW AND PROCEDURE

The New York Double Jeopardy Loophole

By **Barry Kamins**

The law of double jeopardy in New York is complex. It emanates from three separate sources: the federal and state constitutions and the Criminal Procedure Law. The decisional law on this subject is difficult to navigate and, as Justice William Rehnquist once noted, "while the Clause itself simply states that no person shall be 'subject for the same offense to be twice put in jeopardy of life or limb', the decisional law in the area is a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator." *Albernaz v. United States*, 450 U.S. 333, 343.

This column will focus on one discrete issue that has arisen in light of current events: Does a presidential pardon pose a bar to a state prosecution for the same acts or criminal transactions committed under federal law? To answer that question, one must first review certain aspects of the double jeopardy doctrine, and how it is applied in this state.

The New York Court of Appeals has made clear the purpose served by the doctrine itself: "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same crime." *People v. Brown*, 40 N.Y.2d 381 (1976). Thus, the motivating force underlying the doctrine is that the sovereign, "with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity ... " *Green v. United States*, 355 U.S. 184, 187.

Having said that, while the sovereign, i.e., the federal government, cannot pursue an individual a second time, the U.S. Supreme Court has held, however, that prosecutions for essentially the same violations may be conducted by *separate* sovereigns with accompanying punishments imposed upon defendants convicted of violating the laws of each. *Bartkus v. Illinois*, 354 U.S. 121.

Thus, despite the federal constitution's prohibition against double jeopardy, the Supreme Court, pursuant to the "dual sovereignty" doctrine has noted that there is nothing improper about separate prosecutions by both the federal government and by a state when the criminal law of each has been violated by the same conduct. The Supreme Court's rationale is that a defendant who, in a single act, violates the laws of two sovereigns, has committed two distinct offenses. *United States v. Lanza*, 260 U.S. 377.

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Justice Hugo Black, dissenting in *Bartkus*, noted that it does not matter to the person being charged that a different sovereign is conducting the second prosecution; he only cares that he is being made to stand trial for the same offense. The federal double jeopardy doctrine was ultimately applied to the states through the Fourteenth Amendment in 1969. *Benton v. Maryland*, 395 U.S. 784.

On Dec. 6, 2018, the Supreme Court heard argument in *Gamble v. United States*, No. 17-646 in which the court is being asked to overturn the dual sovereignty doctrine. The defendant was stopped for driving with a broken tail light, and a gun was found in his automobile. After pleading guilty in an Alabama state court, he was charged by the Alabama U.S. Attorney for the same crime.

After his federal conviction by guilty plea, he appealed on the grounds of double jeopardy, arguing that the dual sovereignty doctrine undermines the protection that the Double Jeopardy clause was designed to provide and that it is inconsistent with its purposes. Counsel also argued that, in the latter part of the 20th century, federal criminal statutes increasingly addressed conduct already criminalized under state law. Thus, this federalization of criminal law has gone far beyond what the judicial authors of the dual sovereignty doctrine could possibly have imagined.

During oral argument, the defendant faced a number of concerns voiced by the justices. Some justices raised the issue of stare decisis, noting that the dual sovereignty doctrine is a "170-year-old-rule" for which 30 justices have voted. Justice Gorsuch asked why "of all the errors this Court has made over the years" it should overrule the duel sovereignty doctrine?

Nearly half the states have limited the application of the dual sovereignty clause either by statute or constitution. 38 N. Kentucky L. Rev. 1. While states are bound to provide no less protection than that afforded by the federal constitution, they are free to provide greater protection. New York has done so through Article 40 of the Criminal Procedure Law and the New York Court of Appeals has acknowledged that CPL 40.20(2) "does reject, in large part the dual sovereignty statute" (*Matter of Polito v. Walsh*, 8 N.Y.3d 683, 690). As a result, a prosecution which may not be barred by a constitutional provision, may be barred by a statutory one.

Under CPL 40.30(1), a person is placed "in jeopardy" or "prosecuted" for an offense, when

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"MAMMOGRAMS ON TRIAL"

Courtesy Photo

JUDGES and Lawyers Breast Cancer Alert (JALBCA) presented "Mammograms on Trial," where lawyers, judges, doctors and others interested in breast cancer acted as the "jury" during this 23rd annual Ellen P. Hermanson symposium, held in the Ceremonial Courtroom at the Daniel Patrick Moynihan U.S. Courthouse on March 26. Pictured from left were **Claire Gutekunst**, executive director, JALBCA; **Lauren Wachtler**, partner, Phillips Nizer; **Sandra Lespinasse**, principal appellate law clerk, New York State Supreme Court Appellate Division, First Department; **Katherine Ginzburg Treistman**, shareholder, Greenberg Traurig; Dr. **Laurie Margolies**, system chief of breast imaging, Mount Sinai Health System; Judge **Colleen McMahon**, Chief Judge, U.S. District Court, Southern District of New York, who presided over the "trial;" Judge **Saliann Scarpulla**, New York State Supreme Court, Commercial Division; Dr. **Barry Kramer**, former director, Division of Cancer Prevention, National Cancer Institute; **Rita Glavin**, partner, Seward & Kissel; **Judith Livingston**, partner, Kramer, Dillof, Livingston & Moore; **Edward Friedland**, district executive, Southern District of New York, and **Virginia Trunkes**, partner, DelBello Donnellan Weingarten Wise & Wiederkehr.

Judicial Ethics

Opinions From the Advisory Committee on Judicial Ethics

The Committee on Judicial Ethics responds to written inquiries from New York state's approximately 3,600 judges and justices, as well as hundreds of judicial hearing officers, support magistrates, court attorney-referees, and judicial candidates (both judges and non-judges seeking election to judicial office). The committee interprets the Rules Governing Judicial Conduct (22 NYCRR Part 100) and, to the extent applicable, the Code of Judicial Conduct. The committee consists of 27 current and retired judges, and is co-chaired by former associate justice George D. Marlow of the Appellate Division and Margaret Walsh, a Family Court judge and acting justice of the state Supreme Court.

Opinion: 18-138

Digest: (1) A judge with personal knowledge of relevant facts may testify as a fact witness in an attorney disciplinary proceeding, either voluntarily or pursuant to a subpoena. (2) The judge may provide a written factual statement at the request of the attorney's lawyer, but its admissibility is a legal question. Rules: 22 NYCRR 100.2; 100.2(A); 100.2(C); Opinions 15-74; 12-10; 10-118; 07-153; 01-25; 95-148; 88-155.

Opinion: The inquiring surrogate recently presided over a probate proceeding. The attorney who drafted the will submitted an affidavit concerning a draft-

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