CRIMINAL/CONSTITUTIONAL

Supreme Court Update – Double Jeopardy and Issue Preclusion

By Cory Morris

On November 29, 2016, the Supreme Court decided *Bravo-Fernandez v. United States* ("*Bravo*") (580 U.S. __ (2016)), rejecting petitioners' issue-preclusion argument and holding that the government is not barred from retrying the petitioners on the count of which petitioners were found guilty. The petitioners were indicted for *inter alia*, conspiracy to commit bribery, traveling in interstate commerce to violate the federal bribery statute, 18 U.S.C. §666 and bribery. After trial, the jury rendered a guilty verdict for bribery under 18 U.S.C. § 666 but acquitted petitioners on the conspiracy to commit bribery and travelling in interstate commerce to commit bribery counts. On appeal, the First Circuit held that there were improper jury instructions, a legal error, concerning the bribery convictions. The First Circuit vacated the convictions and remanded the matter for trial, as often occurs when a criminal defendant is successful in such an appeal. The petitioners appealed, protesting that the issue-preclusion effect of petitioners' acquittals should bar a retrial on the substantive bribery charge.


Cory Morris

Petitioners in *Bravo* argued that the issues of fact surrounding both acquittals should encompass the elements of the substantive bribery charges and thus preclude a second trial for the bribery charge. The Supreme Court decided that the vacatur of a conviction alters the issue-preclusion analysis under the Double Jeopardy clause and that petitioners failed to meet their heavy burden in showing that petitioners' acquittals decided the same factual issues concerning whether petitioners violated 18 U.S.C. § 666, bribery. Justice Thomas, concurring, wrote separately to note that the Double Jeopardy Clause did not originally have an issue-preclusion prong and that the Supreme Court should reconsider the line of Supreme Court precedent holding otherwise. The effect of the issue-preclusion in *Bravo*, while not preventing a second trial of petitioners, bars the government from invoking the gratuity theory, upon which the government originally relied, in the second trial.

The Fifth Amendment of the United States Constitution, the Double Jeopardy Clause states that "…[n]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb…" Juries enjoy an "unreviewable power . . . to return a verdict of not guilty for impermissible reasons," for "the Government is precluded from appealing or otherwise upsetting such an acquittal by the Constitution's Double Jeopardy Clause."[1] The Supreme Court in *Bravo* reminds us that while "claim preclusion is also essential to the Constitution's prohibition against successive criminal prosecutions," double jeopardy, "[t]he allied doctrine of issue preclusion ordinarily bars relitigation of an issue of fact or law raised and necessarily resolved by a prior judgment."[2] The acquittals in *Bravo*, not the convictions, have preclusive effect on issues of fact in petitioners' second trial. Differentiating between a hung jury, that renders no decision, the Supreme Court holds that the petitioners' acquittals are a clear decision by the jury. The Supreme Court reiterates that "by permitting a new trial post vacatur, the continuing-jeopardy rule serves both society's and criminal defendants' interests in the fair administration of justice."[3]

Double jeopardy, aside from Hollywood depictions and the wonderful ethics program hosted by the Suffolk County Bar Association,[4] is a constitutional safeguard vital to our criminal justice system. In *Benton. v Maryland*, (395 US 784, 794 (1969) ("*Benton*")), the Supreme Court held that the "double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the states through the Fourteenth Amendment." The *Benton* decision had a fully retroactive effect.

In *North Carolina v. Pearce*, the Supreme Court held that the Fifth Amendment guarantee against double jeopardy made collateral estoppel a constitutional requirement, preventing the successful second litigation of certain issues already decided. Collateral estoppel "means simply that when an issue of ultimate fact has once been

(Continued on page 20)

VEHICLE AND TRAFFIC

A Review of Common Issues at the Suffolk County Traffic and Parking Violations Agency

By David J. Mansfield

Defense counsel's representation of clients at the Suffolk County Traffic and Parking Violations Agency has proven to be challenging to the average practitioner. The agency has made some incremental changes, which has saved time for the defense lawyers. The agency generally does not receive enough credit.

The advent of computerized Notices of Appearance at the Attorney's Window has greatly reduced the processing time to generate a bar code to allow defense counsel to adjourn or conference the case. The number system is similar to the one used at the local offices of the Department of Motor Vehicles. While not perfect, this has brought semblance of order, and once defense counsel understands the system, it works smoothly.

The agency has also added an overflow conference prosecutor for two or fewer cases, which doesn't involve scofflaw, diversion, community service or any other complicated issues. This has reduced congestion in the attorney conference room.


David Mansfield

The agency has assigned a judicial hearing officer to preside over attorney dispositions and applications as soon as the attorneys report to the designated part. Some issues still remain, including the amount of time it takes to conclude a trial on any of the scheduled timeslots. And defense counsel must budget the entire morning, afternoon or a Thursday evening.

Defense counsel for an 8:30 a.m. trial should be present at the appointed time to avoid the chance of a default conviction or an inquest taken against their client. My practice is to try to arrive at the appointed time, even if the trial may not be commenced for a few hours.

Any retainer agreement should specify that a trial, appearance at any Department of Motor Vehicles hearing or an appeal is not included. You may wish to specify a per diem fee for the trial because an adjournment of the trial in the event the police officer is unable to appear will then cause you to have to dedicate another entire timeslot to the trial of your client's case.

Other trial issues include the requirement that your client must appear at trial pursuant to CPL §350, unless the appearance is waived in advance with the consent of the agency prosecutors. They do seem to be less willing to consent, and in many cases it benefits defense counsel to have the defendant present to observe and participate in the process and advocate for their clients.

When the defense counsel is consulted by a prospective client, the most important question is: Is it on for conference or for trial?

When a case is set for trial at the agency it is a matter of utmost urgency, because unlike many courts, the agency will not allow you to appear and request an adjournment on the date of trial because you were just retained. You must also convey to your client that basically their "house is on fire" and something must be done right away. You must inform your client that if they retain you the night before the date of or on the trial date you will not have an opportunity to represent them to the best of your ability.

Once retained on a trial case defense counsel should appear at the agency with written authorization to learn if there is an acceptable disposition that can be worked out.

Other issues involve letters of proof of insurance coverage for which the agency has stringent standards, which generally exceed the minimum requirements of other courts. The letter must be signed by an underwriter, include the policy number with effective dates, a statement of no lapse of insurance and one indicating that the vehicle was specifically covered on the date of incident.

The agency also requires, unlike most jurisdictions, the license plate number of the vehicle, despite the fact that the insurance companies will reference the vehicle only by vehicle identification number.

Defense counsel should send a spe-

(Continued on page 21)

Pro Bono Attorney of the Month Scott B. Augustine (Continued from page 12)

earlier in his career, the break from practicing full time had exacted a toll. Most of his clients had moved on.

Among the different ways he set about re-establishing his practice was to offer his volunteer services to the Pro Bono Project.

"I had time on my hands and I thought that by taking some matrimonial pro bono cases I could get up to speed on the changes that had developed in that area of the law since the last time I had a matrimonial case," he said.

It was the perfect pairing. The Project, as always, had more matrimonial clients in need of representation than volunteer attorneys to assist them. Mr. Augustine was assigned his first client, which quickly led to another, and then another.

Several of his clients were victims of domestic violence. For some, Mr. Augustine's work began with helping the client obtain custody and child support orders and orders of protection in Family Court before then commencing the divorce action and resolving the matters of equitable distribution and maintenance.

Mr. Augustine wishes to acknowledge several people who helped him a great deal with his early Pro Bono Project referrals. These include Nassau Suffolk Law Services staff attorneys Lawrence Tuthill (Domestic Violence Family Court Unit), Patricia Caruso (Foreclosure Unit), and Lewis Silverman (former Touro Law School Professor and Pro Bono Project mentor). Mr. Augustine was also impressed with how helpful opposing counsel was. Attorneys like Bill Sweeney took time to answer questions and provide guidance.

Mr. Augustine has been moved by the expressions of gratitude he has received from his pro bono clients and members of the judiciary. "They realized I was not getting compensated, and they all were very thankful," Mr. Augustine said. "Judge Glenn Murphy expresses his thanks to me both privately and publicly every time I appear before him on a pro bono case."

Maria Dosso, Nassau Suffolk Law Services' Director of Communications and Volunteer Services, is also grateful for Mr. Augustine's generosity. "We are in such dire need of pro bono attorneys to represent in pro bono matrimonial matters and Scott has been a lifesaver," Ms. Dosso said. "He is making a real difference in the lives of his clients."

Mr. Augustine lives in Brookhaven Hamlet, two towns over from Patchogue, where he grew up. His wife Lisa teaches kindergarten. He and Lisa raised two daughters, Alexa and Carlyn. Alexa attends Stony Brook University and will graduate this month with a business degree. Carlyn attends the University of Alabama, where she is majoring in astrophysics and will graduate in 2018.

The Pro Bono Project is most appreciative for Scott Augustine's generosity and the skilled advocacy he has provided to every referred client. For this reason, it is with great pleasure that we honor him as the Pro Bono Attorney of the Month.

Note: *Ellen Krakow is the Suffolk Pro Bono Project Coordinator at Nassau Suffolk Law Services.*

The Suffolk Pro Bono Project is a joint effort of Nassau Suffolk Law Services, the Suffolk County Bar Association and the Suffolk County Pro Bono Foundation, who, for many years, have joined resources toward the goal of providing free legal assistance to Suffolk County residents who are dealing with economic hardship. Nassau Suffolk Law Services is a non-profit civil legal services agency, providing free legal assistance to Long Islanders, primarily in the areas of benefits advocacy, homelessness prevention (foreclosure and eviction defense), access to health care, and services to special populations such as domestic violence victims, disabled, and adult home resident. The provision of free services is prioritized based on financial need and funding is often inadequate in these areas. Furthermore, there is no funding for the general provision of matrimonial or bankruptcy representation, therefore the demand for pro bono assistance is the greatest in these areas. If you would like to volunteer, please contact Ellen Krakow, Esq. (631) 232-2400 x 3323.

Supreme Court Update – Double Jeopardy and Issue Preclusion (Continued from page 14)

determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit."[5]

"The ban on double jeopardy has its roots deep in the history of occidental jurisprudence. Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization. And its purposes are several. It prevents the State from using its criminal processes as an instrument of harassment to wear the accused out by a multitude of cases with accumulated trials."[6]

In *Bravo*, the Supreme Court focused on whether the jury actually decided the issue of fact(s) surrounding the bribery charge as to preclude the retrial of petitioners. Think civil procedure. "In criminal prosecutions … the issue-preclusion principle means that 'when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.' "[7] Should the issue of fact(s) be resolved by the prior acquittal, the Supreme Court holds, that issue of fact would bar a second trial regarding that issue. However, the fact that the jury acquitted petitioners on the conspiracy to commit bribery and the travelling to commit bribery charges does not necessarily mean that the jury decided the issue of whether the petitioners committed bribery.

The Supreme Court differentiates the situation in *Bravo* with that of a hung jury or a jury's failure to decide. "One cannot know from the jury's report why it returned no verdict."[8] The petitioners in *Bravo* focused on the issue-preclusion component of the Double Jeopardy Clause and argued that the facts established in their acquittals would make it impossible to convict petitioners in a second trial for bribery. The lower courts rejected the petitioner's argument. The Supreme Court agrees, holding that while the acquittals stand, the petitioners failed to meet their burden in showing that those acquittals decided the issues of fact central to whether the petitioners violated 18 U.S.C. § 666, bribery.

The Supreme Court noted that the petitioners bear the burden of demonstrating that the jury found that petitioners did not (or could not) violate the bribery statute. Additionally, the Supreme Court commented that this is a heavy burden, as the government cannot obtain review of the petitioners' acquittals. The Supreme Court found that "a defendant cannot meet that burden where the trial yielded incompatible jury verdicts on the issue the defendant seeks to insulate from relitigation."[9] Although there was a legal error — the jury instruction — it does not violate the Double Jeopardy Clause to retry the petitioners in *Bravo* because there was no issue-preclusion effect given to the substantive bribery charge. The actual determinations by the jury in the acquittals are speculative and would not serve to resolve the issues of fact required to support a bribery charge and, thus, preclude a second trial. The Supreme Court makes clear that "issue preclusion is not a doctrine [petitioners] can commandeer when inconsistent verdicts shroud in mystery what the jury necessarily decided."

Bravo highlights the importance of issue-preclusion. "For double jeopardy purposes, [however], a court's evaluation of the evidence as insufficient to convict is equivalent to an acquittal and therefore bars a second prosecution for the same offense."[10] Additionally, "[n]or…would retrial be tolerable if the trial error could resolve the apparent inconsistency in the jury's verdicts." Criminal defense attorneys may find *Bravo* to be problematic as this may provide prosecutors incentive to use the first trial as a "full-scale dress rehearsal," or "treat[ing] the first trial as no more than a dry run for the second prosecution." This, however, may be unlikely as memories fade, witnesses become lost and, let us not forget that trials are very expensive and time consuming.

Note: Cory H. Morris maintains a practice in Suffolk County and is the co-chair of the Suffolk County Bar Association's Young Lawyers Committee. He has been honored as a SuperLawyer Rising Star. Cory also serves as a Nassau Suffolk Law Services Advisory Board Member and is an adjunct professor at Adelphi University. (www.coryhmorris.com)

[1] *United States v. Powell*, 469 U. S. 57, 63, 65 (1984). Yes I could've swore to help them but now I don't don't have it only have one

[2] *Bravo*, at P. 3 (citations omitted).

[3] *Id.* at P. 13.

[4] Jeopardy, Suffolk Academy of Law Game Night Networking Event; flyer available at, http://scba.org/flyers/Jeopardy%202017.pdf.

[5] *Ashe v. Swenson*, 397 US 436, 443 (1970).

[6] *North Carolina v. Pearce*, 395 US 711, 733-734 (1969) (internal citations and quotations omitted).

[7] *Bravo*, at P. 1 (quoting *Ashe v. Swenson*, 397 U. S. at 443).

[8] *Bravo*, at P. 3.

[9] *Id.* at P. 13.

[10] *Id.* at P. 15 (citations omitted).

[11] Brief of the National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Petitioners at 9; Brief of the Cato Institute as Amicus Curiae in Support of Petitioners at 21, *Bravo*.

[12] *Ashe v. Swenson*, 397 US at 447.