

Court of Appeals
of the
State of New York

In the Matter of ENRIQUE RIVERA,

Defendant-Respondent,

For a Judgment Pursuant to C.P.L.R. Article 78,

-against-

The Honorable NEIL JON FIRETOG,
a Justice of the Supreme Court, Kings County,

Respondent,

and

The Honorable CHARLES J. HYNES,
District Attorney, Kings County,

Appellant.

BRIEF FOR *AMICUS CURIAE*
NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
IN SUPPORT OF DEFENDANT-RESPONDENT

Herald Price Fahringer, Esq.
Erica T. Dubno, Esq.
Fahringer & Dubno
120 East 56th Street, Suite 1150
New York, New York 10022
Tel.: (212) 319-5351
Fax: (212) 319-6657

Counsel for Amicus Curiae
New York State Association of
Criminal Defense Lawyers

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Corporate Disclosure Statement and Statement of Interest

The New York State Association of Criminal Defense Lawyers (the "Association" or "amicus"), a not-for-profit professional association, is the state affiliate of the National Association of Criminal Defense Lawyers.¹ The Association has a subscribed membership of approximately 800 attorneys, including private practitioners, public defenders and law professors.² As amicus, the Association offers the Court the perspective of practitioners who regularly handle criminal cases in state and federal courts.

¹ The National Association of Criminal Defense Lawyers is a nonprofit corporation with membership of more than 10,000 attorneys and 28,000 affiliate members in all 50 states.

² The Association was founded in 1986 to promote study and research in the field of criminal defense law and related disciplines. Its stated goals include promoting the proper administration of criminal justice; fostering, maintaining and encouraging the integrity, independence and expertise of defense lawyers in criminal cases; protecting individual rights and improving the practice of criminal law; educating the public on such issues; and promoting the exchange of ideas and research, including appearing as amicus curiae in cases of significant public interest or of professional concern to the criminal defense bar.

The Association is filing this amicus brief in support of Defendant-Respondent Enrique Rivera because of its concern over the serious constitutional implications that would result from a reversal of the Appellate Division's decision granting an Article 78 petition prohibiting the Kings County prosecutor and court from retrying Mr. Rivera for murder.

The Association wishes to provide the Court with a perspective on double jeopardy claims in the state court system, as well as how reversal of the Appellate Division's decision would have devastating consequences. Moreover, amicus seeks to assist the Court by highlighting the dangers inherent in a refusal to poll the jurors concerning whether they had reached a verdict on any one of the pending charges before granting a mistrial.

Members of the New York State Association of Criminal Defense Lawyers wrote this brief. No party has participated in the preparation of this brief. Similarly, no party made any monetary contribution for the submission of this brief.

Statement of the Case

At the trial of Defendant-Respondent Enrique Rivera, who was charged in Kings County, the court submitted a second-degree murder charge together with lesser-included offenses of first and second-degree manslaughter. The court instructed the jurors only to consider the manslaughter charges if they could not reach a verdict on the predominant murder charge.

Following days of deliberations, the jurors inquired about the specific elements of manslaughter. After receiving this information, the jurors reported that they were still deadlocked. The trial judge, rather than ask whether they had received a partial verdict, ultimately declared a mistrial.

Subsequently, the jury forewoman signed an affidavit revealing that the jurors had reached a unanimous "not guilty" verdict on the murder charge. In light of this startling disclosure, which confirmed what counsel believed when the jurors asked about the manslaughter charges, the defense brought an Article 78 proceeding to prevent retrial on the murder charge.

The Appellate Division, Second Department granted the Writ of Prohibition, finding that

in light of the evidence that the jury had reached a verdict on the murder count, and defense counsel's repeated requests for an inquiry as to a partial verdict, the trial court's declaration of a mistrial on that count without any inquiry into the alternative of taking a partial verdict was an improvident exercise of discretion and was not manifestly necessary under all of the circumstances. Rivera v. Firetog, 44 A.D.3d 957, 959, 844 N.Y.S.2d 116, 119 (2d Dept. 2007).³

The District Attorney's application for leave to appeal to this Court was granted. See Rivera v. Firetog, 10 N.Y.3d 703, 854 N.Y.S.2d 104 (2008).

³ The panel did find, however, that Mr. Rivera could be retried on the manslaughter charges for which the jurors never reached a verdict. Id.

ARGUMENT

WHERE THERE IS EVIDENCE THAT THE JURORS MAY HAVE REACHED A PARTIAL VERDICT, THE JURORS SHOULD BE POLLED BEFORE A MISTRIAL, WHICH EXPOSES THE DEFENDANT TO DOUBLE JEOPARDY, IS DECLARED

Enrique Rivera was acquitted of murder. And yet, the State is attempting to try him again for the same murder! That simple statement suggests the awful solemnity of the occasion that brings us before this Court.

The Fifth Amendment's Double Jeopardy Clause protects a defendant from being punished twice for the same offense.⁴ This constitutional safeguard, which prevents those charged with crimes from having to run the gauntlet twice, is indispensable to our system of justice.

⁴ The Fifth Amendment to the United States Constitution, made applicable to the States through the Fourteenth Amendment, provides in relevant part "[n]o person shall be ... subject for the same offence to be twice put in jeopardy of life or limb." See also Davis v. Brown, 87 N.Y.2d 626, 629-30, 641 N.Y.S.2d 819, 821 (1996) (prohibition granted to preclude the defendant's retrial on double jeopardy grounds for robbery); United States v. DiFrancesco, 449 U.S. 117, 129, 101 S. Ct. 426, 433 (1980); N.Y. Const. art. I, § 6.

This Court has declared,

[a] second prosecution may be grossly unfair because it increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted.⁵

Nevertheless, the ancient ideals of the Double Jeopardy Clause would be rendered meaningless if a defendant, who was found not guilty by 12 jurors, can be tried again simply because that unanimous verdict did not undergo the formality of being announced. It would elevate form over substance to ignore such a determination by the jurors where there was evidence before the trial judge that the jury had reached a partial verdict. The law traditionally abhors such a proposition.

⁵ See People v. Baptiste, 72 N.Y.2d 356, 360, 533 N.Y.S.2d 853, 856 (1988).

It is, of course, a fundamental precept of double jeopardy jurisprudence that a defendant should be notified of all consummated verdicts reached by the jury that is considering his fate. Thus, "[a]s a general rule, the prosecutor is entitled to one, and only one, opportunity to require the accused to stand trial."⁶ After all, a defendant "possesses a 'valued right' to have his trial completed by a particular tribunal on the first presentation of the evidence."⁷

As a consequence, although trial judges are accorded great discretion in determining whether to grant a mistrial where a jury appears deadlocked, there are limitations on that discretion. Therefore, a defendant's right to obtain a verdict should not be preempted unless it is clear that the jury is hopelessly deadlocked on all charges and that there is "no reasonable probability it can agree."⁸

⁶ Baptiste, 72 N.Y.2d at 359, 533 N.Y.S.2d at 856.

⁷ 72 N.Y.2d at 359-60, 533 N.Y.S.2d at 856.

⁸ Id.

Where, however, there is evidence in the record that the jurors agreed on at least one count considered by them, it would be a grave miscarriage of justice to deny the defendant of the constitutional right to the benefit of that verdict by declaring a mistrial.

Significantly, federal law provides that juries

should be neither encouraged nor discouraged to return a partial verdict, but should understand their options, especially when they have reached a stage in their deliberations at which they may well wish to report a partial verdict as to some counts or some defendants.⁹

The economy and efficiency contained in this rule needs no scholarly vindication.

⁹ United States v. Dolah, 245 F.3d 98, 108 (2d Cir. 2001), abrogated on other grounds by Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004), quoting United States v. DiLapi, 651 F.2d 140, 147 (2d Cir. 1981).

Applying this cogent rule to the facts of this case, the jurors could only consider the evidence relating to the lesser manslaughter charges if they unanimously agreed that the defendant was not guilty of murder. Thus, by requesting information regarding the manslaughter charges, it is clear that the jurors had acquitted Enrique Rivera of the murder, which was the top charge in the indictment.

Under these circumstances, where there is evidence of a unanimous verdict, the trial judge is obliged to inquire about the specific verdict reached by the jury. The presiding spirit of the Double Jeopardy Clause requires that any verdict unanimously reached by the jury should be disclosed to the accused.

In addition, jurors, who have devoted six days to the arduous task of carefully considering the evidence, which bears on the life and liberty of Enrique Rivera, are entitled to have their labors and hard earned verdict considered by the court -- even if their tireless efforts have only achieved an acquittal on one count.

Moreover, a defendant who assumes the risk of seeking a partial verdict is particularly aggrieved if he cannot enjoy its fruits as his request exposes him to possible conviction. Defense attorneys are in the best position to determine whether to seek a partial verdict based on their knowledge of the trial record and jury deliberations to the extent revealed by jury notes, read backs of testimony, and supplemental jury instructions.

Furthermore, the defendant's constitutional right to finality and a jury verdict are not forfeited merely because an instruction on a partial verdict was not sought prior to deliberations. Such rights are fundamental.¹⁰

Finally, a defendant, such as Enrique Rivera, should not be forced to face the anxiety of another trial and the horrors of a second murder charge when he was already acquitted of the murder. Equity requires no more and due process of law requires no less.

¹⁰ See Duncan v. Louisiana, 391 U.S. 145, 157-58, 88 S. Ct. 1444, 1452 (1968) ("a general grant of jury trial for serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants").

Conclusion

For these reasons, amicus submits that the Decision and Judgment of the Appellate Division, Second Department, which granted an Article 78 petition in the nature of prohibition, seeking to prohibit the prosecution from retrying the Defendant, should be affirmed.

Dated: New York, New York
August 27, 2008

Herald Price Fahringer, Esq.
Erica T. Dubno, Esq.
Fahringer & Dubno
120 East 56th Street, Suite 1150
New York, New York 10022
(212) 319-5351

Attorneys for Amicus Curiae
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of Criminal Defense Lawyers