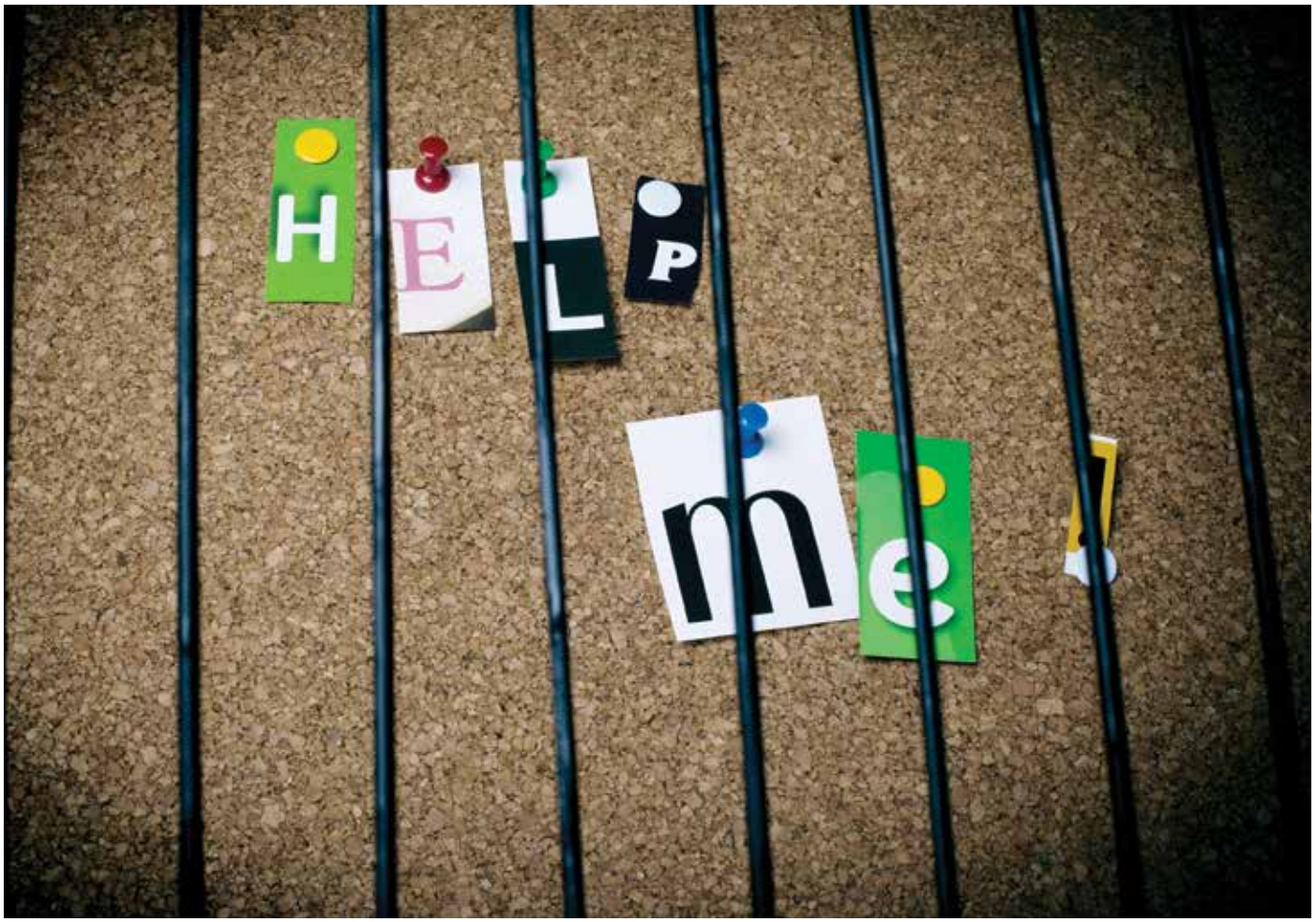
By Colin Quinn Commito

A Letter from Jail



A handwritten letter on a lined sheet of paper slid across my desk as the senior partner inquired, "Commito, do we have a case here?" As a new associate in the law office of Luther Franklin Spence & Associates, I frantically skimmed the document for an answer. I could make something out: The author was an inmate in an Illinois correctional institution who had been tried twice in succession –an acquittal followed by a conviction for first degree murder. "Mr. Spence," I replied, "this is a double jeopardy case and one we have to take."

The Facts

On the night of November 12, 2004 a gunfight broke out on Chicago's west side at a strip mall on 9th and Roosevelt. Cordelrow Brown ("Brown") was alleged to have fired a handgun at three young men who sat in a black SUV. The young men fired back and Mr. Brown fled. One bullet hit Terrell Spencer. Michael Dixon and Jarrett Swift went unscathed. But there was someone else.

A person sitting in a car nearby had been struck in the neck by a stray bullet. Mycal Hunter, an innocent bystander, would never again walk or breathe without the assistance of a ventilator. In fear of causing his death, Hunter's doctors decided not to remove the bullet lodged in his neck.

An investigation of the scene uncovered only one weapon; a 9.mm firearm fired by Dixon. Spencer, Dixon and Swift were not charged for their participation in the gunfight. Cordelrow Brown, however, was found, arrested and indicted for criminal offenses committed against each individual at the scene.

As to Spencer (who had been hit by a bullet) and Hunter (the bystander who was hit), Brown was charged with counts of attempted murder, aggravated battery with a firearm, aggravated discharge of a firearm and aggravated battery. With respect to Dixon and Swift (who were not hit), Brown was charged with counts of aggravated discharge of a firearm and aggravated battery.

The First Prosecution

In December 2008, Mr. Brown waived his right to a jury, and a trial commenced before Judge Thomas M. Tucker in the Circuit Court of Cook County, Fourth District. The government elicited testimony from Dixon, Swift and Spencer identifying Brown as the initial shooter and used forensic evidence to persuade the judge that the bullets from three of the young men went one way while the bullets from Brown went another. Dixon fired shots away from Hunter and Brown shot in his direction. The government rested after arguing that Brown discharged the bullet that caused Hunter's paralysis. But the gun allegedly fired by Brown was not introduced into evidence and the bullet that struck Hunter remained lodged in his neck.

The defense then moved for a directed verdict, arguing that the government had failed to prove each offense charged as to Hunter beyond a reasonable doubt. The judge agreed. Motion granted. Brown was *acquitted* of all charges as to Hunter –attempted murder, aggravated battery with a firearm, aggravated discharge of a firearm and aggravated battery.

A different result obtained with respect to Dixon, Swift and Spencer. The Court found Brown guilty of the aggravated discharge of a firearm and aggravated battery with a firearm of Spencer. With respect to Swift and Dixon, Brown was convicted of the aggravated discharge of a firearm. Brown was sentenced to serve six years in the Illinois Department of Corrections.

The Second Prosecution

Mycal Hunter died two years into Brown's sentence. Brown was then charged with first-degree knowing and felony murder. The counsel who secured Brown's acquittal in the first prosecution prepared to defend him a second time.

The second trial started in error. Brown's defense counsel did not file a motion to dismiss the indictment on the basis of a double jeopardy violation. The Fifth Amendment of the United States Constitution guarantees citizens the freedom from being tried twice for the same offense. U.S. Const., amend. V; Ill. Const. 1970, art. 1, § 10. As a result, the trial commenced without an interlocutory appeal to the First District Appellate Court of Illinois to resolve any issues of former jeopardy. Ill. Sup. Ct., R 604(f).

The government freely presented its former case against Brown anew. But this time, the government had newly discovered evidence: the bullet removed from Hunter's neck. Forensic testing showed that the bullet recovered from Hunter was not discharged from Dixon's gun. This "smoking gun" evidence was of little probative value, but managed to persuade the Judge.

Brown was found guilty on all counts for the first-degree knowing and felony murder of Hunter. A sentencing hearing was scheduled and his legal counsel withdrew.

Attempting to raise the issue of double jeopardy himself, Brown filed a *pro se* motion arguing that his lawyers were ineffective. I imagined him sitting at the law library reading through double jeopardy cases, treading water in an area of law that Chief Justice Rehnquist referred to as a "veritable Sargasso Sea that could not fail to challenge the most intrepid judicial navigator." *Albernaz v. United States*, 450 U.S. 333, 343 (1981). The Sargasso Sea has gained literary infamy due to its near impossible navigability and definition as the only sea defined by currents, not land. Unsurprisingly, Brown's motion was denied.

Brown then wrote the lined sheet of paper from jail that slid across my desk at the law office of Luther Franklin Spence & Associates.

My Entrance

Upon reading Brown's letter, it was apparent to me that something was wrong. Though he had been tried twice for the same crimes, no one had raised the issue of double jeopardy. Brown himself had started the discussion, belying the old maxim about a fool for a client. But was it too late to raise double jeopardy? A waiver would end his case. It was up to me to get the issue on the record.

Just days away from Mr. Brown's sentencing hearing, I drafted and filed a post-trial motion to vacate his conviction on the basis of double jeopardy. Motion filed, motion denied. Brown was sentenced to natural-life in prison with no chance for of parole. At 25 years of age, he would die in jail.

There was one option left. I would press the issue again. With permission from Brown's family to appeal the case and authority to file and argue the case from Mr. Spence, my commitment to Brown in the intellectual tug of war with the double jeopardy clause began.

The "Sargasso Sea"

The double jeopardy clause serves as protection against governmental abuse in the following circumstances: (1) a second prosecution for the same offense after conviction; (2) a second prosecution for the same offense after acquittal; and (3) multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). Seemed simple enough, and in fact, rather clear. Not so.

The "Second Trial" Test

The double jeopardy clause prevents a second trial only when there has been a first. A truism at first glance, but there are complications. Unless jeopardy attaches and terminates in the first trial, the "double" drops off and there is just jeopardy with no constitutional implications. Jeopardy attaches the moment at which a defendant is at risk of being found guilty. *Serfass v. United States*, 420 U.S. 377, 388 (1975). Jeopardy terminates upon a final and substantive judgment of acquittal or conviction, by judge or jury. *Kepner v. United States*, 195 U.S. 100, 134-35 (1904) (Holmes, J., dissenting, joined by White and McKenna, JJ.).

At Brown's first trial, Spencer was sworn in and answered the government's questions. Brown was then at risk of being found guilty. Jeopardy attached. At the close of the government's case, the Honorable Thomas M. Tucker acquitted Mr. Brown of all offenses charged as to Hunter. This was done by way of a directed verdict, which contained the hallmark requirements of finality. Jeopardy terminated. I was determined to show the First District Appellate Court of Illinois that Brown had therefore been prosecuted twice for the same offense in violation of the double jeopardy clause of the United

States Constitution. But I had to hurdle some barriers at the same time–there was another important test to pass.

The "Same Elements" Test

In 1911, the Supreme Court first addressed, but did not definitively resolve, the question of what test should determine whether two offenses are the same or different for double jeopardy purposes. *Gavieres v. United States*, 220 U.S. 338, 342 (1911) citing *Morey v. Commonwealth*, 108 Mass. 433 (1871) (Judge J. Gray). With a definitive answer given in 1932, the test seemed to be set in stone: "whether each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180 (1932). Eloquent and simple, but how did the test operate?

Lower courts interpreted this language as creating a "same elements" test–a side-by-side comparison of the common elements of two offenses aimed at identifying a difference between them. *People v. Perkins*, 2016 IL App (5th) 140429-U, ¶ 18. Identify a difference in the elements of two subject offenses and the government may prosecute successively.

In Brown's case, the first test subjects were the offenses of attempted murder (acquitted in the first trial) and murder (found guilty in the second trial). Placed side-by-side, comparing the elements, the test seemed to fail Brown. The two offenses were different. Attempted murder required specific intent, while "knowing" murder only called for knowledge, e.g., knowing that you were firing a gun. Then there was the victim's death–required for a murder charge but not for attempt. Yet the physical conduct required for the commission of each offense was the same. *People v. Davidson*, 159 Cal. App. 4th 205, 210 (2008).

Brown had been acquitted of the attempted murder of Hunter. How could he thereafter be found guilty of having murdered Hunter? Is the government able to prosecute in succession simply because the "same elements test" identifies a difference between the culpable mind state elements of two criminal offenses though there is an identity in the physical conduct? This would be particularly odd given the higher standard of mens rea for attempt.

The "Same Conduct" Test

In 1990, the Supreme Court decided the case of *Grady v. Corbin*, 495 U.S. 508 (1990), which assigned equal importance to the elements of conduct and mind state when subjecting two criminal offenses to the "same elements" test. The Court held that even if the "same elements" test revealed a difference between the culpable mind state elements of two criminal offenses, the double jeopardy clause prevented a second prosecution if the government would be required to prove the same conduct it failed to prove in a prior prosecution. *Id.* at 510. This case would set Brown free.

The conduct that the government failed to prove in Brown's first trial, that he took a substantial step towards the commission of Hunter's murder, was used to prove his guilt in the second trial. Sounded good. But as always, keep researching.

In 1993, the Supreme Court overturned *Grady v. Corbin*, allowing the government to successively prosecute the same culpable conduct regardless of a previous loss at trial. But not all was lost. The case that overturned *Grady v. Corbin* had reaffirmed a legal doctrine that would offer Brown relief.

The "Collateral Estoppel" Doctrine

The court in *Dixon* reaffirmed the incorporation of the collateral estoppel doctrine into the double jeopardy clause. Collateral estoppel operates when the government loses. It is a narrower concept that operates when the government fails to prove a material "ultimate fact" in a prior case which is a necessary part of a conviction in a second trial, even for a different offense. Once an "issue of ultimate fact has been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *United States v. Oppenheimer*, 242 U.S. 85, 87 (1916) (Holmes, J.). An issue once lost, is lost forever.

The government lost its first prosecution of Brown. Therefore, collateral estoppel was triggered to preclude re-litigation of issues that had died in his first trial. Because the commission of attempted murder requires a specific intent to kill, the government was precluded from securing Brown's conviction for the intentional murder of Hunter. Also in its first prosecution, the government failed to prove that Brown committed the offenses of aggravated discharge of a firearm, aggravated battery with a firearm and aggravated battery against Hunter. *People v. Brown*, 2015 IL App (1st) 134049. Therefore, the government was prevented from retrying the essential factual issues of whether Brown knew that his acts would more probably than not result in the death of Hunter. This issue of his knowledge, now lost, was lost forever and in all circumstances where some mens rea was necessary. Brazenly, the government re-litigated the issues anyway in the second trial.

We argued these points on appeal. I attempted to help navigate the panel through the series of confusing double jeopardy holdings in a fact situation which presented like a law school hypothetical. And I had an unsympathetic client. But the court agreed. On the murder charges and other charges of aggravated battery and discharging a firearm as to Hunter where intent was necessary, it found for Brown. Those charges were dismissed.

But we were not home free. Still on the list was Brown's conviction for the felony murder of Hunter. On this count, a life sentence also rested.

The "Offense Distinction" Test

In order to convict Brown for the felony murder of Hunter in the second trial, as opposed to intentional murder, the government used his prior felony convictions for the felony offenses committed against Swift, Dixon and Spencer as predicates; aggravated discharge of a firearm, aggravated battery and battery. *People v. Brown*, 2015 IL App (1st) 134049, ¶ 36.

Felony murder is an oddity. Rather than possess a culpable mind state requirement of its own, the offense derives mental culpability from its predicate felony, much like a virus that swaps genes. *People v. Aaron*, 409 Mich. 672, 708-09 (1980). Even more bizarre, the offense of felony murder employs the civil liability construct of proximate cause foreseeability in

determining a defendant's fate. *People v. Lowery*, 178 Ill. 2d 462, 467 (1997). The Illinois Supreme Court has defined felony murder's requisite connection between its forcible felony and death as "any cause which, in natural or probable sequence, produced the injury complained of, it need not be the only cause, nor the last or nearest cause. It is sufficient if it concurs with some other cause acting at the same time, which in combination with it causes the injury." *People v. Hudson*, 222 Ill. 2d 392, 405 (2006). The definition is radically broad, punishing the unknowing and unintentional loss of life.

But in the world of double jeopardy, felony murder and its predicate felony are the same offense. As the Supreme Court explained, if one offense incorporates another offense, without expressing the latter's elements, both offenses are the same. *In re Nielsen*, 131 U.S. 176, 188 (1889)(Bradley, J.). In the words of the late Justice Scalia, "the offense commonly known as felony murder is not an offense, distinct from its various elements." *United States v. Dixon*, 509 U.S. 688, 698 (1993). Matter closed. The double jeopardy clause prevents a second prosecution for the same offense even after conviction. Brown had already been held convicted and sentenced for his felony offenses committed against Dixon, Swift and Spencer. He could not be retired and sentenced again. The appellate court squarely reversed the trial court on felony murder.

But as a Chicago lawyer once told me, "young man, in this business, you are going to win cases you should have lost and lose cases you should have won."

The Bullet and the "Death Exception"

When Mycal Hunter died and the bullet that paralyzed him was recovered, the prosecution threw everything it could at Brown. It was not concerned about the niceties of double jeopardy. It wanted something to stick. And there remained one theory on which something might.

Remarkably, the delayed death of the Brown case had factual antecedents at both the United States and Illinois Supreme level, but they were not helpful to Brown. In 1912, the Supreme Court decided *Diaz v. United States*, 223 U.S. 442, 448 (1912), a case that involved a battered man who died from his injuries a month after trial. The convicted batterer was subsequently prosecuted again, this time for murder. Would not the double jeopardy clause trigger to protect the defendant from a second trial for the same offense after conviction? The Court held the opposite, stating that the victim's death was a "consummation" of the defendant's initial offense, the effect of which merely continued the first prosecution without creating a new jeopardy. *Diaz v. United States*, 223 U.S. 442, 448-49 (1912). Jeopardy delayed is not double jeopardy.

In 1932, Justice Brennan incorporated this ruling, which would come to be known as the "death exception," into a footnote in the case of *Ashe v. Swenson*, 397 U.S. 436 (1970). This footnote drove a stake a through the heart of Brown's case. And 60 years later the Illinois Supreme Court decided the case of *People v. Carrillo*, 164 Ill. 2d 144 (1995), which involved a beating victim who lived through the first trial of her assailants and died nine years later. Similar to Brown, following the victim's death, the government used prior predicate felony convictions to charge felony murder in a second prosecution. The Illinois Supreme Court applied the death exception stating that the victim's death was merely a consummation of what the defendant set into motion by committing predicate felony offenses. No double jeopardy violation.

The similarity of these cases to Brown's case was striking, but there were also differences. First, *People v. Carillo* involved the government's use of predicate felonies committed against the victim who later died. Brown involved the government's use of predicate felonies committed against *other* persons, not the victim, who lived. Second, Brown's case involved an *acquittal* of all offenses charged as to the victim, who later died. *People v. Carillo* did not involve a prior acquittal. The bottom line is that the government had been given a second chance to convict Brown of essentially the same crime based on the same conduct. The policies underlying double jeopardy should have prevented that, no matter the equities.

But the differences proved unavailing. Though the court had recognized the violations of double jeopardy in much of the second trial, Brown's appeal of his life sentence in the end failed. The appellate court affirmed his conviction. As the law stands today, an acquittal cannot operate to estop the government from prosecuting a defendant for the felony murder when a forcible felony conviction, even if committed against another person, was secured in the defendant's first trial. The death exception and the oddity that is felony murder combined to seal Brown's fate.

Final Reflection

Mycal Hunter was killed. My client was at the scene of the crime and convicted of other violent crimes. The decisional law of double jeopardy is, as Justice Rehnquist stated, a veritable Sargasso Sea; a convergence of violent currents generated by governmental forces. A defendant who finds himself in the Sargasso Sea will need a life vest. That life vest is the double jeopardy protection of our state and federal Constitution. Only a lawyer can provide such a vest. But once provided, the life vest must remain free from the puncture that is our society's overwhelming interest in immediate accountability for crime. *N. Sec. Co. v. United States*, 193 U.S. 197, 400-01 (1904) (Holmes, J. dissenting). ■

Colin Quinn Commito's litigation experience includes trials, settlements, and appeals with a variety of criminal offenses. Commito has also litigated civil cases in Illinois that include divorce, parentage fraud, trustee and successor trustee liability, breach of fiduciary duties, and administrative review actions under the Illinois Video Gaming Act. A committed skateboarder, Commito is above all else dedicated to assisting skateboarders and skateboard companies navigate, manage and utilize U.S. law.

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