



HIGH-STAKES TAX DEFENSE & COMPLEX CRIMINAL DEFENSE

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## **Sample Double Jeopardy Motion**

Dear Judge Smith:

Please accept this letter brief in lieu of a more formal brief in support of John Doe's motion to dismiss Count Four of the indictment on the grounds of double jeopardy.

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## LAW

The common law principle of double jeopardy prevents any person from being twice put in jeopardy for the same offense. This principle is enshrined in the Fifth Amendment to the United States Constitution which states, “nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb,” and is applicable to the States through the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784 (1969). Art. I, par. 11 of the New Jersey Constitution states that, “No person shall, after acquittal, be tried for the same offense.”

Although the language of Art. I, par. 11 of the New Jersey Constitution is narrower than either the common law principle or the language of the Fifth Amendment, the full sweep of the common law doctrine has long been accepted in New Jersey. State v. Currie, 41 N.J. 531 (1964). Its purpose is to protect against three harms: (1) re-prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711 (1969).

In addition to the defense of double jeopardy, the doctrine of collateral estoppel may serve as a bar to prosecution. In Asche v. Swenson, 397 U.S. 436 (1970), the Supreme Court of the United States held that collateral estoppel is a part of the Fifth Amendment’s guarantee against double jeopardy. The determination of whether a particular prosecution is barred by double jeopardy or collateral estoppel has been codified in N.J.S.A. 2C:1-9 and N.J.S.A. 2C:1-10. N.J.S.A. 2C:1-9 enumerates the circumstances when a prosecution is barred by a former prosecution for the same

statutory offense. N.J.S.A. 2C:1-10 enumerates the circumstances when prosecution is barred by a former prosecution for a different statutory offense.

The defense of double jeopardy or collateral estoppel must be raised prior to trial by a motion to dismiss the indictment. N.J. Ct. R. 3:10-2(c); State v. Currie, 41 N.J. 531 (1964). The burden of persuasion is on the defense to establish a double jeopardy claim. State v. Capak, 271 N.J. Super. 397 (1994). When such a showing is made, the burden of proof shifts to the State to prove by a preponderance of the evidence that double jeopardy does not bar the prosecution. United States v. Ragins, 840 F.2d 1184 (4th Cir. 1988); United States v. DelVecchio, 800 F.2d 21 (2d Cir. 1986); State v. Samarel, 231 N.J. Super. 134 (1989).

Following an acquittal or conviction in a former prosecution, a defendant may not be tried for a different statutory offense based on the same conduct as the former prosecution. N.J.S.A. 2C:1-10(a)(3). It is this subsection that the defense relies upon in seeking dismissal of the indictment.

Subsection a(3) also sets forth an exception to the basic rule. The exception is that there is no bar to subsequent prosecution if the offense in the former prosecution and the offense in the subsequent prosecution each required proof of a fact not required by the other and the law defining each of the offenses is intended to prevent a substantially different harm. In such circumstances, the former and subsequent offenses are not considered to be the “same” offense. This exception to the basic rule is a codification of the holding in Blockburger v. United States, 284 U.S. 299 (1932).

Under Blockburger, double jeopardy does not bar a subsequent prosecution if both statutes – the statutes involved in the former and subsequent prosecution – contain an element not required in

the other. In other words, each statute must contain an element foreign to the other for the exception to apply so that there is no bar to subsequent prosecution. In Illinois v. Vitale, 447 U.S. 410 (1980), the Supreme Court of the United States reaffirmed Blockburger, adding that a defendant has a “substantial” double jeopardy claim if the prosecution relies on the same evidence to prove the offense in the subsequent prosecution that it did to prove the offense in the former prosecution.

The New Jersey Supreme Court has interpreted the language in Vitale as enhancing the protections afforded by the Blockburger test. In State v. DeLuca, 108 N.J. 98 (1987), the New Jersey Supreme Court held that a subsequent prosecution is barred if either (1) the offenses are the same under the Blockburger test or (2) the evidence actually used to establish guilt in the former prosecution is identical to that which will be used in the subsequent prosecution.

Specifically, the Court held that drunk driving and death-by-auto are not the same offense under the Blockburger test because death-by-auto requires proof of *death*, a fact not required for proof of drunk driving. Similarly, drunk driving requires proof of *intoxication*, a fact not required for proof of death-by-auto. However, the Court held that a DWI prosecution would be barred following a conviction or acquittal for death-by-auto if the sole evidence of recklessness in the death-by-auto case was evidence of *intoxication*.

Under the Blockburger test and the holding in State v. DeLuca, 108 N.J. 98 (1987), New Jersey applies a two-prong alternative test to determine whether a subsequent prosecution is barred by a former prosecution. Either prong may bar a subsequent prosecution. The two-part test is:

- (1) Does each offense require proof of an additional fact not necessary for proof of the other offense? To the extent each requires such proof, the two offenses are not the “same” and the

subsequent prosecution is not barred. If each does not require such proof, the two offenses are the “same” and the subsequent prosecution is barred. This is the Blockburger test.

OR

- (2) Whether the evidence actually used to establish guilt in the former prosecution is identical to that which will be used in the subsequent prosecution. If so, the second prosecution is barred. State v. Dively, 92 N.J. 573 (1983). This is called the “evidence” or Vitale-DeLuca test.

#### Conclusion

For these reasons, the defense respectfully requests that Your Honor grant its motion to dismiss Count 4 of the indictment on the grounds of double jeopardy.

Respectfully submitted,

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