DOUBLE JEOPARDY

Salvatore R. Martoche & Donald S. Stefanski***

I. INTRODUCTION

The Fifth Amendment to the U.S. Constitution declares that "[n]o person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb."[1] The rule is simply stated and somewhat intuitive: a person should not be tried twice for the same crime. The lineage of the rule underscores its obviousness: the rule dates back to the twelfth century.[2] Despite its apparent simplicity, application of the rule has not been simple. As with many "rules of law," the devil is in the details. The underlying notion of double jeopardy requires, among other things, an examination of what it means to be placed "in jeopardy."[3] Certainly, it seems self-evident that a person charged with a crime who has gone to trial, faced all the resources of the government, and been acquitted of that crime by a jury of his peers, should rest easy that he or she can never be prosecuted again for that crime. But what of the defendant who has been charged with various crimes, some in the alternative, and was convicted of some crimes, but not others?

This article will address the question of what happens in New York when two counts are charged in the alternative—specifically, intentional murder and depraved indifference murder—and the jury

* Salvatore R. Martoche is an Associate Justice of the Appellate Division of the New York State Supreme Court, Fourth Judicial Department. He also served as the U.S. Attorney for the Western District of New York and was Assistant Secretary of Labor under President Ronald Reagan.

** Confidential Law Clerk to the Hon. Salvatore R. Martoche. Syracuse University College of Law, J.D.; SUNY Stony Brook, B.A.

[1] U.S. CONST. amend. V; *see also* N.Y. CONST. art. 1, § 6 ("No person shall be subject to be twice put in jeopardy for the same offense . . . .").

[2] *See* Justin W. Curtis, Comment, *The Meaning of Life (or Limb): An Originalist Proposal for Double Jeopardy Reform*, 41 U. RICH. L. REV. 991, 992 (2007); James Hammerton, *In Defence of the "Double Jeopardy" Rule*, MAGNACARTAPLUS, http://www.magnacartaplus.org/briefings/double_jeopardy.htm (last updated Mar. 10, 2013).

[3] *See generally* Akhil Reed Amar, Essay, *Double Jeopardy Law Made Simple*, 106 YALE L REV. 1807, 1838–40 (1997) (examining a situation where the attachment of jeopardy is made within the context of continuing jeopardy, erroneous jury verdicts, and mistrials).

convicts on one of the counts. In a recent decision from the New York Court of Appeals, *People v. Gause*,[4] the court held that the defendant's conviction on the depraved indifference murder count amounted to an implied acquittal on the intentional murder count for double jeopardy purposes, and thus, despite overwhelming evidence of the defendant's participation in the crime, defendant was allowed to go free.[5] Unfortunately, this issue appears in several other cases in New York, arising from a combination of the evolving definition of depraved indifference murder and the proclivity of prosecutors to charge a defendant with both intentional murder and depraved indifference murder.

II. *PEOPLE V. GAUSE*

Around one o'clock in the morning on January 26, 2002, in Rochester, New York, Timothy Lundy fired two or three bullets at Whitney Morris.[6] A witness testified that after Morris fell to the ground, Derrick Gause repeatedly struck Morris in the head with a metal pipe.[7] Morris sustained three gunshot wounds to his chest, face and neck, and right arm—which could have been caused by either two or three projectiles—and various blunt trauma injuries to his face and head.[8] The police stopped Lundy's vehicle shortly after the incident.[9] Gause was driving the vehicle alone, and there was a blood-stained metal pipe on the floor near the front passenger seat.[10] Subsequent DNA evidence confirmed that it was Morris's blood on the pipe.[11] Gause admitted to the police that the car belonged to Lundy, and that he was at the scene of the crime; however, he denied any participation in the crime.[12]

Gause was charged with two counts of murder[13]—namely,

---

[4] People v. Gause, 971 N.E.2d 341 (N.Y. 2012), *rev'g* 916 N.Y.S.2d 376, 376 (App. Div. 4th Dep't 2011).

[5] *See id.* at 343.

[6] Brief for Respondent at 5, 7–8, People v. Gause, 971 N.E.2d 341 (N.Y. 2012) (No. 2012-0090).

[7] *Id.* at 7.

[8] *Id.* at 9.

[9] *Id.* at 8.

[10] *Id.* at 8–9.

[11] *Id.* at 9.

[12] *See generally* Brief for Appellant at 10, People v. Gause, 971 N.E.2d 341 (N.Y. 2012) (No. 2012-0090) ("At the conclusion of the prosecution's case, Mr. Gause moved for a trial order of dismissal, arguing specifically that the evidence had failed to prove that he . . . engaged in any conduct that either set in motion or continued in motion the events that ultimately resulted in the death of Whitney Morris.").

[13] *Id.* at 6.

intentional murder and depraved indifference murder.[14] The People presented proof as described above, and after the People rested, defense counsel made a general motion "to dismiss [both counts of] the indictment . . . on grounds that the conviction was not properly entered, as the People had failed to make a prima facie case with respect to intent to kill and causation."[15] Monroe County Court denied the motion[16] and the defendant presented alibi witnesses.

Defense counsel did not renew his motion for a trial order of dismissal.[17] No lesser included offenses were presented to the jury for consideration.[18] The court instructed the jury:

> In your deliberations, you may consider the charges in any order you wish, thus you may start with either Count 1 or Count 2. However, regardless of which count you consider first, if you should find the defendant guilty of such, you will stop right there and you will not go on to consider the other count. Only if you should find the defendant not guilty of the first count or the second, if that's what you start with, will you then go on to consider the other count. Of course, you may find the defendant not guilty of both counts.[19]

The jury convicted Gause of depraved indifference murder and advised the court that it considered the depraved indifference count first.[20] On appeal, Gause argued that the evidence was not legally sufficient to convict him of depraved indifference murder.[21]

III. DEPRAVED INDIFFERENCE MURDER

The New York State Legislature codified five basic categories of homicide when the Penal Law was revised in 1965.[22] The two

---

[14] *Id.*; *see also* N.Y. PENAL LAW § 20.00 (McKinney 2013) (imposing the same level of criminal liability on a non-principal actor in an offense when he or she has the requisite *mens rea* for the crime and intentionally acts in furtherance of it); PENAL LAW § 125.25(1) (defining intentional homicide); PENAL LAW § 125.25(2) (defining depraved indifference homicide).

[15] Brief for Appellant, *supra* note 12, at 6 (citations omitted).

[16] *See id*.

[17] People v. Gause, 848 N.Y.S.2d 495, 496 (App. Div. 4th Dep't 2007) (citing People v. Finger, 739 N.E.2d 290, 290 (N.Y. 2000); People v. Gray, 652 N.E.2d 919, 921–22 (N.Y. 1995); People v. Rivera, 834 N.Y.S.2d 913, 913–14 (App. Div. 4th Dep't 2007)).

[18] Brief for Respondent, *supra* note 6, at 12.

[19] *Id.* at 12–13.

[20] *Id.* at 13.

[21] *Gause*, 848 N.Y.S.2d at 496.

[22] People v. Suarez, 844 N.E.2d 721, 724–25 (N.Y. 2005) (per curiam); *see also* N.Y. PENAL LAW § 125.10 (McKinney 2013) (criminally negligent homicide); PENAL LAW § 125.20(1) (manslaughter); PENAL LAW § 125.25(1) (intentional homicide); PENAL LAW § 125.25(2) (depraved indifference); PENAL LAW § 125.25(3) (felony murder); *see also* Note, *The Proposed Penal Law of New York*, 64 COLUM. L. REV. 1469 (1964) (discussing the changes to the New

categories of concern here are intentional murder in the second degree,[23] and depraved indifference murder in the second degree.[24] Both crimes, and other categories of homicide—intentional manslaughter in the first degree,[25] reckless manslaughter in the second degree,[26] and criminally negligent homicide[27]—are "necessarily meant to prescribe different conduct, [and] are distinguish[able] by the level of blameworthiness attributable to the actor who commits them."[28] In *People v. Suarez*, the Court of Appeals noted "the number of indictments for depraved indifference murder—often charged in conjunction with intentional murder—ha[d] increased dramatically" in the years leading up to *Suarez*.[29] The court stated that "[t]he proliferation of the use of depraved indifference murder as a fallback theory under which to charge intentional killers reflect[ed] a fundamental misunderstanding of the depraved indifference murder statute."[30]

Penal Law section 125.25(2) provides that a person is guilty of depraved indifference murder when "[u]nder circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person."[31] In *Suarez*, the court noted that "because the [depraved indifference murder] statute requires 'circumstances evincing a depraved indifference to human life' . . . [it] properly applies only to a small, and finite, category of cases where the conduct is at least as morally reprehensible as intentional murder."[32] The important distinction that the court sought to make was that depraved indifference murder and intentional murder were essentially on the same level; that is, depraved indifference murder was not a *lesser offense* than intentional murder.[33] Instead, the court intended to ensure that depraved murder convictions were limited to those murders intended by the legislature to be different than intentional

York Penal Law that had been proposed in 1964).

[23] PENAL LAW § 125.25(1).

[24] *Id.* § 125.25(2).

[25] *Id.* § 125.20(1).

[26] *Id.* § 125.15(1).

[27] *Id.* § 125.10.

[28] People v. Suarez, 844 N.E.2d 721, 725 (N.Y. 2005) (per curiam).

[29] *Id.*

[30] *Id.*

[31] PENAL LAW § 125.25(2).

[32] *Suarez*, 844 N.E.2d at 725.

[33] *Id.* at 728.

murders.[34]

For example, "[t]he use of a weapon can never result in a depraved indifference murder when . . . there is a manifest intent to kill."[35] Notably, a "weapon" is not limited to a gun.[36] In *Suarez*, the defendant used a knife and the court emphasized that a one-on-one shooting or knifing or similar killing can almost never qualify as depraved indifference murder, despite the fact that the defendant in *Suarez* not only stabbed the victim, but then also failed to seek medical assistance for the injuries he inflicted and instead left the victim to die.[37] The court noted that a killing, whether intentional or unintentional, is not transformed into depraved indifference murder simply because the killer does not summon aid for the victim.[38]

What then, is a depraved indifference murder? In New York, "[h]istorically, depraved indifference murder had no application at all to one-on-one killings."[39] The notion of "depraved mind" murder required conduct that endangered many people indiscriminately, that is, the defendant did not intend to kill or injure any particular individual, but "had no care for whether the life of any particular person was lost or not."[40]

The classic examples of what historically constituted depraved indifference murder are the defendant (1) driving at a high rate of speed in a crowded area, or (2) shooting indiscriminately into a crowd.[41] In 1983, all that changed—with *People v. Register*.[42] In that case, the Court of Appeals used an "objective" approach to the traditional element of wanton recklessness.[43] Thus, the focus of depraved indifference was on the degree of risk created by the

---

[34] *See id.*

[35] People v. Payne, 819 N.E.2d 634, 636 (N.Y. 2004).

[36] *See, e.g.*, *Suarez*, 844 N.E.2d at 733 (Smith, J., concurring) (discussing the use of a knife as a weapon).

[37] *Id.* at 726–27 (majority opinion).

[38] *See id.* at 727.

[39] *Id.* (citing Bernard E. Gegan, *A Case of Depraved Mind Murder*, 49 ST. JOHN'S L. REV. 417, 423 (1974)).

[40] *Suarez*, 884 N.E.2d at 728; *see also* Darry v. People, 10 N.Y. 120, 120 (1854) ("The second subdivision of . . . the statute defining murder embraces those cases only where the act resulting in death is such as to imperil indiscriminately the lives of many persons, without being aimed at anyone in particular . . . ." (internal citations omitted)).

[41] *See, e.g.*, People v. Payne, 819 N.E.2d 634, 636 (N.Y. 2004) (giving the usual examples of depraved indifference murder); Gegan, *supra* note 39, at 443 n.101 (providing a list of cases decided by the New York State Court of Appeals where shots were indiscriminately fired).

[42] People v. Register, 457 N.E.2d 704 (N.Y. 1893), *overruled by* People v. Feingold, 858 N.E.2d 1163 (N.Y. 2006).

[43] *Register*, 457 N.E.2d at 707.

conduct, and not the *mens rea* or the *actus rea*.[44] After *Register*, there was a distinction between manslaughter in the second degree (reckless disregard of a substantial risk of death), and depraved indifference murder (reckless disregard of a "very substantial" risk).[45]

This distinction, however narrow, did not go without criticism; and it produced dissenting opinions, first in *Register*, and then later in *People v. Roe*, with the latter written by Judge Joseph Bellacosa.[46] In his *Roe* dissent, Judge Bellacosa stated his belief that the result reached by the majority "finalizes the obliteration of the classical demarcation between murder and manslaughter," and that this would lead to indictments in which both intentional and depraved indifference murder were charged.[47] Defendants thus would be labeled as depraved, but there existed a possibility that a jury would consider the depraved indifference murder as a lesser-included offense of intentional murder.[48] In fact, Judge Bellacosa's dissent proved prophetic, because that is *exactly* what happened. Although the Court of Appeals did not intend depraved indifference murder to be used as a lesser-included offense with intentional murder, prosecutors typically charged both—even in cases that involved clear intentional homicide.[49]

Over several cases, the Court of Appeals clarified the distinction between intentional murder and depraved indifference murder, culminating in *People v. Payne*.[50] In *Payne*, the court noted that "depraved indifference murder may not be properly charged in the overwhelming majority of homicides that are prosecuted in New York."[51] Additionally, the court stated that there were two "species" of depraved indifference murders, namely, actions that endanger the public at large, and actions directed at a single person but

---

[44] *See id.*

[45] *Id.* at 706–07.

[46] *See id.* at 709 (Jasen, J., dissenting); People v. Roe, 542 N.E.2d 610, 614 (N.Y. 1989) (Bellacosa, J., dissenting).

[47] *Roe*, 542 N.E.2d at 615.

[48] *Id.* at 619.

[49] *See, e.g.*, People v. Sanchez, 777 N.E.2d 204, 223–24 (N.Y. 2002) (Rosenblatt, J., dissenting) ("[D]epraved indifference murder counts have become routine escorts to intentional murder counts."), *overruled by* People v. Feingold, 852 N.E.2d 1163 (N.Y. 2006).

[50] People v. Payne, 819 N.E.2d 634 (N.Y. 2004); *see also* People v. Gonzalez, 807 N.E.2d 273, 275 (N.Y. 2004) ("Depraved indifference murder differs from intentional murder in that it results not from a specific, conscious intent to cause death, but from an indifference to or disregard of the risks attending defendant's conduct."); People v. Hafeez, 792 N.E.2d 1060, 1063 (N.Y. 2003) (citing *Sanchez*, 777 N.E.2d at 208) (noting the "heightened recklessness" requirement in depraved indifference cases).

[51] *Payne*, 819 N.E.2d at 635.

characterized by "uncommon brutality."[52] The court set forth the notion that one-on-one shootings, knifings, or similar killings almost never qualified as depraved indifference murder because shooting more rounds or stabbing a victim more times did not make the act "more depravedly *indifferent*, but more intentional."[53]

The next significant pronouncement by the Court of Appeals came in *People v. Suarez*.[54] In *Suarez*, the court noted that it was "compel[led] . . . to revisit what is unique and distinctive about th[e] crime [of depraved indifference murder] as defined by the Legislature."[55] The Court of Appeals obviously was concerned that the trial courts and the appellate divisions did not understand the distinctions between intentional murder and depraved indifference murder, noting that further "guidance" was necessary to "enable prosecutors, juries, trial courts and reviewing courts to function without risk of reversal."[56] The court's clarification noted that "utter disregard for the value of human life—a willingness to act not because one intends harm, but because one simply doesn't care whether grievous harm results or not" was the significant issue.[57] For purposes of this article, it is equally significant that the Court of Appeals mandated that trial courts "presume 'that the defendant's conduct falls within only one category of murder'" and dismiss the count "least appropriate to the facts" prior to jury deliberations.[58] Thus, the court sought to end the "twin-count" indictments that had proliferated in New York State.[59]

IV. DERRICK GAUSE'S FIRST APPEAL

Suarez was decided in December 22, 2005;[60] Gause was indicted in 2002.[61] Thus, the admonition against twin-count indictments was years away when Gause was tried. Given the state of depraved indifference murder at the time of the trial, the People conceded on appeal that the circumstances of the crime presented an intentional

[52] *Id.* at 636–37.
[53] *Id.* at 637.
[54] People v. Suarez, 844 N.E.2d 721 (N.Y. 2005) (per curiam).
[55] *Id.* at 726.
[56] *Id.*
[57] *Id.* at 730.
[58] *Id.* at 731 (quoting Abraham Abramovsky & Jonathan I. Edelstein, *Depraved Indifference Murder Prosecutions in New York: Time for Substantive and Procedural Clarification*, 55 SYRACUSE L. REV. 455, 491 (2005) (internal quotation marks omitted)).
[59] *See Suarez*, 844 N.E.2d at 731.
[60] *See id.* at 721.
[61] Brief for Appellant, *supra* note 12, at 6.

murder, and not a depraved indifference murder, and thus implicitly conceded that the evidence was legally insufficient to convict Gause of depraved indifference murder.[62] The issue of legally sufficient evidence was not preserved for review because defense counsel's general motion to dismiss at the close of the People's case did not preserve any specific arguments, and counsel failed to renew the motion at the close of defendant's case.[63]

The Fourth Department had cases on both sides of the issue, that is, in some cases they addressed the issue in the interest of justice and in others they did not.[64] In any event, the Fourth Department decided to reach the issue in the interest of justice and reverse the judgment of conviction.[65] Up to that point, the case is relatively unremarkable. Given the People's concession that the crime was an intentional murder, and not a depraved indifference murder, no significant legal issues had been presented.[66] The more difficult question, however, as will be seen, was whether reversal required dismissal of the entire indictment—an assault charge had been withdrawn before trial—or whether Gause could be retried on the intentional murder count.[67] The question thus may be framed simply: if the jury never considered the intentional murder count, then double jeopardy principles did not preclude a new trial on that count.

In *People v. Charles*,[68] the Court of Appeals stated:

> [T]he Judge instructed the jury that they did not have to consider the remaining counts if they found defendant guilty of count one. It is clear from the record that the jury elected

---

[62] *See* Brief for Respondent, *supra* note 6, at 11.

[63] *See* People v. Finger, 739 N.E.2d 290, 290 (N.Y. 2000); People v. Gray, 652 N.E.2d 919, 921 (N.Y. 1995).

[64] *Compare* People v. Garrison, 834 N.Y.S.2d 430, 431 (App. Div. 4th Dep't 2007) (reviewing the legal sufficiency of a depraved indifference murder conviction despite defendant's failure to preserve the question for appeal), *and* People v. De Capua, 829 N.Y.S.2d 799, 800 (App. Div. 4th Dep't 2007) ("While we recognize that defendant did not preserve for our review his contention that the evidence is legally insufficient to support the conviction, we nevertheless exercise our power to review that contention as a matter of discretion in the interest of justice."), *with* People v. Packer, 817 N.Y.S.2d 829, 830 (App. Div. 4th Dep't 2006) (holding that because defendant did not renew his motion to dismiss, he failed to preserve his contention that the evidence was legally insufficient to convict him of depraved indifference murder), *and* People v. Robinson, 801 N.Y.S.2d 449, 450 (App. Div. 4th Dep't 2005) ("Defendant failed to preserve his contention that the evidence is legally sufficient to support the conviction of depraved indifference murder.").

[65] People v. Gause, 848 N.Y.S.2d 495, 496 (App. Div. 4th Dep't 2007).

[66] *See id.*

[67] *See id.* at 496–97.

[68] People v. Charles, 581 N.E.2d 1336 (N.Y. 1991), *rev'g* 556 N.Y.S.2d 396 (App. Div. 2d Dep't 1990).

> that option and did not consider or reach a verdict on counts two and three. . . . Thus, jeopardy was never terminated by acquittal or dismissal of those counts and retrial of them [would] not violate the [double] jeopardy principles . . . .[69]

Charles in turn relied upon *People v. Jackson*.[70] In *Jackson*, the Court of Appeals concluded that because the jury was instructed at the first trial that it could convict defendant of either felony murder or intentional murder, but not both, the court could not claim "that the jury's silence on the felony murder theory had the effect of acquitting Jackson of that theory. The jury's silence could only have that effect if it were given a full opportunity to consider the felony murder theory."[71] The difference between the *Jackson* and *Charles* decisions, and the *Gause* decision, is that in both *Jackson* and *Charles*, the defendant's remedy for the error—the trial court's improper admission of a statement—was a new trial.[72]

A. People v. Suarez

Shortly before the Fourth Department considered the first *Gause* appeal, the First Department addressed a similar question in *People v. Suarez*.[73] There, the defendant was acquitted of intentional murder and convicted of depraved indifference murder,[74] but that conviction was reversed by the Court of Appeals and the matter was remitted to the First Department "to exercise its corrective action powers under CPL [section] 470.20."[75] The First Department concluded that because of the court's "trial error" in submitting the depraved indifference murder count to the jury, the jury did not have the opportunity to consider the count of manslaughter in the first degree, and it therefore remitted the matter for a new trial on the manslaughter count.[76] It may be argued that the defendant in *Suarez* was subjected to double jeopardy, because manslaughter in

---

[69] *Id.* at 1338.

[70] *Id.* (citing People v. Jackson, 231 N.E.2d 722 (N.Y. 1967)).

[71] *Jackson*, 231 N.E.2d at 730 (citations omitted).

[72] *See* N.Y. CRIM. PROC. LAW § 470.20(1) (McKinney 2013).

[73] People v. Suarez, 832 N.Y.S.2d 532, 533 (App. Div. 1st Dep't 2007), *remanded from* 844 N.E.2d 721 (N.Y. 2005). The First Department cited the recent decisions by the Court of Appeals discussing the depraved indifference definition and stated that the question of the remedy was "a critical and potentially recurring issue, given the widespread use of the depraved indifference murder statute in recent years." *Id.*

[74] *Id.* at 533–34.

[75] People v. Suarez, 844 N.E.2d 721, 732 (N.Y. 2005) (per curiam) (citing CRIM. PROC. LAW § 470.20).

[76] *Suarez*, 832 N.Y.S.2d at 537.

the first degree is the same offense for double jeopardy purposes as intentional murder inasmuch as the lesser included offense of manslaughter requires no proof beyond that which is required for conviction of the greater offense of intentional murder.[77] Where the judgment is reversed because of trial error, the defendant may be retried on the counts that were reversed on appeal and those not considered by the jury.[78]

However, when the judgment is reversed because of legally insufficient evidence, as happened in *Gause* and *Suarez*, it may be argued that the indictment with respect to any counts not considered by the jury had to be dismissed.[79] Indeed, in the first *Gause* decision at the Fourth Department, the court stated that the certificate of conviction incorrectly reflected that Gause was acquitted on intentional murder in the second degree and amended the certificate "to reflect that the jury did not address that count."[80]

As one might expect, at his retrial, Gause was convicted of intentional murder.[81] His argument on appeal to the Fourth Department the second time was essentially the same argument that the court addressed in the first appeal, namely, whether his retrial was barred by double jeopardy.[82] The Fourth Department stated that the memorandum in the first *Gause* appeal expressly concluded that, "the jury considered only the depraved indifference murder count and did not reach the intentional murder count,"[83] and thus double jeopardy did not preclude a new trial on that count.[84] Gause's conviction for murder was affirmed for a second time.[85] In a 5–2 decision, the Court of Appeals reversed Gause's conviction and thus, as of June 5, 2012, Derrick Gause was a free man.[86]

The issue of the remedy requires us to return to *Suarez*. In the

---

[77] *See* People v. Biggs, 803 N.E.2d 370, 374 (N.Y. 2003) (describing the *Blockburger* test). Under the *Blockburger* test, "the inquiry is 'whether each offense contains an element not contained in the other.'" Gregory R. Nearpass, *The Overlooked Constitutional Objection and Practical Concerns to Penalty-Enhancement Provisions of Hate Crime Legislation*, 66 ALB. L. REV. 547, 560 (2003) (quoting United States v. Dixon, 509 U.S. 688, 696 (1993)).

[78] *See* CRIM. PROC. LAW § 470.20(1).

[79] *See id.* § 470.20(2).

[80] People v. Gause, 848 N.Y.S.2d 495, 497 (App. Div. 4th Dep't 2007).

[81] People v. Gause, 916 N.Y.S.2d 376, 376 (App. Div. 4th Dep't 2011), *rev'd*, 971 N.E.2d 341 (N.Y. 2012).

[82] *Id.*

[83] *Id.*

[84] *Id.* at 377.

[85] *Id.*

[86] *See* People v. Gause, 971 N.E.2d 341, 345 (N.Y. 2012), *rev'g* 916 N.Y.S.2d 376, 376 (App. Div. 4th Dep't 2011).

first *Suarez* appeal before the Court of Appeals, the court dismissed the count of depraved indifference murder on which defendant was convicted and remitted the case to the First Department for consideration of the appropriate remedy.[87] On remand, the First Department considered the constitutional and statutory double jeopardy implications.[88] The First Department cited Criminal Procedure Law section 40.30,[89] which explained that a person is "prosecuted" for an offense:

> when he is charged . . . by an accusatory instrument . . . and when the action . . . [p]roceeds to the trial stage and a jury has been impaneled and sworn or, in the case of a trial by the court without a jury, a witness is sworn.[90]

If, however, the proceedings specified in subdivision one of the statute are subsequently nullified by a court order which restores the action to its pre-pleadings status or which directs a new trial of the same accusatory instrument, the nullified proceedings do not bar further prosecution of the offense under the accusatory instrument.[91] Thus, on remittal, the First Department held that double jeopardy implications did not preclude a trial for intentional manslaughter, although the analysis was complicated by the fact that intentional manslaughter is a lesser included offense of intentional murder, of which defendant was acquitted.[92] On that basis, a dissenting justice at the First Department concluded that first degree manslaughter was "the 'same offense' for double jeopardy purposes."[93]

Santos Suarez made his way back to the Court of Appeals following the First Department's decision.[94] Critical to the court's decision in the second *Suarez* appeal was the jury instruction, which said:

> So if you find him guilty of that [intentional murder] you have to consider the defense [EED] . . . You only consider depraved indifference murder if you find him not guilty of

---

[87] People v. Suarez, 844 N.E.2d 721, 732 (N.Y. 2005) (per curiam).

[88] People v. Suarez, 832 N.Y.S.2d 532, 534 (App. Div. 1st Dep't 2007), *remanded from* 844 N.E.2d 721 (N.Y. 2005).

[89] *Id.* at 535–36.

[90] N.Y. CRIM. PROC. LAW § 40.30(1)(b) (McKinney 2013).

[91] *Id.* § 40.30(3); *see Suarez*, 832 N.Y.S.2d at 535–36.

[92] *Suarez*, 832 N.Y.S.2d at 536.

[93] *Id.* at 540 (Tom, J., dissenting) (citing Blockburger v. United States, 284 U.S. 299, 304 (1932)).

[94] Suarez v. Byrne, 890 N.E.2d 201 (N.Y. 2008), *aff'g* 834 N.Y.S.2d 860 (App. Div. 1st Dep't 2007); People v. Suarez, 869 N.E.2d 670 (N.Y. 2007).

> intentional murder. Then you have to mark that not guilty. You don't consider Man One [reduced manslaughter]. You go right to depraved indifference murder. You mark him either guilty or not guilty. If you find him not guilty of that count [of depraved indifference murder,] you considered the last count Man One. And you make the determination of whether those elements have been proven or not proven.[95]

As the court described it, "the [trial] judge submitted the intentional and depraved indifference murder counts to the jury in the alternative. He told the jurors *not* to consider intentional manslaughter (intent to cause serious physical injury) unless they first acquitted Suarez of depraved indifference murder."[96]

On the second *Suarez* appeal, the Court noted that the issue of the remedy was not raised on the first appeal.[97] Rather, "the parties focused on the merits . . . and the [First Department] 'had no occasion to address' the . . . remedy."[98] On remittal, the First Department squarely focused on the double jeopardy question and concluded that there was no constitutional, statutory, or collateral estoppel bar to Suarez's retrial for intentional manslaughter.[99] The First Department had concluded that the jury essentially was foreclosed from reaching the charge of intentional manslaughter and that, "[b]ut for the trial judge's error [in submitting the depraved indifference murder count to the jury], 'the jury would have been required to consider intentional manslaughter once it acquitted [Suarez] of intentional murder.'"[100] The First Department "analogized what had happened to a 'mistrial or partial verdict situation,' in which 'a verdict on the charge was never reached' and therefore future prosecution of that charge was permissible."[101]

The second *Suarez* appeal to the Court of Appeals actually was not from a conviction, but from the First Department's determination that the prosecution could go forward.[102] Suarez commenced an Article 78 proceeding and the second appeal to the Court of Appeals was from a dismissal of that Article 78 petition.[103] The court's decision was predicated on whether the first jury had "a

---

[95] *Suarez*, 890 N.E.2d at 204.
[96] *Id.*
[97] *Id.* at 205.
[98] *Id.* (quoting People v. Suarez, 844 N.E.2d 721, 732 (N.Y. 2005) (per curiam)).
[99] *Suarez*, 890 N.E.2d at 205–06.
[100] *Id.* at 206 (quoting *Suarez*, 832 N.Y.S.2d at 535).
[101] *Suarez*, 890 N.E.2d at 206 (quoting *Suarez*, 832 N.Y.S.2d at 536).
[102] *Suarez*, 890 N.E.2d at 205–06, 207.
[103] *Id*. at 207.

full opportunity to return a verdict" on both inconsistent charges.[104] The majority concluded that the jury did not and therefore Suarez was "impliedly acquitted" of the intentional murder charge and double jeopardy barred retrial on that charge; Suarez could be retried on the international manslaughter charge.[105]

B. The Decision in Gause

1. The Majority

Returning to Derrick Gause—recall the charge, discussed above[106]—and consider the charge in light of what occurred when the jury returned its verdict. The trial court specifically asked the foreperson if, in accordance with the court's instructions, which count the jury considered first and the foreperson responded "Count 2."[107] That count, of course, was depraved indifference murder.[108] The Court of Appeals relied heavily on what apparently occurred in the jury deliberation room,[109] which is, as we all know, not recorded.[110] During deliberations, the jury requested, via jury notes, that the court "[r]epeat the two elements of the first charge"—intentional murder.[111] The Court of Appeals concluded that because of the jury note, the jury "necessarily rejected" the intentional murder theory and thus "impliedly acquitted" defendant of that charge.[112]

2. The Dissent

Judge Pigott, writing for himself and Judge Read, concluded, on the same record, that the jury was not afforded a full and fair opportunity to consider the intentional murder charge.[113]

Judge Pigott rejected the majority's assumption that the jury note established that the jury considered both charges, relying on the

---

[104] *Id.* (quoting Green v. United States, 355 U.S. 184, 191 (1957)).

[105] *Suarez*, 890 N.E.2d at 214.

[106] *See* discussion *supra* Part II.

[107] People v. Gause, 971 N.E.2d 341, 345 (N.Y. 2012) (Pigott, J., dissenting), *rev'g* 916 N.Y.S.2d 376, 376 (App. Div. 4th Dep't 2011).

[108] *Id.*

[109] *Id.*

[110] *See* Diane E. Courselle, *Struggling with Deliberative Secrecy, Jury Independence, and Jury Reform*, 57 S.C. L. REV. 203, 213–19 (2005) (detailing the history of independent, secret deliberations by the jury).

[111] *Gause*, 971 N.E.2d at 342 (majority opinion).

[112] *Id.* at 344.

[113] *Id.* at 346 (Pigott, J., dissenting).

long standing principle that "[j]urors are presumed to follow the legal instructions they are given."[114] Thus, the majority's conclusion was "purely speculative."[115]

The dissent discussed a recent U.S. Supreme Court case, *Blueford v. Arkansas*,[116] which involved a process not known in New York, where the foreperson of a jury "informally" advises the court of its interim results.[117] The Supreme Court sanctioned such a process, by holding that "'the foreperson's [initial] report was not a final resolution of anything' because when she apprised the court as to how the jury voted, 'the jury's deliberations had not yet [been] concluded.'"[118] In *Gause*, on the other hand, the jury had "undeniably considered" only the depraved indifference count.[119]

The dissent also relied on *People v. Jackson*,[120] where the Court of Appeals held that the first jury's silence relative to the felony murder count did not have the effect of acquitting the defendant on that theory, where the jury convicted the defendant of premeditated and deliberate murder.[121] The court instructed the jury, without exception, to render only one of two verdicts, and to "render one verdict; one or the other, not both."[122] Thus,

> because the trial court instructed the jury that it was free to choose whichever theory to consider first it was certainly "possible that the jury considered felony murder first and acquitted him of that theory but under the single verdict charge[,] the jury was not able to express an acquittal, and to say that the defendant was so acquitted would be to engage in mere speculation."[123]

Judge Pigott ended his dissent with a strong rebuke to the majority as follows:

> We have a defendant twice convicted of a homicide he

---

[114] *Id*. at 345 (alteration in original) (quoting People v. Baker, 926 N.E.2d 240, 245 (N.Y. 2010)).

[115] *Gause*, 971 N.E.2d at 345.

[116] *See id*. at 345–46 (citing Blueford v. Arkansas, 132 S. Ct. 2044 (2012)).

[117] *Gause*, 971 N.E.2d at 345–46 (quoting *Blueford*, 132 S. Ct. at 2050). New York is an "acquit first" state, that is, a jury must be charged to conduct its deliberations in a certain order when lesser included offenses are submitted—the offenses are considered in decreasing order of culpability, so there must an acquittal on the greater before consideration of the lesser. *See* People v. Johnson, 662 N.E.2d 1066, 1067 (N.Y. 1996) (discussing the reasons behind the acquit first procedure).

[118] *Blueford*, 132 S. Ct. at 2050.

[119] *Gause*, 971 N.E.2d at 346.

[120] *Id.* (citing People v. Jackson, 231 N.E.2d 722 (N.Y. 1967)).

[121] *Gause*, 971 N.E.2d at 346.

[122] *Id.* (emphasis omitted) (quoting *Jackson*, 231 N.E.2d at 730).

[123] *Gause*, 971 N.E.2d at 346 (quoting *Jackson*, 231 N.E.2d at 731).

> undoubtedly committed and twice having his conviction overturned on grounds that can only be described as technical. If law enforcement is puzzled as what to do next, we shouldn't be surprised.[124]

V. IMPLICATIONS OF *GAUSE* AND CONCLUSIONS

Unfortunately, Mr. Gause will not be the only defendant to slip through the cracks of the intentional/depraved indifference murder problem. In fact, in *People v. Rodriguez*,[125] defendant and his co-defendant Eric Boyer were both implicated in a murder and the victim's brother was the only eyewitness to the murder; he testified that defendant fired at least one of two shots into the victim's head and struck him multiple times in the head with a hammer.[126] At trial, the defendant testified that Boyer had coerced him to bring the gun to the scene and to strike the victim with a single blow of the hammer, but a jury rejected defendant's affirmative defense of duress.[127] Boyer was convicted of intentional murder.[128] The defendant, however, was convicted of depraved indifference murder, not intentional murder, and on appeal the Fourth Department concluded that Oneida County Court erred in submitting the depraved indifference murder count to the jury because this was essentially a one-on-one murder.[129] There is no indication in the record that defendant was going to be retried for intentional murder, and thus Jose Rodriguez, unlike his codefendant, did get away with murder, although he was also incarcerated on other related charges.[130]

Walter Gonzalez was equally lucky.[131] He shot his victim several times in a barber shop in Rochester.[132] Some of the shots may have been fired from as close as six to eighteen inches away.[133] Defendant was apprehended at the Rochester Airport and in his statement to the police, he stated that he was afraid of the victim

---

[124] *Id.* at 346.

[125] People v. Rodriguez, 824 N.Y.S.2d 536 (App. Div. 4th Dep't 2006).

[126] Brief for the Respondent at 9, People v. Rodriguez, 824 N.Y.S.2d 536 (App. Div. 4th Dep't 2006) (No. KA 03-02424), 2006 WL 4692135, at *9.

[127] *Id.* at 30.

[128] *See* People v. Boyer, 930 N.Y.S.2d 503, 503 (App. Div. 4th Dep't 2011).

[129] *Rodriguez*, 824 N.Y.S.2d at 537.

[130] *Id.*

[131] People v. Gonzalez, 755 N.Y.S.2d 146 (App. Div. 4th Dep't 2003), *aff'd*, 807 N.E.2d 273 (N.Y. 2004).

[132] *Id.* at 147.

[133] *Id.*

because the victim's niece told the victim that he had raped her and he knew that the victim was a member of a gang.[134] When defendant saw the victim in the barbershop, his heart was pounding and his stomach was tense, but he blanked out and did not recall anything else.[135] However, on the way to the booking department he confessed to the shooting.[136] Although defendant did not testify at trial, his defense centered on his identification by a witness, arguing that defendant was not the shooter. The court charged both intentional murder and depraved indifference murder, and the jury acquitted defendant of intentional murder, but convicted him of depraved indifference murder.[137] The Fourth Department, citing primarily other appellate division cases, but also using a "*c.f.*" citation to several Court of Appeals cases, concluded that the conviction of depraved indifference murder had to be vacated and that count of the indictment dismissed.[138] Because defendant was already acquitted of intentional murder,[139] he also effectively got away with murder.[140]

One need only consider a recent decision of the Second Circuit, *Gutierrez v. Smith*,[141] where the Second Circuit, in a federal habeas corpus appeal, analyzed the state of the law in New York with respect to the intentional/depraved indifference murder issue and certified questions of law to the New York Court of Appeals because of "unresolved and recurring issues of New York state law."[142]

We daresay that because there were so many twin-count indictments brought in New York State, with varying results, it is likely that other defendants, who clearly had committed intentional murder, will go free.[143] One can only hope that the Court of Appeals

---

[134] *Gonzalez*, 755 N.Y.S.2d at 147; Reply Brief for Appellant at 7, People v. Gonzalez, 755 N.Y.S.2d 146 (App. Div. 4th Dep't 2003) (Nos. 27, 01-00128).

[135] Reply Brief for Appellant, *supra* note 134, at 2.

[136] *Gonzalez*, 755 N.Y.S.2d at 147.

[137] People v. Gonzalez, 807 N.E.2d 273, 275 (N.Y. 2004).

[138] *Gonzalez*, 755 N.Y.S.2d at 148.

[139] *Id.* at 147.

[140] In yet another Fourth Department case, Edward Rodriguez stabbed his victim eight times, killing her, but contended that he acted in self-defense. People v. Rodriguez, 842 N.Y.S.2d 631, 632 (App. Div. 4th Dep't 2007). The Monroe County Court submitted both intentional and depraved indifference murder to the jury, which convicted defendant of the depraved indifference count but acquitted him of intentional murder. *Id.* The Fourth Department dismissed the depraved indifference count. *Id.*

[141] Gutierrez v. Smith, 692 F.3d 256 (2d Cir. 2012).

[142] *Id.* at 268.

[143] A perfect example of the convoluted state of law on this topic is the case of David Policano. On January 27, 1997, David Policano shot his victim three times at close range, killing him; six days earlier the victim had assaulted Policano and Policano told police he would "take care of this" himself. Policano v. Herbert, 430 F.3d 82, 84 (2d Cir. 2005). He was

has provided enough clarity on this issue so that future miscarriages of justice will not occur. Prosecutors presumably have learned a lesson on twin-count indictments, so that future murder cases are brought with more specificity. And Judge Pigott's concern that law enforcement would be "puzzled as to what to do next" will no longer be an issue, although an unknown number of defendants will truly have gotten away with murder.[144]

charged with depraved indifference and intentional murders, a jury found him guilty of depraved indifference murder, and the Appellate Division affirmed his conviction. *Id.* The jury did not render a verdict on the intentional murder count. *Id.*

Policano was granted habeas relief in 2004. Policano v. Herbert, 2004 WL 1960203, at *48–49 (E.D.N.Y. Sept. 7, 2004). That judgment was affirmed by the Second Circuit, because there was no question that if Policano committed the murder (there being a question of identification), he did so intentionally. *Policano*, 430 F.3d at 89. The Second Circuit stated that New York law as set forth in *People v. Gallagher*, 508 N.E.2d 909 (N.Y. 1987), was clear: depraved indifference and intentional murder were mutually exclusive. *Policano*, 430 F.3d at 88. The Second Circuit, however, "never issued" its mandate, but instead certified a question to the New York Court of Appeals regarding the issue of depraved indifference. Policano v. Herbert, 859 N.E.2d 484, 486 (N.Y. 2006). Based "largely" on the fact of certification, the Second Circuit denied rehearing en banc with five judges dissenting. Policano v. Herbert, 453 F.3d 79, 79, 80 (2d Cir. 2006).

The New York Court of Appeals responded to the certification and explained that the Second Circuit's reliance on *Gallagher*, and on *Gonzalez*, had been mistaken. *Policano*, 859 N.E.2d at 493. Instead, the standard for legal sufficiency for depraved indifference murder was found in *People v. Register*, 457 N.E.2d 704, 705–06 (N.Y. 1983), *overruled by* People v. Feingold, 858 N.E.2d 1163 (N.Y. 2006). *Policano*, 859 N.E.2d at 493. The Court of Appeals noted that at the time of Policano's conviction, it had not yet cut back on *Register*. *Id.*

In light of that response from the Court of Appeals, the Second Circuit stated that it would not have affirmed Policano's initial request for habeas relief, despite having reservations about such a ruling. Policano v. Herbert, 507 F.3d 111, 117 (2d Cir. 2007). Thus, the Second Circuit withdrew its previous decision. *Id.*

When the courts granted Policano's request for habeas relief, the *New York Daily News* boldly announced, "Killers Go Free. Twisting the Law Opens Cell Doors. 'The Defendant Is Set Free Because He Meant to Kill His Victim.'" Thomas Zambito, *Killers Go Free. Twisting the Law Opens Cell Doors. 'The Defendant is Set Free Because He Meant to Kill His Victim*,' N.Y. DAILY NEWS, Nov. 27, 2005, at 7, *available at* 2005 WLNR 25295267. The article stated, "Convicted killers are walking out of state prisons, thanks to a series of controversial rulings by judges who decided the jailbirds were charged with the wrong type of murder." *Id.* The media discovered other killers who had been set free, and speculated that "dozens more" could be in the process of being set free. *Id.* Professor Abramovsky believed that the prosecutors were to blame, by charging the two inconsistent counts. *Id.* Interestingly, Mr. Policano asserted his innocence to the end. *Id.*

[144] People v. Gause, 971 N.E.2d 341, 346 (N.Y. 2012) (Pigott, J., dissenting), *rev'g* 916 N.Y.S.2d 376, 376 (App. Div. 4th Dep't 2011).