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CPL § 20.20(2)(b): Criminal Jurisdiction Over Out-of-State Conduct Threatening New York's Community Welfare Withheld

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asserting a *Dole* claim before a judge who has not yet declared his position — and they are an overwhelming majority[164] — a claimant will be best advised to file a claim against the State within 6 months of the date of negligence. Such a course of action would, in all instances, preserve the tortfeasor's claim for apportionment.

CRIMINAL PROCEDURE LAW

CPL § 20.20(2)(b): Criminal jurisdiction over out-of-state conduct threatening New York's community welfare withheld.

Section 20.20(2) of the CPL permits New York courts to exercise jurisdiction over certain types of criminal conduct having a deleterious effect in New York although the criminal acts themselves have been performed in another state.[165] Departing from the traditional territorial theory of jurisdiction,[166] the statute is based upon the concept of "the injured forum."[167] As the name implies,

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[164] Out of the 17 judges in the Court of Claims, only Judges Blinder, DeIorio, Lengyel and Quigley have declared their positions.

[165] CPL § 20.20(2) provides state criminal courts with jurisdiction to convict a person of an offense:

> Even though none of the conduct constituting such offense may have occurred within this state [if]:
> (a) The offense committed was a result offense and the result occurred within this state. If the offense was one of homicide, it is presumed that the result, namely the death of the victim, occurred within the state if the victim's body or a part thereof was found herein; or
> (b) The statute defining the offense is designed to prevent the occurrence of a particular effect in this state and the conduct constituting the offense committed was performed with intent that it would have such effect herein; or
> (c) The offense committed was an attempt to commit a crime within this state; or
> (d) The offense committed was conspiracy to commit a crime within this state and an overt act in furtherance of such conspiracy occurred within this state . . . .

[166] Under the common law territorial theory of jurisdiction, a sovereign state has jurisdiction over all crimes committed within its borders. *See* Ludwig, *Improving New York's New Criminal Procedure Law,* 45 ST. JOHN'S L. REV. 387, 396-400 (1971).

[167] For a discussion of the injured forum theory of jurisdiction, see *id.* at 397-98. The injured forum concept appears to be an offshoot of the territorial theory and has been termed "objective territorial jurisdiction." United States v. Daniszewski, 380 F. Supp. 113, 115 (E.D.N.Y. 1974). Jurisdiction based on the concept of the injured forum can be traced through the leading case of Strassheim v. Daily, 221 U.S. 280 (1911), wherein defendant was indicted in Michigan for bribery and the use of false pretenses to defraud that State. In spite of the fact that the alleged criminal acts occurred entirely in Illinois, the State of Michigan was deemed to have jurisdiction, since "[a]cts done outside a jurisdiction, but intended to produce *and producing* detrimental effects within it, justify a State in punishing the cause of the harm . . . ." *Id.* at 285 (citation omitted) (emphasis added). The federal courts have recognized the "objective territorial jurisdiction" theory in the prosecution of crimes committed in a foreign jurisdiction that have resulted in harmful effects in the United States. *See, e.g.,* United States v. Fernandez, 496 F.2d 1294 (5th Cir. 1974) (prosecution in United States for uttering stolen American checks in Mexico); Rivard v. United States, 375 F.2d 882 (5th Cir.), *cert. denied,* 389 U.S. 884 (1967) (jurisdiction asserted over conspiracy conducted abroad which resulted in successful smuggling of drugs into United States); *cf.* SEC v. Kasser, 391 F. Supp. 1167, 1174 (D.N.J. 1975); Ramirez & Feraud Chili Co. v. Las Palmas Food Co., 146 F. Supp. 594, 600 (S.D. Cal. 1956), *aff'd mem.,* 245 F.2d 874 (9th Cir. 1957), *cert. denied,* 355 U.S. 927 (1958).

the latter jurisdictional base confers the right to prosecute upon the community which has been harmed by the criminal conduct irrespective of where such conduct occurs.

Three of the four "injured forum" paragraphs of section 20.20(2) are relatively clear. An out-of-state principal or accessory to a crime or criminal conduct is subject to New York jurisdiction if the crime is a "result offense" and the injury ensuing from the criminal conduct occurs here;[168] if the conduct amounts to an attempt to commit a crime in New York;[169] or if an overt act in furtherance of an out-of-state conspiracy occurs in this State.[170] The import and application of the remaining subdivision, section 20.20(2)(b), however, is less readily apparent. Subsection (2)(b) grants New York courts jurisdiction over an offense notwithstanding the fact that none of the proscribed conduct occurred within this State provided that "[t]he statute defining the offense is designed to prevent the occurrence of a particular effect in this state and the conduct constituting the offense committed was performed with intent that it would have such effect herein."[171] While this language on its face appears to be a broad grant of jurisdiction, it must be read in conjunction with section 20.10(4), which requires

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Prior to the enactment of CPL § 20.20, extraterritorial application of New York's criminal law was generally avoided. *See* People v. Werblow, 241 N.Y. 55, 148 N.E. 786 (1925) (New York had no jurisdiction over in-state conspiracy to commit larceny in another country unless conspiratorial conduct constituted an attempt in New York); People v. International Nickel Co., 218 N.Y. 644, 112 N.E. 1068 (1916) (mem.), *aff'g* 168 App. Div. 245, 153 N.Y.S. 295 (2d Dep't 1915) (New York lacked jurisdiction over New Jersey factory producing smoke which created noxious odors in Richmond County); Wilson v. Commissioners of Parole Div., 123 N.Y.S.2d 916 (Sup. Ct. N.Y. County 1953) (New York parole warrant could not prevent defendant from obtaining bail in another state); People v. Hess, 207 Misc. 520, 141 N.Y.S.2d 804 (Schuyler County Ct.), *aff'd,* 286 App. Div. 617, 146 N.Y.S.2d 210 (3d Dep't 1955) (New York resident could not be convicted in New York of bigamy which occurred in another state).

[168] CPL § 20.20(2)(a). *See* TEMPORARY COMM'N ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, PROPOSED NEW YORK CRIMINAL PROCEDURE LAW § 10.20(2)(d), Staff Comment at 41 (1967) [hereinafter cited as Staff Comment], which posits that New York would have jurisdiction over a "homicide case in which the victim is shot in Florida and later dies of the wound in New York." *See also* United States v. Aluminum Co. of America, 148 F.2d 416, 443 (2d Cir. 1945).

[169] *See* CPL § 20.20(2)(c). Staff Comment, *supra* note 168, § 10.20(3)(b), at 46, which indicates that New York would have jurisdiction over "F, a Florida resident who, with intent to kill N, a New York resident, mails a packaged bomb in Florida addressed to N in New York" which is intercepted before it reaches New York.

[170] CPL § 20.20(2)(d). *See* Staff Comment, *supra* note 168, § 10.20(3)(c), at 42, which offers the example of "A, B, and C who conspire in Florida to kill N in New York and by pre-arrangement they mail a packaged bomb to their co-conspirator D in New Jersey for the purpose of having him plant it in N's New York home, but the package . . . never reaches D." Although the draftsmen indicate that A, B, C and D all would be subject to New York jurisdiction, CPL § 20.20(2)(d) clearly indicates that some overt act in furtherance of the conspiracy must take place in New York before jurisdiction could be asserted.

[171] CPL § 20.20(2)(b).

that a "particular effect" must "have a materially harmful impact upon the governmental processes or the community welfare of a *particular jurisdiction.*"[172]

The extent to which CPL Section 20.20(2)(b) provides jurisdiction when, in fact, no harm has actually occurred in New York and the relevant criminal conduct does not amount to an attempt to commit a crime in this State, was the question confronting the Supreme Court, New York County, in *People v. Puig.*[173] After summarily upholding that portion of the indictment which charged defendant with conspiracy " 'to sell and distribute cocaine in the City of New York and elsewhere,' "[174] the *Puig* court focused on four counts based on an alleged transfer of cocaine near Newark Airport in the State of New Jersey.[175] No resale of the cocaine in the State of New York was established in the grand jury proceeding.[176]

Noting that this was a question of first impression, the court ruled that section 20.20(2)(b) did not confer jurisdiction, and thus granted defendant's motion to dismiss the four relevant counts of the indictment.[177] While conceding that the alleged New Jersey sale could have harmed the community welfare of New York by placing the drug "in the stream of illicit commerce,"[178] the court emphasized the significance of the term "particular jurisdiction" in the definition of "particular effect."[179] This limiting provision, said the court, renders section 20.20(2)(b) inapplicable to conduct which is intended to injure the general community welfare of any New York political subdivision. Rather, it is limited to offenses producing "palpably harmful consequences which are of necessity local and peculiarly injurious to the rights of this state or its citizens."[180]

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[172] CPL § 20.10(4) (emphasis added).

[173] 85 Misc. 2d 228, 378 N.Y.S.2d 925 (Sup. Ct. N.Y. County 1976).

[174] *Id.* at 233, 235-36, 378 N.Y.S.2d at 933, 936.

[175] The indictment charged "defendant [with] sale of a controlled substance, possession with intent to sell, straight possession and criminal facilitation . . . ." *Id.* at 231, 378 N.Y.S.2d at 932.

[176] *Id.* at 232, 378 N.Y.S.2d at 933.

[177] *Id.* at 231-35, 378 N.Y.S.2d at 933-36.

[178] *Id.* at 233, 378 N.Y.S.2d at 933-34.

[179] *See* text accompanying note 172 *supra.*

[180] 85 Misc. 2d at 235, 378 N.Y.S.2d at 935. Judge Coon noted that although the thrust of CPL § 20.20(2)(b) is severely limited with respect to interstate conduct, its "community welfare" language is appreciably more expansive with regard to purely intrastate transactions. *Id. See* CPL § 20.40. Thus, in People v. Brill, 82 Misc. 2d 865, 370 N.Y.S.2d 820 (Nassau County Ct. 1975), a case involving the sale of pornographic material in New York City with intent to resell in Nassau County, the Nassau County Court found that it had jurisdiction pursuant to § 20.40 despite the fact that the proscribed conduct took place outside the county.

Examples of such offenses, according to the court, include attempts to impugn the integrity of the State governmental or judicial processes or to commit fraud upon New York institutions.[181]

Clearly, *Puig* offered an opportunity for a broad expansion of New York's power to prosecute criminal conduct which would ultimately have an injurious effect on the people of this State. Unfortunately, the constitutionally mandated concept of state sovereignty bars prosecution of most crimes where the criminal acts occurred on another side of a geopolitical boundary. Although a contrary decision here might have signaled a major step in the effort to curtail interstate trafficking in illegal narcotics, in declining the opportunity Judge Coon appears to have reached the only result possible under the circumstances.

The court's stated fears that a contrary result would have infringed on due process guarantees, rights against double jeopardy, and the sovereign authority of other states[182] were well founded. It is obvious that the defendant could not be prosecuted for the same crime in both New York and New Jersey.[183] Since all

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[181] 85 Misc. 2d at 235, 378 N.Y.S.2d at 935. The draftsmen of the New York statute noted that it would:

> [deal] with cases which are prosecutable in New York despite the lack of any conduct or physical occurrence herein, [and] is somewhat more delicate and controversial than the other categories.
>
> The kinds of offenses contemplated by [the] paragraph are exemplified by bribery and perjury, the "effects" of which are confined to corruption of New York's governmental and judicial processes. Under this paragraph, New York would have jurisdiction of, for example, a bribery offense based upon a bribe payment in Florida to a New York judge for a future favorable decision in a pending New York action.

Staff Comment, *supra* note 168, § 10.20(3)(a), at 41.

Various commentators have considered the effects of CPL § 20.20(2)(b). None, however, have mentioned any conduct to which the statute is applicable other than the two examples listed in the Staff Comment, *i.e.*, bribery and perjury. *See* R. PITLER, NEW YORK CRIMINAL PRACTICE UNDER THE CPL § 1.8, at 15-16 (1972); H. ROTHBLATT, CRIMINAL LAW OF NEW YORK § 35, at 22-23 (1971); 1 M. WAXNER, NEW YORK CRIMINAL PRACTICE § 1.2(2), at 1-27 to -29 (1973).

[182] 85 Misc. 2d at 234, 378 N.Y.S.2d at 934; *cf.* Pearson v. Northeast Airlines, Inc., 309 F.2d 553 (2d Cir. 1962), *cert. denied*, 372 U.S. 912 (1963).

[183] The fifth amendment provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ." This has been held not to bar successive prosecutions by the federal and state governments when each prosecutes separate offenses arising from the same nucleus of operative facts. Bartkus v. Illinois, 359 U.S. 121 (1959). Subsequently, however, the Supreme Court in Benton v. Maryland, 395 U.S. 784 (1969), applied the double jeopardy clause of the fifth amendment to the states. As Justice Douglas noted in Smith v. United States, 423 U.S. 1303, 1307 (1975), *Benton* may cast doubts upon the *Bartkus* holding.

New York prosecutions for crimes previously punished in another jurisdiction were specifically prohibited in the old Penal Law. Ch. 88, § 33, [1909] N.Y. Consol. Laws 2538. CPL § 40.20(1) now simply provides that "[a] person may not be twice prosecuted for the same offense." In the practice commentary to § 40.20 Professor Denzer states that the general New York position on the separate sovereign theory is unclear. 11A MCKINNEY'S CPL § 40.20, commentary at 106 (1971). There have been cases in which a separate

the acts alleged in *Puig* occurred in New Jersey, that state has primary jurisdiction over the offense. Absent a "particular effect" in New York, this State could not properly deny New Jersey its authority to prosecute by assuming extraterritorial jurisdiction.

The *Puig* holding appears to be in harmony with the legislative intent underlying CPL section 20.20(2)(b). The only apparent purpose of the provision is to protect New York from offenses which, although committed without the state, have the effect of corrupting this state's governmental processes.[184] Nothing in the legislative history supports an expansion of extraterritorial jurisdiction beyond such offenses. Under the *Puig* holding, therefore, out-of-state criminal conduct cannot generally be prosecuted in New York absent an in-state act in furtherance thereof. The constitutional obstacles to any contrary result are simply too substantial to overcome.

CPL § 60.35: Affirmative damage required for impeachment of one's own witness.

When the legislature enacted section 60.35 of the CPL[185] it drastically changed the method for impeaching one's own witness

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prosecution by the state after a federal conviction or acquittal was barred when the crimes charged were too similar. In Cirillo v. Justices of the Sup. Ct., 43 App. Div. 2d 4, 349 N.Y.S.2d 129 (2d Dep't 1973), a New York prosecution for possession of heroin was dismissed where there had been a prior federal indictment charging the defendant with an attempt to distribute heroin. The court did, however, approve the State's indictment against the defendant for possession of cocaine on the same date. *See* People v. LoCicero, 17 App. Div. 2d 31, 230 N.Y.S.2d 384 (2d Dep't 1962), *modified,* 14 N.Y.2d 374, 200 N.E.2d 622, 251 N.Y.S.2d 953 (1964) (state prosecution barred after federal acquittal on substantially identical charges).

In general, however, New York courts have adopted the state-federal exception to the double jeopardy rule. *See* People v. Broady, 5 N.Y.2d 500, 158 N.E.2d 817, 186 N.Y.S.2d 230, *cert. denied,* 361 U.S. 8 (1959) (state law against wiretapping punishes different conduct than does federal law); *accord,* Klein v. Murtagh, 44 App. Div. 2d 465, 355 N.Y.S.2d 622 (2d Dep't 1974); People v. Adamchesky, 184 Misc. 769, 55 N.Y.S.2d 90 (Ct. Gen. Sess. 1945). In determining whether a sister-state prosecution bars subsequent indictment in New York, courts consider the nature of the relationship between the offenses prosecuted. *See generally* 7B McKINNEY'S CPL § 40.20, commentary at 105 (1971). In People *ex rel.* Heflin v. Silberglitt, 2 App. Div. 2d 767, 153 N.Y.S.2d 279 (2d Dep't 1956), the defendant had stolen a car in New York, driven it in Massachusetts, and was convicted there for operating a stolen vehicle. He then returned to New York and pleaded guilty to petit larceny. Later, however, he brought a writ of habeas corpus, claiming that the New York indictment, containing counts for the taking, removing, operating, and driving of the car in New York, subjected him to double jeopardy. The court held there was no violation of his rights because the two indictments involved different crimes, each of which was prosecuted in the state where it had been committed.

[184] *See* note 181 *supra.*

[185] Section 60.35 of the CPL provides:

1. When, upon examination by the party who called him, a witness in a criminal proceeding gives testimony upon a material issue of the case which tends to disprove the position of such party, such party may introduce evidence that such