

1-1-2018

## Constitutional Law - Double Jeopardy Will Not Bar Subsequent Prosecution under Alternative OUI Theory - Commonwealth v. Hebb, 77 N.E.3D 308 (Mass. 2017)

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### Recommended Citation

23 Suffolk J. Trial & App. Advoc. 383 (2017-2018)

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**CONSTITUTIONAL LAW— DOUBLE JEOPARDY  
WILL NOT BAR SUBSEQUENT PROSECUTION  
UNDER ALTERNATIVE OUI THEORY—  
COMMONWEALTH V. HEBB, 77 N.E.3D 308 (MASS.  
2017)**

For a criminal defendant, a return verdict of not guilty and the dismissal of a criminal complaint serve as great relief and signify the end of prosecution.<sup>1</sup> The Double Jeopardy Clause of the Fifth Amendment, providing the longstanding safeguard protecting defendants from a second prosecution for the same offense, is deeply ingrained in both the United States and Massachusetts' justice systems.<sup>2</sup> In *Commonwealth v. Hebb*,<sup>3</sup> the Supreme Judicial Court of Massachusetts ("SJC") addressed the issue of whether Double Jeopardy principles precluded a retrial where the defendant was prosecuted under the Massachusetts Operating Under the Influence ("OUI") statute, Massachusetts General Laws Chapter 90, Section 24 ("M.G.L. c. 90 § 24"), and the jury returned a verdict of not guilty on one theory, however the judge declared a mistrial on the other.<sup>4</sup> The Court held

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<sup>1</sup> See *Commonwealth v. Aldrich*, 486 N.E.2d 732, 736 (Mass. App. Ct. 1985) (explaining dismissal of complaints signifies end of prosecution for defendants). "Whether further prosecution is contemplated has been referred to as 'the critical question' in determining whether a dismissal without a defendant's consent bars further prosecution." *Id.* at 735. The critical question becomes whether the defendant had a reasonable expectation that the dismissal was a final disposition of the charge. *Id.*

<sup>2</sup> See U.S. CONST. amend. V (defining Double Jeopardy clause). The Fifth Amendment provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

*Id.*; see also *Commonwealth v. Brown*, 24 N.E.3d 1025, 1032 (Mass. 2015) (describing safeguards of Double Jeopardy); see also *Berry v. Commonwealth*, 473 N.E.2d 1115, 1119 (Mass. 1985) (holding Massachusetts common law principles of Double Jeopardy provide greater protection than United States Constitution).

<sup>3</sup> 77 N.E.3d 308 (Mass. 2017).

<sup>4</sup> See MASS. GEN. LAWS ch. 90, § 24 (1)(a)(1) (2017) (outlining operating under the influence statute); see also *Hebb*, 77 N.E.3d at 310 (determining whether double jeopardy principles precluded retrial).

that an acquittal on a single theory was not an effective acquittal of both violations, and thus Double Jeopardy principles did not preclude a retrial on the second theory.<sup>5</sup>

On May 16, 2013, William J. Hebb was struck by a car while riding his motorcycle.<sup>6</sup>

Hebb was taken to the Milford Hospital emergency department where the physician made several observations which led him to determine Hebb was intoxicated.<sup>7</sup> While at the hospital, Hebb's blood was drawn and tested for alcohol which yielded a .133 blood alcohol level.<sup>8</sup> Subsequently, Hebb was charged under M.G.L. c. 90, § 24 (1)(a)(1) which contains two violations; the impaired ability, or factual violation, and the per se violation.<sup>9</sup>

The jury verdict slip contained two options charging the defendant with both the impaired ability violation and the per se violation.<sup>10</sup> The jury returned a verdict of not guilty for option one regarding the impaired ability theory, but left the verdict slip blank for option two, the per se violation, and as a result, the judge accepted the verdict for option one, and declared a

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<sup>5</sup> See *Hebb*, 77 N.E.3d at 312-13 (finding acquittal of only one charged violation will not preclude retrial of other violation).

<sup>6</sup> See *Hebb*, 77 N.E.3d at 309 (explaining defendant's involvement in accident).

<sup>7</sup> See *id.* (noting treating physician's observations). "[T]he defendant's skin appeared 'flushed' and that his speech was slurred, and [physician] detected an 'odor of alcohol on his breath.'" *Id.*

<sup>8</sup> See *id.* (describing blood testing done by blood analyst in state police crime laboratory and defenses' objections). Defense counsel urged the jury to find the blood alcohol tests were unreliable based on the blood analyst's acknowledgement during cross examination that the blood samples also contained an anticoagulant that, if not properly activated, would cause the blood to clot and yield an artificially high blood alcohol test. *Id.*

<sup>9</sup> See MASS. GEN. LAWS ch. 90, § 24 (2017) (criminalizing operation of motor vehicle under influence of alcohol). The impaired ability violation requires operating a motor vehicle under the influence of intoxicating liquor and the per se violation requires operating a motor vehicle with a blood alcohol level of .08 or more. *Id.*; see also *Hebb*, 77 N.E.3d at 310 (explaining defendant's charge under OUI Statute). The prosecution urged the jury to find the defendant guilty under both theories. *Hebb*, 77 N.E.3d at 310. Prosecution first argued the defendant's appearance and behavior at the accident was sufficient evidence to find him guilty under the impaired ability violation. *Id.* They then contended the defendant's .133 blood alcohol level was sufficient to prove the per se violation as well. *Id.* at 311.

<sup>10</sup> See *Hebb*, 77 N.E.3d at 310 (describing jury verdict slip and jury's decision-making process).

The verdict slip conformed to the complaint, charging both the impaired ability violation and the per se violation, and provided the jury the following options: (I) "Operating a Motor Vehicle Under the Influence of Liquor: 1. Not Guilty; 2. Guilty"; and (II) "Operating a Motor Vehicle with a Blood Alcohol Level of .08% or greater: 1. Not Guilty; 2. Guilty."

*Id.*

mistrial for option two.<sup>11</sup> In December 2015, the prosecution issued a second complaint against Hebb charging him solely with the per se violation.<sup>12</sup> Confronted with this new complaint, Hebb moved to dismiss on grounds of Double Jeopardy.<sup>13</sup> Hebb's Double Jeopardy claim did not prevail in the district court, leading the judge to dismiss his case, and Hebb appealed to the SJC.<sup>14</sup>

The Fifth Amendment Double Jeopardy Clause prevents a criminal defendant from being prosecuted for the same crime twice.<sup>15</sup> Providing three constitutional safeguards, the principle bars prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense.<sup>16</sup> The Double Jeopardy Clause is applicable to states through the Due Process Clause of the Fourteenth Amendment.<sup>17</sup> In addition to the United States constitutional

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<sup>11</sup> See *id.* at 310 (outlining jury's deliberations and verdict). The jury reported that they saw evidence concerning the second count which was meant to be redacted, and asked the judge how to proceed. *Id.*

<sup>12</sup> See *id.* (explaining second complaint charges). The defendant was charged with one count of operating a vehicle with a blood alcohol level percentage of .08 or greater, which is the per se violation of M.G.L. c. 90 § 24 (1)(a)(1). *Id.*

<sup>13</sup> See *Hebb*, 77 N.E. 3d at 310 (articulating defendant's reasons for filing motion to dismiss).

<sup>14</sup> See *id.* (outlining stages of case leading to appeal). "A second judge denied the motion, and the defendant filed a petition pursuant to M.G. L. c. 211, § 3, seeking review of that judge's order." *Id.*

<sup>15</sup> See *Sanabria v. United States*, 437 U.S. 54, 64 (1978) (explaining extent of Double Jeopardy protections). *Sanabria* held that a verdict of acquittal is guaranteed the upmost Double Jeopardy protection. *Id.* The scope of the Double Jeopardy clause even reaches acquittal based on "egregiously erroneous foundation." *Id.* See *Brown v. Ohio*, 432 U.S. 161, 164 (1977) ("It has long been understood that separate statutory crimes need not be identical either in constituent elements or in actual proof in order to be the same within the meaning of the constitutional prohibition."). See *Commonwealth v. Lowder*, 731 N.E.2d 510, 520 (Mass. 2000) (affirming constitutional right to Double Jeopardy Protections). The prosecution attempted to argue because the judge had no authority to enter a finding of not guilty, it was not a true acquittal. *Id.* The court affirmed, holding although the trial judge lacked the power to enter the verdict, the prosecution was still barred from seeking further proceedings against the defendant. *Id.* To do so, would put the defendant in jeopardy twice for the same offense. *Id.* See *Aldrich*, 486 N.E.2d at 735 (quoting *Green v. United States*, 355 U.S. 184, 187 (1957)) (explaining principal purpose of Double Jeopardy clause). The Double Jeopardy clause serves the purpose of "protect[ing] an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." *Id.*

<sup>16</sup> See *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) (summarizing Double Jeopardy as safeguards). "That guarantee has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *Id.*; see also *Brown*, 24 N.E.3d at 1032 (quoting *Yeager v. United States*, 557 U.S. 110, 119 (2009)) ("[T]he [d]ouble [j]eopardy [c]lause precludes the [g]overnment from relitigating any issue that was necessarily decided by a jury's acquittal in a prior trial.').

<sup>17</sup> See *Benton v. Maryland*, 395 U.S. 784, 794 (1969) (declaring Double Jeopardy principle fundamental right). The court acknowledged that the Fifth Amendment Double Jeopardy principal

safeguards, Massachusetts has both statutory and common law Double Jeopardy principles that encompass the same standards and protections as those outlined in the Fifth Amendment.<sup>18</sup>

For purposes of establishing whether Double Jeopardy principles apply, the court must first determine whether original jeopardy has been terminated.<sup>19</sup> A termination of original jeopardy requires all factual elements of the charged offense charged to be resolved.<sup>20</sup> A jury acquittal implies the factual elements have been resolved, and therefore, subsequent prosecution is barred but, it is conversely held that a mistrial resulting from a hung jury

is a fundamental ideal in constitutional heritage and, as such, should be applied through the Fourteenth Amendment. *Id.*; see also *Pearce*, 395 U.S. at 717 (affirming Fifth Amendment Double Jeopardy guarantee enforceable against states through Fourteenth Amendment).

<sup>18</sup> See MASS. ANN. LAWS c. 263 § 7 (Lexis Nexis 2017) (establishing Massachusetts Double Jeopardy protections). The provisions state:

A person shall not be held to answer on a second indictment or complaint for a crime of which he has been acquitted upon the facts and merits; but he may plead such acquittal in bar of any subsequent prosecution for the same crime, notwithstanding any defect in the form or substance of the indictment or complaint on which he was acquitted.

*Id.*; see also *Marshall v. Commonwealth*, 977 N.E.2d 40, 45 (Mass. 2012) (recognizing Double Jeopardy principle's reach to Massachusetts state law). "At its core, the prohibition against double jeopardy, which flows from the Fifth Amendment to the United States Constitution, well as the statutory and common law of Massachusetts, provides that 'a person cannot twice be put in jeopardy for the same offence.'" *Id.*; *Berry*, 473 N.E.2d at 1119 (stating longstanding Double Jeopardy principles in Commonwealth). Common law Double Jeopardy principles in Massachusetts may provide for greater protection than what is required in both the State and Federal Constitution. *Id.*

<sup>19</sup> See *Ferrari v. Commonwealth*, 859 N.E.2d 808, 811 (Mass. 2007) (noting original jeopardy terminates when proceedings against defendant ends); *Commonwealth v. Johnson*, 689 N.E.2d 1327, 1333 (Mass. 1998) (quoting *Richardson v. United States*, 468 U.S. 317, 325 (1984)) ("...the protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy."); *Berry*, 473 N.E.2d at 1118 (placing importance of defendant's expectation on Double Jeopardy). "Whether the defendant's jeopardy has terminated depends on whether, in light of double jeopardy policies and principles, the proceedings against him have reached a point at which they should cease." *Id.*; *Aldrich*, 486 N.E.2d at 735 (turning on whether defendant expects further litigation to continue with the same question as original jeopardy). "The dispositive issue is whether the defendant had a reasonable expectation that the dismissal was a final disposition of the charges." *Aldrich*, 486 N.E.2d at 735. The court ruled that the defendant's unreasonable belief that the dismissal of his complaint was a final disposition of the case ultimately led to the denial of his Double Jeopardy claim. *Aldrich*, 486 N.E.2d at 736.

<sup>20</sup> See *Yeager v. United States*, 557 U.S. 110, 118 (2009) (holding jury's inability to reach a verdict does not bar further prosecution). "The interest in giving the prosecution one complete opportunity to convict those who have violated its laws justifies treating the jury's inability to reach a verdict as nonevent that does not bar retrial." *Id.*; see also *Brown*, 24 N.E.3d at 1032-34 (Mass. 2015) (determining acquittal is final when all factual elements of offense charged are resolved). The court held that retrying a defendant for first degree murder under a theory of deliberate premeditation did not violate Double Jeopardy principles. *Id.* at 1033. The court reasoned that since the first trial did not produce a verdict which was based on all of the facts, the Jury's verdict was not equivalent to a true acquittal. *Id.* at 1034.

will not automatically terminate original jeopardy because the facts could have possibly been unresolved.<sup>21</sup> The principles guiding whether original jeopardy has terminated, and thus whether a new trial is precluded, weigh the defendant's right to finality against the government's interest in receiving a final judgment for those who have committed a crime against the public.<sup>22</sup>

For purposes of Double Jeopardy, when a statute allows a defendant to be charged under two separate theories of liability, the court must determine whether the factual elements of one theory preclude a retrial under an alternative theory.<sup>23</sup> To make this determination, the court looks to the

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<sup>21</sup> See *Richardson*, 468 U.S. at 326 (quoting *Wade v. Hunter*, 336 U.S. 684, 688-89 (1949)) (reiterating that hung jury will not bar further prosecution).

The Double-Jeopardy provision of the Fifth Amendment however, does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed.

*Id.* at 324. The Court acknowledges certain circumstances could make it impossible for a jury to reach a complete verdict on the merits of a case. *Id.* The purpose of the Double Jeopardy law is two-fold: to protect society from those who commit crimes and to deny the government the opportunity to further prosecute in instances where the jury was unable to reach a verdict. *Id.* at 325; *United States v. Scott*, 437 U.S. 82, 91 (1978) (stressing acquittal based on insufficient evidence to convict terminates original jeopardy). The prejudice facing a defendant when being forced to stand a new trial after acquittal far outweighs any prejudice the government might face after a defendant successfully appeals. *Id.* at 91-92; see also *United States v. Perez*, 22 U.S. 579, 580 (1824) (holding mistrial based on manifest necessity does not bar second trial); *Marshall*, 977 N.E.2d at 45 (noting exceptions of Double Jeopardy in mistrials). "State and Federal double jeopardy protections bar, 'as a general rule,' retrial of a defendant whose initial trial ends over his objection and without a conviction. . . . However, an exception to the general rule applies where a mistrial is declared as a matter of 'manifest necessity.'" *Marshall*, 977 N.E.2d at 45; see also Erin Miller, *When are a Mistrial and Retrial Double Jeopardy?*, SCOTUS BLOG, <http://www.scotusblog.com/2010/03/when-are-a-mistrial-and-retrial-double-jeopardy/>(2017) (pointing to jury's inability to reach verdict as grounds for new trial); William S. McAninch, *Unfolding the Law of Double Jeopardy*, 44 S.C.L. REV. 411, 420 (1993) (describing mistrials and Double Jeopardy). "Consequently, a subsequent prosecution on that indictment does not implicate double jeopardy; it is simply a continuation of the original jeopardy. On the other hand, a mistrial declared over the defendant's objection will terminate jeopardy unless the mistrial was required by manifest necessity" *Id.*

<sup>22</sup> See *Richardson*, 468 U.S. at 325-26 (explaining governmental interest in resolution). "[A] defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments." *Id.* at 325. The government is equally as entitled to a resolution as the defendant and their interests are comparable. *Id.* at 326; see also *Brown*, 24 N.E.3d at 1032 ("The defendants' Double Jeopardy claim depends not on what the jury explicitly stated in the report of the verdict but on the defendants' interpretation of what the jury must have intended.").

<sup>23</sup> See *Commonwealth v. Roderiques*, 968 N.E.2d 908, 915 (Mass. 2012) (quoting *Commonwealth v. Santos*, 797 N.E.2d 1191, 1198 (Mass. 2003)) (differentiating alternative methods of establishing criminal elements from alternative theories of liability). When the statute sets out two methods of establishing a required element of a crime, it is not in fact, setting out

legislative intent underlying the two theories and decides whether the legislature intended to authorize multiple punishments for a single incident.<sup>24</sup> The Massachusetts OUI statute sets out two theories of liability, which may be argued in the alternative, to convict for operating under the influence.<sup>25</sup> In 2003, the Massachusetts state legislature amended the OUI statute to include the per se violation.<sup>26</sup>

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alternative theories under which the crime can be committed. *Id.* Alternative methods of establishing an element are “merely similar, equivalent types of conduct any one (or more) of which will suffice to prove a single element.” *Id.*

<sup>24</sup> See *Commonwealth v. Callahan*, 799 N.E.2d 113,116 (Mass. 2003) (“We [also] presume that when the Legislature amends a statute it is aware of the prior state of the law as explicated by the decisions of this court.”). See *Commonwealth v. Traylor*, 34 N.E.3d 276, 282-83 (Mass. 2015) (determining what unit of prosecution was intended as punishable act). Courts draw a distinction between crimes committed against several victims and crimes committed against society as a whole. *Id.* Crimes committed against several victims warrant multiple indictments for the same crime for each victim, but when a statute is directed at punishing the defendant for conduct against society, a single violation of said statute can only result in one conviction regardless of how many victims were affected. *Id.* See *Commonwealth v. Botev*, 945 N.E.2d 956, 961 (Mass. 2011) (quoting *Commonwealth v. Antonmarchi*, 874 N.E.2d 665, 668 (Mass. App. Ct. 2007) (describing importance of considering legislative intent).

The appropriate inquiry in a case like this . . . asks what ‘unit of prosecution’ was intended by the Legislature as the punishable act. . . . The inquiry requires us to look to the language and purpose of the statute[], to see whether [it] speak[s] directly to the issue of the appropriate unit of prosecution . . . keeping in mind that any ambiguity that arises in the process must be resolved, under the rule of lenity, in the defendant’s favor.

*Id.* See *Sanabria v. United States* 437 U.S. 54, 69 (1978) (“It is Congress, and not the prosecution, which establishes and defines offenses.”); *Ohio*, 432 U.S. at 165 (“The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments; but once the legislature has acted courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial.”).

<sup>25</sup> See MASS. GEN. LAWS ch. 90, § 24 (2017) (stating two theories for prosecution); see also *Commonwealth v. Filoma*, 943 N.E.2d 477, 481 (Mass. App. Ct. 2011) (explaining two theories under OUI statute). The OUI statutes creates two approaches:

The Commonwealth could establish the OUI element by either of two methods. By the “per se” method, it could introduce evidence of a breathalyzer reading of .08 percent or greater and request the judge to instruct the jury that, if they believed the accuracy of that measure, it conclusively established operation under the influence. Alternatively, by the method of proof by impaired operation, the prosecution could introduce percipient evidence of the defendant’s appearance and conduct and a breathalyzer result of .08 percent or greater without a request for an instruction that such a reading, if believed, conclusively established operation under the influence.

*Filoma*, 943 N.E.2d at 481; see also *Commonwealth v. Colturi*, 864 N.E.2d 498, 501-02 (Mass 2007) (analyzing statute under two alternative theories).

<sup>26</sup> See *Colturi*, 864 N.E.2d at 501 (describing legislative intent behind amendment). “The expressly stated purpose of the 2003 amendments was to ‘avoid loss of life and the loss of federal highway aid funds’ by the prompt enactment of further provisions ‘necessary for the immediate preservation of the public safety.’” *Id.* (citation omitted). “It is beyond reasonable dispute that, in

In *Hebb*, the Supreme Judicial Court of Massachusetts upheld the lower court's decision that the defendant's Double Jeopardy rights were not violated by the commonwealth seeking further prosecution for only the per se violation under the OUI statute.<sup>27</sup> The court affirmed the prosecution's decision to charge Hebb for both violations, holding that each violation contained their own distinct factual elements.<sup>28</sup> Accordingly, the court rejected the defendant's claim that the previous acquittal on the impaired ability charge barred further prosecution with respect to the per se violation.<sup>29</sup> The court analogized its holding to its previous application of Double Jeopardy principles in murder trials prosecuted under multiple theories.<sup>30</sup> Thus, the court ruled that Hebb's Double Jeopardy rights were not violated because the judge's declaration of a mistrial based on the impaired ability theory prevented the jury from resolving all of the factual elements of the per se violation.<sup>31</sup>

In *Hebb*, the Massachusetts Supreme Judicial Court relied heavily on the notion that the previous acquittal on the impaired ability OUI theory, and the mistrial on the per se violation theory, did not bar further prosecution and therefore Hebb's Double Jeopardy protections were not violated.<sup>32</sup> While seemingly adhering to the traditional principle that a mistrial will not

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adding a per se violation to the OUI statute, the Legislature intended to strengthen the protections afforded the public from drivers who might be impaired by the consumption of alcohol." *Id.*

<sup>27</sup> See *Hebb*, 77 N.E.3d at 309 (Mass. 2017) (concluding retrial permitted where jury reached verdict on only one of two prosecuted theories).

<sup>28</sup> See *id.* at 311 (describing two theories of prosecution under statute). The court explained that "the statutory framework created by the 2003 amendment established alternative theories . . . each containing a factual element not necessary to prove the other." *Id.* The court held that the decision to charge for each violation separately was appropriate and consistent with the intent behind the 2003 amendment to protect public safety. *Id.*

<sup>29</sup> See *id.* (rejecting defendant's claim of acquittal barring further prosecution). The court reasoned "the jury's not guilty verdict on the impaired ability charge did not resolve the factual element necessary to establish a per se violation. . . ." *Id.*

<sup>30</sup> See *id.* ("Our conclusion that double jeopardy principles do not bar retrial on the per se violation where the defendant was acquitted on the impaired ability violation is consistent with this court's application of double jeopardy principles in cases involving trials for murder under multiple theories."). The court relied on *Commonwealth v. Zanetti* which held that the defendant could be retried for murder on a theory which the jury had not reached a verdict on in the first trial. See *id.* (citing *Commonwealth v. Zanetti*, 910 N.E.2d 869, 878 (Mass. 2009)). The court also cited *Commonwealth v. Brown*, which held that the Commonwealth could retry the defendant on the theory of deliberate premeditation in first degree murder charge because the jury failed to reach a verdict on the "facts and merits of the charge." *Id.* (citing *Brown*, 24 N.E.3d at 1034).

<sup>31</sup> See *Hebb*, 77 N.E.3d at 311 (using declaration of mistrial as basis to bypass Double Jeopardy rights).

<sup>32</sup> See *id.* (ruling previous acquittal did not bar further prosecution). The court reasoned that the jury's opportunity to determine whether Hebb operated a motor vehicle with a blood alcohol level of .08 percent or greater was "foreclosed by the ruling of a mistrial." *Id.* Consequently, the court reasoned double jeopardy did not bar the Commonwealth from prosecuting on the per se theory alone. *Id.*

bar further prosecution, the SJC failed to recognize the facts that made this case distinguishable.<sup>33</sup> The SJC expressly rejected the application of *Sanabria v. United States*<sup>34</sup> as controlling precedent, which led to their skewed Double Jeopardy analysis.<sup>35</sup> As argued by the defense, the principles set forth in *Sanabria* determine that Hebb's OUI acquittal barred further prosecution despite the Commonwealth's argument that the jury declared a mistrial only on the per se theory.<sup>36</sup> Given the factual similarities between *Sanabria* and *Hebb*, the SJC's ruling should have been compelled to yield the same result, which would have afforded Hebb complete Double Jeopardy protection.<sup>37</sup>

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<sup>33</sup> See *Perez*, 22 U.S. at 580 (holding further prosecution not usually barred by mistrials). The Court further held prosecution was not disallowed when a mistrial is called for manifest necessity. *Id.* The Court expanded on the discretion judges have in making this decision, noting "whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated." *Id.*; see also Miller, *supra* note 21 (analyzing controlling Supreme Court precedent surrounding mistrials and Double Jeopardy).

The controlling Supreme Court precedent is *United States v. Perez* (1824), which held that a second trial does not violate the defendant's constitutional rights as long as the trial judge has declared a mistrial in the first proceeding based on "manifest necessity." There is no mechanical formula to determine whether a new trial is a "manifest necessity"; rather, in *Perez*, the Court merely required the trial judge to exercise "sound discretion" in making that decision.

Miller, *supra* note 21 ..

<sup>34</sup> 437 U.S. 54 (1978) (discussing SJC holding).

<sup>35</sup> See *Hebb*, 77 N.E.3d at 312 (noting "Because *Sanabria* is distinguishable from this case, it does not advance the defendant's argument."). The court expressly disagreed with the defense's contention that *Sanabria* served as controlling precedent. *Id.* The court argued *Sanabria* was distinguishable because the judge "entered an acquittal on the entire count rather than only with respect to one theory of liability." *Id.*

<sup>36</sup> See *Sanabria*, 437 U.S. at 78 (using multiple theories to argue further prosecution barred after acquittal). In *Sanabria*, the defendant was charged with participating in an illegal gambling business in violation of 18 U.S.C. § 1955. *Id.* at 56-57. The indictment charged the defendant under two theories of participation: accepting bets on number pools and the results of horse races. *Id.* at 58-59. The defendant was acquitted of the horse racing theory and appealed the judge's order excluding the numbers pool evidence and pursued a new trial on that evidence alone. *Id.* at 60-61, 64. The Supreme Court ruled the second prosecution was barred under Double Jeopardy principles. *Id.* at 75.

<sup>37</sup> See *id.* at 72-73 (highlighting prosecution's argument).

While recognizing that only a single violation of the statute is alleged under either theory, the Government nevertheless contends that separate counts would have been proper . . . [the] petitioner here was acquitted for insufficient proof of an element of the crime which other counts would share—that he was "connected with" the single gambling business." This finding of fact stands as an absolute bar to any further prosecution for participation in that business.

*Id.* (citation omitted); see also *Hebb*, 77 N.E.3d at 309-10 (describing defendant's charges). Although the defendant was charged under two theories, the charge was for a single count of OUI.

Moreover, in analyzing the legislative intent behind the 2003 amendment to the OUI statute, the court failed to give appropriate weight to the statute's increased reliance on blood alcohol content in determining whether a defendant was under the influence of alcohol.<sup>38</sup> The court's failure to provide a complete analysis of this intention, consequently, led to their inaccurate interpretation that the per se and impaired ability theories constitute separate offenses, allowing for multiple prosecutions.<sup>39</sup> Thus, analogizing the OUI statute in *Hebb* to previous murder cases involving multiple theories of prosecution was not a suitable comparison because the factual impairment and the per se violation are ways of proving a single element of the same offense.<sup>40</sup> This misinterpretation of the legislature's

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*Hebb*, 77 N.E.3d at 309-10. The prosecution's argument that an acquittal on one theory did not bar further prosecution on another after the jury declared a mistrial is exactly what was argued in *Sanabria*. See *id.* at 311-12.

<sup>38</sup> See *Hebb*, 77 N.E.3d at 310-11 (highlighting intent behind legislature passing amendment). The Court claimed the decision to charge *Hebb* under both theories was consistent with the legislative purpose of the statute's amendment which they explain as being "to minimize the risk to public safety from drivers who are either actually impaired or presumed to be impaired based on their blood alcohol level." *Id.* But see *Colturi*, 864 N.E.2d at 500-01 (noting abandonment of previous permissible inference standard).

[T]he [Massachusetts] Legislature added language to the OUI statute, making it a violation to operate a motor vehicle not only under the influence of intoxicating liquor, but also with a blood alcohol level of .08 or more. Having added this language to the violation provision of the statute, the Legislature deleted language in § 24(1)(e) that had created a "permissible inference that person with a blood alcohol level of .08 or more was indeed "under the influence of intoxicating liquor."

*Colturi*, 864 N.E.2d at 500-01 (citation omitted). By abandoning the permissible influence standard the court increased the weight of blood alcohol content as evidence as a way to prove a defendant's intoxication more definitively. *Id.*

<sup>39</sup> See *Hebb*, 77 N.E.3d at 311 (holding double jeopardy does not bar retrial on per se violation); see also *Traylor*, 34 N.E.3d at 283 (explaining need for analysis of unit of prosecution intended by statute). An important distinction must occur when determining whether a single statute can give rise to multiple offenses or one continuing offense. *Traylor*, 34 N.E.3d at 283. The court distinguishes between crimes offensive to society and crimes of violence which are committed against several victims. *Id.* The latter groups of cases, such as homicide cases, warrant multiple convictions and thus it is not necessary to implicate double jeopardy principles when the prosecution fails on one theory and pursues another in subsequent prosecution. *Id.* In upholding multiple convictions based on two deaths from a vehicular homicide, the court ruled the offense "falls within the general category of homicide offenses and those offenses traditionally have permitted punishment for each death caused by a defendant's criminal conduct." *Id.* at 268. In cases involving punishing the defendant for conduct offensive to society, the Court holds "a single instance of unlawful conduct can support only a single conviction, even if it affected several victims" *Id.* at 269 (citation omitted).

<sup>40</sup> See *Roderiques*, 968 N.E.2d at 915 (quoting *Santos*, 797 N.E.2d at 1198)("[A]lternative methods of establishing a required element are not distinct 'theories' of how the crime may be committed, but are merely similar, equivalent types of conduct any one (or more) of which will suffice to prove a single element."); see also *Zanetti*, 910 N.E.2d at 877-78 (allowing for retrial on alternative theory of homicide). The jury slip in this case provided the following options "(1) 'Not

intention behind amending the statute led to the court's futile conclusion that the factual and per se violations were separate offenses, which allowed the Commonwealth to pursue further prosecution for the same episode of operating a motor vehicle under the influence.<sup>41</sup>

Furthermore, in *Hebb*, the SJC acknowledged the application of the Double Jeopardy clause's protection when original jeopardy has been terminated; however, they failed to appropriately apply this standard to the facts of the case.<sup>42</sup> The termination of original jeopardy is fatal to the Commonwealth's ability to pursue further prosecution.<sup>43</sup> Since the intended unit of prosecution under the OUI statute was one episode of driving under the influence, it therefore follows that the SJC was wrong in finding the jury's acquittal on the factual violation as not terminating original jeopardy.<sup>44</sup>

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Guilty'; (2) 'Guilty - Murder, First Degree,' and, indented and underneath, the choices of (a) 'Theory of Deliberate Premeditation (Principal),' and (b) 'Theory of Deliberate Premeditation (Joint Venture)'; (3) 'Guilty - Murder, Second Degree (Principal)'; and (4) 'Guilty - Murder, Second Degree (Joint Venture).'" *Zanetti*, 910 N.E.2d at 878. The jury's verdict of guilty under the joint venture theory did not preclude further prosecution under the theory of Deliberate Premeditation. *Id.*

<sup>41</sup> See *Hebb*, 77 N.E. 3d at 310-11 (holding Double Jeopardy principles were not violated). The court determined that each theory consisted of entirely separate offenses stating, "to prove a per se violation of the OUI statute, the Commonwealth need not establish that the defendant was under the influence of intoxicating liquor." *Id.* Further, the court concluded that the legislative intent allowed for this interpretation creating two separate units of prosecution allowing for further prosecution. *Id.*; see also *Brown*, 432 U.S. at 164 (prohibiting courts from dividing a crime into multiple units). "The Double Jeopardy clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units." *Brown*, 432 U.S. at 169 (citation omitted).

<sup>42</sup> See *Hebb*, 77 N.E.3d 308 at 311 (alteration in original) (quoting *Johnson*, 689 N.E.2d at 1133) ("the protection of the [d]ouble [j]eopardy [c]lause by its terms applies only if there had been some event, such as an acquittal, which terminates the original jeopardy."). The SJC contends original jeopardy was not terminated by Mr. Hebb's acquittal of the factual impairment violation. *Id.* Further, the court purported that the declaration of a mistrial on the per se violation was wholly separate from the acquittal, thus further prosecution was not barred. *Id.*

<sup>43</sup> See *Ferrari*, 859 N.E.2d at 811 (failing to apply double jeopardy protection when jury is unable to reach unanimous decision). "Original jeopardy terminates when proceedings against a defendant end. However, as the defendant concedes, if the Commonwealth presents legally sufficient evidence to convict, double jeopardy will not prevent retrial after a mistrial is declared because of the jury's inability to reach a unanimous decision." *Id.*; see also *Lowder*, 731 N.E.2d at 520 ("When a defendant has been put in jeopardy for an offense and acquitted, he may not be retried for that offense."); *Aldrich*, 486 N.E.2d at 735 (finding expectation of further prosecution indicates original jeopardy has not been terminated). The defendant in this case did not have a reasonable belief that the proceedings were over, therefore the court affirmed further prosecution as not being in violation of double jeopardy principles. *Aldrich*, 486 N.E.2d at 735; *Berry*, 473 N.E.2d at 1118 ("In order for a defendant to be placed twice in jeopardy, his original jeopardy must have terminated.").

<sup>44</sup> See *Brown*, 432 U.S. at 166 (using consecutive sentences as a measure of whether successive prosecutions would be allowed). In *Brown*, the defendant was charged for stealing an automobile after he had pled guilty to operating a vehicle without the owner's consent. *Id.* at 163. The defendant argued that double jeopardy applied because the subsequent prosecution arose from the

The SJC's contention that Double Jeopardy did not apply was rooted in their misinterpretation that Hebb's acquittal had no bearing on the judge's declaration of a mistrial, when in fact, the acquittal effectively terminated jeopardy on both theories.<sup>45</sup>

In *Commonwealth v. Hebb*, the Massachusetts SJC discussed the issue of whether double jeopardy principles preclude the Commonwealth from retrying a defendant for a charge under the Massachusetts OUI statute on the theory of a per se violation after a judge declared a mistrial and after the jury acquitted the defendant on the impaired ability violation of the statute. The SJC failed to apply United States Supreme Court precedent in *Sanabria v. United States*. In doing so, the SJC misinterpreted the legislative intent behind the 2003 amendment of G.L.c. 90 § 24 (1)(a)(1), which added the per se violation language. The SJC wrongfully treated the two theories under the statute as alternative offenses rather than two ways of proving one incident of operating under the influence. Consequently, the SJC violated the defendant's Fifth Amendment right to protection against double jeopardy by allowing the government to pursue further prosecution.

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same incident as the charge he already pled guilty to. *Id.* The court ruled when two theories are the same for purposes of barring consecutive sentences in one trial, then successive prosecutions for each theory will also be barred. *Id.* at 166.

<sup>45</sup> See *Berry*, 473 N.E.2d at 1118 (finding mistrials not always dispositive of allowing further prosecution). When the prosecution has had a full opportunity to obtain a conviction and the defendant is acquitted, the judge's declaration of a mistrial will have no bearing on the bar for further prosecution under double jeopardy principles. *Id.* The court in *Berry* ruled that a subsequent prosecution would essentially be giving the government an unfair bite at the apple, a right that has been historically unavailable to defendants. *Id.*; see also *Fong Foo*, 369 U.S. at 142 ("[Double jeopardy was] violated when the Court of Appeals set aside the judgement of acquittal and directed that petitioners be tried again for the same offense."). *Fong Foo*, 369 U.S. at 143. An acquittal is final and is non-reviewable without putting a defendant in jeopardy. *Id.* Even if the acquittal is based upon an "egregiously erroneous" foundation, original jeopardy is terminated. *Id.*

