



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

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Governor Andrew M. Cuomo
New York State Capitol Building
Albany, NY 12224

Speaker Carl E. Heastie
New York State Assembly
Legislative Office Building, Room 932
Albany, NY 12248

Minority Leader Brian M. Kolb
New York State Assembly
Legislative Office Building, Room 933
Albany, NY 12248

Majority Leader John J. Flanagan
New York State Senate
Room 330, State Capitol Building
Albany, NY 12247

Minority Leader Andrea Stewart-Cousins
New York State Senate
Legislative Office Building, Room 907
Albany, NY 12247

Dear Governor Cuomo, Speaker Heastie, Majority Leader Flanagan, Minority Leader Stewart-Cousins, and Minority Leader Kolb:

The President's power to pardon federal crimes is sweeping and subject to limited review by the other branches of government. Our country's founders argued this power was "benign" and would be used by presidents with "scrupulousness and caution."¹ Thus far, they have generally been right. Since the Nation's founding, presidents have used this power sparingly, largely to do justice, rather than subvert it.

Yet recent reports indicate that the President may be considering issuing pardons that may impede criminal investigations. This is disturbing news, not only because it would undermine public confidence in the rule of law, but also because—due to a little-known feature of New York law that appears to be unique in its reach—a strategically-timed pardon could prevent individuals who may have violated our State's laws from standing trial in our courts as well. My staff has researched the relevant state statute and its legislative history, and can find no evidence that the Legislature intended this result. Therefore, I write to urge you to amend a law that may prevent state prosecutors from pursuing serious violations of state criminal law after a

presidential pardon.

The federalist system enshrined in the U.S. Constitution envisions two levels of government, state and federal, each with independent authority.ⁱⁱ Although crimes may be prosecuted at both levels, “‘States possess primary authority for defining and enforcing’ criminal laws, including those prohibiting the gravest crimes.”ⁱⁱⁱ The federal government may also, of course, enact and enforce criminal laws within the scope of Congress’s enumerated powers.^{iv}

An important constitutional limitation on criminal prosecutions is the Double Jeopardy Clause of the Fifth Amendment, which states: “nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.”^v This protection, rooted in the common law, reflects an important principle that a government should not be permitted multiple attempts to try an individual for the same offense. Our State’s Constitution contains a similar protection, and the Court of Appeals recently noted that “[t]he Double Jeopardy Clauses in the State and Federal Constitutions are nearly identically worded, and we have never suggested that state constitutional double jeopardy protection differs from its federal counterpart.”^{vi}

Under U.S. Supreme Court precedent, a federal prosecution poses no constitutional bar under the Double Jeopardy Clause to a subsequent state prosecution, and vice versa.^{vii} This constitutional principle reflects the independent sovereign criminal law enforcement powers of the States and the Federal Government. “The States are separate sovereigns from the Federal Government.”^{viii}

Although more than twenty states grant only the minimum double-jeopardy protection required by the Constitution, New York and several other states have added statutory protections that go beyond those requirements.^{ix} These laws generally provide limited protections against successive prosecutions under state criminal law only where another jurisdiction (such as another State) already has prosecuted the defendant for identical criminal acts or offenses. As a longtime supporter of criminal justice reform, I am proud that New York has long been among the leaders in protecting criminal defendants from facing successive punishments for the same acts.^x

Nevertheless, New York’s statutory protections could result in the unintended and unjust consequence of insulating someone pardoned for serious federal crimes from subsequent prosecution for state crimes—even if that person was never tried or convicted in federal court, and never served a single day in federal prison.

The problem arises under Article 40 of the Criminal Procedure Law. Under that law, jeopardy attaches when a defendant pleads guilty, or, if the defendant proceeds to a jury trial, the moment the jury is sworn.^{xi} If any of those steps occur in a federal prosecution, then a subsequent prosecution for state crimes “based upon the same act or criminal transaction” cannot proceed, unless an exception applies.^{xii} New York’s law provides exceptions when a *court* nullifies a prior criminal proceeding (such as when an appeals court vacates a conviction),^{xiii} or even when a federal court overturns a federal conviction because the prosecution failed to establish an element of the crime that is not an element of the New York crime.^{xiv} But there is no parallel exception for when the *President* effectively nullifies a federal criminal prosecution via pardon.

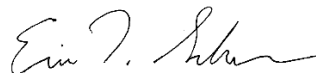
Thus, if a federal defendant pleads guilty to a federal crime, or if a jury is sworn in a federal criminal trial against that defendant, and then the President pardons that individual, this New York statute could be invoked to argue that a subsequent state prosecution is barred. Simply put, a defendant pardoned by the President for a serious federal crime could be freed from *all* accountability under federal and state criminal law, even though the President has no authority under the U.S. Constitution to pardon state crimes.^{xv}

The Legislature could not possibly have intended this result. The Court of Appeals has noted that the Legislature recognized “that the general rule barring subsequent prosecutions was too broad,” and so “added to the statute [several] exceptions in which a second prosecution is expressly permitted.”^{xvi} And, after the First Department ruled that certain state tax charges against Leona Helmsley were barred because of a prior federal prosecution,^{xvii} the Legislature amended the law to enable state tax fraud prosecutions notwithstanding a prior prosecution for a conspiracy to commit federal tax fraud.^{xviii} The statute today has twelve exceptions.^{xix}

The Legislature should take a similar route here, and do so quickly. Any amendment should be narrow and ensure only that a state prosecution is not barred by a proceeding that the President annulled by issuing a pardon. The amendment could be modeled on existing provisions that enable subsequent prosecution when a prior proceeding is nullified by court order. My team and I are confident that well-crafted legislation to close New York’s double-jeopardy loophole would not only withstand constitutional scrutiny, but would advance the cause of justice and help preserve the rule of law. I stand ready to work with you to advance such legislation.

Thank you for your attention to this important matter.

Sincerely,



Eric T. Schneiderman
Attorney General

ⁱ *Shick v. Reed*, 419 U.S. 256, 263 n.6 (1974) (quoting THE FEDERALIST No. 74) (Hamilton).

ⁱⁱ *See, e.g., Printz v. United States*, 521 U.S. 898 (1997).

ⁱⁱⁱ *Torres v. Lynch*, 136 S. Ct. 1619, 1629 n.9 (2016) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993)). *See also, e.g., United States v. Lopez*, 514 U.S. 549, 564 (1995) (recognizing that “in areas such as criminal law enforcement . . . States historically have been sovereign”).

^{iv} *See Bond v. United States*, 134 S. Ct. 2077, 2086 (2014).

^v U.S. CONST. amend. V.

^{vi} *Matter of Suarez v. Byrne*, 10 N.Y.3d 523, 534 (2008); *cf. Matter of Polito v. Walsh*, 8 N.Y.3d 683, 690 (2007) (noting dual-sovereignty doctrine applicable under Fifth Amendment and State Constitution, and holding that CPL § 40.20(1) prohibition against successive prosecutions for the “same offense” offers “at most, no more double jeopardy protection than the Constitutions do”).

^{vii} “[U]nder what is known as the dual-sovereignty doctrine, a single act gives rise to distinct offenses—and thus may subject a person to successive prosecutions—if it violates the laws of separate sovereigns.” *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1867 (2016); *see also id.* at 1871 (noting that “States rely on authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment,” and that “State prosecutions therefore have their most ancient roots in an inherent sovereignty unconnected to, and indeed pre-existing, the U.S. Congress”) (citations and quotation marks omitted).

^{viii} *Id.* at 1871.

^{ix} *See, e.g.,* Thomas White, *Limitations Imposed on the Dual Sovereignty Doctrine by Federal and State Governments*, 38 N. KY. L. REV. 173, 207–17 (2011). According to this article, twenty-four states, including Connecticut, Massachusetts, Rhode Island, and Vermont, do not impose double-jeopardy requirements beyond what the U.S. Constitution requires, thus allowing full application of the dual sovereignty doctrine. *Id.* at 215–16.

^x Although other States have also adopted statutory double-jeopardy protections, New York’s statute generally provides greater double-jeopardy protections for defendants than those States’ statutes. For example, some states’ double jeopardy statutes apply only where the prior prosecution was by a particular sovereign listed in the statute. *See, e.g.,* N.J. Stat. Ann. 2C:1-11 (providing double jeopardy protection only with respect to certain State prosecutions that follow federal prosecutions, but not prosecutions in other states); *Evans v. State*, 725 So. 2d 613, 658-59 (Miss. 1997) (construing statute to provide double-jeopardy protection based on other States’ prosecutions, but not federal prosecutions). Many States’ statutes limit successive prosecutions only for identical offenses, or where the acts or elements required to be proven in the second prosecution are identical to the acts required to be proven in the first. *See People v. Homick*, 289 P.3d 791 (Cal. 2012); *State v. Cargill*, 711 A.2d 318, 321 (N.J. App. Div. 1998). New York’s statute already provides greater protection for defendants on both of those fronts: it prohibits successive prosecutions based on federal and other States’ prosecutions, and it provides protection based not only on the same offense, but on the same “act or criminal transaction.” CPL § 40.20.

^{xi} CPL § 40.30(1) (defining when a person “is prosecuted” within the meaning of Article 40 as when the person pleads guilty; when, in a jury trial, the jury has been impaneled and sworn; or when, in a bench trial, a witness is sworn).

^{xii} CPL § 40.20(2). It is conceivable that, depending on the factual circumstances, federal statutes, and state statutes in question, that a state prosecution would not be barred under § 40.20.

^{xiii} CPL § 40.30(3–4).

^{xiv} CPL § 40.20(2)(f) (providing an exception to double-jeopardy bar is “[o]ne of the offenses consists of a violation of a statutory provision of another jurisdiction, which offense has been prosecuted in such other jurisdiction and has there been terminated by a court order expressly founded upon insufficiency of evidence to establish some element of such offense which is not an element of the other offense, defined by the laws of this state”); *see Matter of Polito v. Walsh*, 8 N.Y.3d 683, 687 (2007) (holding that state murder prosecution could proceed after federal conviction for murder in aid of racketeering was overturned for insufficient evidence that the crime was committed “in aid of racketeering”).

^{xv} *Ex parte Grossman*, 267 U.S. 87, 113 (1925). The power to pardon state crimes in New York is reserved to the Governor. N.Y. CONST. art. IV, § 4.

^{xvi} *People v. Rivera*, 60 N.Y.2d 110, 114 (1983).

^{xvii} *People v. Helmsley*, 170 A.D.2d 209 (1st Dep't 1991).

^{xviii} CPL § 40.20(2)(i).

^{xix} Nine of the exceptions are enumerated in CPL § 40.20(2)(a–i). Three more exceptions are stated in CPL § 40.30(2–4).