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Legal Sidebar

When Does Double Prosecution Count as Double Jeopardy?

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UPDATE: On June 17, 2019, the Supreme Court declined, by a vote of 7 to 2, to overrule its dual-sovereignty doctrine under the Double Jeopardy Clause, and affirmed Gamble's conviction. The original post from August 15, 2018 is below.

After a broken headlight led to the discovery of a loaded handgun in Terance Martez Gamble's car, he found himself in a familiar spot: pleading guilty to a felony in Alabama court, this time for having a firearm despite a prior robbery conviction. A few months later, however, Gamble would find himself pleading to having that handgun all over again—only now in federal court, for a substantively overlapping federal charge. On June 28, 2018, following a failed bid by Gamble to have that second conviction overturned in the federal court of appeals, the U.S. Supreme Court agreed to consider whether that federal prosecution violated Gamble's right under the Fifth Amendment's Double Jeopardy Clause not to be put in jeopardy twice for the same crime. And, with *Gamble v. United States*, the Court may well rule that it did, despite long having said just the opposite.

Gamble's case challenges what, until his appeal, seemed like a firmly settled point of constitutional law. Although the Double Jeopardy Clause provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb," the Supreme Court has made clear that that protection has its limits. And one of the most significant arises in a case like Gamble's, where federal and state authorities both seek to prosecute a defendant for the same conduct. For, despite some pointed criticism over the years, the Court has long held that such double prosecutions do not amount to double jeopardy.

This judicial "carve-out" from the Fifth Amendment—called the *separate* or *dual sovereigns exception*—has enjoyed a "long, unbroken, unquestioned" run in the Court's Double Jeopardy jurisprudence. And, according to the Court, the justification for it boils down to constitutional basics—indeed, to the "basic structure of our federal system." Because our federalist system

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"split[s] the atom of sovereignty," the states and the federal government each enjoy the authority to enact their own, separate criminal laws. And when those laws happen to overlap, by outlawing the same conduct, a single wrongful act will end up spawning two separate offenses, one under each "sovereign's" law. If federal and state prosecutors then separately decide to file charges for that same misconduct, the defendant will face two prosecutions for two legally distinct offenses, one state and the other federal. And as those prosecutions will therefore not involve "the same offense," the Double Jeopardy Clause simply "drops out of the picture."

Gamble's case is a hornbook example. As he was facing prosecution in Alabama court for unlawfully having a handgun, a federal grand jury was preparing to indict him for a virtually identical offense under federal law. It so happened that Gamble ended up in state court, pleading to the state charge, first. After pleading to that state offense, Gamble then sought to have the federal charge dismissed, citing the Double Jeopardy Clause. But the federal district court refused, pointing to the separate-sovereigns exception. Effectively out of options, Gamble then pled to the federal charge—tacking another three years' imprisonment onto his one-year state sentence. An appeal to the U.S. Court Appeals for the Eleventh Circuit followed, but also fizzled, again due to the separate-sovereigns exception.

In his petition for writ of certiorari Gamble has therefore asked the court to resolve a single question: whether the time has come for the separate-sovereigns exception to go. And by taking the opportunity to revisit that question, the Court may well make a major about-turn in its Double Jeopardy jurisprudence.

But to do that, the Court would first have to undo a lot of case law—by the government's count, more than 150 years' worth of the Court's cases, reaching as far back as 1852, and continuing up until just two years ago, with *Puerto Rico v. Sánchez Valle*. Nevertheless, picking up on a suggestion floated by Justices Ginsburg and Thomas in *Sánchez Valle*, Gamble argues that a "fresh examination" of the exception is long overdue. As he points out, the Double Jeopardy Clause itself says nothing about sovereigns; it instead speaks simply of prosecutions for "the same *offense*." That choice of words—and, arguably, their original meaning—could suggest that what should matter for double jeopardy is not the "sovereign" doing the prosecuting, but the conduct being punished. And, text aside, Gamble contends that history has since revealed the separate-sovereigns exception to be an unjust anachronism, now that the Double Jeopardy Clause has been applied to the states, and given that state authorities are increasingly teaming up with federal prosecutors, who are themselves charged with policing an ever expanding universe of federal crimes. The government, meanwhile, has urged the Court to stick by its long-held views on the separate-sovereigns exception, pointing to many of the same reasons the Court itself has given over the years. And the government points as well to the Department of Justice's longstanding policy presuming that "a prior prosecution, regardless of result, has vindicated [any] relevant federal interest," arguably diminishing the likelihood of a duplicative prosecution by the federal government.

Although it is ultimately up to the Supreme Court to decide the fate of the separate-sovereigns exception, Congress does have some say on one part of that carve-out—the scope of federal

prosecutions. Congress could, for example, strengthen the Department of Justice's current "*Petite* policy," presuming that a prior prosecution has already vindicated any federal interest, by codifying a general requirement that the Attorney General certify that a state prosecution has in fact left some important federal interest "demonstratively unvindicated" before pursuing a federal case. Indeed, Congress has done just that before, in the context of certain hate crimes under 18 U.S.C. § 249(b)(1)(C) and (D). Less clear, however, is how much that requirement would really restrain successive prosecutions, given the "great deference" courts show prosecutorial decisions of that kind, if they review them at all.

But even if the Supreme Court were to overturn its longstanding recognition of the separate-sovereigns exception, that decision may only modestly affect prosecutorial practice. A major reason is that these successive prosecutions already appear to be uncommon. Indeed, about half of the states have forbidden successive prosecutions to varying degrees. And the DOJ continues to observe its *Petite* policy, without, however, creating any enforceable rights for defendants.

The *Gamble* case may nevertheless have significant collateral legal effects. A ruling for Gamble, for instance, could affect the availability of the Sixth Amendment right to counsel for some defendants, like those facing federal and state prosecutors teamed up for joint taskforces, since the federal courts have generally looked to double-jeopardy jurisprudence to decide what counts as an "offense" subject to that Sixth Amendment right. And, perhaps more notably, a win for Gamble could also indirectly strengthen the President's pardon power, by precluding a state from prosecuting an already-pardoned defendant who has gone to trial on an overlapping offense.

But for Gamble, and defendants like him, a win in the Supreme Court would mean something more much concrete—the difference between freedom and more time behind bars. His case is expected to be heard sometime in the next several months.

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