"THE FEDERAL CORNER"

What Is The Supreme Court Going To Do With A Separate Sovereigns Issue?

Buck Files

On June 28, 2018 the Supreme Court granted Terance Martez Gamble's Petition for Writ of Certiorari. The question presented: Whether the Court should overrule the "separate sovereigns" exception to the Double Jeopardy Clause. Gamble was involved with two sovereigns: The State of Alabama and the United States. He had been convicted of a robbery in an Alabama state prosecution in 2008. Some seven years later, he was prosecuted again in an Alabama state court as a prohibited person in possession of a firearm in violation of Ala. Code § 13A-11-72, convicted and served a one-year sentence. Before the Alabama prosecution was completed, Gamble was indicted in the United States District Court for the Southern District of Alabama for a violation of 18 U.S.C. § 922(g)(1) as a prohibited person in possession of a firearm. The Government based its charge on the same conduct that supported Gamble's Alabama conviction.

Gamble's lawyer filed a motion to dismiss the indictment and a hearing was had before Judge Kristi K. DuBose of the United States District Court for the Southern District of Alabama. Her Order Denying Relief reads, in part, as follows:

> Gamble argues that the dual prosecution by this Court and the State of Alabama subjects him to Double Jeopardy.
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> While the Court has consistently expressed concern over the possible abuses of dual prosecutions, *See Bartkus v. Illinois*, 359 U.S. 121, 138, 79 S.Ct. 676, 3 L.Ed.2d 684 (1959) ('the greatest self-restraint is necessary when that federal system yields results with which a court is in little sympathy'); *United States v. Lanza*, 260 U.S. 377, 383, 43 S.Ct. 141, 67 L.Ed. 314 (1922) ('in the benignant spirit' in which the federal system is administered, defendants should be subject to dual state-federal prosecutions only 'in instances of peculiar enormity'), Quoting *Fox v. Ohio*, 46 U.S. (5 How.) 410, 434, 12 L.Ed. 213 (1847), and while the *Lanza-Abbate-Bartkus* doctrine has met harsh criticism, *See, e. g.,* Harrison, Federalism and Double Jeopardy; A Study in the Frustration of Human Rights, 17 U. Miami L.Rev. 306 (1963); Fisher, Two Sovereignties and the Intruding Constitution, 28 U.Chi.L.Rev. 591, 599 (1961); Grant, The Lanza Rule of Successive Prosecutions, 32 Colum.L.Rev. 1309, 1329 (1932), the doctrine has nonetheless been applied consistently by the Circuit Courts. *See, e.g., United States v. Harris*, 551 F.2d 621 (5th Cir.), Cert. denied, 434 U.S. 836, 98 S.Ct. 125, 54 L.Ed.2d 98 (1977); *United States v. Cordova*, 537 F.2d 1073, 1075 (9th Cir.), Cert. denied, 429 U.S. 960, 97 S.Ct. 385, 50 L.Ed.2d 327 (1976); *United States v. Villano*, 529 F.2d 1046, 1061 (10th Cir.), Cert. denied, 426 U.S. 953, 96 S.Ct. 3180, 49 L.Ed.2d 1193 (1976); *United States v. Johnson*, 516 F.2d 209, 212 (8th

> Cir.), Cert. denied, 423 U.S. 859, 96 S.Ct. 112, 46 L.Ed.2d 85 (1975); *United States v. Barone*, 467 F.2d 247, 250 (2d Cir. 1972). Moreover, the Supreme Court has recently reaffirmed the dual sovereignty doctrine. *See United States v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978) (Indian tribe and federal government are dual sovereigns); *Rinaldi v. United States*, 434 U.S. 22, 98 S.Ct. 81, 54 L.Ed.2d 207 (1977) (dictum) (dual sovereignty principle is inherent in the federal system). Unless and until the Supreme Court overturns *Abbate*, appellant's double jeopardy claim must fail.
> *United States v. Gamble*, 2016 WL 3460414 (S.D. Ala. June 21, 2016)

Gamble then gave notice of appeal to the United States Court of Appeals for the Eleventh Circuit. A panel of the Circuit (Circuit Judges Hull, Wilson and Anderson) affirmed the district court's Order Denying Relief. The *per curiam* opinion reads, in part, as follows:

> The district court did not err by determining that double jeopardy did not prohibit the federal government from prosecuting Gamble for the same conduct for which he had been prosecuted and sentenced for by the State of Alabama, because based on Supreme Court precedent, dual sovereignty allows a state government and the federal government to prosecute an individual for the same crime, when the States rely on authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment. Accordingly, we affirm.
> *United States v. Gamble*, 694 F. App'x 750 (11th Cir. 2017)

On October 24, 2017, Gamble filed his Petition for Writ of Certiorari. The Petition reads, in part, as follows:

> STATEMENT OF THE CASE
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> 1. In 2008, Terance Gamble was convicted of second-degree robbery in Mobile County, Alabama. C.A. App. 12, 37. Because second-degree robbery is a felony offense, both federal and state law forever barred him from possessing a firearm.
> 2. More than seven years later, on November 29, 2015, Gamble was driving in Mobile when a police officer pulled him over for a faulty tail light. *See* C.A. App. 49-50. The officer smelled marijuana coming from Gamble's car and, after searching it, discovered two baggies of marijuana, a digital scale, and a 9 mm handgun. *Id.*
> 3. Alabama prosecuted Gamble for possessing marijuana and for being a felon in possession of a firearm. The State's felon-in-possession statute, under which Gamble was convicted, 'prohibits a convicted felon from possessing a pistol.' *Ex parte Taylor*, 636 So. 2d 1246, 1246 (Ala. 1993); *see* Ala. Code §§ 13A-11-70(2); Pet. App. 5a-6a. Gamble received a one-year sentence, which he finished serving on May 14, 2017.
> 4. While the State's prosecution was ongoing, the federal government charged Gamble for the same offense under federal law: being a felon in possession of a firearm. *See* 18 U.S.C. § 922(g)(1). The federal statute prohibits convicted

felons from 'possess[ing] in or affecting commerce[] any firearm.' *Id*. The government based this charge on 'the same incident of November 29, 2015 that gave rise to his state court conviction.' Pet. App. 6a; *see also* C.A. App. 12.

Gamble raised one and only one objection to his federal prosecution: that it violated his 'Fifth Amendment [right] against being placed twice in jeopardy for the same crime.' C.A. Supp. App. 10. And he moved to dismiss his federal indictment on that ground. *Id.*

The District Court, in a thorough opinion, denied Gamble's motion (as it was bound to do) on the basis of this Court's separate-sovereigns exception. '[U]nless and until the Supreme Court overturns' that doctrine, the District Court reasoned, 'Gamble's Double Jeopardy claim must likewise fail.' Pet. App. 10a.

Gamble then entered a conditional guilty plea, specifically preserving his right to appeal the District Court's denial of his double-jeopardy claim. C.A. App. 33, 45-46. He was sentenced to 46 months' imprisonment, a three-year period of supervised release, and a $100 assessment. *Id*. At 15-20. He is set to be released from federal prison on February 16, 2020 – nearly three years after he would have been released from state prison.

5. Gamble appealed the 'issue preserved in writing in his Plea Agreement and preserved on the record at his Plea Hearing' – namely, whether the federal prosecution violated 'his rights pursuant to the Double Jeopardy clause of the Fifth Amendment.' C.A. Supp. App. 12. The Eleventh Circuit issued a *per curiam* opinion affirming the decision below. '[U]nless and until the Supreme Court overturns' the separate-sovereigns exception, the court reasoned, Gamble's 'double jeopardy claim must fail.' Pet. App. 9a.

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THIS CASE IS AN IDEAL VEHICLE

1. *This case is as clean a vehicle as the Court will ever get for taking up this question. Gamble raised only one defense to his federal conviction – that it violated the Double Jeopardy Clause. When the District Court denied Gamble's motion to dismiss his indictment on that ground, Gamble expressly preserved his right to raise this issue on appeal. He then duly raised in on appeal before the Eleventh Circuit. Both decisions below hinged exclusively on the validity of this Court's separate-sovereigns exception. Neither the District Court nor the Court of Appeals even hinted that any procedural bar or other substantive issue impacted (or could have impacted) their decisions, or that there is any basis for maintaining Gamble's federal conviction if this Court overrules the separate-sovereigns exception. If ever there were a clean vehicle for revisiting the separate-sovereigns exception, this is it.* (emphasis added)
2. It is not every day that this Court is presented with a clean vehicle on this issue. Gamble's counsel is aware of just two petitions purporting to present this question since Justices Thomas and Ginsburg called for reconsideration of

> the issue. The first was denied after respondent raised a number of vehicle problems. *See Walker*, 137 S.Ct. 1813 (denying certiorari). The second remains pending before this Court. *See Tyler v. United States*, No. 17-5410. While *Tyler* may be a suitable vehicle, it arises in an interlocutory posture and has a complex procedural history. *See United States v. Tyler*, 220 F. Supp. 3d 563, 570-71 (M.D. Pa. 2016).
> *Here, Gamble preserved the question presented at every turn, and that question is undeniably outcome determinative. He has no other defense; proceedings are otherwise complete; and neither court below suggested any alternative round, procedural or substantive, for denying his motion to dismiss. In short, Terance Gamble is sitting in prison because of the separate-sovereigns exception; overruling that exception would set him free. This is the 'appropriate case' Justices Ginsburg and Thomas envisioned. Sanchez Valle, 136 S. Ct. at 1877 (Ginsburg, J., concurring). The Court should not pass it up.* (emphasis added)
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> CONCLUSION
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> For the foregoing reasons, the Court should grant the petition for a writ of certiorari.
> *Gamble v. United States*, S. Ct. No. 17-646 (Petition for Writ of Certiorari. October 24, 2017)

Gamble's Brief on the Merits has been filed. *Gamble v. United States*, S. Ct. No. 17-646 (Petitioner's Brief on the Merits. September 4, 2018). The Government has until October 25th to respond. I realize the insanity of predicting the outcome of this case without having had the opportunity to see the Government's Brief on the Merits. Two paragraphs, though, in the Government's Response to Petitioner's Petition for Writ of Certiorari support my prediction that Gamble will not be successful.

> *Under petitioner's interpretation of the Double Jeopardy Clause, one sovereign's efforts (successful or not) to enforce its own laws would vitiate the other sovereign's similar law-enforcement prerogatives. But that cannot be squared with the Constitution's bedrock structure of governance. As this Court has recognized, 'undesirable consequences would follow' if prosecution by any one State could bar prosecution by the federal government. Abbate v. United States, 359 U.S. 187, 195 (1959). '[I]f the States are free to prosecute criminal acts violating their laws, and the resultant state prosecutions bar federal prosecutions based on the same acts,' the Court has explained, 'federal law enforcement must necessarily be hindered.' Ibid. Similarly, if a federal prosecution could bar prosecution by a State, the result would be a significant interference with the States' historical police powers. See Heath, 474 U.S. at 93 ('Foremost among the prerogatives of sovereignty is the power to create and enforce a criminal code.').* (emphasis added)
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> The dual-sovereignty doctrine thus 'finds weighty support in the historical

understanding and political realities of the States' role in the federal system and in the words of the Double Jeopardy Clause itself.' *Heath*, 474 U.S. at 92; see, *e.g.*, *Wheeler*, 435 U.S. at 320, 330 (it rests 'on the basic structure of our federal system' and the 'very words of the Double Jeopardy Clause'); *Rinaldi v. United States*, 434 U.S. 22, 28 (1977) (per curiam) ('[I]n our federal system the State and Federal Governments have legitimate, but not necessarily identical, interests in the prosecution of a person for acts made criminal under the laws of both.'). *As Justice Holmes stated nearly a century ago, the dual sovereignty doctrine is 'too plain to need more than statement.' Westfall v. United States*, 274 U.S. 256, 258 (1927). (emphasis added)
Gamble v. United States, S. Ct. No. 17-646 (Brief of Respondent United States in Opposition. January 16, 2018)

[My Thoughts]

1. This case has garnered a great deal of attention. To date, *amicus curiae* and *amici curiae* briefs have been filed by the following:
   - Howard University School of Law Thurgood Marshall Civil Rights Center;
   - Law Professors;
   - U.S. Navy-Marine Corps Appellate Defense Division, et al;
   - Constitutional Accountability Center, et al;
   - Criminal Defense Experts;
   - National Association of Criminal Defense Lawyers, et al;
   - Criminal Procedure Professors Stephen E. Henderson, et al; and,
   - Senator Orrin Hatch.

2. My favorite way of keeping up with what's happening at the Supreme Court is by reading the SCOTUS blog. Its internet address is www.scotusblog.com/case-files/terms/ot2018. It has all of the cases that are pending before the Supreme Court, the question presented, the important filings and the date for oral argument in each case.

3. Gamble reminds me of a client who was prosecuted by three sovereigns when I was with the 1st Marine Brigade FMF at Kaneohe Bay, Oahu, Hawaii, in 1967. I cannot remember all of the details, but it involved an insurance fraud scheme. His bad luck caused him to be prosecuted at a special court-martial of the Marine Corps, in a Hawaii district court and in a United States district court. All of the prosecutions were based on the same set of facts. His only luck was bad luck.