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The Supreme Court considers nixing a “double jeopardy” loophole

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When motorist Rodney King received more than 50 baton-strikes from police on a Los Angeles roadside in 1991, state charges against the four officers failed to produce convictions. But after another round of prosecution in which the federal government charged the officers with violating Mr King’s civil rights, two of the attackers were sentenced to 30 months in prison. Ordinarily, the Fifth Amendment’s prohibition on double jeopardy—“nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb"—shields individuals from being prosecuted (and punished) repeatedly for the same crime. Since 1850, though, the Supreme Court’s “separate sovereigns” doctrine has permitted such dual prosecutions on the theory that each level of government gets to enforce its own laws.

That long-standing exception to the double-jeopardy rule will be reconsidered on December 6th when the justices take up *Gamble v United States*. *Gamble* concerns a more recent and less notorious crime on America’s roads. In 2015, when Terance Marez Gamble was pulled over in Mobile, Alabama for having a broken headlight, the officer smelled marijuana and found a gun in his car. As a convicted felon (he had been found guilty of second-degree robbery in 2008), Mr Gamble was barred from possessing a firearm. Alabama prosecuted Mr Gamble for this crime and he spent one year in prison, but the federal government soon piled in, charging him for the same offence under federal law and putting Mr Gamble behind bars until February 16th 2020.

Rather than contest the facts on the second go-around, Mr Gamble wagered his freedom on a bold constitutional claim: that the “separate sovereigns” principle—entrenched though it may be—violates the constitution. The federal district court refused to throw out the federal conviction, noting that only the Supreme Court is empowered to find dual prosecutions inconsistent with the double-jeopardy clause. On appeal, the Eleventh Circuit Court of Appeals sided with the lower court. After mulling whether to take the case for several months last spring, the Supreme Court finally agreed to add the controversy to its docket on the last day of its 2017-2018 term.

The issue is not new to the justices. Just two years ago, in a highly unusual cross-ideological pairing, Justice Ruth Bader Ginsburg, joined by Justice Clarence Thomas, wrote separately in *Puerto Rico v Sanchez Valle* to suggest that the separate-sovereigns doctrine was ripe for “fresh examination”. The bar on double jeopardy was meant “to shield individuals from the

harassment of multiple prosecutions for the same misconduct", Justice Ginsburg wrote for herself and her much more conservative colleague. "Current 'separate sovereigns' doctrine hardly serves that objective", she added, with a citation to Alexander Hamilton, as "states and nation are 'kindred systems' yet 'parts of ONE WHOLE'". Not hiding their motivation for filing the concurrence, the justices invited future litigants to dial up a case exactly like *Gamble*: "The matter warrants attention in a future case in which a defendant faces successive prosecutions by parts of the whole USA."

Evidently at least two more justices agreed to hear *Gamble*, as four must vote to take a case, but it will take five to overturn the 168-year-old precedent that gives states and the federal government licence to prosecute individuals separately for the same infraction. The ratio of amicus briefs is rather lopsided: eight filings support Mr Gamble and oppose the double-jeopardy exception, while only three encourage the justices to stay the course and keep it around. Mr Gamble's boosters are impressively diverse: left-leaning organisations like the American Civil Liberties Union and the Constitutional Accountability Centre are joined with the Rutherford Institute and the Cato Institute on the right. Republican Senator Orrin Hatch filed his own 44-page brief urging the justices to quell the "harm to individual liberty suffered by criminal defendants" who are subjected to federal prosecution for crimes that have until recently been under "the states' power to criminalise and prosecute".

The federal government counters that the Supreme Court has authored an "unbroken line" of rulings upholding the dual sovereigns doctrine for a reason: violations of state and federal law are "distinct" offences under the double-jeopardy clause, and both "text and federalism" bear that out. The courts, the government wrote in its brief to the justices, should not impose "a one-size-fits-all judicial reinterpretation" of double jeopardy. Courts "can, and regularly do" take care to avert defendants' over-punishment "by taking account of previous prosecutions by different sovereigns", but neither states nor the federal government should be stopped from enforcing their laws. There is "no sound reason for suddenly reversing course".

Some have noted that if the justices do reverse course, the impact of a presidential pardon may rise, as states would find if more difficult to prosecute people who have seen federal prosecutions lifted from their shoulders. That is indeed a possible consequence. But there is little cause to think that such a ruling would undermine efforts to hold various players in Donald Trump's orbit accountable for their alleged misdeeds. As Teri Kanefield and Jed Shugerman note, Robert Mueller, the special counsel, is well aware of double-jeopardy rules in states like New York and Virginia where his witnesses reside and may have strategised his charges around them. The wide scope of state criminal laws gives prosecutors a long menu from which to choose when pursuing prosecutions that do not violate the constitution by overlapping with federal charges. Mr Mueller's investigation is unlikely to be impeded no matter how *Gamble* turns out when it is decided in the spring.