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Jim Dey: Status quo of 'double jeopardy' in some serious jeopardy

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When former University of Illinois graduate student Brendt Christensen was arrested in June 2017 in connection with the disappearance and suspected death of a visiting Chinese scholar, both state and federal prosecutors could have pursued the case.

Ultimately, federal prosecutors charged Christensen with kidnapping and killing Yingying Zhang. They are seeking the death penalty.

But if somehow the feds mishandled the case, Champaign County State's Attorney Julia Rietz would have the option under state law of charging the 29-year-old Christensen with murder.

That alternative applies even in the face of the U.S. Constitution's prohibition on "double jeopardy" — being tried twice for the same offense.

The Fifth Amendment states "... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." In reality, this type of double jeopardy — being tried once in federal court and then again in state court for the same offense — is legally permissible under the "separate sovereigns" doctrine that establishes the federal government and the states as dual jurisdictions.

That has been the law for decades.

But it might not be for much longer if an Alabama man — Terance Gamble — wins his challenge to the separate-sovereigns doctrine before the U.S. Supreme Court. Oral arguments are scheduled for Thursday.

After Gamble was pulled over on a traffic charge in 2015, authorities found marijuana, a digital scale and a handgun.

The state charged him with drug offenses and being a felon in possession of a firearm. He was sentenced to one year in state prison.

Like the state, federal prosecutors charged Gamble with being a felon in possession of a firearm. He was sentenced to nearly four years in federal prison.

The high court has twisted itself into a knot on the issue.

Before agreeing to hear Gamble's case June 28, justices devoted 11 consecutive conferences to the question.

There is reason to think the justices might be willing to overturn the long-standing separate-sovereigns doctrine because justices at opposite ends of the ideological spectrum — Ruth Ginsburg on the left and Clarence Thomas on the right — have expressed misgivings about current law.

Prominent national cases and less-well-known local cases have raised the "separate sovereigns" issue.

After Los Angeles police officers were acquitted of criminal violations in the Rodney King beating case in the 1990s, federal prosecutors indicted the officers and won convictions and prison sentences in federal court.

Years ago, a Champaign police officer who was illegally growing marijuana in Iroquois County was convicted and sentenced to probation.

Federal prosecutors from the Central District of Illinois then charged the officer in federal court and won a conviction that sent him to prison.

More recently, a big-time Paxton drug dealer — Eddie "Migo" Ramirez — won a reversal of his 30-year federal prison sentence because the government violated his right to a speedy trial.

At the behest of federal prosecutors, Macon County State's Attorney Jay Scott reindicted Ramirez on state charges of drug dealing.

Ultimately, Ramirez pleaded guilty in exchange for a 10-year sentence.

But before pleading guilty, Ramirez fought the state charges on double-jeopardy grounds.

He relied on a state law that bars a second prosecution if the first prosecution "resulted in either a conviction or acquittal."

A state appeals court concluded that overturning Ramirez's conviction on speedy-trial grounds did not block a retrial because "an acquittal generally requires some resolution of a defendant's factual guilt or innocence."

The federal government makes a variety of arguments for maintaining the separate-sovereigns status quo, focusing both on the text of Fifth Amendment and the policy behind it.

"The text of the double-jeopardy clause bars successive prosecution and punishment for the same offense, the government emphasizes, not for the same conduct," legal analyst Amy Howe wrote Thursday onSCOTUSblog.

"And when it uses the term 'offense,' the government continues, the double-jeopardy clause is referring to the violation of a law.

"The same conduct can violate two different sovereigns' laws and constitute two different offenses ..."

The federal government also asserts that current law is simple to apply and that changing it could result in unintended complications.

"For example, under Gamble's interpretation, the U.S. or a state government would not be able to prosecute a foreign terrorist if a foreign government had also tried him," Howe wrote.

Gamble's lawyers also rely on text and policy arguments.

In briefs, they have told the justices that "nothing in the text points to any exceptions to the double-jeopardy rule."

They also argue the separate-sovereigns doctrine is "inconsistent with the purpose of the double-jeopardy clause" and note that when the double-jeopardy clause was written, it did not apply to the states.

Since then, the Fifth Amendment has been incorporated to the states through the 14th Amendment.

Among the prominent groups supporting Gamble with amicus briefs are the CATO Institute, a libertarian organization; the American Civil Liberties Union; and Sen. Orrin Hatch, R-Utah.

Among those opposing Gamble with amicus briefs are attorneys general from 36 states, including Illinois' Lisa Madigan; the National Indigenous Women's Resource Center; and the Congress of American Indians.