



## State-Federal ‘Double Jeopardy’ Case to Be Heard by Supreme Court

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The legal doctrine that allows states and the federal government to separately prosecute a person for the same alleged crime could be upended or reaffirmed depending on how the U.S. Supreme Court rules in a case before the justices on Thursday.

In *Terance Martez Gamble v. United States of America*, lawyers for Gamble, an Alabama man now serving a prison sentence for state and federal gun possession charges, argue that the court should abandon what’s known as the “separate sovereigns” exception.

The exception provides a pathway for states and the federal government to both prosecute someone for the same activity, without running afoul of the “double jeopardy” clause of the Fifth Amendment, which prohibits multiple prosecutions for the same offense.

Gamble’s attorneys argue that the exemption is incompatible with the double jeopardy clause and that it “survives only as a remnant of a bygone constitutional era—‘the kind of doctrinal dinosaur or legal last-man-standing,’” and should be overturned.

They characterize the doctrine as being “at war” with the original meaning of the double jeopardy clause.

But lawyers for the U.S. government counter that the Supreme Court has ruled for nearly two centuries that a criminal act can amount to a distinct “offense” at both the state and federal level.

They say that Gamble’s case presents no reason for changing course with the separate sovereigns precedent.

“For nearly 170 years, repeatedly and without exception, this Court has relied on the plain meaning of ‘offence’ and principles of federalism to recognize that state and federal offenses are not the ‘same,’” the government’s brief argues.

It adds: “Unless both the conduct and the laws are deemed identical, successive prosecutions do not fall within the defendant-protective purposes” of the double jeopardy clause.

Attorneys General and other officials for 36 states submitted a brief in support of the U.S., as did local government groups, including the National Association of Counties, the National League of Cities, U.S. Conference of Mayors and the National Sheriffs’ Association.

The American Civil Liberties Union, the libertarian-leaning Cato Institute, the National Association of Criminal Defense Lawyers and retiring U.S. Sen. Orrin Hatch, a Utah Republican, are among those who have registered support for Gamble's position.

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There's currently special attention on the case because it could complicate future state efforts to take legal action against Paul Manafort, President Trump's former campaign chairman, who special counsel Robert Mueller III prosecuted for tax and bank fraud. It's possible Trump could pardon Manafort for his federal convictions.

Gamble, back in 2008, was convicted in Mobile County, Alabama of second-degree robbery, a felony, which then prohibited him from legally possessing a firearm under state and federal law.

In 2015, a police officer pulled him over for having a faulty headlight. A brief filed on his behalf says the officer who made the traffic stop smelled marijuana, searched Gamble's car, and found two baggies of marijuana, a digital scale and a 9 millimeter handgun.

Alabama prosecuted Gamble for possessing marijuana and breaking a state law that bars convicted felons from having handguns. He received a one-year sentence.

While the state was pursuing its case, the federal government charged Gamble for being a felon in possession of a firearm based on the same 2015 incident. Faced with the federal charge in district court, Gamble's objection was that the federal prosecution was a violation of his Fifth Amendment rights under the double jeopardy clause.

The district court rejected this argument, saying that unless and until the Supreme Court overturns the separate sovereigns exception, Gamble's double jeopardy claim was invalid.

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At this point, Gamble entered a conditional guilty plea and was sentenced to 46 months in prison. The federal sentence was set to run concurrently with the one-year state sentence.

Gamble next appealed to the 11th Circuit Court of Appeals, which affirmed the district court decision. The appeals court, too, pointed to the separate sovereigns doctrine in explaining its ruling.

Four law professors, including Paul Cassell, at the University of Utah, and Stuart Banner, at the University of California Los Angeles, who filed a brief backing Gamble's Supreme Court case, contend that the dual sovereignty doctrine did not exist before the mid 1800s.

"At the Founding and for several decades thereafter, a prosecution by one sovereign was understood to bar a subsequent prosecution by all other sovereigns," they write.

"Defendants today enjoy a weaker form of double jeopardy protection than they did when the Bill of Rights was ratified," the professors add.

They make a case that dual sovereignty emerged in a series of cases in the years before the Civil War.

The Supreme Court, the scholars say, invented the concept largely to prevent “free” states from rushing to court with cases that would, in turn, block federal legal action in situations involving federal laws dealing with the capture of escaped slaves.

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"Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either," reads the court's opinion in the 1852 case *Moore v. Illinois*, which centered on a state conviction for harboring a fugitive slave.

A later ruling that bolstered the doctrine came in the 1922 Supreme Court case *United States v. Lanza*, which featured bootlegger defendants during the Prohibition era convicted of violating liquor laws in Washington state, and indicted on similar federal charges.

Here the professors say the court was concerned less with the original meaning of the double jeopardy clause than with the rampant disregard for Prohibition. “Prohibition, like slavery, was an issue as to which states were certain to nullify federal policy if they were given half a chance,” they write in their brief. “The purpose of dual sovereignty was to cut off that opportunity.”

“Dual sovereignty was not part of the constitutional design,” they add. “It is an accident of history.”

The local government groups say in their filing supporting the United States that the dual sovereignty doctrine is a recognition of principles outlined in the 10th Amendment, which specifies that powers not delegated to the federal government by the Constitution, nor prohibited by it to the states, are reserved for the states, or the people.

In addition, the groups argue that toppling the doctrine would hinder state and local cooperation with federal authorities and that it would increase competition between law enforcement agencies.