

## Two Bites at the Same Apple—Supreme Court Rules Defendants Can Be Prosecuted by Federal and State Governments for the Same Crime

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On June 17, the Supreme Court declined to overturn the Dual Sovereign Doctrine, maintaining individuals may be prosecuted under both federal and state law for the same criminal conduct. The Court's decision was a loss for Petitioner Terance Martez Gamble, who had been prosecuted twice for illegal possession of a firearm, first in state court and then in federal court.

In 2008, Gamble pleaded guilty to felony robbery in the state of Alabama.<sup>[1]</sup> Seven years later during a traffic stop for a broken tail light, an officer discovered a gun, marijuana, and marijuana paraphernalia in Gamble's car.<sup>[2]</sup> As a convicted felon, Gamble was not permitted to own a gun under Alabama state law, and the state prosecuted him for illegal possession of a firearm.<sup>[3]</sup> In 2016, the federal government indicted Gamble for being a felon in possession of a firearm in violation of federal law for the same conduct arising out of the 2015 traffic stop.<sup>[4]</sup>

Gamble filed a motion to dismiss in the United States District Court for the Southern District of Alabama, arguing the federal government's decision to prosecute him after his state prosecution constituted a violation of his Fifth Amendment right against dual prosecutions for the "same offense."<sup>[5]</sup> The district court found Gamble's subsequent federal conviction was constitutional under the Dual Sovereign Doctrine, which provides that separate sovereigns, including the United States federal government and state governments, may subject a defendant to prosecutions twice for the same conduct.<sup>[6]</sup> Gamble appealed the district court's decision to the United States Court of Appeals for the Eleventh Circuit.<sup>[7]</sup> The Eleventh Circuit affirmed the lower court's decision, reasoning the Dual Sovereign Doctrine permitted the federal government to conduct a separate and subsequent prosecution.<sup>[8]</sup> Gamble petitioned for certiorari, and the Supreme Court granted on the question of the constitutionality of the Dual Sovereign Doctrine under the Fifth Amendment.<sup>[9]</sup>

The Supreme Court's decision to take Gamble's case trailed on the back of a 2016 concurrence written by Justice Ginsburg and joined by Justice Thomas in *Puerto Rico v. Sanchez Valle*, where both Justices urged the Court to reconsider the constitutionality of the Dual Sovereign Doctrine.<sup>[10]</sup> When the Court initially opted to take Gamble's case, the decision created considerable buzz surrounding what seemed like the potential willingness of the Court to overturn the

Doctrine.<sup>[11]</sup> Of course, the initial draw of this case was the possibility defendants could be spared from dual prosecutions and subsequent convictions arising from federal and state prosecutors working together.<sup>[12]</sup> A less expected interest in Gamble's case arose in the wake of the FBI's investigation into Russian meddling, where *Gamble v. United States* became the hopeful road paved with gold for officials under investigation.<sup>[13]</sup> In one example, putting the Dual Sovereign Doctrine to rest would bar the state of New York from prosecuting Paul Manafort for tax fraud in addition to his federal conviction, giving more weight to a presidential pardon for Manafort's federal charges.<sup>[14]</sup>

But with the Supreme Court's decision to uphold the Dual Sovereign Doctrine, Manafort's get out of jail free card will have to come in another form. In light of the Supreme Court's decision to take Gamble's case after nearly 60 years of silence on the constitutionality of the Dual Sovereign Doctrine, its resounding agreement to adhere to precedent is remarkable. In a sweeping 7-2 decision, the Court declined to overturn the Dual Sovereign Doctrine, finding individuals convicted in either state or federal court may be tried again in the other.<sup>[15]</sup> In its reasoning, the Supreme Court remained loyal to 170 years of precedent and what it found to be the original understanding of the term "offence" under the Fifth Amendment.<sup>[16]</sup> In writing for the majority, Justice Alito surprisingly embraced an originalist interpretation, which he has rejected in the past,<sup>[17]</sup> stating that "an 'offence' is defined by law, and each law is defined by a sovereign. So where there are two sovereigns, there are two laws and two 'offences.'"<sup>[18]</sup> Under this understanding of double jeopardy, Gamble's dual prosecutions arose out of separate "offences" under separate sovereigns rather than out of the "same offence."

In light of his previous skepticism of the Dual Sovereign Doctrine, Justice Thomas' decision to write separately in a concurring opinion was unanticipated. In what was Justice Thomas' most forceful articulation of his opinion on *stare decisis*, he voiced his willingness to overhaul precedent, while qualifying his contradictory choice to side with the majority in declining to overturn the Dual Sovereign Doctrine.<sup>[19]</sup> On the other hand, Justice Ginsburg remained faithful to her *Sanchez Valle* concurrence in criticizing the majority for its interpretation of the Fifth Amendment and its unwillingness to break away from precedent.<sup>[20]</sup>

But what was perhaps most unexpected about this case was Justice Gorsuch's willingness to defect from the other conservative Justices to write separately in a vibrant dissent. Surprisingly, Justice Gorsuch hinged his deprecation for the Dual Sovereignty Doctrine on originalism, arguing the Framers "sought not to multiply governmental power but to limit it."<sup>[21]</sup> But even the unlikely duo of Justice Ginsburg and Justice Gorsuch was not enough to sway the other Justices in favor of abandoning the Doctrine.

Even so, there is some debate as to whether the Supreme Court's ruling would have had a significant impact had the other Justices been swayed to rule in the reverse. For one, dual prosecutions are uncommon. The Department of Justice's Petite Policy prevents federal prosecutors from pursuing subsequent prosecutions unless they have sought authorization from a policy waiver.<sup>[22]</sup> Additionally, the *Blockburger* test for double jeopardy is easily penetrable, and it would not be difficult for federal or state legislators and prosecutors to maneuver the test in a way that would remove subsequent prosecutions from the bar of double jeopardy.<sup>[23]</sup> Ultimately, there is no way to know what impact, if any, an alternative disposition would have had. The only thing we can know for certain is that the Dual Sovereign Doctrine remains unchanged.

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[1] Brief of Petitioner-Appellant at 1-2, *Gamble v. United States*, \_\_\_ U.S. \_\_\_ (2019).

[2] *Id.* at 2.

[3] *Id.* at 2.

[4] *Id.* at 2.

[5] *United States v. Gamble*, S.D. Ala. No. 16-00090-KD-B, 2016 U.S. Dist. LEXIS 80201, \*1 (June 21, 2016).

[6] *Id.* at \*5.

[7] *United States v. Gamble*, 694 Fed. Appx. 750, 750 (11th Cir. 2017).

[8] *Id.* at 751.

[9] *United States v. Gamble*, 694 Fed. Appx. 750, 750 (11th Cir. 2017), *cert granted*, 86 U.S.L.W. 3650 (U.S. June 28, 2018) (No. 17-646).

[10] *Commonwealth of Puerto Rico v. Sanchez-Valle*, \_\_\_ U.S. \_\_\_, 136 S. Ct. 1863, 1877, 195 L. Ed. 2d 179 (2016) (Ginsburg, J., concurring).

[11] See U.S. News, *Supreme Court Takes up Closely Watched Double Jeopardy Case*, (Dec. 5, 2018)

<https://www.usnews.com/news/politics/articles/2018-12-05/supreme-court-takes-up-closely-watched-double-jeopardy-case> (accessed June 21, 2019).

[12] See *id.*

[13] Constitutional Accountability Center, *Supreme Court to consider case that could affect potential Manafort prosecutions*,

<https://www.theusconstitution.org/news/supreme-court-to-consider-case-that-could-affect-potential-manafort-prosecutions/> (accessed June 21, 2019).

[14] *Id.*

[15] *Gamble v. United States*, \_\_\_ U.S. \_\_\_, \_\_\_ (2019).

[16] *Id.* at \_\_\_.

[17] See Transcript of Oral Argument at 18, *Brown v. Entertainment Merchants Ass'n.*, 564 U.S. 786 (2019) (No. 08-1448).

[18] *Id.* at \_\_\_.

[19] *Gamble*, \_\_\_ U.S. at \_\_\_.

[20] *Id.* at \_\_\_.

[21] *Id.* at \_\_\_.

[22] The United States Department of Justice, *Dual Prosecution (Petite Policy)*<https://www.justice.gov/usam/file/872941/download> (accessed June 21, 2019).

[23] See *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932); See also *Gamble*, \_\_\_ U.S. at \_\_\_ (Ginsburg, J., dissenting).

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