

Case Number: _____

IN THE
SUPREME COURT OF THE UNITED STATES

In Re RICHARD DECARO, – Petitioner

PETITION FOR ISSUANCE OF AN EXTRAORDINARY
WRIT OF HABEAS CORPUS AUTHORIZED BY 28 U.S.C. § 1651(a)

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QUESTION PRESENTED

Whether the Court should overrule the "separate sovereigns" exception to the Double Jeopardy Clause.

STATEMENT OF ISSUES PRESENTED

The "separate-sovereigns" exception to the Double Jeopardy Clause, pursuant to which Mr. DeCaro's otherwise plainly unconstitutional duplicative conviction was upheld, is inconsistent with the plain text and original meaning of the Constitution.

The separate-sovereigns exception's doctrinal underpinnings have eroded; and, this caused the federal jury to re-adjudicate the State law.

This case is in aid of the Court to *Gamble v. United States*, No. 17-646, because the decisions below hinged on the validity of this Court's separate-sovereigns exception; and, where *Gamble* was convicted, Mr. DeCaro was acquitted in the State. Richard DeCaro has maintained his innocence for over twenty-six years, because of the separate-sovereigns exception he is slated to die in prison; overruling that exception would set him free.

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PETITION FOR EXTRAORDINARY WRIT/RELIEF SOUGHT

Richard DeCaro respectfully petitions to be joined with *Gamble v. United States*, case no. 17-646, or for the Court to issue a Stay of this writ until after the *Gamble* decision, or grant the writ vacating his conviction. This case presents the Court with the same issue as in *Gamble* except Mr. DeCaro was found innocent in the State trial. The decisions below hinged on the validity of this Court's separate-sovereigns exception.

OPINIONS BELOW

The opinion of the Eighth Circuit appears at Appendix A and is published.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

This Court has jurisdiction to grant the writ under 28 U.S.C. § 1251.

RELEVANT CONSTITUTIONAL PROVISION

The Fifth Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment, provides in relevant part: "No person shall... be subject for the same offence to be twice put in jeopardy of life or limb."

STATUTES AND OTHER PROVISIONS

The text for the Statutes and Other Provisions are reproduced at Appendix B.

INTRODUCTION

The Fifth Amendment enshrines a promise that "No person shall... be twice put in jeopardy" "for the same offence." Yet Richard DeCaro has been subjected to exactly that: two prosecutions, one state trial resulting in an acquittal on all counts

and a federal trial resulting in a conviction; both stemming from the identical facts, evidence and charges. As a result of the duplicative prosecution, he is forced to spend the rest of his life behind bars. The Double Jeopardy Clause prohibits that result.

The fact that Mr. DeCaro's prosecutions were brought by separate sovereigns, Missouri and the United States, should make no difference. The court-manufactured "separate-sovereigns" exception, pursuant to which his otherwise plainly unconstitutional duplicative conviction was upheld, is inconsistent with the plain text and original meaning of the Constitution.

This case clearly is aligned with the question in *Gamble v. United States*, case no. 17-646; Whether the Court should overrule the "separate-sovereigns" exception to the Double Jeopardy Clause. And Richard DeCaro ought not be made to die in prison, in violation of his constitutional rights. This Court should overrule the separate-sovereigns exception, and restore the original meaning of the Double Jeopardy Clause and grant this writ.

STATEMENT OF THE CASE

On September 14, 1994, Mr. DeCaro was found innocent, by a death penalty qualified jury, of all charges in *State of Missouri v. DeCaro*, No. 92-650. The jury acquitted him of first and second degree murder, murder for hire, aiding and encouraging, and aiding and encouraging a burglary.

On May 31, 1995, a federal grand jury returned a seven count indictment against Mr. DeCaro. Count I - Conspiracy to Commit Murder for Hire, 18 U.S.C. § 371; Count II - Use of Interstate Commerce Facilities in the Commission of Murder

for Hire, 18 U.S.C. § 1958 and § 2; Counts III-VII, Mail Fraud, 18 U.S.C. § 1341 and § 2, all in connection with the same alleged acts in which Mr. DeCaro was found innocent in *State of Missouri v. DeCaro*. Federal Case No. 1:96CR0005.

Mr. DeCaro was offered five years to plead guilty which he refused because he did not commit the crime. On March 7, 1996, the federal jury convicted Mr. DeCaro on all counts. On June 21, 1996, Mr. DeCaro was sentenced to a mandatory life on Count II and sixty months on each of the remaining counts, all run concurrently.

The denial of Mr. DeCaro's direct appeal, *United States v. DeCaro*, 109 F.3d 1304 (8th Cir. 1997), and his Section 2255 motion, No. 1:98CV00112 were hinged on the validity of this Court's separate-sovereigns exception.

REASONS FOR GRANTING THE WRIT

The separate-sovereigns exception to the Double Jeopardy Clause flunks every test of constitutional interpretation. It has no basis in the text of the Fifth Amendment. It is inconsistent with the Clause's original meaning, which derived from a long common-law tradition that explicitly extended to prosecutions by separate sovereigns. It is irreconcilable with the Clause's driving purpose, which is to ensure finality by protecting individuals from the threat or reality of successive prosecutions. And it distorts foundational precepts of federalism, pursuant to which our system of dual sovereignty is supposed to protect individual liberty rather than take it away.

A. The Separate-Sovereigns Exception is Inconsistent with the Plain Text, Original Meaning, and Purpose of the Constitution.

1. The text of the Double Jeopardy Clause of the Fifth Amendment provides that "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." The Clause admits of no distinctions based on the identity of the prosecuting entity. To the contrary, it unambiguously protects each "person" from duplicative prosecutions regardless of their source.

2. Evidence of the Clause's original meaning overwhelmingly supports this reading. The Double Jeopardy Clause has its origins in "this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence." 4 William Blackstone, *Commentaries on the Laws of England* 329 (1768). The Founders took the core promise of the Clause as a given: "[T]he courts of justice," they assumed, "would never think of trying and punishing twice for the same offence." 1 *Annals of Cong.* 753 (1789) (statement of Representative Roger Sherman).. To the contrary, "it [was] the universal practice in Great Britain, and in this country, that persons shall not be brought to a second trial for the same offence." *Id.* (statement of Representative Samuel Livermore).

The rule "that an acquittal or conviction by a court of competent jurisdiction abroad" i.e., by a separate sovereign "is a bar to a prosecution for the same offense in England had been definitely settled . . . prior to the American revolution." J.A.C. Grant, *Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons*, 4 *UCLA L. REV.* 1, 8 (1956); see also, e.g., 2 William Hawkins, *A Treatise of the Pleas of the Crown* 515, 522 (John Curwood ed., 8th ed. 1824) (explaining that double-jeopardy protections apply to prosecutions "in any court

whatsoever"). Accordingly, an acquittal or conviction in, say, Portugal or Wales, had long barred a subsequent prosecution in England. See *King v. Hutchinson* (1678) 84 Eng. Rep. 1011, 1011 (Portugal); *King v. Thomas* (1664) 83 Eng. Rep. 326, 327 (Wales). Indeed, early decisions by this Court appeared to recognize the common-law doctrine's application to prosecutions by separate sovereigns. See *Houston v. Moore*, 18 U.S. (5 Wheat.) 1 (1820) ("The exercise of this jurisdiction by a State Court Martial would either oust the United States' Courts of their jurisdiction, or might subject the alleged delinquents to be twice tried and punished for the same offense.").

The Double Jeopardy Clause was meant to codify this broad common-law doctrine in which a separate- sovereigns exception had no place. See *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 170 (1873) (explaining that the purpose of the Clause is "to prevent a second punishment under judicial proceedings for the same crime, so far as the common law gave that protection.").

3. The purpose of the Double Jeopardy Clause likewise extends to prosecutions by separate sovereigns. At its core, the Clause reflects a "constitutional policy of finality for the defendant's benefit." *United States v. Jorn*, 400 U.S. 470, 479 (1971). To that end, it protects individuals "from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." *Green v. United States*, 355 U.S. 184, 187 (1957).. "The underlying idea . . . is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity." Id. at 187

88; see also *Sanchez Valle*, 136 S. Ct. at 1877 (Ginsburg, J., concurring) ("The double jeopardy proscription is intended to shield individuals from the harassment of multiple prosecutions for the same misconduct.").

The separate-sovereigns exception cannot be reconciled with that motivating purpose. To the contrary, permitting consecutive prosecutions for the same offense whenever those prosecutions are initiated by different sovereigns implicates the very finality and fairness concerns the Clause was designed to address. After all, "[i]f double punishment is what is feared, it hurts no less for two 'Sovereigns' to inflict it than for one.." *Bartkus v. Illinois*, 359 U.S. 121, 155 (1959) (Black, J., dissenting); see also *Sanchez Valle*, 136 S. Ct. at 1877 (Ginsburg, J., concurring) (explaining that the separate-sovereigns exception "hardly serves" the Double Jeopardy Clause's "objective"). The exception forces defendants like Mr. DeCaro who have already been acquitted or convicted of an offense to " 'run the gauntlet' a second time." *Abney v. United States*, 431 U.S. 651, 662 (1977). That is precisely the result the Double Jeopardy Clause was designed to prevent.

4. What is more, the separate-sovereigns exception runs afoul of foundational concepts of federalism. "The federal system rests on what might at first seem a counterintuitive insight, that 'freedom is enhanced by the creation of two governments, not one!'" *Bond v. United States*, 564 U.S. 211, 220 21 (2011) (quoting *Alden v. Maine*, 527 U.S. 706, 758 (1999)). In other words, our system of dual sovereignty was meant to "secure[] to citizens the liberties that derive from the diffusion of sovereign power." Id. at 221 (quoting *New York v. United States*, 505 U.S.

144, 181 (1992)); see also *The Federalist No. 51*, at 320 (James Madison) (Clinton Rossiter ed., 2003) explaining that division of power "between two distinct governments" would afford "a double security . . . to the rights of the people").

The separate-sovereigns exception turns federalism on its head. The mechanism through which federalism enhances liberty was, to the Founders, straightforward: "The different governments will control each other, at the same time that each will be controlled by itself." *Id.* In the teeth of the separate-sovereigns exception, however, dual sovereignty does precisely the opposite: It permits different governments "to do together what . . . neither can do separately" all to the detriment of individual liberty. *Abbate v. United States*, 359 U.S. 187, 203 (1959) (Black, J., dissenting).

Mr. DeCaro's is a case in point. Far from enhancing his freedoms and securing his liberty, the constitutional division of sovereign power has cost him over twenty-two years of his life, so far, with thirty or forty more years to go before dying in prison. After all, had the "atom of sovereignty" never been split, *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring), Mr. DeCaro's dual prosecutions would never have been possible and he would be a free man today.

B. The Separate-Sovereigns Exception's Doctrinal Underpinnings have Eroded; and, this Caused the Federal Jury to Re-Adjudicate the State Law.

1. True, this Court has previously endorsed the separate-sovereigns exception. But "stare decisis cannot possibly be controlling when . . . the decision in question has . . . [had] its underpinnings eroded . . . by subsequent decisions of this Court." *United*

States v. Gaudin, 515 U.S. 506, 521 (1995). Put differently, stare decisis must give way when “related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine.” *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 855 (1992). In 1969 the Court vaporized the doctrinal underpinnings of the separate-sovereigns exception when it incorporated the Double Jeopardy Clause against the States. See *Benton v. Maryland*, 395 U.S. 784, 787 (1969). “[T]he double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage,” the Court held, so it “should apply to the States through the Fourteenth Amendment.” Id. at 794. Thus, the separate-sovereigns exception has outlived the world that birthed it.

2. Mr. DeCaro's indictment alleged a violation of 18 U.S.C. § 1958. Section 1958 is modeled after the Travel Act, 18 U.S.C. § 1952, and legislative history indicates that the Travel Act precedent should be considered relevant. Section 1958 is predicated on "in violation of the laws of the State" requiring the State statute and its elements to be "charged by indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict." *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000). It is structurally the same as the statute at issue in *Jones v. United States*, 526 U.S. 227 (1999) where the Court held that "Section 2119 establishes three separate offenses by the specification of elements, each of which must be charged by indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict." Id., at 232.

Mr. DeCaro's indictment (Appendix C, Appendices p. 24) did not plead any of the requisite State laws or elements. Having been acquitted of the State laws of first

and second-degree murder, murder for hire (included in the instructions), aiding and encouraging, and aiding and encouraging a burglary (Appendix D) the separate-sovereigns exception cannot survive because it requires the federal jury to re-adjudicate the same State laws and elements. "When the unlawful activity charged in the indictment is in violation of State law, the commission of, or intent to commit such a violation is an element of the federal offense." *United States v. Bertman*, 686 F.2d 772, 774 (9th Cir. 1982). See also, *United States v. DeLuna*, 763 F.2d 897, 903 (8th Cir. 1985).

3. Because of the separate-sovereigns exception to the Double Jeopardy Clause the federal jury actually re-adjudicated the same Missouri statute that Mr. DeCaro was acquitted of in *State of Missouri v. DeCaro*, No. 92-650. See Instruction 31, Appendix E. Instruction 31 was objected to by counsel; Ms. Kister stated that it, "misstates the law and mischaracterizes the statute on which it's based." Appendix F. The separate-sovereigns exception, and its ability to re-adjudicate State law, cannot survive because incorporation eroded its doctrinal underpinnings.

C. This Case is in Aid of the Court to *Gamble v. United States*, case no. 17-646.

This case is in aid of the Court to *Gamble* for two reasons. First, like *Gamble*, the decisions below hinged on the validity of this Court's separate-sovereigns exception. Second, where *Gamble* was convicted in the State, Mr. DeCaro was acquitted. His acquittal in the State and subsequent federal prosecution is the same premise as in *Abbate v. United States*, 359 U.S. 187 (1959), which the Court will no doubt be reexamining.

Richard DeCaro is slated to die in prison because of the separate-sovereigns exception; overruling that exception would set him free.

CONCLUSION

For the foregoing reasons, Mr. DeCaro prays the Court will join his case with Gamble or Stay his writ until after that decision and/or grant this writ.

Respectfully submitted, July 11, 2018.



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