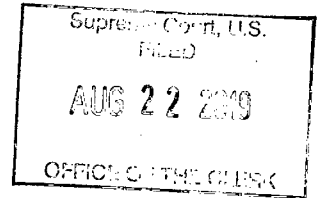


19-5739

No. _____

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES



DUANE POPE — PETITIONER
(Your Name)

VS.

SCOTT FRAKES, Director NDCS — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE SUPREME COURT OF THE STATE OF NEBRASKA

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Duane Pope #84196

(Your Name)

P.O. Box 2500

(Address)

Lincoln, NE 68542-2500

(City, State, Zip Code)

(none)

(Phone Number)

QUESTIONS PRESENTED

The U.S. Supreme Court's recent affirmation of the "separate sovereigns" doctrine in *Gamble v. U.S.*, ____ U.S. ____, 139 S.Ct. 1960 (2019), raises a number of questions in the Petitioner's case as to the boundaries of that doctrine.

Generally,

#1. Does the "separate sovereigns" doctrine permit multiple punishments that are exempted from the constitutional prohibitions against cruel and unusual punishment or ex post facto changes to the punishment imposed?

Specifically,

#2. Where the "separate sovereigns" doctrine permitted the Petitioner's two separate convictions, in the Federal Court and then in the State Court, does the 8th Amendment's prohibition of cruel and unusual punishment, applying through the 14th Amendment's Due Process and Privileges and Immunities clauses require concurrent rather than consecutive, cumulative, double punishment?

#3. Where the "separate sovereigns" doctrine permitted the Petitioner's two separate convictions, in the Federal Court and then in the State Court, does the 14th Amendment's privileges and immunities clause prohibit the State's ex post facto changes to the second, separate, and consecutive sentences?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☒ For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix C to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the Nebraska Court of Appeals court appears at Appendix B to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

JURISDICTION

☐ For cases from federal courts:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from state courts:

The date on which the highest state court decided my case was May 28, 2019. A copy of that decision appears at Appendix A.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. The 5th Amendment's Double Jeopardy and Due Process clauses:

No person shall be ...; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; ... nor be deprived of life, liberty, or property, without due process of law;

II. The 8th Amendment's Cruel and Unusual Punishment prohibition:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

III. Article I, Section 9's Ex Post Facto prohibition:

... No Bill of Attainder or ex post facto Law shall be passed.

IV. The 14th Amendment's Due Process and Privileges and Immunities clauses:

Section 1. ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law;

V. Neb.Rev.Stat. §83-1,106 (Reissue 2014) is provided in Appendix D.

STATEMENT OF THE CASE

The Petitioner's case has been before this Court twice before. The Petitioner first received three death sentences in the U.S. District Court for the District of Nebraska for three murders committed during a bank robbery in 1965. This Court ruled the Petitioner's federal death sentences were unconstitutional in *Pope v. U.S.*, 392 U.S. 651 (1968). The federal court resentenced the Petitioner in December of 1968 to two life sentences and a sentence of 99 years to be served concurrently; see, *Pope v. U.S.*, 434 F.2d 325 (8th Cir. 1970). This Court denied his Petition for a Writ of Certiorari at that time; *Pope v. U.S.*, 401 U.S. 949 (1971); even though Justice Douglas would have granted that Petition.

Following the federal court's resentencing of the Petitioner, the State courts pursued and obtained convictions for the same three murders and then imposed death sentences; *State v. Pope*, 186 Neb 489 (1971). This Court granted the Petitioner's Writ of Certiorari and vacated the State's death sentences in *Pope v. Nebraska*, 408 U.S. 933 (June 29, 1972). On remand the State Court imposed three consecutive life sentences; *State v. Pope*, 190 Neb 689 (1973). Despite three dissents that argued consecutive sentences were constitutionally required, the Nebraska Supreme Court decided that Neb.Rev.Stat. §83-1,106 did not make credit for time served mandatory. This Court denied the Petition for a Writ of Certiorari challenging these sentences on Double Jeopardy grounds; *Pope v. Nebraska*, 416 U.S. 977 (1974) (Again, Justice Douglas would have heard the Double Jeopardy issue). But the Nebraska Legislature had responded to the 1971 Pope decision (186 Neb 489) by amending Neb.Rev.Stat. §83-1,106 to require state courts to determine whether to give credit for time served "for another offense based on the same conduct"; see, Laws 1972, LB1499 §6, effective

July 8th, 1972 [significant for the State resentencing]. Then in 1988 the Legislature made such credits mandatory; Laws 1988 LB1054 §1.

All of the above took place while the Petitioner was in the custody of the Federal Bureau of Prisons serving his federal sentences. In July of 2016, the Petitioner was paroled from his federal sentences and finally placed into the custody of the Nebraska Department of Correctional Services (NDCS) under the control of the Respondent, Director Scott Frakes.

At the direction of Respondent Frakes, the NDCS Records Office then interpreted the meaning of the Petitioner's state sentences, pursuant to Neb.Rev.Stat. §83-1,106 (Reissue 1971). The Petitioner was NOT given credit for time served on any of the federal sentences. But the Petitioner was now informed that his state life sentences would be interpreted as indeterminate, minimum life to maximum life, sentences with no parole eligibility. (The Legislature did not authorize indeterminate life sentences for First Degree or Felony murder until 2015; see, Laws 2015 LB605 §60, effective 8/30/2015. This was not the case in 1965 to 1972, life sentences were "determinate" sentences; see, *State v. Blazek*, 199 Neb 466, 469-70 (1977)).

The Petitioner filed a state court action for a declaratory judgment, seeking a statement of his federal constitutional rights under the 5th and 14th Amendments to the U.S. Constitution. The State District Court denied the Petitioner relief by finding that §83-1,106, as written and construed prior to the imposition of the Petitioner's state life sentences, applied to him. [See, Appendix C]. The Nebraska Court of Appeals summarily affirmed that decision [Appendix B] and the Nebraska Supreme Court denied any further review [Appendix A]. The Petitioner timely filed this Petition in the U.S. Supreme Court raising his federal constitutional claims.

REASONS FOR GRANTING THE PETITION

This Court recently affirmed, in *Gamble v. U.S.*, ___ U.S. ___, 139 S.Ct. 1960 (2019), the validity of the "separate sovereigns" doctrine that permitted both the State and Federal government to separately prosecute an offender for the same conduct without violating the Federal Constitution's Double Jeopardy prohibition. The Court's reasoning relied upon the definition of an "offense"; that each sovereign's crime defined a separate "offense."

But the Double Jeopardy clause provides other, different in kind, protections than just the prohibition against successive prosecutions. The Clause creates three separate constitutional protections; *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." It is this third protection, against multiple punishments (again) for the same "offense," that is at issue in the Petitioner's case.

The limitation on successive prosecutions is different in kind from the limitation on multiple punishments; *U.S. v. Dixon*, 509 U.S. 688, 748 (1993) (Justices Souter and Stevens concurring and dissenting). This Court has called upon other constitutional protections when considering multiple (consecutive) punishments. The *Pearce* Court said: "This last protection is what is necessarily implicated in any consideration of the question whether, in the imposition of sentence for the same offense after retrial, the constitution requires that credit must be given for punishment already endured." *N.C. v. Pearce*, *supra*, 395 U.S. at 717. The Court went on to conclude that "Due Process of Law, then, requires that vindictiveness against a Defendant for having successfully attacked his first conviction must play no part in the sentence he

receives after a new trial." *Id.*, 395 U.S. at 725. The limitation on multiple punishments also assured that Courts not exceed their legislative authorization; *Brown v. Ohio*, 432 U.S. 161, 165 (1977); and this implicated the separation of powers; *Whalen v. U.S.*, 445 U.S. 684, 689 n.4 (1980). But none of these cases involved "separate sovereigns."

Vindictiveness was not an issue in *Gamble*, *supra*, his State sentence of 10 years with all but one year suspended was followed by a federal sentence of nearly three years in prison. *Gamble's* federal sentence would be served well within the boundaries of his state sentence. In the Petitioner's case, however, the State did not pursue state criminal charges until the Petitioner's federal death sentences were vacated. Eventually the Petitioner's State death sentences were also declared unconstitutional and he was resentenced to three consecutive life sentences in the State court and, significantly, consecutive to his federal life sentence(s).

By imposing three consecutive life sentences consecutive to the federal sentence, the State Court has imposed upon the Petitioner (at least) four life sentences for three homicides. In the Petitioner's case the State Legislature ~~DID NOT~~ authorize four life sentences (or 5 life sentences and 99 years) for the three homicide offenses committed by the Petitioner. This raises (Question #2) the issue of the prohibition of cruel and unusual punishment (because of the nature of Nebraska's "life" sentence, discussed *infra*) and the protections from the Due Process and Separation of Powers issues this Court has described and decided outside the "separate sovereigns" context. The Petitioner argues that the Double Jeopardy protection against multiple punishments must apply these same constitutional protections even to "separate sovereign" convictions for the same conduct. Neither of the "separate sovereigns"

should get a free pass to ignore these other provisions of the federal constitution.

Therefore, the Court should grant the Petition, as to Question #2, because the State Courts have decided an important question of federal law in a way that conflicts with "relevant" decisions of this Court which have not specifically been associated with the "separate sovereigns" doctrine.

Question #3 involves the judicial mutation of life sentences over time in Nebraska. At the time of the Petitioner's crime and final sentencing, a "life" sentence was a determinate sentence whose parole release was subject to the action of a Board; see, *State v. Blazek*, supra, 199 Neb at 470. However, the State's paranoia with the uncertain viability of (any) death sentence in the 1970's cause the state courts to turn "life" sentences into an indeterminate "life without parole" sentence, actually a "death in prison" sentence. The Legislature did not participate (totally) in this process until 2015 with the enactment of Laws 2015 LB605 §60, effective 8/30/2015, before the Petitioner was placed into the custody of the State of Nebraska. With this amendment, the state's indeterminate sentencing statute, Neb.Rev.Stat. §29-2204 now says:

... (3) When a maximum term of life is imposed by the court for a class IA felony, the minimum term of the court shall be:

(a) a term of life imprisonment; or

Neb.Rev.Stat. §29-2204 (Reissue 2016)

The federal constitution's ex post facto prohibition is directed to the action of the Legislature; *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981). While the State Courts' slow manipulation of explanations over the years to accomplish their goal was not a Legislative action, the Respondent Director's application of this later Legislative standard to the Petitioner's 1972 life sentences

manifests their ex post facto effect. Thus the Petitioner's case presents the circumstances of another possible, ex post facto, federal constitutional violation which the "separate sovereigns" doctrine seems to, and could, validate.

Therefore, the Court should grant the Petition, as to Question #3, because the State Courts have decided an important question of federal law in a way that conflicts with "relevant" decisions of this Court which have not been specifically associated with the "separate sovereigns" doctrine.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Duane Pope
Duane Pope #84196

Date: 8-21-19