No. 17-6680

In the Supreme Court

of the United States

William M. Eaton

- Petitioner

versus

United States of America

-Respondent

Petition for Rehearing

in

Gamble v United States

No. 17-646

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In the Supreme Court of the United States

Petition for Rehearing Under Rule 44

Comes now, William Eaton, requesting this honorable court reconsider Gamble v United States, No. 17-646 (2019) under Rule 44(2). Eaton previously requested to be joined with Gamble, as he was also arguing the double jeopardy-dual sovereignty issue, and presented relevant factors neither advanced by Gamble nor decided by this court which would have led to a different outcome. Due to Eaton's unique status, and the importance of Gamble to his issue, Eaton would appear to have standing to raise this. This court should rehear on the following four grounds.

1. The "antiquity" of Lanza is overstated, and ignores the conflict with older precedent.

Gamble relied on "170 years of precedent", and stated that the evidence presented was not enough to overturn such an old, unbroken string of cases. Lost in this consideration is that Lanza itself was a break with precedent, not a fulfillment of it. Gamble did not address this conflict.

As noted in Eaton's petition for certiorari, Lanza was the first case to approve of dual prosecutions for the same offense. While some cases, in dicta, noted that prosecutions by both state and federal could occur in rare circumstances, none of them claimed this was permissible because both sovereignties could prosecute the same crime. To the contrary, the case law universally condemned this result (Cert. Pet. p. 21-22).

In the seventy-five years prior to Lanza, the court went to pains to distinguish the crime at issue in any given case from the purely theoretical one each defendant claimed he could be subjected to prosecution for by the other sovereign. These early cases bore far more similarities to the Blockberger v United States, 284 US 299 (1932) "different elements" test than the dual

sovereignty test Lanza created.

Fox v Ohio, 5 How 410 (1947) distinguished between coutnerfeitting, which was a crime against the nation, and passing a counterfeit coin, a private cheat. "There exists an obvious difference, not only in the description of these offenses **even when prosecuted by the same government.** Likewise, in Moore v Illinois, 14 How 13 (1853), the court explained how the federal government could punish the murder of a marshall as it interfered with their legal processes, while the state could punish the murder or assault as itself, if at 19-20. See, also Gilbert v Minnesota, 254 US 325, 331 (1920).

By conflating these two lines of precedent, this court gave Lanza far more credit and antiquity than it truly had. An unbroken precedent of 170 years is far more worthy of stare decises than a ninety year old case in direct conflict with the 170 year old precedent. If antiquity is what truly matters, then upholding Lanza undermines the antiquity of Fox. These two cases cannot coexist, one must be overruled. This undermines rather than promotes, the purposes of stare decisis, as the court is letting conflict between cases remain unsolved.

This conflict, which is not addressed in Gamble, but was presented in Eaton's certiorari petition, is a relevant factor which would almost certainly have changed the outcome if fully briefed and addressed.

2. The lack of different "interests" and "rights" by expanded jurisdiction is not addressed.

Gamble cited McCulloch v Maryland, 4 Wheat 316, 431-36 (1819) and its discussion of the different "interests" and "rights" the two sovereigns have as a "clear[] statement of the premises of our dual sovereignty rule", at 10. The contrary is true. McCulloch's understanding of the different roles for the two sovereigns **undermines** the rule, especially once the creep of

the federal government's authority is examined.

As originally understood, the federal and state governments operated in two different spheres, involving different duties and powers, McCulloch, at 430, 432; Massachusetts v Morash, 490 US 107, 119 (1989). What was entrusted to the national government was necessarily withdrawn from the states, United States Public Workers v Mitchell, 330 US 75, 96 (1947). While this court allowed some state action where the federal government had not yet exercised its power, once the national government had acted, it precluded state regulation on the subject, Bethlehem Steel Co v New York Labor Bd, 330 US 767, 773 (1947).

Each of the pre-Lanza cases took pains to explain how the state's judgment under challenge was **not** invading the federal sphere, or exercising powers left to the national government. Fox explained that protecting the citizenry from being cheated by false coin was not included in the counterfeitting power, it was reserved to the states. Moore noted that punishing slave harboring vindicated state's interests in keeping the peace, and neither helped nor hindered slave reclaimation, Gilbert distinguished between the power to supress speech obnoxious to the public morality and regulation of the military.

Each of these cases saw itself as maintaining the delicate balance between state and federal power. With rare exceptions, like taxation or elections, the state and federal power were not seen to overlap; they were distinct. One of the cases often cited for the dual sovereignty doctrine, Ex Parte Siebold, 100 US 371, 382-85 (1880) actually dealt with one of these concurrent powers, elections. Even there, it explained where the Constitution drew the line, when these powers actually overlapped, and what happened in the occasion both sovereignties acted. Most notably, the court admonished Congress not to use its constitutional powers to interfere with state sovereignty, id at 383.

While Gamble itself gives nothing but a passing mention to this idea, the cases cited and discussed within give credence to, rather than detract from, the force of the distinction. That a court in England would have no jurisdiction to try an offense in Portugal, or that an admirality court had no jurisdiction, over common law crimes are analgous to the lack of federal jurisdiction over state crimes, see United States v Fox, 95 US 670, 672 (1878).

This courted relied on Furlong to suport the dual sovereignty claim. Eaton must respectfully insist this is untrue. Furlong made an exception to the common-law rules of crimes on the high seas for murder due to its odious nature, id at 197. The plain text of Furlong (cited by Eaton as Pirates, p. 21) was precisely that murder was unique, not that any crime punishable by any state (which piracy was) could be charged by each state. The exception does not disprove the rule.

For the past century, the federal authority has expanded into the state realm. Powers that, traditionally, only belonged to the state and were seen as beyond federal authority are now charged by both. Crimes solely within one state and implicating no obvious federal interest are still nonetheless charged because the crime used an item which travelled across state lines at some point, see, for example Carroll v United States, 562 US 1163 (2011) (collecting cases) or because an "instrumentality" like the phones or internet was used, even though nothing crossed states lines, see, for example, United States v Gant, 663 F.3d 1023 (8th, 2011); United States v Edington, 526 Fed Appx 584 (6th, 2013).

This constitutional change has rendered the practical difference between state and federal crimes non-existent. When, as for Gamble, both the state and federal governments charge him with being a felon in possession of a handgun, they are charging the exact same crime and vindicating the exact

same interests, here, protecting the citizens of Alabama from Gamble's intrastate possession of a gun, see §922(q)(1) (stating purpose). Likewise, Eaton's non-commercial viewing of free information without crossing state lines is punished by both sovereignties to protect children, see Congressional findings for §2251. Protecting citizens from intrastate violence has always been seen as a **solely** state function, Hill v Colorado, 147 L.Ed.2d 597, 611 (2000).

This discussion of the distrinction between the federal and state authority may not have been solely caused by, and therefore will not be "cured" by overturning, the dual sovereignty doctrine, see Gamble, at 30-31. But it is not difficult to see how the doctrine has contributed. If the exact same crime, with the same elements, and serving the same interests is transformed into two by the use of two sovereigns, then a major check on ensuring that neither sovereignty passes its constitutional limits has been removed. Courts need not examine which "sphere of influence" a crime actually falls in.

Yet, whether the breakdown in distinction is caused by or contributed to by this doctrine, or if it is not, the practical consequences of the breakdown are still a factor that needs to be, but wasn't considered. While Eaton maintains that Lanza flies in the face of prior precedent, and thus was wrongly decided, it must be recognized that, when it was decided, such concurrent jurisdiction did not exist. Federal and state authorities were still largely separated into their proper "spheres".

It need not be found that the Lanza rule was wrong from its inception to overturn it. One need only recognize that it was made for a different legal landscape and set of circumstances, which no longer exist, Bowers v Hardwick, 478 US 186, 1999 (1986). That reason being gone, the rule itself either needs to be removed, or sharply modified, Zadvydas v Davis, 533 US 678, 699 (2001).

3. The decision in Gamble conflicts with Bond.

In Bond v United States, 189 L.Ed.2d 1,17 (2014), this court forbid federal prosecutors from usurping jurisdiction from the state to try Bond with using chemical weapons, simply because they did not like the result of the state proceedings. "Undermining state sovereignty" is not a legitimate federal goal, id. Yet, here in Gamble, the court upholds a prosecution with the same illegitimate end, giving Gamble a harsher sentence than he would have received in the state of Alabama, see Justice Ginsberg's dissent, p. 1.

What is the difference? Like the power to pass a law, the double jeopardy clause serves as a limitation on the ability of the court to proceeed at all, Class v United States, 200 L.Ed.2d 37, 40 (2018)(citing Menna v New York, 423 US 61, 63 & n2 (1975)). The defendant may not be tried, no matter how validly the guilt is established. The court there makes no attempt to distinguish these two cases, and the end result is a sub silentio overruling of Bond.

Both the commerce clause and double jeopardy clause contain structural limitations upon the government. There is no explanation why a creative expansion of an enumerated power is somehow more serious than the prosecution in the face of an express constitutional prohibition. If anything, as the Bill of Rights came last and thus modifies the enumerated powers of the federal government, Kleindienst v Mandel, 408 US 753, 782-83 (1972), it should cut the other way.

Allowing the government to circumvent Bond in the name of dual sovereignty only invites disrespect to this court's precedents. This court should rehear to address this tension.

4. The dual sovereignty doctrine is infirm in light of Waller.

In Waller v Florida, 397 US 387 (1970), this court held that the dual sovereignty doctrine did not extend to municipalities. In holding this, the court noted that parts of the state draw their powers from the state itself. Thus, they cannot said to be separate sovereigns, at 391-93.

The powers of the United States, however, also come from the state. Each state, upon entering the Union, gave up some of its preexisting power and sovereignty to the control of the central government, Coleman v Tennessee, 97 US 509, 530-31 (1879). If the original source of the power of the sovereignty is what decides the doctrine, the origin in both cases is the same. There would be no meaningful difference, then, between state/federal dual prosecutions, and state/city dual prosecutions.

Gamble did not address this distinction, and it should.

Conclusion

These four factors were not considered by the court, but are directly relevant to the result. It is prayed that this court rehear to address these salient points. Eaton would also ask to be able to brief the fact that dual sovereignty, contrary to Gamble, could not have survived incorporation as Fox, Lanza, Bartkus, and Abbate all directly relied on the inapplicability of the Fifth Amendment to the states.

Respectfully submitted this 26th day of June, 2019.

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