On June 17, 2019, in *Gamble v. United States*, the U.S. Supreme Court held that the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution does not prohibit a successive federal prosecution of an individual for the same conduct that was at issue in the defendant’s prior state conviction.¹

The Court re-affirmed the long-standing “dual-sovereignty” doctrine, that is, a crime under one sovereign’s laws is not “the same offence” for double jeopardy purposes as a crime under the laws of another sovereign. In doing so, the Court relied in part on the principle that the U.S. may prosecute conduct already tried in a foreign court.

**Companies facing parallel cross-border criminal actions should carefully consider the implications of Gamble in formulating their defense strategies.**

As such, Gamble’s impact extends beyond federal-state prosecutions involving the same conduct and may have significant implications for companies facing parallel criminal actions brought by the U.S. and other countries, and on the application of the Department of Justice’s (the “DOJ”) anti-piling on policy.

**‘PILING ON’ IN PARALLEL CROSS-BORDER CRIMINAL ACTIONS**

Over the past several years, the U.S. government has aggressively investigated and enforced U.S. criminal law against multinational and foreign corporations for alleged conduct that substantially took place overseas.

Companies in the crosshairs of such investigations frequently have complained that the U.S. would not coordinate with foreign governments in assessing penalties or give credit for any penalties imposed by foreign governments in connection with their own enforcement actions involving the same conduct. As a result, U.S. authorities have sometimes appeared to be “piling on” financial penalties.

In response to this criticism, in May 2018, the DOJ adopted a nonbinding policy into the Justice Manual that promotes coordination between U.S. and foreign law enforcement in an effort to limit duplicative penalties on corporate entities for the same conduct.² The DOJ’s recent enforcement actions show that it appears to be following this anti-piling on policy.

**THE GAMBLE DECISION**

In November 2015, Terance Gamble pled guilty to an Alabama state law that prohibited a person who had previously been convicted of “a crime of violence” from possessing a firearm.³

Federal prosecutors then indicted Gamble for the same conduct under a federal law prohibiting individuals convicted of a crime punishable by imprisonment for a term exceeding one year “to possess in or affecting commerce, any firearm or ammunition.”⁴ Gamble moved to dismiss the federal indictment on double jeopardy grounds.⁵

After the district court denied his motion to dismiss, Gamble pled guilty to the federal charge while preserving the right to appeal his double jeopardy claim.⁶ On appeal, the 11th Circuit affirmed Gamble’s conviction, citing the “dual-sovereignty” doctrine.⁷

The Supreme Court granted certiorari to determine whether to overturn that doctrine and ultimately affirmed the 11th Circuit’s decision. The Court reasoned that the text of the Double Jeopardy Clause bars a defendant from being twice put in jeopardy “for the same offence,” not for the same conduct or actions.⁸

As originally understood, the term “offence” is defined by a law, and each law is defined by a sovereign.⁹ So where there are two sovereigns, the Court continued, there are two laws and thus two “offences.”¹⁰

The Supreme Court reasoned that its prior decisions reveal how fidelity to the Double Jeopardy Clause’s text also honored the substantive differences between the interests that the federal government and a state can have in punishing the same act.¹¹

The Court continued that this principle “comes into still sharper relief” when considering a prosecution in the U.S. for crimes committed abroad.¹²

For example, the Court posited, if a U.S. national has been murdered in another country, that country could rightfully seek to punish the killer for committing an act of violence within its
territory. The foreign country’s interest lies in protecting the peace in that nation, not the American.

But the murder of a U.S. national is an offense to the U.S. as much as it is to the country where the murder occurred. That is why the killing of an American abroad is a federal offense that can be prosecuted in U.S. courts, and why customary international law allows this exercise of jurisdiction.

According to the Court, this and other examples “reinforce the foundation ... that a crime against two sovereigns constitutes two offenses because each sovereign has an interest to vindicate.”

Justices Gorsuch and Ginsburg dissented from the majority decision. In particular, Justice Gorsuch reasoned that, actually, “the great weight of authority” at the time the Fifth Amendment was ratified “indicated that successive prosecutions by different sovereigns — even sovereigns as foreign to each other as England and Portugal — were out of bounds.”

When faced with regulatory scrutiny by both U.S. and foreign governments, it is critical that companies engage outside counsel experienced in multijurisdictional enforcement investigations and proceedings.

The majority rejected Justice Gorsuch’s interpretation of pre-Fifth Amendment common law precedent.

Gamble’s Impact on Companies Involved in Parallel Cross-Border Criminal Actions

Companies facing parallel cross-border criminal actions should carefully consider the implications of Gamble in formulating their defense strategies. While, as noted above, the DOJ maintains a nonbinding policy against “piling on,” the application of that policy is at the federal prosecutor’s discretion.

As former Deputy Attorney General Rod Rosenstein stated when announcing the policy, it does not create a “private right of action and is not enforceable in court.”

Gamble has now apparently foreclosed any double jeopardy-based legal challenge to a decision by U.S. authorities to impose duplicative sanctions in transnational enforcement actions, such that companies will have to rely upon prosecutorial discretion.

Indeed, Gamble’s reasoning for why the U.S. may prosecute the same conduct tried in another country is similar to the DOJ’s justifications for its expansive jurisdictional approach in cross-border criminal enforcement actions.

For example, when the DOJ has asserted jurisdiction in financial crimes for which most of the alleged criminal conduct occurred overseas and the only conduct in the U.S. consisted of correspondent banking transactions, it has argued that U.S. criminal prosecution is necessary to protect the U.S.’s interest in not having its financial system used in foreign criminal enterprises. Prosecutors may also view Gamble as giving them greater liberty to exercise their discretion to not follow the anti-piling on policy in a given case.

When faced with regulatory scrutiny by both U.S. and foreign governments, it is critical that companies engage outside counsel experienced in multijurisdictional enforcement investigations and proceedings. DOJ policies and enforcement priorities frequently change as administrations change or as new Attorneys General are appointed.

Thus, the DOJ’s current anti-piling on policy may change or be rescinded in the future. After Gamble, it is even more important for companies to stay informed on how the DOJ has been exercising its anti-piling on discretion in cross-border criminal proceedings.

Notes

3 Gamble, 139 S. Ct. at 1964.
4 Id. (citing 18 U.S.C. § 922(g)(1)).
5 Id.
6 Id.
7 Id.
8 Id. at 1965.
9 Id.
10 Id.
11 Id. at 1966.
12 Id. at 1967.
13 Id.
14 Id.
15 Id.
16 Id.
17 Id.
18 Id. at 2002 (Gorsuch, J., dissenting).
19 Id. at 1969-70.

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