Duquesne Law Review

Volume 12 | Number 2 Article 11

1973

Constitutional Law - Double Jeopardy Clause of the Fifth Amendment - Doctrine of Dual Sovereignty

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CONSTITUTIONAL LAW—DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT—DOCTRINE OF DUAL SOVEREIGNTY—The Pennsylvania Supreme Court has held that where the interests of the Commonwealth have been sufficiently vindicated in a federal prosecution, a subsequent state prosecution for conduct resultant from the same act will be barred.

Commonwealth v. Mills, 447 Pa. 163, 286 A.2d 638 (1971).

On March 11, 1969 appellant, Ronald Edward Mills, was indicted in Philadelphia county and charged with carrying a concealed weapon, unlawfully carrying a firearm without a license[1] and aggravated robbery.[2] The charges arose out of the robbery of the Crusader Savings and Loan Association, a federally insured savings and loan association in Philadelphia. Subsequently appellant was indicted on April 9, 1969 in the United States District court for the Eastern District of Pennsylvania for the federal offenses of bank robbery and assault.[3] These charges arose out of the same robbery of the Crusader Savings and Loan Association. Mills pleaded guilty to the federal charges and was sentenced to five years imprisonment.[4] After receiving this federal imprisonment sentence, Mills petitioned the Court of Common Pleas of Philadelphia County for dismissal of the state charges. He alleged that a state prosecution following a federal prosecution for the same transaction would subject him to double jeopardy.[5] The court of common pleas dismissed the petition and Mills then pleaded guilty to the state charges.[6] The appellant received a sentence of five years probation for carrying a concealed weapon and three years probation for unlawfully carrying a firearm without a license. The aggravated robbery charges were dismissed.[7] The probations imposed by the state court were to run concurrently but following the five year federal imprisonment sentence.[8] Appellant appealed to the Pennsylvania Superior Court alleging double jeopardy. The superior court affirmed the trial court,[9]

1. Act of June 24, 1939, Pa. P.L. 872, *as amended*, PA. STAT. ANN. tit. 18, § 6106 (Supp. 1973).
2. Act of June 24, 1939, Pa. P.L. 872, *as amended*, PA. STAT. ANN. tit. 18, § 3701 (Supp. 1973).
3. 18 U.S.C. §§ 2113(a)-(b), (d) (1970).
4. Commonwealth v. Mills, 217 Pa. Super. 269, 269 A.2d 322, *vacated*, 447 Pa. 163, 286 A.2d 638 (1971).
5. 447 Pa. at 166.
6. *Id.*
7. *Id.*
8. *Id.*
9. Commonwealth v. Mills, 217 Pa. Super. 269, 269 A.2d 322 (1970).

relying on the United States Supreme Court's decision in *Bartkus v. Illinois*,[10] which held that successive federal and state prosecutions did not constitute double jeopardy and are permissible based on the doctrine of dual sovereignty. The Pennsylvania Supreme Court granted allocatur.[11]

The main issue in this case concerns the friction between the two apparently conflicting doctrines of dual sovereignty and double jeopardy. The court held that where the interests of the Commonwealth have been sufficiently vindicated under the judicial proceedings of the federal sovereign, a subsequent judicial proceeding by the state sovereign will be barred.[12]

In reaching its decision the court recognized the continued validity of *Bartkus v. Illinois*[13] and its companion case *Abbate v. United States*.[14] In *Abbate* the Court permitted a prosecution by the state government followed by a prosecution by the federal government.[15] Both *Bartkus* and *Abbate* rested on the principle of dual sovereignty of federal and state governments as enunciated in *United States v. Lanza*.[16] Notwithstanding the Pennsylvania court's recognition of the continued viability of *Bartkus* and *Abbate*, the court concluded that successive prosecutions should nonetheless be barred in the instant case.[17]

The court in reaching its holding utilized an interest analysis approach whereby a subsequent state prosecution is barred if the interests of the Commonwealth have been sufficiently litigated in the federal forum.[18] The main portion of the court's opinion, however, is concerned with the right of the individual not to be put in jeopardy twice. The court stated:

> We are talking about two governments protecting their interests, when we really should be talking about the individual, since by focusing on the individual we see that it matters little where he is confined—in a federal or state prison—the fact is that his liberty is taken away twice for the same offense.[19]

10. 359 U.S. 121 (1959).
11. *Id.* at 166.
12. *Id.* at 171-72.
13. 359 U.S. 121 (1959).
14. 359 U.S. 187 (1959).
15. *Id.* at 188.
16. 260 U.S. 377, 382 (1922).
17. 447 Pa. at 172.
18. *Id.*
19. *Id.* at 170. The holding of the court seems to rest on one principle: that the interests of both sovereigns coincide. Supportive reasoning emphasized the individual's right not to be put in jeopardy twice.

Justice Barbierri's dissent[20] indicated his dissatisfaction with the majority opinion's interest analysis test for determining whether a prior federal prosecution will serve as a bar to a subsequent state prosecution. He stated that the court's opinion has propounded a double jeopardy rule which places Pennsylvania in a unique position in dual sovereignty cases. As a result the question of double jeopardy will be a question of fact rather than a question of law and will not depend upon conviction or acquittal in the prior proceeding, but rather upon the nature of the sentence imposed. In addition he emphasized that there will be inequality in treatment of similarly situated defendants based solely upon the result of a race for forum. For example, if one defendant is first prosecuted in Pennsylvania the federal government is free to institute a federal prosecution.[21] Whereas, a defendant involved in the same transaction who is first prosecuted by federal authorities will escape prosecution in Pennsylvania if the interests of the state have been sufficiently vindicated in the federal prosecution. Although he recognized the object of the majority opinion, *i.e.*, to relieve the individual from the burden of two prosecutions, the dissenter would affirm the superior court because of the continued viability of *Bartkus* and the validity of the dual sovereignty distinction set forth in it.

In *Bartkus*[22] the defendant was acquitted by a federal jury of robbing a federally insured savings and loan association but was convicted in Illinois for armed robbery under Illinois law.[23] Because the fifth amendment double jeopardy clause was not made applicable to the states until ten years after *Bartkus*, when *Benton v. Maryland*[24] was decided, the *Bartkus* majority did not consider valid the claim that successive prosecutions by federal and state sovereigns may constitute double jeopardy.[25] Instead the opinion emphasized the concept of dual sovereignty; that both the federal and state governments have separate

20. *Id.* at 175.
21. N.Y. Times, Apr. 6, 1959, ¶ 1, at 1, col. 4 (statement of then Attorney General William P. Rogers):
> After a state prosecution, there should be no federal trial for the same act . . . unless the reasons are compelling. We should continue to make every effort to cooperate with the state and local authorities to the end that the trial occur in the jurisdiction, whether it be state or federal, where the public interest is best served. If this be determined accurately, and is followed by efficient and intelligent cooperation by state and federal law enforcement authorities, the consideration of a second prosecution very seldom will arise.
22. 359 U.S. 121 (1959).
23. *Id.* at 121-22.
24. 395 U.S. 784 (1969).
25. 359 U.S. at 127.

interests to protect and each is therefore independently responsible for enforcement of its own law.[26] The opinion stated that to bar successive prosecutions would enable one sovereign to interfere with the administration of the other's criminal law.[27] Justice Black in his dissent[28] focused in on the problem from the standpoint of the individual and concluded that a second trial for the same act is just as repulsive when it takes place in an independent sovereign as when it takes place within the same sovereign. There is still double punishment from two trials by two sovereigns. Such punishment hurts the individual to the same extent as when it is imposed by the same sovereign.[29]

Abbate v. United States[30] involved the precise issue of dual sovereignty discussed in *Bartkus* except that the first trial was held in the state forum and was followed by a trial in the federal forum. The defendant was charged in federal court with the offense of destroying United States communications property which carries a sentence of up to ten years imprisonment.[31] In state court the defendant was charged with the crime of conspiring to destroy another's property which carries a sentence of three months imprisonment. The Court pointed out that if a successful state prosecution imposing a three month prison sentence would serve to bar a subsequent federal prosecution carrying a potential imprisonment term of ten years, such a bar would infringe upon the law enforcement authority of the federal government.[32] Again dissenting, Justice Black emphasized the double jeopardy with respect to the individual who is punished twice for the same offense, once by the state and once by the United States.[33]

Both the *Bartkus* and *Abbate* decisions were based on *United States v. Lanza*.[34] *Lanza* was the first decision expressly authorizing successive prosecutions by state and federal courts based on the doctrine of dual sovereignty. The Court stated that a conviction and punishment in a

26. *Id.* at 131.
27. *Id.* at 137.
28. *Id.* at 155 (Black, J., dissenting).
29. *Id.*
If double punishment is what is feared it hurts no less for two "Sovereigns" to inflict it than for one.
30. 359 U.S. 187 (1959).
31. 19 U.S.C. § 1362 (1966).
32. 359 U.S. at 195.
33. *Id.* at 203 (Black, J., dissenting). For a discussion of successive prosecutions by state and federal governments, *see* Note, *Successive Prosecutions by State and Federal Governments for Offenses Arising Out of the Same Act*, 44 MINN. L. REV. 534 (1960). *See also* Comment, *Double Prosecutions by State and Federal Governments: Another Exercise in Federalism*, 80 HARV. L. REV. 1538 (1967).
34. 260 U.S. 377 (1922).

state court under state law will not bar a subsequent conviction and punishment in a federal court under federal law for the same conduct.[35] The Court further stated:

> Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other. It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both, and may be punished by each.[36]

The basis for the *Lanza* decision was derived from dicta in the prior cases of *Fox v. Ohio*,[37] *United States v. Marigold*[38] and *Moore v. Illinios*.[39] The issue in each of these cases concerned the power of the state and federal governments to enact laws aimed at proscribing the same criminal conduct.[40] The *Fox* Court, relying on the principle of dual sovereignty, held that where a state law is not repugnant to the United States Constitution it is within a state's power as an independent sovereign to legislate for the protection of its own peace and dignity.[41] The Court's dicta in *Fox*,[42] *Marigold*[43] and *Moore*[44] recognized that because the state and federal governments have concurrent criminal jurisdiction there exists a possibility of double prosecution and punishment. In *Moore*[45] the Court further stated in dicta, however, that if a person is subjected to successive prosecutions by federal and state governments the offender is not punished twice for the same offense but is punished once for one state offense and once for one federal offense which happened to arise from the same act.[46]

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35. *Id.* at 385.
36. *Id.* at 382.
37. 46 U.S. (5 How.) 410 (1847).
38. 50 U.S. (9 How.) 560 (1850).
39. 55 U.S. (14 How.) 13 (1852).
40. *See* Note, *Double Prosecutions by State and Federal Governments: Another Exercise in Federalism* 80 HARV. L. REV. 1538, 1541 (1967). The author points out that at the time of the decisions of *Fox*, *Marigold* and *Moore* slavery and state sovereignty were prime political issues. Therefore, any restrictions placed on the state power to punish criminal offenses by denying concurrent jurisdiction, or by outlawing successive prosecutions, would have resulted in violent opposition in the Southern states.
41. 46 U.S. at 433-34.
42. *Id.* at 435.
43. 50 U.S. at 569.
44. 55 U.S. at 20.
45. *Id.*
46. In one early case, Houston v. Moore, 18 U.S. (5 Wheat.) 1, 10 (1820), there is some language to the effect that there would be a bar to a second prosecution by a different government. It was the belief of the majority, however, that the state statute in question imposed state sanctions for violations of a federal criminal law. Therefore, this case stands for the proposition that a bar to a subsequent state prosecution will exist only where the state prosecution is based on the same statute under which the proscribed conduct has already been tried in the courts of another jurisdiction.

United States v. Cruikshank[47] was one of a series of cases, prior to *Lanza*, reaffirming the principle of dual sovereignty set forth in *Fox*. The Court stated that persons within the United States are subject to the laws of both federal and state governments. As a necessary consequence it may happen that an individual will be prosecuted and punished by each government for the same act.[48]

It is this necessary consequence of dual sovereignty, *i.e.*, the possibility of double jeopardy, that was the primary concern of the Pennsylvania Supreme Court in *Mills*.[49] At the time of the *Bartkus* decision, the United States Supreme Court in *Palko v. Connecticut*[50] had held that the fifth amendment double jeopardy clause was not applicable to the states.[51] Therefore, the *Bartkus* Court concluded that its decision was not only based on the principle of dual sovereignty but also on the fact that successive prosecutions by federal and state sovereigns did not constitute double jeopardy.[52] Since the fifth amendment was not binding on the states, the majority of the *Bartkus* Court did not view double jeopardy as being in friction with the principle of dual sovereignty. Justice Black, however, in his dissent argued that double jeopardy should be an important consideration.[53]

In *Benton v. Maryland*[54] the United States Supreme Court overruled *Palko* and held that the fifth amendment double jeopardy clause was binding on the states through the due process clause of the fourteenth amendment.[55] The *Benton* Court established that a state could no longer repeatedly retry a man for the same crime.[56] The Court was silent, however, as to the effect of its ruling on *Bartkus*. The only mention of the *Bartkus* decision was in reference to Justice Black's dissent concerning the concept of double jeopardy.[57] Thus, it is sug-

47. 92 U.S. 588 (1875).
48. *Id.* at 590-91.
The people of the United States resident within any State are subject to two governments: one State and the other National; but there need be no conflict between the two. . . . True, it may sometimes happen that a person is amenable to both jurisdictions for one and the same act. . . . He owes allegiance to the two departments, so to speak, and within their respective spheres must pay the penalties which each exact for the disobedience of its laws.
49. 447 Pa. at 170.
50. 302 U.S. 319 (1937).
51. *Id.* at 328.
52. 359 U.S. at 132-33.
53. *Id.* at 155 (Black, J., dissenting).
54. 395 U.S. 784 (1969).
55. *Id.* at 787, 794.
56. *Id.* at 796.
57. *Id.* at 795. The fact that the *Benton* court cited the dissenting opinion by Justice

gested that the majority of the *Benton* Court indicated by their silence that the *Bartkus* holding was primarily based on the concept of dual sovereignty and secondarily on the non-applicability of the fifth amendment double jeopardy clause to the states. Therefore, successive federal and state criminal prosecutions for the same conduct were still permissible under *Bartkus*.[58]

The Pennsylvania decision in support of its unique approach to successive prosecutions cited *State v. Fletcher*,[59] an Ohio appeals court decision. This Ohio decision held that a federal prosecution followed by a state prosecution constituted double jeopardy. The, *Mills* Court, however, failed to note that the Ohio appeals court decision was reversed by the Ohio Supreme Court.[60] Justice Corrigan, speaking for the Ohio Supreme Court, stated that it was bound to follow the constitutional guidelines which the United States Supreme Court established in *Bartkus*.[61]

The dual sovereignty doctrine has been sustained as a viable doctrine and followed with respect to decisions involving military and territorial courts,[62] and state and city courts.[63] The fact that the interests of the military and territorial courts or the state and city courts may have been the same was not considered of significance.[64]

In contrast, the dual sovereignty doctrine has been disregarded in favor of the rights of the individual in cases involving the fifth amend-

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Black in *Bartkus* may suggest that the *Benton* court was in disagreement with the *Bartkus* holding.

58. For a discussion of double jeopardy as it relates to *Bartkus* and *Abbate see* Brant, *Overruling Bartkus and Abbate: A New Standard for Double Jeopardy*, 11 WASHBURN L.J. 188 (1971-72).

59. 22 Ohio App. 2d 83, 259 N.E.2d 146 (1970), *rev'd*, 26 Ohio St. 2d 221, 271 N.E.2d 567 (1971).

60. 26 Ohio St. 2d 221, 271 N.E.2d 567 (1971).

61. *Id.* at 225, 271 N.E.2d at 569.

62. Grafton v. United States, 206 U.S. 333 (1907). This case concerned a military court martial barring a subsequent territorial proceeding. The Court held that the two courts derived their jurisdiction from the same authority—the federal government. Therefore, a second prosecution constituted double jeopardy. The Court stated:

> . . . the cases holding that the same acts committed in a state of the Union may constitute an offense against the United States and also a distinct offense against the State do not apply here, where the two tribunals that tried the accused exert all their powers under and by authority of the same government—that of the United States.

Id. at 354-55. *See also* Puerto Rico v. Shell Co., 302 U.S. 253 (1937); United States v. La Plant, 156 F. Supp. 660 (D. Mont. 1957).

63. Waller v. Florida, 397 U.S. 387 (1970). This Court held that both the municipal court and state court owe their source of authority to the same sovereign and therefore a second prosecution is barred. *Id.* at 394-95.

64. *But see* People v. Wendel, 59 Misc. 354, 112 N.Y.S. 301 (Sup. Ct.), *appeal dismissed*, 128 App. Div. 437, 112 N.Y.S. 837 (1908).

ment protection against self-incrimination[65] and the fourth amendment protection against unreasonable searches and seizures.[66]

Lanza, Bartkus and *Abbate* are all based on the concept of dual sovereignty. Specifically these cases stand for the proposition that the state and federal governments are independent sovereigns, each responsible for prosecuting and punishing conduct proscribed as criminal under their criminal codes. The fact that the same conduct may give rise to successive prosecutions by federal and state authorities, thereby imposing a double punishment on the individual, is of no concern to the two governments vindicating their interests. When *Benton v. Maryland*[67] made the fifth amendment double jeopardy clause applicable to the states through the fourteenth amendment due process clause, the Court was silent as to what effect its decision had on *Bartkus*. Therefore, although the fifth amendment was made applicable to the States, the *Bartkus* holding was apparently still good law.

The problem confronting the Pennsylvania Supreme Court was that the United States Supreme Court, as evidenced by *Bartkus*, did not view the concepts of double jeopardy and dual sovereignty as being in conflict. The Pennsylvania Supreme Court was presented with a case which it viewed as one of apparent double jeopardy, but which the United States Supreme Court might view as a proper exercise of state power based on dual sovereignty. To resolve what the Pennsylvania Supreme Court viewed as an apparent conflict between the principles of double jeopardy and dual sovereignty a unique decision was reached. The decision is grounded upon the premise that if the interests of the Commonwealth have been fully vindicated in a prior federal proceeding, then a subsequent state proceeding is barred. Thus, the court discounts the fact that there are two sovereigns each permitted to vindicate their interests independently when the interests are the same.[68] In effect, the Pennsylvania court has held that when the interests of

65. Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964). The Court held that the constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law, and a federal witness against incrimination under state as well as federal law. *Id.* at 77-78.

66. Elkins v. United States, 364 U.S. 206 (1960). The Court prohibited the use by federal authorities of evidence illegally seized by state authorities. The Court stated:

> To the victim it matters not whether his constitutional right has been invaded by a federal agent or by a state officer.

Id. at 215.

67. 395 U.S. 784 (1969).

68. *See* United States v. Furlong, 18 U.S. (5 Wheat.) 184 (1820). This case represents an application of the separate sovereign doctrine in international law. *See also* Franck, *An International Lawyer Looks at the Bartkus Rule*, 34 N.Y.U.L. REV. 1096 (1959).

the state have been fully litigated in a prior federal forum, then a subsequent state proceeding stemming from the same act constitutes double jeopardy.[69]

Because double jeopardy is the import of the Pennsylvania court's analysis, it stands in apparent conflict with the United States Supreme Court's holding in *Bartkus*. The *Bartkus* court neglected to consider the interest of the individual, to which the Pennsylvania court has given primary consideration under circumstances where the state's interests have been satisfied in a prior federal proceeding. It is suggested that the Pennsylvania Supreme Court under the facts of *Mills* has made an appropriate and necessary decision and, therefore, ought to be followed by the highest court in the land. Therefore, the United States Supreme Court ought to overrule *Bartkus* in order to permit double jeopardy to serve as a defense to a state prosecution following a federal prosecution where the state's interest has been sufficiently vindicated. To maintain judicial consistency in decision making, the Court ought to overrule *Abbate v. United States*[70] and permit double jeopardy to serve as a defense to a federal prosecution following a state prosecution where the federal interest has been sufficiently vindicated.

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AUTHOR'S NOTE: Subsequent to the decision by the Supreme Court of Pennsylvania in *Commonwealth v. Mills*, the Pennsylvania legislature enacted section III of the Crimes Code.[71] The statute bars a

69. Fifteen state jurisdictions have provided a statutory double jeopardy defense for any person prosecuted in a state court after being tried in a federal court for the same offense. *See, e.g.*, ILL. REV. STAT. ch. 38, §§ 3-4 (1972). *See also* MODEL PENAL CODE § 1.10 (Prop. Offic., Draft 1962).

70. 359 U.S. 187 (1959).

71. PA. STAT. ANN. tit. 18, § 111 (1973) states:

When conduct constitutes an offense within the concurrent jurisdiction of this Commonwealth and of the United States or another state, a prosecution in any such other jurisdiction is a bar to a subsequent prosecution in this Commonwealth under the following circumstances: (1) The first prosecution resulted in an acquittal or in a conviction as defined in section 109 of this title (relating to when prosecution barred by former prosecution for same offense) and the subsequent prosecution is based on the same conduct unless: (i) the offense of which the defendant was formerly convicted or acquitted and the offense for which he is subsequently prosecuted each requires proof of a fact not required by the other and the law defining each of such offenses is intended to prevent a substantially different harm or evil; or (ii) the second offense was not consummated when the former trial began. (2) The former prosecution was terminated, after the indictment was found, by an acquittal or by a final order or judgment for the defendant which has not been set aside, reversed or vacated and which acquittal, final order or judgment necessarily required a determination inconsistent with a fact which must be established for conviction of the offense of which the defendant is subsequently prosecuted.