

Department of Legislative Services
Maryland General Assembly
2013 Session

FISCAL AND POLICY NOTE

House Bill 152

(Delegate Anderson, *et al.*)

Judiciary

Criminal Procedure - Successive Federal and State Prosecutions - Bar

This bill establishes that if an act is a violation of both a State and federal criminal statute, the commencement of a prosecution under the federal statute prohibits a prosecution under the State statute. A prosecution under the federal statute commences once jeopardy has attached.

The bill applies prospectively and does not apply to or have any effect on crimes committed before the bill's October 1, 2013 effective date.

Fiscal Summary

State Effect: Potential minimal decrease in general fund expenditures if the bill reduces the number of individuals housed in State correctional facilities. Revenues are not affected.

Local Effect: The bill does not materially affect local government finances.

Small Business Effect: None.

Analysis

Current Law: The double jeopardy clause of the Fifth Amendment of the U.S. Constitution prohibits subsequent prosecutions of a person for the same offense following an acquittal or conviction. It also prohibits multiple convictions for the same offense. The purpose of double jeopardy is to protect a defendant from facing multiple trials for the same offense.

In a jury trial, jeopardy attaches when the jury is sworn in. In a bench trial, jeopardy attaches once the judge begins to receive evidence (*i.e.*, once the first witness is sworn in).

Double jeopardy applies to state criminal prosecutions through the Fourteenth Amendment. States may also have common law or constitutional double jeopardy provisions. While the principles of double jeopardy apply to states, double jeopardy only applies within the same jurisdiction. Therefore, a person may be acquitted or convicted of an offense in one jurisdiction but is still subject to prosecution for the same offense in a different jurisdiction. States and the federal government are considered separate sovereigns or separate jurisdictions.

The U.S. Supreme Court has held that successive state and federal prosecutions for a crime sharing the same evidence do not violate the Fifth Amendment's prohibition of double jeopardy. *See Bartkus v. People of State of Illinois*, 359 U.S. 121 (1959). The Maryland Court of Special Appeals has noted that the federal government and the State of Maryland "may prosecute an accused under separate criminal offenses even if the offenses are based upon the same conduct." *Khan v. State*, 115 Md. App. 636, 643 (1996).

The Full Faith and Credit Clause of the U.S. Constitution requires states to recognize judgments from other state courts. *Weinberg v. Johns-Manville Sales Corp.*, 299 Md. 225, 234 (1984). In *Gillis v. State*, 333 Md. 69 (1993), the Maryland Court of Appeals held that the Full Faith and Credit Clause did not preclude Maryland from prosecuting a man for murder even though the man had been acquitted of the same murder in Delaware. In reaching its decision, the court noted that the principle of separate sovereigns applied to the double jeopardy clause as well as the Full Faith and Credit Clause.

Background: Virginia law prohibits successive federal and state prosecutions under a statute similar to this bill. In 2002, Virginia enacted an exception to this statute for any offense involving an act of terrorism.

State Expenditures: To the extent that the bill reduces the number of individuals incarcerated in State correctional facilities, general fund expenditures decrease. The number of individuals affected by this bill is expected to be minimal. This assumes that the individuals affected by this bill are being prosecuted for serious offenses that are eligible for incarceration in a State facility.

State's Attorneys in Anne Arundel, Howard, and Montgomery counties do not recall recent cases that would be covered by this bill. Baltimore County advises that it has not had a case since 1985 that would be covered by this bill. Caroline County advises that one of its recent cases could be covered under the bill. Calvert County advises that it

does not recall a recent case that is completely on point with the requirements of the bill, but has handled cases that, depending on the technicalities involved, may be covered by the bill. Talbot County advises that it has not handled cases that would be covered by the bill, but does recall several cases with joint jurisdiction between the federal government and the county that have been resolved.

Based on the information provided by the State's Attorneys, child pornography and drug cases are two types of cases that are likely to be unable to be prosecuted by the State if jeopardy has attached at the federal level. Prosecutors repeatedly mentioned the extensive coordination, cooperation, and activity involved in cases that are eligible for prosecution at the federal and State levels.

The Office of the Attorney General (OAG) advises that State and federal prosecutors historically exercise appropriate discretion when deciding to pursue parallel or successive prosecutions of offenses that are eligible for prosecution at the federal and State levels, in part due to the federal government's Petite Policy (see below) and noted that it is conceivable that a State's Attorney would defer to a federal prosecutor since federal crimes generally have a five-year statute of limitations while felonies in Maryland have none.

Policy 9-2.031 (also referred to as the "Petite Policy"), precludes the initiation or continuation of a federal prosecution following a prior state or federal prosecution based on substantially the same acts or transactions unless three substantive prerequisites are met: (1) the matter must involve a substantial federal interest; (2) the prior prosecution must have left that interest demonstrably vindicated; and (3) the government must believe that the defendant's conduct constitutes a federal offense, and that the admissible evidence probably will be sufficient to obtain and sustain a conviction by an unbiased trier of fact. The prosecution must also be approved by the appropriate U.S. Assistant Attorney General. The policy applies to certain types of prosecutions and at certain stages of prosecution.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Judiciary (Administrative Office of the Courts); Office of the Attorney General; State's Attorneys' Association; Anne Arundel, Baltimore, Calvert, Caroline, Frederick, Harford, Howard, Montgomery, and Talbot counties; U.S. Attorney's Office; American Jurisprudence 2d; Black's Law Dictionary; United States Attorneys' Manual; Department of Legislative Services

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