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Double Jeopardy Clause and Successive State Prosecutions: If at First You Don't Succeed, Try, Try Again, The--Fifth Amendment: Heath v. Alabama, 106 S. Ct. 433 (1985)

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FIFTH AMENDMENT—THE DOUBLE JEOPARDY CLAUSE AND SUCCESSIVE STATE PROSECUTIONS: IF AT FIRST YOU DON'T SUCCEED, TRY, TRY AGAIN

Heath v. Alabama, 106 S. Ct. 433 (1985).

I. INTRODUCTION

The United States Supreme Court has long held that the double jeopardy clause of the fifth amendment[1] disallows punishing a defendant twice for the same offense.[2] In *Heath v. Alabama*,[3] however, the Court found that a single act may violate the laws of two states and, therefore, constitute two distinct offenses. As a result, the majority concluded that a defendant may be punished for each offense. The Court based its ruling on an expanded application of the dual sovereignty doctrine. This doctrine states that when two sovereigns derive their prosecutorial power from separate sources, each may prosecute a defendant for the same act.[4] Before *Heath*, the doctrine was applied only when the physical boundaries of the sovereigns involved overlapped, but the Court's decision in *Heath* allows successive state prosecutions despite the fact that only one of the states had jurisdiction over the locus of the crime.

This Note discusses the dual sovereignty doctrine and its applicability to successive state prosecutions in light of its historical development. Additionally, this Note will examine the rationale of the majority and dissenting opinions in *Heath*. Finally, this Note consid-

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[1] The fifth amendment of the United States Constitution states "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ." U.S. CONST. amend. V. The double jeopardy clause was made applicable to the states through the due process clause of the fourteenth amendment in Benton v. Maryland, 395 U.S. 784 (1969).

[2] Brown v. Ohio, 432 U.S. 161, 165 (1977)("The Double Jeopardy Clause 'protects against . . . a second prosecution for the same offense after conviction.' " (quoting North Carolina v. Pearce, 395 U.S. 711, 717 (1969))); *Ex Parte* Lange, 85 U.S. (18 Wall.) 163, 169 (1873)("No one can twice be punished for the same crime . . . .").

[3] 106 S. Ct. 433 (1985).

[4] *See infra* notes 5-24 and accompanying text.

ers the implications of the Court's ruling as it applies to the double jeopardy clause of the fifth amendment and to individual rights.

II. THE DUAL SOVEREIGNTY DOCTRINE

The Supreme Court first discussed the issue of successive prosecutions by two sovereigns for the same act in *Moore v. Illinois*.[5] In *Moore*, the defendant was convicted under an Illinois statute which prohibited the harboring or secreting of fugitive slaves.[6] Moore contended that the state prosecution should have been prohibited because he was also in violation of the federal Fugitive Slave Act, thus creating the possibility of a second prosecution for the same act.[7] The Court, unmoved by the argument, noted that the interests of the federal and state statutes were different.[8] Despite the lack of an actual second prosecution, the Court, for the first time, articulated the dual sovereignty doctrine:

> An offense, in its legal signification, means the transgression of a law .... Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable for punishment for an infraction of the laws of either. The same act may be an offense or transgression of the law of both .... That either or both may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twiced punished for the same offense; but only that by one act he has committed two offenses, for each of which he is justly punishable. He could not plead the punishment by one in bar to a conviction by the other ....[9]

Seventy years later the Court, for the first time, faced a situation where actual successive state and federal prosecutions occurred under similar statutes. In *United States v. Lanza*,[10] the federal government prosecuted a defendant for prohibition violations. This prosecution followed a state prosecution for the same acts.[11] Applying the dual sovereignty doctrine, the Court held the second prosecution valid, stating "an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of

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5 55 U.S. (14 How.) 13, 19 (1852). The possibility of duplicate prosecutions was noted, however, in earlier cases. *See* Fox v. Ohio, 46 U.S. (5 How.) 410 (1847); Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820).

6 *Moore*, 55 U.S. at 17.

7 *Id.*

8 The purpose of the federal statute was to protect personal property while the state interest was to bar black people from entering its territory. *Id.* at 18-19.

9 *Id.* at 19-20.

10 260 U.S. 377 (1922).

11 *Id.* at 378-79.

both, and may be punished by each."[12]

The Court again considered the dual sovereignty doctrine in *Bartkus v. Illinois*,[13] where it rejected a fourteenth amendment argument against successive state and federal prosecutions for the same act. In *Bartkus*, Illinois convicted the defendant of robbery after he had been acquitted of federal bank robbery charges.[14] The Court affirmed the state conviction and offered a practical justification for the dual sovereignty doctrine: the prosecution by one sovereign of a minor offense must not preclude the prosecution by a second sovereign for a graver offense.[15]

The Court's decision in *Bartkus* was immediately followed by *Abbate v. United States*.[16] In *Abbate*, a federal conviction for conspiracy to destroy communications equipment followed a state conviction, based on the same acts, for conspiracy to destroy the private property of telephone companies.[17] The Court, using the practical justification offered in *Bartkus*, again reasoned that the rejection of the dual sovereignty doctrine would hinder law enforcement.[18]

Two cases since *Bartkus* and *Abbate* have helped define the parameters of the dual sovereignty doctrine. In *Waller v. Florida*,[19] the Court unanimously held that the doctrine did not apply to successive prosecutions by a municipality and a state. The Court refused to apply the doctrine because each entity derived its prosecuting authority from a single source: the state constitution.[20] In *United States v. Wheeler*,[21] the Court held that the dual sovereignty doctrine allowed the federal government to prosecute an individual even if he had already been prosecuted by an Indian tribe for the same acts.[22] The defendant in *Wheeler* plead guilty to disorderly conduct and contributing to the delinquency of a minor in the initial tribal proceeding, while the subsequent federal conviction was for statutory rape.[23] The Court rested its decision entirely on the dual sovereignty doctrine, stating "[s]ince tribal and federal prosecutions are

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12 *Id.* at 382. The Court also noted that at that time the fifth amendment did not apply to state prosecutions. Therefore, unless the successive prosecutions were both federal, the double jeopardy clause would have no effect.

13 359 U.S. 121 (1959).

14 *Id.* at 122.

15 *Id.* at 137.

16 359 U.S. 187 (1959).

17 *Id.* at 188-89.

18 *Id.* at 195.

19 397 U.S. 387 (1970).

20 *Id.* at 393.

21 435 U.S. 313 (1978).

22 *Id.* at 332.

23 *Id.* at 315-16.

brought by separate sovereigns, they are not 'for the same offense,' and the double jeopardy clause thus does not bar one when the other has occurred."[24]

III. BACKGROUND: *HEATH V. ALABAMA*

In August, 1981 Larry Gene Heath hired two men to kill his wife, Rebecca Heath. On August 31, 1981, Mr. Heath met the men in Georgia and led them to the Heath home in Alabama. After giving the men keys to his house and car he departed. The men then kidnapped Rebecca Heath from her home. Her body was later found in the Heath's car on a Georgia roadside. The coroner determined the cause of death to be a gunshot wound to the head.[25] Based on the estimated time of death and the distance from the Heath's home in Alabama to the spot where the body was found, it is probable that while the kidnapping occured in Alabama the murder took place in Georgia.[26]

The Georgia authorities arrested Heath on September 4, 1981. Upon his arrest, Heath waived his *Miranda* rights and gave a full confession.[27] The following November a grand jury in Troup County, Georgia indicted Heath on charges of malice murder.[28] Georgia then informed Heath that it would seek the death penalty at trial. On February 10, 1982, Heath pleaded guilty to the Georgia murder charge in exchange for a sentence of life imprisonment.[29]

On May 5, 1982, the grand jury of Russell County, Alabama indicted Heath for the capital offense of murder during a kidnapping.[30] Prior to the Alabama trial, Heath entered pleas of *autrefois convict* and former jeopardy under the Alabama Constitution[31] and the United States Constitution,[32] stating that his conviction in Geor-

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24 *Id.* at 329-30.

25 *Heath*, 106 S. Ct. at 435.

26 *Id.* The State of Alabama never contended otherwise at trial.

27 *Id.*

28 The indictment read as follows: "[The grand jurors] in the name and on behalf of the citizens of Georgia, charge and accuse LARRY GENE HEATH [et al.] with the offense of murder . . . ; for the said LARRY GENE HEATH [et al.] on the date of August 31, 1981, . . . did then and there with malice aforethought cause the death of Rebecca McGuire Heath, a human being, by shooting her with a gun, a deadly weapon." *Id.* at 435 n.1.

29 *Id.*

30 This indictment read: "Larry Gene Heath did intentionally cause the death of Rebecca Heath, by shooting her with a gun, and Larry Gene Heath caused said death during Larry Gene Heath's abduction of, or attempt to abduct, Rebecca Heath with the intent to inflict physical injury on her . . . ." *Id.* at 435 n.2.

31 ALA. CONST. art. I, § 9 ("That no person shall, for the same offense, be twice put in jeopardy of life or limb . . . .").

32 U.S. CONST. amend. V. *See supra* note 1.

gia barred his prosecution in Alabama for the same act.[33]

The trial court rejected Heath's double jeopardy claims and the second prosecution was allowed.[34] Heath was convicted of murder during a kidnapping in the first degree. The jury recommended the death penalty and the trial court followed this recommendation.[35]

On appeal, the Alabama Court of Criminal Appeals upheld his conviction.[36] Heath sought a writ of certiorari from the Alabama Supreme Court arguing double jeopardy. The court granted the petition and unanimously affirmed Heath's conviction, stating "[p]rosecutions under the laws of separate sovereigns do not improperly subject an accused twice to prosecutions for the same offense."[37]

Heath then sought a writ of certiorari from the United States Supreme Court, again arguing the double jeopardy claim.[38] In granting certiorari, the Court directed the parties to address the question of the applicability of the dual sovereignty doctrine to successive prosecutions by two states.[39]

IV. The Majority Opinion

In delivering the majority opinion, Justice O'Connor first assumed, *arguendo*, that "had these offenses arisen under the laws of one State and had petitioner been separately prosecuted for both offenses in that State, the second conviction would have been barred by the double jeopardy clause."[40] With this assumption in mind, the Court turned to the issue on which certiorari was granted: whether the dual sovereignty doctrine permits successive prosecutions under the laws of two states, which would otherwise be held to be double jeopardy.[41]

The majority noted that the dual sovereignty doctrine derives from "the common law conception of crime as an offense against the sovereignty of the government."[42] The Court reasoned that a

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33 *Heath*, 106 S. Ct. at 435.

34 *Id.*

35 *Id.* at 436.

36 Heath v. State, 455 So. 2d 898 (Ala. 1983).

37 *Ex Parte* Heath, 455 So. 2d 905, 906 (Ala. 1984)(citing United States v. Wheeler, 435 U.S. 313, 317 (1978)).

38 Heath also raised the issue of whether Alabama had jurisdiction over the crime because it occurred in Georgia. The Court did not grant certiorari on this issue because it had not been raised in the state courts. *Heath*, 106 S. Ct. at 436-37.

39 105 S. Ct. 1390 (1985).

40 *Heath*, 106 S. Ct. at 437.

41 *Id.*

42 *Id.*

defendant can, with a single act, violate the laws of two sovereignties, and thereby commit two distinct offenses.[43] Successive prosecutions are therefore allowed because two separate offenses have occurred. The Court found that each prosecuting entity must derive its authority to punish from a distinct source before the double prosecution will be allowed.[44] The majority based its finding on prior cases that applied the dual sovereignty doctrine to permit successive prosecutions for the same act.[45]

The Court's prior decisions demonstrated that the dual sovereignty doctrine allows successive state and federal prosecutions for single acts because the states derive their power to create and enforce laws from a source other than the federal government.[46] The majority in *Heath* extended this rationale to include successive prosecutions by two states. The Court justified this expansion because the states derive their sovereign power from sources separate from each other.[47]

The Court rejected dicta from an earlier opinion in which concurrent jurisdictions of two states were involved. In *Nielsen v. Oregon*,[48] the State of Oregon convicted a Washington resident for violating Oregon laws by fishing on the Columbia River, the natural boundary between the two states. The Court in *Nielsen* held that because the fisherman was properly licensed by the State of Washington, Oregon was precluded from prosecuting.[49] Despite petitioner's argument that *Nielsen* suggests "where States have concurrent jurisdiction over a criminal offense, the first State to prosecute thereby bars prosecution by any other State,"[50] the majority in *Heath* limited *Nielsen* "to its unusual facts and [noted that it] has continuing relevance, if at all, only to questions of jurisdiction between two entities deriving their concurrent jurisdiction from a

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43 *Id.* (citing United States v. Lanza, 260 U.S. 377, 382 (1922)).

44 *Id.* at 437.

45 *See, e.g.*, United States v. Wheeler, 435 U.S. 313 (1978)(Indian tribe and federal government are separate sovereigns); Waller v. Florida, 397 U.S. 387 (1970)(state and city governments are not separate sovereigns); Puerto Rico v. The Shell Co., 302 U.S. 253 (1937)(federal and territorial governments are not separate sovereigns); United States v. Lanza, 260 U.S. 377 (1922)(state and federal governments are separate sovereigns); Grafton v. United States, 206 U.S. 333 (1907)(federal and territorial governments are not separate sovereigns).

46 The states power to prosecute is "inherent" and thus separate from the federal government. *Wheeler*, 435 U.S. at 320.

47 *Heath*, 106 S. Ct. at 438.

48 212 U.S. 315 (1909).

49 *Id.*

50 *Heath*, 106 S. Ct. at 438.

single source of authority."[51]

In the final portion of its opinion, the Court declined to examine the interests of the state that prosecutes second. The Court found it irrelevant whether those interests were vindicated by the first prosecution because the "Court has plainly and repeatedly stated that two identical offenses are *not* the 'same offense' within the meaning of the Double Jeopardy Clause if they are prosecuted by different sovereigns."[52] The Court reasoned that if states are indeed separate sovereigns then an interest analysis is not required because "the circumstances of the case are irrelevant."[53] Additionally, the majority rejected a balancing of interests approach as too "uncertain" and troublesome.[54]

Justice O'Connor concluded by reiterating that a state is a sovereign which must be allowed to enforce its criminal laws. To deprive a state of this right because another state has "won the race to the courthouse" would be "shocking."[55] The Court held that a state must be allowed to determine whether its sovereign interests have been satisfied by a prior prosecution by another state. "A State's interest in vindicating its sovereign authority through enforcement of its laws by definition can never be satisfied by another State's enforcement of *its* own laws."[56]

V. Justice Marshall's Dissent

In his dissenting opinion, Justice Marshall argued that the majority wrongly seized upon the suggestion in past cases that each sovereign may prosecute a defendant for a violation of its laws, despite a previous prosecution by another sovereign for the same act. Justice Marshall found that in relying on those precedents, the majority ignored the policy considerations underlying those cases.[57]

According to Justice Marshall, the Court created the dual sovereignty doctrine to accomodate complimentary state and federal interests that arise in the United States' system of concurrent territorial jurisdictions,[58] and he noted that courts do not serve that purpose by applying the doctrine in a way which allows successive

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51 *Id.*

52 *Id.* at 439 (emphasis in original).

53 *Id.* at 439.

54 *Id.*

55 *Id.* at 440.

56 *Id.* (emphasis in original).

57 *Id.* at 441 (Marshall, J., dissenting).

58 *Id.* (Marshall, J., dissenting).

state prosecutions.[59] Justice Marshall's dissent emphasized the need to examine the policy justifications behind the doctrine of dual sovereignty before expanding it to include a new class of cases.[60]

Justice Marshall noted that the Constitution provides the federal government with the exclusive authority to vindicate some of the country's sovereign interests. The states then exercise complimentary authority in matters with a more local concern.[61] As noted in *Abbate*, these spheres of authority may, at times, overlap.[62] Justice Marshall found that if such an overlap occurs, the interests of both the federal government and the state must be vindicated. The fact that one of the governmental bodies prosecuted an offender for an act should not preclude the other from vindicating its separate and distinct interest.[63] Justice Marshall concluded that the possibility of successive federal and state prosecutions must be allowed, then, as "the price of living in a federal system, the cost of dual citizenship."[64]

Justice Marshall found that neither precedent nor policy considerations support the application of the dual sovereignty doctrine in *Heath*.[65] Indeed, Justice Marshall noted the Court's language in *Nielsen* that where an act violates the laws of separate states with concurrent jurisdiction, "the one first acquiring jurisdiction of the person may prosecute the offense, and its judgment is a finality in both States, so that one convicted or acquitted in the courts of the one State cannot be prosecuted for the same offense in the courts of the other."[66] Unlike the majority, Justice Marshall considered this dicta compelling, since it represents the Court's only explicit consideration of competing state prosecutorial interests.[67]

The finality sought by the Court in *Nielsen* was of chief concern to Justice Marshall. He found that Heath's guilty plea in Georgia should have precluded any further prosecution, stating, "I cannot

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59 Indeed Justice Marshall found the rationale for the existence of the dual sovereignty doctrine under successive state and federal prosecutions strained, and stated that the doctrine is really just "reassuring interpretivist support for a rule that accommodates the unique nature of our federal system." *Id.* at 442 (Marshall, J., dissenting).

60 *Id.* at 442-43 (Marshall, J., dissenting).

61 *Id.* (Marshall, J., dissenting).

62 Abbate v. United States, 359 U.S. 187 (1959)(conspiracy to dynamite telephone company facilities entails both destruction of property, a state interest, and disruption of the nation's communications network, a federal concern).

63 *Heath*, 106 S. Ct. at 443 (Marshall, J., dissenting).

64 *Id.* (Marshall, J., dissenting).

65 *Id.* (Marshall, J., dissenting).

66 *Id.* at 443-44 (Marshall, J., dissenting)(quoting Nielsen v. Oregon, 212 U.S. 315, 320 (1909)).

67 *Id.* (Marshall, J., dissenting).

believe [Heath] . . . would have [pleaded guilty] . . . had he been aware that the officials whose forebearance he bought in Georgia with his plea would merely continue their efforts to secure his death in another jurisdiction."[68]

Justice Marshall concluded that although barring successive state prosecutions may preclude the state that lost the "race to the courthouse" from vindicating its interests,[69] a defendant must not be denied his constitutional right to be protected from double jeopardy.[70] The dual sovereignty doctrine was created as an accomodation to our dual system of government.[71] Justice Marshall does not believe this rationale justifies two states prosecuting a single act successively.[72]

VI. Justice Brennan's Dissent

Justice Brennan concurred "wholeheartedly with Justice Marshall's dissent."[73] Justice Brennan wrote separately to "clarify [his] . . . views on the role that 'different interests' should play in determining whether two prosecutions are 'for the same offense' within the meaning of the Double Jeopardy Clause."[74]

Justice Brennan adhered to his position in *Abbate*. In *Abbate*, in addition to authoring the majority opinion, Justice Brennan wrote a separate opinion which rejected the government's argument that the separate statutory interests involved—the federal statute protecting communications and the state statute protecting private property—allowed successive state and federal prosecutions for the

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68 *Id.* at 445 (Marshall, J., dissenting).

69 It should be noted that any unvindicated interests would likely be different from the interests satisfied by the initial prosecuting state, *see, e.g.*, *Abbate*, 359 U.S. at 187, where differing interests were federal concern of protecting interstate communication and state concern of protecting personal property, and therefore would be exceedingly rare in cases involving successive state prosecutions.

70 *Heath*, 106 S. Ct. at 444 (Marshall, J., dissenting).

71 *Id.* at 441 (Marshall, J., dissenting).

72 In his dissent, Justice Marshall also took exception to the manner in which the Alabama prosecution was conducted. Of the 82 prospective Alabama jurors, all but seven were aware that Heath had pleaded guilty to the same crime in Georgia. Those jurors who knew of the guilty plea were then asked if they could give Heath a fair trial. A great majority said that they could. This satisfied the trial judge, who denied Heath's challenges for cause for all but two of the prospective jurors (these two had stated they could not give Heath a fair trial given that they knew of his guilty plea in Georgia). *Id.* at 441-42 (Marshall, J., dissenting). Additionally, Justice Marshall found that the cooperation between the Alabama and Georgia authorities during the trial constituted fundamental unfairness and thus a violation of Heath's due process rights. *Id.* at 444-45 (Marshall, J., dissenting). Certiorari, however, was not granted on either of these issues.

73 *Id.* at 440 (Brennan, J., dissenting).

74 *Id.* (Brennan, J., dissenting).

same act. Justice Brennan feared that such reasoning would also apply to successive federal prosecutions: that two federal statutes with different purposes could lead to two federal prosecutions for one act.[75]

In *Heath*, however, Justice Brennan read Justice Marshall's use of "interest" analysis in another context. He found that "[Justice Marshall] employs it to demonstrate the qualitative difference in the general nature of federal and state interests and the qualitative similarity in the nature of states' interests."[76] Justice Brennan concluded that this use of "interest" analysis "furthers rather than undermines the Double Jeopardy Clause."[77]

VII. Discussion and Analysis

Because the dual sovereignty doctrine allows the Court to ignore the double jeopardy clause, it should be used only in the most narrow set of circumstances. In recognition of the doctrine's repercussions, both federal[78] and state[79] governments have limited their use of successive prosecutions by establishing discretionary prohibitions. Unfortunately, the Court has yet to recognize what many of the states and the United States Attorney General have acknowledged: an individual's constitutional rights must take precedence over almost any interest of state or federal governments.

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75 *Id.* (Brennan, J., dissenting)(citing *Abbate*, 359 U.S. at 197).

76 *Id.* at 441 (Brennan, J., dissenting).

77 *Id.* (Brennan, J., dissenting).

78 Just seven days after *Bartkus* and *Abbate* were decided, Attorney General William Rogers issued a memorandum outlining what was to become known as the "*Petite* policy." The memorandum established the procedure for prosecuting criminal cases where the defendant had already been prosecuted by the state. This procedure attempted to ensure that successive prosecutions would be used sparingly. This memorandum is reprinted in full in the N.Y. Times, April 6, 1959, at 19, col. 2. *See also* United States v. Mechanic, 454 F.2d 849, 855-56 n.5 (8th Cir. 1971)(reprinted in full). The Court approved the Department's discretionary policy of self-restraint in Petite v. United States, 361 U.S. 529 (1960). For a detailed discussion of the *Petite* policy including an analysis of its weaknesses, see Note, *Selective Preemption: A Preferential Solution to the* Bartkus-Abbate *Rule in Successive Federal-State Prosecutions*, 57 Notre Dame Law 340, 347-53 (1981).

79 *See* Alaska Stat. § 12.20.010 (1984); Ark. Stat. Ann. § 43-1224.1 (1977); Cal. Penal Code § 656 (West 1970); Colo. Rev. Stat. § 18-1-303 (1986); Del. Code Ann. tit. 11, § 209 (1979); Ga. Code Ann. § 26-507 (1983); Haw. Rev. Stat. § 701-112 (1976); Idaho Code § 19-315 (1986); Ill. Ann. Stat. ch. 38, ¶ 3-4 (Smith-Hurd 1972); Ind. Code Ann. § 35-41-4-5 (Burns 1985); Kan. Stat. Ann. § 21-3108(3) (1981); Mich. Comp. Laws § 767.64 (1982); Minn. Stat. § 609.045 (1983); Miss. Code Ann. § 99-11-27 (1973); Mont. Code Ann. § 46-11-504 (1985); N.J. Stat. Ann. § 2C:1-11 (West 1982); N.Y. Code Crim. Proc. § 40.20 (Consol. 1981 & 1984-85 Supp.); N.D. Cent. Code § 29-03-13 (1974); Okla. Stat. Ann. tit. 22, § 130 (West 1969); 18 Pa. Cons. Stat. Ann. § 111 (Purdon 1983); Utah Code Ann. § 76-1-404 (1978); Va. Code § 19.2-294 (1983); Wash. Rev. Code Ann. § 10.43-040 (1980); Wisc. Stat. Ann. § 939.71 (West 1982).

In holding that successive state prosecutions fall within the ambit of the dual sovereignty doctrine, the majority engaged in far too little policy analysis. This inadequacy is revealed by the Court's initial assumption that Alabama's second prosecution would not have been allowed had it been brought by Georgia because it would have violated the double jeopardy clause.[80] Having realized the likelihood of a double jeopardy violation, the Court should then have sought compelling reasons why Alabama's prosecution was valid. Clearly, the breach of an individual's constitutional rights warrants such consideration. Instead of engaging in an in-depth policy analysis, however, the Court cursorily analyzed its prior decisions and concluded that if the dual sovereignty doctrine applied in the instant case, then Heath must lose.

The meager analysis the Court offered as to the dual sovereignty doctrine's applicability is not adequate when such a breach of individual rights is involved. The Court has never before faced a dual sovereignty case involving successive prosecutions by two states. This fact alone cries for the more detailed analysis Justice Marshall sought in his dissent. The majority, however, looked only at the holdings of its prior decisions, declining to consider their underlying policy justifications. Rather than deciding the case in a mechanical fashion, the Court could have better served itself by closely examining the policy considerations which lead to its prior rulings regarding the dual sovereignty doctrine.

Such an analysis would have shown that the policy considerations underlying the dual sovereignty doctrine are present only when the sovereign territories involved both claim jurisdiction over the locus of the crime. As Justice Marshall noted, the doctrine only exists as an accomodation to our dual system of government.[81]

Abbate and *Bartkus* both teach that successive state and federal prosecutions must be allowed because each government has an interest in enforcing its laws. The overlapping territory of state and federal governments necessitates the application of the dual sovereignty doctrine.[82] There is, however, no similar consideration requiring successive state prosecutions. Georgia and Alabama did not have concurrent jurisdiction over the locus of the murder in *Heath*. The crime occurred in Georgia and Georgia correctly prosecuted. Precluding a second state prosecution did not render Alabama's

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80 *Heath*, 106 S. Ct. at 437.

81 *Id.* at 443 (Marshall, J., dissenting).

82 This reasoning also applies to successive federal and Indian tribe prosecutions. *See* United States v. Wheeler, 435 U.S. 313 (1978).

laws powerless. Alabama was still able to enforce its law within its borders, thus leaving its sovereign power intact.

The majority, in its haste to expand the dual sovereignty doctrine, dismissed *Nielsen* too quickly. The Court in *Nielsen* found that successive state prosecutions were prohibited in the interest of finality and individual rights.[83] This reasoning applies equally to the facts of *Heath*. As Justice Marshall noted, *Nielsen* represents the only time the Court had considered competing state prosecutorial interests.[84]

The majority also too quickly rejected the use of an examining of interests approach to determine whether Alabama's second prosecution should have been allowed. The Court was misguided in its reliance on the majority and Justice Brennan's separate opinion in *Abbate* as support for its refusal to use such an approach. The majority in *Abbate* never rejected an interest analysis. In fact, it was this omission which prompted Justice Brennan to take the unusual step of writing a separate opinion despite the fact that he had written the majority opinion.

Justice Brennan's separate opinion in *Abbate* rejected the theory that because the federal and state statutes involved had different "interests," the prosecutions were really for different offenses.[85] Justice Brennan was concerned that "this reasoning would apply equally if each of two successive *federal* prosecutions based on the same acts was brought under a different *federal* statute, and each statute was designed to protect a different federal interest."[86] Justice Brennan expressed a similar concern in his dissenting opinion in *Heath*: that one state might bring two prosecutions for the same act if two applicable statutes could be shown to vindicate different interests.[87]

This possible defect in an examining of interests approach could easily be avoided. The Court could determine as a threshold issue whether the interests of the statutes involved are the same. If the interests are the same, as in *Heath*, the Court need go no further. The second prosecution would be prohibited as a violation of the

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[83] Nielsen v. Oregon, 212 U.S. 315, 320 (1909). It is interesting to note that *Nielsen* was decided a full sixty years before the double jeopardy clause was made applicable to the states by the fourteenth amendment. Benton v. Maryland, 395 U.S. 784 (1969). This fact underscores the importance of *Nielsen* as an indicator of the Court's disposition towards successive state prosecutions.

[84] *Heath*, 106 S. Ct. at 443 (Marshall, J., disenting).

[85] Abbate v. United States, 359 U.S. 187, 196-201 (1959)(opinion of Brennan, J.).

[86] *Id.* at 197 (emphasis in original).

[87] *Heath*, 106 S. Ct. at 441 (Brennan, J., dissenting).

double jeopardy clause.[88] If the interests of the statutes are different, such as was found in *Abbate*, the Court would then continue its analysis and determine whether the prosecuting entities are separate sovereigns. If they are, a second prosecution would be allowed. In this manner a defendant would not be twice prosecuted for the same act by two sovereigns under virtually identical statutes. Similarly, a defendant would not be twice prosecuted for the same act by one sovereign under two statutes with different interests. A defendant would, however, be subject to two prosecutions when separate sovereigns *and* separate interests were involved.

Under the above approach the Court would weigh the interests of the second state against the harm resulting if that state was not allowed the second prosecution. The majority in *Heath*, however, rejected this approach because it would create uncertainty. To avoid this uncertainty the Court opted for a simple-minded mechanical approach. The majority went through the formality of determining that states are separate sovereigns, and then found that, because they are separate, the facts of the case are irrelevant. This simple approach, however, ignores Heath's constitutional rights. An individual's constitutional right not to be twice placed in jeopardy for the same crime must outweigh a state's interest in bringing a second prosecution. This fact is particularly true in *Heath*, where virtually all of Alabama's interests[89] were satisfied when Heath received a life sentence in Georgia. The Court has allowed a flagrant violation of the double jeopardy clause for the sake of creating an easily applicable rule.[90]

The majority, however, stated that Georgia, in enforcing its own laws, cannot possibly satisfy Alabama's interest in enforcing its laws.[91] The Court here merely plays with semantics and ignores practicalities. Georgia convicted Heath of malice murder and sentenced him to life in prison. Despite the fact that Heath was not technically punished for violating Alabama's murder during a kidnapping statute, the life sentence he received from Georgia clearly vindicated both states' interest in seeing Heath punished for his ac-

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88 Only in the most unusual circumstances would a second prosecution still be warranted, for example if the state bringing the initial prosecution did not do so in good faith or an obviously inappropriate sentence was given.

89 Alabama's interests in the *Heath* case were to punish the defendant for his crime and/or remove him from society.

90 Indeed, the Court could have ruled exactly the opposite, that under no circumstances could successive state prosecutions be brought. This also would have dispensed with any uncertainty while protecting Heath's constitutional rights.

91 *Heath*, 106 S. Ct. at 440.

tions. To allow a second prosecution merely because Heath was not specifically convicted of violating Alabama's law is outlandish.

The Court's ruling also removes any semblence of finality from plea bargaining when two states are potentially involved. As Justice Marshall noted, it is highly unlikely that Heath would have pleaded guilty to the Georgia malice murder charge had he realized Alabama would be able to try him for the very same crime. The Court has acknowledged the advantages of plea bargaining,[92] and yet here, with no legitimate policy justifications, it has essentially dispensed with plea bargaining for an entire class of cases.

Finally, the Court's "race to the courthouse" fear holds little weight. With the current overcrowding of court dockets, prosecuting attorneys are more likely to work together on a case than to race to trial.[93] Even if a race did occur, any interests of the second place contestant would be satisfied by the winner's prosecution. Even if a state's interests were thereby left unfulfilled, they must take a back seat to the defendant's constitutional rights.

VIII. CONCLUSION

The majority in *Heath v. Alabama* extended the dual sovereignty doctrine to successive state prosecutions with virtually no legitimate analysis or policy justifications. Based upon the majority's minimal analysis, Justice Marshall, in dissent, noted that he was "not persuaded that a State's desire to further a particular policy should be permitted to deprive a defendant of his constitutionally protected right not to be brought to bar more than once to answer essentially the same charges."[94] Had the majority completed a proper analysis it would have realized that Justice Marshall correctly decided the case and that the dual sovereignty doctrine has no application to successive state prosecutions. Instead, the Court has sent out a dangerous message in regard to individual rights and their priority in relation to state's rights: an individual's constitutional right to be free from double jeopardy is secondary to the right of a state to prosecute for an act that has already been punished.

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92 Brady v. United States, 397 U.S. 742, 752 (1970)("For the defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious . . . . For the State there are also advantages . . . .").

93 The likelihood of such cooperation is supported by *Heath* itself. Justice Marshall noted in his dissent that "the cooperation between Georgia and Alabama in this case went far beyond their initial joint investigation." *Heath*, 106 S. Ct. at 445 (Marshall, J., dissenting).

94 *Id.* at 444 (Marshall, J., dissenting).