No. 17-_____

IN THE
Supreme Court of the United States

QUIYONTAY SANDERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

REBECCA SHEPARD
Counsel of Record
FEDERAL DEFENDER PROGRAM
101 Marietta Street, NW
Suite 1500
Atlanta, Georgia 30303
(404) 688-7530
Rebecca_Shepard@FD.org

QUESTION PRESENTED

Whether the Court should overrule the "dual sovereignty" exception to the Double Jeopardy Clause of the Fifth Amendment for serial state and federal prosecutions for the same conduct.

TABLE OF CONTENTS

ATTACHED APPENDIX

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

PETITION FOR A WRIT OF CERTIORARI

Petitioner Quiyontay Sanders respectfully petitions for a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals.

OPINIONS BELOW

The unpublished opinion of the Eleventh Circuit Court of Appeals is reported at 2017 WL 4422474, and is included in the appendix below. The order of the United States District Court for the Northern District of Georgia is not reported, but the written order is included in the appendix below.

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was entered on October 5, 2017. Justice Thomas extended the time within which to file this petition to and including March 4, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1), which permits review of criminal cases in the courts of appeals.

RELEVANT CONSTITUTIONAL PROVISION

The Fifth Amendment to the United States Constitution provides, in relevant part, that no person "shall be subject for the same offense to be twice put in jeopardy of life or limb."

STATEMENT OF THE CASE

Quiyontay Sanders was indicted on one count of possession of a firearm by a convicted felon, in violation of § 922(g)(1) of Title 18. Mr. Sanders argued to the district court that his prosecution violated the Double Jeopardy Clause of the Fifth Amendment, because he had already been charged, convicted, and sentenced in the state for the same felon-in-possession offense, and had fully served his custodial state sentence. The district court denied his motion to dismiss on Double Jeopardy grounds. Mr. Sanders subsequently was found guilty after a stipulated-facts bench trial. He was sentenced to one year and one day of imprisonment to be followed by three years of supervised release.

Mr. Sanders argued to the Eleventh Circuit that his federal prosecution was barred by the Double Jeopardy Clause, in light of his previous state prosecution. He acknowledged that existing authority supports the "dual sovereignty" doctrine, which allows the federal government to prosecute a defendant, like Mr. Sanders, who was also convicted of the same crime previously in a state court, but he argued that the court-created doctrine warrants reconsideration and rejection. After briefing by the parties, the panel affirmed Mr. Sanders' conviction. The panel noted that it was bound to apply this Court's precedent supporting the dual sovereignty doctrine.

REASONS FOR GRANTING THE PETITION

The dual sovereignty exception to the Double Jeopardy Clause should be overruled. The dual sovereignty doctrine was wrongly decided and is contrary to the plain language of the Fifth Amendment. It warrants "fresh examination," and, ultimately, rejection. *Puerto Rico v. Sanchez Valle, et al.*, 136 S. Ct. 1863, 1877 (2016) (Ginsburg, J., concurring). And Mr. Sanders' case presents an ideal and appropriate case for that "fresh examination."

I. The Dual Sovereignty Doctrine Should Be Overruled

The Fifth Amendment's Double Jeopardy Clause provides that no person "shall be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. On its face, the clause does not provide any exception for serial prosecutions by state and federal authorities. Indeed, the plain language of the clause would bar such serial prosecutions.

The clause codifies an idea "deeply ingrained in . . . the Anglo-American system of jurisprudence," that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity." *Green v. United States*, 355 U.S. 184, 187 (1957). The dual sovereignty doctrine directly contradicts this purpose.

Notwithstanding the plain language of the Fifth Amendment or the original meaning and purpose of the Double Jeopardy Clause, the court-created dual sovereignty doctrine establishes an exception for duplicative convictions in state and federal prosecutions. The doctrine was fully articulated in a pair of seminal decisions, issued on the same day in 1959: *Abbate v. United States*, 359 U.S. 187 (1959), and *Bartkus v. Illinois*, 359 U.S. 121 (1959). In *Abbate*, the Court ruled that the "dual sovereignty" doctrine allows the federal government to prosecute a defendant who was also convicted of the same crime previously in a state court, and in *Bartkus*, the Court sanctioned the trial of a person in state court after a federal trial based upon the same conduct. The crux of the holdings of these cases is that two identical offenses are not the "same offense" within the meaning of the Double Jeopardy Clause if they are prosecuted by different sovereigns. *See, e.g., Heath v. Alabama*, 474 U.S. 82, 87-93 (1985) ("When a defendant in a single act violates the 'peace and dignity' of two sovereigns by breaking the laws of each, he has committed two distinct 'offences.'").

Regardless of the long-standing nature of the "dual sovereignty" doctrine, the history and frequency of litigation over identical and successive prosecutions illustrate the inherent unfairness and counter-intuitive legal analysis imposed on what seems to be a simple constitutional provision. As Justice Marshall noted, there is no basis to believe the Framers intended this exception to the plain language of the Clause, and the doctrine requires a "strained reading of the Double Jeopardy Clause" and lacks "any inherent plausibility." *Heath*, 474 U.S. at 98 & n.1 (Marshall, J., dissenting). In *Bartkus* and *Abbate*, the majority prevailed by only a slim margin, and

in both cases, Justice Black wrote a compelling dissenting opinion highlighting the flaws and shaky foundation of the doctrine. Justice Black rejected the notion that somehow "one act becomes two" just because two jurisdictions are involved. *Bartkus*, 359 U.S. at 158. He characterized this logic as a "dangerous fiction" and "contrary to the spirit of our free country." *Id.* at 150-51, 158. Tracing the history of double jeopardy back to early Christian writers and thirteenth century English common law, Justice Black explained that the "basic and recurring theme has always simply been that it is wrong for a man to be brought into danger for the same offense more than once." *Id.* at 151-55. To justify double prosecutions based upon notions of "federalism" as the majority did constitutes, in the words of Justice Black, a "misuse and desecration" of the concept. *Id.* at 155. Put simply:

> It is just as much an affront to human dignity and just as dangerous to human freedom for a man to be punished twice for the same offense, once by a State and once by the United States, as it would be for one of these two Governments to throw him in prison twice for the offense.

Abbate, 359 U.S. at 203-04 (Black, J., dissenting).

Moreover, the nature of the relationship between federal and state criminal codes has changed tremendously since the dual sovereignty doctrine was conceptualized in *Bartkus* and *Abbate*. Historically, federal and state criminal codes seldom overlapped. But in the latter half, and particularly the latter quarter, of the twentieth century, Congress increasingly passed criminal laws, and

the significant expansion of federal criminal law resulted in federal statutes addressing matters already addressed by state statutes. Timothy White, *Limitations Imposed on the Dual Sovereignty Doctrine By Federal and State Governments*, 38 N. Ky. L. Rev. 188-89 (2011). Thus, the occurrence of overlapping federal and state criminal laws, and consequentially overlapping federal and state prosecutions, has increased dramatically since the development of the dual sovereignty doctrine. As such, the effects of the doctrine today are far beyond what could have been foreseen when *Bartkus* and *Abbate* were decided in 1959. Due to the increasing federalization of crime, there are more opportunities for successive prosecutions by the state and federal governments. Edwin Meese, III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 Tex. Rev. L. & Pol. 1, 22 (1997). The risk of successive prosecutions—the exact fear meant to be allayed by the Double Jeopardy Clause—is now an everyday prospect, rather than a rare event.

"It is common wisdom that the rule of *stare decisis* is not an 'inexorable command.'" *Planned Parenthood of SE Penn. v. Casey*, 505 U.S. 833, 854 (1992). "The doctrine of *stare decisis* allows [the Court] to revisit an earlier decision where experience with its application reveals that it is unworkable." *Johnson v. United States*, 135 S. Ct. 2551, 2562 (2015). Reexamining prior holdings is appropriate where, *inter alia*, the principles of law related to the prior decision "have so far developed as to have left the old rule no more than a remnant of an abandoned doctrine," or where the facts have so changed "as to have robbed the old rule of significant application or justification." *Casey*, 505 U.S. at 854-55.

In the case of the dual sovereignty doctrine, both the principles of law and the factual circumstances have developed, such that the exception is due to be revisited, and overturned. Doctrinally, the incorporation of the Double Jeopardy Clause against the states through the Fourteenth Amendment undermined the key reasoning underlying the dual sovereignty exception, namely, that the states were not bound to follow the Double Jeopardy bar. *Benton v. Maryland*, 395 U.S. 784 (1969); *see United States v. Grimes*, 641 F.2d 96, 101 (3d Cir. 1981) (noting that the Court's decision in *Benton* weakened the theory and reasoning behind *Barktus*). And factually, the expansion of federal criminal law and increasing overlap of state and federal criminal law have so changed the landscape of criminal prosecutions that the justification for the exception no longer stands.

In the most recent Supreme Court case addressing the doctrine, *Sanchez Valle*, Justice Ginsburg wrote a concurring opinion specifically "to flag a larger question that bears fresh examination in an appropriate case," namely, the dual sovereignty doctrine as it applies to, *inter alia*, dual prosecutions by the federal government and a state. *Sanchez Valle*, 136 S. Ct. at 1877. Justice Ginsburg, joined in her concurrence by Justice Thomas, asserted that the "separate sovereigns" doctrine does not serve the objective of the Double Jeopardy Clause. Citing to, *inter alia*, Justice Black's dissenting opinions in *Abbate* and *Bartkus*, Justice Ginsburg revived the question of whether it is inconsistent with the spirit of the Bill of Rights and "an affront to human dignity" for an individual to be punished twice for the same offense, and she asserted that the "dual sovereignty" doctrine warrants further attention. *Id.*

This invented doctrine does, indeed, warrant further attention and, ultimately, rejection. It is an affront to human dignity to be punished twice in this manner, and, moreover, it is an affront to the Double Jeopardy Clause. The doctrine baselessly permits violations of the Fifth Amendment. And because of the increasing overlap in state and federal criminal law, any notion that the state and federal governments have distinct, separate interests in fighting crime that would make otherwise identical state and federal crimes separate offenses is no longer supportable.

II. Mr. Sanders' Case Presents An Ideal Case For Reconsideration Of This Doctrine

Mr. Sanders' case presents a clear and ideal vehicle for the Court to consider this issue, and is the "future case in which a defendant faces successive prosecutions by parts of the whole USA," described by Justices Ginsburg and Thomas. *Sanchez Valle*, 136 S. Ct. at 1877 (Ginsburg, J., concurring). First, there is no dispute that Mr. Sanders was prosecuted, convicted, and punished by the state of Georgia for possession of a firearm by a felon, and then was prosecuted by the federal government for the same conduct. This was the only count he faced in his federal prosecution, and the only count of conviction. Thus, there is no question that, in prosecuting Mr. Sanders in this federal case, the government sought to punish him a second time for conduct that was already punished in state court.

Second, Mr. Sanders' claim comes to the Court on direct appeal, and he has preserved this issue at each stage. He

raised the question whether his federal prosecution was barred by the Double Jeopardy Clause before the district court. When his motion to dismiss on Double Jeopardy grounds was denied, he resolved his case by way of a stipulated-facts bench trial, in order to preserve the issue for appeal. On appeal he raised his Double Jeopardy argument, and the Eleventh Circuit's decision on this issue rested only upon the validity of the Court's precedent. Absent the dual sovereignty doctrine, his motion to dismiss would have been granted, and/or his case would have been reversed on appeal.

This issue does "bear[] fresh examination," as two Justices of this Court have noted. Because Mr. Sanders has preserved this issue at every opportunity, and because a decision on this issue would determine the outcome of his case, this is an ideal and "appropriate case" for taking up the dual sovereignty doctrine.[1]

---

[1] Mr. Sanders is aware of other petitions purporting to present this question, including at least two that remain pending. *See Tyler v. United States*, No. 17-5410; *Gamble v. United States*, No. 17-646. If the Court grants *certiorari* in these or any other case presenting this question, it should hold this case and, if the Court rejects the dual sovereignty doctrine, should grant this petition and vacate the decision below.

CONCLUSION

For the foregoing reasons, the Court should grant this Petition for a Writ of Certiorari.

Respectfully Submitted,

REBECCA SHEPARD
Counsel of Record
FEDERAL DEFENDER PROGRAM
101 Marietta Street, NW
Suite 1500
Atlanta, Georgia 30303
(404) 688-7530
Rebecca_Shepard@FD.org

March 2, 2018

No. 17-_____

IN THE
Supreme Court of the United States

QUIYONTAY SANDERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that I have mailed a true and correct copy of Mr. Sanders' *Petition for a Writ of Certiorari to the United States of Appeals for the Eleventh Circuit* via the United States Postal Service, first-class postage paid, to counsel for the Respondent: The Honorable Noel Francisco, Solicitor General of the United States, Room 5616, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, DC, 20530-0001.

This 2nd day of March, 2018.

REBECCA SHEPARD
Counsel of Record
FEDERAL DEFENDER PROGRAM, INC.
101 Marietta Street, NW
Suite 1500
Atlanta, Georgia 30303
(404) 688-7530
Rebecca_Shepard@FD.org

Subscribed and sworn to
Before me this 2nd day
of March, 2018.

NOTARY PUBLIC in and for
said County and State