No. 17-8002

IN THE SUPREME COURT OF THE UNITED STATES

QUIYONTAY SANDERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Court should reinterpret the Double Jeopardy Clause and overturn the long-held understanding that successive prosecutions by separate sovereign governments are not prosecutions for the "same offence." U.S. Const. Amend. V.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is not published in the Federal Reporter but is reprinted at 712 Fed. Appx. 956. The order of the district court (Pet. App. B1-B5) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 2017. On January 3, 2018, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including March 4, 2018. The petition for a writ of certiorari

was filed on March 2, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a stipulated bench trial in the United States District Court for the Northern District of Georgia, petitioner was convicted on one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Judgment 1. He was sentenced to one year and one day of imprisonment, to be followed by three years of supervised release. Id. at 2-3. The court of appeals affirmed. Pet. App. A1-A8.

1. In 2010, petitioner was convicted in Georgia on one count each of robbery, hijacking a motor vehicle, and possession of a firearm during a felony and two counts of aggravated assault. Presentence Investigation Report ¶ 26. He was released on parole in 2011. Ibid. On April 26, 2013, petitioner was arrested at his girlfriend's apartment on a parole-violation warrant. Gov't C.A. Br. 4-6. During a protective sweep of the apartment, law-enforcement officers found a firearm that petitioner acknowledged was his. Id. at 6-7.

2. On May 3, 2013, a state grand jury in Fulton County, Georgia, charged petitioner with one count of possession of a firearm by a convicted felon, in violation of Georgia Code Ann. § 16-11-131 (Supp. 2013). Gov't C.A. Br. 7. On May 30, 2013, petitioner pleaded guilty in Fulton County Superior Court and was

sentenced to five years of imprisonment, all but eight months of which were suspended in favor of probation. Id. at 8.

On July 7, 2015, a federal grand jury in the Northern District of Georgia returned a one-count indictment charging petitioner with possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Indictment 1. Petitioner moved to dismiss the federal indictment on the theory that the Double Jeopardy Clause barred the federal prosecution because he already had been prosecuted in state court for the same crime. See Pet. App. A2. The district court denied the motion, concluding that petitioner's argument was foreclosed by binding precedent of this Court holding that the federal government is a separate sovereign from an individual State and that the Double Jeopardy Clause does not prohibit separate prosecutions by separate sovereigns. Id. at B2-B4 (citing Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863 (2016), Heath v. Alabama, 474 U.S. 82, 89 (1985), and United States v. Lanza, 260 U.S. 377, 382 (1922)).

Following a stipulated bench trial, petitioner was found guilty. D. Ct. Doc. 54 (Nov. 8, 2016). At sentencing, the district court determined that petitioner's advisory Sentencing Guidelines range was 30 to 37 months. Sent. Tr. 4. The court varied downward from that range based in part on petitioner's service of his state sentence for the same conduct. Id. at 22, 26-27. The court

sentenced petitioner to one year and one day of imprisonment, to be followed by three years of supervised release. Judgment 2-3.

3. In an unpublished per curiam opinion, the court of appeals affirmed. Pet. App. A1-A8. The court explained that under the dual-sovereignty doctrine, "a single act gives rise to distinct offenses--and thus may subject a person to successive prosecutions--if it violates the laws of separate sovereigns." Id. at A2-A3 (quoting Sanchez Valle, 136 S. Ct. at 1867). The court observed that this Court had held "that a prior state conviction does not preclude a subsequent federal prosecution based on the same conduct." Id. at A3 (citing Abbate v. United States, 359 U.S. 187, 194-196 (1959)).

ARGUMENT

Petitioner contends (Pet. 4-10) that, although his double-jeopardy claim is foreclosed by controlling precedent from this Court, see, e.g., Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863, 1867 (2016), the Court should grant certiorari to reconsider the Double Jeopardy Clause's dual-sovereignty doctrine. That contention lacks merit. This Court has applied that doctrine numerous times over the span of more than 150 years, and has already considered and rejected many of petitioner's arguments for reconsidering it. See Heath v. Alabama, 474 U.S. 82, 88 (1985); Bartkus v. Illinois, 359 U.S. 121, 138 (1959). This Court has also repeatedly denied other petitions seeking to reconsider the

doctrine, including most recently in Walker v. Texas, 137 S. Ct. 1813 (2017) (No. 16-636).* The Court should do the same here.

1. The court of appeals correctly rejected petitioner's claim that, because he was previously convicted on a state charge in Georgia, the Double Jeopardy Clause bars his federal conviction for possession of a firearm by a felon.

The Double Jeopardy Clause provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V (emphasis added). As this Court recently reaffirmed in Sanchez Valle, 136 S. Ct. at 1867, the Double Jeopardy Clause does not prohibit successive prosecutions by separate sovereigns for offenses that consist of the same elements, because transgressions against the laws of separate sovereigns do not constitute the "same offence," within the meaning of the Double Jeopardy Clause. See United States v. Wheeler, 435 U.S. 313, 316-318 (1978); see also Sanchez Valle, 136 S. Ct. at 1870 (explaining that the Double Jeopardy Clause "drops out of the picture when the 'entities that seek successively to prosecute a defendant for the same course of conduct [are] separate sovereigns'") (quoting Heath, 474 U.S. at 88) (brackets in original). The Double Jeopardy Clause thus does not forbid

* Other petitions raising the same question are pending before this Court. See Gordillo-Escandon v. United States, No. 17-7177 (filed Dec. 14, 2017); Gamble v. United States, No. 17-646 (filed Oct. 24, 2017); Ochoa v. United States, No. 17-5503 (filed July 31, 2017); Tyler v. United States, No. 17-5410 (filed July 27, 2017).

successive prosecutions by a State and the federal government because a State and the federal government are "two sovereignties, deriving power from different sources." United States v. Lanza, 260 U.S. 377, 382 (1922).

Petitioner recognizes (Pet. 3-4) that this dual sovereignty doctrine forecloses his double jeopardy claim in this case. Petitioner contends (Pet. 4-6), however, that this Court should reexamine the line of cases explaining and applying that doctrine on the theory that it is inconsistent with the text and purpose of the Double Jeopardy Clause. This Court has repeatedly denied other petitions raising that contention. E.g., Walker, supra (No. 16-636); Roach v. Missouri, 134 S. Ct. 118 (2013) (No. 12-1394); Donchak v. United States, 568 U.S. 889 (2012) (No. 12-197); Mardis v. United States, 562 U.S. 943 (2010) (No. 10-6013); Angleton v. United States, 538 U.S. 946 (2003) (No. 02-1233); Sewell v. United States, 534 U.S. 968 (2001) (No. 01-6131); see also Koon v. United States, 515 U.S. 1190 (1995) (No. 94-1664) (granting certiorari on a sentencing question, but denying review of a challenge to the dual-sovereignty doctrine). It should do the same here.

The dual-sovereignty principle has been "long held," Sanchez Valle, 136 S. Ct. at 1870, and "consistently * * * endorsed" by this Court, Heath, 474 U.S. at 93, which has recognized its soundness as a matter of "[p]recedent, experience, and reason alike," Bartkus, 359 U.S. at 139. The Court explained the roots

of the principle more than 150 years ago. See Moore v. Illinois, 55 U.S. (14 How.) 13, 20 (1852) ("The same act may be an offence or transgression of the laws of both" state and federal governments; "[t]hat either or both may (if they see fit) punish such an offender, cannot be doubted."). And in 1959, the Court described a challenge to the dual-sovereignty doctrine as "not a new question," having been "invoked and rejected in over twenty cases." Bartkus, 359 U.S. at 128-129. The Court stated that to disregard a "long, unbroken, unquestioned course of impressive adjudication" was not only unwarranted, but "would be a shocking and untoward deprivation of the historic right and obligation of the States to maintain peace and order within their confines." Id. at 136-137.

The dual-sovereignty doctrine follows from "the basic structure of our federal system." Wheeler, 435 U.S. at 320. "The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other." U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring); see Heath, 474 U.S. at 92 ("It is axiomatic that '[i]n America, the powers of sovereignty are divided between the government of the Union, and those of the States.'") (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 410 (1819)) (brackets in original). Consistent with the constitutional

design, the Double Jeopardy Clause does not prohibit prosecutions by both a State and the federal government for the same conduct: "When a defendant in a single act" breaks the laws of two sovereigns, "he has committed two distinct 'offences'" and can be prosecuted for both. Heath, 474 U.S. at 88 (citation omitted). Each sovereign is entitled to "exercis[e] its own sovereignty" to "determin[e] what shall be an offense against its peace and dignity" and prosecute the offender "without interference by the other." Lanza, 260 U.S. at 382.

Under petitioner's interpretation of the Double Jeopardy Clause, one sovereign's efforts (successful or not) to enforce its own laws would vitiate the other sovereign's similar law-enforcement prerogatives. But that cannot be squared with the Constitution's bedrock structure of governance. As this Court has recognized, "undesirable consequences would follow" if prosecution by any one State could bar prosecution by the federal government. Abbate v. United States, 359 U.S. 187, 195 (1959). "[I]f the States are free to prosecute criminal acts violating their laws, and the resultant state prosecutions bar federal prosecutions based on the same acts," the Court has explained, "federal law enforcement must necessarily be hindered." Ibid. Similarly, if a federal prosecution could bar prosecution by a State, the result would be a significant interference with the States' historical police powers. See Heath, 474 U.S. at 93 ("Foremost among the

prerogatives of sovereignty is the power to create and enforce a criminal code.").

The dual-sovereignty doctrine thus "finds weighty support in the historical understanding and political realities of the States' role in the federal system and in the words of the Double Jeopardy Clause itself." Heath, 474 U.S. at 92; see, e.g., Wheeler, 435 U.S. at 320, 330 (explaining that the doctrine rests "on the basic structure of our federal system" and the "very words of the Double Jeopardy Clause"); Rinaldi v. United States, 434 U.S. 22, 28 (1977) (per curiam) ("[I]n our federal system the State and Federal Governments have legitimate, but not necessarily identical, interests in the prosecution of a person for acts made criminal under the laws of both."). As Justice Holmes stated nearly a century ago, the dual sovereignty doctrine is "too plain to need more than statement." Westfall v. United States, 274 U.S. 256, 258 (1927).

2. Petitioner contends (Pet. 4-9) that these cases were all wrongly decided and should be overruled. That contention is without merit.

Petitioner suggests (Pet. 5) that the dual-sovereignty rationale originated with this Court's decisions in Abbate and Bartkus, and quotes (Pet. 6) Justice Black's dissent in Abbate. But the Court articulated the dual-sovereignty rationale long before those decisions. Indeed, the very first time the Court

encountered a situation in which the same conduct could violate different laws from two separate sovereigns, the Court explained that prosecutions by both sovereigns would not violate the Double Jeopardy Clause. See Fox v. Ohio, 46 U.S. (5 How.) 410, 435 (1847) (stating that "offences falling within the competency of different authorities to restrain or punish them" are properly "subjected to the consequences which those authorities might ordain and affix to their perpetration"); see also Moore, 55 U.S. (14 How.) at 20 (stating that validity of successive state and federal prosecution "cannot be doubted"); United States v. Marigold, 50 U.S. (9 How.) 560, 569 (1850) (accepting that "the same act might * * * constitute an offence against both the State and Federal governments, and might draw to its commission the penalties denounced by either"). And in the century from Moore in 1852 to Bartkus in 1959, the Court reaffirmed the dual-sovereignty principle 20 times. Bartkus, 359 U.S. at 132 & nn.19-20 (collecting cases).

Petitioner contends (Pet. 8) that this Court's subsequent decision to apply the Double Jeopardy Clause to the States has undermined the dual-sovereignty doctrine. See Benton v. Maryland, 395 U.S. 784 (1969). But the Court has specifically reaffirmed the dual-sovereignty doctrine after Benton, concluding in Heath that the doctrine's rationale has "weighty support," both in the Double Jeopardy Clause's use of the word "offence" and in the

"historical understanding and political realities of the States' role in [our] federal system" of government. 474 U.S. at 92. And since Heath, the Court has repeatedly recognized the doctrine's continuing validity. E.g., Sanchez Valle, 136 S. Ct. at 1870; United States v. Lara, 541 U.S. 193, 197 (2004); Koon v. United States, 518 U.S. 81, 112 (1996); Department of Revenue v. Kurth Ranch, 511 U.S. 767, 782 n.22 (1994); Wheeler, 435 U.S. at 330; Rinaldi, 434 U.S. at 28.

Petitioner also fails to present any logical reason why Benton's incorporation of the Double Jeopardy Clause as applicable to the States should affect the dual-sovereignty doctrine. A defendant who claims a right to avoid prosecution by the federal government based on previous prosecution by a State is in the same position irrespective of whether the State itself is subject to the Double Jeopardy Clause. In each case, the defendant is arguing that the Clause prohibits a second trial by the federal government following a state trial. That claim does not in any way depend on whether the State could itself prosecute him a second time for the "same offence." U.S. Const. Amend. V.

Petitioner contends (Pet. 6-7) that "the significant expansion of federal criminal law" has resulted in increased overlap in federal and state prosecutions. But the very point of the dual-sovereignty doctrine is to allow each sovereign to enforce its laws within its respective constitutional sphere, without

undue interference from the other. An increase in federal criminal enforcement would mean that now more opportunities exist for the federal government's actions to impair the "historic right" and obligation of each State to define offenses and punish offenders within its jurisdiction. Bartkus, 359 U.S. at 137. If the federal government could prevent a State from vindicating its criminal laws, the Founders' desire to guard against a "centralized government" and the attendant "'exercise of arbitrary power'" would be frustrated, not safeguarded. Ibid. (citation omitted); see Abbate, 359 U.S. at 195 (petitioners' rule would "marked[ly]" alter the distribution of crime-fighting authority, as the States "have the principal responsibility for defining and prosecuting crimes").

In any event, it is not clear whether a significant increase in the rate of federal prosecution has actually occurred in areas of overlap with state authority. See 1 Wayne R. LaFave et al., Criminal Procedure § 1.2(f), at 106 (4th ed. 2015); Susan R. Klein & Ingrid B. Grobey, Debunking Claims of Over-Federalization of Criminal Law, 62 Emory L.J. 1 (2012). Under the so-called "Petite Policy," see Petite v. United States, 361 U.S. 529 (1960) (per curiam), the Department of Justice will generally decline to authorize a successive federal prosecution unless it is justified by a substantial federal interest that was "demonstrably unvindicated" by the prior state prosecution. Offices of the U.S.

Att'ys, Dep't of Justice, U.S. Attorneys' Manual § 9-2.031(A) (2009); see ibid. (describing procedures and policies by which a designated Department of Justice official must determine whether a federal case may be brought after a state prosecution). As this Court has recognized, this policy serves to protect "the citizen from any unfairness that is associated with successive prosecutions based on the same conduct" by "limit[ing] the exercise of the power to bring successive prosecutions * * * to situations comporting with the rationale for the existence of that power." Rinaldi, 434 U.S. at 27-29. And in exercising their discretion, sentencing courts can take into account the results of any proceedings before another sovereign. Cf. Koon, 518 U.S. at 112 (federal judge may take into account prior acquittal on state charges in assessing whether to grant a downward departure from the United States Sentencing Guidelines).

This case illustrates both points. Consistent with the Petite policy, the government sought an indictment against petitioner based on concerns about the seriousness of his offense, petitioner's prior history of violence and present gang affiliation, and the "abbreviated sentence" of only eight months of imprisonment he received in the state case. D. Ct. Doc. 46, at 2 (July 7, 2016). Moreover, at sentencing, the district court varied downwards from the recommended range under the Sentencing

Guidelines, based in part on petitioner's service of his state sentence for the same conduct. Id. at 22, 26-27.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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