

No. _____

In The
Supreme Court of the United States

DAVID KEITH WILLS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court should overrule the dual sovereignty exception to the Fifth Amendment Double Jeopardy Clause.

This question is currently before the Court in *Gamble v. United States*, No. 17-646 (argued Dec. 6, 2018). Petitioner respectfully requests that this petition be held pending the decision in *Gamble*.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Fifth Circuit were Petitioner David Keith Wills and Respondent United States of America.

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PETITION FOR A WRIT OF CERTIORARI

David Keith Wills petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion (App. 1-3) is unpublished. The district court's order concerning double jeopardy (App. 4-31) is unpublished.

JURISDICTION

The court of appeals entered judgment on November 21, 2018. App. 1.¹ This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment provides:

"[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb

INTRODUCTION

This case squarely presents the precise question before the Court in *Gamble v. United States*, No. 17-646 (argued Dec. 6, 2018): whether the Court should overrule the dual sovereignty exception to the

¹ The appendix to this petition is cited as "App." The record on appeal in the court of appeals is cited as "ROA."

Fifth Amendment Double Jeopardy Clause. Both the district court and the court appeals assumed without deciding that the State of Texas had punished petitioner Wills for the same offenses on which he now faces trial in federal court. Relying solely on the dual sovereignty exception to the double jeopardy protection, the district court denied Wills' motion to dismiss the federal charges, and the court of appeals affirmed. Accordingly, if the Court overrules or modifies the dual sovereignty exception in *Gamble*, it should grant the writ, vacate the decision of the court of appeals, and remand for further proceedings.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS.

Beginning in October 2015, three Texas counties--Nueces, Cameron, and San Patricio--charged Wills with state offenses based on the same conduct, the same alleged victim, and the same time period at issue here. App. 6-10 (district court opinion summarizing state charges); ROA.92-95 (Cameron County), ROA.97-101 (Nueces County), ROA.103-04 (San Patricio County), ROA.112-21 (Nueces County), ROA.125-27 (San Patricio County).² Contrary to Texas law, which prohibits charging a defendant in more than one count for the offense of continuous sexual assault on a single minor victim,³ the counties "carefully" divided Wills' alleged continuous offense

² Wills was initially arrested on April 13, 2015 based on charges in Cameron County. The bond conditions at issue here, however, were instituted beginning in October 2015.

³ Texas Penal Code § 21.02(f).

into three separate time periods to permit each county to charge him. ROA.89.

Wills filed motions to dismiss in each county. Two counties (Nueces and Cameron) dismissed without prejudice on the eve of hearings on the defense motions, in deference to the charges pending in other counties. ROA.110, 123. San Patricio County was the last to dismiss, also without prejudice, ROA.129, 2363-66, after the United States Attorney's Office (in its own words) "adopted [Wills' case] for federal prosecution on June 28, 2017," ROA.5732; *see* ROA.3431.

San Patricio and Nueces Counties imposed onerous conditions of release. ROA.131-36 (San Patricio County), ROA.138-41 (Nueces County). As the district court broadly summarized the conditions, they involved "(1) restricted travel; (2) monitoring of and prohibitions on electronic communications and internet usage; (3) monthly in-person reporting; (4) medical testing for sexually transmitted disease; and (5) treatment as being on the sex offender caseload." App. 10-11.

Wills' conditions of release from Nueces and San Patricio Counties required him to obtain permits for travel. The travel permits that the counties issued branded him as a convicted sex offender. As the district court found, the San Patricio County travel permits represented that Wills "was on 'community supervision' for the offense of 'Trafficking Of Persons: Continuous' or 'Sexual Abuse of Child: Continuous Victim.'" App. 12. The Nueces County travel permits--required whenever Wills traveled outside a "50

mile radius of Nueces County, Texas" (ROA.138)--"represented that Defendant was on 'probation' for the offense of 'Trafficking Of Persons: Continuous.'" App. 12.

The state authorities treated Wills as a convicted sex offender in other respects as well. For example, as the district court found, "[o]n March 22, 2016, the Nueces County Community Supervision & Corrections Department (Adult Probation) left a bright pink door knob hang tag at Defendant's residence, plainly stating that the Sex Offender Stabilization Unit had been by to verify Defendant's address and that he was to contact the named Community Supervision Officer in response." App. 13; *see* ROA.1914. And "the same department issued letters addressed to the Nueces County Health Department informing it that Defendant, an 'offender,' had been ordered to submit for HIV/AIDS testing." App. 13.

II. PROCEDURAL HISTORY.

A grand jury in the Southern District of Texas indicted Wills on June 28, 2017 (ROA.23) and returned a superseding indictment on November 8, 2017 (ROA.1621). The superseding indictment charges Wills with causing a person under the age of 14 to engage in a commercial sex act and with conspiring to do so, both in violation of 18 U.S.C. § 1591. ROA.1621-22. Wills entered a plea of not guilty and asserts his innocence.

On September 14, 2017, Wills moved to dismiss the indictment on Double Jeopardy grounds.

ROA.1011. As relevant here, he maintained that the onerous state court bond restrictions under which he had lived for more than two years constituted punishment for purposes of the Double Jeopardy Clause, and that the federal case sought to punish him a second time for the same offense. Following an evidentiary hearing, the district court denied the motion. App. 4.

The district court "assume[d] without deciding that one or more of the state conditions of release constituted punishment of Defendant Wills." App. 19. The court noted that "[t]he parties do not seriously dispute that the charges brought in the various cases contain the same elements and trigger double jeopardy concerns." App. 5 n.1. The court rested its denial of Wills' motion solely on the dual sovereignty doctrine, "which permits prosecutions by both federal and state authorities on the exact same charge because the sources of their prosecutorial powers are different." App. 17 (citing *Abbate v. United States*, 359 U.S. 187 (1959)).

The district court acknowledged that Justices Ginsburg and Thomas invited reexamination of the dual sovereignty doctrine in their concurrence in *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1877 (2016) (Ginsburg, J., concurring, joined by Thomas, J.). App. 18. The court concluded, however, that it "is governed by precedent" and thus must apply the dual sovereignty doctrine until this Court or the court of appeals says otherwise. App. 18. The court found inapplicable the narrow exception to the dual sovereignty doctrine where federal officials

manipulate the actions of state prosecuting authorities. App. 18-21.

Petitioner appealed before trial under *Abney v. United States*, 431 U.S. 651 (1977). On November 21, 2018, the court of appeals affirmed the district court. App. 1. Like the district court, the Fifth Circuit did not decide whether the conditions of release imposed on Wills in the state courts constituted punishment for the same offense on which he faces trial in federal court. App. 2-3. Although the court of appeals acknowledged that *Gamble* is pending before this Court, it declined to withhold its decision until that case is decided. App. 3. Instead, relying on its own precedent, the court applied the dual sovereignty exception, rejected petitioner's Double Jeopardy claim, and affirmed the district court. App. 2-3.

The district court denied Wills' motion to stay the trial pending his appeal of the dual sovereignty ruling. App. 29-31. The court of appeals also denied a stay. Wills' trial is currently set for February 19, 2019.

REASONS FOR GRANTING THE WRIT

This case squarely presents the precise dual sovereignty question now before the Court in *Gamble*. Petitioner preserved that issue at each stage of the proceedings below. He maintained that the dual sovereignty exception disregards the original intent of the Framers of the Bill of Rights, *see, e.g.*, *United States v. G.P.S. Automotive Corp.*, 66 F.3d 483, 497 (2d Cir. 1995) (Calabresi, J., concurring) (noting that criticism of the dual sovereignty exception has

"emphasized . . . the doctrine's weakness from an originalist point of view"); that this Court's seminal decisions embracing the dual sovereignty exception⁴ rested in part on the now-discarded premise that the Fifth Amendment's Double Jeopardy protection applies only to the federal government and not to the states; and that since those early decisions "the scope of federal criminal law has expanded enormously," *id.* at 498, increasing the likelihood that a defendant will face state and federal prosecutions and punishments for the same offense. Opening Brief of Appellant at 9-14, *United States v. David Keith Wills*, No. 18-40234 (5th Cir. Nov. 21, 2018).

The district court and the court of appeals decided the dual sovereignty question on the merits. Both courts assumed without deciding that the onerous state bond conditions constituted punishment for the same offenses for which petitioner has been indicted in federal court. App. 2-3, 5 n.1, 19. Both courts rested their rejection of petitioner's Double Jeopardy claim solely on the dual sovereignty exception. App. 2-3, 17-18.

⁴ *United States v. Lanza*, 260 U.S. 377, 382 (1922) ("The Fifth Amendment, like all the other guaranties in the first eight amendment, applies only to proceedings by the Federal Government . . . and the double jeopardy therein forbidden is a second prosecution under authority of the Federal Government after a first trial for the same offense under the same authority."); *Abbate v. United States*, 359 U.S. 187, 194 (1959) (same); *Bartkus v. Illinois*, 359 U.S. 121, 124-25 (1959) (same). A decade after *Abbate* and *Bartkus*, the Court held that the Fifth Amendment Double Jeopardy protection applies to the states through the Fourteenth Amendment. See *Benton v. Maryland*, 395 U.S. 784 (1969).

The Court should hold this petition until it decides *Gamble*. If the Court overrules or modifies the dual sovereignty exception to the double jeopardy protection, then it should grant Wills' petition, vacate the court of appeals' decision, and remand for further proceedings consistent with *Gamble*. The lower courts can then decide the question they left open: whether the state court bond restrictions constitute punishment under the standards this Court established in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), and *Smith v. Doe*, 538 U.S. 84, 92, 97 (2003).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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