No. 20-7622

IN THE SUPREME COURT OF THE UNITED STATES

MERLE DENEZPI, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Double Jeopardy Clause of the Fifth Amendment bars the prosecution of petitioner in federal district court of aggravated sexual abuse, in violation of 18 U.S.C. 1153(a) and 2241(a)(1) and (2), based on his previous conviction on a tribal-law charge of assault and battery, in violation of 6 Ute Mountain Ute Code § 2, in the Court of Indian Offenses.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Colo.):

United States v. Denezpi, No. 18-cr-267 (June 5, 2019)

United States Court of Appeals (10th Cir.):

United States v. Denezpi, No. 19-1213 (Oct. 28, 2020)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 979 F.3d 777. The order of the district court (Pet. App. 14-21) is not published in the Federal Supplement but is available at 2019 WL 295670.

JURISDICTION

The judgment of the court of appeals was entered on October 28, 2020. The petition for a writ of certiorari was filed on March 26, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Colorado, petitioner was convicted of aggravated sexual abuse in Indian country, in violation of 18 U.S.C. 1153(a) and 2241(a)(1) and (2). Judgment 1. The district court sentenced him to 360 months of imprisonment, to be followed by ten years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1-11.

1. Petitioner is a member of the Navajo Nation. Pet. App. 14 n.2. In July 2017, he and another member of the Navajo Nation -- V.Y. -- traveled from Teec Nos Pos, Arizona, to Towaoc, Colorado. Id. at 14 & n.2. After arriving, V.Y. spent some time at the Ute Mountain Casino and then accompanied petitioner to the nearby home of petitioner's girlfriend, within the Ute Mountain Ute Indian reservation. Id. at 2; D. Ct. Doc. 81, at 47-49, 53-54 (Aug. 14, 2019). Inside the home, petitioner threatened to beat V.Y. with a four-foot post if she did not have sex with him. D. Ct. Doc. 81, at 63-64. Petitioner then pulled V.Y. by her shirt and hair, pushed her to the ground, and forced her to engage in nonconsensual sex. Id. at 65-68. Petitioner barricaded the door, hid V.Y.'s clothing, and threatened her with physical harm if she went to the police. Id. at 69-74; Pet. App. 2-3.

After petitioner fell asleep, V.Y. fled on foot to the Ute Mountain Casino, where she was arrested for public intoxication and for an outstanding warrant on an unpaid fine. Pet. App. 3.

V.Y. then reported the sexual assault to a federal Bureau of Indian Affairs (BIA) police officer. Ibid.; D. Ct. Doc. 81, at 75-78, 188-189. A nurse conducted a sexual-assault exam and documented injuries to V.Y.'s chest, back, arms, legs, and genitals. Pet. App. 3.

About two hours after V.Y. reported the sexual assault, the BIA police officer went to petitioner's girlfriend's house to investigate. Pet. App. 3; D. Ct. Doc. 81, at 202. Upon hearing the officer knocking, petitioner fled through a second-floor window and hid in a neighbor's yard for about 13 hours. Pet. App. 3. After officers located him, petitioner gave contradictory accounts of his interactions with V.Y. Ibid. Petitioner initially denied having any sexual contact with her, but "[a]fter the officers confronted him with the possibility of DNA evidence, [he] claimed he and V.Y. had engaged in consensual sex." Ibid. Subsequent forensic testing revealed the presence of petitioner's DNA and semen on V.Y.'s genitals. D. Ct. Doc. 82, at 145-151 (Aug. 14, 2019).

2. A BIA police officer arrested petitioner and filed a criminal complaint with the Court of Indian Offenses of the Ute Mountain Ute Agency. D. Ct. Doc. 81, at 256; D. Ct. Doc. 29-1, at 4-5 (Jan. 6, 2019); see 25 C.F.R. 11.300(a) ("All criminal prosecutions shall be initiated by a complaint filed with the court by a law enforcement officer and sworn to by a person having personal knowledge of the offense."). Courts of Indian Offenses

are courts created by the BIA "to administer criminal justice for those tribes lacking their own criminal courts." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 64 n.17 (1978). With respect to certain tribes that do not have their own tribal courts, those regulations make a Court of Indian Offenses the forum for prosecuting violations of "tribal ordinance[s] duly enacted by the governing body of [a] tribe" and "approved by the Assistant Secretary—Indian Affairs or his or her designee," 25 C.F.R. 11.449; see 25 C.F.R. 11.108, as well as offenses specified in the regulations themselves, see 25 C.F.R. 11.114(a).

The criminal complaint against petitioner charged him with one count of assault and battery, in violation of 6 Ute Mountain Ute Code § 2. It also charged him with one count of terroristic threats, in violation of 25 C.F.R. 11.402, and one count of false imprisonment, in violation of 25 C.F.R. 11.404. D. Ct. Doc. 29-1, at 4. Following a plea pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), petitioner was convicted on the tribal-law assault-and-battery count, and the regulatory counts were dismissed. See Pet. App. 4; D. Ct. Doc. 29-1, at 3, 8. Petitioner was sentenced to 140 days of imprisonment and was released from custody in December 2017. Pet. App. 4; D. Ct. Doc. 29-1, at 3, 9.

3. Six months later, a federal grand jury in the District of Colorado indicted petitioner on one count of aggravated sexual abuse in Indian country, in violation of 18 U.S.C. 1153(a) and 2241(a)(1) and (2). Indictment 1. Petitioner moved to dismiss

the indictment under the Double Jeopardy Clause, asserting that he had been previously convicted of the "same" offense in the Court of Indian Offenses. D. Ct. Doc. 29, at 3 (Jan. 6, 2019). Petitioner acknowledged that, under the "dual sovereignty" doctrine, "the Federal Government may prosecute an American Indian, subsequent to a Tribal prosecution of the same person for the same acts." Ibid. But petitioner argued that because a Court of Indian Offenses is administered by the BIA, rather than by a tribe, ibid., the "pending proceeding and previous [Court of Indian Offenses] proceeding involve the same plaintiff and the same sovereign: the United States Government," id. at 4.

The district court denied petitioner's motion to dismiss. Pet. App. 14-21. The court explained that, although the Courts of Indian Offenses "'retain some characteristics of an agency of the federal government,'" their "power to punish crimes occurring on tribal lands derives from [the tribes'] original sovereignty, not from a grant of authority by the federal government." Id. at 18 (citation omitted). The district court therefore determined that the "court which convicted [petitioner] was exercising the sovereign powers of the Ute Mountain Ute Tribe" and that "[t]he charges brought in the present federal indictment thus are not duplicative of [petitioner's] conviction in that independent and sovereign court." Id. at 20-21.

Following a trial, a jury found petitioner guilty of aggravated sexual abuse. D. Ct. Doc. 52, at 1 (Mar. 1, 2019).

The district court sentenced petitioner to 360 months of imprisonment, to be followed by ten years of supervised release. Judgment 2-3.

4. The court of appeals affirmed. Pet. App. 1-11. The court observed that "whether two prosecuting authorities are different sovereigns for double jeopardy purposes * * * hinges on a single criterion: the 'ultimate source' of the power undergirding the respective prosecutions." Id. at 6 (citations omitted). The court then recognized that the "'ultimate source' of the power undergirding" the prosecution of petitioner in the Court of Indian Offenses was "the Ute Mountain Ute Tribe's inherent sovereignty." Id. at 10 (citation omitted). The court explained that Congress's creation of such courts "did not divest the tribes of their self-governing power but instead merely provided the forum through which the tribes could exercise that power until a tribal court replaced" them. Id. at 8 (footnote omitted).

ARGUMENT

Petitioner contends (Pet. 4-12) that the Double Jeopardy Clause bars his prosecution for aggravated sexual abuse in federal district court. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. The court of appeals correctly determined that petitioner's prosecution for aggravated sexual abuse does not violate the Double Jeopardy Clause. Pet. App. 5-10.

a. 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. The "dual-sovereignty" doctrine reflects a longstanding interpretation of the phrase "'same offence.'" Gamble v. United States, 139 S. Ct. 1960, 1966 (2019). "As originally understood," "an 'offence' is defined by a law, and each law is defined by a sovereign." Id. at 1965. "So where there are two sovereigns, there are two laws, and two 'offences.'" Ibid. "The Double Jeopardy Clause thus drops out of the picture when the 'entities that seek successively to prosecute a defendant for the same course of conduct are separate sovereigns.'" Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863, 1870 (2016) (brackets and citation omitted).

"To determine whether two prosecuting authorities are different sovereigns for double jeopardy purposes, this Court asks a narrow, historically focused question." Sanchez Valle, 136 S. Ct. at 1867. "The inquiry does not turn, as the term 'sovereignty' sometimes suggests, on the degree to which the second entity is autonomous from the first or sets its own political course." Ibid.; see id. at 1870 ("The degree to which an entity exercises self-governance -- whether autonomously managing its own affairs or continually submitting to outside direction -- plays no role in

the analysis."). "Rather, the issue is only whether the prosecutorial powers of the two jurisdictions have independent origins -- or, said conversely, whether those powers derive from the same 'ultimate source.'" Id. at 1867 (citation omitted). "The inquiry is thus historical, not functional -- looking at the deepest wellsprings, not the current exercise, of prosecutorial authority." Id. at 1871.

Applying that historical analysis, this Court has determined that "Indian tribes * * * count as separate sovereigns under the Double Jeopardy Clause." Sanchez Valle, 136 S. Ct. at 1872. In United States v. Wheeler, 435 U.S. 313 (1978), the defendant, a member of the Navajo Nation, was prosecuted in federal district court for statutory rape, in violation of 18 U.S.C. 1153 and 2032 (1976), after having been convicted in Navajo Tribal Court of contributing to the delinquency of a minor, in violation of the Navajo Tribal Code, for the same conduct. 435 U.S. at 314-316 & n.3. This Court explained that the Double Jeopardy Clause did not bar the second prosecution because the two prosecutions originated from independent sources: whereas the ultimate source of the power to prosecute the defendant under federal law was "the sovereignty of the Federal Government," the ultimate source of the power to prosecute the defendant for violating the tribal code was "inherent tribal sovereignty," id. at 322 -- a "primeval sovereignty" that "has never been taken away" from tribes, id. at 328; see United States v. Lara, 541 U.S. 193, 199 (2004) (holding that inherent

tribal sovereignty is likewise the ultimate source of the power to prosecute "nonmember Indian offenders" for violating tribal law).

Although the Court in Wheeler expressed no view on whether a prosecution for a tribal offense would still "derive[] its powers from the inherent sovereignty of the tribe" if brought in a Court of Indian Offenses rather than in a tribal court, 435 U.S. at 327 n.26, the court of appeals in this case correctly recognized that "the Court's reasoning in Wheeler also applies" to a conviction under tribal law like petitioner's, Pet. App. 8. The BIA created the Courts of Indian Offenses to "provide adequate machinery for the administration of justice for Indian tribes in those areas of Indian country where tribes retain jurisdiction over Indians that is exclusive of State jurisdiction but where tribal courts have not been established to exercise that jurisdiction." 25 C.F.R. 11.102. The premise of prosecuting an Indian offender under tribal law in such a court is thus precisely that tribes "retain" authority to punish offenses against tribal law committed by Indians. Ibid. Such a court merely provides the administrative "machinery" for exercising that authority until a tribe establishes its own courts. Ibid.; see Pet. App. 8 (explaining that "Congress's creation" of such courts "merely provided the forum through which the tribes could exercise [their self-governing power] until a tribal court replaced" them). The exercise of a tribe's power to prosecute an Indian for violating tribal law does not change its character simply because the

prosecution occurs in the Court of Indian Offenses. It is tribal law that defines the substantive offense on which the prosecution is based; without such an exercise of tribal power, the prosecution for that offense would be impossible.

Accordingly, a prosecution for a tribal offense in the Court of Indian Offenses is commonly understood to be an exercise of a tribe's own sovereignty. Cf. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206 (1978) (considering the "commonly shared presumption of Congress, the Executive Branch, and lower federal courts" on the scope of inherent tribal sovereignty). For example, Congress and the President have recognized "courts of Indian offenses" as "tribunals by and through which" "governmental powers possessed by an Indian tribe" "are executed." 25 U.S.C. 1301(2); see 25 U.S.C. 1301(3) (defining "Indian court" to include any "court of Indian offense"); 25 U.S.C. 1903(12) (defining "tribal court" to include "a Court of Indian Offenses"). This Court has likewise recognized that a State's interference with the jurisdiction of such a court "would infringe on the right of the Indians to govern themselves." Williams v. Lee, 358 U.S. 217, 223 (1959); see Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 14-15 & n.6 (1987) (describing Courts of Indian Offenses as "[t]ribal courts" that "play a vital role in tribal self-government"). And Courts of Indian Appeals have affirmed that a Court of Indian Offenses "exercis[es] the sovereign authority of the tribe for which the court sits." Ponca Tribal Election Bd. v. Snake, 1 Okla.

Trib. 209, 228 (Ponca C.I.A. 1988); see Kiowa Election Bd. v. Lujan, 1 Okla. Trib. 140, 151 (Kiowa C.I.A. 1987) (explaining that the Court of Indian Offenses "was established by the United States as a channeling function simply to set up a tribunal * * * so that a tribe could exert through it the powers it always had").

b. Petitioner does not dispute (Pet. 5) that if he had been prosecuted in a tribal court, there would be no double jeopardy concerns. And his efforts to distinguish the prosecution here lack merit.

Petitioner contends (Pet. 8) that because a Court of Indian Offenses is administered by the BIA under federal regulations, it "function[s], at least in part, as a 'federal agency.'" Under this Court's precedents, however, the relevant inquiry is "historical, not functional." Sanchez Valle, 136 S. Ct. at 1871. The BIA's administration of the Court of Indian Offenses may affect the "current exercise" of the power to punish violations of the Ute Mountain Ute Code. Ibid. But it does not alter the "ultimate source" of that power, which remains the Tribe's inherent sovereignty. Ibid. (citation omitted).

Petitioner observes (Pet. 11) that a tribal ordinance cannot be enforced in the Court of Indian Offenses unless the ordinance has been approved by the Assistant Secretary—Indian Affairs (or his or her designee) pursuant to federal regulations. See 25 C.F.R. 11.108, 11.449. But the fact that the federal government "has in certain ways regulated the manner and extent of the tribal

power of self-government does not mean that [the federal government] is the source of that power." Wheeler, 435 U.S. at 328; see Sanchez Valle, 136 S. Ct. at 1870 ("The degree to which an entity exercises self-governance -- whether autonomously managing its own affairs or continually submitting to outside direction -- plays no role in the analysis."). In Wheeler itself, for example, the tribal code that the defendant had violated became "effective" only upon "approv[al] by the Secretary of the Interior," "[p]ursuant to federal regulations." 435 U.S. at 327. The Court nevertheless recognized that the power to prosecute the defendant for that violation originated from the tribe's own sovereignty, because "none" of those federal regulations "created the Indians' power to govern themselves and their right to punish crimes committed by tribal offenders." Id. at 328. Likewise here, the regulations governing the Court of Indian Offenses merely regulate the use of such a court; they do not create the power to punish violations of the Ute Mountain Ute Code.

Petitioner also asserts (Pet. 10) that "[t]his is not a case in which the sources of prosecutorial power are fundamentally different" because, in his view, "inherent tribal sovereignty" is "the source of prosecutorial power for [prosecutions] brought pursuant to [18 U.S.C.] 1153" as well. That argument cannot be squared with this Court's decision in Wheeler. The defendant in that case, like petitioner here, had been prosecuted in federal court for an offense pursuant to Section 1153. Wheeler, 435 U.S.

at 324. And the Court recognized that prosecution as a "federal prosecution" -- i.e., a prosecution that derived its powers from the sovereignty of the federal government. Id. at 330. Likewise here, the conviction that he now appeals is federal, not tribal.*

2. Petitioner does not identify any conflict of authority on the question presented in this case. The decisions of other courts of appeals that petitioner cites (Pet. 7-8) did not address whether a prosecution for a tribal offense in the Court of Indian Offenses derives its powers from the inherent sovereignty of the tribe. See United States v. Red Lake Band of Chippewa Indians, 827 F.2d 380, 383 (8th Cir. 1987) (addressing whether the records of the Court of Indian Offenses were "agency records and thus the property of the United States"), cert. denied, 485 U.S. 935 (1988); Colliflower v. Garland, 342 F.2d 369, 379 (9th Cir. 1965) (addressing whether "it is competent for a federal court in a habeas corpus proceeding to inquire into the legality of the detention of an Indian pursuant to an order of" the Court of Indian Offenses "of the Fort Belknap reservation"). The court of appeals'

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* Petitioner notes (at 11) that "[t]he charges [he] faced" in the Court of Indian Offenses included not just the "offense under the Ute Mountain Ute Code," but also "two offenses under the federal regulations." Those two other charges, however, were dismissed before trial. See Pet. App. 4; p. 4, supra. They therefore play no role in the double jeopardy analysis. See Serfass v. United States, 420 U.S. 377, 388 (1975) (explaining that "jeopardy does not attach, and the constitutional prohibition can have no application, until a defendant is 'put to trial before the trier of facts, whether the trier be a jury or a judge'") (citation omitted).

decision in this case therefore does not conflict with any decision of another court of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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