No._____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2020

JAMES MICHAEL GARCIA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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SUBMITTED: March 31, 2021

QUESTION PRESENTED

WHETHER, AFTER A DEFENDANT PLEADS GUITLY TO FELONY CHILD ABUSE, THE GOVERNMENT MAY STILL PURSUE A CHARGE OF ASSAULT RESULTING IN SERIOUS BODILY INJURY AT TRIAL WHERE THE ASSAULT CHARGE SUBSUMES THE PLED PROOF FOR THE FELONY CHILD ABUSE CHARGE.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES **Page No.**

STATUTES AND RULES

Supreme Court Rule

United States Code

United States Constitution

Montana Code Annotated

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Petitioner, James Michael Garcia, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

1. The memorandum disposition of the Ninth Circuit Court of Appeals styled as *United States v. Garcia*, 829 Fed.Appx. 840 (9th Cir. 2020) and the Court's order denying rehearing are unreported. A copy of those decisions is attached in the Addendum to this petition at pages 1-5.

2. The decision of the federal district court denying Petitioner's motion to dismiss is unreported and is also attached in the Addendum (at pages 6-11).

JURISDICTION AND TIMELINESS OF THE PETITION

The Ninth Circuit's memorandum disposition was filed on November 23, 2020. Petitioner filed a timely petition for rehearing, which was denied, on December 31, 2021 (Addendum at page 5). This Court's jurisdiction arises under 28 U.S.C. §1254(1). Petitioner's petition is timely because it was placed in the United States mail, first class postage pre-paid, on March 31, 2021, within the 150 days for filing under the Rules of this Court (*see* Rule 13, ¶1) *as amended* by the Court's March 19, 2020 order. Petitioner's petition was also filed electronically the same day as it was placed in the United States mail.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

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STATEMENT OF THE CASE AND FACTS

(A) Overview

1. On June 6, 2019, the United States indicted Petitioner by way of a superseding indictment with Count I, assault resulting in serious bodily injury and Count II, felony child abuse. Petitioner appeared and was arraigned on September 25, 2019. He pled not guilty. The counts alleged as follows:

COUNT I

> That on or about August 26, 2018, at Brockton, in Roosevelt County, in the State and District of Montana, and within the exterior boundaries of the Fort Peck Indian Reservation, being Indian Country, the defendant, JAMES MICHAEL GARCIA, and Indian person, intentionally assault Jane Doe, who at the time of the offense was less than eighteen years of age, with said assault being a crime of violence resulting in serious bodily injury, in violation of 18 U.S.C. §§§ 1153(a), 113(a)(6), and 3559(f)(3).

COUNT II

> That on or about August 26, 2018, at Brockton, in Roosevelt County, in the State and District of Montana, and within the exterior boundaries of the Fort Peck Indian Reservation, being Indian Country, the defendant, JAMES MICHAEL GARCIA, an Indian person, who is over the age of 18 years, purposely and knowingly caused bodily injury to a minor, Jane Doe, an individual who had not attained the age of 14 years, in violation of 18 U.S.C. § 1153(a) and Mont. Code Ann. § 45-5-212(1).

(Addendum at pages 12-13).

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2. Petitioner sought to change his plea as to Count II. Prior to doing so, the government filed an offer of proof which stated the following, in pertinent part:

PLEA

> The defendant, JAMES MICHAEL GARCIA, has indicated that he will enter a voluntary plea of guilty to the crime of felony child abuse, as charged in Count II of the Indictment, without a plea agreement. Count I remains pending and set for trial. The government intends to proceed to trial on Count I regardless of any plea to Count II.

ELEMENTS

> In order for the defendant to be found guilty of the crime of felony child abuse (assault on a minor) as charged in Count II in the superseding indictment, the United States must prove each of the following elements beyond a reasonable doubt:
>
> 1. That the defendant committed an assault, as defined by MCA § 45-5-201, by purposely or knowingly causing bodily injury to another.
>
> 2. That at the time of the offense, the victim was under 14 years of age.
>
> 3. That at the time of the offense the defendant was 18 years of age or older.
>
> 4. The defendant is an Indian person.

(Addendum at pages 14-17).

3. The district court held a change of hearing on December 10, 2019. At that hearing, Petitioner pled guilty to Count II of the superseding indictment,

agreeing that (1) he committed an assault as defined by Mont. Code Ann. §45-5-201 by purposely or knowingly causing bodily injury to another; (2) the victim was under 14 years of age; (3) Mr. Garcia was 18 years or older at the time of the offense; (4) Mr. Garcia is an Indian person; and (5) the offense occurred within the exterior boundaries of the Fort Peck Indian Reservation. After pleading guilty to Count II, Petitioner filed a motion to dismiss as to Count I, alleging pursuit of both counts by the government violated the Double Jeopardy Clause.

4. The district court held a hearing regarding Petitioner's motion to dismiss on January 15, 2020. At that hearing, the district court questioned counsel for Petitioner as it concerned Count II having two other elements—that being the age of the victim under 14 and the age of Mr. Garcia being 18 or over.

5. Petitioner maintained that his age of being over 18 was implicit given that he was not charged under the Federal Juvenile Act. As it concerned the victim's age, the fact the victim in this case was 3 years old at the time would not change the government's presentation of its case as it concerned Count I. Consequently, Petitioner argued that everything the government indicated in its offer of proof and everything to which Petitioner pled satisfied the elements of Count I—a count the government still wanted to pursue.

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6. The government responded that Petitioner's double jeopardy argument failed because the extent of injuries involved were not elements; rather, they were sentence enhancers. And regardless, according to the government, under a double jeopardy argument Petitioner could not avoid prosecution of the greater offense of assault resulting in serious bodily injury by pleading to the lesser offense of felony child abuse pursuant to Supreme Court precedent where Petitioner elected to have the offenses tried separately.

7. The district court denied Petitioner's motion to dismiss Count I. In doing so, the district court analyzed whether assault resulting in serious bodily injury and felony child abuse each required proof of a fact that other did not. The district court found that assault resulting in serious bodily injury required proof that the victim suffered a greater degree of injury than felony child abuse. In addition, the district court indicated assault resulting in serious bodily injury did not require proof of the victim's or the defendant's ages. In sum, then, the district court stated the double jeopardy clause of the Fifth Amendment did not prohibit the government from trying Petitioner as to Count I.

(B) The Ninth Circuit's Decision

8. The Ninth Circuit affirmed the district court. In its decision, the Panel ruled that as it concerned felony child abuse and assault resulting in serious bodily injury, "each offense require[d] proof of an element that the other [did] not."

(Addendum at page 3). Hence, according to the Panel, the district court "properly determined that the Double Jeopardy Clause [did] not preclude Garcia's prosecution for assault resulting in serious bodily injury after he pleaded guilty to felony child abuse." *Id.*

REASONS FOR GRANTING THE WRIT

The Ninth Circuit Panel's decision conflicts with the double jeopardy clause and its attendant decisions as well as this Court's own precedent construing the same. In its decision, the Panel ruled that "[t]o the extent Garcia argues that the evidence the government would use to prove serious bodily injury is the same he stipulated to in his guilty plea, the government does not need to demonstrate separate conduct to avoid violating the Double Jeopardy Clause," citing *United States v. Wright*, 79 F.3d 112, 114 (9th Cir. 1996). (Addendum at page 4).

The test delineated in *Blockburger v. United States*, 284 U.S. 299 (1932), states that "double jeopardy exists if the second offense contains elements identical to, *or included as a subset within*, the elements of the former charge." *United States v. Wright*, 79 F.3d 112, 114 (9th Cir. 1996) (emphasis added). Put differently, if one statute is subsumed within the other statute, under *Blockburger*, the inquiry is over and the statutes are the same for double jeopardy purposes. The Panel erroneously missed that the felony child abuse statute is subsumed within the assault resulting in

serious bodily injury statute because proof of the felony child abuse elements is included within proof of the elements of the assault resulting in serious bodily injury. *See Whalen v. United States*, 445 U.S. 684, 694 (1980) ("A conviction for killing in the course of a rape cannot be had without proving all the elements of the offense of rape."); *Iannelli v. United States*, 420 U.S. 770, 785 n.17 (1975) (so long as each statute "requires proof of a fact that the other does not, the Blockburger test is satisfied, *notwithstanding a substantial overlap in the proof offered to establish the crimes*") (emphasis added).

The Panel rightly cited to the Major Crimes Act that gives the government authority to prosecute felony child abuse in Indian country, as well as use of state law to define the elements of the offense where a federal definition does not exist. However, the manner in which the Panel decided Petitioner's case, which has very little law on the topic, gives way for prosecutorial oddities in contradiction to constitutional law.

Namely, the Panel followed the same short-sighted analysis that the district court did in assessing whether assault resulting in serious bodily injury and felony child abuse each required proof of a fact the other did not. The Panel ruled no double jeopardy violation existed because assault resulting in serious bodily harm required proof of a greater harm than did felony child abuse, and felony child abuse has an age requirement that is not an element of assault resulting in serious bodily injury.

Both offenses, however, as charged, must occur on tribal land. Both offenses, as charged, require an intentional act. Both offenses, as charged, are not premised on Petitioner's age or the victim's as evidenced by both charges not being brought under the Federal Juvenile Act. And both offenses, as charged, are premised on commission of bodily harm, meaning even without Petitioner's plea he could not be convicted of assault resulting in serious bodily injury without also being convicted of felony child abuse. The elements of felony child abuse are, therefore, subsumed by the elements of assault resulting in serious bodily injury.

Petitioner's arguments on appeal, as they concerned what proof the government would have remaining given his plea to felony child abuse, was not an argument about conduct. It was to show as in *Whalen* and *Iannelli* that, in tracking the elements, by pleading guilty to felony child abuse, Petitioner agreed to every element that assault resulting in serious bodily injury subsumes. With the Panel's decision in this case now and for future cases, the government will be permitted to pursue as assault charge against Petitioner at trial after a guilty plea to an offense whose elements are subsumed by the charge he will go to trial on. Neither Supreme Court precedent nor the Ninth Court's precedent permit this.

CONCLUSION

WHEREFORE, the Court should grant this petition and set the case down for full briefing.

RESPECTFULLY SUBMITTED this 31st day of March, 2021.

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