No. 17-5410

IN THE SUPREME COURT OF THE UNITED STATES

WILLIE TYLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD 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 order of the court of appeals (Pet. App. 3a-4a) is not published in the Federal Reporter. The opinion of the district court (Pet. App. 27a-45a) is reported at 220 F. Supp. 3d 563. A related district court opinion (Pet. App. 47a-50a) is not published in the Federal Supplement, but is available at 2016 WL 6728804.

JURISDICTION

The judgment of the court of appeals was entered on January 6, 2017. A petition for rehearing was denied on February 27, 2017 (Pet. App. 1a-2a). On May 10, 2017, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari

to and including July 27, 2017, and the petition was filed on that date. 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 Middle District of Pennsylvania, petitioner was convicted of conspiracy to kill a witness, in violation of 18 U.S.C. 371 (1988); tampering with a witness by murder, in violation of 18 U.S.C. 1512(a)(1)(A) and (C) (1988); tampering with a witness by intimidation and threats, in violation of 18 U.S.C. 1512(b)(1)-(3) (1988); and using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) (1988 & Supp. IV 1992). Petitioner mounted several appellate and collateral challenges, which resulted in two retrials on the two witness-tampering counts. Before his most recent trial, petitioner claimed that the Double Jeopardy Clause barred a federal trial on the witness-tampering counts because of a prior trial in state court. The district court rejected his claim, Pet. App. 35a, 47a-50a, and the court of appeals summarily affirmed, id. at 3a. Petitioner has since been tried and convicted again on all the non-conspiracy counts, but he has not yet been sentenced.

1. Doreen Proctor was an undercover government informant for a drug task force in central Pennsylvania. In February 1991, she bought several grams of cocaine from David Tyler, petitioner's brother. David was arrested; Proctor testified against him at his

state preliminary hearing; and she was scheduled to testify at his trial. See 281 F.3d at 84, 88.

The day before the trial, David told petitioner, "The bitch is going to die tonight." 281 F.3d at 88. The two brothers tried but failed to abduct Proctor during the day; that night, petitioner showed David how to cock a sawed-off shotgun. Ibid. The next morning, petitioner told a woman, "It's over. She's gone." Ibid. Arriving at the same woman's house, David said: "[S]he's dead, and I'll be at court, I'll be in court but that bitch won't." Ibid. David's girlfriend, Roberta Bell, who had been with David the previous night, returned to her apartment the next morning with an armful of bloody clothing and instructed her baby sitter to say she had been home all night. Ibid. The sitter also overheard an argument among Bell, David, and petitioner, during which Bell told petitioner, "I shot Doreen, but you killed her." Ibid.

On the day of David's trial, Proctor's body was found, severely beaten and mangled, on the side of a country road in a neighboring county. She had also been shot in the head and chest. 281 F.3d at 88; see 01-1119 Gov't C.A. Br. 10.

Petitioner was charged in the Court of Common Pleas for Adams County, Pennsylvania in connection with Proctor's murder. See 35 F. Supp. 3d at 652. After a jury trial, petitioner was acquitted of murder, but convicted of conspiracy to intimidate a

witness. Ibid. In June 1993, he was sentenced to two to four years of imprisonment. Pet. App. 10a.[1]

2. In 1996, after petitioner's release from state custody, a federal grand jury charged petitioner with conspiracy to kill a witness, in violation of 18 U.S.C. 371 (1988); tampering with a witness by murder, in violation of 18 U.S.C. 1512(a)(1)(A) and (C) (1988); tampering with a witness by intimidation and threats, in violation of 18 U.S.C. 1512(b)(1)-(3) (1988); and using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) (1988 & Supp. IV 1992). 4/16/1996 Indictment 8-13. He was convicted on all counts and sentenced to a term of life imprisonment. 281 F.3d at 89.

The court of appeals reversed and remanded, ruling that the district court erroneously admitted a statement petitioner made to state police on the night of his arrest. 164 F.3d 150, 151, 159; see also id. at 159 (Alito, J., concurring). The court of appeals also rejected a number of petitioner's other claims, which did not include a double jeopardy challenge. Id. at 153. This Court denied a petition for a writ of certiorari. 526 U.S. 1077. On remand, the district court granted petitioner a new trial. See 281 F.3d at 89.

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[1] David was convicted of murder. Bell was acquitted of all state charges, but was later convicted on federal charges relating to the murder and sentenced to life imprisonment. See United States v. Bell, 113 F.3d 1345, 1346-1347 (3d Cir.) (Alito, J.), cert. denied, 522 U.S. 984 (1997).

After his new trial, petitioner was acquitted of the Section 371 conspiracy count, but again convicted of tampering with a witness by murder; tampering with a witness by intimidation and threats; and using a firearm during and in relation to a crime of violence. He was sentenced to a term of life imprisonment on the witness-murder count; a concurrent term of ten years of imprisonment on the witness-intimidation count; and five years of imprisonment on the Section 924(c) count, to run consecutively to the life term. See 207 Fed. Appx. 173, 175 & n.1. The court of appeals affirmed, 281 F.3d 84, and this Court denied certiorari, 537 U.S. 858.

Petitioner filed several unsuccessful post-conviction motions. See 732 F.3d 241, 245 n.2; 207 Fed. Appx. at 173; 2007 WL 2319796.

3. In 2005, this Court held that the "official proceeding" provision of the federal witness-tampering statute, 18 U.S.C. 1512(b)(2)(A) and (B), requires the government to prove a nexus between a defendant's conduct and a particular federal proceeding. Arthur Andersen LLP v. United States, 544 U.S. 696, 707-708. And in 2011, this Court held that Section 1512's law-enforcement-communication provision requires the government to prove a reasonable likelihood that a tampered-with witness's communication would have been made to a federal officer. Fowler v. United States, 563 U.S. 668, 677.

In 2009, petitioner filed another post-conviction motion, contending in light of Arthur Andersen that he was actually innocent of the two witness-tampering counts to the extent they rested on the official-proceeding theory. See 732 F.3d at 245. He later supplemented the motion to argue in light of Fowler that he was also actually innocent of those two counts to the extent they rested on the law-enforcement-communication theory. The district court denied the motion, but the court of appeals reversed. Id. at 246-253. The court of appeals held that the record contained sufficient evidence of petitioner's actual innocence on both theories to support a remand. Ibid. The court further held that, if petitioner was actually innocent on one invalid theory, the district court must order a new trial "based only on the legally valid theory." Id. at 253.

On remand, the district court accepted the government's concession that petitioner could not be convicted under the official-proceeding theory, but found that he was not actually innocent under the law-enforcement-communication theory. See 35 F. Supp. 3d at 653-654. The district court granted a new trial on the two witness-tampering counts, in accordance with the court of appeals' directive. Id. at 656. The government appealed; the court of appeals affirmed, 626 Fed. Appx. 375; and the court of appeals denied the government's petitions for en banc review. See 14-4080 Order (June 13, 2015).

4. In 2016, before his second retrial, petitioner moved to dismiss the indictment, contending, inter alia, that the Double Jeopardy Clause barred his trial because he had already been subjected to trial in Pennsylvania state court in connection with the Doreen Proctor murder. Pet. App. 27a, 35a. The district court denied the motion, relying on the longstanding doctrine that the "prosecution of the same crime in both the federal and state systems does not violate the Double Jeopardy Clause." Id. at 35a (citation omitted). Recognizing that its order was immediately appealable, the court also ruled that a double-jeopardy appeal would be frivolous, because the "Supreme Court has consistently rejected" petitioner's construction of the Double Jeopardy Clause "over a long period of years." Id. at 50a. The court thereby maintained jurisdiction over the case for the upcoming trial. Ibid.; see United States v. Salerno, 868 F.2d 524, 539 (2d Cir.) (only non-frivolous double jeopardy claims will stay proceedings pending interlocutory appeal), cert. denied, 493 U.S. 811 (1989).

Petitioner filed an interlocutory appeal and moved for a stay of his trial pending resolution of that claim. The court of appeals denied the motion for a stay and summarily affirmed the district court's ruling. Pet. App. 3a.

5. While this interlocutory appeal was pending, petitioner was retried and again convicted of witness tampering by murder and

witness tampering by threats.[2] Petitioner has not yet been sentenced for those offenses.

ARGUMENT

Petitioner contends (Pet. 11-17) 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). The Court should do the same here.

1. The court of appeals correctly rejected petitioner's claim that, because he was previously tried on state charges in Pennsylvania, the Double Jeopardy Clause bars his federal trial for witness tampering by murder and witness tampering by threats.

[2] Petitioner has filed a motion to vacate his 2000 conviction under 18 U.S.C. 924(c), which the district court denied. See Order (June 26, 2017). Petitioner's appeal of that Order is pending. See 17-2613 Clerk Order (Oct. 25, 2017). Petitioner has also filed a motion for a judgment of acquittal in the district court. D. Ct. Doc. No. 537 (Aug. 25, 2017).

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 (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). The Double Jeopardy Clause thus does not forbid 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. 16-17) that this "dual sovereignty" doctrine forecloses his double jeopardy claim in this case. Petitioner contends (Pet. 11-17), 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 history 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 138. 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.

This 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)). 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: "[w]hen 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. 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 93; see, e.g., Wheeler, 435 U.S. at 320, 330 (it 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).

b. Petitioner contends (Pet. 7-13) that the above-cited decisions of this Court and many more were all wrongly decided because, he asserts, they conflict with the original meaning of the Double Jeopardy Clause. In so claiming, petitioner relies (Pet. 8-9, 15) in large measure on English law. But this Court has already considered and rejected that line of argument. In Bartkus, this Court described as "dubious" several of the English cases petitioner relies upon, and stated that they were not "relevant to discussion of our problem." 359 U.S. at 128 n.9. Given our unique constitutional scheme, a doctrine rooted in the powers and obligations of separate State and federal sovereigns will necessarily reflect the "American experience, including our structure of federalism which had no counterpart in England." United States v. Gillock, 445 U.S. 360, 369 (1980). "We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject matter within the same territory." Lanza, 260 U.S. at 382. As even critics of the dual sovereignty doctrine have recognized, that was not true in England. See, e.g., Harlan R. Harrison, Federalism and Double Jeopardy: A Study in the Frustration of Human Rights, 17 U. Miami L. Rev. 306, 316 (1963) ("In that country two sovereigns do not have territorial jurisdiction over a crime.").

The Court articulated the dual-sovereignty rationale the first time it encountered a situation in which the same conduct could violate different laws from two separate sovereigns. 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 (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).

This Court has considered and rejected petitioners' contention (Pet. 10-11) that an early decision from this Court, Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820), is inconsistent with the dual sovereignty doctrine. Pet. 10-11. In Houston, the Court upheld a state statute that purported to grant state military courts authority to impose federal sanctions on militiamen who failed to report for federal duty. Justice Washington suggested that if jurisdiction were proper in both state and federal military courts, then final adjudication in one would bar prosecution in

the other. Id. at 31. But in Bartkus, this Court explained that those statements were based on the view that "the state statute [at issue] imposed state sanctions for violation of a federal criminal law." 359 U.S. at 130 (emphasis added). Accordingly, this Court concluded in Bartkus, Houston "can be cited only for the presence of a bar in a case in which the second trial is for a violation of the very statute whose violation by the same conduct has already been tried in the courts of another government empowered to try that question." Ibid.

Bartkus also considered and rejected petitioner's contention (Pet. 11-12 & n.3) that pre-1850 state court decisions rejected the dual sovereignty principle. The Court surveyed pre-1850 state practice; identified pre-1850 state cases accepting the validity of successive state and federal prosecutions; and explained that the historical background was "totally inconclusive" and "somewhat impaired" by some courts' misreading of Houston. Bartkus, 359 U.S. at 130-131; see id. at 129-131 & nn. 10-17.

c. Petitioner contends (Pet. 19) that this Court's subsequent decision to apply the Double Jeopardy Clause to the States has undermined Lanza and Abbate. 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 of Montana v. Kurth Ranch, 511 U.S. 767, 782 n.22 (1994); Wheeler, 435 U.S. at 330; Rinaldi, 434 U.S. at 28.

Petitioner contends (Pet. 20-21) that the "federalization of criminal jurisdiction" has "robbed Lanza and Abbate of any justification." But the very point of the dual-sovereignty doctrine is to allow each sovereign to enforce its laws within their respective constitutional spheres, 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 their jurisdictions. 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.; 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 Wayne R. LaFave et al., Criminal Procedure § 1.2(f), at 106 (4th ed. 2016); 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. United States Dep't of Justice, Offices of the U.S. Att'ys, United States Attorneys' Manual § 9-2.031 (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 a downward departure from the United States Sentencing Guidelines).

Petitioner contends (Pet. 21) that increased cooperation among federal and state prosecutors provides reason to overrule the dual sovereignty doctrine because, in his view, federal and state governments no longer have distinct interests in prosecuting crime. But federal-state cooperation has long been a "conventional practice between the two sets of prosecutors throughout the country" and has long been a backdrop to the Court's interpretation of the Double Jeopardy Clause. Bartkus, 359 U.S. at 123. The Court has also rejected the contention that application of the dual-sovereignty doctrine turns on any showing that the United States or a State have a unique interest in a prosecution. See Heath, 474 U.S. at 90-92. Because the Founders "split the atom" of sovereignty, U.S. Term Limits, 514 U.S. at 838 (Kennedy, J., concurring), the only question is whether the prosecuting authorities derive their powers from independent sources of authority. Heath, 474 U.S. at 90. If they do, the "circumstances of the case are irrelevant," for one sovereign's "interest in vindicating its sovereign authority through enforcement of its laws by definition can never be satisfied by another [sovereign's] enforcement of its own laws." Id. at 92-93.

Even when they are cooperating, the federal government and the States also may have different interests in the same conduct. E.g., Abbate, 359 U.S. at 195 (conspiracy to dynamite telephone

company facilities entails both destruction of property and disruption of a federal communications network); Bartkus, 359 U.S. at 121-122, 137 & n.25 (robbery of a federally insured bank). This case illustrates the point: The State had an interest in prosecuting petitioner for a murder that prevented the victim from testifying in a state trial; the federal government had an interest in vindicating the murder of a federal informant. Petitioner's arguments thus provide no basis for reconsidering the dual-sovereignty doctrine.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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