No. 17-7177

IN THE SUPREME COURT OF THE UNITED STATES

MANUEL DE JESUS GORDILLO-ESCANDON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH 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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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-3) is not published in the Federal Reporter but is reprinted at 706 Fed. Appx. 119.

JURISDICTION

The judgment of the court of appeals was entered on December 13, 2017. The petition for a writ of certiorari was filed on December 14, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A federal grand jury in the District of South Carolina indicted petitioner on one count of conspiracy to distribute and to possess with intent to distribute methamphetamine, in violation of 21 U.S.C. 841(a)(1), (b)(1)(B), and 846; one count of possession with intent to distribute a mixture or substance containing a detectable amount of methamphetamine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B); and one count of possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A). Pet. App. 9-12. The district court denied petitioner's motion to dismiss the indictment on double-jeopardy grounds. Id. at 6-7. The court of appeals affirmed. Id. at 1-3. Petitioner has since been tried and convicted on all counts, but he has not yet been sentenced.

1. On December 28, 2016, petitioner and a co-defendant allegedly transported approximately 280 grams of methamphetamine from Atlanta, Georgia, to Greenville County, South Carolina, where petitioner intended to distribute the drug to his co-conspirators. Pet. App. 17. Homeland Security Investigations jointly investigated petitioner's activities along with the Union County Sheriff's Office and the Greenville County Sheriff's Office. Ibid. As a result of this investigation, federal agents and state officers found petitioner in a South Carolina hotel room with

approximately 140 grams of methamphetamine and two handguns. Id. at 18.

2. Based on the hotel room discovery, a state grand jury sitting in Greenville County, South Carolina, indicted petitioner on one count of knowingly delivering more than 100 grams but less than 200 grams of methamphetamine, in violation of S.C. Code Ann. § 44-53-375 (Supp. 2016); and one count of possession of a firearm during the commission of a violent crime, in violation of S.C. Code Ann. § 16-23-490 (2015). Pet. App. 19.

On June 12, 2017, petitioner was convicted, following a guilty plea, in South Carolina state court of two lesser-included offenses of the indicted crimes. Specifically, petitioner pleaded guilty to trafficking between ten and 28 grams of methamphetamine, in violation of S.C. Code Ann. § 44-53-375(C)(3) (Supp. 2016); and unlawfully carrying a weapon, in violation of S.C. Code Ann. § 16-23-20 (2015). Pet. App. 20-21. Section 44-53-375(C) provides that a person who "knowingly sells, manufactures, delivers, purchases, or brings into this State," or "provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, deliver, purchase, or bring into this State," or "who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of ten grams or more of methamphetamine or cocaine base" is guilty of a felony. S.C. Code Ann. § 44-53-375(C)(3) (Supp. 2016).

Section 16-23-20 provides that "[i]t is unlawful for anyone to carry about the person any handgun, concealed or not," unless the carrying of the handgun falls within a list of statutory exceptions. S.C. Code Ann. § 16-23-20 (2015). Petitioner was sentenced to three years of imprisonment on the drug charge, and one year of imprisonment on the firearms charge, to be served concurrently. Pet. App. 20-21.

3. On March 14, 2017, before petitioner's guilty plea in state court, a federal grand jury sitting in the District of South Carolina returned an indictment charging petitioner with one count of conspiracy to distribute and to possess with intent to distribute 50 grams or more of a mixture containing a detectable amount of methamphetamine, in violation of 21 U.S.C. 841(a)(1), (b)(1)(B), and 846; one count of possession with intent to distribute 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B); and one count of possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A). Pet. App. 9-12.

Petitioner moved to dismiss the federal indictment, arguing, among other things, that the federal prosecution violated the Fifth Amendment's prohibition on double jeopardy, as well as the Full Faith and Credit Act, 28 U.S.C. 1738. The district court denied petitioner's motion. The court explained that "[t]he well-known

Dual Sovereignty Doctrine applies," and stated that "parallel prosecutions by State and Federal Governments, even for the same underlying conduct, raise no specter of a double jeopardy violation." Pet. App. 6-7.

4. In an unpublished, per curiam opinion, the court of appeals affirmed. Pet. App. 1-3. The court concluded that this Court's precedent foreclosed petitioner's double-jeopardy claim. See id. at 2 (citing Abbate v. United States, 359 U.S. 187, 194-196 (1959)). The court of appeals similarly rejected petitioner's arguments pertaining to the Full Faith and Credit Act. Id. at 3.

5. After the court of appeals' decision, petitioner was convicted of the three charged federal offenses, following a jury trial in the District of South Carolina. See D. Ct. Doc. 148 (Feb. 15, 2018); Pet. App. 9-12. The district court has not yet sentenced petitioner.

ARGUMENT

Petitioner contends (Pet. 13-19) 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. 16-6361).* The Court should do the same here.

1. The court of appeals correctly rejected petitioner's claim that, because he was previously convicted on state charges in South Carolina, the Double Jeopardy Clause bars his federal trial for the indicted drug and firearms offenses.

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

* Other petitions raising the same question are pending before this Court. See 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).

a defendant for the same course of conduct [are] separate sovereigns'") (brackets in original) (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. 13) that this dual-sovereignty doctrine forecloses his double jeopardy claim in this case. Petitioner contends (Pet. 14-16), 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 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: "[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 92 ("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 (explaining that 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).

2. Petitioner contends (Pet. 13-16) that these cases were all wrongly decided and should be overruled. That contention is without merit.

Petitioner suggests (Pet. 13-14) that the dual-sovereignty rationale originated with this Court's decision in Abbate and

quotes Justice Black's dissent in that case. But the Court articulated the dual-sovereignty rationale long before Abbate. 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. 14) 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.

The Court has also emphasized that, as a practical matter, the so-called "Petite Policy," see Petite v. United States, 361 U.S. 529 (1960) (per curiam), helps 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. Pursuant to that policy, 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, U.S. Dep't of Justice, United States Attorneys' Manual § 9-2.031 (July 2009) (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). 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 is warranted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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