

In The Supreme Court of the United States

RODNEY SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit**

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

The government argues that *stare decisis* and general principles of federalism justify retaining the dual-sovereignty limitation on the Double Jeopardy Clause. It does not offer a textual basis for the limitation or explain how the doctrine comports with the Constitution’s unequivocal prohibition that “[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . .” U.S. Const. amend. V. Nor has the government disputed that federal criminal laws have significantly expanded into spheres that were traditionally the province of state law enforcement. The Court did not foresee this expansion when it first recognized the doctrine and assured that dual prosecution “might occur [only] in instances of peculiar enormity, or where the public safety demanded extraordinary rigor.” *United States v. Lanza*, 260 U.S. 377, 383, 43 S. Ct. 141, 143 (1922) (quoting *Fox v. Ohio*, 46 U.S. (5 How.) 410, 435 (1847)). Finally, the government does not deny that Mr. Smith’s case is “an appropriate case” for a “fresh examination” of the dual-sovereignty doctrine; it adheres to a contention that no further examination is needed.

The dual-sovereignty doctrine is counter-textual, elevating governmental power in a federalist system over a Bill of Rights limitation on that power. The Court adopted it with the expectation that instances of dual prosecution would be exceedingly rare, which has not proved to be the case. Neither *stare decisis* nor federalism—nor the two in combination—justifies retaining the dual-sovereignty doctrine.

ARGUMENT

***Stare decisis* and general principles of federalism are insufficient justification for the Court to abstain from reexamining the dual-sovereignty doctrine.**

Rodney Dewayne Smith has petitioned this Court to grant certiorari to decide whether the Court should overrule the dual-sovereignty doctrine, a judicially created “carve-out from the Double Jeopardy Clause” that allows separate state and federal prosecutions where multiple prosecutions by a single government would be double jeopardy. *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1870 (2016). His case presents an ideal vehicle for the Court’s reexamination of the doctrine because his federal and state convictions were for the same offense—possession of a firearm on November 18, 2015, after a disqualifying felony.

The government does not dispute that this is an appropriate case for reexamination of the doctrine. *Cf. Sanchez Valle*, 136 S. Ct. at 1877 (Ginsburg, J., dissenting) (stating that the dual-sovereignty doctrine “bears fresh examination in an appropriate case”). Instead, the government simply argues that reexamination is unnecessary. The doctrine, it argues, is an inherent incident of a federalist system, “the Constitution’s bedrock structure of governance.” Br. in Opp’n 8. And the government notes that *stare decisis* is on its side: “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.” *Id.* at 4.

Those considerations should not prevent the Court’s reexamination of the doctrine in light of the significant erosion of its underpinnings. *See* Pet. for Cert. 15–

18. The government is unquestionably correct that the dual-sovereignty doctrine was established on principles of federalism. But the doctrine is not compelled by those principles. Even in *Our Federalism*, the powers of the various sovereigns derive from a Constitution in which the people “reserve[d] to themselves those sovereign authorities which they . . . [chose not] to delegate to” any government. *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 325 (1816). The power to prosecute a person twice for the same offense is among the powers the Constitution expressly withheld, so federalism cannot allocate that power to any government after the people, in ratifying the Constitution, denied it to all governments.

The government also is correct that the dual-sovereignty doctrine is entrenched. It has stood for nearly a century, *see United States v. Lanza*, 260 U.S. 377, 43 S. Ct. 141 (1922), and the Court’s opinions decades earlier assumed its validity, *see, e.g., Fox v. Ohio*, 46 U.S. (5 How.) 410, 433–35 (1847). But the Court adopted the doctrine based on legal understandings that have not held up, including the beliefs that federal and state criminal laws would seldom overlap and that the Double Jeopardy Clause applies only to federal prosecutions.

The government’s invocation of the Court’s previously expressed concern that “‘undesirable consequences would follow’ if prosecution by any one State could bar prosecution by the federal government,” Br. in Opp’n 8 (quoting *Abbate v. United States*, 359 U.S. 187, 195, 79 S. Ct. 666, 671 (1959)), also rings hollow, given that prosecution by a territory may accomplish that result. *See Sanchez Valle*, 136 S. Ct. at 1870 (“[T]he Double Jeopardy Clause bars the Federal Government and Puerto

Rico from successively prosecuting a defendant on like charges for the same conduct.”). For these reasons and those stated in Mr. Smith’s petition, the Court should grant certiorari in this case to reexamine the validity of the dual-sovereignty doctrine.

A. Considerations of federalism cannot establish an implied federal power expressly withheld by the Constitution.

The government argues that the federal government’s power to prosecute a person for an offense after a state already has done so “follows from ‘the basic structure of our federal system.’” Br. in Opp’n 8 (quoting *United States v. Wheeler*, 435 U.S. 313, 320, 98 S. Ct. 1079, 1084 (1978)). But that federalist structure stands on a deeper foundational principle: that “sovereignty is vested in the people,” *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 794, 115 S. Ct. 1842, 1851 (1995); see also *Ariz. State Legislature v. Ariz. Indep. Redist’g Comm’n*, 135 S. Ct. 2652, 2677 (2015) (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 404–405 (1819)) (“[A]ll political power flows from the people.”). In a structure of governance that derives its powers from the consent of the governed, “it was competent to the people . . . to prohibit to the states the exercise of any powers which were, in their judgment, incompatible with the objects of the general compact . . . , or to reserve to themselves those sovereign authorities which they might not choose to delegate to either [the states or the federal government].” *Martin*, 14 U.S. (1 Wheat.) at 324–25.

The people, in ratifying the Constitution, withheld from the government the power to subject any person “for the same offence to be twice put in jeopardy of life or limb” U.S. Const. amend. V. The text of the Double Jeopardy Clause admits of

no exception. The federal government’s power “to enforce the observance of law, by punishing its infraction” is an “incidental power[]” that exists even though it “is not among the enumerated powers of congress.” *McCulloch*, 17 U.S. (4 Wheat.) at 416. But the general “structure of governance” and vague fear of “undesirable consequences” if double-jeopardy protections were enforced, Br. in Opp’n 8 (quoting *Abbate*, 359 U.S. at 195, 79 S. Ct. at 671), cannot extend that incidental power beyond the limits explicitly established by the Constitution.

To suggest a textual basis for the dual-sovereignty doctrine, the government offers only a tautology. It quotes statements in *Heath v. Alabama*, 474 U.S. 82, 106 S. Ct. 433 (1985), and *United States v. Wheeler* that the doctrine “finds weighty support . . . in the words of the Double Jeopardy Clause itself,” *Heath*, 474 U.S. at 92, 106 S. Ct. at 439, and that to abandon it “would require disregard of the very words of the Double Jeopardy Clause,” *Wheeler*, 435 U.S. at 330, 98 S. Ct. at 1089, *superseded by statute as recognized in United States v. Lara*, 541 U.S. 193, 124 S. Ct. 1628 (2004). See Br. in Opp’n 9. But the “words of the Double Jeopardy Clause” that both decisions emphasized were the words “same offence,” which do not, according to the dual-sovereignty doctrine, embrace “two prosecutions . . . brought by different sovereigns,” *Sanchez Valle*, 136 S. Ct. at 1870. So it is true that the doctrine involves an interpretation of the words of the Double Jeopardy Clause. That does not mean, however, that the doctrine is compelled by those words. Rather, the doctrine depends on its own nonintuitive interpretation of the words “same offence” and, indeed, of the extra-textual word “sovereign.” See *id.* The words of the Double Jeopardy Clause

support the dual-sovereignty doctrine only in the sense that the doctrine itself limited those words' meaning by "carv[ing] out" double jeopardy by separate sovereigns. *Id.*

Even before the Court first postulated the possibility of a dual-sovereignty doctrine, it received Chief Justice Marshall's self-administered admonition: "[W]e must never forget that it is a *constitution* we are expounding." *McCulloch*, 17 U.S. (4 Wheat.) at 407. He offered that reminder to explain that the Constitution's Necessary and Proper Clause recognizes implied powers that are not explicitly enumerated. He counted enforcement of federal criminal laws among those implied powers. *Id.* at 416. But he also acknowledged that there are points beyond which power cannot be implied: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, *which are not prohibited*, but consist with the letter and spirit of the constitution, are constitutional." *Id.* at 421 (emphasis added).

Multiple prosecutions for the same offense *are* prohibited by the Double Jeopardy Clause, and prosecutions may be under "separate statut[es]" yet still "be the same within the meaning of the constitutional prohibition." *Brown v. Ohio*, 432 U.S. 161, 164–65, 97 S. Ct. 2221, 2225 (1977). The dual-sovereignty doctrine causes "[t]he Double Jeopardy Clause . . . [to] drop[] out of the picture," though, where the separate statutes were enacted by separate governments—if both governments satisfy the peculiar test that "overtly disregards common indicia of sovereignty" to identify a "sovereign." *See Sanchez Valle*, 136 S. Ct. at 1870. The government's appeal to the general principles of federalism is too feeble an enticement to justify

disregarding substance in service of the legal fiction that “two prosecutions . . . are not for the same offense if brought by different sovereigns” *Id.* The very purpose of federalism is to divide “all the power surrendered by the people,” and thereby to provide “a double security . . . to the rights of the people.” *Gregory v. Ashcroft*, 501 U.S. 452, 459, 111 S. Ct. 2395, 2400 (1991) (quoting *The Federalist* No. 51, at 323 (Madison)). To circumscribe a specifically enumerated right on the basis of federalism results in double jeopardy, not double security.

B. The Court’s history of recognizing a dual-sovereignty exception to double-jeopardy protection does not justify retaining it.

The government argues that the Court should not overrule its dual-sovereignty precedents because doing so would “disregard a ‘long, unbroken, unquestioned course of impressive adjudication’ . . . [and] ‘would be a shocking and untoward deprivation of the historic right and obligation of the States to maintain peace and order within their confines.’” Br. in Opp’n 7 (quoting *Bartkus v. Illinois*, 359 U.S. 121, 136–37, 79 S. Ct. 676, 685 (1959)). That lineage is so deeply ingrained in the nation’s understanding of the Constitution, the government claims, that “[t]his Court articulated the dual-sovereignty rule the first time it encountered a situation in which the same conduct could violate different laws from two separate sovereigns.” *Id.* at 11 (citing *Fox*, 46 U.S. (5 How.) at 435). But the government is mistaken on that point.

In *Houston v. Moore*, 18 U.S. (5 Wheat.) 1 (1820), involving a conviction under a Pennsylvania statute criminalizing military desertion, the Court stated, “[I]f the jurisdiction of the two Courts be concurrent, the sentence of either Court, either of conviction or acquittal, might be pleaded in bar of the prosecution before the other,”

18 U.S. (5 Wheat.) at 31. The Court in *Bartkus* acknowledged *Houston*’s “language to the effect that there would be a bar to a second prosecution by a different government.” 359 U.S. at 130, 79 S. Ct. at 682. But the Court said that language merely “reflected [a] belief that the state statute imposed state sanctions for violation of a federal criminal law,” and therefore stood “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.” *Id.*

Whether that understanding of *Houston* is correct is debatable. See Brief of Law Professors as Amici Curiae Supporting Petitioner at 4–6, *Tyler v. United States*, No. 17-5410 (U.S. Aug. 15, 2017) (explaining that “the *Bartkus* Court misinterpreted *Houston v. Moore*,” which at the time “was uniformly understood to mean that a prosecution by one sovereign would bar a subsequent prosecution by a second sovereign”). Even if *Bartkus* correctly understood *Houston*, though, the wrinkle of determining whether one sovereign’s law exists to enforce another’s or simply criminalizes the same conduct—and the related question of how to tell the difference—has not figured in subsequent dual-sovereignty jurisprudence. Yet that wrinkle further convolutes the doctrine, showing its artificial contours that bear little relation to either the text or the purpose of the Double Jeopardy Clause.

Contrary to the government’s contention, the dual-sovereignty doctrine did not assume an urgent place in the Court’s decisions until the uneasy antebellum years when enforcement of fugitive-slave laws was a fractious concern among the states.

See id.; *Fox*, 46 U.S. (5 How.) at 410; *United States v. Marigold*, 50 U.S. (9 How.) 560 (1850); *Moore v. Illinois*, 55 U.S. (14 How.) 13 (1852). Indeed, the central question in *Moore* was the validity of a state fugitive-slave law in light of the existence of a federal prohibition of the same offense. *See* 55 U.S. (14 How.) at 17.

The Court in *Moore* held the Illinois law to be constitutional. *Id.* at 18–19. And it took pains to state in dicta that the Double Jeopardy Clause would not bar a separate federal prosecution:

That either or both [governments] may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable.

Id. at 20. Therefore, the Court assured, a lenient state fugitive-slave prosecution could not be used to nullify or blunt the federal law: “[S]uch regulations can never be permitted to interfere with or to obstruct the just rights of the owner to reclaim his slave, derived from the Constitution of the United States, *or with the remedies prescribed by Congress to aid and enforce the same.*” *Id.* at 21 (emphasis added) (quoting *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 625 (1842)).

As Mr. Smith’s petition notes, rejecting a dual-sovereignty exception to double-jeopardy safeguards would have done little to prevent separate federal and state prosecutions before the Court’s decision in *Benton v. Maryland*, 395 U.S. 784, 89 S. Ct. 2056 (1969). Up to that point, the Court had held that the Double Jeopardy Clause did not constrain the states, so even without a dual-sovereignty doctrine, the federal Constitution would not be implicated when a state prosecuted an offense after the

federal government or another state had done so. As long as federal and state prosecutors properly choreographed occasions of jeopardy, no Fifth Amendment restriction would apply. That changed, though, when *Benton* held that the Fourteenth Amendment incorporated the Double Jeopardy Clause.

The government states that Mr. Smith’s petition “fails to present any logical reason why *Benton*’s incorporation of the Double Jeopardy Clause as applicable to the States should affect the dual-sovereignty doctrine.” Br. in Opp’n 12; *but see* Pet. for Cert. 11–12 (explaining why, before *Benton*, “barring separate prosecutions on double-jeopardy grounds would only punish missteps, not meaningfully protect individuals on a principled basis”). Whether the government concedes its logic or not, the reason is this: *Benton* transformed the effect of the doctrine. It recognized that successive prosecutions in state court—where the great majority of criminal prosecutions occur—were a federal constitutional concern. Until *Benton*, the dual-sovereignty doctrine served to prevent (1) almost unimaginably rare instances in which the very purpose of a state prosecution was to undercut a federal law, and (2) clumsy choreography, where prosecutors allowed jeopardy to attach first in state court. After *Benton*, though, the doctrine protects dual prosecutions within a large and expanding circle where federal and state criminal laws overlap. The antebellum Court specifically stated that it did not expect that consequence, *see Fox*, 46 U.S. (5 How.) at 435 (“It is almost certain, that . . . [dual prosecution] might occur [only] in instances of peculiar enormity, or where the public safety demanded extraordinary

rigor.”), and *Lanza* reiterated that expectation when it formally adopted the doctrine, *see* 260 U.S. at 383, 43 S. Ct. at 143 (quoting same statement from *Fox*).

The Court should issue a writ of certiorari to seriously reexamine the soundness of the dual-sovereignty doctrine for the first time in its post-*Benton* context. In the half-century since that decision, the federal prison population has exploded as federal criminal laws increasingly target purely local conduct that state laws also cover. *See* Pet. for Cert. 11–14. The hole that the dual-sovereignty doctrine “carve[d] out from the Double Jeopardy Clause,” *Sanchez Valle*, 136 S. Ct. at 1870, has grown to proportions the Court never foresaw.

The government is correct that the Court’s dual-sovereignty precedents mean much, but even they do not mean that the doctrine’s status is unassailable when subsequent legal and factual developments that “have robbed the old rule of significant . . . justification,” *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855, 112 S. Ct. 2791, 2809 (1992). And the Court’s “repeated[] deni[als] [of] other petitions” challenging the doctrine, by contrast, mean nothing.¹ *See Maryland v.*

¹ Nor does the fact that, as the government notes, some of Mr. Smith’s federal sentence was satisfied by time he spent in state custody. *See* Br. in Opp’n 14 (arguing that “this case illustrates” that “sentencing courts can take into account the results of any proceedings before another sovereign” because the district court ordered that his federal sentence run concurrently with his state sentence and gave credit for time in state custody). The Double Jeopardy Clause “protects against a second prosecution for the same offense after conviction,” *Brown*, 432 U.S. at 165, 97 S. Ct. at 2225 (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 2076 (1969)), and even a concurrent sentence that is entirely subsumed within another does not preclude a finding of double jeopardy, *Benton*, 395 U.S. at 792–93, 89 S. Ct. at 2061–62. Credit for time in state custody satisfied only some of Mr. Smith’s federal sentence, and he now is in federal custody at the Federal Correctional Institution in Memphis, Tennessee. Moreover, imprisonment is not the only consequence of a

Baltimore Radio Show, 338 U.S. 912, 919, 70 S. Ct. 252, 255 (1950) (“[A]ll that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted [A] denial carries with it no implication whatever regarding the Court’s views on the merits of a case which it has declined to review. The Court has said this again and again; again and again the admonition has to be repeated.”).

Much has changed since the Court first adopted the dual-sovereignty doctrine, and those changes raise new questions about the doctrine’s compatibility with the text and purpose of the Double Jeopardy Clause. Reconsideration of the doctrine is overdue.

conviction, and even after “the term has been served, the results of the conviction may persist. Subsequent convictions may carry heavier penalties, [and] civil rights may be affected.” *Sibron v. New York*, 392 U.S. 40, 55, 88 S. Ct. 1889, 1898 (1968) (quoting *United States v. Morgan*, 346 U.S. 502, 512–13, 74 S. Ct. 247, 253 (1954)).

CONCLUSION

For the foregoing reasons and those stated in Mr. Smith's petition for a writ of certiorari, the petition should be granted.

Respectfully submitted this, the 27th day of June, 2018.

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