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Is the Court of Indian Offenses of Ute Mountain Ute Agency a Federal Agency for Purposes of the Fifth Amendment's Double Jeopardy Clause?

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INDIAN LAW

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CASE AT A GLANCE

This case, which examines the application of the U.S. Constitution's Double Jeopardy Clause, sits within the intersection of tribal courts, federal Indian law, and federal criminal law and jurisdiction. Essentially, the question is whether a Native American Indian can be punished twice for the same conduct—first in tribal court and a second time in federal court.

Denezpi v. United States
Docket No. 20-7622

Argument Date: **February 22, 2022** From: **The Tenth Circuit**

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Introduction

There are 574 federally recognized Indian tribes listed by the Bureau of Indian Affairs (BIA) that possess a formal nation-to-nation relationship with the United States government. Notice, 87 Fed. Reg. 4636-02 (Jan. 28, 2022). Some, but not all of these tribes, operate tribal criminal courts. Scholars and the courts generally use the term *tribal courts* to encompass tribal courts created by tribal tradition; courts created under a tribal constitution; and Courts of Indian Offenses. *Courts of Indian Offenses* are defined as "the courts established pursuant to" 25 C.F.R. Part 11, 25 U.S.C. 3602(2); such courts are also known as "CFR courts."

Criminal jurisdiction in Indian country is complex. *See McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). Tribal criminal jurisdiction over Native American Indian offenders is *inherent* and exclusive, limited only by federal statute. *Ex parte Kan-gi-shun-ca*, 109 U.S. 556 (1883). This jurisdiction extends to Native American offenders whether or not they are enrolled citizens of the tribe in which they are being prosecuted. *U.S. v. Lara*, 541 U.S. 193 (2004).

Federal criminal jurisdiction within "the Indian country," is necessarily limited and proscribed by the Indian Major Crimes Act. That statute provides "[a]ny Indian who commits" certain enumerated offenses "against the person or property of another Indian or any other person" "shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States." 18 U.S.C. § 1153. State courts generally have no jurisdiction to try Indians for conduct committed in "Indian country" unless Congress says that they do. *Negonsott v. Samuels*, 507 U.S. 99 (1993).

Thus, federal and tribal courts have concurrent jurisdiction over "major" or serious crimes committed in Indian country, 18 U.S.C. § 1153, unless the federal government has delegated that authority to a state government, 18 U.S.C. § 1162, 25 U.S.C. § 1321 (Public Law 280). Tribal courts exercise exclusive jurisdiction over nonmajor crimes when the victim is Native American, 18 U.S.C. § 1152, and over victimless crimes, *U.S. v. Quiver*, 241 U.S. 602 (1916); *contra U.S. v. Sosseur*, 181 F.2d 873 (7th Cir. 1950). After Chief Justice William Rehnquist's decision in *Oliphant v. Suquamish*, tribal courts have no power to prosecute or punish non-Indians. 435 U.S. 191 (1978). With this sketch of criminal

jurisdiction in Indian country in mind, it becomes clear that the answer to the double jeopardy question raised in this case will apply only to Native Americans.

The tribe in this case, the Ute Mountain Ute Tribe, operates a court system through a Court of Indian Offenses (CFR Court), an entity established by the BIA under the Code of Federal Regulations. The CFR Court enforces both the Ute Mountain Ute Code and the Code of Federal Regulations (CFR). The issue lies in whether the CFR Court is a tribal entity or a federal entity. If the CFR Court is a federal instrumentality, then there are not two separate sovereigns—jeopardy attaches with the first conviction and the Double Jeopardy Clause would prohibit the second prosecution. If the CFR Court is a tribal entity deriving its power from inherent tribal sovereignty, then the dual-sovereignty doctrine would apply, and the second prosecution in federal court would not be barred by the Double Jeopardy Clause.

Notably, the U.S. Constitution does not apply to tribal governments, as the tribes predate both the United States and its Constitution. *Talton v. Mayes*, 163 U.S. 376 (1896). Instead, the Indian Civil Rights Act (ICRA) applies a modified version of the Bill of Rights to tribal governmental actions, which includes a double jeopardy prohibition. 25 U.S.C. § 1302(a)(3).

Issue

Is the Court of Indian Offenses of Ute Mountain Ute Agency a federal agency, barring Denezpi's prosecution by both the CFR Court and the federal district court as violative of the Fifth Amendment's Double Jeopardy Clause?

Facts

The petitioner in this case, Merle Denezpi, is an enrolled member of the Navajo Nation. The respondent is the United States. The Ute Mountain Ute Tribe is not a party but joined in an amicus brief.

On June 7, 2018, Denezpi was indicted and charged with aggravated sexual abuse in Indian country in a single count indictment. *See* 18 U.S.C. §§ 2241(a)(1)–(2) and 1153(a). The indictment was based upon an alleged sexual assault of another Native American Indian, V.Y., which occurred on the Ute Mountain Ute Reservation a year earlier. Both the alleged victim and the defendant are Navajo. The case was prosecuted in the Ute Mountain CFR Court because the incident occurred within the exterior boundaries of the Ute Mountain Ute Reservation.

On July 17, 2017, Denezpi and V.Y. traveled together from Teec Nos Pos, Arizona (Navajo—*T'iis Názbąs*, meaning "round tree"), near the Four Corners area, to Towaoc, Colorado. Once they arrived, V.Y. spent some time at the Ute Mountain Casino. She then accompanied Denezpi to a home located within the Ute Mountain Ute Reservation. Denezpi is accused of forcing V.Y. to have nonconsensual sex while inside the home, barricading the front door, and threatening V.Y. The next morning, while Denezpi was still asleep, V.Y. walked back to the casino, where she was arrested for public intoxication and on an outstanding warrant. She then reported the assault to a BIA officer. Denezpi asserted that the sexual encounter was consensual, whereas V.Y. asserted it was not.

Following a short investigation, BIA Special Agent Lyle Benally swore out a criminal complaint in the CFR Court for the Ute Mountain Ute Agency. Denezpi was charged with assault and battery, in violation of the Ute Mountain Tribal Code, and with false imprisonment and making terroristic threats, in violation of the Code of Federal Regulations. *See* 25 C.F.R. § 11.402 and § 11.404. The caption appearing on all CFR Court documents was *The United States of America v. Merle Denezpi*. Denezpi requested a jury trial and remained in custody on a $5,000 cash-only bond, pending the CFR Court proceeding.

On December 6, 2017, the tribal case resolved when Denezpi entered an *Alford* plea to the assault and battery charge, and the remaining two charges were dismissed with prejudice. The *Alford* plea is so called based on the holding of *North Carolina v. Alford*, 400 U.S. 25 (1970), in which the Supreme Court sanctioned pleas by which "[a]n individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime" because he "intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt." The CFR Court accepted the plea and sentenced Denezpi to 140 days incarceration, representing his time-served in the BIA Chief Ignacio Federal Detention Center. He was released from custody on that charge on December 6, 2017.

Six months later, on June 7, 2018, Denezpi was indicted in the federal district court for the District of Colorado on one count of aggravated sexual abuse in Indian country, based upon the same incident that occurred on the Mountain Ute Reservation investigated and prosecuted by the CFR Court.

Denezpi moved to dismiss the federal indictment on double jeopardy grounds, arguing that Denezpi had already been prosecuted by the federal government through the CFR Court. He argued that the subsequent prosecution by the federal government was "an impermissible and illegal violation of Denezpi's double jeopardy rights as envisioned in the Fifth Amendment to the United States Constitution." The United States District Court for the District of Colorado denied the motion, stating that "the CFR Courts' power to punish crimes occurring on tribal lands derives from their original sovereignty, not from a grant of authority by the federal government." *U.S. v. Denezpi*, No. 18-cr-00267, 2019 WL 295670, at *3 (D. Colo. Jan. 23, 2019). The court explained that, under the "dual sovereignty doctrine," "'a single act gives rise to distinct offenses—and thus may subject a person to successive prosecutions—if it violates the laws of separate sovereigns.'" (quoting *Puerto Rico v. Sanchez Valle*, 579 U.S. 59 (2016).)

Denezpi was found guilty after a jury trial. The trial court imposed a sentence of 360 months (30 years) in prison followed by 10 years supervised upon his release—"a sentence almost 80 times longer" than his first sentence.

Denezpi appealed the district court's denial of his motion to dismiss on double jeopardy grounds.

On appeal, the Tenth Circuit noted that the parties agreed the Ute Mountain Ute Tribe had "the inherent power to prosecute criminal offenses committed by an Indian on its sovereign lands and that the source of this power is the Ute Mountain Ute Tribe's 'pre-existing sovereignty.'" They departed on the source from which the CFR Court derives its power to prosecute crimes in Indian country. In other words, whether the CFR Court's power to punish came from the federal government or its own wellspring of inherent sovereignty. Denezpi argues that the ultimate source is federal power rather than tribal sovereignty, based upon the nature of the CFR Court as evidenced by its origins and current structure within the federal Bureau of Indian Affairs agency. He argues that since its inception, the CFR Court has been a federal instrumentality. "He therefore contends that his prosecution by both the CFR Court and the federal district court violated the Fifth Amendment's Double Jeopardy Clause."

The Tenth Circuit affirmed the decision, and Denezpi petitioned for Supreme Court review. The Court granted *certiorari* on October 18, 2021. The case is scheduled for oral argument on Tuesday, February 22, 2022.

Case Analysis

Double Jeopardy

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. Whether this protection is afforded to Native American Indians previously prosecuted by an Indian tribal government is the question in this case, but the heart of the matter is the nature of the CFR Court in question and the "ultimate source" of its power.

In *U.S. v. Wheeler*, 435 U.S. 313 (1978), the Supreme Court upheld the subsequent conviction of a Navajo man in federal court after his conviction and punishment in Navajo tribal court for the same offense. The Court recognized that tribes possessed inherent sovereign powers, including the power to "prescribe laws for their members and to punish infractions of those laws." Because this power is inherent, rather than delegated by the federal government, the *Wheeler* Court determined that the exercise of that power is part of the tribe's retained sovereignty and "not as an arm of the Federal Government." Therefore, the prosecution by a tribal court and federal court of charges arising from the same set of events was an exercise by dual sovereigns that did not violate the Double Jeopardy Clause. *Wheeler* left open the question of whether CFR Courts were to be treated in the same manner as tribal courts for the purposes of Double Jeopardy.

The United States' position follows *Wheeler* closely, asserting that Denezpi's prosecution in the Court of Indian Offenses does not bar his prosecution in a subsequent federal district court for the federal-law offense of aggravated sexual abuse. The government takes the position that the CFR Court is a tribunal exercising the powers of a Native American tribe, arguing that the dual-sovereignty doctrine permits the subsequent prosecution. Citing to a recent case, the United States provides, "[f]or nearly two centuries, this Court has consistently recognized that a single act that violates two sovereign's laws comprises two distinct 'offences' and that the Double Jeopardy Clause accordingly permits two prosecutions." (*quoting Gamble v. United States*, 139 S. Ct. 1960 (2019).)

Both parties recognize that had he been tried for his tribal-law offense in a tribally operated court, Denezpi's subsequent federal prosecution would be permissible under *Wheeler*. Where they differ is whether the Ute Mountain Ute Tribe is operating as a separate sovereign because the Tribe utilizes the Court of Indian Offenses

as the forum for prosecuting violations on tribal lands. Denezpi argues that the dual-sovereignty doctrine does not apply because the CFR Court is a federal instrumentality.

Are Courts of Indian Offenses (CFR Courts) Tribal Sovereign Courts?

The CFR Courts arose in the late 19th century as a tool of assimilation. The commissioner of Indian Affairs to the secretary of the interior described the CFR courts in this manner:

> Since 1882, what is known as a "court of Indian offenses" has been established and maintained upon a number of Indian reservations. It has been a tentative and somewhat crude attempt to break up superstitious practices, brutalizing dances, plural marriages and kindred evils, and to provide an Indian tribunal which, under the guidance of the agent, could take cognizance of crimes, misdemeanors and disputes among Indians, and by which they could be taught to respect law and obtain some rudimentary knowledge of legal processes. Notwithstanding their imperfections and primitive character these so-called Courts have been a great benefit to the Indians and of material assistance to the agents. (*Colliflower v. Garland*, 342 F.2d 369 (1965))

At their start, the CFR Courts used codes developed by the BIA, and tribal member judges were appointed by an Indian agent.

In 1888, the Ninth Circuit decision in *United States v. Clapox* provided this contemporary view.

> These "courts of Indian offenses" are not the constitutional courts provided for in section 1, art. 3, Const., …but mere educational and disciplinary instrumentalities, by which the government of the United States is endeavoring to improve and elevate the condition of these dependent tribes to whom it sustains the relation of guardian. In fact, the reservation itself is in the nature of a school, and the Indians are gathered there, under the charge of an agent, for the purpose of acquiring the habits, ideas, and aspirations which distinguish the civilized from the uncivilized man. (35 F. 575 (1888))

According to the BIA website, "Courts of Indian Offences [sic] (CFR Courts) operate where Tribes retain jurisdiction over American Indians that is exclusive of state jurisdiction, but where Tribal courts have not been established to fully exercise that jurisdiction." Currently, there are five CFR Courts across the United States, which serve 15 tribes, and the Santa Fe Indian School, which occupies Indian trust lands. See https://www.bia.gov/CFRCourts.

The Ute Mountain Ute Tribe is one such tribe that has maintained its relationship with the CFR Court that serves them. The BIA continues to supervise the court, appoints the prosecutor, and runs the jail located on the reservation. The Code of Federal Regulations sets out due process requirements for CFR Courts and affords individuals an appointed counsel, 25 CFR § 11.303(c), even though the ICRA does not require it for sentences less than one year, 25 U.S.C. § 1302(a)(6). The government argues that this is immaterial because the Ute Mountain Tribe has chosen the CFR Court to "exercise [the] tribes' sovereign authority." Essentially, the CFR Court is the chosen mechanism or machinery for criminal jurisdiction. It is a sovereign choice.

Herein lies the weakness of the Tribe's and United States' argument. The Ute Mountain Ute Tribe has the sovereign authority to determine how it exercises criminal jurisdiction. It chose to utilize the CFR Court system, as opposed to its own traditional justice system, like the Navajo Nation Tribal Court in *Wheeler* or its own unique expression of the adversary system.

Dual Sovereignty Doctrine as Applied to State/Federal Concerns

The dual-sovereignty doctrine provides a carve-out to the ordinary rule against double jeopardy. According to that doctrine, successive prosecutions of a single defendant by separate sovereigns, even to punish "identical criminal conduct through equivalent criminal laws," are not prosecutions for the "same offense" within the meaning of the Double Jeopardy Clause. *Puerto Rico v. Sanchez Valle*, 579 U.S. 59 (2016). If there are two separate sovereigns, then there are two separate harms, and each is entitled to exercise the sovereign right to punish.

Dual Sovereignty Doctrine as Applied to Tribal/Federal Concerns

In *United States v. Wheeler*, the Supreme Court applied the dual sovereignty doctrine to hold that a tribal-court prosecution for a tribal offense does not bar a federal prosecution for a federal offense, because tribes are separate sovereigns whose "right to punish crimes occurring on tribal lands derives from the tribes'

'primeval sovereignty' * * * 'and is attributable in no way to any delegation to them of federal authority.'" There, the Court explicitly declined to address whether the same logic applies to a prosecution in the Court of Indian Offenses.

In its amicus brief, the Ute Mountain Ute Tribe argues in support of the United States that, because CFR Courts derive their power to prosecute crimes from the tribe's inherent sovereignty, rather than that of the federal government, they are dual sovereigns not subject to the Fifth Amendment prohibition on Double Jeopardy. In support of this assertion, the Tribe describes the government's role in the CFR Courts as "providing the machinery," while the tribe provides most of the staff, controls decision-making, and, most importantly, enforces tribal laws. However, the Tribe spends less time examining the prominent role the federal government plays in the prosecutorial role of the CFR Courts. Unless expressed otherwise in contract, the tribal prosecutor is appointed by the BIA—a federal agency. 25 CFR § 11.204.

The National Association of Criminal Defense Lawyers, as amicus, describes some of the "machinery" in place within a CFR Court:

> The federal government can unilaterally establish a CFR Court, but the tribe cannot unilaterally terminate it. (Petr's Br. at 24) Prosecutions are brought in the name of the United States. (Petr's Br. at 25) The federal government implements any sentence meted out and collects any fine imposed. (Id.) The federal government pays for the defendant's counsel in CFR Court if he is indigent, 25 C.F.R. § 11.309(c)(2), just as it does for defendants in federal district court, 18 U.S.C. § 3006A(a). In short, the federal government is deeply involved on all three sides of the triangle—the judge, the prosecutor, and defense counsel are all on the payroll of the federal government, all arguing from or applying federal law. (12)

Significance

This case presents the Court with an opportunity to resolve the question left unanswered in *Wheeler*: "whether [a CFR Court] is an arm of the Federal Government or, like the Navajo Tribal Court, derives its powers from the inherent sovereignty of the tribe." Thus, the case is the first to provide a constitutional analysis of whether the double jeopardy protections afforded under the U.S. Constitution apply to the Native American prosecuted in federal court under the Major Crimes Act after his conviction and sentence in this particular type of tribal court—the Code of Federal Regulations Court. To answer the question, the Supreme Court must look to the origins of the BIA Court of Indian Offenses, and finally determine their status in the framework of federal judiciary or tribal/federal Indian law.

As set forth above, CFR Courts are not Article III courts. The CFR Courts have their origins in settler-colonialism as "disciplinary instrumentalities" to civilize the Indian. "Currently the CFR Courts are the tribal criminal justice system of choice by a little more than a dozen of the 574 federally recognized Indian tribes." The opinion will impact Denezpi to determine whether his 30-year sentence under the Indian Major Crimes Act will stand. It will also determine the Court's view of the CFR Courts within the federal/tribal jurisdictional scheme and their authority within it.

Ultimately, the decision will determine whether Native Americans will remain the only persons who can be twice punished based upon their race and political status.

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