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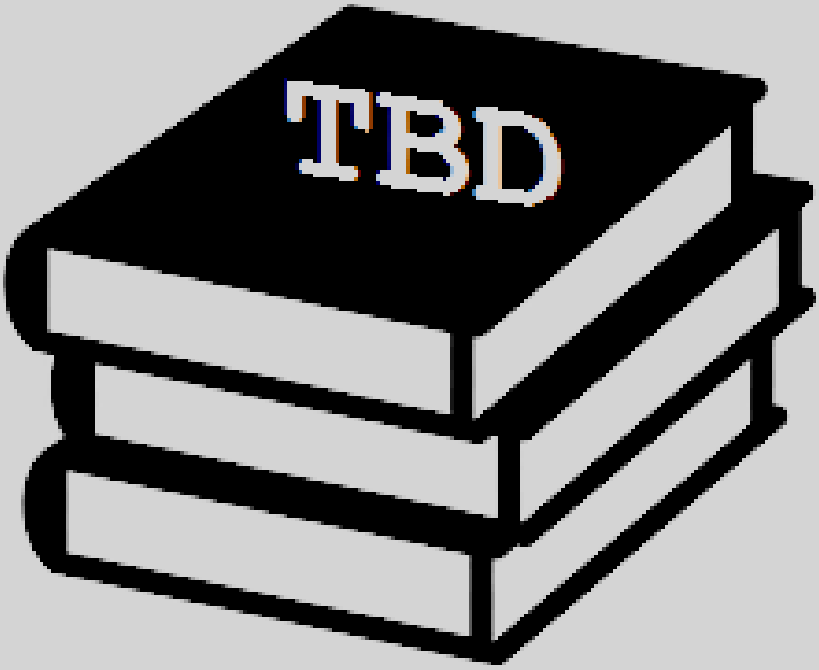

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MERLE DENEZPI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the Court of Indian Offenses of Ute Mountain Ute Agency a federal agency such that Merle Denezpi's conviction in that court barred his subsequent prosecution in a United States District Court for a crime arising out of the same incident?

LIST OF PARTIES

1. Merle Denezpi, Petitioner.

2. United States of America, Respondent

RELATED PROCEEDINGS

1. *United States v. Merle Denezpi*, Case No. 18-cr-00267-REB-JMC (D. Colorado) (June 5, 2019)

2. *United States v. Merle Denezpi*, Case No. 19-1213 (10th Circuit) (October 28, 2020)

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The citation to the Tenth Circuit Opinion below is *United States v. Denezpi*, 979 F.3d 777 (10th Cir. 2020). The citation to the District Court Order below is *United States v. Denezpi*, No. 18-CR-00267-REB-JMC, 2019 WL 295670 (D. Colo. Jan. 23, 2019), *aff'd*, 979 F.3d 777 (10th Cir. 2020).

JURISDICTION

The United States District Court for the District of Colorado had jurisdiction over this matter pursuant to 18 U.S.C. §§ 1153 and 3231. The Tenth Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a)(3). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The United States Court of Appeals for the Tenth Circuit decided Mr. Denezpi's appeal on October 28, 2020. No petition for rehearing was filed.

This petition is timely filed pursuant to this Court's Order of March 15, 2020, ordering that in light of the ongoing public health concerns relating to COVID-19:

> the deadline to file any petition for a writ of certiorari due on or after the date of this order is extended to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing.

RELEVANT CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment V:

> 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 be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

"[T]he double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage." *Benton v. Maryland*, 395 U.S. 784, 794 (1969). Indeed, "[t]he fundamental nature of the guarantee against double jeopardy can hardly be doubted. Its origins can be traced to Greek and Roman times, and it became established in the common law of England long before this Nation's independence." *Id*. at 795.

This case presents the question whether a defendant convicted of an offense in a Court of Indian Offenses, in a case brought in the name of the United States, can subsequently be convicted for the same conduct in a United States District Court, in a case brought in the name of the United States.

1. Procedural History.

The charges against Mr. Denezpi stemmed from a sexual encounter with V.Y., a fellow member of the Navajo Nation, in July 2017. The encounter occurred within the exterior boundaries of the Ute Mountain Ute Reservation. Mr. Denezpi asserted that the sexual encounter was consensual, whereas V.Y. asserted it was not.

A. Arrest and CFR Court Prosecution.

Law enforcement arrested Mr. Denezpi on July 19, 2017, and he was charged by complaint in the Court of Indian Offenses of Ute Mountain Ute Agency ("CFR Court")[1] with three offenses: terroristic threats, contrary to 25 C.F.R. § 11.402; false

[1] The court is known as a "CFR Court" because it is governed by regulations found in the Code of Federal Regulations, 25 C.F.R. 11.100 et seq.

imprisonment, contrary to 25 C.F.R. § 11.404; and assault and battery, contrary to 6 Ute Mountain Ute Code (UMUC) 2. The caption on the Complaint is "United States of America, Plaintiff vs. Merle Denezpi[, Defendant.]" Indeed, all pleadings in that court are likewise captioned.

On December 6, 2017, Mr. Denezpi entered an *Alford* plea to the assault and battery charge in exchange for which the prosecutor agreed to dismiss the terroristic threats and false imprisonment charges. The CFR Court sentenced Mr. Denezpi to 140 days' incarceration.

B. District Court Prosecution.

Six months after Mr. Denezpi completed his sentence, he was charged by indictment in the United States District Court for the District of Colorado with violating 18 U.S.C.§§ 2241(a)(1) and (2), 1153(a). The charge is based on the same conduct underlying the charges in the CFR Court. The caption on the Indictment is "United States of America, Plaintiff vs. Merle Denezpi, Defendant." Indeed, all pleadings in the case are likewise captioned.

Prior to trial, Mr. Denezpi filed a motion to dismiss the indictment on double jeopardy grounds. In his motion, Mr. Denezpi argued that his conviction in the CFR Court for the same conduct underlying the charge in the District Court violated his Fifth Amendment right to be free from double jeopardy. Mr. Denezpi acknowledged Supreme Court precedent holding that the dual sovereignty doctrine allows the federal government to prosecute a tribal member following a tribal prosecution for the same acts. *See United States v. Wheeler*, 435 U.S. 313 (1978); *United States v. Lara*, 541 U.S. 193 (2004). However, he argued that these cases are not controlling

because they involved tribal court prosecutions whereas his case involves a CFR Court. Mr. Denezpi argued that a CFR Court, which was created to fill a void in areas of Indian Country without a tribal court system, is an arm of the federal government and thus double jeopardy principles prohibit a subsequent prosecution in a district court following a prosecution in a CFR court. The district court denied his motion. *See* Appx. at 14; *United States v. Denezpi*, No. 18-CR-00267-REB-JMC, 2019 WL 295670 (D. Colo. Jan. 23, 2019).

Following a jury trial, Mr. Denezpi was convicted of aggravated sexual assault. On June 3, 2019, the district court sentenced Mr. Denezpi to 360 months incarceration.

C. Appeal to the Tenth Circuit.

Mr. Denezpi timely appealed his conviction to the Tenth Circuit, raising two issues: (1) whether his conviction in district court violated the Double Jeopardy Clause given his prior conviction in the CFR court for the same conduct and (2) whether the trial court erred in refusing to strike testimony that Mr. Denezpi had served time in prison and had previously committed acts of domestic violence.

The Court of Appeals affirmed his conviction. *See* Appx. at 1; *United States v. Denezpi*, 979 F.3d 777 (10th Cir. 2020).

REASONS FOR GRANTING THE WRIT

1. This Court Must Decide the Important Question of Whether a CFR Court is an Arm of the Federal Government for Purposes of the Double Jeopardy Clause.

The Double Jeopardy Clause of the Fifth Amendment prohibits more than one prosecution for the "same offence." U.S. Const. amend. V. If a CFR court is an

arm of the federal government, then a conviction in that court precludes a subsequent prosecution in a district court for the same offense. If a CFR court is a tribal court, however, then a subsequent prosecution for the same offense in a district court is permissible under the dual sovereignty doctrine.

The dual-sovereignty doctrine recognizes that "a crime under one sovereign's laws is not 'the same offence' as a crime under the laws of another sovereign." *Gamble v. United States*, 139 S. Ct. 1960, 1964 (2019). Therefore, "a single act . . . may subject a person to successive prosecutions[] if it violates the laws of separate sovereigns." *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1867 (2016).

To determine whether two prosecuting authorities are different sovereigns for double jeopardy purposes, the Court looks to the source of the authorities' prosecutorial power. "[T]he issue is only whether the prosecutorial powers of the two jurisdictions have independent origins—or, said conversely, whether those powers derive from the same 'ultimate source.'" *Sanchez Valle*, 136 S. Ct. at 1867 (quoting *Wheeler*, 435 U.S. at 320).

This Court has held that Indian tribes are separate sovereigns under the Double Jeopardy Clause. *See Wheeler*, 435 U.S. at 322-323; *Lara*, 541 U.S. at 210. Under *Wheeler* and *Lara*, if the Ute Mountain Ute Tribe had established a tribal court to punish infractions of its laws, it is undisputed that the Double Jeopardy Clause would not be offended by a federal prosecution subsequent to a tribal one based on the same conduct. *See id*. But Mr. Denezpi was not prosecuted in a tribal court; he was prosecuted in a Court of Indian Offenses in Indian Country (CFR Court) established by the Bureau of Indian Affairs

pursuant to 25 C.F.R. § 11.100 et seq. CFR courts differ from tribal courts and whether federal or tribal sovereignty is the source of their prosecutorial powers is an important question this Court has not yet answered. *See Wheeler*, 435 U.S. at 327 n. 26 ("We need not decide today 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."); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 196 n. 7 (1978) (distinguishing between tribal courts, traditional courts, conservation courts, and CFR Courts; "The case before us is concerned only with the criminal jurisdiction of tribal courts.").

The history and structure of the CFR Courts establish they are arms of the federal government despite also functioning as tribal forums in areas lacking independent tribal courts. "The CFR Courts are the offspring of the Courts of Indian Offenses, first provided for in the Indian Department Appropriations Act of 1888, 25 Stat. 217, 233." *Oliphant*, 435 U.S. at 196 n. 7. These courts "were created by the Federal Bureau of Indian Affairs to administer criminal justice for those tribes lacking their own criminal courts." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 64 n. 17 (1978). The courts are established pursuant to regulations promulgated by the Bureau of Indian Affairs (BIA). *See* 25 C.F.R. § 11.100 et seq. The purpose of the CFR courts is "to provide adequate machinery for the administration of justice for Indian tribes in those areas of Indian country where tribes retain jurisdiction over Indians that is exclusive of State jurisdiction but where tribal courts have not been established to exercise that jurisdiction." 25 C.F.R. § 11.102; *see also Tillett*

v. Lujan, 931 F.2d 636, 638 (10th Cir. 1991) (quoting prior version of § 11.102, which read: "to provide adequate machinery of law enforcement for those Indian tribes in which traditional agencies for the enforcement of tribal law and custom have broken down for which no adequate substitute has been provided under Federal or State law").

The Indian Reorganization Act of 1934 "paved the way for tribes to develop tribal courts and phase out the CFR courts. The most significant distinction between the tribal courts and CFR courts is that tribal judges are responsible to the tribe instead of the BIA, thus allowing the tribes greater autonomy to development their own tribal judicial systems." Vincent C. Milani, The Right to Counsel in Native American Indian Tribal Courts: Tribal Sovereignty and Congressional Control, 31 Am. Crim. L. Rev. 1279, 1281 (1994). Today, only seven CFR Courts remain in operation. *See* 25 C.F.R. § 11.100 (listing tribes subject to CFR courts); Tribal Law and Policy Institute, Tribal Court Clearinghouse, Tribal Courts: CFR Courts—Bureau of Indian Affairs (available at https://www.tribal-institute.org/lists/justice.htm#CFRCourts) (last visited Mar. 24, 2021). The Ute Mountain Ute Agency CFR Court is one of the seven. *Id*.

"CFR courts that have not been supplanted by independent tribal courts pursuant to the provisions of 25 C.F.R. § 11(d) [now 25 C.F.R. § 11.1046] retain some characteristics of an agency of the federal government." *Tillett*, 931 F.2d at 640 (citing *United States v. Red Lake Band of Chippewa Indians*, 827 F.2d 380, 383 (8th Cir. 1987) ("The records of C.F.R. courts are agency records and

belong to the United States.") and *Colliflower v. Garland*, 342 F.2d 369, 378-379 (9th Cir. 1965) ("It is pure fiction to say that the [CFR courts] … are not in part, at least, arms of the federal government.")); *see also Red Lake Band of Chippewa Indians*, 827 F.2d at 383-384 (noting that a "C.F.R. court may … exempt itself from BIA regulation and be reclassified as an independent tribal court if the tribe establishes that it was organized under the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. §§ 461–479, and that it has adopted its own law and order code in accordance with its constitution and bylaws").

At the same time, CFR courts can "function as tribal courts; they constitute the judicial forum through which the tribe can exercise its jurisdiction until such time as the tribe adopts a formal law and order code." *Tillett*, 931 F.2d at 640. Given the hybrid nature of the CFR courts, they "function in part as a federal agency and in part as a tribal agency[.]" *Colliflower*, 342 F.2d at 379.[2] Because the CFR courts function, at least in part, as a "federal agency," the the Double Jeopardy clause prohibits a second prosecution by another federal agency, in this case the Department of Justice.

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[2] In *Davis v. Muellar*, 643 F.2d 521 (8th Cir. 1981), the Eighth Circuit suggested *Colliflower* was overruled by this Court's decision in *United States v. Wheeler*. *Davis*, 643 F.2d at 532 n. 13. This is not correct. *Wheeler* addressed the source of Indian tribes' power to enforce their criminal laws against tribe members in tribal courts. *Wheeler*, 435 U.S. at 328-329. In reaching its holding that a tribe's power to punish tribal offenders in tribal court is part of a tribe's retained sovereignty, this Court distinguished CFR courts, explicitly withholding ruling on the source of a CFR court's power. *Id.* at 327 and n. 26. By contrast, *Colliflower* concerned a CFR court. *Colliflower*, 342 F.2d at 370. In reaching its holding that CFR courts "function in part as a federal agency and in part as a tribal agency," the *Colliflower* court confined its ruling to the CFR court at issue, recognizing that the "history of other Indian courts may call for a different ruling." *Id*. Because the two cases address different types of courts, *Wheeler* does not overrule *Colliflower*.

In denying Mr. Denezpi's motion, the Tenth Circuit cites to a series of decisions by the Courts of Indian Appeals for the principle that the CFR courts exercise the inherent authority of Indian tribes. Appx. at 9. Although these cases do acknowledge tribal sovereignty, they also recognize that the CFR courts operate under the authority of the federal government, not just the tribes. In *Kiowa Election Bd. v. Lujan*, 1 Okla. Trib. 140 (1987), for example, the court recognized that CFR courts operate under both the "residual sovereignty of the tribes as well as under the authority of the federal government." *Id*. at 151. As another court wrote:

> [S]everal previous opinions of this court have addressed the issue of whether the power or sovereignty being exercised by this court is actually derived from the inherent authority of the Indian tribe or is derived from the federal government. Several courts have faced this issue, and have come down on both sides of this question. Our previous opinions have consistently held that the power being asserted by the Court of Indian Offenses is not solely derived from the federal government as the Appellant suggests. We believe that the Court of Indian Offenses is essentially asserting the authority of the tribe it serves as well as any delegated authority of the United States government. ***The Court of Indian Offenses is essentially both a tribal and a federal entity.*** Thus, a modern day Court of Indian Offenses may most accurately be characterized as a "federally administered tribal court."

Gallegos v. French, No. CIV-90-A09P, 1991 WL 733411, at *11 (Delaware CIA June 4, 1991) (emphasis added); *but see Ponca Tribal Election Bd. v. Snake*, No. CIV-88-P05P, 1988 WL 521355, at *6 (Ponca CIA Nov. 10, 1988) (concluding CFR courts are tribal courts exercising tribe's inherent sovereignty).

The Tenth Circuit mistakenly concludes that because the Tribe's inherent authority to prosecute those who violate its laws has never been withdrawn, that authority is the "ultimate source" of the power undergirding the CFR court.

Appx. at 10. This conclusion ignores the overlapping authority and power of the CFR and district courts. The power to prosecute criminal offenses committed on tribal land in the CFR courts and in the federal district courts (pursuant to Indian Country jurisdiction (18 U.S.C. §1152 and 18 U.S.C. § 1153)) is the same: the inherent sovereignty of the tribe as expressed through a federal court or agency.

Like federal district courts and unlike tribal courts, CFR courts are a blend of federal and tribal prosecutorial power. In both CFR courts and federal district courts exercising Indian Country jurisdiction, the authority or power to prosecute stems exclusively from the alleged commission of the offense on Indian lands and the cases are brought in federal courts.

This is not a case in which the sources of prosecutorial power are fundamentally different. *Compare United States v. Lara*, 541 U.S. 193 (2004) (double jeopardy clause not violated where defendant prosecuted both for tribal offense of violence to a policeman and federal offense of assault on a federal officer); *United States v. Wheeler*, 435 U.S. 313 (1978) (double jeopardy clause not violated where defendant prosecuted for contributing to delinquency of a minor in tribal court and rape in federal court). The source of prosecutorial power for federal crimes of general applicability—such as carjacking or Hobbs Act robbery—is the federal government. But the source of prosecutorial power for crimes brought pursuant to 18 U.S.C. § 1152 and 18 U.S.C. § 1153 is inherent tribal sovereignty. *Cf.* 18 U.S.C. § 3598 (recognizing tribal authority to determine whether capital punishment may be imposed in cases where federal

jurisdiction is predicated solely on Indian country). Thus, a district court prosecution of an Indian Country offense shares the same sources of prosecutorial power as a prosecution in a CFR court.

The charges Mr. Denezpi faced in the CFR court—coupled with the manner in which those charges were resolved—further support a finding that the CFR court is a quasi-federal court for Double Jeopardy purposes. Mr. Denezpi was charged with one offense under the Ute Mountain Ute Code and two offenses under the federal regulations. The offense under the Ute Mountain Ute Code was prosecutable in the CFR Court by virtue of 25 C.F.R. § 11.108, which provides:

> The governing body of each tribe occupying the Indian country over which a Court of Indian Offenses has jurisdiction [to] enact ordinances which, when approved by the Assistant Secretary—Indian Affairs or his or her designee:
>
> (a) Are enforceable in the Court of Indian Offenses having jurisdiction over the Indian country occupied by that tribe; and
>
> (b) Supersede any conflicting regulation in this part.

Absent such action by a tribe—and approval the Assistant Secretary of Indian Affairs—the crimes over which the CFR court has jurisdiction are set forth in 25 C.F.R. § 11.400 et seq. *See also* 25 C.F.R. § 11.114(a) ("Except as otherwise provided in this title, each Court of Indian Offenses has jurisdiction over any action by an Indian (hereafter referred to as person) that is made a criminal offense under this part and that occurred within the Indian country subject to the court's jurisdiction.").

Mr. Denezpi entered an Alford plea to the Ute Mountain Ute Code charge in exchange for the dismissal with prejudice of the two CFR counts. The caption on the pleadings in the CFR Court (*United States of America v. Merle Denezpi*) support the conclusion that the CFR Court is a federal court for purposes of double jeopardy analysis. Mr. Denezpi was twice prosecuted in the name of the "United States of America" for unitary conduct. He was entitled to dismissal of the second prosecution and the district court erred in denying his motion to dismiss and the Tenth Circuit Court of Appeals erred in affirming that denial.

CONCLUSION

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." *Wheeler*, 435 U.S. at 327 n. 26. For the foregoing reasons, Mr. Denezpi respectfully requests that this Court issue a writ of certiorari to review the judgment of the Tenth Circuit Court of Appeals.

Dated this 26th day of March 2021.

Respectfully submitted,

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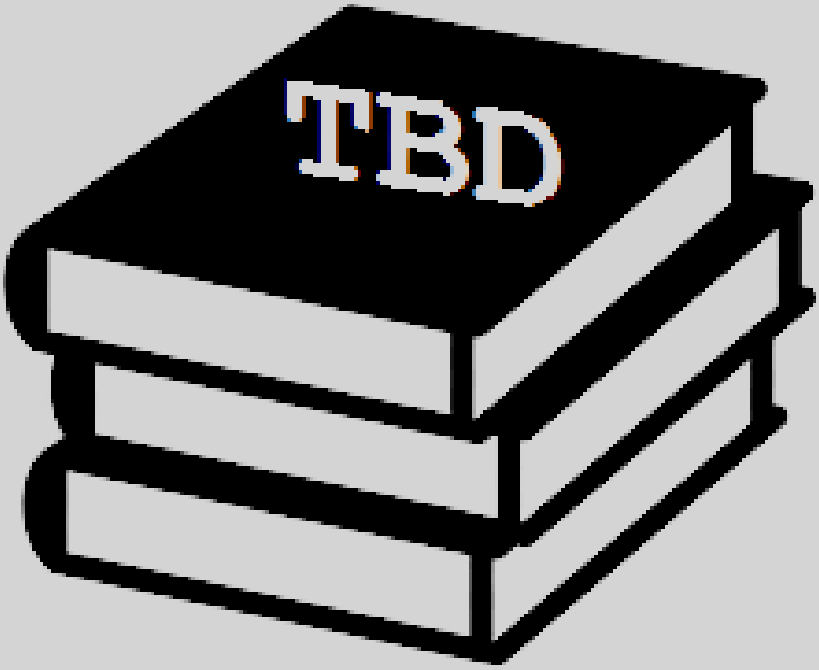

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