Appeal No. 19-1213

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee

vs.

MERLE DENEZPI
Defendant-Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
THE HONORABLE ROBERT E. BLACKBURN, JUDGE
DISTRICT COURT CASE NO. 1:18-CR-00267-REB-JMC-1

BRIEF OF APPELLANT MERLE DENEZPI

ORAL ARGUMENT REQUESTED

Theresa M. Duncan, Esq.
Duncan Earnest LLC
515 Granite Ave NW
Albuquerque, New Mexico 87102
(505) 842-5196

Attorney for Defendant-Appellant
Merle Denezpi

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None.

JURISDICTIONAL STATEMENT

The United States District Court for the District of Colorado had jurisdiction over this matter pursuant to 18 U.S.C. §§ 1153 and 3231. Defendant-Appellant Merle Denezpi was convicted after jury trial of aggravated sexual abuse in Indian Country, contrary to 18 U.S.C. §§ 2241(a)(1) and (2), 1153(a). The district court entered its judgment on June 5, 2019 [ROA[1] 205-211 (Dkt. 71); attached as Attachment 1.] Mr. Denezpi timely filed his notice of appeal on June 17, 2019, in accordance with Fed. R. App. P. 4(b)(1)(A)(i) [ROA 212 (Dkt. 73)]. This Court's jurisdiction derives from 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a)(3).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Because the Court of Indian Offenses is a federal agency, Mr. Denezpi's conviction in that court barred his subsequent federal prosecution for a crime arising out of the same incident.

II. The trial court erred in refusing to strike testimony that Mr. Denezpi had served time in prison and had beaten a prior girlfriend.

STATEMENT OF THE CASE

On June 7, 2018, the government obtained an indictment against Mr. Denezpi, charging him with aggravated sexual abuse, in violation of 18 U.S.C. §§ 2241(a)(1) and (2), 1153(a). [ROA 6-7 (Dkt. 1).] The indictment alleged that Mr. Denezpi committed this crime on or about July 18, 2017. (*Id.*) The charge

[1] "ROA" refers to the Record on Appeal, filed Sept. 6, 2019.

stemmed from a sexual encounter between Mr. Denezpi and V.Y., both of whom are members of the Navajo Nation. 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. 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.

STATEMENT OF FACTS

A. The Alleged Offense and Investigation.

In the early morning hours of July 18, 2017, V.Y.[2] was arrested at the Ute Mountain Casino in Towaoc, Colorado, on suspicion of public intoxication and because she had an outstanding warrant for an unpaid fine. [Trial Trans. (Day 2) at 75-76, 192-193, 195.] While a Bureau of Indian Affairs (BIA) officer was transporting V.Y. to the local jail, V.Y. told the officer that she had been sexually assaulted earlier that morning. [*Id*. at 77, 197-198.] She made this statement as the pair drove by the house in which V.Y. claimed to have been assaulted. [*Id*.] She later identified Appellant Merle Denezpi as the person who assaulted her.

The BIA opened an investigation into the allegations. Law enforcement interviewed V.Y. and ultimately drove her to Farmington for a sexual assault

[2] Given the nature of the allegations, Mr. Denezpi will refer to the complaining witness as V.Y. rather than use her full name.

examination. [*Id*. at 78.] During the examination, the SANE nurse questioned V.Y. and took pictures of various injuries on V.Y.'s body. [*Id*. at 78-79.]

During law enforcement questioning, V.Y. said that she had spent much of the day with Mr. Denezpi drinking alcoholic beverages. Eventually, the pair walked to a house near the Ute Mountain Casino.[3] [*Id*. at 53-55.] Once inside, Mr. Denezpi made V.Y. a sandwich and the pair finished their alcoholic beverages. [*Id*. at 56-60.] At that point, V.Y. said Mr. Denezpi became violent with her, pushing her to the ground, threatening to harm her, forcibly removing her clothing, and ultimately inserting his penis into her vagina without her consent. [*Id*. at 61-68.] After Mr. Denezpi fell asleep, V.Y. gathered her clothes and walked to the casino. [*Id*. at 70-74.]

After speaking with V.Y., law enforcement turned their attention to Mr. Denezpi. Officers located him sleeping under a tree or bush near the house where V.Y. claimed to have been raped. [*Id*. at 243-244.] Although Mr. Denezpi initially denied knowing V.Y., he ultimately told officers that he had spent the day with her and that the two had consensual sex. [*Id*. at 251-253; *see also* Gov. Ex. 36 (recording of interview).) Mr. Denezpi denied raping V.Y.

[3] The house belonged to Mr. Denezpi's then-girlfriend.

B. 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")[4] with three offenses: terroristic threats, contrary to 25 C.F.R. § 11.402; false imprisonment, contrary to 25 C.F.R. § 11.404; and, assault and battery, contrary to 6 Ute Mountain Ute Code (UMUC) 2. [ROA 29-31 (Exhibit 1 to Defendant's Motion to Dismiss on Double Jeopardy Grounds (Dkt. No. 29)).] The caption on the Complaint is "United States of America, Plaintiff vs. Merle Denezpi[, Defendant.]" [ROA 29.] Indeed, all pleadings in that court are likewise captioned. [ROA 27-28, 32-34.] 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. [ROA 33.] The CFR Court sentenced Mr. Denezpi to 140 days incarceration. [ROA 34.]

C. District Court Prosecution.

On June 7, 2018, Mr. Denezpi 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). [ROA 6-7 (Indictment (Dkt. 1).] The charge is based on the same conduct underlying the charges in the CFR Court. The caption on the

[4] 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.*

Indictment is "United States of America, Plaintiff vs. Merle Denezpi, Defendant." [*Id*.] Indeed, all pleadings in the case are likewise captioned.

D. Motion to Dismiss on Double Jeopardy Grounds.

On January 6, 2019, Mr. Denezpi filed a motion to dismiss the indictment on the double jeopardy grounds. [ROA 20-34 (Defendant's Motion to Dismiss on Double Jeopardy Grounds (Dkt. 29)).] 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. [ROA 22, citing *United States v. Wheeler*, 435 U.S. 313 (1978).] *See also 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. [*Id*.] 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 district court following a prosecution in a CFR court.

The government filed its response on January 15, 2019 [ROA 35-43 (Dkt. 30)], and Mr. Denezpi filed his reply on January 18, 2019 [ROA 44-64 (Dkt. 31)].

On January 23, 2019, the district court entered an order denying the motion. [ROA 65-72 (Dkt. 32); attached as Attachment 2.] Mr. Denezpi orally renewed his motion at the close of the evidence at trial and the court once again denied it. [Trial Trans. (Day 4) at 568-569.]

E. The Trial.

Trial began on February 25, 2019, and it lasted five days (including jury deliberations). The government called seven witnesses, including V.Y. Mr. Denezpi testified on his own behalf. He testified that he did not rape V.Y. and that the two of them had consensual sex. [Trial Trans. (Day 3) at 440-473; Trial Trans. (Day 4) at 480-566.]

During trial, V.Y. testified that Mr. Denezpi forced her to have vaginal intercourse under the threat of great bodily injury or death. [Trial Trans. (Day 2) 37-168.] On cross-examination, among other things, V.Y. testified that Mr. Denezpi had been in jail and/or prison and that he abused another woman:

> Q. Did you have visits and social conversation at City Market in Shiprock, New Mexico, prior to July 18, 2017?
>
> A. No. Only time that I've seen Mr. Denezpi was, like, when I used to sell my jewelry. I do jewelry. I would see him at the laundromat with his ex-girlfriend, **or I would see him when he got out of jail. I didn't know he got out of prison.**
>
> Q. I want –
>
> A. Well, you're asking me how I know him.

…

Q. Tell me what you knew about Mr. Denezpi, not about punishment or other issues. About socially.

A. **Socially, when I seen him and his girlfriend, his girlfriend would be all beat up, would be all abused.**

Q. I want to stop—

A. That's how I know him.

[Trial Trans. (Day 2), at 91-92 (emphasis added).] Although trial counsel did not object to the statement Mr. Denezpi had served time in jail and/or prison, he did object to the later statement—made only moments after the jail testimony—that Mr. Denezpi abused his girlfriend:

[Defense Counsel]: I ask that it be stricken from the record, Your Honor. I think there's a cautionary thing. I've talked to [the prosecutor] about this before trial started.[5]

The Court: You can't whisper to get my attention, Mr. Duthie. If you need my attention, you need to speak loud enough to hear it.

[Defense Counsel]: I ask for it to be stricken from the record.

The Court: Response.

[Prosecutor]: Your Honor, the question directly called for the response. I object to it being stricken from the record.

[5] The parties had previously agreed to redact information regarding Mr. Denezpi's alleged criminal history and the allegation he abused a girlfriend from recordings and transcripts introduced in the case. Such information was redacted from government exhibits 33, 36, and 138, which are out-of-court statements by V.Y. and Mr. Denezpi.

The Court: Well, the question is broad enough. You asked about socially, and then socially the witness gave her answer. It is within the ambit or purview of the question asked. Therefore, it will not be stricken. The request to strike is respectfully denied.

[*Id*., at 92-93.]

Although defense counsel attempted to mitigate the harm caused by the witness's prejudicial remarks and the court's refusal to strike them, he unable to do so:

Q: So you made assumptions in seeing my client and his girlfriend about his behavior with her?

A: Assumptions?

Q: You made an assumption?

A: No. I seen it.

Q: Yeah. You saw it—

A: Yes.

Q: -- and you assumed the girlfriend was hurt by my client?

A: Because she told me, and she's a friend of mine.

Q: So seeing that—you're not saying that in front of this jury to poison or say negative things about my client. You're not doing that intentional, are you?

A: No, I'm not.

Q: You're trying to respond to my question honestly?

A: Yes.

[*Id*. at 93.]

In addition to V.Y., the government called the law enforcement officers who interacted with her on the day of the alleged incident, a DNA expert who testified that DNA found on V.Y.'s genitals matched Mr. Denezpi's DNA, and a SANE nurse who took pictures of various injuries to V.Y.'s body. Although the nurse testified that V.Y.'s injuries were consistent with a nonconsensual sexual assault, she also testified they were consistent consensual, rough sex. [Trial Trans. (Day 3) at 390-391, 411-412.] She also testified that she could not date the bruises she noted on V.Y.'s body and thus could not say when those injuries were inflicted. [*Id*. at 401-402.]

The jury deliberated approximately 7 hours before returning a verdict of guilty. [Trial Trans. (Day 4) at 624, 628-631 (jury retired to deliberate at 2:18p.m., excused at 5:25p.m. and instructed to resume deliberations at 8:30a.m.); Trial Trans. (Day 5) at 636 (court announced jury reached verdict at 12:33); *id.* at 637 (announcement of jury verdict).] On June 3, 2019, the court sentenced Mr. Denezpi to 360 months' incarceration. [R)A 205-211 (Judgment in a Criminal Case (Dkt. 71).]

SUMMARY OF THE ARGUMENT

It is undisputed that the Ute Mountain Ute Tribe is sovereign and it maintains "the inherent powers of a limited sovereignty which has never been extinguished," including the power to enforce its criminal laws against tribal members. *United States v. Wheeler*, 435 U.S. 313, 322 (1978). It is equally undisputed that had the Ute Mountain Ute Tribe established a tribal court in exercise of its inherent power and had Mr. Denezpi been convicted in such a court, the dual sovereignty exception to the Fifth Amendment's prohibition against double jeopardy would allow the federal government to charge him a second time based on the same incident. *See United States v. Lara*, 541 U.S. 193 (2004). But Mr. Denezpi was not convicted in a tribal court. He was convicted in the Court of Indian Offenses in Indian Country, Ute Mountain Ute Agency, a court established by the Bureau of Indian Affairs, a federal agency. Although such courts may function as tribal courts, they "retain some characteristics of an agency of the federal government" and are, at least in part, an arm of the federal government. *Tillett v. Lujan*, 931 F.2d 636, 640 (10th Cir. 1991). Thus, the subsequent federal prosecution of Mr. Denezpi for an Indian Country crime arising out of the same incident for which he was convicted in the Court of Indian Offenses was barred by the Double Jeopardy Clause and the district court erred in denying Mr. Denezpi's motion to dismiss.

The district court also erred in denying Mr. Denezpi's request to strike V.Y.'s testimony that he had been in jail and/or prison and that he had abused a prior girlfriend. The unfairly prejudicial impact of this testimony cannot be overstated. By refusing to instruct the jury to disregard the testimony, the court improperly permitted the jurors to consider it in deciding whether Mr. Denezpi committed the offense charged. Given that the case was essentially Mr. Denezpi's word against V.Y.'s, the error was not harmless and Mr. Denezpi's conviction must be reversed.

ARGUMENT

I. Because the Court of Indian Offenses is a Federal Agency, Mr. Denezpi's Conviction in That Court Barred His Subsequent Federal Prosecution for a Crime Arising Out of the Same Incident.

The Double Jeopardy Clause of the Fifth Amendment prohibits more than one prosecution for the "same offence." U.S. Const. amend. V. Under the dual sovereignty doctrine, however, prosecutions under the laws of separate sovereigns—even if based on the same act—do not violate the double jeopardy clause. To determine whether two prosecuting authorities are different sovereigns for double jeopardy purposes, a court must look 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.'" *Puerto Rico v. Sanchez Valle*,

136 S. Ct. 1863, 1867 (2016) (quoting *United States v. Wheeler*, 435 U.S. 313, 320 (1978)).

The Supreme Court has held that the States are separate sovereigns from the federal government and from one another. *See Abbate v. United States*, 359 U.S. 187, 195 (1959); *Heath v. Alabama*, 474 U.S. 82, 88 (1985). It has also held that Indian tribes are separate sovereigns under the Double Jeopardy Clause. *See Wheeler*, 435 at 322-323; *United States v. Lara*, 541 U.S. 193, 210 (2004). 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 a question of first impression. *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 establishes they are arms of the federal government despite also functioning as tribal courts in areas lacking independent tribal courts. Thus, the Double Jeopardy Clause prohibits the Department of Justice from bringing a subsequent prosecution for which a defendant was previously convicted in a CFR Court based on the same conduct.

"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#CFR%20Courts) (last visited Nov. 25, 2019). The Ute Mountain Ute Agency CFR Court is one of the seven. *Id*.

As this Court has previously recognized, "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. § 11.104[6]] retain some characteristics of an agency of the

[6] 25 C.F.R. § 11.104 provides two avenues for a tribe to establish a tribal court independent from the BIA and its regulations:

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 (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") (emphasis added).

Of course, this Court has also recognized that CFR courts "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

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> (a) The regulations in this part continue to apply to each tribe listed in § 11.100 until either:
>
> > (1) BIA and the tribe enter into a contract or compact for the tribe to provide judicial services; or
> >
> > (2) The tribe has put into effect a law-and-order code that establishes a court system and that meets the requirements of paragraph (b) of this section.

in part as a federal agency and in part as a tribal agency[.]" *Colliflower*, 342 F.2d at 379.[7] Because the CFR courts function, at least in part, as a "federal agency" the dual sovereignty exception does not apply and the Double Jeopardy clause prohibits a second prosecution by another federal agency, in this case the Department of Justice.

In denying Mr. Denezpi's motion, the district court 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. [ROA at 71.] 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

[7] In *Davis v. Muellar*, 643 F.2d 521 (8th Cir. 1981), the Eighth Circuit suggested *Colliflower* was overruled by the Supreme 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, the Supreme 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*.

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); *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 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 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. [RA 29-31.] 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. [ROA 33-34.] The caption on the pleadings in the CFR Court—although of course not determinative—nonetheless 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.

II. The District Court Erred in Denying Mr. Denezpi's Request to Strike V.Y.'s Irrelevant and Highly Prejudicial Testimony Regarding His Previous Incarceration and Alleged Prior Violence Towards Women.

In response to questions about how she knew Mr. Denezpi, V.Y. testified in front of the jury that Mr. Denezpi had served time in jail and/or prison and that he had previously beaten his girlfriend.[8] [Trial Trans. (Day 2), at 91-92 (emphasis added).] The probative value of this testimony was clearly and substantially outweighed by the danger of unfair prejudice, *see* Fed. R. Evid. 403, and the trial court erred in denying Mr. Denezpi's request to strike it.

The testimony in this case and the district court's refusal to strike the testimony and admonish the jury is similar to the circumstances in *Sumrall v. United States*, 360 F.2d 311, 312 (10th Cir. 1966). In *Sumrall*, the defendants were charged with armed robbery. During the trial, the arresting officer was asked, "What was your purpose in removing this examination from the scene of the arrest to the police station?'" The officer answered, "The purpose was after questioning them that we advised them that we were going to check their records, and being that they admitted that they had one." *Id*. The defense objected to the answer and asked the court to strike it. The court overruled the objection, finding the answer was responsive to the question (as did the district court in Mr. Denezpi's case), and

[8] As noted above, defense counsel objected to the testimony that Mr. Denezpi had beaten his girlfriend, but not to the earlier testimony that he had been in jail. However, because these comments were made close in time, they should be read together in fairness.

refused to admonish the jury. This Court held that the trial court erred in overruling the objection and that the court should have stricken the answer and instructed the jury not to consider it as the defense requested. *Id*. at 313. Although this Court found the evidence of guilt to be "overwhelming" and that "nothing further was said concerning the matter during the trial of the case," it nonetheless held that the error was not harmless and reversed the defendants' convictions:

> We are, of course, loathe to reverse a case like this in the face of overwhelming evidence of guilt. Technical niceties such as these make the law appear ridiculous to the man on the street. But, 'All law is technical if viewed only from concern for punishing crime without heeding the mode by which it is accomplished.' I.e. see Mr. Justice Frankfurter in *Bollenbach v. United States*, 326 U.S. 607, 614, 66 S.Ct. 402, 90 L.Ed. 350. In circumstances like these the question is not whether the appellants have been proven guilty, but whether guilt has been established according to the procedural safeguards to insure trial before a fair and unprejudiced jury. It is not enough to be able to say that the evidence is entirely sufficient to convict without reference to prior records of appellants and that the jury would have in all probability returned a verdict of guilty without such knowledge. The question we must decide is whether the jury was more prone to convict these appellants knowing they had previous records than without such knowledge. In other words, can we say with reasonable certainty that the reference to prior records 'had but very slight effect on the verdict of the jury'? We cannot so say, and the cases must, therefore, be reversed.

Id. at 314; *see also United States v. Sands*, 899 F.2d 912, 916 (10th Cir. 1990) (holding court erred in denying defense motion for mistrial after witness responded to question where the defendant had lived, "He lived around Okfuskee County for awhile [sic], and went to Tulsa, *been to prison*, Broken Arrow.") (emphasis in the original).

In this case, the evidence of guilt was not overwhelming. As is frequently true in sexual assault cases, the evidence presented at trial was largely he said-she said. V.Y. testified Mr. Denezpi raped her and Mr. Denezpi testified that the sexual encounter was consensual. Although the government also introduced evidence of injuries to V.Y.'s body, the government's expert could not say how old the injuries were and conceded that some of them were consistent with consensual intercourse. It took the jury nearly seven hours to convict Mr. Denezpi. Under these circumstances, the court's error in refusing to strike V.Y.'s answer and admonish the jury left the jury with the impression that it should consider Mr. Denezpi's prior incarceration and acts of violence in deciding whether he committed the crime with which he was charged. This was improper and prejudicial and it denied Mr. Denezpi his right to a fair trial.

CONCLUSION

For the foregoing reasons, Mr. Denezpi's conviction should be reversed and the case remanded for dismissal. In the alternative, the conviction should be reversed and the case remanded for a new trial.

STATEMENT REGARDING ORAL ARGUMENT

Mr. Denezpi respectfully submits that oral argument is necessary given that this appeal raises an issue of first impression, namely whether a CFR Court is the

same as a tribal court for purposes of the Double Jeopardy Clause. Additionally, oral argument is necessary to fully address the district court's failure to admonish the jury following a witness's inadmissible and highly prejudicial testimony.

Respectfully submitted,

/s/ Theresa M. Duncan
Theresa M. Duncan, Esq.
Duncan Earnest LLC
515 Granite NW
Albuquerque, NM 87102
505-842-5196
505-750-9780 (fax)
teri@duncanearnest.com

Attorney for Appellant Merle Denezpi

CERTIFICATION OF DIGITAL SUBMISSIONS

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/s/ Theresa M. Duncan
Theresa M. Duncan

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I hereby certify that on November 26, 2019, a copy of the foregoing brief was served by (ECF) electronic service on all counsel of record.

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Theresa M. Duncan