IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Criminal Action No.: 18-cr-00267-REB-DW

UNITED STATES OF AMERICA,

Plaintiff,

v.

MERLE DENEZPI,

Defendant.

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS [ECF #29]

The United States of America respectfully requests that this Court deny the Defendant's Motion to Dismiss on Double Jeopardy Grounds [ECF #29]. As grounds, the Government states:

Summary

The Defendant asserts that a prior prosecution by the Ute Mountain Ute Tribe inoculates him against this federal indictment on Double Jeopardy grounds. While acknowledging the separate sovereign doctrine, the Defendant believes it does not apply because the "CFR Court is clearly an arm of the Federal Government." [ECF #29 at 4]. This argument is without authority and contrary to binding circuit precedent establishing that CFR courts exercise tribal power. *Tillett v. Lujan*, 931 F.2d 636, 640 (10th Cir. 1991).

Successive prosecutions do not implicate Double Jeopardy when each prosecution draws from a distinct source of sovereign power. Here, the Ute Mountain

Ute Indian Tribe's prosecution of the Defendant flowed from its unextinguished sovereign power. The tribe may exercise its sovereign power through the CFR Courts without altering that power's source. The Defendant's prior assault conviction is tribal, not federal. Therefore, Double Jeopardy does not bar this federal prosecution by the United States and the Defendant's motion should be denied.

Relevant Background

Merele Denezpi and V.Y are both members of the Navajo tribe. On July 17, 2017, the two traveled from Teec Nos Pos, Arizona, to Towaoc, Colorado. Later that evening, the Defendant lured V.Y. to his girlfriend's house, located on the Ute Mountain Ute Indian Reservation, with the promise of alcohol. Once inside, the Defendant wedged a three-foot piece of 2x4 against the interior door. The Defendant demanded sex. When V.Y. refused, the Defendant used force and threats against V.Y. to cause her to engage in nonconsensual sex. After the Defendant had fallen asleep, V.Y. escaped and reported the offense.

Tribal authorities arrested the Defendant the next day for alleged violations of tribal law; specifically, a violation of Title 6, Ute Mountain Ute Code, Section 2 (Assault and Battery) and two provisions of the Code of Federal Regulations enforceable only against tribal members by a tribal court (Terrorist Threats and False Imprisonment). A prosecution in the Ute Mountain Ute Agency Court of Indian Offenses (also referred to as the "CFR Court") ensued. The Defendant entered an apparent *Alford* plea to the violation of the Ute Mountain Ute Tribal Code and was released from custody with credit for time served.

Six months after his plea, a federal grand jury issued an indictment against the Defendant, alleging a violation of Title 18, United States Code, Sections 2241(a)(1) and

(2) and 1153(a), Aggravated Sexual Abuse in Indian Country. [ECF #1]. Trial is scheduled for February 11, 2019. [ECF #24].

Argument

I. Double Jeopardy Does Not Foreclose Prosecution by Separate Sovereigns

The Fifth Amendment prohibits "more than one prosecution for the 'same offence.'" *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1867 (2016) (quoting U.S. CONST. AMEND V). But if a single act "violates the laws of separate sovereigns," the violator may be subject to successive prosecutions by each sovereign. *Id*.[1] Put differently, an act that violates the laws of two separate sovereigns is not the same offense. This rule respects the inherent power of each sovereign. Otherwise, "[p]rosecution by one sovereign for a relatively minor offense might bar prosecution by the other for a much graver one, thus effectively depriving the latter of the right to enforce its own laws." *United States v. Wheeler*, 435 U.S. 313, 318 (1978).

Application of the separate sovereign doctrine "turns on whether the two entities draw their authority to punish the offender from distinct sources of power." *Heath v. Alabama,* 474 U.S. 82, 88 (1985). In asking that "narrow, historically focused question," the key determination is "whether the prosecutorial powers of the two jurisdictions have independent origins." *Sanchez Valle*, 136 S.Ct. at 1867 (citing *United States v. Wheeler*, 435 U.S. 313, 320 (1978)).

Indian Tribes, by virtue of their retained inherent sovereignty, maintain the power to prosecute Indians.[2] *Wheeler*, 435 U.S. 323-324; *United States v. Lara*, 541 U.S. 193,

[1] The Government notes that the United States Supreme Court has granted *certiorari* in *Gamble v. United States*, 138 S. Ct. 2707 (2018) to consider whether the separate sovereign doctrine should be overruled.
[2] The term "Indian" is used throughout due to the use of the term in both statutory and case law.

210 (2004). Where an individual has been convicted of an offense by a tribal sovereign, "the Double Jeopardy Clause does not prohibit the Federal Government from proceeding with [a] prosecution for a discrete *federal* offense." *Lara*, 541 U.S. at 210 (italics in original).

II. The Ute Mountain Ute Tribe is Sovereign

The Ute Mountain Ute Tribe is a separate sovereign from the United States. For at least the last thousand years, Ute Indians have inhabited a vast area of the Southwest. *See* VIRGINIA SIMMONS, UTE INDIANS OF UTAH, COLORADO, AND NEW MEXICO 1-11 (2000). The Utes first encountered European colonists around the dawn of the 17th Century. *Id*. at 22. The first generally recognized official contact between the United States and the Utes occurred in 1846 during the conclusion of the Mexican-American War. *See Cuthair v. Montezuma-Cortez, Colorado Sch. Dist. No. RE-1*, 7 F. Supp. 2d 1152, 1155 (D. Colo. 1998) (outlining the history of the Ute Indians based on a report of Professor Ellis of Ft. Lewis College). In a series of military conflicts and treaties from approximately 1849 to 1874, Ute lands were significantly reduced. *Id*. at 1156. In 1895, Congress passed an act forcibly allotting ownership of most of the Ute land to individual tribal members. *Id*. at 1157. The Weminuche band of Utes resisted allotment and decamped to a western tract of the existing Ute lands. *Id*. at 1158; SIMMONS, *supra*, at 218. This territory, encompassing "part of Sleeping Ute Mountain…with some changes, became the Ute Mountain Ute Reservation." SIMMONS, *supra*, 219. The Ute Mountain Ute Tribe was officially recognized by the United States in 1915. *Id*. at 235. The Ute Mountain Ute Tribe adopted its constitution and by-laws on May 8, 1940; the Secretary of Interior approved the Constitution on June 6, 1940.

CONSTITUTION AND BY-LAWS OF THE UTE MOUNTAIN UTE TRIBE, June 6, 1940, available at http://thorpe.ou.edu/IRA/utemtcons.html.

In summary, the Ute Mountain Ute Tribe has maintained the "*inherent powers of a limited sovereignty which has never been extinguished*." *Wheeler*, 435 U.S. at 322 (quoting F. Cohen, Handbook of Federal Indian Law (1945)) (italics in original). Courts have repeatedly recognized the tribe's sovereign status. *See, e.g.*, *Jimi Dev. Corp. v. Ute Mountain Ute Indian Tribe*, 930 F. Supp. 493, 497 (D. Colo. 1996) (applying the doctrine of sovereign immunity to the Ute Mountain Ute Tribe); *Rush Creek Sols., Inc. v. Ute Mountain Ute Tribe*, 107 P.3d 402, 408 (Colo. App. 2004) (examining the sovereign immunity of the Ute Mountain Ute Tribe).

III. The CFR Court's Authority Flows from the Ute Mountain Ute's Sovereignty

The crux of the Defendant's argument is that the CFR Court "is clearly an arm of the Federal Government," pointing primarily to the caption of the court's documents. [ECF #29]. But the relevant inquiry is not the nature of the instrument, but the source of the power. *Heath,* 474 U.S. at 88; *Sanchez Valle*, 136 S. Ct. at 1867; *Wheeler*, 435 U.S. at 320.

CFR Courts are instruments for tribal governments to exercise their sovereign power. The Bureau of Indian Affairs established the CFR Courts by regulation at 25 C.F.R. §11.100 *et. seq.*[3] These regulations instruct that CFR courts shall "provide adequate machinery for the administration of justice for Indian tribes in those areas of Indian country where tribes retain jurisdiction over Indians …but where tribal courts have not been established to exercise that jurisdiction." *Id*. at §11.102 (emphasis

[3] This is further evidence that a CFR Court is not a federal court. A federal court cannot be created by regulation. Only Congress has the ability to create a federal court. U.S. CONST. art. I, sec. 8, cl. 9.

added). The tribe retains the ability to dissolve and replace the CFR Court. *Id*. at §11.104; *see, e.g., Alexander v. Salazar*, 739 F.Supp.2d 1333, 1336 (E.D. Okla. 2010) (describing the Choctaw Nation's dissolution and replacement of the CFR Court). Likewise, the tribe can institute ordinances to be enforced in tribal court, including ordinances that supersede any of the otherwise enforceable regulations. 25 C.F.R. §11.108.

A CFR Court's jurisdictional boundaries exactly match those arising from the tribe's sovereign status, as modified by Congress and case law. 25 C.F.R. §§ 11.114, 116, 118. In the criminal context, this means a tribe acting through a CFR Court may only prosecute Indian offenders for violations occurring on tribal land of tribal ordinances or non-superseded portions of the federal regulations. *Id*. The United States, in contrast, has no jurisdiction to prosecute Indian offenders for violation of tribal ordinances or the code of federal regulations. In fact, the United States cannot prosecute offenses committed on tribal land by an Indian with an Indian victim unless the crime falls under the ambit of the Major Crimes Act, 18 U.S.C. §1153 or is a crime of nationwide applicability, *e.g.*, violations of the Controlled Substance Act or bank robbery.[4]

The Tenth Circuit recognizes that a CFR Court's power flows from the tribe. In *Tillett v. Lujan*, an Indian plaintiff argued that a CFR court did not have jurisdiction over her because it was not a tribal court. 931 F.2d 636, 639-641 (10th Cir. 1991). The court squarely rejected this argument, holding 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." *Id*. at 640. Similarly, in *Dry*

[4] For this reason, if the CFR Courts did exercise federal power (which they do not), all convictions from CFR Courts nationwide would be cast into significant doubt.

v. CFR Court of Indian Offenses for Choctaw Nation, the court unambiguously categorized a CFR Court as the "tribal authorities." 168 F.3d 1207, 1208 (10th Cir. 1999); *accord Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 64 & n. 17 (1978) (referring to Courts of Indian Offenses as "tribal courts"). Numerous district courts have reached the same conclusion. *Oklahoma v. Court of Indian Offenses for the Anadarko Agency*, 2014 WL 3880464, at *1 (W.D. Okla. Aug. 7, 2014) (rejecting an argument that the Court of Indian Offense for the Anadarko Agency is not a tribal court); *CDST-Gaming I, LLC v. Comanche Nation, Oklahoma*, 2009 WL 10668664, at *2, n.2 (W.D. Okla. July 27, 2009) ("The CFR Courts are characterized as tribal courts."); *U.S. Bancorp v. Ike*, 171 F. Supp. 2d 1122, 1126 (D. Nev. 2001) (categorizing the Court of Indian Offenses as a tribal court).

Congress agrees. The Indian Civil Rights Act ("ICRA") defines a tribe's "powers of self-government" to include the "judicial" power applied through the "courts of Indian offenses." 25 U.S.C. §1301(2). This statute illustrates that the source of a tribe's judicial power remains a tribe's sovereign status and affirms this power can be applied through a CFR court if the tribe so chooses.

The Courts of Indian Appeals – the appellate bodies for CFR courts – have repeatedly rejected arguments that CFR Courts exercise federal power. *See, e.g., Combrink v*. *Allen,* 20 Indian L. Rep. 6029, 6030 (Ct. Ind. App., Tonkawa, Mar. 5, 1993) (C.F.R. court is a "federally administered tribal court"); *Ponca Tribal Election Bd.* v. *Snake,* 17 Indian L. Rep. 6085, 6088 (Ct. Ind. App., Ponca, Nov. 10, 1988) ("The Courts of Indian Offenses act as tribal courts since they are exercising the sovereign authority of the tribe for which the court sits."); *Kiowa Bus. Comm. v. Ware*, 1980 WL 128845, at

*1 (Kiowa Ct. Ind. Off. Dec. 24, 1980) ("The CFR courts are not federal district courts and function primarily as tribal courts.").

Conclusion

The Ute Mountain Ute Tribe is a sovereign. The CFR Court is an instrument for channeling the tribe's sovereignty in its prosecution of the Defendant. The Defendant was convicted of a violation of the Ute Mountain Ute Code. A federal court *cannot* prosecute anyone under a tribal code. Because the case before this Court is being prosecuted by the sovereign power of the United States, not the tribe, the separate sovereign doctrine forecloses the Defendant's motion to dismiss based on Double Jeopardy.

For the reasons stated above, the United States respectfully requests that this Court DENY the Defendant's Motion to Dismiss on Double Jeopardy Grounds [ECF#27]

Respectfully submitted this 15th day of January 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of January, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to counsel of record.

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