

No. 16-30276

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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**UNITED STATES OF AMERICA,**  
**PLAINTIFF-APPELLEE,**

V.

**TAWNYA BEARCOMESOUT,**  
**DEFENDANT-APPELLANT.**

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
D.C. No. CR-16-13-BLG-SPW

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**ANSWERING BRIEF OF THE UNITED STATES**

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## INTRODUCTION

After Tawnya Bearcomesout stabbed her common-law husband to death, she was charged and convicted of homicide by the Northern Cheyenne Tribe. Later, a grand jury indicted her for the same killing. Bearcomesout moved to dismiss the indictment on Double Jeopardy grounds, alleging that the United States and the Northern Cheyenne Tribe are not separate sovereigns for the purposes of the Double Jeopardy Clause. The district court denied her motion and she pleaded guilty to involuntary manslaughter while reserving the right to challenge on appeal the denial of her motion to dismiss.

The issues Bearcomesout presents here are squarely foreclosed by *United States v. Wheeler*, 435 U.S. 313 (1978). The Supreme Court has reaffirmed on a number of occasions since *Wheeler*—as recently as the October 2015 term—that Indian tribes and the United States are separate sovereigns for the purposes of the Fifth Amendment because each have distinct sources of inherent power to prosecute. The Double Jeopardy Clause, therefore, does not apply in this case, and the district court’s denial of Bearcomesout’s motion to dismiss should be affirmed.

## **STATEMENT OF JURISDICTION**

The district court had jurisdiction under 18 U.S.C. § 3231. This Court has jurisdiction under 28 U.S.C. § 1291. Judgment was entered on November 10, 2016. ER 12-18. Bearcomesout timely appealed on November 14, 2016. ER 143-44.

## **STATEMENT OF THE ISSUE**

Does the Double Jeopardy Clause bar Bearcomesout's successive prosecution by the United States following her conviction for the same incident in tribal court?

## **STATEMENT OF THE CASE**

In February 2016, a grand jury returned a two-count indictment against Bearcomesout charging her with voluntary manslaughter and involuntary manslaughter, both in violation of 18 U.S.C. §§ 1153(a) and 1112(a). ER 19-21. She filed a motion to dismiss the indictment on June 16, 2016. ER 22-23. The district court denied that motion without a hearing on July 22, 2016. ER 76-86. Bearcomesout entered a conditional guilty plea under Federal Rule of Criminal Procedure 11(a)(2) to involuntary manslaughter on August 12, 2016, reserving her right to appeal the district court's denial of her motion to dismiss. ER 87-96, 101-35. The district court sentenced Bearcomesout to time

served with three years of supervised release on November 10, 2016.<sup>1</sup>  
ER 136-42.

### **STATEMENT REGARDING ORAL ARGUMENT**

Under Federal Rule of Appellate Procedure 34(a), the United States advises the Court of its view that oral argument is unnecessary because the facts and legal arguments are adequately presented in the briefs and record.

### **STATEMENT OF FACTS**

During an altercation on November 22, 2014, Tawnya Bearcomesout fatally stabbed her common-law husband in the chest. ER 126. The victim was discovered unresponsive outside of a residence in Lame Deer, Montana around 7:30 p.m. ER 126-27. Efforts to revive him at the local Indian Health Service's clinic failed and he was declared dead shortly before 8:00 p.m. *Id.* Around the same time, Bearcomesout was located inside of the residence appearing as though

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<sup>1</sup> In addition to the agreement that Bearcomesout could challenge on appeal the district court's denial of her motion to dismiss, the parties agreed under Federal Rule of Criminal Procedure 11(c)(1)(C) that a sentence of 18 to 24 months was appropriate in this case, to be reduced by a downward variance of 17 months to account for the time Bearcomesout spent in tribal custody for the homicide and a previous assault. ER 41-42, 92-93.

she had been physically assaulted. ER 126. Bearcomesout stated repeatedly that she thought she had stabbed the victim. ER 127.

Investigators with the Federal Bureau of Investigation and the Bureau of Indian Affairs searched the residence later on and discovered a short green-and-white knife with blood on it in one of the bedrooms. *Id.* An autopsy performed on the victim showed his cause of death to be a single stab wound through the aorta. ER 127-28. He also suffered other injuries consistent with a physical altercation including multiple scratches and fresh bruises. ER 128.

Bearcomesout did not provide a statement to investigators, but explained to her mother days later that she stabbed the victim because he was assaulting her, had hit her head against the sink, and nobody was there to help her. *Id.* She was charged with homicide in Northern Cheyenne Tribal Court where she entered an *Alford* plea and was sentenced to one year of imprisonment. ER 41-42. A grand jury later indicted Bearcomesout in February 2016 for the same killing. ER 19-21.



## SUMMARY OF ARGUMENT

The United States and the Northern Cheyenne Tribe are separate sovereigns for the purposes of the Fifth Amendment's Double Jeopardy Clause because each have distinct sources of inherent power to enforce their respective criminal laws. Both sovereigns properly exercised their prosecutorial powers by charging Bearcomesout for the 2014 killing of her common-law husband. As a result, the Constitution's proscription against double jeopardy does not apply and the district court's denial of her motion to dismiss should be affirmed.

## ARGUMENT

**As separate sovereigns, the Northern Cheyenne Tribe and the United States were each empowered to prosecute Bearcomesout for killing her common-law husband without regard to the Double Jeopardy Clause.**

**Standard of review:** This Court reviews a district court's denial of a motion to dismiss on double jeopardy grounds de novo. *United States v. Price*, 314 F.3d 417, 420 (9th Cir. 2002).

**Argument:** The questions Bearcomesout raises here have been answered time and again by the Supreme Court. And because her arguments are unmoored from the firm constitutional footing

underlying the separate sovereigns doctrine, the district court was right to deny her motion to dismiss the indictment in this case.

Under the Fifth Amendment’s Double Jeopardy Clause, no person can be prosecuted twice for the same offense. U.S. Const. amend V. It provides protection against: (1) successive prosecution following acquittal for the same offense; (2) successive prosecution following conviction for the same offense; and (3) multiple punishments for the same offense. *Dept. of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 769 n. 1 (1994). One significant exception to that general bar, however, is the dual sovereignty doctrine. *See United States v. Enas*, 255 F.3d 662, 666-67 (9th Cir. 2001) (en banc). Two prosecutions, as the Supreme Court has long held, “are not for the same offense if brought by different sovereigns—even when those actions target the identical criminal conduct through equivalent criminal laws.” *Puerto Rico v. Sanchez Valle*, \_\_\_ U.S. \_\_\_, 136 S. Ct. 1863, 1870 (June 9, 2016).

The concept of sovereignty in the Double Jeopardy Clause context does not turn on its traditional meaning, however. *Id.* Instead, the test of whether two entities are separate sovereigns hinges on the “ultimate source” of the power “undergirding the respective

prosecutions.” *Id.* at 1871; *see also Wheeler*, 435 U.S. at 320. While Indian tribes are dependent sovereign nations ultimately subject to federal control, they retain their “primeval sovereignty” to prosecute tribal members. *Wheeler*, 435 U.S. at 328. “The inquiry is thus historical, not functional—looking at the deepest wellsprings, not the current exercise, of prosecutorial authority.” *Sanchez Valle*, 136 S. Ct. at 1871. At bottom: “Indian tribes . . . count as separate sovereigns under the Double Jeopardy Clause.” *Id.* at 1872.

Bearcomesout attempts here to resuscitate a dead question, arguing that the Northern Cheyenne Tribe is no longer sovereign for the purposes of the Double Jeopardy Clause on account of plenary federal control. Opening Br. at 17-22. But she overlooks the critical distinction that forms the basis for the tribe’s sovereignty in this context. *See Sanchez Valle*, 136 S. Ct. at 1870 (“The degree to which an entity exercises self-governance—whether autonomously managing its own affairs or continually submitting to outside direction—plays no role in the analysis.”). The only determining criterion is whether the tribe’s power to prosecute springs from its inherent or “primeval” sovereignty. *Id.* at 1872. And “unless and until Congress withdraws a tribal power—

including the power to prosecute—the Indian community retains that authority in its earliest form.” *Id.* Congress has not done so, meaning the Northern Cheyenne Tribe retains its inherent power to prosecute members of its tribe like Bearcomesout.

In this case, Bearcomesout’s successive prosecution by the United States following her conviction in Northern Cheyenne Tribal Court in no way runs afoul of the Double Jeopardy Clause. The United States and the Northern Cheyenne Tribe are each empowered to prosecute violations of their respective laws. In killing her common-law husband, Bearcomesout committed a single act but two separate offenses. Nothing about that violates the Fifth Amendment. *See Heath v. Alabama*, 474 U.S. 82, 88 (1985).

Equally without merit is Bearcomesout’s argument based on *Bartkus v. People of the State of Illinois*, 359 U.S. 121 (1959). She alleges that her prosecution in Northern Cheyenne Tribal Court was a sham because extensive federal control over the tribe has led to a de facto erosion of the tribe’s sovereignty. Opening Br. at 22-25. The district court quickly disposed of this argument because it was based on “conclusory allegations and no specific evidence that the Tribe had ‘little

or no independent volition” in Bearcomesout’s tribal prosecution. ER 85 (quoting *United States v. Zone*, 403 F.3d 1101, 1105 (9th Cir. 2005) (per curiam)). This Court can do the same.

In order to implicate the Double Jeopardy Clause, a defendant must show “[i]mpermissible collusion,” which “may be found when the prosecutors of one sovereign so thoroughly dominate or manipulate the prosecutorial machinery of the other sovereign that the latter retains little or no volition in its own proceedings.” *United States v. Lucas*, 841 F.3d 796, 803 (9th Cir. 2016) (internal quotation marks and alterations omitted). “Very close coordination” between sovereigns in the investigation and prosecutions is permissible, however. *United States v. Figueroa-Soto*, 938 F.2d 1015, 1020 (9th Cir. 1991). Conclusory allegations of collusion are insufficient to obtain an evidentiary hearing despite a showing of cooperation between sovereigns. *See United States v. Koon*, 34 F.3d 1416, 1439 (9th Cir. 1994), *rev’d in part on other grounds*, 518 U.S. 81 (1996). Instead, the defendant must present sufficient evidence to make a prima facie showing of collusion. *Zone*, 403 F.3d at 1105.

Even if grounded in fact, “it is extremely difficult and highly unusual to prove that a prosecution by one government is a tool, a sham or a cover for the other government.” *Figueroa-Soto*, 938 F.2d at 1019. But Bearcomesout does not even allege any facts to show that the United States exerted such control over her prosecution in Northern Cheyenne Tribal Court so as to erase the tribal prosecutor’s volition. *See* ER 83-85. Despite an investigation conducted by federal authorities on a reservation where the tribe is subject to Congress’s plenary control, Bearcomesout has failed to carry her burden to show that any sort of collusion existed between the United States and the Northern Cheyenne tribe that would even justify an evidentiary hearing on the matter, let alone trigger the *Bartkus* exception.<sup>2</sup>

## CONCLUSION

This Court should affirm the district court’s denial of Bearcomesout’s motion to dismiss.

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<sup>2</sup> Bearcomesout’s remaining argument that the dual sovereignty exception to the Double Jeopardy Clause is unconstitutional is foreclosed. *Wheeler*, 435 U.S. at 322-26; *Sanchez-Valle*, 136 S. Ct. at 1870-72.

DATED this 12th day of April, 2017.

Respectfully submitted.

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/s/ John D. Sullivan  
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## **STATEMENT OF RELATED CASES**

The government is not aware of any related cases.



## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached answering brief is proportionately spaced, has a typeface of 14 points or more, and the body of the argument contains 1,849 words.

DATED: April 12, 2017

/s/ John D. Sullivan

JOHN D. SULLIVAN

Assistant United States Attorney

### **CERTIFICATE OF SERVICE**

I hereby certify that on April 12, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ John D. Sullivan

JOHN D. SULLIVAN

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