IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, -vs- TAWNYA BEARCOMESOUT, Defendant-Appellant.	**CA No. 16-30276** D.C. No. 1:16-cr-00013-SPW-1 U.S. District Court for Montana, Billings

OPENING BRIEF OF DEFENDANT-APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION
HONORABLE SUSAN P. WATERS
UNITED STATES DISTRICT JUDGE, PRESIDING

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SUBMITTED: February 13, 2017

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ABBREVIATIONS

Criminal Docket	"CR"
Excerpts of Record	"ER"
Reporter's Transcript of the Sentencing Hearing	"RT-COP"
United States Code	"U.S.C."
Presentence Investigation Report	"PSR"
United States Sentencing Guidelines	"USSG"

[The Presentence Investigation report (PSR) and its Addendum, sealed documents, are filed under separate cover.]

Ninth Circuit Court of Appeals No. 16-30276
District Court No. D.C. No. 1:16-cr-00013-SPW-1

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UNITED STATES OF AMERICA,

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v.

TAWNYA BEARCOMESOUT,

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I. JURISDICTION

A. Statutory Basis of Subject Matter Jurisdiction of the District Court

The United States District Court for the District of Montana had jurisdiction over the original criminal action under Article III, Section 2, Clause 1 of the United States Constitution and Title 18 U.S.C. § 3231, because the United States charged Defendant-Appellant Tawnya Bearcomesout ("Ms. Bearcomesout") by Indictment with Voluntary Manslaughter (Count I) and Involuntary Manslaughter (Count II) in the District of Montana. The charges arose from an incident at Lame Deer, Montana, within the exterior boundaries of the Northern Cheyenne Indian Reservation. (CR 2; ER 19-21).

B. Jurisdiction in the Court of Appeals

This Court has appellate jurisdiction pursuant to 28 U.S.C. §1291. This appeal addresses denial of a pretrial motion to dismiss on double jeopardy grounds. Pursuant to a written plea agreement (CR 36, ER 87-95), Ms. Bearcomesout tendered a plea of guilty reserving her right to appeal the District Court's adverse pretrial ruling with the government's consent and the acquiescence of the court below.

C. Appealability

The District Court pronounced sentence on November 10, 2016. Having pled guilty to Count II of the Indictment, Ms. Bearcomesout was committed to the custody of the Bureau of Prisons (BOP) for a term of time served, followed by Supervised Release for three years with standard and special conditions. A fine was waived, but a special assessment of $100 was immediately due. Restitution was also ordered. (CR 43). The Judgment was filed and entered in the criminal docket the same day. (CR 46; ER 12-18).

Notice of Appeal was filed November 14, 2016. (CR 48; ER 143-144). The Notice explicitly mentioned Federal Rule of Criminal Procedure 11(a)(2). With the government's consent, Ms. Bearcomesout reserved her right to appeal the District Court's denial of her motion to dismiss on double jeopardy grounds. The appeal is timely filed under Rule 4(b) of the Federal Rules of Appellate Procedure.

II. STATEMENT OF THE ISSUES

A. In the circumstances of this case – Congress' plenary power over Indian tribes and the general erosion of any real tribal sovereignty, amplified by the Northern Cheyenne Constitution's surrender of power to the executive authority of the United States – the Tribe's prior prosecution of Ms. Bearcomesout derived from the same ultimate source. Double jeopardy bars her subsequent prosecution in federal court.

B. The Dual-Sovereignty Exception to the Double Jeopardy Clause is at odds with the text, history, and structure of the constitution and undermines the protection of individual liberty that the clause and our federalist structure were designed to provide.

III. STATEMENT OF THE CASE

A. Nature of the Appeal

Because the Northern Cheyenne Constitution cedes almost unfettered authority to the federal government, Ms. Bearcomesout's prior conviction in Tribal Court bars subsequent federal prosecution in U.S. District Court as a violation of the Double Jeopardy clause. What is more, the frequency of litigation attacking identical and successive prosecutions says something about the inherent unfairness and counter intuitive legal analysis imposed on what seems to be a simple constitutional prohibition. Perhaps it is time to eschew the 'separate sovereign' concept altogether; because the harm it is intended to proscribe is hardly served by current separate sovereigns doctrine. See *Puerto Rico v. Sanchez Valle*, 579 U.S. ___, 136 S.Ct. 1863, 1877 (2016) (Ginsberg, J., concurring).

B. Course of the Proceedings

On February 19, 2016, a two count Indictment was filed charging Ms. Bearcomesout with Voluntary and Involuntary Manslaughter. (CR 1, 2; ER 19-21). As she neared release on related tribal charges she was taken into federal custody (CR entry for 4/27/2016), appeared for Arraignment before a United States Magistrate Judge on April 28, 2016, and tendered pleas of not guilty to both counts. (CR 5). She was ordered detained and remanded to the custody of the United States Marshal. (*Id.*). The Federal Defenders of Montana were appointed to represent her at the Arraignment. (CR 6).

Several pretrial Motions were filed. (CR 16, 18 and 25). One of those motions, the Motion to Dismiss the Indictment on Double Jeopardy Grounds (with supporting memorandum), is the focus of this appeal. (CR 25, 26; ER 22-23, 24-58). The government filed a response to the Motion (CR 30; ER 59-67), to which Ms. Bearcomesout replied. (CR 31; ER 68-75). The Court denied the Motion in a written opinion and order. (CR 32; ER 76-86). The parties then negotiated a settlement: dismissal of Count I, guilty plea to Count II, Involuntary Manslaughter, and, with the Court's acquiescence, preservation of the Double Jeopardy issue for appeal. (CR 36; ER 87-95). The plea was accepted at a Change of Plea proceeding on August 12, 2016. (CR 38; RT-COP 33; ER 133).

C. Disposition in the District Court

Ms. Bearcomesout was sentenced on November 10, 2016. Prior to imposing sentence, the District Court accepted the Plea Agreement, sanctioning this appeal. (CR 43). The court below imposed custody of "time served," followed by three years of supervised release. Ms. Bearcomesout was ordered to pay restitution in the amount of $7,919 and a $100 special assessment. (CR 46; ER 136-142).

D. Bail Status

Ms. Bearcomesout is currently serving her term of supervised release at her home on the Northern Cheyenne Indian Reservation.

IV. SUMMARY OF THE ARGUMENT

This prosecution is barred by the Double Jeopardy clause. The Northern Cheyenne Tribe is not a truly self-governing sovereign political community. The Tribe is a dependent entity, subject to federal government decision-makers, so the Dual Sovereignty Doctrine does not apply. Alternatively, even if deemed two sovereigns under current law, because control exercised by federal authorities extraordinarily and thoroughly dominates the Northern Cheyenne tribal government, successive prosecutions are impermissible under the Double Jeopardy clause of the Fifth Amendment in accord with the *Bartkus* exception to the Dual Sovereignty Doctrine.

This Court cannot overrule the United States Supreme Court. Nevertheless, the validity of the dual-sovereignty exception to the Double Jeopardy Clause has not been meaningfully revisited since that Clause was incorporated. It should be reexamined now. See *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1877 (2016) (Ginsburg, J., concurring) ("The [validity of the dual-sovereignty exception] warrants attention in a future case in which a defendant faces successive prosecutions by parts of the whole USA."). The dual-sovereignty doctrine as applied to the Double Jeopardy Clause is at odds with the text, history, and structure of the Constitution. The proper scope of this important protection of individual liberty must be restored.

V. STATEMENT OF PERTINENT FACTS

According to pages 3-5 of the Offer of Proof filed by the United States (CR 37; ER 96-100; see also CR 38; RT-COP 26-33; ER 126-133), on the evening of November 22, 2014, Tawnya Bearcomesout fatally stabbed her common-law husband, B.B., in the chest at their residence outside of Lame Deer. He was pronounced dead at 7:51 p.m. after efforts to revive him at the IHS clinic were unsuccessful.

Earlier in the day, Bearcomesout, B.B., and several others – including B.B.'s brother Eugene and his wife, Darcy Bishop – were consuming alcohol together. For at least part of the day, they were drinking at the Jimtown Bar just off the Northern

Cheyenne Indian Reservation. In the afternoon, Bearcomesout and B.B. returned to their residence. Around 7:30 p.m., Eugene and Bishop went to B.B.'s and Bearcomesout's residence to borrow movies. The pair entered the residence and saw Bearcomesout as she was exiting a bedroom and walking down the hallway toward them. She was crying and described as looking "bloody" and "dazed." While Bishop helped Bearcomesout get cleaned up, Bearcomesout stated several times that she thought she had stabbed B.B. Eugene then went looking for B.B., finding him at the base of the stairs behind the residence. B.B.'s body was still warm but he was not breathing. He was eventually taken to the IHS clinic in Lame Deer where he was declared dead.

During this time, BIA law enforcement officers responded to Bearcomesout's residence. One officer found Bearcomesout bleeding from the head and passed out. She only responded nominally when he attempted to rouse her. Bearcomesout was then taken to IHS as well where she was treated and photographed. She had a black eye and several cuts on her face and head.

Officers received a tribal search warrant for the residence on the same evening. A group of officers and agents from BIA and FBI conducted the search shortly after midnight on the morning of November 23, 2014. They discovered a short green and white knife with blood on it under a television stand in one of the bedrooms.

Photographs of the interior suggest that a struggle took place in the kitchen area. Spatters of blood were left inside the residence leading out to the back porch and down the stairs ending where B.B. was discovered.

An autopsy was performed on November 24, 2014. The cause of death was identified as a stab wound through the ascending aorta causing a massive right hemothorax and insanguination. The report noted that the internal injuries suggest that the knife was inserted, partially removed, and then reinserted. Also of significance were multiple scratches to B.B.'s face, right forearm, and hands and fresh bruises to his upper left arm.

Bearcomesout was arrested after she was treated for her injuries at IHS. She did not provide a statement at that time, but did speak with her mother about the stabbing when she called her from the jail the day after the incident. Bearcomesout stated that she and B.B. got into an altercation on the night of his death and that he hit her head against the sink. She explained that she stabbed B.B. because he was beating on her and nobody was helping her.

The incident occurred within the exterior boundaries of the Northern Cheyenne Reservation and Bearcomesout is an enrolled member of the tribe.

As a result of the events described above, Ms. Bearcomesout was arrested by tribal authorities. She appeared in tribal court charged, *inter alia*, with the Northern

Cheyenne Tribal crime of homicide. After negotiating a plea agreement pursuant to *Alford v. North Carolina*, she was sentenced to one year in custody, to be served consecutively to a one year term in an unrelated Assualt involving the same victim. (ER 41-42). Recognizing the homicide may give rise to a federal prosecution, the Tribal Court explicitly "urge[d] the United States District Court to credit Defendant on any federal sentence with time served on these tribal charges." (ER 42). Ms. Bearcomesout was nearing the completion of that sentence when removed from the tribal jail by United States Marshals based on an arrest warrant (CR notation 4/27/16; CR 12) to answer to the Indictment. (CR 1, 2).

VI. ARGUMENT

A. In the unique circumstances of this case – Congress' plenary power over Indian tribes and the general erosion of any real tribal sovereignty, amplified by the Northern Cheyenne Constitution's surrender of power to the executive authority of the United States – the Tribe's prior prosecution of Ms. Bearcomesout derived from the same ultimate source. Double jeopardy bars her subsequent prosecution in federal court.

Standard of Review

Double jeopardy claims are reviewed *de novo*. See *United States v. Castillo-Basa*, 483 F.3d 890, 895 (9th Cir. 2007); *United States v. Lun*, 944 F.2d 642, 644 (9th Cir. 1991).

Reviewability

By written Order the District Court denied Ms. Bearcomesout's Motion to Dismiss the Indictment on Double Jeopardy grounds without a hearing. (CR 32, ER 76-86). Shortly thereafter, Ms. Bearcomesout tendered a plea of guilty to Involuntary Manslaughter pursuant to a plea agreement. A portion of that agreement cited to Federal Rule of Criminal Procedure 11(a)(2). With the government's consent, Ms. Bearcomesout reserved her right to appeal the District Court's denial of her motion to dismiss on double jeopardy grounds. (CR 36, ER 87-95).

Argument

The separate sovereigns exception contravenes the Double Jeopardy Clause's core protection against being tried twice for the same alleged offense. It also squarely conflicts with the common law guarantee the Clause was meant to enshrine. And the exception turns federalism on its head, using our "diffusion of sovereign power" to deprive individuals of liberty, rather than to "enhance[]" their protection from the government. *Bond v. United States,* 564 U.S. 211, 221 (2011) (quotation marks and citation omitted).

It has long been held that the separate sovereign rationale is applicable to Indian tribal courts – tribal and federal prosecutions are brought by separate sovereigns unaffected by the protection against double jeopardy. *United States v.*

Wheeler, 435 U.S. 313, 98 S. Ct. 1079 (1978). Thus, when an Indian tribe conducts a criminal prosecution in tribal court for crimes occurring in Indian country, it "acts as an independent sovereign, and not as an arm of the Federal Government." *Wheeler*, 435 U.S. at 329. See also *United States v. Tsinnijinnie*, 91 F.3d 1285 (9th Cir. 1996) (Navajo defendant's conviction for sexually abusing a minor upheld in federal court after defendant pled guilty in tribal court for engaging in the same conduct).

The *Wheeler* Court's view was simple – because a tribe's power to enforce tribal law emanates from "retained tribal sovereignty," tribal prosecutions are not governed by provisions of the federal Constitution. *Wheeler*, 435 U.S. at 323-324. That simple view has garnered intense criticism in later Supreme Court cases to the point where the concept of tribal sovereignty is in question. And unique to this case, the Northern Cheyenne Constitution (see ER 43-58) undermines the concept of sovereignty entirely. That document expressly or impliedly relinquishes to a superior entity, depleting any residual sovereignty. As discussed below, the Northern Cheyenne tribe and the United States are not separate sovereigns.

1. The law has evolved since *Wheeler* to the extent that Tribes are not sovereign for the purpose of the Double Jeopardy clause, particularly given the unique facts in this case.

The Double Jeopardy Clause only bars successive prosecutions if those prosecutions are brought by the same sovereign. *United States v. Lanza*, 260 U.S. 377, 382 (1922). "Sovereignty" is defined by a single criterion: the "ultimate source" from where the respective prosecution derives its power to prosecute. *United States v. Wheeler*, 435 U.S. 313, 320 (1978). The Supreme Court recently addressed the dual-sovereignty inquiry as it concerned the Commonwealth of Puerto Rico. See *Puerto Rico v. Sanchez Valle*, 579 U.S. ___, 136 S.Ct 1863 (2016) (holding the Double Jeopardy Clause bars Puerto Rico and the United States from successive prosecution for the same conduct because the ultimate source of Puerto Rico's sovereignty is Congress). In *dicta* the high court said that Indian tribes count as separate sovereigns because, like a State's prosecution, a tribal prosecution is "attributable in no way to any delegation . . . of federal authority." *Sanchez Valle*, 136 S.Ct. at 1866 (quoting *Santa Clara*, 436 U.S. at 56).

Justice Kagan writing for the majority pointed out the counterintuitive nature of the Court's doctrinal formulation. "Truth be told," Justice Kagan observed, "'sovereignty' in [the dual-sovereignty] context does not bear its ordinary meaning." *Sanchez Valle*, 136 S.Ct. at 1870. To the contrary, and "[f]or whatever reason," the

doctrine "overtly disregards common indicia of sovereignty," *id.* at 1871 n.3, all but ignoring a political entity's degree of independent prosecutorial authority, *id.* at 1870 (citing *United States v. Wheeler*, 435 U.S. 313, 320 (1978)), the extent of local self-governance, *id.* (citing *Puerto Rico v. Shell Co. (P.R.)*, 302 U.S. 253, 261-62, 264-66 (1937), or the capacity for imposing punishment. *Id.* (citing *Waller v. Florida*, 397 U.S. 387, 391-95 (1970)).

Rather, the relevant inquiry "hinges on a single criterion: the 'ultimate source' of the power undergirding the respective prosecutions." *Id.* at 1871 (quoting *Wheeler*, 435 U.S. at 320). The Supreme Court's test is therefore a historically oriented rule that "look [s] at the deepest wellsprings, not the current exercise, of prosecutorial authority"– an authority that precedes the existence of federal power itself. *Id.* However, where "[two] entities draw their power from the same ultimate source"– multiple prosecutions offend the Fifth Amendment. *Id*.

Within this framework, the Supreme Court has determined that the states and Indian tribes qualify as distinct and separate sovereigns from the federal government for Fifth Amendment purposes. See *id*. at 1871-72; see also *Heath v. Alabama*, 474 U.S. 82 (1985) (two states); *Wheeler*, 435 U.S. 313 (Indian tribes and the federal government). While it is an "undisputed fact that Congress has plenary authority to legislate for the Indian tribes in all matters," *Wheeler*, 435 U.S. at 319, the Supreme

Court has held that "unless and until Congress withdraws a tribal power – including the power to prosecute – the Indian community retains that authority in its earliest form," a form predating the federal government. *Sanchez Valle*, 136 S. Ct. at 1872 (quoting *Wheeler*, 435 U.S. at 323).

Justice Thomas, while concurring with the *Sanchez Valle* holding, expressed his concerns regarding Indian law precedents. Citing to his concurrence in *United States v. Lara*, 541 U.S. 193, 200, 124 S. Ct. 1628 (2004), Justice Thomas stated he could not join the portions of the *Sanchez Valle* opinion that discussed application of the Double Jeopardy Clause to successive prosecutions involving Indian tribes. *Sanchez Valle*, 136 S.Ct. at 1877 (Thomas, J., concurrence in part and concurrence in the judgment).

In *United States v. Lara*, 541 U.S. 193, 200, 124 S. Ct. 1628 (2004), the Court held the Double Jeopardy Clause did not prohibit the federal government from proceeding with its prosecution because the tribe acted as a sovereign, independent authority. *Lara*, 541 U.S. at 210. In so holding, the Supreme Court described Congress' powers to legislate with respect to Indian matters as "plenary and exclusive." Such description arose from previous decisions where the Supreme Court has consistently interpreted Congress' authority to legislate in matters involving Indian affairs broadly. See, e.g., *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329,

343, 118 S. Ct. 789 (1998) ("Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights."); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192, 109 S. Ct. 1698 (1989) ("[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs[.]") (citing *Morton v. Mancari*, 417 U.S. 535, 551–52, 94 S.Ct. 2474 (1974)).

Although officially a 7-2 decision,[1] the *Lara* majority opinion generated an interesting concurring opinion by Justice Clarence Thomas that drives Ms. Bearcomesout's constitutional challenge to this federal prosecution. Justice Thomas felt "the tribes either are or are not separate sovereigns, and our federal Indian law cases untenably hold both positions simultaneously." *United States v. Lara*, 541 U.S. at 215 (Thomas, J., concurring in judgment). He opined that what he called the "residual-sovereignty theory" ignores that tribes are "not part of [the] constitutional order, and their sovereignty is not guaranteed by it." *Id.* at 218-19. If one accepts the theory that Congress has the authority to regulate tribal sovereignty, the result in

[1] Justice Kennedy only concurred in the result because he believed that any challenge to congressional power reaffirming tribal power to prosecute non-member Indians should have been raised during the tribal prosecution, and not the subsequent federal one.

Wheeler, which affirmed the inherent nature of tribal sovereignty, is "questionable" and may have been incorrectly decided. *Id.* at 217.

Justice Thomas did "not necessarily agree that the tribes have any residual inherent sovereignty or that Congress is the constitutionally-appropriate branch to make adjustments to sovereignty." *Id*. at 224. Calling federal Indian policy "schizophrenic," the Justice observed that it "is quite arguably the essence of sovereignty not to exist merely at the whim of an external government." *Id.* at 218. Ultimately, in the spirit of *stare decisis*, he concurred with the majority, but Justice Thomas expressed profound concern: "The Federal Government cannot simultaneously claim power to regulate virtually every aspect of the tribes through ordinary domestic legislation and also maintain that the tribes possess anything resembling 'sovereignty.'" *Id.* at 225.

Again, Justice Thomas reiterated those concerns in *Sanchez Valle*, as did Justice Breyer and Justice Sotomayor who dissented. The majority in *Sanchez Valle* explained the ultimate source of the tribes independence can be traced back to when they were "self-governing sovereign political communities." *Wheeler*, 435 U.S. at 322-323. As such, tribes remain sovereign for purposes of the Double Jeopardy Clause only "until" Congress chooses to withdraw the plenary power it has. If that is true, Justices Breyer and Sotomayor question how Congress is not the source of the

Indian tribes' criminal enforcement power, since by refraining to withdraw its power, Congress is – by inaction – choosing still to grant the tribes sovereignty. *Sanchez Valle*, 136 S.Ct. at 1879-80.

The District Court, citing to *Wheeler*'s instruction that a tribe's prosecutorial sovereignty is inherent, denied Ms. Bearcomesout's motion. The court below said the Supreme Court has already answered the question of when, for Double Jeopardy purposes, a tribe's ultimate source of power is not diminished despite the Tribe's "decision to intentionally subject its governance to the oversight of the Secretary of the Interior." Thus, the relinquishment of power "has no bearing on the Tribe's sovereignty with respect to prosecutions." (Order, page 7; ER 82). So, notwithstanding arguments that were "logical, persuasive, and buttressed by significant legal analysis," the District Court opined that Ms. Bearcomesout failed to provide the "authority to rule against such a firmly rooted line of precedent." (*Id*).

In recent years the line of precedent is stretched too thin. It no longer forms a chain strong enough to withstand challenge. What is more, *Wheeler* does not answer the most pertinent question presented by Ms. Bearcomesout: in light of its unequivocal deference to a superior authority, how does the Northern Cheyenne Tribe's constitution bear on the Tribe's sovereignty *vis a vis* the United States? Ms. Bearcomesout shares the view expressed by the dissent in *Sanchez Valle*. The

relationship between the Tribe and the federal government makes her dual prosecution impermissible, because, unlike the states, tribal governments exist at the behest of the United States government. The instant federal prosecution violates Ms. Bearcomesout's constitutional protection against double jeopardy. As a general principle, Tribes are not separate sovereigns. In the specific case of the Northern Cheyenne Tribe, plenary federal control depletes any residual sovereignty. The United States is the ultimate source of Northern Cheyenne tribal governance.

First, "the Indian tribes come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209, 98 S. Ct. 1011 (1978) (the holding adversely affected by statute as recognized in *United States v. Lara*, 541 U.S. 193, 124 S. Ct. 1628 (2004)). The existence of Congress' legislative power over criminal offenses on Indian lands has been upheld consistently since it was firmly established in the Nineteenth Century in *United States v. Rogers*, 45 U.S. (4 How.) 567 (1846), and *United States v. Kagama*, 118 U.S. 375 (1886). Congress followed defining "Indian country" in part as ". . . all *dependent Indian communities* within the borders of the United States whether within the original or subsequently acquired territory thereof . . . ." 18 U.S.C. § 1151(b)

(emphasis added). The Supreme Court has consistently confirmed that the Indian tribes are subject to the jurisdiction of the federal government.[2]

Second, the tribal sovereignty schizophrenia diagnosed years later in *Lara* by Justice Thomas was present the year before *Wheeler* in *United States v. Antelope*, 430 U.S. 641 (1977). Although in a different context, in discussing dependent status of Indians as a people, the *Antelope* Court said the federal legislature's power to impose regulations "is governance of *once-sovereign* political communities." *Id.* at 646 (emphasis added). See also *United States v. Zepeda*, 792 F.3d 1103, 1110 (9th Cir. 2015) (describing tribes as "once-sovereign" quoting *Antelope*).

Third, limitations imposed on tribal court jurisdiction show the absence of dual sovereignty. For instance, in *Nevada v. Hicks*, 533 U.S. 353 (2001), the Supreme Court said tribal courts do not automatically have jurisdiction over disputes involving nonmembers just because the dispute occurs on reservation land. The state still has jurisdiction over reservation land when the dispute involves nonmembers. In another case, the Supreme Court said where nonmembers are concerned, "the exercise of tribal power beyond what is necessary to protect tribal self-government or to control

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[2] See generally Vanessa J. Jimenez and Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 Am. U.L. Rev. 1627 (1998);Felix Cohen, Handbook of Federal Indian Law (1982); William Canby, American Indian Law (1988); Robert Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through A Jurisdictional Maze*, 18 Ariz. L. Rev. 521 (1976).

internal relations . . . cannot survive without express congressional delegation." *Montana v. United States*, 450 U.S. 544, 564 (1981).

In the process of reaching its result in *Lara*, the Supreme Court made two related findings. *Lara* first held that the extent of tribal sovereignty is not a constitutional question. *Lara*, 541 U.S. at 205 (stating that "the Constitution does not dictate the metes and bounds of tribal autonomy"). Next, the Court founded its holding on the notion that because Congress has plenary power over Indian tribes, it can re-calibrate the metes and bounds of tribal sovereignty. *Id*. at 202. However, implicit in these two findings is a third: the reason the extent of tribal sovereignty is not a constitutional question is that Congress has plenary power to increase (perhaps within limits) or reduce (apparently without limits) the extent of tribal sovereignty. This begs the question presented here: With such blanket power, is *Wheeler* still viable? Are the tribes truly sovereign?

The law has evolved since *Wheeler* to the extent that tribes are not sovereign for the purpose of the Dual Sovereignty Doctrine. Indian tribes are recognized as quasi-sovereign entities that may regulate their own affairs *except where Congress has modified or abrogated that power* by treaty or statute." *United States v. Begay*, 42 F.3d 486, 498 (9th Cir. 1994) (emphasis added). As developed in recent years, the concept of self-governance and sovereignty in any true sense is essentially the

product of the federal government's legislative largesse when it comes to the Tribes. With that level of dominion, unlike the states which voluntarily joined to form the United States, the tribes are subject to the external whim of the United States. As subject entities, the Dual Sovereignty Doctrine cannot be applied to Indian Tribes.

The sovereignty schizophrenia decried by Justice Thomas is even more stark when the Constitution of the Northern Cheyenne Tribe, is considered. With the requirements for approval by the Secretary of the Interior throughout the Tribe's Constitution (see e.g., pp. 1-6, 10-11 at ER 43-48, 52-53), subservience of the Northern Cheyenne government to the federal government is unassailable. The United States is the ultimate source of the tribe's existence as a political entity. The federal government not only regulates tribal sovereignty, it sanctions it in some respects, dissuades it in others.

Any remaining vitality in the rationale underpinning *Wheeler* is undermined to the point that a prosecution in Northern Cheyenne Tribal Court is in essence a federal prosecution. The express limitations imposed on Northern Cheyenne tribal government in its formation document foreclose independence and sovereignty. Stated differently, the charter of the Northern Cheyenne Tribe's very existence is exclusively controlled by a superior political entity, the United States government, through its Executive Branch agency, the Department of the Interior. The Tribe's

written fundamental statement of its law expressly or impliedly surrenders to a superior entity the balance of tribal sovereignty.

Thus, based on either the general erosion of tribal sovereignty emanating from the development of the law from *Wheeler* to *Sanchez Valle*, or the specific restrictions on tribal independence expressed in the Northern Cheyenne Constitution, Ms. Bearcomesout's prosecution in the United States District Court, following conviction of a like offense in Tribal Court (based on the same acts), violates Double Jeopardy protections guaranteed by the Fifth Amendment.

2. The law has evolved since *Wheeler* to the extent that Tribes are not sovereign for the purpose of the Double Jeopardy clause, particularly given the unique facts in this case.

Ms. Bearcomesout's double jeopardy claim should also be considered in light of the exception to the dual sovereignty doctrine expressed in *Bartkus v. People of State of Illinois*, 359 U.S. 121, 123-24, 79 S.Ct. 676 (1959). The *Bartkus* Court suggested that the dual sovereignty doctrine might be overcome if one jurisdiction was acting as a "tool" of another, or if a state prosecution was "a sham and a cover for a federal prosecution." This statement has given rise to the so-called *Bartkus* exception, recognized by the Ninth Circuit. See e.g. *United States v. Bernhardt*, 831 F.2d 181, 182–83 (9th Cir. 1987) and *United States v. Guy*, 903 F.2d 1240 (9th Cir. 1990).

The Defendant-Appellant recognizes that "[a]s a practical matter . . . under the criteria established by *Bartkus* itself it is extremely difficult and highly unusual to prove that a prosecution by one government is a tool . . . for the other government." *United States v. Figueroa-Soto*, 938 F.2d 1015, 1019 (9th Cir. 1991). Evidence of close coordination and resource-sharing between state and federal authorities is insufficient to establish a *Bartkus* claim. *Figueroa-Soto*, 938 F.2d at 1019-20. Admittedly, cooperation and collaboration are insufficient as well. But consecutive criminal proceedings are barred when one entity thoroughly dominates or manipulates the other's prosecutorial machinery. *United States v. Zone*, 403 F.3d 1101, 1105 (9th Cir. 2005). Northern Cheyenne tribal government prosecution was and is thoroughly dominated by the federal government.

The burden of establishing sufficient federal manipulation or control is "substantial; the [defendant] must demonstrate that the [tribal] officials had little or no independent volition in the [tribal] proceedings." *Zone*, 403 F.3d at 1105 (quoting *United States v. Liddy*, 542 F.2d 76, 79 (D.C. Cir. 1976)). While multi-jurisdictional central funding and pooling of investigatory capabilities may not be unique, the very power to operate and the dependent source of funding is.

Here, much more than close coordination and resource-sharing exists. The federal authorities actually exclusively provide resources through the Departments

of Justice (FBI) and Interior (BIA). Indeed, the exercise of federal control here creates a *de facto* divestiture of tribal sovereignty giving rise to the level of collusion necessary to meet the *Bartkus* exception. The Tribe does not just merely cooperate with the federal government. Rather, the nature of the dealings between the Tribe and the federal government subjugates tribal law – be it from the law enforcement authority operating on tribal land or through tribal court personnel. This is unlike the relationship between state and federal governments. In fact, the financial and regulatory control exercised by federal authorities makes the Tribe a subject entity.

The Tribe operates only because the federal government allows it to do so within certain closely defined parameters. See e.g., pages 1-6, 10-11, Constitution of the Northern Cheyenne Tribe (with its numerous requirements for approval by the Secretary of the Interior, including approval of any constitutional amendments).[3] (See ER 43-48, 52-53). "The political future of the tribe is determined by the federal government, reminiscent of the paternal policies aimed at assimilation." Sheldon Spotted Elk, *Northern Cheyenne Tribe: Traditional Law & Constitutional Reform*, Tribal Law Journal, Vol. 11, p. 16 (2012).

[3] Northern Cheyenne sovereignty, if any, is eroded by these provisions. Research has uncovered no other tribal constitution which grants such extensive power to the Interior Department to approve, sanction or alter tribal governance.

The Northern Cheyenne Tribe is not a truly self-governing sovereign political community. The Tribe is a dependent entity, subject to federal government decision-makers, thus the Dual Sovereignty Doctrine does not apply. Alternatively, even if deemed two sovereigns under current law, because control exercised by federal authorities extraordinarily and thoroughly dominates the Northern Cheyenne tribal government, successive prosecutions are impermissible under the Double Jeopardy clause of the Fifth Amendment in accord with the *Bartkus* exception to the Dual Sovereignty Doctrine.

B. The Dual-Sovereignty Exception to the Double Jeopardy Clause is at odds with the text, history, and structure of the constitution and undermines the protection of individual liberty that the clause and our federalist structure were designed to provide.

Standard of Review

Double jeopardy claims are reviewed *de novo*. See *United States v. Castillo-Basa*, 483 F.3d 890, 895 (9th Cir. 2007); *United States v. Lun*, 944 F.2d 642, 644 (9th Cir. 1991).

Reviewability

In a written Order the District Court denied Ms. Bearcomesout's Motion to Dismiss the Indictment on Double Jeopardy grounds without hearing. (CR 32, ER 76-86). Ms. Bearcomesout reserved her right to appeal the District Court's denial of her motion to dismiss on double jeopardy grounds. (CR 36, ER 87-95). Though this

Court cannot overrule Supreme Court precedent, Ms. Bearcomesout raises the issue for consideration here because whatever sense the Dual Sovereignty exception to the Double Jeopardy Clause may have had before, it plainly makes no sense now.

Argument

> The underlying idea [behind the Double Jeopardy Clause], one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-88 (1957); see *Sanchez Valle*, 136 S. Ct. at 1877 (Ginsburg, J., concurring) ("The double jeopardy proscription is intended to shield individuals from the harassment of multiple prosecutions for the same misconduct."). See Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction,* page 96 (1998) (Double Jeopardy Clause "safeguards … the individual defendant's interest in avoiding vexation," whether he was first acquitted or convicted).

When a defendant is subjected to multiple prosecutions for the same offense, the anxiety and humiliation are the same, regardless of whether the successive prosecutions are brought by the same sovereign or different ones. Similarly, the prospect that an innocent person might be wrongly convicted also increases with

multiple prosecutions, regardless of whether the successive prosecutions are brought by the same sovereign or different ones. As Justice Black once put it, "If double punishment is what is feared, it hurts no less for two 'Sovereigns' to inflict it than for one." See *Bartkus*, 359 U.S. at 155 (Black, J., dissenting); see also *id*. ("The Court apparently takes the position that a second trial for the same act is somehow less offensive if one of the trials is conducted by the Federal Government and the other by a State. Looked at from the standpoint of the individual who is being prosecuted, this notion is too subtle for me to grasp.").

Indeed, the dual-sovereignty exception to the Double Jeopardy Clause turns federalism principles on their head, permitting the two levels of government that the Framers believed would enhance individual liberty to do just the opposite. This perversion of federalist principles is particularly troubling in an age of expansive federal criminal law and significant federal-state cooperation in criminal law enforcement. See, e.g., Edwin Meese III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 Tex. Rev. L. & Pol. 1, 3 (1997) (hereafter, "Meese III") ("[F]ew crimes, no matter how local in nature, are beyond the reach of the federal criminal jurisdiction."); Erin Ryan, *Negotiating Federalism*, 52 B.C. L. Rev. 1, 31-32 (2011). The tribes share the largesse of federal cooperation and law enforcement coordination.

Significant developments in constitutional law that have occurred since the Supreme Court last considered the dual-sovereignty exception make this Court's views on the issue all the more important. See generally *United States v. Gaudin*, 515 U.S. 506, 521 (1995) (reasons for *stare decisis* undermined when the "underpinnings" of the "decision in question" have been "eroded[] by subsequent decisions of [the Supreme] Court"). When the Supreme Court first adopted the dual-sovereignty doctrine that allows successive prosecutions by different sovereigns, it did so against the background of a legal regime in which the Double Jeopardy Clause did not apply to the States. See, e.g., *Bartkus v. Illinois*, 359 U.S. 121 (1959); *Abbate v. United States*, 359 U.S. 187 (1959). Whatever validity the doctrine may have had in that context, it has been completely undermined by subsequent decisions recognizing that the Fourteenth Amendment protects against state infringement of the personal rights guaranteed by the Bill of Rights, including the Double Jeopardy Clause. See *Benton v. Maryland*, 395 U.S. 784 (1969). As the high Court has recognized in other contexts, the "incorporation" of the Bill of Rights undermines whatever basis may once have existed for this doctrine. Indeed, the Fourteenth Amendment's protection of individual rights against state action makes clear that successive prosecutions by different sovereigns violate the Double Jeopardy Clause.

Although "[t]o the Constitution of the United States the term ***sovereign*** is totally unknown," *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 454 (1793) (opinion of Wilson, J.), the separate sovereigns doctrine is premised on the notion that "two identical offenses are not the 'same offense' within the meaning of the Double Jeopardy Clause if they are prosecuted by different sovereigns." *Heath v. Alabama*, 474 U.S. 82, 92 (1985). This doctrine is inconsistent with both historical and modern jurisprudence, and is an artifact from an era in which the Bill of Rights did not bind the States. To the extent that a separate sovereigns exception was implicitly grafted onto the Double Jeopardy Clause of the Fifth Amendment, courts and commentators have noted Founding era publications reflecting that the federal government and the states are "parts of ***one whole***," *Puerto Rico v. Sanchez-Valle*, 136 S.Ct. 1863, 1877 (2016) (Ginsburg, J., concurring) (quoting *The Federalist No. 82*, p. 245 (J. Hopkins ed., 2d ed. 1802) (reprint 2008)), rather than genuinely distinct sovereigns. And, to the extent that the federal and tribal governments could be considered separate sovereigns, that was only to ensure that they would compete to "protect citizens from overzealous government," and not to operate in tandem to expose individuals to successive prosecutions. Meese III, at page 21 (1997) (citing *The Federalist No. 51*, at 323 (Clinton Rossiter ed., 1961)).

Tribal and federal governments are now encouraged to function as a unit, bound together by information, technology, financial incentives, contractual arrangement, and statutory mandate. In this modern context, the dual sovereignty doctrine makes it particularly easy for federal and tribal governments to work together to subject individuals to repeated harassment for a single offense, just the type of government overreach that the Double Jeopardy Clause was adopted to prevent. See Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 Colum. L. Rev. 1, 9-10 (1995) ("given the increased level of federal-state cooperation in enforcing criminal laws, dual sovereign prosecutions also raise[] the traditional double jeopardy concern that successive prosecutions [will] give government an illegitimate dress rehearsal of its case and a cheat peek at the defense" (internal footnote omitted)); Meese III, *supra*, at 22 ("The federalization of crime has profound implications for double jeopardy protections for the simple reason that it creates more opportunities for successive prosecutions.").

In this case, because the United States has been granted supremacy by the Northern Cheyenne over executive actions, Ms. Bearcomesout's tribal prosecution was a creature of the federal government. The Northern Cheyenne's financial dependence upon and political domination by the United States mandated in the tribal constitution represents the epitome of one government being the tool of the other.

United States v. Figueroa-Soto, 938 F.2d 1015, 1019 (9th Cir. 1991). Cf. *Bartkus*, 359 U.S. at 123-124. Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 Am. J. Crim. L. 1, 69 & n.351, 77 (1992).

VII. CONCLUSION

Tawnya Bearcomesout's prosecution in federal court violated the constitutional proscription against being twice placed in jeopardy for the same offense. On any or all of the grounds discussed herein, her prior conviction in Tribal Court bars subsequent federal prosecution.

RESPECTFULLY SUBMITTED this 13th day of February, 2017.

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Ninth Circuit Rule 32 that the Opening Brief of Defendant-Appellant contains double-spaced line spacing, with exception of quotations and footnotes. The body of the argument has a Times New Roman typeface, proportionateley spaced, 14-point size and contains less than 14,000 words at an average of 280 words (or less) per page, including footnotes and quotations. (Total number of words: 6,657 excluding tables and certificates).

DATED this 13th day of February, 2017.

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STATEMENT OF RELATED CASES

There are no related cases.

DATED this 13th day of February, 2017.

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CERTIFICATE OF SERVICE
Fed.R.App.P. 25

I hereby certify that on February 13, 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.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by first-class Mail, postage prepaid, or have dispatched it to a third party carrier for delivery within three calendar days, to the following non-CM/ECF participants:

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