No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2017

TAWNYA BEARCOMESOUT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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SUBMITTED: November 14, 2017

QUESTION PRESENTED

The Ninth Circuit failed to analyze Petitioner's Double Jeopardy argument, holding instead that under this Court's opinion in *Puerto Rico v. Sanchez Valle*, 579 U.S. ___, 136 S. Ct. 1863 (2016), Petitioner's argument was "foreclosed." In this case, however, the Northern Cheyenne Constitution cedes almost unfettered authority to the federal government such that Petitioner's prior conviction in Tribal Court bars subsequent federal prosecution in United States District Court as a violation of the Double Jeopardy Clause. Against this background the question presented is:

> Whether the "separate sovereign" concept actually exists any longer where Congress's plenary power over Indian tribes and the general erosion of any real tribal sovereignty is amplified by the Northern Cheyenne Tribe's Constitution in this case such that Petitioner's prosecutions in both tribal and federal court violate the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page No.

TABLE OF CASES

FEDERAL STATUTES

UNITED STATES CODE ANNOTATED

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PETITION FOR WRIT OF CERTIORARI
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Petitioner, Tawnya Bearcomesout, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The memorandum disposition of the Ninth Circuit Court of Appeals styled as *United States v. Bearcomesout*, 696 Fed.Appx. 241 (9th Cir. August 17, 2017), is unreported. A copy of the decision is attached as Appendix A to this petition, pages 1a-2a.

The written decision of the federal district court denying Petitioner's motion to dismiss, which was affirmed by the Ninth Circuit, is unreported in F.Supp.3d (2016). Only the Westlaw citation is currently available – 2016 WL 3982455. See Appendix B, pages 1b-4b.

JURISDICTION AND TIMELINESS OF THE PETITION

The Ninth Circuit's memorandum disposition was filed on August 17, 2017 (Appendix A at pages 1a-2a). Petitioner did not file a petition for rehearing. This Court's jurisdiction arises under 28 U.S.C. §1254(1). This petition is timely because it was placed in the United States mail, first class postage pre-paid, on November 15, 2017, within the 90 days for filing under the Rule of this Court (see Rule 13, ¶1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Double Jeopardy Clause of Fifth Amendment to the United States Constitution, which provides that no person "shall be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amd. V.

STATEMENT OF THE CASE

(A) General case overview.

1. On February 19, 2016, a two count Indictment was filed charging Petitioner with voluntary and involuntary manslaughter. As Petitioner neared release on related tribal charges, she was taken into federal custody, appeared for arraignment before a United States Magistrate Judge on April 28, 2016, and tendered pleas of not guilty to both counts. Petitioner was ordered detained and remanded to the custody of the United States Marshal. The Federal Defenders of Montana was appointed to represent her at the arraignment.

2. Several pretrial motions were filed–one of which was Petitioner's motion to dismiss the Indictment on Double Jeopardy grounds. The government responded to the motion and Petitioner replied. Without hearing, the district court denied the motion, issuing a written opinion and order.

3. Thereafter, the parties negotiated a settlement: dismissal of Count I, voluntary manslaughter and guilty plea to Count II, involuntary manslaughter. The parties agreed, with the district court's acquiescence, that Petitioner may raise the Double Jeopardy issue on appeal. Petitioner's change of plea was accepted and Petitioner was sentenced to "time served" followed by three years supervised release. Petitioner was ordered to pay restitution in the amount of $7,919 and a $100 special assessment.

(B) The district court's decision on Petitioner's motion to dismiss.

4. The district court denied Petitioner's motion to dismiss, stating that a tribe's prosecutorial sovereignty is inherent. Appendix B pp. 2b - 3b, citing *Puerto Rico v. Sanchez Valle*, 579 U.S. ___, 136 S. Ct. 1863, 1869 (2016), and *United States v. Wheeler*, 435 U.S. 313, 323 (1978). The district court also indicated that this Court has already answered Petitioner's issue 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." Appendix B, p. 3b. Consequently, the district court found that the Northern Cheyenne Tribe's relinquishment of power had "no bearing on the Tribe's sovereignty with respect to prosecutions." *Id*. Notwithstanding arguments that were "logical, persuasive, and buttressed by significant legal analysis," the district court opined that Petitioner failed to provide the "authority to rule against such a firmly rooted line of precedent." *Id*.

(C) The Ninth Circuit's Opinion.

5. The Ninth Circuit affirmed the district court, indicating that Petitioner's Double Jeopardy argument was foreclosed by *Puerto Rico v. Sanchez Valle*, 579 U.S. ___, 136 S. Ct. 1863, 1870-1872 (2016). See *United States v, Bearcomesout*, 696 Fed.Appx. 241; Appendix A, p. 1a.

Namely, the Ninth Circuit intimated that because the Northern Cheyenne Tribe is a separate sovereign so successive prosecutions for the same offense are not barred by the Double Jeopardy Clause. *Id.*

STATEMENT OF THE FACTS

1. On the evening of November 22, 2014, Petitioner fatally stabbed her common-law husband, B.B., in the chest at their residence outside of Lame Deer, Montana, on the Northern Cheyenne Reservation. Petitioner is an enrolled member with the Norther Cheyenne Tribe.

2. Earlier that day, Petitioner, B.B., and several others were consuming alcohol together. At some point, Petitioner and B.B. went back to their residence, after which their friends stopped by to borrow some movies. When they did, they saw Petitioner exiting a back bedroom. She was crying and was described as looking "bloody" and "dazed." When her friend tried to help Petitioner get cleaned up, Petitioner told her several times that she thought she stabbed B.B., who was later found and taken to a clinic where he succumbed to his injuries.

3. Bureau of Indian Affairs (BIA) law enforcement officers responded to Petitioner's home. One officer found Petitioner bleeding from the head and passed out. She only responded nominally when he attempted to rouse her. Petitioner was also taken to a clinic where she was treated and photographed. She had a black eye and several cuts on her face and head.

4. Officers received a tribal search warrant for Petitioner's home. A group of officers and agents from the BIA and the Federal Bureau of Investigations conducted a search and discovered a short green and white knife with blood on it. Photographs of the interior of the home suggested that a struggle took place in the kitchen area. Splatters of blood were also discovered leading down the stairs to where B.B. was found.

5. The cause of B.B.'s death was a stab wound through the ascending aorta. B.B. also sustained several scratches to his face, right forearm and hand, and fresh bruises to his upper left arm.

6. After being treated, Petitioner was arrested. She provided a statement to her mother which was recorded by the jail. Petitioner stated that she and B.B. had gotten into an altercation; that he hit her head against the sink; and that she stabbed him because he was beating on her and nobody was there to help her.

7. Petitioner appeared in tribal court and was charged with the Northern Cheyenne tribal crime of homicide. After negotiating a plea agreement pursuant to *Alford v. North Carolina*, 394 U.S. 956, 89 S. Ct. 1306 (1969), Petitioner was sentenced to one year custody to be served consecutively to a one-year sentence in an unrelated assault involving the same victim.

8. Recognizing the homicide might 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." Petitioner was nearing the completion of her tribal sentence when she was removed from tribal jail by the United States Marshals based on an arrest warrant to answer the Indictment.

REASONS FOR GRANTING THE PETITION

This is the "future case" Justice Ginsburg suggested this Court to pay "attention" to where "a defendant faces successive prosecutions by parts of the whole USA." *Puerto Rico v. Sanchez Valle*, 579 U.S. ___, 136 S. Ct. 1863, 1877 (Ginsburg, J., concurrence).

This is also the case to "reconsider" this Court's Indian law precedents, *United States v. Bryant*, 579 U.S. ___, 136 S. Ct. 1954, 1968 (2016) (Thomas, J., concurrence), since the Northern

Cheyenne Tribe is one of the Indian tribes that Justice Thomas suggested this Court treats "as an undifferentiated mass." *Bryant*, 579 U.S. at ___, 136 S. Ct. at 1968. Petitioner is an enrolled member of the Northern Cheyenne Tribe and that Tribe's very existence – pursuant to its own Constitution – is controlled by the United States government through the Department of Interior, an Executive Branch agency. See Appendix C, pp. 1c - 16c. When the provisions of the Northern Cheyenne Constitution are scrutinized, it is clear the Tribe gives away any sovereignty it may have inherently possessed. The Preamble sets forth the identity of the framers of the Constitution and Bylaws: the people of the Northern Cheyenne. It also outlines fundamental goals. See Appendix C, p. 1c. The Tribe established an elected Council as the governing body of the Northern Cheyenne. Under the 1996 amendments, the Tribal government has three branches. See Appendix C, p. 13c. While the Tribal Council defines core purposes of police powers, court jurisdiction, and who is subject to tribal jurisdiction, the overarching power explicitly lies with the Secretary of the Interior. The Secretary has been given final review authority. See Appendix C, p. 5c. In fact, the constitution cannot be amended without input from and approval by the Interior Secretary. Appendix C, p. 12c-13c. The federal government, through its review and approval power, dictates the management of all Tribal functions and exercises sway over all three branches of government.

As Appendix C shows, ultimate decision-making is in the hands of the Secretary of the Interior. This fact is critical to resolution of Petitioner's double jeopardy claim. The Northern Cheyenne Executive Branch's prerogative to prosecute the Tribe's members is not free of the United States' dominance. The district court in Petitioner's case permitted dual prosecutions of Petitioner when, in reality, the Northern Cheyenne Tribe is not sovereign. The "fiction" that the tribes are sovereign should not continue any longer. See *Bryant*, 579 U.S. at ___, 136 S. Ct. at 1969 (Thomas,

J., concurrence).

Indeed, four Justices on this Court in *Sanchez* effectively questioned how it could be true that Congress was not the Tribes' ultimate source of criminal enforcement power. See *Sanchez Valle*, 579 U.S. ___, 136 S. Ct. 1863 (Ginsburg, J., concurring, questioning the dual sovereignty doctrine's continued vitality); (Thomas, J., concurring in part and in the judgment but disagreeing with this Court's treatment of Indian tribes in this Court's double jeopardy jurisprudence); (Breyer, J. and Sotomayor, J., dissenting, rejecting the notion that the dual sovereignty doctrine requires this Court to "seek the 'furthest-back source of . . . power'" and instead directing this Court to "trace the source of power back to a time when . . . a previously dependent entity, became independent–at least, sufficiently independent to be considered 'sovereign' for purposes of the Double Jeopardy Clause") (internal citation omitted). Ultimately in *Sanchez Valle*, Justice Kagan took it as a foregone conclusion that Indian tribes are separate sovereigns. See *Santa Clara Pueblo et al. v. Martinez et al.*, 436 U.S. 49, 56 (1978) (indicating the ultimate source of a tribe's power to punish tribal offenders lies in its "primeval" or "pre-existing" sovereignty which, like a State's, is not attributable to a delegation of federal authority).

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 (1978). 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. 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 cases by this Court to the point where the concept of tribal sovereignty is in question. Petitioner shares the view expressed by the dissent in *Sanchez Valle*, 579 U.S. ___, 136 S. Ct. 1863 (2016). That is, the relationship between the Northern Cheyenne Tribe and the federal government makes Petitioner dual prosecution impermissible because, unlike the states, tribal government exists at the behest of the United States government.

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. *Wheeler*, 435 U.S. at 320.

This Court recently addressed the dual sovereignty inquiry as it concerned the Commonwealth of Puerto Rico. See *Sanchez Valle*, 579 U.S. ___, 136 S. Ct. 1863 (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*, this Court indicated that Indian tribes are 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' is [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 *Wheeler*, 435 U.S. at 320), the extent of local self-governance, *id.* (citing *Puerto Rico v. Shell Co. (P.R.)*, 302 U.S. 253, 261-262, 264-266 (1937)), or the capacity for imposing punishment. *Sanchez Valle*, 136 S. Ct. at 1870 (citing *Waller v. Florida*, 397 U.S. 387, 391-395 (1970)).

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). This 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.*

While concurring with the *Sanchez Valle* holding, Justice Thomas expressed his concerns regarding Indian law precedents stating 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., concurring in part and concurring in the judgment). The concerns Justice Thomas noted in *Sanchez Valle* were the same as those he raised in *United States v. Lara*, 541 U.S. 193, 210 (2004) (holding the Double Jeopardy Clause did not prohibit the federal government from proceeding with its prosecution because the tribe acted as a sovereign and independent authority). Justice Thomas felt "the tribes either are or are not separate sovereigns, and our federal Indian law cases untenably hold both positions simultaneously. *Lara*, 541 U.S. at 215 (Thomas, J., concurring in judgment). He opined that this Court's holding in *Wheeler* may have been incorrect if one accepts the theory that Congress has the authority to regulate

tribal sovereignty. *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," Justice Thomas 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*, Justice Thomas concurred with the majority in *Lara* but he 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.

Moreover, the notion of "primeval" or "pre-existing" sovereignty fails to evaluate the distinct nature of each tribe which Justice Thomas has also stated directly bears on the issue of sovereignty:

> Indian tribes have varied origins, discrete treaties with the United States, and different patterns of assimilation and conquest. In light of the tribes' distinct histories, it strains credulity to assume that all tribes necessarily retained the sovereign prerogative of prosecuting their own members. And by treating all tribes as possessing an identical quantum of sovereignty, the Court's precedents have made it all but impossible to understand the ultimate source of each tribe's sovereignty and whether it endures.

Bryant, 579 U.S. ___, 136 S. Ct. at 1968.

In the process of reaching its result in *Lara*, this Court made two related findings. *Lara* first held that the extent of tribal sovereignty is not a constitutional question. *Id.* at 205 ("the Constitution does not dictate the metes and bounds of tribal autonomy"). Next, this 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.

Implicit in these two findings, however, 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 here: With such blanket power, is *Wheeler* still viable?

The law has actually 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 that voluntarily joined to form the United States, the Tribes are subject to the external whim of the United States.

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 Appendix C, pp. 2c - 6c, 11c - 13c, and 15c - 16c), 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 and dissuades it in others. The United States is the ultimate source of the tribe's existence as a political entity. The federal government not only regulates tribal sovereignty, the federal government dissuades it.

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 is Executive Branch agency, the Department of Interior. The Tribe's written fundamental statement of its law expressly or impliedly surrenders to a superior entity the balance of tribal sovereignty.

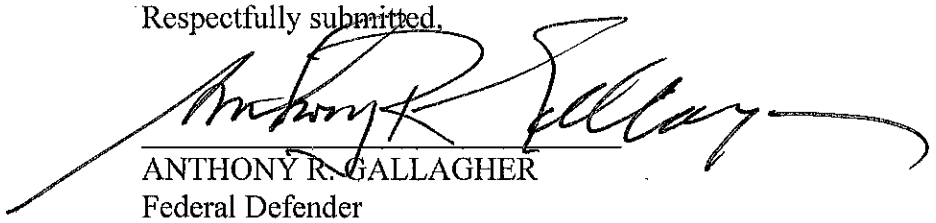
Hence, based on either the general erosion of tribal sovereignty emanating from the development of the law from *Wheeler* to *Sanchez Valle* or the specific restrictions on tribal independence expressed in the Northern Cheyenne Constitution, Petitioner's prosecution in the United States District Court–following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

CONCLUSION

WHEREFORE, based on the general erosion of tribal sovereignty emanating from the development of the law from *Wheeler* to *Sanchez Valle*, coupled with the specific restrictions on tribal independence expressed in the Northern Cheyenne Constitution, Petitioner'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.

The Court should grant this petition and set the case down for full briefing and argument to disapprove the "separate sovereign" concept altogether.

Respectfully submitted,



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