

No.

**IN THE SUPREME COURT OF THE UNITED STATES**

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LARON DARRELL CARTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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PETITION FOR A WRIT OF *CERTIORARI*

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## QUESTION PRESENTED

In *Gamble v. United States*, 138 S. Ct. 2707 (2018), this Court is considering whether the separate sovereign exception to the Double Jeopardy Clause should be overruled. The Ninth Circuit below held that although petitioner's federal charges were "based on the same conduct underlying his Nevada state conviction . . . the 'dual-sovereignty doctrine' provides that the Double Jeopardy Clause does not bar successive state and federal prosecutions 'for the same course of conduct'" and it could not "ignore binding Supreme Court precedent." If this Court overrules the separate sovereign exception, it should grant this petition, vacate the decision below, and remand for further consideration in light of *Gamble*. Even if this Court does not overrule the separate sovereign exception in *Gamble*, that does not mean that a defendant should be without recourse under non-constitutional authority, and this Court should still grant this petition to address the following related question:

What type of prejudice showing, if any, is required to obtain dismissal under Fed. R. Crim. P. 48(b) when the federal government files criminal charges approximately six years after the offense and more than two years after the defendant completed a prison sentence imposed by a state court for the same course of conduct.

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## **OPINION BELOW**

The Ninth Circuit issued a published opinion reported at *United States v. Carter*, 907 F.3d 1199 (9<sup>th</sup> Cir. 2018), and an unpublished memorandum that can be found at *United States v. Carter*, No. 16-50271, 2018 WL 5781502 (9<sup>th</sup> Cir. Nov. 2, 2018).

## **JURISDICTION**

The court of appeals filed its decision on November 2, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS**

### **U.S. Const. Amend. V:**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### **Fed. R. Crim. P. 48(b):**

The court may dismiss an indictment, information, or complaint if unnecessary delay occurs in:

- (1) presenting a charge to a grand jury;
- (2) filing an information against a defendant; or
- (3) bringing a defendant to trial.

## **STATEMENT OF THE CASE**

In May 2010, security at the Hard Rock Hotel and Casino in Las Vegas, Nevada stopped a minor girl. The girl maintained that petitioner had forced her to attempt to work as a prostitute that night, although she never ultimately engaged in prostitution. Nevada authorities immediately arrested petitioner on pandering and other offenses, and he later pled guilty to a felony pandering charge, served a prison sentence in Nevada, and was paroled in 2013. On May 1, 2014, the day before petitioner's parole expired, federal authorities arrested him for an unrelated federal prostitution charge involving a different girl at a different time and location, and he was then held in federal custody pursuant to an indictment in the Central District of California. Approximately two years later, in 2016, the government twice superseded the indictment against petitioner ultimately charging him in a total of 14 counts, including two counts alleging violations of 18 U.S.C. §§ 1591 and 2423(a) for the May 2010 incident.

Before trial, petitioner moved to dismiss the charges related to the May 2010 incident under the Double Jeopardy Clause and Fed. R. Crim. P. 48. The district court denied the motion. A jury convicted petitioner on all 14 counts, and the district court imposed a total sentence of 40 years in custody. Petitioner raised several contentions on appeal, including his claim for dismissal of the two

counts related to the May 2010 incident.

The Ninth Circuit found no double jeopardy violation, explaining: “The district court correctly rejected Carter’s argument that Counts 11 and 12 are barred by the Double Jeopardy Clause. Although these counts are based on the same conduct underlying his Nevada state conviction for pandering, the ‘dual-sovereignty doctrine’ provides that the Double Jeopardy Clause does not bar successive state and federal prosecutions ‘for the same course of conduct.’ Carter asks us to reject the dual-sovereignty doctrine, but we cannot ignore binding Supreme Court precedent.” App. 2 (citations omitted). The Ninth Circuit also rejected petitioner’s Rule 48 claim, stating that to obtain relief for delay under Rule 48, a defendant must show “actual, non-speculative prejudice from the delay” and that his claim of prejudice as to the Nevada incident was speculative. App. 3-4. The Ninth Circuit did, however, reverse two of the other counts of conviction based on a Confrontation Clause violation. App. 13-27.

## **ARGUMENT**

If this Court overrules the separate sovereign doctrine in *Gamble v. United States*, 138 S. Ct. 2707 (2018), then it should grant this petition, vacate the judgment, and remand for further consideration of petitioner’s double jeopardy claim in light of *Gamble*. Even if this Court does not overrule the separate

sovereign doctrine in *Gamble*, it should still grant this petition to assess the standard for dismissal under non-constitutional authority in the context of a federal prosecution following a state prosecution for the same course of conduct.

A court can dismiss under Rule 48 “if unnecessary delay occurs” in bringing charges or in bringing a defendant to trial. Fed. R. Crim. P. 48(b). The plain language of the rule, on its face, only requires “unnecessary” delay, and nothing about the extensive delay in this case was necessary. Despite the plain language in the rule, however, the Ninth Circuit held that to obtain dismissal under Rule 48, petitioner was required to show “actual, non-speculative prejudice.” App. 3-4. The Ninth Circuit only relied on its prior precedent for such a prejudice standard, and its precedent has not pointed to any textual basis in the rule for such a requirement. *Id.*

Rule 48 mentions nothing about having to show such prejudice, and when the Federal Rules of Criminal Procedure require a prejudice showing, they generally say so. For example, Rule 11 states that a defendant must show that a failure to comply with its requirements affected his substantial rights in order to vacate a guilty plea. *See* Fed. R. Crim. P. 11(h). Likewise, Rule 7 states that an indictment can only be dismissed for an erroneous or missing citation if the defendant can show that he was misled and suffered prejudice. *See* Fed. R. Crim.

P. 7(e)(2). The fact that Rule 48(b) contains no such language is a strong indication that prejudice is not required, *see, e.g., Russello v. United States*, 464 U.S. 16, 23 (1983), and its Advisory Committee Notes cite a case affirming dismissal of an indictment where the district court did not find any prejudice. *See United States v. Balochi*, 527 F.2d 562, 563-64 (4<sup>th</sup> Cir. 1976). As the *Balochi* court stated, Rule 48(b) “supplements the district court’s obligation to dismiss indictments in order to protect a defendant’s constitutional rights, and it is broader in compass.” *Id.*

For all of the reasons that have been argued in support of overruling the separate sovereign doctrine by the petitioner and amici in *Gamble*, this Court should hold that, at least in the context of a repeat federal prosecution following a state-court prosecution, a federal defendant need not show prejudice in order to obtain dismissal under Rule 48(b). Alternatively, in this specific context, this Court should adopt a presumption of prejudice, as it did for post-indictment delay in *Doggett v. United States*, 505 U.S. 647, 656-58 (1992).

The context of a repeat federal prosecution following a state prosecution is akin to post-indictment delay as discussed in *Doggett*. For example, even though petitioner was not charged by federal authorities for the Nevada offense until 2016, he was facing criminal charges for the same course of

conduct as early as 2010. Accordingly, he suffered the effects of incarceration and anxiety for years before the federal government elected to file charges for the same conduct. *See Doggett*, 505 U.S. at 654.

As in *Doggett*, the government offered no convincing explanation for why it waited six years after the Nevada offense and more than two years after petitioner completed his state prison sentence to file federal charges based on the same conduct. The circumstances strongly suggest that the federal government simply wished to pile on charges against petitioner, even though it had filed numerous other counts for other crimes that would likely require him to spend many years in prison upon conviction. Under the *Doggett* standard, dismissal is required given the combination of the extensive delay and the government's unconvincing explanation for the delay, if not its outright negligence. *Id.* at 656-58. At the very least, however, this Court should remand this case to the Ninth Circuit to consider dismissal under Rule 48(b) without a prejudice requirement or pursuant to a presumption of prejudice akin to the *Doggett* standard.

As the recent grant in *Gamble* demonstrates, the issue presented in this petition is important. Even if the separate sovereign doctrine survives in *Gamble*, many jurists and scholars have questioned its fairness given the modern proliferation of federal offenses, which have made repeat state-federal

prosecutions a possibility for many, if not nearly all, crimes. The Federal Rules of Criminal Procedure provide an avenue to address that unfairness, even if the Constitution tolerates it. This Court should clarify the standard that federal courts are to employ when considering their non-constitutional authority in this context.

## **CONCLUSION**

For the foregoing reasons, this Court should grant this petition for a writ of *certiorari*.

Respectfully submitted,

*s/Benjamin L. Coleman*

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