No. 17-

IN THE

SUPREME COURT OF THE UNITED STATES

Willie Tyler — PETITIONER
(Your Name)

VS.

United States — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis.*

Please check the appropriate boxes:

☒ Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

United States Court of Appeals for the Third Circuit, United States District Court for the Middle District of Pennsylvania

☐ Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

☐ Petitioner's affidavit or declaration in support of this motion is attached hereto.

☒ Petitioner's affidavit or declaration is **not** attached because the court below appointed counsel in the current proceeding, and:

☒ The appointment was made under the following provision of law: 18 U.S.C. Section 3006A(a), or

☐ a copy of the order of appointment is appended.

(Signature)

No. 17-

IN THE

Supreme Court of the United States

WILLIE TYLER,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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July 27, 2017

QUESTION PRESENTED

Whether the Court should overrule the dual sovereignty exception, which permits a successive federal prosecution after a defendant has been prosecuted for the same offense in state court.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Willie Tyler, Appellant below. Respondent is the United States, Appellee below. Petitioner is not a corporation.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Willie Tyler, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is not reported. The order of the United States District Court is reported at 220 F. Supp. 3d 563 (M.D. Pa. 2016) and is contained in the Petition Appendix at 27a-45a. A related District Court order can be found in the Petition Appendix at 47a-50a.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was rendered on January 6, 2017, Pet. App. at 3a-6a, and the Third Circuit denied petitioner's timely request for rehearing en banc on February 27, 2017. Pet. App. at 1a-2a. On May 10, 2017, Justice Sotomayor extended the time within which to file this petition to and including July 27, 2017. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides in relevant part: "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb."

INTRODUCTION

Successive prosecutions under the dual sovereignty exception to the Double Jeopardy Clause are "an affront to human dignity, inconsistent with the spirit of [our] Bill of Rights." *Puerto Rico* v. *Sanchez Valle*, 136 S. Ct. 1863, 1877 (2016) (Ginsburg, J., concurring) (citations and quotation marks omitted). Just last year, Justices Ginsburg and Thomas called for a "fresh examination" of the dual sovereignty exception "in an appropriate case." *Id.* They recognized that the current doctrine fails to serve the objective of the Double Jeopardy Clause, which is "to shield individuals from the harassment of multiple prosecutions for the same misconduct." *Id.* (citation omitted). Pointing to "jurists and commentators" calling for the Court to overrule the doctrine, Justices Ginsburg and Thomas opined that "[t]he matter warrants attention in a future case in which a defendant faces successive prosecutions by parts of the whole USA." *Id.* This is the "future case" they envisioned.

A "fresh examination" is necessary because the dual sovereignty exception conflicts with the original meaning of the Double Jeopardy Clause. In 1985, Justices Marshall and Brennan observed "how reluctant the Court has always been to ascertain the intent of the Framers in this area." *Heath* v. *Alabama*, 474 U.S. 82, 98 n.1 (1985) (Marshall, J., dissenting). In the thirty years since, the body of scholarship on the issue has grown significantly, and evidence of the Framers understanding of double jeopardy warrants this Court's attention.

Tracing the history of the Double Jeopardy Clause from England in 1644 to America in 2017 confirms that the dual sovereignty exception is unfair in any century. The Framers did not create any exceptions

to the Double Jeopardy Clause; this Court did. It established the dual sovereignty doctrine in a prohibition era decision, *United States* v. *Lanza*, 260 U.S. 377 (1922). That decision rests on a faulty foundation weakened by modern scholarship presenting evidence that the exception is inconsistent with the Framers' understanding of double jeopardy. Constitutional decisions since *Lanza* have further eroded its doctrinal underpinnings. Meanwhile, the federalization of crime and increasing cooperation among state and federal law enforcement have diminished the justifications for *Lanza* and magnified the risks to defendants. For these reasons, academics and jurists of various stripes have urged the Court to reconsider the dual sovereignty exception.

This is the appropriate case for the Court to address the issue. Mr. Tyler has diligently preserved his challenge at every stage of the case, and the viability of the dual sovereignty exception is the only issue this petition presents. Mr. Tyler's federal prosecution also exemplifies why the dual sovereignty exception must be revisited; the record demonstrates that the federal government sought a "retrial" on the same conduct at issue in Mr. Tyler's state court trial because it disliked the outcome in state court. Because this is a rare opportunity to address a critical Constitutional question in a clean case, the petition should be granted.

STATEMENT OF THE CASE

1. In June 1993, an Adams County, Pennsylvania jury found Mr. Tyler not guilty of murder, but guilty of conspiracy to intimidate a witness. Pet. App. at 10a. Mr. Tyler was sentenced to "two-to-four years," dutifully served his time and was paroled in July 1994. *Id.* Mr. Tyler would have been free at that

time but for the subsequent federal prosecution for the same conduct, which was permitted under the dual sovereignty exception to the Double Jeopardy Clause.

2. Two months earlier, on April 8, 1993, Mr. Tyler's co-defendant Roberta Bell had been acquitted of murder and witness intimidation in state court. *Id.* at 63a. Immediately thereafter, FBI Agent Kelly met with Assistant U.S. Attorney Gordon Zubrod to discuss whether Bell could be subject to a "retrial" on federal charges. *Id.* AUSA Zubrod advised that under the dual sovereignty exception, such a "retrial" was possible if the Department of Justice approved the subsequent federal prosecution under the Department's *Petite* Policy.[1] *Id.* at 63a, 65a. Recognizing that this was a successive prosecution of the same conduct, AUSA Zubrod obtained a *Petite* waiver for a "second prosecution" of Bell, approved by the Assistant Attorney General. *Id.* at 57a.

3. After the successful federal prosecution of Bell in January 1996, "the investigation turned to Tyler." *Id.* at 66a. In April 1996, a federal grand jury issued a four-count indictment against Mr. Tyler.[2]

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[1] The Department of Justice permits, with approval from the Assistant Attorney General of the criminal division, a second prosecution if the substantial interests of justice were not met in the prior prosecution or if there is a larger federal interest that the prior prosecution did not address. *See generally id.* at 57a-58a; U.S. Dep't of Justice, U.S. Attorney's Manual, 162 Dual Prosecution (Petite Policy) (July 2016), https://www.justice.gov/usam/162-dual-prosecution-petite-policy.

[2] Count I alleged conspiracy to commit federal witness tampering under 15 U.S.C. § 1512 and conspiracy to carry and use a firearm during a crime under 18 U.S.C. § 924(c). Count II alleged federal witness tampering by murder under 15 U.S.C. § 1512(a)(1)(A) and (C). Count III alleged federal witness tamper-

4. A federal judge was immediately troubled by the double jeopardy concerns Mr. Tyler's federal prosecution raised. At an April 30, 1996 Detention Hearing, Magistrate Judge Andrew Smyser stated that Mr. Tyler was "being charged with substantially the same or similar offenses to those that he was charged with in state court. And that naturally gives rise to a double jeopardy concern." *Id.* at 53a. The same judge stated that the related Bell prosecution was "troublesome" from a "public policy perspective" because the defendant "[was] being *exposed* to a second criminal prosecution by a different government on the basis of *substantially the same* alleged criminal episode for which the person has been tried and in this case acquitted before another government's judicial system." *Id.* at 59a-60a (emphasis added).

5. Mr. Tyler's first of three federal trials began in August 1996. A jury convicted Mr. Tyler on all four counts of the Indictment and the Court sentenced Mr. Tyler to a life term.

6. On direct appeal, the Third Circuit reversed and remanded, ruling that the District Court erroneously admitted a statement Mr. Tyler made to enforcement officers. *United States* v. *Tyler*, 164 F.3d 150, 151 (3d Cir. 1998).

7. Mr. Tyler was subjected to a second federal trial which began in July 2000. The jury found Mr. Tyler guilty on Counts II, III, and IV. *United States* v. *Tyler*, 35 F. Supp. 3d 650, 653 (M.D. Pa. 2014). Mr. Tyler then raised a series of *pro se* collateral challenges

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ing by intimidation under 15 U.S.C. § 1512(b)(1)-(3). Count IV alleged a violation of 18 U.S.C. § 924(c)(1)-(2) for use of a firearm during and in relation of a crime of violence. *See* Indictment, *United States* v. *Tyler*, No. 1:96-cr-00106-JEJ (M.D. Pa. Apr. 16, 1996), ECF No. 1.

to his conviction and sentences over the next decade. *United States* v. *Tyler*, 732 F.3d 241, 245 (3d Cir. 2013).

8. In October 2013, the Third Circuit remanded for the district court to reconsider Mr. Tyler's actual innocence claim after this Court's intervening decisions in *Arthur Andersen LLP* v. *United States*, 544 U.S. 696 (2005) and *Fowler* v. *United States*, 563 U.S. 668 (2011) refined the scope of the "official proceeding" and "investigation" prongs of Section 1512. *Id.*

9. On remand, the district court found that Mr. Tyler was actually innocent of Section 1512's "official proceeding" provisions and vacated that portion of the conviction. However, the district court ordered a new trial limited to the investigation charges. *Tyler*, 35 F. Supp. 3d at 650.

10. The district court denied Mr. Tyler's Motion to Dismiss the Indictment which set forth Mr. Tyler's substantive double jeopardy claims, see Pretrial Motion to Dismiss Indictments, *United States* v. *Tyler*, No. 1:96-cr-00106-JEJ (M.D. Pa. May 20, 2016), ECF No. 375, and granted the government's motion finding Mr. Tyler's appeal "frivolous," thereby allowing Mr. Tyler's third federal trial to proceed. Pet. App. at 27a-50a.

11. Judge Caldwell held that Mr. Tyler's challenge to dual sovereignty was foreclosed at that stage by Third Circuit and Supreme Court precedent, but found that Mr. Tyler had made the argument to preserve it for appeal to this Court. *Id.* at 35a n.6.

12. Mr. Tyler invoked interlocutory appellate jurisdiction and appealed. The Third Circuit denied Mr. Tyler's Motion to Stay the Trial and granted the Government's Motion for Summary Affirmance in a one sentence Order on January 6, 2017. *Id.* at 3a.

13. The Third Circuit denied Mr. Tyler's petition for rehearing en banc on February 27, 2017. Pet. App. 1a-2a.

14. Mr. Tyler's third federal trial began on July 12, 2017 and on July 18, 2017, Mr. Tyler was convicted under the "investigation" prongs of Counts II and III based on the same conduct for which he was originally tried over 24 years ago.

REASONS FOR GRANTING THE PETITION

This Court will reverse itself when it becomes evident that a longstanding doctrine of profound importance was "not correct when [ ] decided" and "not correct today." *Lawrence* v. *Texas*, 539 U.S. 558, 578 (2003). The dual sovereignty exception is one of those doctrines.

I. THE DUAL SOVEREIGNTY EXCEPTION TO THE DOUBLE JEOPARDY CLAUSE WAS NOT CORRECT WHEN THE COURT CREATED IT AND IT IS NOT CORRECT TODAY.

A. The Dual Sovereignty Exception Conflicts With The Original Meaning Of The Double Jeopardy Clause.

At common law, a defendant could enter the common law pleas of *autrefois acquit* (formerly acquitted) and *autrefois convict* (previously convicted) to bar a successive prosecution by a separate sovereign. Because these common law pleas were the basis for the Double Jeopardy Clause, the dual sovereignty exception fundamentally conflicts with the Constitution's original meaning. See *United States* v. *Scott*, 437 U.S. 82, 87 (1978) (the Double Jeopardy Clause "had its origin in the three common-law pleas of *autrefois acquit, autrefois convict*, and pardon. These three

pleas prevented the retrial of a person who had previously been acquitted, convicted, or pardoned for the same offense."); *Brown* v. *Ohio*, 432 U.S. 161, 165 (1977); *United States* v. *All Assets of G.P.S. Auto. Corp.*, 66 F.3d 483, 497 (2d Cir. 1995) (Calabresi, J., concurring) (noting the dual sovereignty exception's "weakness from an originalist point of view").

1. Founding-era English legal authorities confirm that the common law pleas of *autrefois acquit* and *autrefois convict* barred a successive prosecution by a separate sovereign. Those pleas applied in England even if the original prosecution was by a foreign power. For example, in *R.* v. *Roche* (1775) 168 Eng. Rep. 169; 1 Leach 134, 135, the defendant was charged in England for a murder he had already been acquitted of in the Cape of Good Hope, a Dutch colony. Although the defendant ultimately withdrew his plea of *autrefois acquit* in order to submit a plea of not-guilty, the reporter described the basis for his assertion that his prior acquittal barred a successive prosecution in England:

> It is a bar, because a final determination in a Court having competent jurisdiction is conclusive in all Courts of concurrent jurisdiction: therefore if A., having killed a person in Spain, were there prosecuted, tried and acquitted, and afterward were indicted here, at Common Law, he might plead the acquittal in Spain in bar.

Id. at 169 n.(a). Similarly, the King's Bench held in *R.* v. *Hutchinson* that a defendant's acquittal of murder in Portugal barred prosecution of the same crime in England. *Id.*; see also *Burrows* v. *Jemino* (1726) 93 Eng. Rep. 815; 2 Strange 733, 734; *Beak* v. *Thyrwhit* 87 Eng. Rep. 124, 125; 3 Mod. 194, 195 (discussing *Hutchinson*). No mention of a dual sovereignty exception appears in these early cases.

English legal treatises similarly concluded that the common law pleas of *autrefois acquit* and *autrefois convict* barred a successive prosecution by a separate sovereign. 2 William Hawkins, *A Treatise of the Pleas of the Crown* 372 (2nd ed. 1721) ("[A]n Acquittal in any Court whatsoever, which has a Jurisdiction of the Cause, is as good a Bar of any subsequent Prosecution for the same Crime, as an Acquittal in the highest Court."); 4 William Blackstone, *Commentaries on the Laws of England* 329 (1770) ("[H]e may plead such acquittal in bar of any subsequent accusation of the same crime."); Francis Buller, *An Introduction to the Law Relative to Trials at Nisi Prius* 245 (5th ed. 1788) (discussing *Hutchinson*); Leonard MacNally, *The Rules of Evidence on Pleas of the Crown* 428 (1802) ("[A]n acquittal on a criminal charge in a foreign country may be pleaded in bar of an indictment for the same offence in England."); 1 Thomas Starkie, *A Treatise on Criminal Pleading* 301 note h (1814) ("Where the defendant has been tried by a foreign tribunal, it seems equally clear that an acquittal will enure to his defence in this country."); 1 Joseph Chitty, *A Practical Treatise on the Criminal Law* 458 (1816) (a prior acquittal or conviction "will be sufficient to preclude any subsequent proceedings before every other tribunal.").

2. Early American sources provide further evidence that the Founders intended the Double Jeopardy Clause to guarantee Americans at least the protection from successive prosecutions available at common law. See 1 Annals of Cong. 753 (1789) (Joseph Gales ed., 1834) (the Double Jeopardy Clause "was declaratory of the law" as it stood in 1789 consistent with "the universal practice in Great Britain, and in this country, that persons shall not be brought to a second trial for the same offence."); *People* v. *Good-*

win, 18 Johns. 187, 201 (N.Y. 1820) (the Double Jeopardy Clause reflected "a sound and fundamental one of the common law"; *United States* v. *Gibert*, 25 F. Cas. 1287, 1294 (C.C.D. Mass. 1834) (Story, J.) ("[T]he privilege thus secured is but a constitutional recognition of an old and well established maxim of the common law; and, therefore, we are to resort to the common law to ascertain its true use, interpretation, and limitation."); 3 Simon Greenleaf, *A Treatise on the Law of Evidence* 36 (7th ed. 1853) (the Double Jeopardy clause reflects principles "imbedded in the very elements of the common law"); Francis Wharton, *A Treatise on the Criminal Law of the United States* 147 (1846) (describing the Double Jeopardy Clause as "nothing more than a solemn asseveration of the common law maxim"). These sources suggest that the dual sovereignty of the States and the federal government does not justify an exception to the rule against double jeopardy.

3. This Court's early cases are also consistent with the view that common law principles prohibited a federal prosecution following a state prosecution for the same conduct. In *Houston* v. *Moore*, 18 U.S. 1, 6 (1820), the defendant argued that his state court conviction for desertion under a Pennsylvania statute was invalid because his conduct also constituted an offense against the United States, meaning that he was in danger of being "twice tried and punished for the same offence." The Court rejected that argument explaining that "if the jurisdiction [of the state and federal courts] be concurrent, the sentence of either Court, either of conviction or acquittal, might be pleaded in bar of the prosecution before the other." *Id.* at 31. See also *United States* v. *Furlong*, 18 U.S. 184, 197 (1820) ("[T]here can be no doubt that the plea of *autre fois acquit* would be good in any civilized

State, though resting on a prosecution instituted in the Courts of any other civilized State."); *Manley* v. *People*, 7 N.Y. 295, 303 (1852) (citing *Houston* v. *Moore*, 18 U.S. 1, as support for the proposition that "the practice of the several federal and state courts . . . allow[ed] the judgment in one court to be pleaded in bar in the other."). *Houston* reflects this Court's understanding that common law pleas barred a federal prosecution following a state prosecution for the same offense.

4. State court decisions also indicate that the prevailing view before 1850 was that a state prosecution barred a successive federal prosecution under both the common law and the United States Constitution.[3] An 1816 case considering a state court conviction for counterfeiting makes the point. In *State* v. *Antonio*, 7 S.C.L. 776 (1816) the defendant argued that his state court conviction for counterfeiting was invalid be-

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[3] *See, e.g.*, *Harlan* v. *People*, 1 Doug. 207, 212-13 (Mich. 1843) (commenting that a state conviction "would be admitted in federal courts as a bar. This would follow necessarily from the existence of a concurrent jurisdiction, even if it did not come strictly within the provision of the seventh article of the amendments of the constitution."); *State* v. *Randall*, 2 Aik. 89, 100-01 (Vt. 1827) ("The court that first has jurisdiction, by commencement of the prosecution, will retain the same till a decision is made; and a decision in one court will bar any farther [sic] prosecution for the same offence, in that or any other court"); *Commonwealth* v. *Fuller*, 49 Mass. (8 Met.) 313, 317-18 (1844) (explaining that "the delinquent cannot be tried and punished twice for the same offence" and therefore "the supposed repugnancy between the [state and federal laws] does not, in fact, injuriously affect any individual"); *People ex rel. McMahon* v. *Sheriff of Westchester County*, 2 Edm. Sel. Cas. 324, 343-44 (N.Y. Sup. Ct. 1852) (noting that "where the United States and the State courts have concurrent jurisdiction" over a criminal matter, "a judgment rendered in one [is] to be a bar to the recovery of a judgment in the other").

cause he could be prosecuted for the same crime by the federal government. *Id.* at 781. The Constitutional Court of Appeals of South Carolina rejected that argument. It reasoned that because the rule against successive prosecution by courts of "competent jurisdiction" prevailed even "among nations who are strangers to each other," it must also exist among sovereigns "so intimately bound by political ties" as the state and federal governments of the United States. *Id.* The court added that "a guard yet more sure is to be found" in what is now the Fifth Amendment. *Id.* See also *id.* at 788 (Grimke, J., concurring) ("[A] determination in a court having competent jurisdiction, must be final and conclusive on all courts of concurrent jurisdiction.").[4] The concurrent jurisdiction of the state and federal government was thus deemed permissible because the courts understood that it could not result in successive prosecutions for the same crime under the common law or the Constitution.

5. Early American legal treatises agreed that a state court prosecution would bar prosecution by the federal government. James Kent's *Commentaries on American Law* explained that "the sentence of either court, whether of conviction or acquittal, might be pleaded in bar of the prosecution before the other." 1 James Kent 374 (1826), and treatises of the same era are in accord. See Thomas Sergeant, *Constitutional Law* 278 (2nd ed. 1830) (same); Francis Wharton, *A*

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[4] The dissent reached a different result on the underlying question but agreed that successive state and federal prosecutions would be "not only contrary to the express letter of the constitution, but contrary to the eternal and unerring principles of justice." *Antonio,* 7 S.C.L. at 804 (Nott, J., dissenting)

Treatise on the Criminal Law of the United States 137 (1846). These sources reflect that the prevailing view up through at least 1847 was that the Double Jeopardy Clause did not permit a dual sovereignty exception to the rule against successive prosecutions.

Because the Double Jeopardy Clause "was designed originally to embody the protection of the common-law pleas of former jeopardy," the exception must collapse under the weight of this historical record. *Brown*, 432 U.S. at 165.

B. The Seminal Case Establishing The Dual Sovereignty Exception Does Not Withstand Scrutiny.

This Court did not squarely address whether a state prosecution would bar a federal prosecution for the same offense until 1922, when it issued a decision in the prohibition era case of *United States* v. *Lanza*, 260 U.S. 377. See *Abbate* v. *United States*, 359 U.S. 187, 193 (1959) (describing *Lanza* as the case that "directly presented" the issue to this Court). Because *Lanza* does not withstand scrutiny, the foundation of the dual sovereignty doctrine has been flawed from the start.

1. *Lanza* established the dual sovereignty exception without considering the common law origins of the Double Jeopardy Clause.

In *Lanza*, the specific question before the Court was whether "two punishments for the same act, one under the National Prohibition Act and the other under a state law, constitute double jeopardy under the Fifth Amendment." 260 U.S. at 379. On April 16, 1920, the defendant had been charged and fined in Washington state court for manufacturing, transporting, and possessing alcohol. Later that same month, he was charged with a federal indictment for the

same conduct because it violated the newly-enacted Eighteenth Amendment and National Prohibition Act. In the district court, the defendant asserted his state court conviction as a defense and the court dismissed the indictment. *Id.*

Lanza reversed the decision of the district court. It began by analyzing the second section of the Eighteenth Amendment, which stated that "the Congress and the several states shall have concurrent power to enforce this article by appropriate legislation." *Id.* at 380. The Court then concluded that the federal and state government were "two sovereignties, deriving power from different sources" and so each could "enact laws to secure prohibition." *Id.* at 382. From this, the court concluded:

> It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each. The Fifth Amendment, like all the other guaranties in the first eight amendments, applies only to proceedings by the federal government, and the double jeopardy therein forbidden is a second prosecution under authority of the federal government after a first trial for the same offense under the same authority.

Id. (citation omitted). The Court then asserted that its view was consistent with a line of cases dating back to a trio of cases in the mid-1800s that touched on the issue in dicta. *Id.* at 382-85. It did not address a single source of law prior to 1847. Instead, it equated the federal government's power to enact and enforce criminal laws with the power to initiate a successive prosecution, notwithstanding the Constitutional protection against double jeopardy. Finally, the Court articulated a policy concern that animated

its decision, explaining that if a state prosecution resulting in nominal penalties could bar a federal prosecution, that would "not make for respect for the federal statute or for its deterrent effect." *Id.* at 385.

2. All the reasons for the Court's decision in *Lanza* have since been called into question.

First, the Court was wrong when it assumed that permitting successive state and federal prosecutions "follows" from the power to enact separate laws on the same subject. As described above, courts and jurists concluded otherwise up through 1850. And even in *Lanza*'s era, English law barred successive prosecutions by separate sovereigns. See *Aughet* (1919) 13 Cr. App. R. 101, 102 (appeal taken from Cent. Crim. Court) (Gr. Brit.); 2 William Russell, *A Treatise on Crimes and Misdemeanors* 1820 (8th ed. 1923) (commenting that "it does not matter whether the [previous] trial was summary or on indictment, nor whether the Court is an English Court, or one of another of the King's dominions, or of a foreign country.").

Second, *Lanza* relied in part on the premise that the Fifth Amendment applied only to the federal government and therefore double jeopardy applied only to successive prosecutions by the federal government. That premise cannot support the decision now that the Court has applied the Double Jeopardy Clause against the States. *Benton* v. *Maryland*, 395 U.S. 784 (1969); *United States* v. *Grimes*, 641 F.2d 96, 101-02 (3d Cir. 1981).

Third, the "long line of decisions" *Lanza* cited are paltry support for a dual sovereignty exception to the Double Jeopardy Clause. See *Abbate*, 359 U.S. at 202 (Black, J., dissenting); *Bartkus* v. *Illinois,* 359 U.S. 121, 158-61 (1959) (Black, J., dissenting). Not one of these cases reflected on the common law origins of

the Double Jeopardy Clause or stated settled law of the times. And not one of the cases directly addressed whether the Double Jeopardy Clause bars successive federal and state prosecutions for the same offense. Instead, the notion of a dual sovereignty exception emerged from dicta often repeated but never scrutinized.

Finally, the policy grounds *Lanza* cited also do not provide an adequate basis for narrowing a Constitutional protection. This Court has never been free to shrink the scope of the Double Jeopardy Clause to expand the impact of federal law. And the notion that giving the Double Jeopardy Clause its full effect would impair the enforcement of federal law is difficult to credit. It "ignores the fact that our Constitution allocates power between local and federal governments in such a way that the basic rights of each can be protected without double trials." *Id.* at 157. It is also inconsistent with the modern reality of cooperation between federal and state law enforcement. See *infra* at I.C.4.

C. The Dual Sovereignty Exception Has Become A Doctrinal Anachronism That Is Unjust And Unjustifiable Today.

This Court has not seriously considered overruling *Lanza* since decisions in 1959 that failed to fully confront its flaws. In the past six decades, "related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine," and "facts have so changed, or come to be seen so differently" that the exception has been "robbed . . . of . . . [its] justification." *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 855 (1992) (citation omitted). The dual sovereignty exception therefore demands reexamination.

1. The Court last revisited *Lanza* in a decision that was itself infected by *Lanza*'s problematic reasoning.

In *Abbate*, this Court considered whether the "*Lanza* principle" should be overruled. The case involved defendants who had been involved in an unconsummated plot to blow up the facilities of a telephone company. *Abbate*, 359 U.S. at 187-88. The defendants pled guilty to an indictment in Illinois state court charging them with conspiring to injure or destroy the property of another. They were later indicted on charges of violating federal statutory laws pertaining to the destruction of telephone lines operated by the United States. The Court viewed the case as squarely raising the question "whether a federal prosecution of defendants already prosecuted for the same acts by a State" violated the Double Jeopardy Clause. *Id.* at 189-90.

The Court analyzed the issue without reaching back to the common law. *Id.* at 190. Instead, it described the trio of cases *Lanza* cited as having "thoroughly considered" the question of concurrent state and federal jurisdiction in the period "between 1847 and 1852." *Id.*[5] According to the Court, the reasoning in those cases "was subsequently accepted by this Court, in dictum" through a line of cases culminating in *Lanza,* which had since been "accepted without question." *Id.* at 192-94. The Court found no reason to depart from *Lanza* and emphasized its concern that overruling *Lanza* could "hinder[]" federal law enforcement. *Id.* at 195. It concluded that the "efficiency of federal law enforcement must suffer if the Dou-

[5] A companion case addressing the issue of a state prosecution following a federal one touched on earlier law but disregarded the English sources as "dubious" and misconstrued the state court decisions it cited. *See Bartkus*, 359 U.S. at 128 n.9.

ble Jeopardy Clause prevents successive state and federal prosecutions." *Id.*

2. Justice Black's vigorous dissent highlighted the problems with *Abbate* as they already appeared in 1959.

Justice Black, joined by Chief Justice Warren and Justice Douglas, criticized *Lanza* and all its progeny. He described *Lanza* as relying on dicta suggesting that State and Federal crimes are necessarily different offenses and asserted that the "legal logic" in those cases was "too subtle" for him to grasp. *Id.* at 202 (Black, J., dissenting).

Justice Black believed that the majority's decision was unjustified both in terms of principles and practicalities. He understood the Double Jeopardy Clause as "a broad national policy against federal courts trying or punishing a man a second time after acquittal or conviction in any court." *Id.* at 203. It seemed to him "just as dangerous to human freedom for a man to be punished twice for the same offense, once by a State and once by the United States, as it would be for one of these two Governments to throw him in prison twice for the offense." *Id.* He could not "conceive that our States are more distinct from the Federal Government than are foreign nations from each other," and observed that "most free countries have accepted a prior conviction elsewhere as a bar to a second trial in their jurisdiction." *Id.* He also feared that the Court was imposing the very limitation on the Double Jeopardy Clause that Congress had rejected in a proposed Amendment in 1789. *Id.* Practical concerns did not justify the result because it appeared to Justice Black that "federal laws can easily be safeguarded without requiring defendants to undergo double prosecutions." *Id.* at 202 n.2.

3. Subsequent constitutional decisions have eroded *Lanza*'s foundation.

Lanza relied in part on the premise that the "Fifth Amendment, like all the other guaranties in the first eight amendments, applies only to proceedings by the federal government." 260 U.S. at 382 (citation omitted). *Abbate* recited the same rule without question. But this Court's later decision in *Benton* v. *Maryland* destroyed that pillar of *Lanza*'s and *Abbate*'s foundation by holding that the Double Jeopardy Clause applied against the states. See *Grimes*, 641 F.2d at 102 (explaining that it "would appear inconsistent to allow the parallel actions of state and federal officials to produce results which would be constitutionally impermissible if accomplished by either jurisdiction alone.").

This Court has already eliminated dual sovereignty exceptions to other constitutional protections for criminal defendants. See *Elkins* v. *United States*, 364 U.S. 206, 215 (1960) (holding that evidence obtained in unlawful searches by state officials was inadmissible in federal criminal trials after the Fourth Amendment was applied to the states); *Murphy* v. *Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 77-78 (1964) (abandoning the rule that state and federal government could compel a witness to incriminate himself in the other's courts). After *Benton*, the result should be the same for the Double Jeopardy Clause. Viewed against the backdrop of this Court's decisions in cases like *Elkins* and *Murphy*, the dual sovereignty exception to the Double Jeopardy Clause has become a "doctrinal anachronism" requiring review. *Grimes*, 641 F.2d at 101-04; *G.P.S. Auto.*, 66 F.3d at 497.

The Court's renewed emphasis on "preservation" of Constitutional rights as they existed in the Founder's

era also undermines the dual sovereignty exception. *United States* v. *Jones*, 565 U.S. 400, 408 (2012). "Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization," *Bartku*s, 359 U.S. at 152 (Black, J., dissenting), and the "underlying idea" of the Double Jeopardy Clause is "deeply ingrained in [ ] the Anglo-American system of jurisprudence." *Green* v. *United States*, 355 U.S. 184, 187-88 (1957). A successive prosecution subjects a defendant "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." *Id.* From the "standpoint of the individual who is being prosecuted" these dangers are "no less when the power of State and Federal Governments is brought to bear on one man in two trials, than when one of these 'Sovereigns' proceeds alone." *Bartkus*, 385 U.S. at 155 (Black, J., dissenting). Because the protections of the Double Jeopardy Clause are both fundamental and "intrinsically personal," *United States* v. *Halper*, 490 U.S. 435, 447 (1989), it is "difficult to accept generalized statements of sovereign interest as justifying the Clause's inapplicability to successive prosecutions by different governments." *G.P.S Auto.*, 66 F.3d at 498. Criminal defendants suffer an intolerable injustice when Courts reduce the protection against double jeopardy that the Founders conferred in the Constitution.

4. The federalization of criminal jurisdiction has robbed *Lanza* and *Abbate* of any justification, and makes those decisions more dangerous today.

Since *Abbate* and *Lanza*, "the scope of federal criminal law has expanded enormously." *Id.* As a result, there is substantial overlap between federal and state

criminal jurisdiction and the interests at stake. Also, the federal and state government increasingly operate as partners in criminal law enforcement; this cooperation both diminishes the risk that states will subvert federal law, and increases the risk that successive prosecutions will give the federal government an unfair "dress rehearsal" of its case. See Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King,* 95 Colum. L. Rev. 1, 9-10 (1995). In all events, the notion that the federal and state government necessarily occupy distinct spheres of interests in prosecuting criminal conduct is no longer credible. As Judge Calabresi commented, the extent of federal and state cooperation "should cause one to wonder whether it makes much sense to maintain the fiction that federal and state governments are so separate in their interests that the dual sovereignty doctrine is universally needed to protect one from the other." *G.P.S. Auto.*, 66 F.3d at 499.

The "dramatic changes" in the scope of federal criminal law and the extent of federal and state cooperation make what was "perhaps acceptable, or at least tolerable, far more dangerous today" than it was in 1959. *Id.* at 498. "[D]efendants in an enormous number of cases can be subjected to dual prosecutions" because the "number of crimes for which a defendant may be made subject to both a state and federal prosecution has become very large." *Id.* "And this can happen even when state and federal officials, in practice, join together to take a second bite at the apple." *Id.* In light of these changes, a decision to reexamine the dual sovereignty exception is "not only justified but required." *Casey*, 505 U.S. at 862.

5. The dual sovereignty exception bears all the hallmarks of a doctrine requiring reexamination.[6]

In the years since *Lanza*, the dual sovereignty exception has been subject to "substantial and continuing" criticism. *Lawrence*, 539 U.S. at 576. See also *Abbate*, 359 U.S. at 202 (Black, J., dissenting); *Bartkus*, 359 U.S. at 150 (Black, J., dissenting); *Sanchez Valle*, 136 S. Ct. at 1877; *Grimes*, 641 F.2d at 101; *G.P.S. Auto.*, 66 F.3d at 497. Scholars began assailing *Lanza* soon after it was decided.[7] Since then, the chorus has grown. Some academics emphasize the doctrine's inconsistency with the original meaning of the Double Jeopardy Clause.[8] Others argue that the exception is predicated on an outdated view of federalism that cannot be squared with mod-

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[6] *See Lawrence*, 539 U.S. at 588 (Scalia, J., dissenting) ("Today's approach to *stare decisis* invites us to overrule an erroneously decided precedent . . . *if*: (1) its foundations have been "ero[ded]" by subsequent decisions,[ ]; (2) it has been subject to "substantial and continuing" criticism, [ ]; and (3) it has not induced "individual or societal reliance" that counsels against overturning"); *Casey*, 505 U.S. at 855.

[7] *See, e.g.*, J.A.C. Grant, *The* Lanza *Rule of Successive Prosecutions*, 32 Colum. L. Rev. 1309 (1932).

[8] *See, e.g.*, Paul G. Cassell, *The Rodney King Trials and the Double Jeopardy Clause: Some Observations on Original Meaning and the ACLU's Schizophrenic Views of the Dual Sovereignty Doctrine*, 41 UCLA L. Rev. 693 (1994); James E. King, *The Problem of Double Jeopardy in Successive Federal-State Prosecutions: A Fifth Amendment Solution*, 31 Stan. L. Rev. 477 (1979); *Double Prosecution by State and Federal Governments: Another Exercise in Federalism*, 80 Harv. L. Rev. 1538 (1967); George C. Pontikes, *Dual Sovereignty and Double Jeopardy*: *A Critique of* Bartkus v. Illinois *and* Abbate v. United States, 14 W. Res. L. Rev. 700 (1963); Walter T. Fisher, *Double Jeopardy, Two Sovereignties and the Intruding Constitution*, 28 U. Chi. L. Rev. 591 (1961); Lawrence Newman, *Double Jeopardy and the Problem of Successive Prosecution*, 34 S. Cal. L. Rev. 252 (1961).

ern Supreme Court jurisprudence.[9] But by any account, the "historical grounds relied upon" in *Lanza* and *Abbate* are "more complex" than those decisions indicate and the dual sovereignty exception's grounding in historical precedent is "at the very least, [ ] overstated." *Lawrence*, 539 U.S. at 571. And because *Lanza* and *Abbate* have been weakened by subsequent decisions, *supra* at Section I.C.3, "criticism from [academic] sources is of greater significance" than in the typical case. *Lawrence*, 539 U.S. at 576.

Although the dual sovereignty exception has endured since *Lanza*, it has not induced "individual or societal reliance" that counsels against overturning the doctrine. *Id.* at 577. Only federal prosecutors pursuing a successive prosecution after a state court trial directly rely on *Lanza* and *Abbate*. Their number should be limited by the *Petite* policy, which requires DOJ approval for a subsequent prosecution. Because the dual sovereignty exception could be eliminated "without serious inequity to those who have relied upon it or significant damage to the stability of the society governed by it," *Casey*, 505 U.S. at 855, the Court should revisit it now.[10]

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[9] *See* Kenneth M. Murchison, *The Dual Sovereignty Exception to Double Jeopardy*, 14 N.Y.U. Rev. L. & Soc. Change 383 (1986); Evan Tsen Lee, *The Dual Sovereignty Exception to Double Jeopardy: In the Wake of* Garcia v. San Antonio Metropolitan Transit Authority, 22 New Eng. L. Rev. 31 (1987); Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 Am. J. Crim. L. 1 (1992); Sandra Guerra, *The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N.C. L. Rev. 1159 (1995).

[10] Paul Cassell has argued that there is no "ironclad necessity" for following stare decisis for the dual sovereignty exception and that "[t]he Court could probably repudiate the doctrine without much disruption." Cassell, *supra* note 8 at 716-17.

II. THIS CASE IS AN EXCELLENT VEHICLE FOR A FRESH EXAMINATION OF THE DUAL SOVEREIGNTY EXCEPTION.

This is a rare opportunity for the Court to address the dual sovereignty exception in a clean case.

1. Mr. Tyler has preserved his challenge to the dual sovereignty exception at every stage in his case.

Judge Caldwell explicitly found that Mr. Tyler preserved the issue. Pet. App. at 35a n.6 ("Defendant recognizes [dual sovereignty] is the law but makes the argument to preserve the claim that the current law should be changed so that the Double Jeopardy Clause covers trials in state and federal court."). Mr. Tyler also argued the merits of his dual sovereignty challenge on direct appeal, Appellant's Motion to Stay February 2017 Trial at 11-16, *United States* v. *Tyler*, No. 16-4220 (3d Cir. Dec. 13, 2016); Response to Appellee's Motion for Summary Affirmance at 6-10, *United States* v. *Tyler*, No. 16-4220 (3d Cir. Dec. 30, 2016), and again in his petition for rehearing en banc. Pet. App. at 17a-22a. And the government has repeatedly acknowledged Mr. Tyler's preservation of the issue for this Court. Appellee's Response in Opposition to Appellant's Motion to Stay Trial at 15, *United States* v. *Tyler*, No. 16-4220 (3d Cir. Dec. 20, 2016) ("No one is saying that Tyler should be foreclosed from taking his long shot at overthrowing the settled law relating to dual sovereignty. He has not been barred from filing a notice of appeal or, eventually, a petition for certiorari, and he is free to pursue his legal arguments."); *id.* at 20 n.10 (arguing that Mr. Tyler's dual sovereignty challenge "is meant primarily as a vehicle for testing his argument before the Supreme Court").

2. The dual sovereignty exception is the only issue the petition presents.

Throughout the proceedings, the Government relied exclusively on the dual sovereignty exception to defeat Mr. Tyler's double jeopardy claim.[11] See, *e.g.*, Appellee's Motion for Summary Affirmance and to Stay Briefing Schedule at 13-15, *United States* v. *Tyler*, No. 16-4220 (3d Cir. Dec. 20, 2016) ("The Dual Sovereignty Doctrine . . . permits a *retrial*") (emphasis added); Appellee's Response in Opposition to Appellant's Motion to Stay Trial at 13-15, *United States* v. *Tyler*, No. 16-4220 (3d Cir. Dec. 20, 2016); Government's Response to Defendant's Pretrial Motions at 8-9, *United States* v. *Tyler*, No. 1:96-cr-00106-JEJ (M.D. Pa. June 24, 2016), ECF No. 392 ("the dual sovereignty doctrine allows for *re-trial*") (emphasis added). Although there could be some theoretical argument that the state and federal crimes are not the "same offense," the prosecution has never taken that position. Even if it had, that argument could be properly addressed by the district court on remand and is not presented here.

3. Mr. Tyler's federal prosecution exemplifies why the dual sovereignty exception must be revisited.

The federal government has always been aware of the double jeopardy issues in Mr. Tyler's case. AUSA Zubrod obtained a *Petite* waiver approved by the Assistant Attorney General to initiate a "second prosecution" of Mr. Tyler's co-defendant. Pet. App. at 57a-

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[11] Mr. Tyler is no longer pursuing his vacatur argument, leaving the dual sovereignty exception as the sole issue before the Court.

58a; *id.* at 65a.[12] At the outset, Magistrate Judge Smyser expressed grave concerns about the successive prosecution.

> A case like this case where a defendant is being exposed to a *second criminal prosecution* by a different government on the basis of *substantially the same alleged criminal episode* for which the person has been tried and in this case acquitted before another government's judicial system presents questions that are *troublesome* in terms of constitutional questions . . .

Pet. App. at 59a (emphasis added). Judge Smyser's concerns were well-founded. The federal prosecution proceeded because an FBI agent was "troubled" by the result in the state case and sought a "*retrial* on federal charges." *Id.* at 63a (emphasis added). A federal "retrial" was never what the dual sovereignty exception was meant to permit. See, *e.g.*, *Abbate*, 359 U.S. at 203-04 (Black, J., dissenting).

Because the record demonstrates that the federal government used the dual sovereignty exception to get its "second bite at the apple" in this case, *G.P.S. Auto.*, 66 F.3d at 499, it is an excellent vehicle for addressing the question presented.

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[12] The record is unclear as to whether AUSA Zubrod obtained a *Petite* waiver as to Mr. Tyler, who became the target of the investigation after Bell's federal conviction. *Id.* at 63a.

CONCLUSION

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

Respectfully submitted,

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July 27, 2017

Petition Appendix

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16-4220

UNITED STATES OF AMERICA

v.

WILLIE TYLER, a/k/a Little Man

Willie Tyler,
Appellant

(M.D. Pa. No. 1-96-cr-00106-001)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ, KRAUSE, RESTREPO, *GREENBERG, and *FISHER, Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the

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*Hon. Morton I. Greenberg and Hon. D. Michael Fisher votes are limited to panel rehearing only.

panel and the Court en banc, is denied.

BY THE COURT,

s/Patty Shwartz
Circuit Judge

Dated: February 27, 2017

kr/cc: Stephen R. Cerutti, II, Esq.
Ronald A. Krauss, Esq.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

January 3, 2017
CCO-032-E

No. 16-4220

UNITED STATES OF AMERICA

v.

WILLIE TYLER, a/k/a Little Man

Willie Tyler,
Appellant

(M.D. Pa. No. 1-96-cr-00106-001)

Present: FISHER, SHWARTZ and GREENBERG, Circuit Judges

1. Motion by Appellant to Stay February 2017 Trial Based on Appeal Concerning Non-Frivolous Double Jeopardy Arguments;

2. Motion by Appellee for Summary Affirmance;

3. Response by Appellee in Opposition to Motion to Stay;

4. Reply by Appellant to Response to Motion to Stay;

5. Response by Appellant to Motion for Summary Affirmance.

Respectfully,
Clerk/kr

ORDER

The foregoing motion to stay is denied and motion for summary affirmance is granted.

By the Court,

s/Patty Shwartz
Circuit Judge

Dated: January 6, 2017

kr/cc: Stephen R. Cerutti, II, Esq.
Ronald A. Krauss, Esq.

OFFICE OF THE CLERK

MARCIA M. WALDRON

CLERK

UNITED STATES COURT OF APPEALS
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January 6, 2017

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RE: USA v. Willie Tyler
Case Number: 16-4220
District Case Number: 1-96-cr-00106-001

ENTRY OF JUDGMENT

Today, **January 06, 2017** the Court issued a case dispositive order in the above-captioned matter which serves as this Court's judgment. Fed. R. App. P. 36.

If you wish to seek review of the Court's decision, you may file a petition for rehearing. The procedures for filing a petition for rehearing are set forth in Fed. R. App. P. 35 and 40, 3rd Cir. LAR 35 and 40, and summarized below.

Time for Filing:
14 days after entry of judgment.
45 days after entry of judgment in a civil case if the United States is a party.

Form Limits:
3900 words if produced by a computer, with a certificate of compliance pursuant to Fed. R. App. P. 32(g).
15 pages if hand or type written.

Attachments:
A copy of the panel's opinion and judgment only.
Certificate of service.
Certificate of compliance if petition is produced by a computer.
No other attachments are permitted without first obtaining leave from the Court.

Unless the petition specifies that the petition seeks only panel rehearing, the petition will be construed as requesting both panel and en banc rehearing. Pursuant to Fed. R. App. P. 35(b)(3), if separate petitions for panel rehearing and rehearing en banc are submitted, they will be treated as a single document and will be subject to the form limits as set forth in Fed. R. App. P. 35(b)(2). If only panel rehearing is sought, the Court's rules do not provide for the subsequent filing of a petition for rehearing en banc in the event that the petition seeking only panel rehearing is denied.

Please consult the Rules of the Supreme Court of the United States regarding the timing and requirements for filing a petition for writ of certiorari.

Very truly yours,

Marcia M. Waldron

Marcia M. Waldron,
Clerk

By: Kirsi
Case Manager
267-299-4947

NO. 16-4220

IN THE

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

WILLIE TYLER,
Appellant.

On Appeal from the Judgment entered in the U.S. District Court, Middle District of Pennsylvania, on November 15, 2016, at No. 1:96-CR-0106 (Caldwell, J.)

APPELLANT'S PETITION FOR PANEL REHEARING OR REHEARING EN BANC

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,	:	
Appellee,	:	
	:	C.A. No. 16-4220
v.	:	(M.D. Pa. No. 1:096-CR-0106)
	:	(Caldwell, J.)
WILLIE TYLER,	:	
Appellant.	:	

APPELLANT TYLER'S PETITION FOR PANEL REHEARING OR REHEARING EN BANC

Appellant Willie Tyler respectfully requests that the Court grant this Petition for Panel Rehearing or Rehearing En Banc, and in support states:

PRELIMINARY STATEMENT

Because Tyler's Double Jeopardy arguments are sufficiently meritorious to require full briefing and argument, the Panel erred in summarily affirming the District Court's denial of Tyler's Motion to Dismiss the Indictment based on the Double Jeopardy Clause.

This appeal presents two substantial Double Jeopardy Clause issues that deserve more than summary disposition of motion filings, but rather full briefing and argument. First, Tyler's vacatur argument—that the District Court's vacating convictions on Counts II and III constituted an acquittal that constitutionally bars retrial on those Counts—presents a substantial issue involving a novel interpretation of Supreme Court

precedent. Second, Tyler's dual sovereign doctrine argument—that the Constitution should shield him from a third federal trial after a state court jury verdict for the same conduct more than 20 years ago—presents a plausible good faith argument for the reversal of existing law.

Significantly, Tyler presents these arguments in the context of facing a fourth trial for the same alleged criminal conduct—after one state court jury trial, and two federal trial reversals: one as a result of police pre-trial misconduct, and one as a result of a finding Tyler actually innocent of charges alleged in Counts II & III. Indeed, if this case goes to a fourth trial, Tyler intends to establish that Tyler's federal prosecution has been a sham, a nefarious manipulation of federal jurisdiction where there never was any legitimate interest in prosecuting of Tyler that was "genuine and unique to the federal government." Notably, the Government initiated its investigation of Tyler only after the state court jury acquitted him of murder, and never bothered to pursue federal charges against his brother David Tyler, who a state jury convicted of murder. In sum, this federal prosecution never had anything to do with vindicating independent federal interests; rather, the Government was simply unhappy that a state court jury acquitted Willie Tyler of murder.

ARGUMENT

I. Background.

A. Procedural History Before the Current Remand.

A state court jury acquitted Willie Tyler of Doreen Proctor's murder, but found him guilty of conspiracy to intimidate a witness; he was sentenced in June 1993 to two-to-four years, and paroled in July 1994.

In April 1996, a federal Grand Jury, prompted largely by an FBI Agent "troubled" by Tyler's state court murder acquittal, indicted him with witness tampering: (i) by murder (Count II) and (ii) by intimidation (Count III), under both the "official proceedings" and the "investigation-related" provisions of 18 U.S.C. §§ 1512(a)(1) & (b), respectively. Pretrial, Tyler raised Double Jeopardy concerns arising from successive federal prosecution, but the court ruled that argument foreclosed by the "dual sovereign" doctrine. This Court vacated Tyler's conviction in the first federal trial based on police misconduct, *see United States v. Tyler* (*Tyler I*), 164 F.3d 150 (3d Cir. 1998), but affirmed his second trial conviction. *See United States v. Tyler*, 281 F.3d 84 (*Tyler II*) (3d Cir. 2002).

After the Supreme Court decided *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005)(refining scope of "official proceeding" prong of §§ 1512(a)(1),(b)), and *Fowler v. United States*, 563 U.S. 668 (2011)

(refining scope of "investigation-related" prong of §§ 1512(a)(1), (b)), Tyler filed a motion under 28 U.S.C. § 2241, claiming he was convicted for what was now non-criminal conduct. This Court—concluding "these intervening Supreme Court decisions along with the evidence in the record supports Tyler's actual innocence claim", *Tyler III* at 243—remanded.

B. Proceedings On Remand.

On remand, the Government conceded and the District Court found that Tyler was actually innocent of § 1512's "official proceeding" provisions as charged in Counts II and III, and vacated that portion of the conviction. But the District Court found that the record did not conclusively support a finding that Tyler was actually innocent of § 1512's "investigation-related" provisions. Ruling that those charges should be presented to a jury, the District Court ordered a new trial on Counts II and III limited to the investigation-related charges.

Facing a third federal trial for the same offense that a state court jury had acquitted him in 1993, Tyler filed a Motion to Dismiss the Indictment that included, *inter alia*, two Double Jeopardy arguments. The District Court: (i) denied Tyler's Motion (Dist. Ct. Doc. 412, 413); and (ii) granted the Government's motion to find that "any double jeopardy appeal by

Defendant would be frivolous" (thereby precluding a trial stay), stating its intention to schedule trial. (Dist. Ct. Doc. 415). Substantively, the court ruled that Tyler's argument that vacatur of the § 1512 official proceedings charges in Counts II and III necessarily acquitted him—and so with initial jeopardy terminated, retrial was barred on the remaining § 1512 investigation-related charges in Counts II and III—was "well settled" against him. (Dist. Doc. 415 at 4 n.2.) The court also ruled that Tyler's dual sovereign doctrine challenge was foreclosed by Third Circuit and Supreme Court precedent. (Dist. Doc. 415 at 3-4.)

Tyler appealed, invoking interlocutory appellate jurisdiction under *United States v. Wright,* 776 F.3d 134, 140 (3d Cir. 2015)(Pre-trial denial of "colorable" Double Jeopardy claim immediately appealable). Tyler also filed a Motion to Stay Trial pending appeal. The Government moved for summary affirmance. This Court, in a one-sentence Order dated January 6, 2017, summarily denied Tyler's Motion to Stay and granted the Government's Motion for Summary Affirmance.[1]

[1] This Court, by text Order filed January 20, 2017, kindly granted Tyler's motion to extend the time to file a Petition for Rehearing to February 17, 2017.

II. The Double Jeopardy Clause bars another trial on the witness tampering charges in Counts II and III after the District Court, on remand, vacated Tyler's conviction of witness tampering in Counts II and III.

The Double Jeopardy Clause precludes a second trial once a court has found the record evidence insufficient to sustain a jury's verdict of guilt: and "since . . . the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient, the only 'just' remedy available for that court is the direction of a judgment of acquittal." *Burks v. United States*, 437 U.S. 1, 18. The Double Jeopardy Clause:

> forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. This is central to the objective of the prohibition against successive trials. The Clause does not allow the State . . . to make repeated attempts to convict an individual for an alleged offense, since the constitutional prohibition against double jeopardy was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.

Id. at 11 (internal quotations and citations omitted).

In *Burks*, the defendant was convicted of robbing a bank with a dangerous weapon after the jury rejected his defense of insanity. On appeal, the Court of Appeals reversed and remanded for a directed verdict of acquittal, unless the Government was able to present sufficient evidence to carry its burden on the issue of defendant's insanity. The

defendant appealed, arguing that the Court of Appeal's holding was a judgment of acquittal. *Id.* at 2-5. The Supreme Court agreed.

Here, as *in Burks*, the Court of Appeals ruled that the evidence in the record, in light of intervening Supreme Court precedent, supported Tyler's actual innocence claims as to the official-proceeding aspect of the witness tampering offense.[2] Therefore, because this Court ruled that the record evidence was insufficient to support the jury's general verdict of guilty, a retrial would violate Double Jeopardy under *Burks*.

Further, the Double Jeopardy Clause bars retrial on Counts II and III because the District Court, on remand, directed acquittal on Counts II and III—even if the directed acquittal was based on Tyler's actual innocence under only one of the two theories of federal nexus, *Arthur Andersen*'s "official proceeding" theory. Under *Sanabria v. United States*, 437 U.S. 4 (1978), once this Court ruled that Tyler was actually innocent of one of the witness tampering activities in Counts II and III, the Double

[2] While this Court found that Tyler established his actual innocence only on the official proceeding provisions of the witness tampering statute, the Third Circuit found that "as it now stands, we conclude that there is enough evidence to support Tyler's claim that he is actually innocent of violating § 1512's investigation-related communication provisions." *Tyler III* at 252. The Government did not present any additional evidence on remand, but chose to rely solely on the extant record.

Jeopardy Clause bars giving the Government another chance to prove Tyler's guilt on the other charged witness tampering activities—the "investigation-related" charges in Counts II and III.

In *Sanabria*, the Government charged, much like in this case, that defendant violated an illegal gambling business statute in two ways: by engaging in illegal numbers betting, and by engaging in horse race betting. The district court struck the evidence related to numbers betting (because the statute, properly construed, did not prohibit numbers betting) and so dismissed the numbers betting theory, and also entered a judgment of acquittal on the horse betting theory for lack of sufficient evidence related to horse race betting. The Government appealed. The Court of Appeals vacated the judgment of acquittal and remanded for a new trial solely on the illegal numbers betting conduct. *See id.* at 54-55.

The Supreme Court reversed, holding that Double Jeopardy barred retrial on the illegal numbers conduct. The Court reasoned that the indictment in *Sanabria* charged only the singular conduct of running an illegal gambling business and the district court entered judgment of acquittal on the entire count, without distinguishing between horse race betting and numbers betting. *See Sanabria* at 66-67. Even if the district

court simply "dismissed" the numbers-betting-as-illegal-gambling-business charge, a retrial would still subject defendant to a second trial on the "same offense"—illegal gambling—of which he had been acquitted. *Id.* at 69. Once the legislature defined an offense by the "allowable unit of prosecution"—in *Sanabria,* illegal gambling—that definition determines the scope of protection afforded by a prior conviction or acquittal. *Id.* at 69-70. And because the singular allowable unit of prosecution in *Sanabria* was participation in an illegal gambling business, a successive prosecution for illegal gambling, even if involving only the numbers betting activities, was barred by Double Jeopardy. *See id*. at 70-72.

In this case, the "allowable unit of prosecution" in Count II is the conduct of "killing of Doreen Proctor," and the "allowable unit of prosecution" in Count III is the conduct of "intimidation and use of physical force" toward Ms. Proctor, and each count charges that Tyler's illegal conduct was to prevent 1) Ms. Proctor's attendance at a federal proceeding; or 2) Ms. Proctor's communication to a federal law enforcement officer. But Tyler has been acquitted of killing or intimidating Ms. Proctor to prevent her attendance at a federal proceeding, and thus has been acquitted on Count II and Count III. The

District Court's finding of actual innocence on the official proceeding aspect of the witness tampering charges in Counts II and III means that a successive prosecution for the investigation-related aspect of the witness tampering charges in Counts II and III are similarly barred. Both Counts II and III were drafted to charge a single criminal activity—witness tampering—that could be committed in two different ways, so that when the District Court ruled Tyler was actually innocent on the charges relating to the *Arthur Andersen* official-proceeding aspect of witness tampering, Double Jeopardy barred retrial on the charges relating to the *Fowler* investigation-related aspect of witness tampering in both Counts II and III.

The Double Jeopardy Clause does not permit the Government here to get what is a fourth bite at the trial apple, to prosecute Tyler on different theories for a violation of the same statute for the same activity.

III. The Double Jeopardy Clause bars retrial because the federal § 1512 charges are for the same offenses charged in his prior state court trial.

A third federal trial for the same offenses that a Pennsylvania jury rendered a verdict—finding him innocent of murder but guilty of conspiracy to intimidate—also violates the Double Jeopardy Clause.

True, this Court has stated that "a federal prosecution arising out of the same facts which had been the basis of a state prosecution is not barred by the double jeopardy clause." *United States v. Pungitore*, 910 F.2d 1084, 1105 (3d Cir. 1990); *Accord Heath v. Alabama*, 474 U.S. 82 (1985) (dual sovereignty doctrine permits successive prosecutions by state and federal governments for the same conduct notwithstanding Double Jeopardy Clause). But jurists in this Court and the Supreme Court have expressed support for reconsidering the dual sovereign doctrine; with respect, this Court should now consider taking this opportunity to reaffirm that view.

The Double Jeopardy Clause protects a person from defending against prosecution for the same offense twice. No sound basis in law or policy supports permitting a second prosecution for the same offense merely because the second prosecution is brought by a different sovereign. But it does unduly benefit federal prosecutors, who enjoy not only the perspective of hindsight, but greater resources to develop evidence and a larger jury pool from which to select a more favorable jury. That undue benefit is particularly evident where, as here, Tyler's conduct raised no specific federal concerns, and the Government's impetus to bring federal charges was largely an idiosyncratic and personal sense of insufficient

moral retribution: a federal agent was "troubled" by Tyler's state court murder acquittal.

Supreme Court dissatisfaction with dual sovereign doctrine became evident in *Bartkus v. Illinois*, 359 U.S. 121 (1959), where a federal bank robbery trial ended in acquittal and a state robbery trial on the same charges ended in conviction. Although a five-four majority found no Double Jeopardy violation, Justice Black—joined by Chief Justice Warren, Justice Douglas, and Justice Brennan—wrote in dissent that the majority made too much of the history, and too little of the actual wording and spirit, of the Double Jeopardy Clause:

> I have been shown nothing in the history of our Union, in the writings of its Founders, or elsewhere, to indicate that individual rights deemed essential by both State and nation were to be lost through the combined operations of the two governments. Nor has the Court given any sound reason for thinking that the successful operation of our dual system of government depends in the slightest on the power to try people twice for the same act.

Bartkus, 359 U.S. at 1455-56 (Black, J., dissenting). Similarly, in the companion case, Justice Black wrote:

> I am not convinced that a State and the Nation can be considered two wholly separate sovereignties for the purpose of allowing them to do together what, generally, neither can do separately.

Abbate v. United States, 359 U.S. 187, 207 (1959) (Black, J., dissenting).

More recently, Justice Marshall, dissenting in *Heath*, wrote that "despite the independent sovereign status of the Federal and State Governments, courts should not be blind to the impact of combined federal-state law enforcement on an accused's constitutional right". 474 U.S. at 102 n.2 (Marshall, J., dissenting). And most recently, in *Puerto Rico v. Sanchez,* 136 S. Ct. 1863 (2016)—where the Supreme Court found that Double Jeopardy barred Puerto Rico and the United States from successively prosecuting a person for the same conduct under equivalent criminal laws, *id*. at 1865—Justice Ginsburg's concurrence (with Justice Thomas joining) invited a challenge to the dual sovereign doctrine:

> I write only to flag a larger question that bears fresh examination in an appropriate case. The double jeopardy proscription is intended to shield individuals from the harassment of multiple prosecutions for the same misconduct. *Green v. United States*, 355 U.S. 184, 187 (1957). Current "separate sovereigns" doctrine hardly serves that objective. States and Nation are "kindred systems," yet "parts of ONE WHOLE." THE FEDERALIST No. 82, p. 245 (J. Hopkins ed., 2d ed. 1802)(reprint 2008). Within that whole is it not "an affront to human dignity," *Abbate v. United States*, 359 U.S. 187, 203 (1959)(Black, J. dissenting), "inconsistent with the spirit of our Bill of Rights," Developments in the Law – Criminal Conspiracy, 72 HARV. L. REV. 920, 968 (1959), to try or punish a person twice for the same offense? **Several jurists and commentators have suggested that the question should be answered with a resounding yes … The matter warrants attention in a future case in which a defendant faces successive prosecutions by part of the whole USA.**

136 S. Ct. at 1877 (emphasis added).

This Court has echoed these concerns, consistently expressing

dissatisfaction "with the Supreme Court's application of the dual sovereign principle . . . ." *United States v. Wilson*, 413 F.3d 382, 389 (3d Cir. 2005)(citing *United States v. Grimes*, 641 F.2d 96, 100-04 (3d Cir. 1981)(questioning continuing vitality of that jurisprudence particularly because seminal cases were decided before *Benton v. Maryland*, 395 U.S. 784 (1969), which "unqualifiedly held that the Fifth Amendment Double Jeopardy provision applies to the states.")).

In *Wilson,* Judge Ambro's majority opinion noted with favor Judge Aldisert's scholarly dissent: "our dissenting colleague may be correct that the time has come for the Supreme Court to revisit [the dual sovereign doctrine], particularly in light of *Smith v. Massachusetts*, 543 U.S. 462 (2005), in which the Court revisited the scope of the Double Jeopardy Clause." *Id.* And Judge Adams similarly stated 24 years earlier in *Grimes* that he was "troubled by the double jeopardy issue," 641 F.2d at 97, concluding that:

> a reexamination of *Bartkus* may be in order, since questions may be raised regarding both the validity of this formalistic conception of dual sovereignty and the continuing viability of the opinion's interpretation of the Double Jeopardy Clause with respect to the states. **Moreover, the recent expansion of federal criminal law jurisdiction magnifies the impact of *Bartkus* and *Abbate,*** thus rendering a reassessment of those decisions timely from a practical standpoint as well.

Id. at 101 (emphasis added). More specifically, Judge Adams noted that:

> an important predicate of the *Bartkus* opinion that the Fifth Amendment Double Jeopardy provision does not bind the states has been undercut by subsequent constitutional developments. *Benton v. Maryland*, 395 U.S. 784 (1969), unqualifiedly held that the Fifth Amendment Double Jeopardy provision applies to the states. *Benton* thus weakens the theoretical basis of *Bartkus* . . . . The rationale of *Benton* also may diminish the practical reasoning underpinning the *Bartkus* opinion: that states are the most competent authorities to deal with the problem of double jeopardy insofar as its proper solution depends on the scope of the ban against reprosecution that has been historically granted in the state. 359 U.S. at 137-38.

Id. at 101-02.

Tyler now asserts a plausible good faith reversal of existing law at the express invitation of eminent jurists, past and present. Respectfully, this appeal, after full briefing and argument, would provide this Court with what the Court might consider to be a welcome opportunity to restate in detail its reservations about the dual sovereign doctrine, just as this Court did in *Wilson* and *Grimes*.

CONCLUSION

WHEREFORE, for all the foregoing reasons, Appellant Willie Tyler respectfully requests that this Court grant his Petition for Rehearing, either by the Panel or En Banc, as the Court deems proper.

Respectfully submitted,

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Date: February 16, 2017

LAR 35.1 Statement of Counsel for Panel Rehearing or Rehearing En Banc

I, Ronald A. Krauss, Esq., Asst. Federal Public Defender–Appeals, express a belief, based on a reasoned and studied professional judgment, that the Panel's decision warrants rehearing because it is contrary to two decisions of the United States Supreme Court—*Burks v. United States*, 437 U.S. 1 (1978), and *Sanabria v. United States,* 437 U.S. 54 (1978)—and that this appeal involves a question of exceptional importance, *i.e.*, whether a defendant's retrial on two counts of obstruction of justice based on two legal theories is barred when the District Court has vacated his conviction on the two counts after finding him legally innocent of both Counts based on one of those legal theories.

Further, the Panel's decision was by Summary Affirmance, which did not permit defendant the opportunity to fully set forth his arguments as in the normal course of appellate briefing and argument.

/s/ Ronald A. Krauss
RONALD A. KRAUSS, ESQ.

Date: February 16, 2017

CERTIFICATION OF BAR MEMBERSHIP IDENTICAL TEXT, VIRUS CHECK, AND WORD COUNT

I, Ronald A. Krauss, Esquire, Assistant Federal Public Defender, certify that:

1) I am a member in good standing of the bar of this Court;

2) The text of the electronic format of the Petition for Panel Rehearing or Rehearing En Banc is identical to the hard copy format;

3) A virus check was performed on the Petition for Panel Rehearing or Rehearing En Banc using Symantec Endpoint Protection, last update was February 15, 2017, and no virus was detected;

4) This Petition for Panel Rehearing or Rehearing En Banc contains 3856 words.

I make this combined certification under penalty of perjury, pursuant to 28 U.S.C. § 1746.

/s/ Ronald A. Krauss
RONALD A. KRAUSS, ESQ.

Date: February 16, 2017

CERTIFICATE OF SERVICE

I, Ronald A. Krauss, Esq., Assistant Federal Public Defender, certify that I caused to be served on this date a hard copy of the attached Petition for Panel Rehearing or Rehearing En Banc via Electronic Case Filing, and/or by placing a copy in the United States mail, first class in Harrisburg, Pennsylvania, and/or by hand delivery, addressed to the following:

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Date: February 16, 2017

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	
	:	
v.	:	CRIMINAL NO. 1:96-CR-106
	:	
WILLIE TYLER,	:	(Judge Caldwell)
Defendant	:	

M E M O R A N D U M

I. *Introduction*

After a remand from the Third Circuit, we scheduled this case for another trial. Currently before the court are Defendant's motions (set forth in one document) to dismiss the indictment, arguing that retrial is barred by the Sixth Amendment's Confrontation Clause, the Fifth Amendment's Double Jeopardy Clause, and the Fifth Amendment's Due Process Clause. For the reasons that follow, the motions will be denied.

II. *Background*

In August 2000, defendant, Willie Tyler, was convicted of obstructing justice by tampering with a witness by murder, 18 U.S.C. § 1512(a)(1), and by tampering with a witness by intimidation and threats. *Id.* § 1512(b). The charges arose from the murder of Doreen Proctor on April 21, 1992, who was to be a witness later that day in a state-court

drug trial against Defendant's brother, David Tyler. Defendant was sentenced to life imprisonment.[1]

His convictions were upheld on direct appeal, *see United States v. Tyler*, 281 F.3d 84 (3d Cir. 2002)("*Tyler* 2002"), and survived several postconviction challenges, including one under 28 U.S.C. § 2255. (Doc. 280, memorandum and order of August 11, 2003, denying Defendant's section 2255 motion).

In 2009, Defendant initiated proceedings cognizable under 28 U.S.C. § 2241, contending that under *Arthur Andersen LLP v. United States*, 544 U.S. 696, 125 S.Ct. 2129, 161 L.Ed.2d 1008 (2005), and *Fowler v. United States*, 563 U.S. 668, 131 S.Ct. 2045, 179 L.Ed.2d 1099 (2011), he was convicted for conduct that later changes in the law established was not criminal. On March 20, 2012, we denied relief. *United States v. Tyler*, 2012 WL 951479 (M.D. Pa.). On appeal, the Third Circuit reversed and remanded, requiring that Defendant be given the opportunity to show that under *Arthur Andersen* and *Fowler* he was actually innocent of the obstruction-of-justice offenses. *United States v. Tyler*, 732 F.3d 241 (3d Cir. 2013)("*Tyler* 2013").

In pertinent part, the government organized the indictment as follows. Count II charged one offense, obstruction of justice under 18 U.S.C. § 1512(a)(1) by tampering with a witness by murder. The murder was to prevent either one of two things, as the statutory language required: (1) the victim's attendance at future criminal

[1] This was Defendant's second federal trial. Defendant had been convicted in August 1996, but after an appeal, *United States v. Tyler*, 164 F.3d 150 (3d Cir. 1998), we granted him a new trial.

proceedings (the official proceeding provision, subsection (a)(1)(A)), and (2) the victim's communication to a law enforcement officer of information relating to the possible commission of a federal offense (the investigation-related communications provision, subsection (a)(1)(C)). Count III charged one offense, obstruction of justice under 18 U.S.C. § 1512(b) by tampering with a witness by intimidation and threats. Like Count II, the conduct was to prevent either one of two things, as the statutory language required: (1) the victim's attendance at future criminal proceedings (the official proceeding provision, subsection (b)(2)(D)), and (2) the victim's communication to a law enforcement officer of information relating to the possible commission of a federal offense (the investigation-related communications provision, subsection (b)(3)). Defendant was found guilty of both offenses on a general verdict.

On remand, the parties briefed whether Defendant could show that he was actually innocent of conduct that would satisfy either of these provisions and hence show he was innocent of the obstruction-of-justice offenses. As part of its briefing, the government conceded that, in light of the changes in the pertinent law, it could no longer prove Defendant's guilt under the official proceeding provision. *United States v. Tyler*, 35 F. Supp. 3d 650, 653 (M.D. Pa. 2014)("*Tyler* 2014"). In regard to the other provision, the investigation-related communications provision, we concluded he had not shown that he was actually innocent of conduct that would satisfy that provision. *Id.* at 656. In accord with the Third Circuit's instructions, once we decided Defendant had not shown his actual innocence on both provisions, we vacated the convictions on both Counts II and III and

ordered a new trial on those counts based on a violation of the investigation-related communications provision. *Id.*

Defendant then filed his currently pending pretrial motions to dismiss the indictment, arguing that he should not be subjected to another trial.

III. *Discussion*

A. *The Confrontation Clause Claim*

Defendant contends the Sixth Amendment's Confrontation Clause bars a retrial because the government is relying on a single hearsay statement supposedly made by the victim Doreen Proctor to a law-enforcement officer as the sole proof for the investigation-related communications provision. And since this hearsay statement is the sole proof, he cannot be retried.

As noted, we have decided that a new trial should take place on both Counts II and III based on a violation of the investigation-related communications provision. In the language of the statute, that provision requires, in relevant part, that the government show that the obstruction of justice (either by murder or intimidation) was intended to "prevent the communication by any person to a law enforcement officer . . . of the United States of information relating to the commission or possible commission of a Federal offense . . . ." 18 U.S.C. § 1512(a)(1)(C)(murder) and 1512(b)(3)(intimidation). In *Fowler*, the Supreme Court held that "'in a case . . . where the defendant does not have particular federal law enforcement officers in mind[ ] the Government must show *a*

reasonable likelihood that, had . . . the victim communicated with law enforcement officers, at least one relevant communication would have been made to a federal law enforcement officer.'" *Tyler* 2013, 732 F.3d at 248 (quoting *Fowler*, 563 U.S. at 677, 131 S.Ct. at 2052)(emphasis in *Fowler*). "[T]he Government must show more than 'a mere possibility that a communication would have been with federal officials' and 'that the likelihood of communication to a federal officer was more than remote, outlandish, or simply hypothetical.'" *Id.* (quoting *Fowler*, 563 U.S. at 676, 678, 131 S.Ct. at 2051, 2052).

In the instant case, as we noted in *Tyler* 2014, the government's showing that Doreen Proctor would have had at least one relevant communication with a federal law enforcement officer would stem from the testimony of David Fones, a narcotics detective with the Borough of Carlisle Police Department. As he testified at Defendant's second federal trial in August 2000, Fones said that Proctor told him that David Tyler (Defendant's brother) had a source for cocaine in New York City, that David Tyler had ties to "various Jamaicans in the Carlisle and Adams County area and that . . . [David Tyler] also went to Jamaica himself." (Doc. 337-3, ECF pp. 8–9). Fones would have given this information to Ronald Diller, a state investigator who was a federal law enforcement officer by virtue of being an adviser or consultant to the DEA.[2] In turn, Diller testified that he would have debriefed Proctor and that he intended to refer her to the DEA at the time of her murder for use as a witness. *Tyler* 2014, 35 F. Supp. 3d at 655.

[2] A federal law enforcement officer is defined in part as a person "serving the Federal Government as an adviser or consultant . . . authorized under law to engage in or supervise the prevention, detection, investigation, or prosecution of an offense." 18 U.S.C. § 1515(a)(4)(A).

Defendant contends that Fones's hearsay statement is inadmissible under the Confrontation Clause in light of *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). In *Crawford*, the Supreme Court held that under the Confrontation Clause testimonial statements of a witness who does not appear at trial are only admissible when the witness is unavailable and the defendant has had a prior opportunity to cross-examine her. *Id.* at 59, 124 S.Ct. at 1369. Defendant points out that he has had no prior opportunity to cross-examine Proctor, so he argues it would violate his right to confront the witnesses against him if Fones were allowed to testify about what Proctor allegedly told him.

In opposition, the government contends that Fones's hearsay statement is admissible because it would not be admitted for the truth of the matter it asserts; the government would not be using the statement to show that David Tyler actually had a source of cocaine in New York City, that he actually had ties to various Jamaicans in the Carlisle and Adams County area and that he had actually gone to Jamaica himself. Instead, it would be offered for the simple fact that Proctor had made the statement, which would support the government's contention that, as a result, she would have made at least one communication to a federal law enforcement officer. As such, the statement present no Confrontation Clause issue; *Crawford* itself recognizes that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Id.* at 59 n.9, 124 S.Ct. at 1369 n.9.

The government also points out Defendant had previously argued that Fones's statement was inadmissible, on the basis that it was hearsay, and that the Third Circuit rejected this argument, reasoning that the statement was admissible under an exception to the hearsay rule for a verbal act. The Third Circuit stated:

> The statements were offered only to demonstrate that federal officials had jurisdiction to initiate a federal drug investigation. The hearsay rule excludes "verbal acts," statements which themselves "affect[ ] the legal rights of the parties or [are] circumstance[s] bearing on conduct affecting their rights." fed. R. Evid. 801(c) advisory committee's note. In this sense, the veracity of Proctor's statement to Fones was irrelevant. Even if David Tyler did not actually operate his drug business outside of Pennsylvania, as Proctor indicated, Proctor's statement provided a jurisdictional basis for initiating a federal investigation into Tyler's activities. As such, the statements were not hearsay. *Cf. Kulick v. Pocono Downs Racing Ass'n, Inc.,* 816 F.2d 895, 897 n.3 (3d Cir. 1987)(testimony of track president's statement not hearsay where not offered to prove truth of its assertions but simply to demonstrate state action).

Tyler 2002, 281 F.3d at 98. Likewise, here Fones's statement is admissible to show that Proctor would have communicated with a federal law-enforcement officer, regardless of whether Proctor's statement was true or not.

Defendant argues that this hearsay analysis is no longer true in light of the Supreme Court's subsequent decisions in *Fowler* and *Crawford*. Defendant contends:

> [I]n light of *Fowler* and *Crawford*, the truth of this single, unsubstantiated, and contradicted statement is critical to the Government's burden of proving an element of the offense, *i.e*., whether there was a possibility of a future federal investigation in which Ms. Proctor might have played a role. This was clearly a fact introduced for the truth of that possibility arising. Indeed, the fact that the Government

> asked two trial witnesses to assume its truth demonstrates that the Government offered the statement for the truth of the matter asserted. *See* (N.T. Humphreys, July 31, 2000, pgs. 158-159; N.T. Diller Deposition, July 28, 2000, pgs. 11-12). Therefore, it cannot be just a "verbal act," and is, in fact, inadmissible hearsay as well as inadmissible under *Crawford.*

(Doc. 376, Def.'s Br. in Support, ECF p. 14 n.5).

We reject this argument for the following reasons. First, Defendant provides us with no evidence Fones's statement was contradicted. Second, the statement will not be admitted to show there was a possibility of a future federal investigation in which Proctor might have played a role but to show that she would have made at least one communication to a federal law enforcement officer. Third, the cited testimony of the two trial witnesses (Doc. 400-2, ECF pp. 2-3, testimony of Humphreys; doc. 353-1, ECF pp. 11-12, Diller deposition) does not establish, without more context, that the government offered the statement to prove the truth of the matter asserted. In any event, since Defendant is going to be retried, the remedy would not be to exclude an admissible piece of evidence but for Defendant to object whenever at the upcoming trial the government does try to use Fones's hearsay improperly.[3]

We conclude that admission of Fones's statement would not violate the Confrontation Clause.[4]

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[3] For this reason, we also reject Defendant's citation in his reply brief to other parts of the record where the prosecutor allegedly used Fones's hearsay as truth of the matter asserted.

[4] Defendant also argues that it was unlikely that Proctor would have cooperated with law enforcement after the state-court trial for David Tyler because she "was finished with law enforcement cooperation." (Doc. 376, Def.'s Br. in Support, ECF p. 14, n.6). This argument

B. *The Double Jeopardy Claim*

Defendant contends that the Fifth Amendment's Double Jeopardy Clause bars another trial on two grounds. First, in May 1993, he was already subjected to trial in Pennsylvania state court for criminal homicide and lesser charges.[5] We reject this argument because "the dual sovereignty principle" states that "prosecution of the same crime in both the federal and state systems does not violate the Double Jeopardy Clause." *United States v. Wilson*, 413 F.3d 382, 389 (3d Cir. 2005).[6]

Second, citing *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978), Defendant contends the Double Jeopardy Clause bars subjecting him to another trial after we vacated the convictions on Counts II and III. According to Defendant, the vacatur of the convictions was the equivalent of granting a motion for a judgment of acquittal on the basis of insufficient evidence, and such an acquittal bars a

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goes to the strength of the government's case, not to the admissibility of Fones's hearsay. Additionally, while Proctor testified at one state-court trial that her involvement in undercover work was limited to the four controlled drug buys she had made and that she was "out of the business" of being a government informant and witness, (Doc. 353–6, ECF pp. 27–28), as we noted in *Tyler* 2014, this testimony appears to relate only to her undercover work, not to being interviewed about information Proctor had already acquired in making her controlled buys. *Tyler* 2014, 35 F. Supp. 3d at 656. *See also Tyler* 2013, 732 F.3d at 244-45 ("At the time of her death, Proctor no longer engaged in undercover operations but had continued to provide Fones with information on the drug market, including local drug activity in Harrisburg and non-local activity about David's drug sources in New York and Jamaica.").

[5] He was found not guilty of criminal homicide but guilty of conspiracy to intimidate a witness. He received two to four years in prison.

[6] Defendant recognizes this is the law but makes the argument to preserve the claim that the current law should be changed so that the Double Jeopardy Clause covers trials in state and federal court.

retrial under the Double Jeopardy Clause. Defendant maintains it is immaterial that we concluded there was sufficient evidence for a trial on both Counts on the basis of the investigation-related communications provision. The key ruling was our determination that Defendant had established his actual innocence in regard to the official proceeding provision. Once the government had failed to present sufficient evidence on the latter theory of criminal liability, Defendant maintains that under *Sanabria v. United States*, 437 U.S. 54, 98 S.Ct. 2170, 57 L.Ed.2d 43 (1978), the Double Jeopardy Clause bars giving the government another chance to prove Defendant's guilt on another theory.

Burks and *Sanabria* have some superficial resemblance to the instant case. *Burks* held that an appellate court's reversal of a conviction based on insufficient evidence was the equivalent of a trial court's grant of a judgment of acquittal and barred another trial on Double Jeopardy grounds. Burks, 437 U.S. at 5-6, 17-18, 98 S.Ct. at 2144, 2150-51. Similarly, it could be argued here that after remand from the Third Circuit our vacatur of the convictions on Counts II and III was the equivalent of a judgment of acquittal.

In *Sanabria,* the defendant was charged with a single offense, conducting an illegal gambling business, by engaging in horse betting and numbers betting. In what was assumed to be an erroneous interpretation of the indictment, the trial court struck the evidence related to numbers betting. The court also entered a judgment of acquittal based on the lack of evidence the defendant had engaged in horse betting. The Supreme Court held that the Double Jeopardy Clause barred a second trial on the

numbers theory of liability for two reasons. First, the indictment, as drafted, charged only one offense, conducting an illegal gambling business, and the judgment of acquittal was entered on the entire count, without distinguishing between theories of liability. 437 U.S. at 66-67, 98 S.Ct. at 2180. Second, even if the trial court's action meant that only the numbers theory was dismissed, the "allowable unit of prosecution" in the statute was an "illegal gambling business," which meant that successive prosecutions on a horse betting theory and a numbers theory was barred, as the only offense designated in the statute was conducting an illegal gambling business. *Id.* at 70-72, 98 S.Ct. at 2182-83.

Similarly, it could be argued here that our decision that there was insufficient evidence on the official proceeding theory means that neither count can be retried under the investigation-related communications theory. Both counts were drafted to charge a single offense that could be committed in two different ways, so that when we decided there was insufficient evidence on one of the ways, retrial was barred on either count on the other way.

We reject Defendant's position. *Burks* and *Sanabria* are distinguishable, for a reason the government advances. Those cases dealt with insufficient evidence to support the conviction. In the instant case, as the government observes, the convictions were vacated not because of insufficient evidence but because of errors of law in the previous trial in light of *Arthur Andersen* and *Fowler.* In regard to the official proceeding theory, the error was in not requiring the government to show that Defendant contemplated a particular federal proceeding. *Tyler* 2013, 732 F.3d at 250-51. In regard

to the investigation-related communications theory, the error was in not requiring the government to show a reasonable likelihood that at least one of the victim's communications with law enforcement would have been with a federal law enforcement officer. *Id.* at 252. In remanding for further proceedings, the Third Circuit recognized that what was involved was error of law. *Id.* at 253 ("A legal theory is invalid when, as here, 'the indictment or the district court's jury instructions are based on an erroneous interpretation of law or contain a mistaken description of the law.'" (quoted case omitted). We add that our order requiring retrial on both counts under the investigation-related communications theory complies with the Third Circuit's instructions on what to do on remand. *Tyler* 2014, 35 F. Supp. 3d at 656 (citing *Tyler* 2013, 732 F.3d at 253).

"[T]he Double Jeopardy Clause's general prohibition against successive prosecutions does not prevent the government from retrying a defendant who succeeds in getting his first conviction set aside, through direct appeal or collateral attack, because of some error in the proceedings leading to conviction." *Lockhart v. Nelson*, 488 U.S. 33, 38, 109 S.Ct. 285, 289, 102 L.Ed.2d 265 (1988). That is exactly what happened here. *Burks* itself recognizes this rule. 437 U.S. at 14, 98 S.Ct. at 2149 (the principle that the Double Jeopardy Clause does not bar retrial of "a defendant whose conviction was set aside because of an *error in the proceedings* leading to conviction is a well-established part of our constitutional jurisprudence")(internal quotation marks and quoted case omitted)(emphasis in original). *See also United States v. Scott*, 437 U.S. 82, 90-91, 98 S.Ct. 2187, 2193-94, 57 L.Ed.2d 65 (1978)("The successful appeal of a judgment of

conviction, on any ground other than the insufficiency of the evidence to support the verdict [citing *Burks*] poses no bar to further prosecution on the same charge."). *Burks* is the exception to this rule. *Lockhart*, 488 U.S. at 39, 102 L.Ed.2d at 290. And *Sanabria* dealt with the opposite situation, an appeal by the government from the trial court's entry of a judgment of acquittal, "when a defendant [who] has been acquitted at trial . . . may not be retried on the same offense, even if the legal rulings underlying the acquittal were erroneous." *Sanabria*, 437 U.S. at 64, 98 S.Ct. at 2179.

Retrial is not barred after a conviction is vacated for trial error because it serves the interest of the defendant in a fair trial free from error and it serves society's interest in punishing the guilty. *McMullen v. Tennis*, 562 F.3d 231, 238 (3d Cir. 2009)(quoting *Burks*). Retrial is barred after a conviction is vacated for insufficient evidence (1) because it serves the Double Jeopardy Clause's purpose of prohibiting the government from using a second trial to submit evidence it should have supplied at the first trial and (2) because the government cannot complain that it was prejudiced when it was given one fair opportunity to offer its proof. *Id.* at 237. The latter circumstances are not implicated here.

Because Defendant's convictions on Counts II and III were vacated after his successful appeal raising legal error, the Double Jeopardy Clause does not bar retrial on those counts based on the investigation-related communications provision.

C. *The Due Process Claim Based on Outrageous Government Conduct*

Defendant claims that the government's conduct in this case is outrageous and that the Due Process Clause bars any further prosecution. The Due Process Clause prohibits a defendant from being "convicted of a crime in which police conduct was 'outrageous.'" *United States v. Twigg*, 588 F.2d 373, 379 (3d Cir. 1978). The conduct must be "shocking, outrageous and clearly intolerable." *United States v. Nolan-Cooper*, 155 F.3d 221, 231 (3d Cir. 1998)(quoted case omitted). This "principle is to be invoked only in the face of 'the most intolerable government conduct.'" *United States v. Lakhani*, 480 F.3d 171, 180 (3d Cir. 2007)(quoted case omitted).

Although the defense is typically applied to the government's egregious involvement in the crime itself, *see*, *e.g.*, *United States v. Pitt,* 193 F.3d 751, 759-62 (3d Cir. 1999), Defendant applies it here to allegedly improper conduct of the prosecutor committed in two ways.

First, according to Defendant, the prosecutor violated due process when he "prompted" Ronald Diller to testify at the August 2000 trial that he was an adviser or consultant to the DEA, thereby providing evidence satisfying the requirement that the victim would have communicated with a federal law enforcement agent. Defendant asserts that the record existing before the August 2000 trial took place establishes that Diller was never an adviser or consultant. Defendant charges that the government had Diller testify in this way "to create the required federal jurisdiction where none existed." (Doc. 376, Def.'s Br. in Supp., ECF p. 26).

We disagree. Upon remand from the Third Circuit, we reviewed the evidence to support the contention that Diller was an adviser or consultant to the DEA, as part of a broader inquiry into whether Defendant had shown he was actually innocent of Counts II and III because his conduct did not violate the investigation-related communications provision. *Tyler* 2014, 35 F. Supp. 3d at 654-56. None of this evidence supports the notion that the government invented Diller's status as an adviser or consultant.

Defendant asserts the Third Circuit stated that Diller was not an adviser or consultant, quoting from *Tyler* 2013, 732 F.3d at 244, where the court observed that Diller said he had "borrowed" the terms "adviser" or "consultant" from an affidavit of an Assistant United States Attorney. We have already rejected this argument. *Tyler* 2014, 35 F. Supp. 3d at 656 ("We disagree that the Third Circuit said Diller was not an adviser or consultant for the reasons given. The court was merely describing his testimony.").

Defendant argues that the prosecution committed outrageous conduct in a second way, by intentionally failing to disclose to him before the August 2000 trial exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The exculpatory evidence was a statement from a witness named Mark Spotz, given to the FBI on December 9, 1997, long before the August 2000 trial, but not disclosed to Defendant until April 19, 2016, as part of pretrial discovery for the upcoming trial.

In the statement, Spotz said he had provided the shotgun used in killing the victim and that he and his brother had test-fired the gun beforehand. He also said that on May 27, 1992, he went with a Pennsylvania State Trooper to the area where they test-fired the gun. The trooper found two spent shotgun shells. The trooper "put one of the shells in his pocket and indicated, officially, that he only found one shell." (Doc. 375-1, FBI Form 302, ECF p. 2; Doc. 392-1, ECF p. 102). "Spotz stated that he believes that [the trooper] substituted the shell which he placed into his pocket with the shell found at the murder scene thereby enabling the State Police to make a ballistic match-up of the two shells." (Doc. 375-1, FBI Form 302, ECF p. 2).

Defendant contends this was exculpatory evidence under *Brady* because both Spotz at Defendant's state-court trial and the trooper testified that the trooper found only one shotgun shell that had been test-fired. This led Defendant to comply with the government's request to stipulate to the chain of custody concerning the shotgun shell found at the murder scene when the government had information casting doubt on the chain of custody, that the shell supposedly found at the murder scene was actually recovered from the area where the shotgun had been test-fired.

In opposition, the government points out that any *Brady* claim would be meritless or moot as Defendant has been awarded a new trial and can make use of the evidence that has now been made available to him. The government also argues that Defendant has failed to establish a *Brady* claim because he has failed to show prejudice.

Finally, the government contends its conduct in failing to disclose the evidence before the August 2000 trial was not outrageous.

We agree with the government that Defendant has failed to establish a *Brady* claim or that its conduct in failing to disclose the evidence at issue was such that it should be barred from retrying Defendant.

Defendant has failed to establish a *Brady* claim. A *Brady* claim has three elements. "First, the evidence must be favorable to the accused, either because it is exculpatory, or because it is impeaching." *Dennis v. Secretary, Pennsylvania Dep't of Corr.*, 834 F.3d 263, 284 (3d Cir. 2016)(en banc)(internal quotation marks and quoted case omitted). "Second, it must have been suppressed by the State, either willfully or inadvertently." *Id.* at 283-84 (internal quotation marks and quoted case omitted). "Third, the evidence must have been material such that prejudice resulted from its suppression." *Id.* at 285. "The touchstone of materiality is a reasonable probability of a different result" in the case from disclosure of the suppressed evidence. *Id.* (internal quotation marks and quoted case omitted).

Here, as the government points out, Defendant has failed to argue that any prejudice resulted from the government's failure to disclose the evidence earlier; Defendant has failed to argue that there was a reasonable probability of a different result.

He has only argued that he would not have stipulated to the chain of custody for the shotgun shell found at the murder scene.[7]

Defendant has also failed to establish the intentional conduct that would justify barring retrial based on a *Brady* violation. *See Government of the Virgin Islands v. Fahie*, 419 F.3d 249, 255 (3d Cir. 2005)("While retrial is normally the most severe sanction available for a *Brady* violation, where a defendant can show both willful misconduct by the government, and prejudice, dismissal may be proper.")(footnote omitted). It was the prosecutor who precipitated the December 9, 1997, Spotz interview with the FBI, after being contacted by counsel for a co-defendant, Roberta Bell. Then the prosecutor wrote the undersigned a letter, dated January 16, 1998, summarizing the interview and giving his opinion that Spotz's credibility was low, with citation to other evidence. The letter was copied to various officials. The prosecutor also opined that Spotz's statement had no bearing on the federal prosecutions of Bell or Tyler. (Doc. 392-1, ECF pp. 88-89). The latter opinion is buttressed by Defendant's current inability

[7] On the issue of materiality, the government notes that the only evidence presented at trial concerning shotgun shells was that the one shell found at the murder scene was a rifled shotgun slug and the pathologist testified that the victim had died from a rifled shotgun slug. (Doc. 392, Opp'n Br. at ECF p. 49-50). There was no evidence of a ballistic match between two shells. Defendant's reply brief does not attempt to rebut this point.

to show prejudice. In sum, the government's conduct here was not the type of conduct that would support barring a retrial.[8]

We will issue an appropriate order.

/s/William W. Caldwell
William W. Caldwell
United States District Judge

Date: November 15, 2016

[8] Defendant also argues that the government withheld statements of other witnesses. However, since he does not provided us with copies of the statements, we need not address them.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	
	:	
v.	:	CRIMINAL NO. 1:96-CR-106
	:	
WILLIE TYLER,	:	(Judge Caldwell)
Defendant	:	

O R D E R

AND NOW, this 15th day of November, 2016, it is ordered that Defendant's motions (Doc. 375) to dismiss the indictment are denied.

/s/William W. Caldwell
William W. Caldwell
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	
vs.	:	
	:	CRIMINAL NO. 1:CR-96-0106
WILLIE TYLER,	:	
Defendant	:	(Judge Caldwell)
	:	
	:	
	:	

M E M O R A N D U M

This case is here on remand from the Third Circuit, and we have scheduled it for another trial in February 2017. In a memorandum and order filed today, we denied one of Defendant's motions to dismiss the indictment, which argued that a retrial was barred on the basis of the Fifth Amendment's Double Jeopardy Clause. An order denying a motion seeking to avoid trial on double jeopardy grounds is immediately appealable. *Abney v. United States*, 431 U.S. 651, 662, 97 S.Ct. 2034, 2042, 52 L.Ed.2d 651 (1977). We are considering the government's motion requesting that we find that any double jeopardy appeal would be frivolous, thereby allowing us to continue to exert jurisdiction over the case and to proceed to trial even if Defendant files an appeal of the double jeopardy ruling. The government cites *United States v. Leppo*, 634 F.2d 101 (3d Cir. 1980), where the Third Circuit held that "an appeal from the denial of a double jeopardy motion does not divest the district court of jurisdiction to proceed with trial, if the district court has found the motion to be frivolous and supported its conclusions by written

findings." *Id.* at 105. In those circumstances, "both the district court and court of appeals . . . have jurisdiction to proceed." *Id.*[1] Defendant opposes the motion.

In his motion to dismiss the indictment, Defendant made two arguments based on the Double Jeopardy Clause. First, he had already been subjected to jeopardy for the same offense when he was tried in May 1993 in Pennsylvania state court for criminal homicide and lesser charges. We rejected this argument on the basis of the dual sovereignty doctrine, which provides that "prosecution of the same crime in both the federal and state systems does not violate the Double Jeopardy Clause." *United States v. Wilson*, 413 F.3d 382, 389 (3d Cir. 2005).

Second, citing *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978), Defendant contended the Double Jeopardy Clause barred another trial after we vacated his convictions because the vacatur of the convictions was the equivalent of granting a motion for a judgment of acquittal on the basis of insufficient evidence, and the Double Jeopardy Clause bars retrial on such an acquittal. We rejected the argument because the Double Jeopardy Clause does not prevent a retrial for a defendant who succeeds in getting his conviction set aside because of trial error in the previous proceedings. We cited *Lockhart v. Nelson*, 488 U.S. 33, 38, 109 S.Ct. 285, 289, 102 L.Ed.2d 265 (1988), and *United States v. Scott*, 437 U.S. 82, 90-91, 98 S.Ct. 2187, 2193-94, 57 L.Ed.2d 65 (1978).

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1 The general rule is that the filing of a notice of appeal divests the trial court of jurisdiction over the case. *Id.* at 104.

An interlocutory appeal of a double jeopardy ruling is colorable when there is some possible validity to the appeal. *See Richardson v. United States*, 468 U.S. 317, 322, 326 n.6, 104 S.Ct. 3081, 3084, 3086 n.6, 82 L.Ed.2d 242 (1984)(appealability of a double jeopardy claim "depends upon its being at least 'colorable,'" which "presupposes that there is some possible validity to a claim"). Here, based on Defendant's opposition to the government's motion, it appears that Defendant would file an appeal challenging only the ruling based on the dual sovereignty doctrine. Defendant contends that an appeal of that ruling would be "colorable," not frivolous, because over the years some Supreme Court justices have expressed dissatisfaction with the doctrine. Defendant cites *Bartkus v. Illinois*, 359 U.S. 121, 155-56, 79 S.Ct. 676, 698, 3 L.Ed.2d 684 (1959)(Black, J., dissenting); *Heath v. Alabama,* 474 U.S. 82, 102 n.3, 106 S.Ct. 433, 444 n.3, 88 L.Ed.2d 387 (1985)(Marshall, J., dissenting); and *Puerto Rico v. Sanchez Valle*, __ _ U.S. ____, ____, 136 S.Ct. 1863, 1877, 195 L.Ed.2d 179 (2016)(Ginsburg, J., concurring). Since there is a colorable claim, Defendant contends this court should not proceed with the case but await a decision from the court of appeals.

We agree with the government that Defendant's double jeopardy claim concerning federal and state prosecutions of the same offense is frivolous. A claim is frivolous if it lacks an arguable basis in law or fact. *See Chambers v. Dauphin Cnty. Bd. of Inspectors*, No. 16-CV-1732, 2016 WL 6432934, at *1 (M.D. Pa. Oct. 31, 2016) (Caldwell, J.)("A complaint is frivolous if it lacks an arguable basis either in law or fact."); *United States v. Wilkes*, 368 F. Supp. 2d 366, 368 n.6 (M.D. Pa. 2005); *United States v.*

Roland, No. 11-CR-630, 2012 WL 2178709, at *6 (D.N.J. June 13, 2012)(a nonfrivolous double jeopardy claim must have a basis in law or fact).

Here, Defendant's double jeopardy claim is frivolous because it has no basis in law, being a position that the Supreme Court has consistently rejected over a long period of years. *See Roland*, 2012 WL 2178709, at *2-3 (surveying pertinent Supreme Court and Third Circuit cases discussing the dual sovereignty doctrine). There is no possible validity to such a claim, at least one that a lower court can recognize in its frivolousness determination.

We will therefore grant the government's motion to recognize Defendant's double jeopardy claim as being frivolous and to continue to exercise jurisdiction over this case.[2]

/s/William W. Caldwell
William W. Caldwell
United States District Judge

Date: November 15, 2016

2 If Defendant raises on appeal his other double jeopardy claim, we also find that claim is frivolous as it is well settled that retrial after a conviction is vacated based on trial error is not barred by the Double Jeopardy Clause.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	
	:	
v.	:	1:CR-95-106
WILLIE LEE TYLER	:	
Defendant	:	

TRANSCRIPT OF PROCEEDINGS

BEFORE: HON. J. ANDREW SMYSER, U.S. MAGISTRATE

DATE: April 30, 1996

PLACE: Courtroom Number One
Federal Building
Harrisburg, Pennsylvania

COUNSEL PRESENT:

GORDON A. D. ZUBROD, Assistant U.S. Attorney
For - United States of America.

LORI ULRICH, Esquire
For - Defendant

Vicki L. Fox, RMR
Official Reporter

I N D E X

Government Witness	Direct	Cross	Redirect	Recross
1. Patrick Kelly				
By Mr. Zubrod	4	--	44	--
By Ms. Ulrich	--	21	--	45
Defendant's Witnesses				
1. Mildred Tyler				
By Mr. Zubrod	46	--	54	--
By Ms. Ulrich	--	50	--	--
2. Nathaniel Tyler				
By Mr. Zubrod	55	--	--	--
By Ms. Ulrich	--	58	--	--

there would have been Bruton problems at that trial, number one.

And number two, I would certainly object to the Court considering statements by six witnesses that testified at Roberta Bell's trial, the statements made by Roberta Bell made after the trial.

THE COURT: Those won't be considered. And dealing with the matter of the state court trial and state court conviction on some counts and acquittal on others, it is natural I think that we look to that state court disposition because our -- my instinctive reaction is that he is being charged with substantially the same or similar offenses to those that he was charged with in state court. And that naturally gives rise to a double jeopardy concern.

But we know that there is no application of the double jeopardy clause here so he may be prosecuted and convicted in federal court on these charges.

MS. ULRICH: I do understand that. And the first matter I want to address is the presumption. I was reviewing a transcript from Roberta Bell's detention hearing, and I noticed the Court had expressed reservation about the presumption because of her acquittal in state court.

And I would ask the Court to also consider his acquittal on the murder charges to weigh heavily against the presumption in this case.

forthwith after today's arraignment.

Anything further at this time, Mr. Zubrod?

MR. ZUBROD: No, sir.

THE COURT: Ms. Ulrich?

MS. ULRICH: We have nothing further.

THE COURT: We will adjourn.

THE CLERK: Court is adjourned.

(Whereupon, the proceedings were concluded.)

I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me on the trial of the above cause, and that this copy is a correct transcript of the same.

Vicki L. Fox, RMR

Vicki L. Fox, RMR

Official Reporter

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	
	:	
v.	:	1:CR-95-163
	:	
ROBERTA R. BELL,	:	
Defendant	:	

TRANSCRIPT OF PROCEEDINGS

DETENTION HEARING/ARRAIGNMENT

BEFORE: U.S. DISTRICT MAGISTRATE J. ANDREW SMYSER

DATE: July 11, 1995

PLACE: Courtroom Number Three
Federal Building
Harrisburg, Pennsylvania

COUNSEL PRESENT:

GORDON ZUBROD, Assistant United States Attorney
For - United States of America

RICHARD RENN, Esquire
For - Defendant

Vicki L. Fox, RMR
Monica L. Zamiska
Official Court Reporters

I N D E X

Government Witnesses	Direct	Cross	Redirect	Recross
1. Patrick Kelly				
By Mr. Zubrod	13	--	51	--
By Mr. Renn	--	19,42	--	52

opening and closing arguments or the charge to the jury. I have read the testimony of some of the case in chief, the key witnesses.

THE COURT: I don't have, of course, before me any basis to know what evidence was actually presented against her at that trial, so for my purposes what I have is the fact that there was a prosecution and an acquittal and then I have the evidence that's been presented here.

MR. ZUBROD: Yes.

THE COURT: And I won't ask you to go into what was presented since we're in the argument phase of this, but I do want to ask this question, it's my understanding or I should say vague recollection that there are justice department guidelines that govern second prosecutions arising from similar or the same criminal episode.

MR. ZUBROD: The petite policy.

THE COURT: What is that policy? How is that policy framed?

MR. ZUBROD: I would represent to the Court that we have received a petite waiver from the Department of Justice. The Department of Justice policy permits a second prosecution if the substantial interests of justice were not met in the previous prosecution or if there is a larger federal interest that was not addressed specifically in the earlier state prosecution. We -- it is our position we have taken is that

the substantial federal interest is the crossing of interstate lines. It is also the fact that this was a joint federal/state task force, and the way in which the task force works as set forth in the indictment is that the local and state investigators develop prosecutable cases and go forward with prosecutions, developing witnesses to identify the hierarchy of the organization, and federally the organization is prosecuted, the kingpin. And the Court is well aware of, for instance, the four horsemen cases where people were prosecuted for several years down at the state, now the four horsemen have been identified with their lieutenants, they are being prosecuted federally. So in a real sense this victim was also a potential federal witness. So there was a substantial federal interest that was not addressed.

THE COURT: Who is it that makes the determination, the assistant attorney general in charge of the criminal division?

MR. ZUBROD: It's the assistant attorney general.

THE COURT: The assistant attorney general who makes the determination under the petite policy?

MR. ZUBROD: Yes, sir.

THE COURT: Mr. Renn.

MR. RENN: May it please the Court, we are not here to determine whether or not there is a federal interest protected down below to decide whether or not she is going to

Thirdly, the issue of threat to the community is not that she goes around shooting up banks but she has gone around shooting up a witness, and that the witnesses in this case are in fear that she will do the same thing she has done before to them. Specifically she is linked to the threat to Laura Mae Barrett and that Laura Mae Barrett overheard the argument, was confronted and interrogated by the defendant as to whether or not she heard the argument. When she said yes, a short time afterward she received the threatening telephone call. All of those come together to show that she is a risk of flight and that she is a danger to witnesses, members of the community if released, and we ask that she be detained.

THE COURT: A case like this case where a defendant is being exposed to a second criminal prosecution by a different government on the basis of substantially the same alleged criminal episode for which the person has been tried and in this case acquitted before another government's judicial system presents questions that are troublesome in terms of constitutional questions, although I think the precise constitutional questions presented by this case have been looked at many times over and have been clearly resolved in favor of the authority on the part of the United States to proceed with a prosecution of this kind, and troublesome in terms of apart from the constitutional questions, troublesome in terms of a defendant's second exposure to jeopardy,

criminal jeopardy, despite the fact that there is no constitutional preclusion of it. So in that sense troublesome from a policy or public policy perspective, but that's not a matter that's before this Court in connection with this detention motion and the decisions that need to be made under Title 18, Section 3142.

As I have viewed it, this case also presents a difficult question in terms of the question of probable cause underlying and supporting the presumption under Section 3142.

Ordinarily the Third Circuit has ruled, and I neglected to get the name of the case, but I'm positive of the fact that the Third Circuit has ruled some years in the past that a grand jury indictment may serve as the basis for a determination of probable cause. In this case I was concerned by the offsetting factor of the acquittal in state court in permitting the grand jury indictment standing by itself to support a presumption of probable cause, and yet I have to acknowledge that the grand jury certainly did find probable cause in this case. I don't know what evidence was presented before the state court in the course of the state trial, and I don't know what evidence was presented to the grand jury, but I do know that the grand jury found probable cause. I was not content here, and let it be known, to let only the fact of probable cause as found by the grand jury support the presumption, and accordingly other evidence has been presented

MR. ZUBROD: No, sir.

THE COURT: We will adjourn.

(The proceedings concluded.)

I hereby certify that the proceedings and evidence of the court are contained fully and accurately in the notes taken by me on the detention hearing of the within cause, and that this is a correct transcript of the same.

Monica L. Zamrska

Official Court Reporter

DOCUMENTS IN SUPPORT OF RULE 60(b) MOTION

I, PATRICK KELLY, do hereby swear and affirm that the following is true to the best of my knowledge, information and belief.

1. I am a Special Agent with the Federal Bureau of Investigation, having served in that capacity for 30 years.

2. I was the case agent in the cases of *United States of America v. Roberta Ronique Bell* (Criminal No. 1:CR-95-163) and *United States of America v. Willie Lee Tyler.* (Criminal No. 1:CR-96-106).

3. My interest in the case began when Roberta Ronique Bell was acquitted of the murder of Doreen Proctor. Bell's trial took place in the Court of Common Pleas for Adams County. She was acquitted on April 8, 1993.

4. I opened this case after several conversations with numerous individuals. I was troubled that a person who had been involved in the murder of a law enforcement informant had been acquitted. I was concerned about the effect this acquittal would have on all law enforcement efforts in the South Central Pennsylvania area.

5. During the month of April, 1993, I met with Assistant U.S. Attorney Gordon Zubrod to discuss whether Bell could be retried in federal court after her acquittal in state court. since she had been a potential federal witness at the time of her murder. AUSA Zubrod advised that, under the dual sovereign doctrine, a retrial on federal charges was possible assuming the elements of the federal case were met and the Department of Justice gave permission for a federal prosecution.

6. Before opening a case, I met with the investigators in Cumberland and Adams County to make sure that they had no objections to a federal prosecution of Bell and her uncle, Jerome King, believed to have been a key figure in the planning of the murder. They were in agreement that a federal prosecution would be welcomed. I then sought and obtained the approval of my supervisor, David Malarney, who authorized the opening of a case in June of 1993.

7. To open the case, I followed standard FBI operating procedures. I prepared an FD 71, which is a Complaint Form, attached to this affidavit. When the form is completed, it is provided to the supervisor for approval. Upon the concurrence of the supervisor, the form is then forwarded to Philadelphia headquarters for further processing, specifically, the assignment of a file number.

8. I note that my superior at the time, David Malarney, gave his written approval for the investigation on June 8, 1993. My opening of the case would have preceded that approval by several days and even weeks.

9. I would also note that, at the time of the opening of this case, the targets of the investigation were Roberta Ronique Bell and Jerome King, whom I had suspected were the

organizers of this murder. Willie Lee Tyler was not at that time a target. In fact, Mr. Tyler was offered immunity from the murder prosecution if he could pass a polygraph examination on the issue of whether or not he had personally shot Doreen Proctor. Tyler refused to take a polygraph examination. After Roberta Ronique Bell was convicted in June of 1996 in federal court for having murdered Doreen Proctor, the decision was made to prosecute Willie Lee Tyler for his role in the murder. Charges were never brought against Jerome King.

10. In August of 1996, Willie Lee Tyler was tried and convicted in federal court of having murdered Doreen Proctor.

11. On February 10, 2000, the District Court vacated Tyler's conviction and ordered a new trial. Subsequently, I met with AUSA Zubrod to discuss additional investigative avenues to pursue in order to prepare for trial. At AUSA Zubrod's recommendation, I caused an inquiry to be made of the Adams County Adult Probation and Parole Office.

12. On March 15, 2000, I received the letter which is the subject of the present motion to suppress, written by Tyler to President Judge Spicer of the Court of Common Pleas for Adams County in anticipation of his sentencing on his conviction for having tampered with a witness (Doreen Proctor). The letter was dated June 8, 1993. This was the first notice that I had that Tyler had written such a letter. On that same date, I turned a copy of the letter over to AUSA Zubrod, who in turn delivered it to Attorney Lori Ulrich.

13. The commencement of the federal investigation of Roberta Ronique Bell, Jerome King and, eventually, Willie Lee Tyler was not connected with the letter written by Tyler to Judge Spicer on June 8, 1993. The investigation was underway before he wrote the letter and its existence was not discovered by me until nearly seven years after it had been written.

Patrick Kelly

PATRICK KELLY
Special Agent
Federal Bureau of Investigation

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 8th DAY
OF MAY, 2000.

Naomi Unfried

NOTARY PUBLIC
My Commission Expires:

Notarial Seal
Naomi Unfried, Notary Public
Harrisburg, Dauphin County
My Commission Expires July 21, 2003
Member, Pennsylvania Association of Notaries

I, GORDON A.D. ZUBROD, do hereby swear and affirm that the following is true to the best of my knowledge, information and belief.

1. I am an Assistant United States Attorney for the Middle District of Pennsylvania, having served in that capacity for 20 years.

2. I was the prosecutor in the cases of *United States of America v. Roberta Ronique Bell* (Criminal No. 1:CR-95-163) and *United States of America v. Willie Lee Tyler* (Criminal No. 1:CR-96-106).

3. I first became aware of the murder of Doreen Proctor in April of 1993. Special Agent Patrick Kelly came to my office and advised me that Doreen Proctor had been a witness for the Tri County Drug Task Force and had been murdered on the very day she was to testify against an individual named David Tyler and some of his associates. Special Agent Kelly told me that, at the trial of David Tyler and his associates, one Roberta Bell had been acquitted. He inquired whether there were any obstacles to her being tried federally for the same offense. I explained to him the dual sovereign doctrine, which eliminated double jeopardy concerns, and the Department of Justice's *Petite* policy, which required Department approval for a subsequent federal prosecution. I reviewed with him the elements of the offense of tampering with a witness (18 U.S.C. 1512). He advised that he wanted to speak with the state investigators to determine if there was any objection to a subsequent prosecution.

4. Reviewing my calendar for the month of April, 1993, I note an entry under April 28, 1993 which states: "10:00 Pat Kelly and York murder". Since the Doreen Proctor case is the only murder that I have handled since coming to the U.S. Attorney's Office and since the only Middle District of Pennsylvania murder I have ever discussed with Special Agent Kelly, I am satisfied that the entry is a reference to our discussion of the Doreen Proctor murder. See Attachment 1. Although Ms. Proctor was murdered in Adams County (next to York County), and the reference in my calendar is to York County, I would note that Roberta Bell was living in York County at the time of my meeting with Special Agent Kelly. In any case, the records of the U.S. Attorney's Office indicate that on April 29, 1993, a case file was opened on the Talons case management system targeting Roberta Bell and Jerome King. I was assigned to the case. See Attachment 2. This strongly suggests that, as is my normal practice, I filled out the standard Department of Justice Case Initiation Form on date of my first meeting with the case agent (April 28, 1993) and gave the form to my secretary that same day to open a case on the Talons system. The next day, she opened the case. See Attachment 2.

5. The next relevant entry in my 1993 calendar is on June 9, 1993, which reads "10:30 Pat Kelly (Bell case)". See Attachment 3. On that date, I recall that Special Agent Kelly advised me that the investigation had been approved by his superior. We then planned the direction that the investigation would take. At that time, the targets of the investigation were Roberta Bell and Jerome King, who appeared to be the instigators of the murder. Later, when I reviewed the evidence of the first trial, I noted that Willie Tyler had been implicated in the murder of Proctor and, according to one of the witnesses, may have been the individual who administered the *coup de gras* to Doreen Proctor. Mr. Tyler was offered, through counsel, the opportunity to

take an FBI-administered polygraph examination. He was told that, if he passed the polygraph exam on the issue of whether or not he was the trigger man (which he vehemently denied), he would not be prosecuted for murder. Tyler refused to take a polygraph examination. After Bell's conviction in January of 1996, the investigation turned to Tyler, who was indicted on April 16, 1996. The U.S. Attorney's Office file on Tyler was not formally opened until March 7, 1996. See Attachment 4. It was only after Bell's conviction that the decision was made to prosecute Tyler.

6. In August of 1996, Tyler was convicted in U.S. District Court of the murder of Doreen Proctor.

7. On February 10, 2000, the District Court, after an earlier hearing, vacated Tyler's conviction and set a date for a retrial of the case. I immediately met with Special Agent Kelly and directed him to interview anyone Tyler had spoken to between the date of the murder and today. This included cell mates, friends, prison visitors and probation officers.

8. On March 15, 2000, Special Agent Kelly gave me copy of a letter dated June 8, 1993 and signed by Willie Tyler. On that same date, I hand delivered the letter to Lori Ulrich, Esquire, attorney for Willie Tyler, at her office at 100 Chestnut Street in Harrisburg, Pennsylvania. Prior to March 15, 2000, I had not seen, nor had I been aware of the June 8, 1993 Tyler letter. The letter played no role, either in the original decision to investigate Bell, King and Tyler prosecute Tyler or in the subsequent decision to retry him. I requested and received permission from President Judge Oscar Spicer of the Court of Common Pleas for Adams County, to take possession of the original letter for fingerprinting, handwriting analysis and use at the retrial of Willie Tyler.

GORDON A.D. ZUBROD
Assistant U.S. Attorney

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 8th DAY
OF MAY, 2000.

NOTARY PUBLIC
My Commission Expires:

Notarial Seal
Naomi Unfried, Notary Public
Harrisburg, Dauphin County
My Commission Expires July 21, 2003
Member, Pennsylvania Association of Notaries