NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 2021

KHALIL STAFFORD,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIOARARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Double Jeopardy Clause of the Fifth Amendment preclude a Federal petit jury from considering petitioners guilt for murder, *in violation of New Jersey's murder statute*, after a New Jersey petit jury has acquitted him of that same murder charged pursuant to that same New Jersey statute?

2. Was the District Court required to instruct the jury as to the Governments burden to disprove passion provocation manslaughter as demanded by New Jersey's application of its murder statute?

3. Did the District Court's dismissal of three jurors, without any legitimate basis, violate Petitioner's Sixth Amendment right to an impartial jury trial?

4. Did the District Court's erroneous evidential rulings infringe upon appellant's Sixth Amendment right to testify in his own defense?

5. Did the charging of petitioner, in a seventh superseding indictment with murder as a predicate RICO offense and a related VICAR count, constitute vindictive prosecution in violation of petitioner's Fifth Amendment rights?

PARTIES TO PROCEEDING

The parties to the proceeding in the court whose judgment is sought to be reviewed are as follows:

1. United States of America
2. Khalil Stafford

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KHALIL STAFFORD
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UNITED STATES OF AMERICA
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PETITION FOR A WRIT OF CERTIORARI

Petitioner Khalil Stafford respectfully petitions for a writ of certiorari to review the judgment of the United Sates Court of Appeals for the Third Circuit in this case.

DECISION AND ORDERS BELOW

The United States Court of Appeals for the Third Circuit affirmed Petitioner's conviction and sentence in a non-precedential opinion issued on December 20, 2021. *See* Petitioner's Appendix ("Appx.) 1-26.

JURISDICTION

The United States District Court for the District of New Jersey (D.N.J. No. 14-CR-220) exercised jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The Third Circuit Court of Appeals (No. 19-3833) had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). The United States Court of Appeals for the Third Circuit entered judgment on

December 20, 2021. Appx. 27-28. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

This petition is timely filed within 90 days of the entry of judgment.

RELEVANT STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> ... nor shall any person be subject for the same offense to be twice and put in jeopardy ... nor be deprived of life, liberty or property, without due process of law...

U.S. CONST. AMEND. V.

The Sixth Amendment to the Constitution of the United States provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed...

U.S. CONST. AMEND. VI.

The New Jersey homicide statute provides, in pertinent part:

a. Murder defined. Except as provided in N.J.S. 2C:11-4, criminal homicide constitutes murder when:
   1. The actor purposely causes the death or serious bodily injury resulting in death; or
   2. The actor knowingly causes death or serious bodily injury resulting in death; or
b. Criminal homicide constitutes manslaughter when:
   2. A homicide which would otherwise be murder under section 2C:11-3 is committed in the heat of passion resulting from a reasonable provocation.

N.J.S.A. 2C:11-3.

STATEMENT OF THE CASE

A. Background

Petitioner had previously been tried and acquitted in New Jersey Superior Court for the June 19, 2010 murder of Hope Williams. He initially went to trial federally on the sixth superseding indictment, which did not charge the Hope Williams murder. That trial resulted in a mistrial. A132. [1] After Petitioner was severed as a non-violent offender, the government obtained the seventh superseding indictment charging him with the Hope Williams murder in violation of the same New Jersey statute. ECF #839. Petitioner moved to dismiss those new charges as constituting Double Jeopardy, that motion and Petitioner's other applications were denied and he was convicted after a jury trial. A5-7.Petitioner was subsequently sentenced to life imprisonment and appealed his convictions. On December 20, 2021, a panel of the United States Court of Appeals for the Third Circuit (Ambro, Restreop, and Noreika) issued a not precedential opinion affirming the conviction. Appx. 1-26.

June 19, 2010 Shooting

Khalil Stafford testified in his own defense that on June 19, 2010, the date that Hope Williams was shot, he went to Garside Avenue for a memorial for his godbrother "Toke" (Tawan Williams). A2540. Early that day, he saw Aaron Terrell ("Push") riding his motorbike in the neighborhood. A2542-43. At some point Terrell approached Stafford and told him about an interaction with Toke's brother, Iyan Williams ("Doughboy.") A2544-45. Stafford then went to see "Doughboy" to defuse the situation. A2544-47. When Stafford arrived at the memorial he saw that people were agitated and screaming and hollering. A2546-47. "Doughboy" was agitated

[1] "A" refers to the appendix filed in the United States Court of Appeals for the Third Circuit.

and looked under the influence. A2552. Stafford noticed that "Doughboy" had a gun. A2552. Soon thereafter, Terrell rode by on the dirt bike increasing "Doughboy's" agitation and agitating "Doughboy's" mother, Melissa Williams. A2556. At this point "Doughboy" pulled out his gun, his uncle grabbed him, and his mother screamed at the uncle to let him go. A2556. The mother then, referencing Terrell, screamed at "Doughboy" to, "kill that motherfucker." A2558. "Doughboy" began shooting at Terrell. A2560. Then Terrell started shooting back at "Doughboy." A2560. Then Mustafa Stribbling ("Chub"), Ronald Lee ("Doogie"), "Marquis", and "Pussy" jumped out of their cars and started shooting at Terrel as Terrell fled on his motorbike. A2561. Next "Chub" began shooting at a Spanish kid and chased him into the house where Hope Williams was at. A2561-62. The other shooters fled the scene and Stafford left. A2562-62.

Rinita Battle, a Government witness, largely corroborated Stafford's testimony. At the time of the shooting Ms. Battle lived at 96 Garside in Newark. A1302. Ms. Battle was on her porch with Hope Williams, some other women, and their children. A1306. They were sitting on the porch when a guy started running towards them shooting a gun. A1310-11. The guy with the gun ran up on the porch and went inside the house. A1311. Ms. Battle was able to crawl into the house and get upstairs to her apartment. A1311. Ms. Battle saw the man with the gun in her bedroom. A1311. Ms. Battle then recognized that Hope Williams never made it upstairs, so she went back down and located Hope Williams laying on the porch. A1311.

Ms. Battle testified that, the gunman who ran into her home had been in the street to the right of her home, when he was firing his gun. A1313. Ms. Battle, in a photo identification procedure, selected Mustafa Stribbling as the man firing the gun. A1325.

The Government also produced Essex County Prosecutor's Crime Scene Lieutenant Thomas Sheehan who testified, that a nine-millimeter projectile was recovered from the body of Hope Williams. A1393. He further testified that four nine-millimeter casing were recovered on the eastern side of the street, closest to 96 Garside. A1393-94. This was the area where Ms. Battle saw Stribbling firing his gun. A1310-11.

Aaron Terrell, a Government witness who admitted to committing five murders, testified against Stafford in the hope of receiving a reduced sentence. A891-99. Terrell testified that he was riding his motorbike around 7th Avenue, on June 19, 2010, when he heard they were having a cookout for "Toke", the deceased brother of "Doughboy." A909. Terrell indicated that he stopped by the cookout and then left and rode his bike down 7th Avenue by Stafford's ("Stod's") house. A912-13. According to Terrell, Stafford was outside of his house with Tony Phillips ("Blue"), Rahmin Stevenson ("G-Fire") and Corey. A913-14. Except for Corey, all the others, including Stafford and Terrell were members of the Grape Street Crips ("GSC"). A913-14.

According to Terrell, when he pulled up outside the house, Stafford "was having a heated moment." A918. Stafford was "upset." A991. He [Stafford] said he was just at the cookout and Iyan had pulled out a gun on him. A918. According to Terrell, Stafford had approached Iyan Williams aka "Doughboy" about money that "Doughboy" owed Stafford for some bricks of heroin. A919. According to Terrell, "I guess that when he [Stafford] went up there to talk to him, Doughboy pulled a gun on him." A919. According to Terrell, Stafford wanted to return to "confront Doughboy." A919. Terrell, Tony Phillips ("Blue") and Rahmin Stevenson ("G-Fire") all went to accompany Stafford back to confront Iyan Williams ("Doughboy.") A919.

Prior to accompanying Stafford back to confront "Doughboy", Terrell told him "if we going back up there, we gonna need guns." A1083. Terrell indicated that it was his idea to arm

themselves prior to confronting "Doughboy." A1083-84. After Terrell expressed the need for guns, he indicated that Stafford secured three guns. A920. The three guns were a "nine" a "forty" and a "forty-five." A921. The guns were provided to Terrell and "Blue" (Phillips) and Stafford kept one. A921. According to Terrel, Stafford was armed with a .40 caliber or .45 caliber. A1084-85. Terrell "thinks" he had a "nine." A1084. But he also "thinks" "Blue: had a "nine." A1084.

All four were walking towards the cookout when Terrell saw Mustafa Stribbling ("Chub") walking towards them. A930. At this point, Terrell testified, "Chub" "start reaching for his gun, and as 'Chub' start reaching for his gun, 'Stod' started shooting." A932. Terrell testified "'Chub' (sic) started going for his gun. That's the only reason 'Stod' started firing." A1103. At this point, "Chub" started shooting back at Stafford. A933 As "Chub" was shooting, he ran back towards the cookout. A933. At this point, Terrell testified, "Iyan (Doughboy) run out, start shooting at 'Stod', so I ran down to the street, started shooting at Iyan." A933. "I was shooting to make sure Stod was alright, make sure he don't get hurt. So I was backing him up." A1105. At this point, Terrell indicates that "Blue" ran down and "started shooting." A933. Terrell indicates people from all sides are firing all over the place on Garside. A1098. Because of this, he has no idea who shot Hope Williams. A1120.

The Government next produced Ronald Lee to give his account of what occurred the night of the cookout. While at the cookout, Lee testified that he saw "Doughboy", yelling and waving a gun while in a circle of guys. A1182. Within that circle were "Mustafa" (Stribbling), "Stod" (Stafford), "G-Fire" (Stevenson), "Push")Terrell), and Iyan ("Doughboy"). A1182.

According to Lee, after Iyan began waving the gun, everybody began leaving the cookout. A1188. Lee got his girlfriend and they started to get into his truck to leave. A1188. As

Lee was in the process of getting into his Jeep he hesitated because "Chub" (Stribbling) was walking towards him. A1190. Lee had half of his body in the Jeep when he looked to his left and saw Stafford running up the left side of the block with his gun out. A1191. Stafford said "nigga don't move" and Stribbling replied "nigga don't shoot." A1191. Lee then closed the car door and laid on top of his girlfriend. A1193. Lee then heard a bunch of different sounding gunshots. A1194. Immediately after the gunshots stopped, Lee turned his truck on, pulled off and left the scene. A1195. Lee never saw who was firing a weapon, from where they were firing a weapon, or who shot Hope Williams. A1232

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT PRECLUDES A FEDERALLY IMPANELLED PETIT JURY FROM CONSIDERING PETITIONER'S GUILT FOR THE STATUTORY OFFENSE OF MURDER PURSUANT TO NEW JERSEY LAW AFTER A NEW JERSEY JURY HAS ACQUITTED HIM OF COMMITTING THAT SAME STATUTORY OFFENSE.

Petitioner had previously been charged and acquitted of violating New Jersey Statutes 2C:11-3(a)(1) & (2) and 2C:2-6 pertaining to the alleged murder of Hope Williams on June 19, 2010. When Petitioner was charged in the seventh superseding indictment with the RICO and VICAR murder of Hope Williams in violation of those same New Jersey statutory offenses he moved to preclude a federal jury from considering his guilt because it had already been adjudicated by a New Jersey jury. ECF#951. However, the district court ruled that the "Duel-sovereignty" doctrine allowed the government to subject Petitioner to a second determination as to his guilt for the same murder under the same New Jersey statutes. A5-7.

A review of the federal charges, invoking the murder of Hope Williams, makes it abundantly clear that a federal petit jury was tasked with determining Petitioners guilt for murder pursuant to the precise statutory offenses for which a New Jersey jury had adjudicated him not guilty.

Count One of the Redacted Seventh Superseding Indictment, charging the Racketeering Conspiracy, specifically pled in its Notice of Special Factors that, on or about June 19, 2010, Petitioner causes the death or serious bodily injury resulting in death of Hope Williams contrary to *N.J.S.A.* 2C:11-3(a)(1)&(2) and 2C:2-6. ECF #839. At the conclusion of the evidence, the jury was charged with the statutory elements of *N.J.S.A.* 2C:11-3(a)(1)&(2) and 2C:2-6. A2875-86.

Count Two of the Indictment charged that on or about June 19, 2010, Petitioner, for the purpose of gaining entrance to, and maintain and increasing position in, the NJ Grape Street Crips, and enterprise engaged in racketeering activity, did knowingly and purposely murder Hope Williams contrary to N.J.S.A. 2C:11-3(a)(1), 2C:11-3(a)(2), and 2C:2-6. ECF #839.

In charging on this count, the district court advised the jury that "[t]he fourth element the Government must establish beyond a reasonable doubt is that the Defendant committed the murder in Count Two, contrary to the law of New Jersey." A2909.

In recently addressing the "dual-sovereignty" doctrine governing the application of the Double Jeopardy Clause of the Fifth Amendment in situations where a defendant is prosecuted in both state and federal court for the same conduct, this Court focused on what is meant by the language prohibiting a person from twice being put in jeopardy for the same offense. *Gamble v. United States*, 139 S. Ct. 1960, 1963-64 (2019). While acknowledging that case law addressing this issue can appear complex, the Court noted "at its core, the Clause means that those acquitted

or convicted of a particular 'offense' cannot be tried a second time for the same 'offense.'" *Id.* at 1964. Thus, the issue for this Court in *Gamble* and for this Court, in the present case, is "what does the Clause mean by an 'offense'?" *Id.*

Prior to *Gamble*, the Third Circuit in *United States v. Frumento,* 563 F.2d 1083, 1087 (3d Cir. 1977) held that state offenses referenced in RICO prosecutions were "definitional" only, i.e. "racketeering, the federal crime, is defined as a matter of legislative draftsmanship by reference to state law crimes." *Id.* Specifically, that "reference to state law is necessary only to identify the type of unlawful activity in which the defendant intended to engage." *Id.* (citing *United States v. Cerone*, 452 F.2d 274, 286 (7th Cir. 1971), quoting *United States v. Karigiannis,* 430 F.2d 148, 150 (7th Cir.), *cert. denied*, 400 U.S. 904 (1970). *Frumento* rested its holding on the "dual-sovereignty" doctrine set forth in *Abbate v. United States*, 359 U.S. 197 (1959).

The Third Circuit followed *Frumento* when it again considered this issue in *United States v. Pungitore*, 910 F.2d 1084 (1990). In *Pungitore,* the defendants had been tried and acquitted of murders in state courts and then subsequently subjected to a RICO prosecution in Federal District Court. *Pungitore* at 1105. *Pungitore* indicated that it was constrained to follow *Frumento*, absent in banc review, because of its controlling precedent in the Circuit. *Id* at 1106. *Pungitore* relied upon the same "dual-sovereignty" doctrine logic developed by the Supreme Court in *Abbate, United States v. Lanza*, 260 U.S. 377 (1922), and *Bartkus v. Illinois*, 359 U.S. 121, 79 S.Ct. 676, 2 L.Ed.2d 684 (1959).

It is well established that a "crime under one sovereign's laws is not 'the same offense' as a crime under the laws of another sovereign." *Gamble* at 1963-64. Thus, under the "dual-sovereignty" doctrine the federal government may prosecute a defendant under a federal statue even if a state has already prosecuted him under a state statute for the same conduct. *Id.*

Therefore, the critical focus is not on the "conduct" of the individual but rather the statutory "offense." *Id.* at 1965. Each sovereign is free to proscribe conduct by law/statute. Thus, as long as the conduct is subjected to scrutiny under each sovereign's separate statutory/legal scheme, there will be no violation. That is because at the time the Clause was drafted, in 1791, "'offense' was commonly understood ... to mean 'transgression,' that is 'the Violation or Breaking of a Law.'" *Id. quoting, Grady v. Corbin*, 495 U.S. 508, 529 (1990) (Scalia, J., dissenting). Simply put, "[a]s originally understood, then, an 'offense' is defined by law, and each law is defined by a sovereign." *Id.* Thus, where there are two distinct laws, enacted by two separate sovereigns, there are two offenses. *Id. citing Grady*, 495 U.S. at 529 (Scalia, J., dissenting) ("If the same conduct violates two (or more) laws, then each offense may be separately prosecuted.") and *Moore v. Illinois*, 14 How 13, 17 (1852) ("The constitutional provision is not, that no personal shall be subject, for the same act, to be twice put in jeopardy of life and limb; but for the same *offense*, the same *violation of law*, no persons life or limb shall be twice put in jeopardy" (emphasis added by the Court)). *Id.*

In the present case, Petitioner's culpability is twice being considered for the same offense, i.e., the same violation of the law. Specifically, Stafford was tried in the State of New Jersey for the murder of Hope Williams in violation of the New Jersey statute prohibiting murder, *N.J.S.A.* 2C:11-3. At the conclusion of that trial he was acquitted. A168. Now comes the Federal Government and asks a federally impaneled jury to determine, again, whether Stafford is guilty of the same murder of Hope Williams under the same New Jersey statute *N.J.S.A.* 2C:11-3. This result is precisely what *Gamble* says that the Double Jeopardy Clause prohibits.

Gamble now governs the application of the "dual-sovereignty" doctrine in RICO and VICAR prosecutions where the defendant has previously been acquitted of the predicate crime in

state court. *Gamble* provides the required guidance in its discussion of the treatment *Houston v. Moore*, 4 Wheat 1, 18 U.S. 1 (1820) as reviewed by the Supreme Court in *Bartkus v. Illinois*, supra.

In *Houston v. Moore,* the accused faced state-imposed sanctions for violations of federal criminal law. *Bartkus,* in reviewing Justice Washington's opinion in *Houston v. Moore,* that a ruling in either federal or state court would bar a second trial in the other, explained "that language by Mr. Justice Washington reflected his belief that the state statute imposed state sanctions for violation of a federal criminal law." *Gamble* at 1977. Again, similar to the present situation, the issue addresses two sovereigns seeking to impose sanctions for the same, one, statute/law. This, the Clause will not abide. *Bartkus*, in reflecting on Justice Washington's reasons, noted, "[a]s he [Justice Washington] viewed the matter, the two trials would not be of similar crimes arising out of the same conduct; they would be of the same crime… Thus *Houston v. Moore* can be cited only for the presence of a bar in a case in which the second trial is for a violation of the very statute whose violation by the same conduct has already been tried in the courts of another government empowered to try that question." *Gamble* at 1977 (quoting *Bartkus*, 359 U.S. at 130).

The Government cannot seek to escape the Double Jeopardy consequences by arguing that the Federal Government is charging Petitioner with violations of federal law that merely incorporate by reference state statutory definitions of murder. Petitioner's trial belies that argument. In this case, the federally impaneled petit jury was instructed to determine whether Petitioner murdered Hope Williams in contravention of the same New Jersey statutory offense for which he had previously been acquitted.

In both the RICO count (Count 1) and the VICAR count (Count 2), the jury's instructions were explicit. Clearly, Petitioner was twice being put in jeopardy for the same offense, i.e. the same violation of New Jersey law. *Gamble's* rational neither accommodates nor tolerates carve out exceptions for such RICO or VICAR prosecutions where defendant has previously been acquitted when tried for the predicate offense.

Although the Third Circuit in *Frumento* did not find *United States v. Mason*, 213 U.S. 115, 29 S.Ct. 480, 53 L.Ed 725 (1909) instructive as a double jeopardy case, *Gamble*'s discussion of *Houston v. Moore, supra.* reframes the Supreme Court's *Mason* opinion. *Mason* clearly addressed a scenario mirroring the present case. Just as the RICO and VICAR counts here pled violations of New Jersey's murder statute, *Mason* involved a prosecution under §§5508 and 5509 of a federal statute which pled as a predicate offense a violation of Colorado's murder statute. *Mason* at 118-120. Thus, as *Mason* discussed, the inquiry at the federal trial was "whether the defendant had, in the act of violating the provisions of §5508, committed the crime of murdering Walker, - an offense against the state..." *Id.* at 123.

The problem was, the defendant(s) had already been acquitted after "a regular trial in the state court." *Id.* Thus, *Mason* asked whether it was proper for a federal court "to enter upon a judicial investigation to ascertain whether the defendants committed the alleged crime against the state of the murder mentioned in that indictment" where the defendants had been lawfully tried and acquitted as to the identical crime of murder under the same state statute. *Id.* at 124.

In foreshadowing *Gamble*'s focus on "offense" rather than "conduct," *Mason* found "[t]he murder in question, if committed at all, was, as a distinct offense, a crime only against the state; and after the defendants were acquitted of that crime by the only tribunal that had jurisdiction of it *as an offense against the state*, it is to be taken that no such crime of murder as

charged in the indictment was in fact committed by them." *Id.* Thus, where a defendant has been acquitted in state court for commission of a predicate offense, a federal court is precluded from re-examining culpability as defined by that same state statutory offense. *Id.* at 483. *See Also Heath v. Alabama,* 106 S. Ct. 433 (1985).

In the present case, the United States cannot extent its sovereignty over New Jersey's laws proscribing murder . *N.J.S.A.* 2C:11-3(a)(1) & (2) and 2C:2-6 sets forth a statutory scheme that draws from a distinct source of power – the sovereign State of New Jersey. After Stafford was acquitted of violating that statutory scheme the "dual-sovereignty" doctrine cannot be utilized to save the Government from the charge that it offended the Double Jeopardy Clause of the Fifth Amendment when it subsequently asked a federal petit jury to reconsider Stafford's guilt for murder under that same New Jersey statutory scheme.

In its opinion denying Petitioner relief for his claim under the Double Jeopardy Clause, the Third Circuit, while finding Petitioner's argument "colorable" ruled that it was "stymied by our precedent" from providing relief. Appx. 12. Petitioner now ask this Court to provide guidance that *Gamble* precludes a federal petit jury from reconsidering Petitioner's guilt under the exact state statutory scheme for which he had previously been acquitted.

II. CERTIORARI IS WARRANTED BECAUSE THIS COURT SHOULD PROVIDE CLEAR GUIDANCE THAT IF THE GOVERNMENT CHARGES A VIOLATION OF STATE LAW AS A RICO OR VICAR PREDICATE THEN THE JURY MUST BE CHARGED CONSISTENT WITH THAT STATE'S STATUTORY PROVISIONS AND JURISPURDENCE.

The Government charged that Stafford committed the murder of Hope Williams in contravention of New Jersey law. The State of New Jersey defines murder through a compilation of statutory provisions and caselaw. New Jersey law mandates that in order to be found guilty of

murder a defendant needs to purposely or knowingly cause death or serious bodily injury resulting in death. *N.J.S.A.* 2C:11-3(1)&(2). However, conduct that would otherwise constitute murder under *N.J.S.A.* 2C:11-3(1)&(2) is not considered to be murder if it is committed in the heat of passion resulting from a reasonable provocation. *N.J.S.A.* 2C:11-4(b)(2).

Under New Jersey law the fact-finder must be advised of those factors that operate to relieve an actor of criminal culpability for murder even though he/she purposely or knowingly caused death or serious bodily injury resulting in death. See *State v. Robinson*, 136 N.J. 476, 489-92 (1994) (holding that where the evidence clearly indicates adequate provocation, and lack of time to cool off, New Jersey law requires that that the fact-finder be instructed as to how those factors negate criminal culpability for murder).

In the present case the government, in both the RICO and VICAR counts, charged Petitioner with committing murder contrary to New Jersey law. The district court attempted to instruct the jury as to what constituted murder under New Jersey law. However, that instruction was fatally defective because it failed to advise the jury of those factors, under New Jersey law, that would relieve Petitioner of criminal culpability for murder. New Jersey law requires, under the facts of this case, that the government prove that Petitioner was not acting under the heat of passion resulting from a reasonable provocation.

When so supported by the evidence, New Jersey law requires that passion/provocation manslaughter must be considered even if it is contrary to defendant's theory. *State v. Powell*, 84 N.J. 305, 318-19 (1980). *See also, State v. Garron*, 177 N.J. 147, 180 (2003). Thus, under New Jersey's murder statute, when the facts support a finding of passion/provocation manslaughter, then a third element must be proven to convict a defendant of murder, that defendant did not act in the heat of passion resulting from a reasonable provocation.

Further, even granting the Government the inference that the projectile that killed Hope Williams was fired by either Petitioner, Terrell or Phillips, the concept of "mutual combat" would also classify her death as passion provocation manslaughter. New Jersey law recognizes the "common-law rule… that mutual combat under certain circumstances could constitute adequate provocation to reduce murder to manslaughter." *State v. Crisantos*, 102 N.J. 265, 274 (1986). The circumstances required are that "the contest must have been waged on equal terms", that is both sides had to be equally armed. *Id.*

In the present case the shootout at Garside clearly fits the legal definition of "mutual combat." Thus, if the projectile that struck Hope Williams was fired in mutual combat then the shooter's intent would transfer to her, thus absolving the shooter of murder. Further, any accomplice engaged in the mutual combat would share in that intent under an accomplice liability analysis.

The Third Circuit denied Petitioner relief, in part, because "[t]here is neither an on-point case in our Circuit nor a strong consensus in other Courts of Appeals that would make plain that this instruction would be required." Appx. 11. It is submitted that clear guidance in this area is needed. When a state predicate offense is charged in a RICO or VICAR prosecution, due process and fundamental fairness require that all the elements required to prove those crimes be explained to the jury in accordance with that State's jurisprudence.

III. CERTIOARI IS WARRANTED BECAUSE THE DISMISSAL OF THREE JURORS, WITHOUT ANY LEGITIMATE BASIS, IS AN AFRONT TO OUR JUDICIAL SYSTEM, AN ABUSE OF JUDICIAL POWERS, AND IMPERMISSIBLY DEPRIVED PETITIONER OF SIXTH AMENDMENT GUARANTEED TRIAL RIGHTS.

At the start of the trial proceedings on April 3, 2019 the district court advised the government and the defense that the U.S. Marshal driving a van containing nine of the jurors revealed to the court a conversation that he overheard. A3103. At this point the jury had already received their instructions on the law from the trial judge and both parties had given their closing arguments. All that remained before deliberations were set to begin was the government's rebuttal.

As initially described by the district court, the overheard conversation consisted of one juror relating an account of a situation where a juror in another case returned a verdict of guilty and it later turned out the defendant wasn't guilty. A3103. Another juror, upon hearing this, said something that was only described as an affirmation. A3103.

The government moved to strike both jurors. A3105. They argued that the comment and affirmation indicated that the jurors had disregarded the court's admonition not to talk about the case. A3105-06. The defense opposed this motion and pointed out that there was no indication that the juror violated the court's instructions since they were not discussing the case before them. A3106-07.

In order to resolve the issue, the court decided to question the nine jurors A3118. Jurors 1, 2, 4, 6, and 16 advised the court that they didn't hear any relevant conversation. A3114-15, A3119-20, A3125-26 and A3136-38. The remaining jurors, #'s 3, 5, 9, 10, 11, and 13, reported

that the only conversation that occurred had to do with the United States having a better court system than Spain and other countries that lacked a jury system. A3115-136.

At the conclusion of the juror interviews the government moved to strike juror numbers three, five, and ten. A3138. Petitioner opposed this motion. A3140.

The court called the United States Deputy Marshal who drove the van as a witness. A3144. The Deputy Marshal testified that he heard a female juror say she was speaking to someone (possibly her sister) about a prior occasion when the "sister" was a juror and they found someone guilty who was later exonerated. Another juror then said something in affirmation. A3144-47.

At the conclusion of this testimony the government moved to excuse Jurors 3, 5, and 10. A3147-54. Petitioner again objected. A3154. The district court granted the government's motion and dismissed Jurors, 3, 5, and 10. A3174. The court found that the conversation involved "comments about a juror making a wrong decision...relating a story amongst themselves about how jurors made a mistake, and an innocent man was found guilty..." A3165. The court voiced concerns that this might mean that the jurors were thinking, "I don't want that to happen..." i.e. that an innocent man be found guilty. A3166. Additionally, the court found jurors 3, 5, and 10 "evasive" in their responses. A3166-73.

A review of the transcript of the questioning of jurors 3, 5, and 10 evidence no support for the district court's findings. A3115-18; A3120-25 and A3128-33. All three jurors had a recollection of a conversation about how the justice system in the United States differs from the justice system in Spain. The conversation also involved how Spain didn't have jurors and in one case a judge in Spain found someone guilty (or someone pled guilty) who was later determined

to be innocent. Even the Deputy Marshal driving the van did not hear any discussions about defendant's case. A3144-47.

That this was the nature and tenor of the conversation was corroborated by three jurors who were not excused. Juror #9 said the conversation was about how they deal with things in Spain. A3126-28. Juror #11, who participated in the conversation, spoke about how in India, there was not a jury system. A3133-35. Finally, Juror #13, also a party to the discussion, said "we were talk—there was a conversation about the judicial system, and that we were lucky that – that we live – because of being in America that we were able to have the opportunity to be tried by a jury, and that doesn't happen in all other countries." A3135-36.

The *voir dire* of the jurors in the van in question produced no support for the Deputy Marshal's belief that the conversation involved one of the juror's sister's prior jury experience. Given that the Deputy Marshal was focused on driving, and not a party to the conversation, it is understandable that his account diverges from everyone else's.

Also of note, the district court based its ruling on it's perception that the jurors were being evasive. However, the alleged "evasiveness" seems to focus on the completeness of the jurors' accounts, i.e. were they leaving out details. Again, the transcript reflects that this was a somewhat "short-lived" and innocuous conversation that took place between jurors 10, 11, and 13 which was overheard, in part, by jurors 3, 5, and 9. There was no evasiveness as to whether any of those jurors could be fair and impartial or whether they harbored prejudice or sympathy.

In *United States v. Penn, supra.* the Third Circuit has cited to the Seventh Circuit case of *United States v. Pineda*, 743 F.3d 213, 217 (7th Cir. 2014) for the proposition that, on appeal, a reviewing court "will not overturn the trial court's decision to dismiss a juror pursuant to *Rule*

24(c) unless *no legitimate basis* for the court's decision can be found in the record..." See *Penn* at 169 (quoting *Pineda* at 217). In scanning the record, regarding the excusal of jurors 3, 5 and 10, no legitimate basis for the court's decision can be found. None of these jurors violated any of the admonitions of court. None of these jurors said that they couldn't be fair or impartial. And none of these jurors said anything that could be construed as evidencing a bias towards any party nor did they say anything that would call into question their ability to follow the law as they had received it from the court. Further, neither Juror #3 nor Juror #5 were even party to the conversation. Rather, Juror #10 engaged in the exchange about the superiority of the jury system in the United States with Juror #11 and Juror #13. At most Juror #3 may have said "ooh" or "wow" when she heard about the Spanish system. The district court here had no legitimate basis to dismiss jurors 3, 5 and 10.

Petitioner is cognizant that our Circuit Courts of Appeals "have explicitly rejected a rule of *per se* reversal for Rule 24(c) violations." *United States v. Brewer*, 199 F.3d 1283, 1286 (11th Cir. 2000). See also *United States v. Puche*, 350 F.3d 1137, 1152 (11th Cir. 2003) (holding that the exercise of discretion pursuant to *F.R.Cr.P.* 24(c) is reviewed "'to ensure that the District Court did not discharge the juror without factual support, or for a legally irrelevant reason' so as to amount to a showing of bias or prejudice to the defendant." (citation omitted)) and *United States v. Pineda*, 743 F.3d 213, 217 (7th Cir. 2014) (holding '[t]his Court will not overturn the trial court's decision to dismiss a juror pursuant to *Rule 24(c)* unless *no legitimate basis* for the court's decision can be found in the record, and the appellant shows that the juror's dismissal prejudiced his case").

Here, in addition to Petitioner being deprived of a quarter of his selected jurors, defense counsel specifically noted that juror #5 was an African American woman who had responded

favorably to the defense case. A3154. Neither the judge nor the government took issue with the characterization of Juror #5 as being receptive to the defense. The trial was virtually concluded and the jury about to deliberate. It is not unusual that at this stage the attorneys and the judge in a trial would form opinions as to which way certain jurors would be leaning.

Thus, the present situation is distinguishable from *Puche* where the Eleventh Circuit found "defendants only speculate as to whether the replaced juror may have been more favorably disposed to them than the alternate ..." *Puche* at 1153. Here, a record was made as to Juror #5's receptiveness to the defense case and that record was not challenged by the government or the trial judge.

Additionally, upon the excusal of Juror #5, there were only one or at most two African-Americans left on the jury. A3331. Therefore, not only did the trial court replace a quarter of the selected jurors, its actions diminished the African-American representation on the jury by either a third or a half. Thus, this situation is unlike *Brewer*, where the Eleventh Circuit could not find that the District Court's *Rule 24(c)* violation "diluted black representation on the jury" because the racial makeup of the ultimate deliberating juror was unknown. *Brewer* at 1287. Clearly, here the racial dilution is apparent.

In denying Petitioner relief the Third Circuit stated: "To be clear, we do not today conclude that Jurors 3, 5, and 10 were actually evasive, nor do we imply that replacing these jurors was necessary or even the best decision." Appx. 9. Despite this, the Circuit Court deferred to the district court's decision.

The right to a fair and impartial jury trial is guaranteed by the Sixth Amendment. This Court, through its rule making authority, governs how that right is to be enforced pursuant to the

Rules of Criminal Procedure. Petitioner encourages this Court to preclude the dismissal of jurors where no legitimate basis exists in order to preserve the sanctity of the impartial jury system that is at the core of our criminal and constitutional jurisprudence.

IV. CERTIOARI IS WARRANTED BECAUSE ERRORONEOUS EVIDENTIAL RULINGS CANNOT BE ALLOWED TO INFRINGE UPON PETITIONER'S SIXTH AMENDMENT RIGHT TO TESTIFY IN HIS OWN DEFENSE.

During trial Petitioner and the Government each produced testimony that, prior to the June 19, 2010 shooting death of Hope Williams, there was an argument between Iyan Williams (Doughboy) and Petitioner. Each party also presented testimony that, during or immediately subsequent to this argument, Iyan Williams (Doughboy) brandished a handgun. However, the position of the parties diverged on the critical issue as to the sum and substance of the argument between Petitioner and Iyan. Inexplicitly, the District Court only permitted the jury to hear the Government's version as to the sum and substance of that argument when it precluded Petitioner from testifying about the nature of the argument. The District Court also precluded Stafford from testifying as to what prompted the shooting to begin that evening. This limitation of Petitioner's testimony gutted his defense and impermissibly infringed upon his constitutional right to testify in his own defense.

The Government's theory, as to both the RICO and VICAR allegations pertaining to the Hope Williams' murder was that, on the evening of June 19, 2010, Petitioner confronted Iyan Williams (Doughboy) over a drug debt. In order to prevail on Counts One and Two of the Indictment, which address the RICO and VICAR allegations pertaining to the murder of Hope Williams, the Government needed to prove to the jury that the argument that precipitated the shooting involved Iyan's (Doughboy's) refusal to pay a drug debt owed to Petitioner and Petitioner's need to retaliate against Iyan (Doughboy) to maintain his position within the Crips

and preserve his drug business. Also, that Petitioner enlisted the help of other Crip members in this retaliation.

Petitioner wished to present his own testimony as to why he argued with Iyan. If permitted, Petitioner intended to tell the jurors that on the evening of June 19, 2010, Iyan William's family was upset because Terrell was riding his dirt bike around the cookout being held in memory of Iyan's brother Tawan who had been killed the year before. A2412. Petitioner had heard about this and went over to the cookout to attempt to defuse the situation. A2412 and A2544-2546. Petitioner was aware that Iyan William's family held Terrell responsible for the death of Tawan. A2411-2413.

Unfortunately, when Petitioner arrived at the cookout Iyan Williams was smoking PCP. 2421-22 and 2427. Realizing that PCP use was not conducive to calming the situation, Petitioner confronted Iyan about smoking PCP and that is what they began to argue about. 2422 and 2430. During this argument, Terrell appeared and Iyan and his mother Melissa became agitated. A2418 and 2556. It was at this point that Iyan pulled out his gun. A2556. Iyan's uncle tried to restrain Iyan but Melissa screamed at the uncle to "let him go" and she then said, "that motherfucker killed your brother, kill that motherfucker." A2556-2558 and see A2418. This is what Petitioner wished to advise the jury in his testimony.

However, the District Court ruled that Petitioner's testimony was inadmissible because it conflicted with the Government's theory of the case. As the Court advised Petitioner: "That's not the Government's theory. The Government's theory is that you were angry because Iyan Williams was your runner and he owed you money for drugs. It wasn't over him smoking PCP… It has nothing to do with whether he was smoking PCP that night. It was not part of their case, and its not part of your defense. If its not part of their case, your defense is not relevant." A2430.

Prior to Petitioner's testimony, the District Court indicated that it would allow part of Melissa Williams' statement to Iyan in as an excited utterance. However, the portion of her statement as to why she told her son to kill Terrell was specifically precluded. A2489-91. The Court also ruled that Petitioner could tell the jurors that Iyan was agitated and under the influence but continued to preclude any testimony that the argument between Petitioner and Iyan occurred when Petitioner confronted him over his PCP use. A2468-69.

The Third Circuit found these rulings "debatable" but ultimately concluded that the district court's rulings were permissible under Federal Rule of Evidence 403. However, Rule 403 is a rule hat favors admissibility and except in extreme situations the "unfair prejudice" can usually be managed by providing a limiting instruction. Further, this Court has recognized that there is a strong presumption that juries follow limiting instructions. *Zafiro v. United States*, 506 U.S. 534, 540-41 (1993); *Richardson v. Marsh,* 481 U.S. 200, 211 (1987) and *Spencer v. Texas*, 385 U.S. 554, 562 (1967).

It is presumed that the jury would consider this evidence for only its admissible purpose. Of importance here, it is meaningless to Petitioner's defense as to who actually killed Tawan Williams. The importance of the testimony is that Iyan and Melissa believed it was Terrell. It was immaterial to Petitioner's defense whether that belief was true or not. Further, it is ludicrous to think that there would be any danger that the jurors would impermissibly consider this evidence when weighing Terrell's credibility given that Terrell had already advised the jurors that he had committed five murders. Thus in conducting a *F.R.E.* 403 analysis the probative weight of the state of mind evidence is great since it explains and gives context to the statements of Melissa and the actions of Iyan. There is little to no risk of undue prejudice from the jury misusing the evidence. The truth of the statements were unimportant, it was only the fact that

they reflected the states of mind of Melissa and Iyan that was critical to Petitioner's defense. Clearly, a properly drafted limiting instruction could have guided the jury as to the proper use of this evidence. Given that *F.R.E.* 403 is a test that favors admissibility it was improper and an abuse of discretion to exclude the evidence under this Rule.

In addressing Petitioner's proposed testimony as to the sum and substance of his argument with Iyan, the District Court precluded this testimony pursuant to *F.R.E.* 403. The District Court's rationale that Petitioner's account did not comport with the Government's theory and therefore was not relevant is misplaced and constitutes an abuse of discretion. A2428-2432. The fact that Petitioner's account differed from the Government's theory is precisely why it is so probative. Petitioner acknowledged there was an argument and that the argument was loud and drew a crowd. A2553. Unless he was permitted to explain what that argument was about, the jury would only be left with the Government's contention that the argument was over the drug debt. Precluding Petitioner from describing the sum and substance of the argument made his denial that it was over a drug debt ring hollow. A2552-56. The jury was denied a coherent alternative account regarding the nature of the argument.

The right of the accused to testify in their own defense is guaranteed by the Constitution and is essential to due process and fundamental fairness. *Rock v. Arkansas*, 483 U.S. 44, 51 (1987). It has roots in the Compulsory Process Clause of the Sixth Amendment. *Id.* at 52. "Even more fundamental to a personal defense than the right of self-representation, which was found to be 'necessarily implied by the structure of the [Sixth] Amendment… is an accused's right to present his own version of events in his own words." *Id.* (citation omitted). As recognized in *Rock*, "the most important witness for the defense in many cases is the defendant himself." *Id.* See also *Faretta v. California*, 422 U.S. 806, 816-20 (1975).

V. CERTIORARI IS WARRANTED BECAUSE THE CHARGING OF THE SEVENTH SUPERSEING INDICTMENT CONSTITUTED VINDICTIVE PROSECUTION, IN VIOLATION OF PETITIONER'S FIFTH AMENDMENT RIGHTS.

Petitioner moved to dismiss the seventh superseding indictment for vindictive prosecution prior to his second trial. ECF #858 & A173-79. The district court denied that motion. A1; A167-73 & A179-81.

The vindictive prosecution doctrine invokes the due process protections afforded by both the Fifth and Fourteenth Amendment. *See Blackledge v. Perry*. 417 U.S. 21, 25 (1974). "The defendant bears the initial burden of proof in a vindictive prosecution claim and is required to establish the appearance of vindictiveness." *United States v. Schoolcraft*, 879 F.2d 64, 68 (3d Cir. 1989). A presumption of vindictiveness applies in cases in which a reasonable likelihood of vindictiveness exists. *United States v. Esposito*, 968 F.2d 300, 303 (3d Cir. 1992) (citing *Blackledge*, 417 U.S. at 27). Where new charges arise out of the same factual setting as the original prosecution, vindictiveness may be attributed to the prosecutor. It is "the prosecutor's attempt 'to re-try the appellant, seeking a heavier penalty for the same acts as originally charged, [that] is inherently suspect ...'" *Lovett v. Butterworth*, 610 F.2d 1002, 1004 (1st Cir. 1979) (quoting *United States v. Preciado-Gomez*, 529 F.2d 935, 939 (9th Cir. 1976).

The timing of the retaliatory conduct is central to the inquiry. Thus, a change in the charging decision after an initial trial is completed is much more likely to be improperly motivated than a pretrial decision. *United States v. Goodwin*, 457 U.S. 368, 381 (1982).

In the present case, the Government entered into a stipulation in the first trial not to pursue the Hope Williams murder as charged conduct under the four corners of the indictment. An initial trial was completed when the jury returned hung. A132. Appellant was subsequently

severed, on the government's motion, as a non-violent offender. ECF #836. At the time of the severance the Government represented to the district court that they would not be introducing any evidence as to the violent acts by Petitioner during the retrial. Thereafter, the government brought the seventh superseding indictment, which charged, for the first time, the murder of Hope Williams. ECF #839. The government's issuance of a seventh superseding indictment is presumptively vindictive. Unlike in a pretrial setting, there was no additional information that suggested a basis for further prosecution. The Williams murder was the subject of a state court proceeding resulting in Petitioner's acquittal and was the subject of Aaron Terrell's plea agreement prior to the first trial. In fact, the Government gave up its federal interest in the Hope Williams murder by entering into the stipulation and severing Petitioner as a non-violent offender.

While no new evidence was learned between the start of the first trial and the seventh superseding indictment, Petitioner did exercise various constitutional and statutory rights. Petitioner chose to testify at his first trial and after the mistrial pursued a retrial. In retribution for Petitioner going to trial and taking the stand in his own defense and seeking a retrial, the government misled the district court in its "ploy" severance and then charged him with the Hope Williams murder, directly contradicting its own motion to sever him as a non-violent offender.

Petitioner was acquitted in state court, achieved a mistrial in the first federal trial, and then faced harsher charges in retaliation for exercising his Constitutional rights. To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort. *Bordenkircher v. Hayes*. 434 U.S. 357, 363 (1978).

Further, the governments' actions in this regard violates it's own *Petite* policy. The *Petite* policy "precludes the initiation... of a federal prosecution, following a state or federal

prosecution based on substantially the same act(s) or transaction(s) unless three substantive prerequisites are satisfied." *See* justice.gov/jm/jm-9-2000-authority-us-attorney-criminal-division-mattersprior-approvals#9-2.031. Those prerequisites are:

1. the matter must involve a substantial federal interest;
2. the prior prosecution must have left that interest demonstrably unvindicated; and
3. the government must believe that the defendant's conduct constitutes a federal offense.

Id. The *Petite* policy was established by the Justice Department in direct response to the Supreme Court's opinions in *Bartkus*, *supra.* and *Abbate*, *supra. Rinaldi v. United States,* 434 U.S. 22, 28 (1977). Specifically, in response to the Supreme Court's "sensitivity to the fairness implications of the multiple prosecution power..." *Id.* The *Petite* policy, "[a]lthough not constitutionally mandated... serves to protect interests which, but for the 'dual sovereignty' principle inherent in our federal system, would be embraced by the Double Jeopardy Clause." *Id.* at 29.

Petitioner submits that the shooting death of Hope Williams does not involve a substantial federal interest. For example, she was not a federal officer or employee. The matter did not involve federal interests and or property. Nor was Hope Williams a federal witness. Nor did the conduct constitute a federal offense. His prosecution under the seventh superseding indictment thus constituted vindictive prosecution.

CONCLUSION

Based on the foregoing, Petitioner Khalil Stafford respectfully requests this Court to issue a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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