No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2022

DAVID WILLS
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

QUESTION ONE: THIS COURT HAS LONG HELD THAT FOR A JUDGE TO THREATEN A DEFENSE WITNESS WITH PERJURY IF HE TESTIFIES FOR THE DEFENSE VIOLATES THE DEFENDANT'S RIGHTS TO PRESENT A DEFENSE, TO COMPULSORY PROCESS, AND A FAIR TRIAL. THIS CASE PRESENTS THE COURT WITH AN OPPORTUNITY TO DECIDE FOR THE FIRST TIME WHETHER THAT SAME RULE SHOULD APPLY TO FEDERAL PROSECUTORS?

QUESTION TWO: WHETHER A DEFENDANT IS DEPRIVED OF A FAIR TRIAL WHEN HIS CODEFENDANT'S LAWYER IS ALSO SURREPTITIOUSLY REPRESENTING THE VICTIM, CREATING A JOINT MONETARY MOTIVE BETWEEN THE CONFLICTED LAWYER AND HIS TWO CLIENTS TO PROVIDE FALSE TESTIMONY AGAINST HIM?

QUESTION THREE: AN ISSUE NOT ADDRESSED IN *GAMBLE V. U.S. IS* WHETHER THE "DUAL SOVEREINTY DOCTRINE" SHOULD APPLY TO THE LONG-TERM CONCERTED ACTION OF FEDERAL AND STATE AUTHORITIES TO PROSECUTE AN INDIVIDUAL IN FEDERAL COURT FOR VIOLATING THE VERY SAME STATE CRIMINAL STATUTES FOR WHICH THE DEFENDANT HAS ALREADY BEEN PUNISHED IN REPEATED STATE COURT PROCEDINGS? THIS CASE PRESENT THE COURT WITH THAT OPPORTUNITY.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

PETITION FOR WRIT OF CERTIORARI

The petitioner respectfully requests that this Court issue a writ of certiorari on the questions presented.

OPINION BELOW

Wills appealed the pretrial denial of his Motion to bar trial under the double jeopardy clause. The Fifth Circuit denied him relief. The opinion for the United States Court of Appeals for the Fifth Circuit is reported at *U.S. v. Wills*, 742 F. App'x 887 (5th Cir. 2018) and is reprinted as an Appendix to this petition. *See* App's 1. Thereafter, Wills filed a Petition for Certiorari with the United States Supreme Court. The cause was then remanded to the District Court for trial on the indictment below.

After his trial and conviction, Wills appealed his conviction. The opinion for the United States Court of Appeals for the Fifth Circuit is reported at *U.S. v. Wills*, 40 F.4th 330 (5th Cir. 2022) and is reprinted as an Appendix to this petition. *See* App's 4.

JURISDICTION

The opinion of the Court of Appeals was issued on July 13, 2022. This Court has jurisdiction under 18 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment provides no one shall be "deprived of life, liberty or property without due process of law."

U.S. CONST. amend. V.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides:

> "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . ." U.S. CONST. amend. V.

The Sixth Amendment to the United States Constitution provides, in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." U.S. CONST. amend. VI.

STATEMENT OF THE CASE

Procedural Background

In 2019, Petitioner was tried for conspiracy to commit sex trafficking, sex trafficking, coercion and enticement of a minor, and conspiracy to commit obstruction of justice. Before trial, he filed a Plea in Bar on Double Jeopardy grounds and when same was denied by the trial court, Wills took an interlocutory pre-trial appeal to the Fifth Circuit (Cause no. 18-40234) and thereafter sought certiorari in the Supreme Court (Cause no. 18-821) while *Gamble v. U.S.*, 587 U.S. ___ (2019) was still pending. When Certiorari was denied on June 24, 2019, the Fifth Circuit remanded this cause for trial. After trial, Wills was convicted of all but one count of the offenses and his timely motion for new trial was denied without a hearing. He was sentenced and appealed his conviction, sentence, and the denial of his motion for new trial. The Fifth Circuit Court of Appeals affirmed his conviction and sentence on July 13, 2022.

Factual Background

Beginning in April of 2013 three different Texas counties together with the Federal government initiated a joint investigation of Wills for the alleged sexual assault of a minor. The Federal agents participated in every stage of the investigation, from the outset, including the interrogation of witness, the searches and surveillance of premises, the processing of evidence, and the arrests of the defendants.

During the following two years, Nueces, Cameron, and San Patricio Counties, each successively charged Wills with the same state offense (Continuous Sexual Assault of a Minor) based on the same conduct, the same alleged victim, and the same time period at issue here. ROA.92-95 (Cameron County), ROA.97-101 (Nueces County), ROA.103-04 (San Patricio County), ROA.112-21 (Nueces County), ROA.125-27 (San Patricio County), ROA.2499- 2500 (district court opinion summarizing state charges).

Wills filed motions to dismiss in each county alleging that his oppressive bail conditions constituted punishment and that trying and punishing him again would violate the State and Federal prohibitions against Double Jeopardy. Two counties (Nueces and Cameron) dismissed their cases on the eve of hearings on the defense's Double Jeopardy motions. ROA.110, 123. San Patricio County dismissed their charges, ROA.129, 2363-66, after the United States Attorney's Office (in its own words) "adopted the case for federal prosecution on June 28, 2017," charging not only

the same conduct, but pursuant to an indictment which charged the very same State statutory offenses by name and State statute number. ROA.3431 and ROA.5732.

The onerous bail conditions imposed upon Wills included hanging a bright pink doorknob hang tag on Defendant's front door with the words "Sex Offender" prominently displayed,[1] requiring him to obtain travel permits which branded him a convicted sex offender,[2] and issuing letters to the County Health Department that Wills was an "offender," and had been ordered to submit for HIV/AIDS testing. ROA.2503. Essentially, the state authorities treated Wills as a convicted sex offender, with corresponding notice to the public and other state and federal agencies of his status as a convicted sex offender.

The uncontested evidence was that prior to trial, Government counsel threatened a critical defense witness's attorney that if his client testified on behalf of Wills, his client "was very well going to be charged in a superseding indictment with the offense of perjury." DX 604 ("Sealed 9/13/19 Tr.) at 58:7-22.

Wills's attempts to discover the relationship between co-defendant's counsel and the witnesses against him were repeatedly rebuffed. However, shortly before the jury returned their guilty verdict, it was learned that Richard Nunez, the lawyer

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[1] The district court found, "[o]n March 22, 2016, the Nueces County Community Supervision & Corrections Department (Adult Probation) left a bright pink doorknob hang tag at Defendant's residence, plainly stating that the Sex Offender Stabilization Unit had been by to verify Defendant's address and that he was to contact the named Community Supervision Officer in response." ROA.2503; ROA.1914.

[2] The San Patricio County travel permits stated that Wills "was on 'community supervision' for the offense of 'Trafficking of Persons: 'Continuous' or 'Sexual Abuse of Child: Continuous Victim.'" ROA.2502, Additionally, the Nueces County travel permits "represented that Defendant was on 'probation' for the offense of 'Trafficking of Persons: Continuous.'" ROA.2502.

representing Wills's co-defendant, had pled his client to testify against Wills in this case, and at the same time, was representing his client's daughter, the victim of these alleged crimes. This extraordinary arrangement was not just a serious conflict of interest, it was evidence that this lawyer had a substantial monetary incentive to encourage his indicted client to admit her guilt and implicate Wills to serve his own selfish monetary interest in the civil suit on behalf of his victim client. This egregious conflicted relationship would have provided the jury with compelling evidence regarding the credibility of the two witnesses against him, particularly Maria Losoya, co-defendant and the mother of the victim, because, as the trial court stated on the record, there could be little question that she was the "key government witness" who "made the Government's case" and "sealed the verdict."[3]

Additional facts pertaining to each of the issues are discussed under each question presented below.

[3] ROA.27162.

ARGUMENT

QUESTION ONE: THIS COURT HAS LONG HELD THAT FOR A JUDGE TO THREATEN A DEFENSE WITNESS WITH PERJURY IF HE TESTIFIES VIOLATES THE DEFENDANT'S RIGHTS TO PRESENT A DEFENSE, TO COMPULSORY PROCESS AND A FAIR TRIAL. THIS CASE PRESENTS THE COURT WITH AN OPPORTUNITY TO DECIDE, FOR THE FIRST TIME, WHETHER THAT SAME RULE SHOULD APPLY TO FEDERAL PROSECUTORS.

It was uncontroverted that defense witness John Aquilino had favorable and exculpatory testimony to provide the jury,[4] however, Government counsel threatened the witness's attorney that if his client testified on Wills's behalf, he "was very well going to be charged in a superseding indictment with the offense of perjury." DX 604 ("Sealed 9/13/19 Tr.) at 58:7-22. As a consequence, the attorney for the witness testified that his client was invoking his Fifth Amendment privilege and was "not going to testify, not with an allegation by the prosecution like this." DX 604 ("Sealed 9/13/19 Tr.") at 59:3-12.[5]

In *Webb v. Texas*, 409 U.S. 95 (1972) this Court held that a Texas trial judge's stringent threats to a critical defense witness that he could "assure him that if he lied he would be prosecuted and probably convicted for perjury...could well have exerted such duress on the witness's mind as to preclude him from making a free and voluntary choice whether or not to testify," depriving Webb of his "right to offer the

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[4] Count 18 of the indictment charged Wills with Conspiracy to Obstruct Justice, alleging that he conspired to "alter, destroy, mutilate, and conceal...a computer," See ROA.3755:15-22, 1-3 (Filed just five weeks before trial). The attorney for potential defense witness John Aquilino testified that his client would offer exculpatory testimony that no such thing had occurred (ROA.5115-6), however, trial counsel for the Government threatened him that if his client testified for Wills he was definitely "going to be charged...with perjury." DX 604 ("Sealed 9/13/19 Tr.) at 58:7-22

[5] Wills also filed an Offer of Proof that defense witness Aquilino "cannot testify due to being threatened by the Government with a perjury charge," noting that "[c]ounsel for Mr. Aquilino, Tony Canales, asserted his [client's] Fifth Amendment right on his behalf." ROA.4583.

testimony of witnesses, and to compel their attendance." *Webb*, 409 U.S. at 98 (citing *Washington v. Texas*, 388 U.S. 14, 19 (1967)).

> [T]he judge's threatening remarks, directed only at the single witness for the defense, effectively drove that witness off the stand, and thus deprived the petitioner of due process of law under the Fourteenth Amendment. *Webb*, 409 U.S.at 98.

Similarly, here Government counsel's "threatening remarks, directed only at the single witness for the defense, effectively drove the witness off the stand" depriving Wills of his right to the compulsory process of witnesses and due process of law.

While this court has not yet addressed the question of whether threats by a prosecutor to prosecute a defense witness for perjury if he testified for the defense would likewise be considered a violation of the defendant's Constitutional rights, it would seem to be a distinction without a difference. Whether it is a judge or Government counsel who effectively deprived the defendant of "the right to present his own witnesses to establish a defense," the effect is the same, the accused has been denied "a fundamental element of due process of law." *See Webb*, 409 U.S. at 98 and *Washington,* 388 U.S. at 19.

The chilling effect of anticipated federal prosecution is what drove Wills's witness off the stand and deprived Wills of his Constitutional rights, regardless of whether it was at the hand of the judge or Government counsel. *See U.S. v. Thomas,* 488 F.2d 334 (6th Cir. 1973) [where an agent "substantially interfered with any free and unhampered determination the witness might have made as to whether to testify"]; *U.S. v. Vavages*, 151 F.3d 1185 (9th Cir. 1998) [9th Circuit reversed a

conviction on the grounds that the prosecutor engaged in "troublesome" and "intimating" conduct by threatening to file perjury charges and withdraw a plea agreement in an unrelated prosecution if the witness testified for the defense]; *U.S. v. Morrison*, 535 F.2d 223, 226–27 (3d Cir. 1976) [holding that the motives of the prosecutor warning defense witness of perjury charge are not relevant to "whether a defendant was denied his constitutional rights"]; and *U.S. v. Mandujano*, 425 U.S. 564, 582 (1976) ["a witness subpoenaed to testify before a petit jury and placed under oath has never been entitled to a warning that, if he violates the solemn oath 'to tell the truth,' he may be subject to a prosecution for perjury, for the oath itself is the warning"]. A number of Circuit courts have addressed prosecutorial intimidation of defense witnesses and similar issues, suggesting a variety of different remedies,[6] however, this Honorable Court has never directly addressed this issue.

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[6] *See Earp v. Ornoski*, 431 F.3d 1158 (9th Cir. 2005) [holding that petitioner was entitled to an evidentiary hearing on claim that the state intimidated a defense witness]; *U.S. v. Scroggins*, 379 F.3d 233 (5th Cir. 2004) [Holding that a trial court could have granted a new trial in the interest of justice in light of the witnesses' failure to comply with defendant's subpoena); *U.S. v. Viera*, 819 F.2d 498 (5th Cir. 1987) [Reversible error for the prosecutor to advise the defendant's attorney that if one of the defense witnesses testifies, he would either be prosecuted for complicity in the offense or perjury]; *U.S. v. Schlei*, 122 F.3d 944 (11th Cir. 1997) (holding that trial court must grant a hearing to determine whether the allegations of intimidation are true, however, if the witness did not testify and the allegations of intimidation are true, no prejudice need be shown]; *U.S. v. Heller*, 830 F.2d 150 (11th Cir. 1987) (Finding the Government had substantially interfered with the defendant's due process rights by advising his accountant that if he did not cooperate with the government, he might find himself to be a co-defendant]; *U.S. v. Blanche*, 149 F.3d 763 (8th Cir. 1998) [Suggesting the appropriate remedy for prosecutorial intimidation of witnesses with charge of perjury is to judicially immunize the witness]; *U.S. v. Arthur*, 949 F.2d 211 (6th Cir. 1991) (Holding that a trial court warning a witness that anything he said could be used against him and later stating, 'I think it's not in your best interest to testify because anything you say may be held against you in another prosecution against you for bank robbery' was a violation of due process and not harmless]; *U.S. v. Foster*, 128 F.3d 949 (6th Cir. 1997) [holding that the trial judge should have conducted a hearing to determine what effect the prosecutor's threat had on the witness].

Here Wills sought alternative remedies to ameliorate the consequences of Government counsel's improper conduct, to no avail. For example, Wills sought defense witness immunity for witness Aquilino, which both the Government and the trial court refused, ROA.10661-66. Thereafter, Counsel proffered, but was denied a proposed jury instruction that: "If you find that the government intentionally prevented the trial testimony of John Aquilino, who the Defendant intended to call as a witness in his defense, you may infer, but are not required to infer, that this evidence was unfavorable to the Government." ROA.4598:14-17.

Suffice it to say that the actions of Government counsel here went well beyond merely warning a potential witness of the consequences of perjury, he threatened the witness's attorney that if his client testified for Wills he "was very well going to be charged in a superseding indictment with the offense of perjury." DX 604 ("Sealed 9/13/19 Tr.) at 58:7-22. Government counsel effectively sidelined the only witness who could establish that Wills did not and could not have obstructed justice as charged in Count 18, preventing him from receiving due process and a fair trial. Prosecutors are not gatekeepers whose job it is to determine the credibility and worthiness of witnesses for the defense. The Constitutional right to call defense witnesses belongs to the defendant and the ultimate determination of a witnesses' credibility and worth is reserved for the Jury.

> In addition to ensuring that judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and discourages perjury. *Waller v. Georgia*, 467 U.S. 39, 46 (1984).

This Honorable Court should grant Certiorari to consider and resolve the recurring and troubling issue of prosecutorial intimidation of defense witnesses.

QUESTION TWO: WHETHER A DEFENDANT IS DEPRIVED OF A FAIR TRIAL WHEN HIS CODEFENDANT'S LAWYER IS ALSO SURREPTITIOUSLY REPRESENTING THE VICTIM, CREATING A JOINT MONETARY MOTIVE BETWEEN THE CONFLICTED LAWYER AND HIS TWO CLIENTS TO PROVIDE FALSE TESTIMONY AGAINST HIM?

Maria Losoya, the co-defendant and mother of the victim, was originally charged together with Wills with sexually assaulting her own daughter. After repeatedly denying any involvement by Wills or herself for more than two years, her lawyer pled her guilty and she agreed to testify against Wills.[7] What the defense did not know about until it was too late, was that Losoya's lawyer had a substantial financial interest[8] in seeing that Losoya recanted her previous denials and testified to sexually assaulting her own daughter in order to ensure that Wills was convicted and she, her daughter, and their conflicted lawyer could financially benefit from the civil lawsuit Nunez filed against Wills on her behalf.

Our profession has prohibitions against lawyers representing an accused facing life in prison from simultaneously having an economic incentive to sacrifice his client's defense and Constitutional rights in order to financially benefit himself and the alleged victim of his client's wrongdoing. At the very least, it would have been

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[7] While one can only speculate what advice her lawyer provided, Losoya testified at trial on cross-examination, that she thought she was eligible for probation, despite the fact that she had pled to an offense with a 15-year minimum mandatory sentence.

[8] In fact, lawyer Nunez had a contingent fee contract providing him with a 40% interest in any recovery, 50% if he was required to appeal. Nunez gave conflicting statements about when his representation of the victim daughter began, but regardless the contract was signed either shortly before or on the day that the verdict was returned. It defies logic or reason to believe that this nefarious conflicting relationship was not contemplated and anticipated long before. True to plan, Nunez filed a civil suit on behalf of the victim of his other client's conduct immediately following Wills conviction.

important for the jury tasked with determining the witnesses' credibility to know about this hidden collusion between Wills's accusers and their conflicted lawyer.[9]

Wills was relegated to asking the jury to speculate that the victim had hoped to financially benefit from a civil suit against him if he were convicted. However, it would be another thing entirely if Wills had been able to show that the mother's lawyer, who pled her guilty to sexually assaulting her own daughter, was at the same time representing her daughter in a civil suit against the man she contracted to testify against.

Lawyer Nunez had a substantial monetary motive to sacrifice the mother to obtain monetary gain for himself and her daughter. This unexpected and bizarre relationship provided a clear motive for these witnesses to falsely accuse Wills and allow their conflicted lawyer to share in their profits from his conviction. This was not merely cumulative, it was uniquely revealing and critical to a determination of these witnesses' credibility and, in turn, Wills's conviction.

However, the injury extends beyond just Wills personally, this malevolent cabal constituted a fraud on the court.

> [T]ampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always

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[9] The jury was left with the victim's testimony, sponsored by the Government, that she was not suing Wills. ROA.9531-9534. There is no evidence that the Government was aware of the contorted attorney-client relationships before it became public knowledge after the verdict in this case was returned.

be mute and helpless victims of deception and fraud. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 64 S. Ct. 997, 88 L. Ed. 1250 (1944).

Manifest injustice, whether caused by a prosecutor or a private party, results in violation of due process. Wills diligently sought to discover and present this information pre-trial, during trial to present to the jury, and in a Motion for New Trial seeking a hearing to develop additional evidence of this unique and clearly unethical relationship. At all times those involved in this conspiracy blocked these efforts and the court refused to hold a hearing to permit Wills the opportunity to explore the origins of this secret and conflicted relationship between an attorney and his two disparate clients.

The Fifth Circuit did not address this point of error instead stating it was waived because Wills did not adequately address or brief the trial court's determination that Wills failed to meet two of the *Berry* elements that this newly discovered evidence was not merely cumulative and would not have resulted in Wills's acquittal.[10] However, Wills spent almost ten pages setting out the details of counsel's diligent efforts to root out and present evidence of lawyer Nunez's secret "conflicting representation of the alleged perpetrator of these sexual assaults, while at the same time having the expectation of financial benefit from his representation of the alleged

[10] *See Berry v. United States*, 130 S. Ct. 1139 (2010), holding that in order to warrant reversal on the ground of newly discovered evidence, the defendant must show that (1) the evidence is newly discovered and was unknown to the defendant at the time of trial; (2) the failure to detect the evidence was not due to a lack of diligence by the defendant; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence if introduced at a new trial would probably produce an acquittal." (footnote and citations omitted)). The district court here found that Wills failed to establish the third and fifth elements.

victim of those assaults, creat[ing] an egregious actual conflict of interest which not only affected his representation of those two clients, but created a financial incentive for him to encourage his client, Losoya to sacrifice her own interests, testify against and actively participate in the prosecution of Wills in order to serve his own financial interests and those of his other client, Jane Doe." *See* Brief for Appellant, p. 8. It is abundantly clear that these remarkable facts clearly satisfy all five of *Berry's* prerequisites.

Moreover, the suggestion that Wills "does not argue on appeal that the Government suppressed, failed to disclose, or otherwise prevented him from obtaining this evidence" is true, but misses the point. The Court has recognized many circumstances that result in a violation of due process and deny an accused his or her right to a fair and impartial trial, totally apart from any Government misconduct. For example, prejudicial pretrial publicity impacts the fairness of the proceedings, *See Estes v. State of Tex.*, 381 U.S. 532, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965), or jury misconduct, *See Turner v. Louisiana*, 379 U.S. 446 (1965). Manifest injustice that deprives a citizen of his or her right to a fair trial should not be tolerated regardless the source, whether at the hand of a prosecutor, the Courts, or a private party. This case provides the Court an opportunity to address just such an occasion.

QUESTION THREE: WHETHER THE "DUAL SOVEREIGNTY DOCTRINE" SHOULD APPLY TO THE LONG TERM AND CONCERTED ACTION OF FEDERAL AND STATE AUTHORITIES TO PROSECUTE WILLS IN FEDERAL COURT FOR THE VERY SAME STATE CRIMINAL STATUTES, BY TITLE, NUMBER, AND ELEMENTS FOR WHICH HE HAS ALREADY BEEN PUNISHED IN REPEATED STATE COURT PROCEEDINGS?

The Court recently held that the United States and any State may successively prosecute and punish an individual for the same "conduct," refusing to overturn the "dual sovereignty doctrine." *See Gamble v. U.S.*, 587 U.S. ___ (2019). *Gamble* dealt with federal and state governments operating independently of one another. Here the federal and state governments conducted long-term, concerted investigations and prosecutions culminating in federal charges for not only the same "conduct," but for precisely the same State statutory criminal offenses[11] for which Wills had already been punished in repeated State court prosecutions over some four- and one-half years.

In *Gamble*, the record reflects that the Federal agents merely "assisted local law enforcement in the state investigation" from time to time (Gov't Br. at 20–21). The exact opposite was true here. The record reflects that federal agents participated in every phase of this investigation for four-and one-half years, side by side with State agents from the very beginning in April of 2015, (*See* ROA.6755: 4–9); conducting searches of personal and business premises; performing and participating in suspect and witness interviews and interrogations; conducting computer and cell phone forensic examinations; affecting arrests, and canvassing hotels along the Texas coastline (*See* ROA.2413, ROA.7303: 14–24, ROA.7314: 2–21); all orchestrated as part of Project Safe Childhood, which according to the Government's press releases, was "[l]ed by the United States Attorney's Offices...." (ROA.1086-87, ROA.2296,

[11] The Federal indictment actually charged, and the jury instructed on the very same state offenses, expressly citing the State criminal statute by title, number, and elements.

ROA.2358) and those Federal prosecutors acted as the "single point of contact," and the "go to" leaders of this joint operation.

Under these circumstances, the "dual sovereignty doctrine" has no place frustrating the reality that there were not two separate sovereigns acting independently, but rather two sovereigns acting in concert together, as one.[12] Wills was subjected to three successive state court prosecutions and four and a half years of excessively punitive pretrial conditions,[13] before the federal government adopted the state cases and tried and punished Wills for those same offenses.

Neither *Gamble v. U.S.*, 139 S. Ct. 1960 (2019) nor *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863 (2016) suggest that the "separate sovereign doctrine" should apply where the two sovereigns act in concert, prosecuting an individual in Federal Court for the very same identical state offenses for which he has already been repeatedly punished in three separate State courts.

Importantly, counts three, five, seven, nine, eleven, thirteen, fifteen, sixteen, and seventeen of the Federal indictment in this cause expressly charged and required proof of the very same substantive state offences that are violations of Texas Penal

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[12] For example, Federal Homeland Security agent Clay Odem testified that "by and large it was the State's work product" that he was working with in the federal investigation and prosecution, ROA.7303:14-24, confirming that he initially joined the investigation with the Brownsville police department. Moreover, Federal agents HIS Agents Baker (Brownsville), Marino (Brownsville) and Wiatrek (Corpus Christi) were actively engaged in the investigation, interrogation, and conduct of the prosecution from day one. ROA.6755:4-9. Additionally, The U.S. Attorney's Office issued a press release, coinciding with Wills's arrest, which announced that this case "was brought as part of Project Safe Childhood, a nationwide initiative," which was led by the United States Attorney's Offices and included "federal, state and local resources." See ROA.1086-87.

[13] The trial court assumed for purposes of Wills's pretrial Motion to Dismiss, that his excessively harsh pretrial detention conditions constituted punishment for double jeopardy purposes. (ROA.7136:17-25, ROA.7137:3-7 and 16-18, ROA.7138;16-17, and ROA.71392-6).

Code (TPC) §21.11. While separate sovereigns may punish twice for the same "conduct", they may not try or punish for the very same "offence" or crime, and *Gamble* does not suggest otherwise. *See* 139 S. Ct. at 1982.

Here, the Federal indictment below charged and required proof of the very same State "offence"—TPC § 21.11—for which Wills was already punished in the three previous State cases. Accordingly double jeopardy prohibits this subsequent Federal prosecution. *See Bartkus v. Illinois*, 359 U.S. 121, 130 (1959).

Bartkus involved a subsequent prosecution by Illinois state authorities, "not the Federal Government," and therefore involved the application of the "Due Process Clause" of the 14th Amendment, rather than the 5th Amendment's Double Jeopardy Clause. Nevertheless, this Court in *Bartkus* cites with approval *Houston v. Moore*, 5 Wheat. 1 (1820) for the proposition that the Fifth Amendment Double Jeopardy Clause would present "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 [or punished] in the courts of another government." *Bartkus*, 359 U.S at 131 (emphasis supplied). That is precisely what occurred here. Under the Assimilated Crimes Act, Counts 3, 5, 7, 9, 11, 13, 15, and 17 of the indictment below expressly charge the very same State criminal statute by both title and number, and the Federal Court below instructed the jury accordingly.

In *Houston v. Moore*, a Pennsylvania militia member was tried by a state court-martial for the federal offense of deserting and raised a double jeopardy bar to his

subsequent federal prosecution for the same offense. *Gamble, supra,* re-endorsed *Houston's* jeopardy bar holding:

> Justice Washington taught only that the law prohibits two sovereigns (in that case, Pennsylvania, and the United States) from trying an offence against one of them (the United States). *See Gamble*, 587 U.S. ___, 139 S.C.t 1960, 1977 (2019).

Again, this is exactly what occurred here, Wills's Federal indictment expressly charges the violation of state offenses that were also charged in state court. Wills had already suffered punishment for these offenses for Fifth Amendment purposes. Because Wills was punished under the TPC § 21.11,[14] a federal court should not punish him again for those same state "offences." To hold otherwise would be to violate over a century and a half of precedent.

This is not a case where Wills is complaining that the Federal and State Governments are both seeking to punish him for the *same conduct* under each jurisdictions respective laws. Rather, here the Federal Government is actually punishing Wills for the "*same offense*" for which he has already suffered punishment in the preceding, successive state court proceedings.

As the Court in *Gamble* reiterated, "an 'offence' for double jeopardy purposes is defined by statutory elements," referencing *Blockburger v. U.S.,* 284 U.S. 299 (1932).

The federal indictment in this case charged, the jury was instructed, and Wills was convicted and punished for violating the very *same* state offenses (Texas Penal

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[14] The issue of whether the conditions Wills suffered for 4-years constituted punishment was not disputed by the trial court nor addressed by the appellate court below.

Code §§ 21.11 & 22.011) for which he had already suffered punishment in three separate State courts. While the above stated language from the Supreme Court in *Gamble* may be dicta, the Court nevertheless makes clear that where a State has already punished an individual for a particular crime (here a violation of Texas Penal Code §21.11), the Federal Government may not thereafter punish him for those same state "offenses." Again, this is a question in need of an answer.

CONCLUSION

Because this Court has not yet resolved any of these three compelling issues, Petitioner respectfully prays that certiorari be granted and the Court order full briefing and argument on the merits of this case.

Respectfully Submitted,

GOLDSTEIN & ORR

By: _____

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