No.

IN THE SUPREME COURT OF THE UNITED STATES

RONDALE YOUNG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTION PRESENTED

Whether, pursuant to the *Houston v. Moore*, 18 U.S. 1 (1820) exception to the separate-sovereign doctrine, a defendant previously acquitted of murder under a state statute in state court can be tried for the same murder under the same state statute pursuant to a federal charge that assimilates "the laws of any State[.]"

STATEMENT OF RELATED CASES

- *United States v. Rondale Young*, No. 10CR00923-SJO, U.S. District Court for the Central District of California. Judgment entered November 18, 2019.

- *United States v. Rondale Young*, No. 15-50158, U.S. Court of Appeals for the Ninth Circuit. Judgment entered December 27, 2017.

- *Rondale Young v. United States*, No. 21-6787, Supreme Court of the United States. Petition for a writ of *certiorari* denied June 6, 2022.

- *United States v. Rondale Young*, No. 19-50355, U.S. Court of Appeals for the Ninth Circuit. Judgment entered June 30, 2022, rehearing and rehearing *en banc* denied September 8, 2022.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

STATUTES

MISCELLANEOUS

OPINIONS BELOW

The decision below can be found at *United States v. Young*, No. 19-50355, 2022 WL 2356734 (9th Cir. June 30, 2022). An earlier decision in the same appeal can be found at *United States v. Young*, No. 19-50355, 2021 WL 3201103 (9th Cir. July 28, 2021). In a prior appeal, the Ninth Circuit reversed petitioner's convictions in a decision that can be found at *United States v. Young*, 720 Fed. Appx. 846 (9th Cir. Dec. 27, 2017). One of the relevant district court decisions can be found at *United States v. Young*, 2013 WL 12218748 (C.D. Cal. Nov. 22, 2013).

JURISDICTION

The court of appeals filed its memorandum opinion on June 30, 2022 and denied a petition for rehearing and rehearing *en banc* on September 8, 2022. App. 1-2.[1] This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment provides:

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

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[1] "App." refers to the Appendix. "ER" refers to the Excerpts of Record in the Ninth Circuit.

The Violent Crimes in Aid of Racketeering Activity ("VICAR") statute provides:

> Whoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires so to do shall be punished . . . .

18 U.S.C. § 1959(a).

STATEMENT OF THE CASE

On the morning of August 2, 2009, petitioner's friend and alleged Pueblo Bishops Blood gang member Jesse "Skeebo" McWayne was killed during a drive-by shooting in the Pueblo Del Rio Housing Project located in south Los Angeles, California. App. 15. Approximately 30 minutes later, Francisco Cornelio, who had *no* gang ties, was killed at a car wash in rival 38th Street gang territory by two men who exited a vehicle and shot him. *Id.* Although the victim had no gang ties, law enforcement believed that the car wash shooting was a mistaken gang-retaliation murder. *Id.*

Officers suspected that the vehicle involved in the car wash shooting belonged to petitioner's mother because her car resembled a suspected vehicle captured on video surveillance that had a distinctive decal on the back windshield,

and her license plate matched eyewitness descriptions. *Id.* On September 22, 2009, local officers arrested petitioner and subsequently conducted interrogations in which he admitted that he had driven the vehicle on the morning of the shooting. App. 15-17. Petitioner was held in custody, and the State of California prosecuted him for murder under California Penal Code § 187 for the car wash shooting. App. 19, 22. In January 2013, a jury acquitted petitioner on the murder charge in state court. *Id.*

Meanwhile, a federal grand jury in the Central District of California also returned an indictment charging petitioner and numerous codefendants with various offenses, including the same murder under the VICAR statute. App. 22.[2] The VICAR murder charge (Count 3) alleged: "On or about August 2, 2009, in Los Angeles County, within the Central District of California, for the purpose of gaining entrance to and maintaining and increasing position in the Pueblo Bishops gang, an enterprise engaged in racketeering activity, defendant RONDALE YOUNG . . . unlawfully murdered victim F.C. with malice aforethought, *in violation of California Penal Code Sections 21a and 187*, all in violation of Title 18, United States Code, Section 1959(a)(1)." ER 553 (emphasis added).

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[2] The indictment also charged petitioner with RICO conspiracy under 18 U.S.C. § 1962(d) (Count 1), VICAR conspiracy to commit murder (Count 2), and use of a firearm in furtherance of a crime of violence under 18 U.S.C. § 924 (Counts 4 and 5). ER 545-56.

After his acquittal in state court, petitioner was transferred to federal custody, where he moved to dismiss the VICAR murder count, arguing that it alleged a violation of California Penal Code § 187, for which had been acquitted, and that the separate-sovereign doctrine did not permit re-prosecution. App. 22-23. The district court denied the motion, and he proceeded to trial, where a jury convicted him on the VICAR murder count and other charges. App. 19, 22-25.[3] The Ninth Circuit, however, reversed his convictions. App. 4, 19.

On remand, petitioner again moved to dismiss the VICAR murder charge, once again arguing that the separate-sovereign doctrine should not apply and noting that, at that time, this Court's decision in *Gamble v. United States*, 139 S. Ct. 1960 (2019) was pending. App. 15-21. The district court denied his motion, and he then proceeded to a third trial, where the jury again convicted him on the VICAR murder charge and the other three remaining counts. App. 4, 15-21. The district judge held that life imprisonment was mandatory due to the VICAR murder conviction and reluctantly imposed a life sentence, stating that he did not believe it was the appropriate punishment (repeating his comments from the previous sentencing). ER 690-91, 717.

On appeal, petitioner again claimed that the separate-sovereign doctrine did

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[3] The jury acquitted petitioner on one of the § 924(c) charges (Count 4).

not permit his re-prosecution for VICAR murder based on a California Penal Code § 187 violation for which he had been acquitted. The Ninth Circuit rejected his claim, holding: "The federal trial was not for a violation of the same statute adjudicated in state court even though the indictment for VICAR murder borrowed California law defining murder. Thus, the exception to the separate sovereign doctrine recognized in *Houston v. Moore*, 18 U.S. 1 (1820) and confirmed in *Gamble v. United States*, 139 S. Ct. 1960, 1977-78 (2019), does not apply." App. 4. Judge Watford issued a separate concurring opinion addressing the mandatory life sentence on the VICAR murder count, noting that "this case illustrates why mandatory minimum sentences of any sort – especially a sentence of life without parole – are both unjust and unwise." App. 12-14.

Just a couple of weeks before the Ninth Circuit issued its decision, this Court decided *Denezpi v. United States*, 142 S. Ct. 1838 (2022), and petitioner requested rehearing, contending that the panel's separate-sovereign analysis conflicted with this Court's precedent, including *Denezpi*. The Ninth Circuit denied his petition for rehearing on September 8, 2022. App. 1.[4]

[4] The Ninth Circuit had originally issued its decision in this case in 2021 but stayed its mandate pending the decision in another *en banc* case and then issued the current amended decision in June of 2022. Petitioner previously sought review from the original decision raising a different issue. *See Young v. United States*, 142 S. Ct. 2783 (2022).

ARGUMENT

I. The Court should grant this petition to clarify that the Fifth Amendment guarantees application of the *Houston v. Moore* exception to the separate-sovereign doctrine in the context of an assimilated offense.

A. This Court should clarify that the *Houston v. Moore* exception bars re-prosecution under the Double Jeopardy Clause

The VICAR statute provides: "Whoever . . . for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders . . . any individual *in violation of the laws of any State* . . . shall be punished . . . by death or life imprisonment . . . ." 18 U.S.C. § 1959(a) (emphasis added). Thus, the statute assimilates the state law for murder, and, in this case, the VICAR count in the indictment expressly alleged that petitioner committed murder in violation of California Penal Code § 187, the precise statute for which he had previously been acquitted.

The Double Jeopardy Clause, however, states that no person shall "be subject for the same *offence* to be twice put in jeopardy . . . ." U.S. Const. Amend. V (emphasis added). Petitioner was put in jeopardy multiple times for the same "offence." After being acquitted of murder under California Penal Code § 187 in state court, he was again put in jeopardy for the same offense, that is § 187, in federal court. And while separate sovereigns may be permitted to prosecute a defendant for the same *conduct* under the so-called separate-sovereign doctrine,

they cannot prosecute him for the same "offence." *See Denezpi v. United States*, 142 S. Ct. 1838, 1844-45 (2022).

Approximately two hundred years ago, in *Houston v. Moore*, 18 U.S. 1 (1820), this Court explained, in a similar situation, that a defendant cannot be prosecuted in both federal and state court for a violation of the *same statute*. Pennsylvania had enacted a statute that assimilated a federal law proscribing the refusal to serve in the military. In responding to the defendant's claim that the scheme could "subject the accused to be twice tried for the same offence[,]" this Court stated that "the sentence of either Court [state or federal], either of conviction or acquittal, might be pleaded in bar of the prosecution before the other . . . ." *Id.* at 31.

This Court has reaffirmed the *Houston v. Moore* exception to the separate-sovereign doctrine twice. In *Bartkus v. People of the State of Illinois*, 359 U.S. 121 (1959), this Court explained that the "language [in *Houston v. Moore*] by Mr. Justice Washington reflected his belief that the state statute imposed state sanctions for violation of a federal criminal law." *Id.* at 130. "As he 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. Mr. Justice Johnson agreed that if the state courts had become empowered to try the defendant for the federal offense, then such a state trial would bar a federal prosecution." *Id.* "Thus, *Houston v. Moore* can be cited"

as establishing "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 the question." *Id.*

This Court said the same thing more recently in *Gamble v. United States*, 139 S. Ct. 1960 (2019). After quoting the above language from *Bartkus*, *Gamble* explained that, under *Houston v. Moore*, "the law prohibits two sovereigns (in that case, Pennsylvania and the United States) from both trying an offense against one of them (the United States)." *Id.* at 1977. Although "[i]t may seem strange to think of state courts as prosecuting crimes against the United States," and vice versa, that is the narrow instance when successive prosecutions are barred even if carried out by separate sovereigns. *Id.*

As Justice Ginsburg noted in dissent in *Gamble*, the majority recognized the *Houston v. Moore* exception to the separate sovereign doctrine in the "strange" situation where successive state and federal prosecutions utilize the same statute. *Id.* at 1992 (Ginsburg, J., dissenting). Likewise Justice Gorsuch's dissent in *Gamble* explained that, with respect to *Houston v. Moore*, a "point of agreement" for all was "that a second prosecution for the same underlying offense would be prohibited even if brought by a separate government." *Id.* at 2004 (Gorsuch, J., dissenting). He further noted: "Everyone involved in *Houston* agreed that the defendant had been tried by a Pennsylvania court, under a Pennsylvania statute,

passed by the Pennsylvania Legislature. And though there were separate sovereigns with separate laws, everyone agreed there was only one offense." *Id.* at 2004 n.60.

The Ninth Circuit sidestepped the *Houston v. Moore* exception by simply stating, without supporting authority, that the VICAR charge merely "borrowed" California's murder statute. App. 4. But simply throwing out a "borrow" label and quickly moving on does not constitute proper constitutional analysis, as this "Court has said in the double jeopardy context it is the substance of the action that is controlling, and not the label given that action." *United States v. DiFrancesco*, 449 U.S. 117, 142 (1980).

Furthermore, when addressing *Houston v. Moore*, even the government agreed in *Denezpi* that "the forum for prosecution [does not] convert one sovereign's 'offence' into another's." Brief for the United States, No. 20-7622, at 25-26. The Solicitor General also admitted that when the federal government utilizes local law in a federal prosecution, the local law still retains its status as the "ultimate source" of authority for double jeopardy purposes. *Id.* at 29-30; *see also Puerto Rico v. Sanchez Valle*, 579 U.S. 59, 68 (2016) (double jeopardy inquiry assesses if prosecution stems "from the same ultimate source"). Here, the same source, California Penal Code § 187, buttressed the state and federal prosecutions, and the Ninth Circuit's view that the VICAR charge merely "borrowed" the

California murder statute, whatever that may mean, deviates from the principles underlying this Court's double jeopardy jurisprudence and the plain language of the statutory scheme.

Indeed, the indictment explicitly alleged a violation of California Penal Code § 187, as the plain language of the VICAR offense requires. *See* 18 U.S.C. § 1959(a) (assimilating a "violation of the laws of any State"); *see also United States v. Keene*, 955 F.3d 391, 399 (4th Cir. 2020) ("a jury must find that [the defendant] engaged in the conduct alleged in the indictment . . . in violation of the Virginia . . . statute"). In *Denezpi*, this Court stated that an "offence" for purposes of the Double Jeopardy Clause, means a "violation of a law[,]" *Denezpi*, 142 S. Ct. at 1846-47, and petitioner was impermissibly prosecuted for a violation of the same law, California Penal Code § 187, in both state court and then federal court. *See Grafton v. United States*, 206 U.S. 333 (1907) (acquittal in court-martial proceeding on charge that assimilated local homicide law barred subsequent prosecution on greater homicide charge in local court).[5]

Dissenting in *Denezpi*, Justice Gorsuch remarked that "if one sovereign uses another's laws as a 'cover' or 'sham' for what in substance amounts to its own

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[5] The fact that the VICAR offense may require additional elements does not eliminate the double jeopardy protection created by petitioner's earlier acquittal on the § 187 charge. *See Brown v. Ohio*, 432 U.S. 161, 165-68 (1977).

successive prosecution, it will violate the Clause." *Denezpi*, 142 S. Ct. at 1854. This aspect of double jeopardy "jurisprudence represents nothing more than a recognition that 'what cannot be done directly cannot be done indirectly [because] the Constitution deals with substance, not shadows.'" *Id.* Here, there is not even a "cover" or a "sham," as the indictment explicitly alleged a § 187 violation even though petitioner had been acquitted of § 187. In other words, the government attempted to do directly what it cannot do directly, and the Ninth Circuit's sole reliance on the word "borrow" essentially amounted to an unexplained analysis based on shadows, not substance.

While petitioner submits that the Ninth Circuit simply erred under this Court's longstanding precedent, the question presented at least implicates an important and complex constitutional question that is worthy of review. This Court recently remarked that the double jeopardy questions implicated by assimilated crimes are "complex" and therefore declined to resolve them sua sponte. *Denezpi*, 142 S. Ct. at 1845 n.2. This case directly presents the opportunity that was lacking in *Denezpi*. Meanwhile, this "Court has long recognized that, unless carefully cabined, the dual-sovereignty doctrine can present serious dangers." *Id*. at 1852 (Gorsuch, J., dissenting). This case presents the perfect opportunity to clarify the scope of *Houston v. Moore*, a limited yet important exception that cabins the separate-sovereign doctrine.

B. This Court should clarify that the *Houston v. Moore* exception applies under the Due Process Clause

Dissenting in *Denezpi*, Justice Gorsuch noted that the majority "does not conclude that the Constitution *allows* successive prosecutions by one sovereign based on another sovereign's laws." *Denezpi*, 142 S. Ct. at 1856. He further noted that even if the Double Jeopardy Clause somehow does not apply, "the Due Process Clauses may have something to say on the subject." *Id.*

Under the Due Process Clauses, "governments generally may not deprive citizens of liberty or property unless they do so according to 'those settled usages and modes of proceeding' existing at common law." *Id.* The Ninth Circuit did not identify any of this Court's cases blessing successive prosecutions in the context of assimilated crimes, "much less any 'settled' tradition of doing so." *Id.* Indeed, the Ninth Circuit did not cite a single case to support its cursory conclusion that successive prosecutions were permissible in the context of assimilated crimes. To the contrary, the only case identified by the Ninth Circuit was *Houston v. Moore*, which reflects a history of *forbidding* successive prosecutions in this precise context.

While the Double Jeopardy Clause stands as the primary constitutional check on successive prosecutions, there is also a tradition of applying principles of collateral estoppel in criminal cases pursuant to the Due Process Clause. *See Ashe*

v. Swenson, 397 U.S. 436, 442-45 (1970); *United States v. Oppenheimer*, 242 U.S. 85, 87-88 (1916); *see also Bartkus*, 359 U.S. at 151-55 (Black, J., dissenting); *Hoag v. State of New Jersey*, 356 U.S. 464, 473-74 (1958) (Warren, C.J., dissenting). Such principles are "not to be applied with [a] hypertechnical" approach but instead with "realism and rationality." *Ashe*, 397 U.S. at 444. The Ninth Circuit's view that the VICAR charge merely "borrowed" California Penal Code § 187 is the type of "hypertechnicality" departing from "realism" that is inconsistent with the application of estoppel principles under the Due Process Clause.

Furthermore, there is a rich history of affording protections under the Due Process Clause to prevent unfair retribution against unpopular individuals. *See Landgraf v. USI Film Products*, 511 U.S. 244, 266 (1994). These due process concerns are implicated here because "[i]nevitably, the victims of . . . double prosecutions will most often be the poor and weak in our society, individuals without friends in high places who can influence prosecutors not to try them again." *Bartkus*, 359 U.S. at 163 (Black, J., dissenting). In sum, *Denezpi* left "much open for the future[,]" including whether the Due Process Clause affords protection in this context, *Denezpi*, 142 S. Ct. at 1856 (Gorsuch, J., dissenting),and this Court should now grant review to resolve these important questions under the Fifth Amendment.

II. This Court should grant review to clarify that the *Houston v. Moore* exception to the separate-sovereign doctrine applies in the context of assimilated crimes under federal common law and as a matter of statutory interpretation.

In *Houston v. Moore*, this Court analogized to collateral estoppel in civil cases, stating that a "bar of the prosecution" would apply in this context just "as the judgment of a State Court, in a civil case of concurrent jurisdiction, may be pleaded in bar of an action for the same cause, instituted in a Circuit Court of the United States." *Houston*, 18 U.S. at 31. As mentioned, there is a rich body of jurisprudence applying principles of collateral estoppel in criminal cases as a matter of federal common law. *See Ashe*, 397 U.S. at 443 ("Although first developed in civil litigation, collateral estoppel has been an established rule of federal criminal law at least since this Court's decision more than 50 years ago in *United States v. Oppenheimer*"); *Sealfon v. United States*, 332 U.S. 575 (1948); *Oppenheimer*, 242 U.S. at 87-88.

Because this petition arises from a federal criminal case, this Court could hold that the *Houston v. Moore* exception to the separate-sovereign doctrine applies in this instance as a matter of common law without reaching the Fifth Amendment questions. Once again, "the federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with [a] hypertechnical and archaic approach" and instead should be applied "with realism

and rationality." *Ashe*, 397 U.S. at 444. Under a realistic approach, petitioner was prosecuted twice for violating the same statute, California Penal Code § 187, in contravention of *Houston v. Moore*. Any contrary conclusion is nothing more than a "metaphysical subtlety." *Gamble*, 139 S. Ct. at 1989 (Ginsburg, J., dissenting).

Fundamental fairness and policy reasons support a bar on re-prosecution in the context of assimilated crimes, *see Gamble*, 139 S. Ct. at 2007-08 and n.91 (Gorsuch, J., dissenting), particularly because "[t]he expansion of federal criminal law has exacerbated the problems created by the separate-sovereign doctrine." *Id.* at 1994 (Ginsburg, J., dissenting). "Some suggest that 'the federal government has now duplicated virtually every major state crime.'" *Id.* at 2008 (Gorsuch, J., dissenting). "Others estimate that the U.S. Code contains more than 4,500 criminal statutes, not even counting the hundreds of thousands of federal regulations that can trigger criminal penalties. Still others suggest that 'there is no one in the United States over the age of 18 who cannot be indicted for some federal crime.'" *Id.* (footnotes omitted).

Given the current state of affairs, the federal enactment of a broad-based assimilated crime is certainly a dangerous possibility, *see* 18 U.S.C. § 1952, essentially permitting the federal government wide-ranging authority to prosecute defendants under state statutes for which they have been acquitted. Separate-sovereign cases like *Gamble* did not consider a non-constitutional bar, let alone in

the context of assimilated crimes, and this Court can avoid such dangers without necessarily reaching a constitutional conclusion.

Congress was also presumably familiar with the bar set forth in *Houston v. Moore* when it enacted the VICAR scheme and intended for it to constitute a valid defense when a defendant was previously acquitted of the state statute alleged. *See Dixon v. United States*, 548 U.S. 1, 13-14 (2006). Likewise, under the doctrine of constitutional doubt, the scheme should be construed as barring re-prosecution of a state statute following an acquittal in state court so as to avoid the serious Fifth Amendment questions discussed above; this approach is also consistent with the rule of lenity. *See, e.g.*, *Jones v. United States*, 529 U.S. 848, 857-58 (2000).

Finally, Congress has firmly established its concern with respecting state-court judgments, *see* 28 U.S.C. § 2254, and this Court has accordingly emphasized the importance of "comity and finality" in criminal proceedings. *Shinn v. Ramirez*, 142 S. Ct. 1718, 1734 (2022); *Cullen v. Pinholster*, 563 U.S. 170, 185 (2011). Just as state-court judgments of conviction are worthy of respect, an acquittal under a state statute should be given the same deference. At the very least, there should be a "clear statement" from Congress authorizing re-prosecution in this context, and no such "clear statement" exists. *United States v. Bass*, 404 U.S. 336, 349 (1971). Accordingly, the VICAR scheme should be construed as barring re-prosecution when the defendant has been acquitted of the charged state statute in state court.

III. This case is an excellent vehicle to review these important questions concerning the reach of the separate-sovereign doctrine.

This case is an excellent vehicle for review. Unlike the unsuccessful claims in *Gamble* and *Denezpi*, for example, this case involves re-prosecution following an *acquittal*, and "retrials after acquittal have been considered particularly obnoxious, worse even, in the eyes of many, than retrials after conviction." *Bartkus*, 359 U.S. at 162 (Black, J., dissenting).

Furthermore, the circumstances starkly demonstrate how far overreaching, unfair, and unnecessary double-prosecutions can be. Given the proliferation of federal offenses described above, *see Gamble*, 139 S. Ct. at 2008 (Gorsuch, J., dissenting), the government had ample weapons in its arsenal to prosecute petitioner, and it implemented that firepower. Petitioner was also tried and convicted of RICO conspiracy and VICAR conspiracy (Counts 1-2), counts of conviction that permitted the district court to impose decades of imprisonment. *See* 18 U.S.C. §§ 1959(a)(5), 1962(d), 1963. Federal interests were amply satisfied by prosecution on those charges, and sustaining petitioner's challenge would not require reversal of those counts.

The only question is whether, pursuant to the substantive VICAR murder count (Count 3), petitioner could be re-prosecuted under the same state statute for which he had previously been acquitted. For practical purposes, the only

prosecutorial interest at stake with respect to the substantive VICAR murder count that was not satisfied by the other counts was the fact that the former required a *mandatory* penalty of life imprisonment. *See* 18 U.S.C. § 1959(a)(1). Putting aside whether such mandatory minimum penalties are ever advisable, *see* Anthony M. Kennedy, Associate Justice, Supreme Court of the United States, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003) (concluding they are not), both the district judge and Judge Watford believed that the mandatory life sentence imposed on petitioner was unjust. App. 12-14.[6]

Judge Watford explained: "Young's character and background did not suggest that he deserved the law's most severe sanction short of death. He was 26 years old at the time of the offense, a devoted father, and employed as a delivery driver for Arrowhead. He had only a minor criminal record. In addition, there was no evidence suggesting that Young had planned or orchestrated the murder, so his role in the offense rendered him at least somewhat less culpable than the other two participants." App. 13. "Yet the judge had already sentenced one of those defendants – the one who prosecutors believed had actually shot the victim – to 40

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[6] The *Houston v. Moore* bar should also require reversal of the § 924 conviction in Count 5, which used the § 187-based VICAR murder offense as a predicate. In any event, it is clear that the district judge would not impose life imprisonment even if only the VICAR murder conviction were vacated, as it was the only count that required mandatory life imprisonment.

years in prison. (That defendant, Anthony Gabourel, had been tried separate from Young and acquitted of the VICAR murder charge, so he avoided the mandatory life sentence that Young faced.)." *Id.*

Particularly given the comments of the district judge and Judge Watford, when "[l]ooked at from the standpoint of the individual who is being prosecuted," *Bartkus*, 359 U.S. at 155 (Black, J., dissenting), it is hard to fathom how petitioner could not believe that he is subject to an unjust sentence, one that requires him to spend the rest of his life in prison, based on a re-prosecution of the very statute for which he had previously been acquitted. This Court should grant review and remedy this injustice, whether based on Fifth Amendment or non-constitutional grounds.

CONCLUSION

For the foregoing reasons, the Court should grant this petition.

Dated: December 5, 2022

Respectfully submitted,

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