APPENDIX

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RONDALE YOUNG, AKA Devil, AKA P-Grump, AKA PG, AKA Pueblo Group, Defendant-Appellant.	No. 19-50355 D.C. No. 2:10-cr-00923-SJO-31 Central District of California, Los Angeles ORDER

Before: WATFORD and BUMATAY, Circuit Judges, and FREUDENTHAL,* District Judge.

The panel unanimously votes to deny the petition for panel rehearing. Judges Watford and Bumatay vote to deny the petition for rehearing en banc, and Judge Freudenthal so recommends. The full court has been advised of the petition for rehearing en banc, and no judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for panel rehearing and rehearing en banc, filed August 15, 2022, is DENIED.

* The Honorable Nancy D. Freudenthal, United States District Judge for the District of Wyoming, sitting by designation.

NOT FOR PUBLICATION

FILED

JUN 30 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RONDALE YOUNG, Defendant-Appellant.	No. 19-50355 D.C. No. 10-cr-00923-SJO-31 Central District of California, Los Angeles ORDER

Before: WATFORD, BUMATAY, Circuit Judges, and FREUDENTHAL,** Senior District Judge

The Memorandum filed July 28, 2021 is withdrawn and replaced by the new Memorandum filed concurrently with this order. The order staying the mandate pending the conclusion of en banc proceedings in *United States v. Begay*, No. 14-10080 is vacated. Petitions for rehearing or for rehearing en banc may be filed with respect to the new memorandum.

** The Honorable Nancy D. Freudenthal, United States Senior District Judge for the District of Wyoming, sitting by designation.

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RONDALE YOUNG, Defendant-Appellant.	No. 19-50355 D.C. No. 10-cr-00923-SJO MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
S. James Otero, District Judge, Presiding

Argued and Submitted July 9, 2021
Pasadena, California

Before: WATFORD, BUMATAY, Circuit Judges, and FREUDENTHAL,** Senior District Judge
Concurrence by Judge WATFORD

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Nancy D. Freudenthal, United States Senior District Judge for the District of Wyoming, sitting by designation.

Following an earlier reversal and remand in *United States v. Young*, 720 F. App'x 846 (9th Cir. 2017), Rondale Young was tried a second time on charges arising from a 2009 shooting at a carwash in nearby 38th Street gang territory. The jury returned convictions for conspiracy to violate the Racketeer Influenced and Corrupt Practices Act (RICO), conspiratorial and substantive murder under the Violent Crime in Aid of Racketeering (VICAR) statute, and use of a firearm in furtherance of a crime of violence. The Court affirms in all respects.

1. Young argues his prior state acquittal for murder bars or is a defense against federal prosecution for VICAR murder. He also argues re-prosecution is barred because the government delayed prosecution. The district court did not err in denying dismissal. 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.

Young's second theory that his state acquittal is a valid defense was not preserved below, thus this issue is reviewed for plain error. *United States v. McElmurry*, 776 F.3d 1061, 1063 (9th Cir. 2015). The district court did not plainly err in allowing the VICAR murder charge to go to the jury. On this charge, to avoid prejudice, the court "should instruct on the state definition" to include "the requisite

state of mind or the law respecting self-defense." *United States v. Adkins*, 883 F.3d 1207, 1211 (9th Cir. 2018) (citation omitted). A prior acquittal is not part of California's *definition* of murder; thus his state acquittal is not a valid defense to VICAR murder.

As to delay in prosecution, Young's Sixth Amendment speedy trial claim is waived by his failure to raise it in the earlier appeal. *United States v. Radmall*, 340 F.3d 798, 802 (9th Cir. 2003) ("[Defendant] cannot now use the serendipitous fact of reversal . . . to refashion his defaulted claims. . . ."). Dismissal for delay under Federal Rule of Criminal Procedure 48(b) "is limited to post-arrest situations." *United States v. Benitez*, 34 F.3d 1489, 1495 (9th Cir. 1994) ("[A]n arrest or prosecution by state authorities does not trigger Rule 48(b)"). The ten-month period between Young's federal arrest and trial does not constitute unnecessary delay.

2. Young argues the law of the case requires suppression of his second-day custodial statements and recorded calls based on the mid-stream *Miranda* warning given his first day in custody during a deliberate two-step interrogation ruled improper in his earlier appeal. *Young*, 720 F. App'x at 848–49. Young also argues for suppression of his recorded calls, and for suppression of allegedly coerced statements made after officers detained and referred to his mother. The law of the case does not require suppression of Young's second-day statements because this Court's earlier decision addressed only the circumstances of the first day with no

implication that the Court reached Young's later statements. *See United States v. Garcia-Beltran*, 443 F.3d 1126, 1129 (9th Cir. 2006) (the law of the case extends to issues "decided explicitly or by necessary implication").

Further, there is no clear error in the district court's factual findings denying Young's suppression motion. *United States v. Job*, 871 F.3d 852, 859 (9th Cir. 2017) ("[F]actual findings [are reviewed] for clear error . . . ."). These findings support the district court's conclusion that the circumstances of that second day were curative of the prior day's *Miranda* violation. *See Bobby v. Dixon*, 565 U.S. 23, 32 (2011) (the break in time and change in circumstances created "a new and distinct experience" to conclude the *Miranda* warning was not undermined (citation omitted)). No additional curative steps were required for a reasonable person in Young's position to understand that he had a real choice about whether to speak again at his request to the detectives. *See Missouri v. Seibert*, 542 U.S. 600, 611–12 (2004).

The district court's findings that Young's testimony was not credible support the order denying suppression of the recorded calls. Special deference is given to a district court's determinations of witness credibility. *United States v. Hovsepian*, 422 F.3d 883, 885 (9th Cir. 2005). Finally, the detective's actions and comments about Young's mother were not coercive but were logically related to video

surveillance and eyewitness identifications indicating the vehicle used in the carwash shooting belonged to Young's mother.

3. Young argues the jury instructions erroneously described VICAR's purpose (motive) and its malice elements. As to purpose, Young argues *Burrage v. United States*, 571 U.S. 204 (2014) requires a "but-for" causal relationship between the racketeering enterprise and the murder. This argument was rejected in *United States v. Rodriguez*, 971 F.3d 1005, 1010–11 (9th Cir. 2020) and thus we reject it here. The district court correctly gave a "substantial purpose" rather than a "but-for cause" instruction for the VICAR purpose element. Young also argues the disjunctive form of the purpose instruction was erroneous. However, a disjunctive formulation was specifically recognized in *United States v. Banks*, 514 F.3d 959 (9th Cir. 2008) to "ensure that the statute is given its full scope, without allowing it to be used to turn every criminal act by a gang member into a federal crime." *Id*. at 970.

The Court also rejects Young's arguments that the malice instructions were defective for conspiratorial and substantive murder under VICAR. The instruction for conspiratorial murder required the government to prove Young agreed and intended that one or more of his co-conspirators would "intentionally and unlawfully kill" the victim, not just "intentionally kill." The substantive VICAR murder instruction provided that a person acts with *express malice* if he unlawfully intended to kill. Read together, the phrase "intentionally and unlawfully kill" incorporates an

express malice requirement. The jury could not convict on only implied malice. On aiding and abetting VICAR murder, the instruction required the jury find Young "intentionally help[ed] someone else commit a crime" by "act[ing] with the intent to facilitate murder in the aid of racketeering" by "actively participat[ing] in a criminal venture *with advance knowledge* of the crime and having acquired that knowledge *when Defendant still had a realistic opportunity to withdraw from the crime*." (emphasis added). This instruction does not permit a conviction by finding the shooting was merely a natural and probable consequence of Young picking up the co-conspirators.

Young was also not entitled to a sua sponte heat of passion instruction, as the evidence did not support it. *People v. Breverman,* 960 P.2d 1094, 1104 (Cal. 1998). Approximately forty minutes passed between the shooting of Young's fellow gang member (McWayne) and the car wash shooting. Surveillance video shows the car that Young was driving circled the car wash for three to four minutes before the shooting, showing some deliberation. There was also no evidence that Young or his passengers thought the victim was McWayne's shooter; rather, they looked for someone likely to be a member of the rival gang. These facts at best support acting on an emotion of revenge, which cannot support a heat of passion instruction. *People v. Lasko,* 999 P.2d 666, 670 (Cal. 2000). In addition, as in *United States v. Begay*, 33 F.4th 1081 (9th Cir. 2022) (en banc), the theory that Young's counsel

presented to the jury – that Young did not know anyone in the car was going to commit murder – is incompatible with the notion that Young acted in the heat of passion. *See id.* at 1088–89.

Finally, the instruction for *Pinkerton* liability is correct in that the jury was required to find Young agreed with the shooter that one or both of them would kill with express malice, and the shooting of the victim was a natural and probable consequence of that agreement.

4. Young's conviction for use and carry of a firearm in furtherance of a crime of violence relies on the VICAR second degree murder charge as the crime of violence. Previously, *United States v. Begay*, 934 F.3d 1033 (9th Cir. 2019) held that a finding of extreme recklessness, depraved heart, or implied malice will suffice as the requisite mental state for second degree murder under federal and California law. *Id*. at 1040; Cal. Penal Code § 188. The plurality in *Borden v. United States*, 593 U.S. __, 141 S. Ct. 1817 (2021) subsequently concluded the phrase "violent felony" under 18 U.S.C. § 924(e) of the Armed Career Criminal Act (ACCA) does not include offenses criminalizing "ordinary" reckless conduct. *Id*. at 1825, n.4. The definitions of "crime of violence" in § 924(c)(3) and "violent felony" in § 924(e)(2)(B) are identical in relevant part.

On rehearing en banc, this Court found that after *Borden,* "[t]he distinction between degrees of recklessness is critical to our conclusion." *United States v.*

Begay, 33 F. 4th 1081, 1094 (9th Cir. 2022) (en banc). The opinion notes that second degree murder under federal law (18 U.S.C. § 1111(a)) requires conduct in extreme indifference to the value of human life, such that the defendant can fairly be said to have actively used force against the person of another. *Id.* at *11. Therefore, "second-degree [federal] murder qualifies as a crime of violence pursuant to § 924(c)(3)(A)." *Id.* at *3. Here, Count Three was charged as murder in violation of both VICAR (18 U.S.C. § 1959(a)) and California law. California second-degree murder requires express or implied "malice aforethought." Cal. Penal Code § 188.

Young points to the jury instruction defining malice aforethought – based on California's former definition of the term – and argues the jury was not required to find extreme indifference or extreme recklessness in this case, and therefore there was no crime of violence to support the § 924(c) conviction. But the focus here is categorical. And as noted, there was no error on the other counts. At trial, the government pursued Count Three based only on theories of Young being a conspirator or aider and abettor – Young was the driver, not the shooter – and the instructions on conspirator liability and aiding and abetting for Count Three required the jury to find respectively express malice (by referring to Count Two) or advance knowledge that a murder would be committed.

5. Young further argues error in the district court instructing the jury on a *Pinkerton* theory of liability for his § 924(c) conviction. This Court rejected

Young's argument in *United States v. Henry,* 984 F.3d 1343, 1355–56 (9th Cir. 2021). Young contends that *Henry*'s continued reliance on reasonable foreseeability is inconsistent with *Borden* and *Rosemond v. United States,* 572 U.S. 65 (2014). But neither of those cases addresses *Pinkerton* liability, and they are not clearly irreconcilable with *Henry.* Post-*Borden,* this Court continues to follow *Henry*. *See, e.g., United States v. McShane,* No. 17-16906, 2021 WL 4810501, at *1 (9th Cir. Oct. 15, 2021); *United States v. Major,* No. 17-16764, 2022 WL 1714290, at *1 (9th Cir. May 27, 2022).

6. The Court rejects Young's argument that the law permits a fine without imprisonment for VICAR murder. *See United States v. Rollness*, 561 F.3d 996, 998 (9th Cir. 2009) (per curiam) (recognizing that "§ 1959(a)(1) imposes a minimum sentence of life imprisonment for VICAR murder"). The holding in *Rollness* is unaffected by *Encino Motors, LLC v. Navarro*, 138 S. Ct. 1134, 1141 (2018).

AFFIRMED.

FILED

JUN 30 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

United States v. Young, No. 19-50355

WATFORD, Circuit Judge, concurring:

I agree with my colleagues that a conviction for VICAR murder carries a mandatory minimum sentence of life imprisonment without the possibility of parole. *United States v. Rollness*, 561 F.3d 996, 997–98 (9th Cir. 2009) (per curiam); *accord United States v. Under Seal*, 819 F.3d 715, 720 (4th Cir. 2016); *United States v. Carson*, 455 F.3d 336, 385 n.44 (D.C. Cir. 2006) (per curiam); *United States v. James*, 239 F.3d 120, 126–27 (2d Cir. 2000). But this case illustrates why mandatory minimum sentences of any sort—especially a sentence of life without parole—are both unjust and unwise.

The district judge who sentenced Rondale Young to life without parole did not believe that sentence to be warranted. He agreed with the jury's verdict, which was predicated on a finding that Young played an integral role in the murder of an innocent person. To retaliate against a rival gang, Young drove two of his fellow gang members into the rival gang's territory to kill one of that gang's members. Young's co-conspirators got out of the car, shot and killed someone they mistakenly believed to be a member of the rival gang, and then ran back to the car where Young was waiting to drive them off. Young no doubt deserved a lengthy sentence for engaging in that conduct, and the judge who presided over his trial and heard the evidence against him was no doubt prepared to impose such a

sentence. But the judge also stated that, if afforded the discretion to do so, he would not have sentenced Young to spend the rest of his life in prison.

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. Yet the judge had already sentenced one of those defendants—the one who prosecutors believed had actually shot the victim—to 40 years in prison. (That defendant, Anthony Gabourel, had been tried separately from Young and acquitted of the VICAR murder charge, so he avoided the mandatory life sentence that Young faced.) The judge was understandably reluctant to impose on Young a longer sentence than the one his more culpable co-defendant had received.

What the Supreme Court has said in the capital sentencing context applies, in my view, with no less force in non-capital cases. Arriving at a "just and appropriate sentence" in any case—capital or otherwise—"requires consideration of the character and record of the individual offender and the circumstances of the particular offense." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion); *see also* 18 U.S.C. § 3553(a)(1) (requiring the court to

consider, among other factors, the "nature and circumstances of the offense and the history and characteristics of the defendant"). Mandatory minimum sentencing laws frequently preclude the imposition of a just and appropriate sentence because they "treat[] all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass." *Woodson*, 428 U.S. at 304. Young deserved to be treated "with that degree of respect due the uniqueness of the individual," *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion), even if he was facing a sentence of life without parole rather than death.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CRIMINAL MINUTES - GENERAL

Case No.	CR 10-00923 (C)-SJO-31	Date	April 1, 2019

Present: The Honorable	S. James Otero
Interpreter	Not Required

Victor Paul Cruz	Not Present	Not Present
Deputy Clerk	*Court Reporter/Recorder, Tape No.*	*Assistant U.S. Attorney*

U.S.A. v. Defendant(s):	Present	Cust.	Bond	Attorneys for Defendants:	Present	App.	Ret.
Rondale Young	not	xx		Karen L. Goldstein	not	xx	

PROCEEDINGS (in chambers): ORDER DENYING DEFENDANT'S MOTION TO DISMISS COUNTS 1, 2,3, AND 5 BASED ON THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT [Docket No. 3233]

This matter is before the Court on Defendant Rondale Young's ("Defendant") Motion To Dismiss Counts 1, 2,3 and 5 Pursuant to the Double Jeopardy Clause ("Motion"), filed on March 4, 2019. The United States of America ("Government") opposed the Motion ("Opposition") on March 12, 2019, and Defendant filed a Reply ("Reply") on March 17, 2019. For the following reasons, the Court **DENIES** the Motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

On August 2, 2009, the occupants of a black Chrysler 300 shot and killed Mr. Cornelio ("Cornelio") while he was at an East Los Angeles carwash with his young son. (Opp'n at 2-3.) Mr. Cornelio was murdered in misguided retaliation for the death of Jesse McWayne, or "Skeebo," ("Skeebo") a member of the Pueblo Bishop Bloods ("PBB") gang, who was killed earlier that morning by the rival 38th Street Gang. (Opp'n at 3.) After several eye-witnesses described unique information about the car involved in the murder, the detectives identified a woman named Helen Young ("Ms. Young") who lived in the PBB housing project and owned a black Chrysler 300 meeting the description of the eye-witnesses, from its unique hubcaps and window memorial decals to several letters of the license plate. (*Id.*) On September 22, 2009, Detective Calzadillas ("Calzadillas") and his partner Detective Torres ("Torres") arrived at the home of Ms. Young, defendant's mother, to ask about her black Chrysler 300. (*Id.*) Ms. Young informed the officers that the only other person who drove her car was her son, Defendant, who had her car on the day of the murder. (Mot. Ex. A at 27, ECF No. 3236-5.) The detectives then impounded Ms. Young's car and brought her to the station for questioning. (Opp'n at 3.) They also detained Defendant at work and brought him in for questioning. (Opp'n at 3.)

Detectives had reviewed the video surveillance from the murder and determined that the car matched the Defendant's mother's Chrysler 300, (Mot. Ex. A at 26-28, 30.); (b) eye witnesses had identified Ms. Young's vehicle as the one used in the murder, (*Id.* at 126), (c) the defendant's mother had just told Calzadillas that her son was

driving her Chrysler 300 on the morning of the murder, (*Id.* at 27, 39, 50-51); and (d) a cooperating witness told detectives -- several days before Defendant's arrest -- that Rondale Young was involved in the murder with Anthony Gabourel (*Id.* at 91-92).

1. Defendant's Statements to LAPD on September 22, 2009

Defendant was first interviewed by police in connection with his involvement in the murder of Francisco Cornelio that day. (Mot. Ex. A at 16.) During the initial suppression hearing before Defendant's first trial ("the First Suppression Hearing"), Calzadillas testified that he did not immediately administer *Miranda* warnings to Defendant because he intended first to introduce the detectives, advise Defendant of the investigation, and tell the Defendant that they would be back shortly to interview him. (*Id.* at 35.) However, approximately twenty minutes into this introduction, Defendant began speaking without being questioned about how he had been present when his friend "Skeebo" had been killed, and how he had driven to the hospital later that morning in his mother's car with a friend named "Paul." (*Id.* at 104.) Calzadillas then immediately administered *Miranda* warnings to Defendant and let him continue speaking. (*Id.*) Calzadillas did not want to get up and leave the room to get a recording device because he did not want to interrupt the flow of the conversation. (*Id.* at 35, 104.) When it seemed appropriate to take a break, Calzadillas left and returned with his device, and recorded Defendant's remaining statement. (*Id.* at 32, 104.)

During the recorded portion of Defendant's statement, Defendant told police that he had driven to two different hospitals that morning. (Ex. 710A at 1.) Defendant could not remember the route he took to visit these hospitals, or the route he took on the way back, but he denied being on Central Avenue where the Cornelio murder took place. (*Id.* at 18, 24-25.) Defendant told police that "Paul" had given him the directions. (*Id.* at 32-33.) Defendant told police that he had known "Paul" for years, yet he did not know "Paul"'s last name, address, or phone number, and could not give the police any information on how to contact "Paul." (*Id.* at 40-41.)

2. Defendant's Statements to LAPD on September 23, 2009

On September 23, 2009, after spending the night and jail and speaking to his mother and other civilians, Defendant asked for the opportunity to give another statement to police." (Ex. 711A at 1-2, ECF No. 3236-7.) Defendant was therefore transported back to the Newton Police Station for a re-interview with Calzadillas and Torres. (*Id.*) Defendant has filed a fresh declaration in which he claims that he was "forced" into a second interrogation, (Young Decl., ¶ 8), which is flatly contradicted by his recorded statements that day. (ECF No. 3236-2.) At the beginning of the interview, the detectives confirmed: "You decided you wanted to come back in and talk?" and Defendant responded, "Yes." (Ex. 711A at 1-2.) The detectives also reminded him of the *Miranda* warning they had given him the previous day by saying: "everything we talked about yesterday remains the same." (*Id.*)

Defendant again admitted that he had been driving his mother's car on the morning of the murder, but this time his story changed in detail. Defendant said that "Paul" had not been his only passenger in the car that day. (Ex. 711A at 1-2.) "Paul" was in the car when he left his house to visit Skeebo at the hospital, but as they were driving, "Paul" said to pull over. (*Id.* at 1-3.) "Paul" then supposedly exited the car and came back with two men that Defendant had "seen in the neighborhood," but did not know their names. (*Id.* at 2-4.) Through pictures, Defendant identified Gabourel and Tresevant, who he knew as "Bad Ass" and "Shannon." (*Id.* at 39.) Defendant initially said that he did not see if Gabourel or Tresevant had a gun, but that one of the men sitting in his car "could have been hiding something from me," and might have been holding something "long" against his leg. (*Id.* at 5.) Gabourel and Tresevant told him "man, we ain't going to the hospital. Just drop us off." (*Id.* at 4.) "Paul" told Defendant to pull over near a structure that looked like a carwash, and said "just give me a minute," and then got out of the car with

both men. (*Id.* at 13.)

"Paul," the Gabourel and Tresevant were gone for a period, and then defendant saw them running "back towards my car from where the carwash would be." (*Id.* at 14.) Defendant said that he had not heard any gunshot. (*Id.* at 20-21.) "Paul," Gabourel, and Tresevant jumped back in the Defendant's car, and Paul yelled "come on" or "go," so the defendant drove away. (*Id.* at 14, 44.) Defendant finally admitted that he saw both Gabourel and Tresevant had guns when they returned to his car from the carwash, and that the gun Gabourel was carrying was black, and either a rifle or shotgun. (*Id.* at 40-44.) Defendant took his passengers back to 53rd Street and Compton and dropped them off. (*Id.* at 45.) Defendant said at that point he went to the hospital and learned that Skeebo had not survived. (*Id.* at 47.)

3. Defendant Returns to His Jail Cell

After his interview with LAPD, Defendant was brought back to Parker Center. He shared a cell with a person later identified as CW-16, although CW-16 was not cooperating with law enforcement at the time ("CW-16"). (ECF No. 2495 at 38-39.) The jail recorded Defendant's conversations with CW-16. Defendant told CW-16: When you get off work, get back with the homies. Do a mission. Go home. Act like nothing happened. And then go back to work. (*Id.* at 62-63.) Defendant also stated "If something jumps off, go holler at the right person, do a mission. That was my routine." (*Id.* at 63.) Defendant told CW-16 all the ways he had just lied to police during his interviews, claiming: (a) he knew nothing; (b) he did not know CW-16's gang status; (c) he was just going home the day defendant and CW-16 got arrested together with the gun; (d) that Defendant did not know who "P-Grump" was; and (e) that Defendant's lies to detectives had them frustrated and "hot." (*Id.* at 46-55.) During these recorded calls, Defendant and CW-16 relayed messages to the gang including who Defendant believed had snitched on him regarding the murder so that the gang would handle the situation, possibly by having the snitching gang members "beat up or killed." (*Id.* at 55-57, 62, 68-73, 75-79.) CW-16 also testified about Defendant wanting to get the informant information to a PBB member who lived near Defendant and Ms. Young. (Id. at 68-69.) The recording also captured Defendant audibly responding to his gang moniker ("Grump"), when CW-16 and other gang members used it to refer to him. (*Id.* at 59.)

B. Procedural Background

On September 25, 2013, Defendant was charged in a five-count Third Superseding Indictment ("Indictment") with the following:

(1) Conspiracy to Engage in Racketeering Activity in Violation of 18 U.S.C. § 1962(d);

(2) Violent Crimes in Aid of Racketeering in Violation of 18 U.S.C. § 1959

(3) Use and Carry of a Firearm During and in Relation to, and Possess a Firearm in Furtherance of, a Crime of Violence in Violation of 18 U.S.C. §§ 924 (c)(1)(A)(ii), (iii), (j)(i)

(ECF No. 2193 at 1.)

1. Defendant's First Suppression Hearing

Before Defendant's 2013 federal trial, Defendant moved to suppress the statements that he made to police on

September 22 and 23, 2009, on two grounds: first, that he had not received any *Miranda* warnings at all before either interview, and second, that his statements were coerced and the result of undue pressure and threats directed at his mother. (*See* ECF No. 2229.) To resolve the factual questions about whether Defendant had received his *Miranda* warnings or was coerced into speaking to police, the Court held a suppression hearing on November 30, 2009. During the First Suppression Hearing, the Court heard testimony from Calzadillas, FBI Special Agent Michael Brown, Defendant, and Ms. Young.

After a lengthy hearing, this Court denied Defendant's motion to suppress in its entirety. The Court found that (1) Calzadillas's testimony was credible, (2) notwithstanding Defendant's testimony under oath to the contrary, Defendant was given *Miranda* warnings, (3) Defendant waived his rights, and (4) Defendant understood that those rights still applied on September 23, 2009. (Mot. Ex. A at 53-58, 240-256.) The Court expressly found that, even though Defendant was not re-read his *Miranda* warnings again on September 23, 2009,

> "a reasonable defendant in [the Defendant's] position [would] consider the *Miranda* warnings given to him . . . the day before . . . to have still applied."

(*Id.* at 255.)

This Court also concluded that there was no evidence that suggested that the "statements of [the Defendant] were coerced in any way, physically or psychologically." (*Id.* at 256.) In doing so, this Court also found that Defendant's testimony was not credible:

> "And the next issue is psychological coercion. And your client is a young man, seemingly of at least average intelligence, if not more sophisticated. There's no direct testimony here that's believable that your client was informed that if he didn't cooperate or provide answers to questions that his mother was going to be arrested. There's nothing to support that."

(*Id.* at 231.)

> The Court then added that there was no evidence that "the officers attempted to threaten [or] to make statements to [Defendant] that would in any way be coercive. They appear[ed] to conduct a neutral-type investigation."

(*Id.* at 257.)[1]

[1] During the First Suppression Hearing, Calzadillas initially testified that at the time of the first interview, he personally did not think there was reasonable cause to believe defendant was involved in the murder. (Mot. Ex. A at 30.) Defendant's counsel then made an oral motion to suppress defendant's statements as fruit of an arrest without probable cause. (*Id.*) The Court responded that it would need briefing and that issue would be left for another day. (*Id.* at 56-57, 219.) Defendant filed a suppression motion on the probable cause issue on December 2, 2013, the day before trial. (CR 2352.) On the first morning of trial, the Court deferred ruling until it received the Government's opposition. (ECF No. 2506 at 9.) The Government filed its opposition on December 3, 2013. (CR 2357.) When the government questioned Calzadillas about what defendant said during his two interviews during trial on December 10, 2013, Defendant did not object or remind the Court of the pending motion. (*See* ECF No. 2492.)

2. Defendant's Trial and Subsequent Appeal

On December 20, 2013, Defendant was charged in five-count trial indictment ("Trial Indictment") with the following:

(1) Conspiracy to Engage in Racketeering Activity in Violation of 18 U.S.C. § 1962(d);

(2) Violent Crimes in Aid of Racketeering in Violation of 18 U.S.C. § 1959

(3) Use and Carry of a Firearm During and in Relation to, and Possess a Firearm in Furtherance of, a Crime of Violence in Violation of 18 U.S.C. §§ 924 (c)(1)(A)(ii), (iii), (j) (i)

At his first trial, Defendant was convicted on all counts except for possession of a firearm in furtherance of a crime of violence. (Verdict Form, ECF No. 2409.) The jury also unanimously found that Defendant "agreed that he or a co-conspirator would engage in a pattern of racketeering activity consisting of murder, conspiracy to commit murder, and witness and informant intimidation. (*Id.*) On March 30, 2015, Defendant was sentenced to life plus ten years' imprisonment. (Mins. Of Sentencing, ECF No. 2663.) Defendant appealed his conviction and sentence on April 9, 2015.

On appeal, the Ninth Circuit found the following:

(1) This Court's errors in admitting hearsay statements in violation of Confrontation Clause and *Miranda* were collectively prejudicial, and thus, not harmless;

(2) This Court plainly erred in failing to accurately state in jury instruction the culpability required for RICO conspiracy; and

(3) This Court's error in failing to accurately state in jury instruction the culpability required for RICO conspiracy was not harmless.

United States v. Young, 720 F. App'x 846 (9th Cir. 2017).

The Ninth Circuit vacated Defendant's convictions and remanded the proceedings to this Court for a new trial. *Id.*

B. Instant Motion

Defendant now moves to dismiss four counts of the operative indictment on double jeopardy grounds. (*See generally* Mot., ECF No. 3233.) He contends that the Double Jeopardy Clause of the Fifth Amendment bars the Government from prosecuting him for Counts 1, 2, 3, and 5 of the third superseding indictment because the State of California already prosecuted him and found him not guilty of murder under California Penal Code Section 187(a). *See People v. Young*, Case BA394200.

This is not the first time that Defendant has raised the double jeopardy argument before this Court. Defendant filed

a similar motion prior to his first federal trial. (*See* Mot. To Dismiss Counts 1, 2, 3, and 5, ECF No. 2234.) At that time, the Court held that Defendant's prosecution in federal court, after Defendant's prosecution in state court, would not violate Defendant's rights under the Double Jeopardy Clause. (*See* ECF No. 2317.) Because neither the law nor the facts have changed since this Court's prior holding, the Court sees no reason to reach a contrary holding now.

II. DISCUSSION

A. Legal Standard

"The Double Jeopardy Clause of the Fifth Amendment provides 'nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.'" *United States v. Koon*, 34 F.3d 1416, 1438 (9th Cir. 1994), *rev'd in part on other grounds*, 518 U.S. 81 (1996). Under the dual sovereignty doctrine, successive prosecutions by separate sovereigns for crimes arising out of the same acts are not barred by the Double Jeopardy Clause. *Heath v. Alabama,* 474 U.S. 82, 88 (1985); *United States v. Lanza,* 260 U.S. 377, 382 (1922). The separate sovereigns doctrine is premised on the notion that "[w]hen a defendant in a single act violates the 'peace and dignity' of two sovereigns by breaking the laws of each, he has committed two distinct 'offences.'" *Heath,* 474 U.S. at 88, 106 S.Ct. at 437 (quoting *Lanza,* 260 U.S. at 382). Whether two entities that seek to successively prosecute a defendant for the same conduct are separate sovereigns depends on "whether the two entities draw their authority to punish the offender from distinct sources of power." *Id.* The Supreme Court has affirmed that a state prosecution does not bar a subsequent federal prosecution. *See Abbate v. United States*, 359 U.S. 187, 195 (1959); *United States v. Lanza*, 260 U.S. 377, 382 (1922).

The Ninth Circuit recognizes a narrow exception to the separate sovereigns doctrine: "[i]f the second prosecution, otherwise permissible under the dual sovereignty rule, is not pursued to vindicate the separate interests of the second sovereign, but is merely pursued as a sham on behalf of the sovereign first to prosecute, it may be subject to a successful double jeopardy challenge." *United States v. Guy*, 903 F.2d 1240, 1242 (9th Cir. 1990); *United States v. Zone*, 403 F.3d 1101, 1104 (9th Cir. 2005) (stating that the exception has been adopted as the "controlling law" of the Ninth Circuit). This exception is referred to as the "*Bartkus* exception," in reference to the Supreme Court case where the exception was first suggested. *See Guy*, 903 F.2d at 1243; *see also Bartkus v. Illinois*, 359 U.S. 121, 123 (1959).

To allege that a subsequent prosecution violates the Double Jeopardy Clause pursuant to the *Bartkus* exception, "it is not sufficient for the defendant to show that there was cooperation between federal and state authorities; rather, the defendant must prove that the subsequent prosecuting entity is a 'tool' for the first, or the proceeding is a 'sham,' done at the behest of the prior authority." *Koon*, 34 F.3d at 1438 (internal citation omitted). The *Bartkus* exception is "limited to situations in which one sovereign so throughly dominates or manipulates prosecutorial machinery of another that the latter retains little or no volition in its own proceedings." *United States v. Guzman*, 85 F.3d 823, 827 (1st Cir. 1996). "[U]nder the criteria established by *Bartkus* itself it is extremely difficult and highly unusual to prove that a prosecution by one government is a tool, a sham or a cover for the other government." *United States v. Figueroa-Soto*, 938 F.2d 1015, 1019 (9th Cir. 1991); *see Zone*, 403 F.3d at 1105 ("The burden . . . of establishing that federal officials are controlling or manipulating the state processes is substantial.") (internal quotation omitted).

B. Analysis

Having reviewed the facts of this case, the Court concludes that the Double Jeopardy Clause of the Fifth Amendment does not bar the Government's prosecution of Defendant under Counts 1, 2,3, and 5 of the operative indictment. (*See* Third Superseding Indictment at 10-21.) It is blackletter law that "a federal prosecution does not bar a subsequent state prosecution of the same person for the same acts, and a state prosecution does not bar a federal one." *United States v. Wheeler*, 435 U.S. 313, 317 (1978). Here, the State of California's prosecution of Defendants has no impact on the Government's decision to prosecute Defendant for conduct related to the same murder prosecution that occurred in state court.

The Court recognizes that *Bartkus* created a limited exception to the separate sovereigns rule. That exception, however, does not apply to the instant case. There is no evidence before the Court suggesting that the federal government's and state government's respective prosecutions of Defendant are so intertwined that the two governments are operating as a single entity. Defendant points to the following evidence that purportedly triggers the *Bartkus* exception: "1) the lead investigative agency is LAPD Newtown Division; 2) all the essential witnesses were located and interviewed by LAPD detectives; 3) the forensic evidence from the crime scene was gathered and tested by LAPD; 4) the ballistics evidence from the crime scene was gathered and tested by LAPD; and 5) a significant number of witnesses at the first federal trial were LAPD officers." (Mot. 11.) Unfortunately for Defendant, these facts establish nothing more than cooperation between the federal and state governments. Mere cooperation between federal and state authorities is insufficient to qualify for the *Bartkus* exception. *See Koon*, 34 F.3d at 1438.

Finding little recourse in existing law, Defendant resorts to asking this Court to revisit Supreme Court precedent on the Double Jeopardy Clause. According to Defendant, the United States Supreme Court plans to analyze the legitimacy of the separate sovereigns exception in the near future. *See Gamble v. United States*, 694 F. App'x 750 (11th Cir. 2017), *cert. granted*, 138 S. Ct. 2707 (2018) (No. 17-646). Defendant thus asks this Court to overturn the separate sovereigns exception"[b]ecause the modern-day overlap in state and federal criminal law has created an entirely different legal landscape than the one envisioned by the *Bartkus-Abbate* Court in 1959." (Mot. at 11.) Whatever the merits of this policy argument, the Court declines to issue a decision that is contrary to currently-binding Supreme Court precedent. Such a decision by this Court would be especially problematic because it would be based on the notion that the Supreme Court *might* be revisiting this precedent in the near future. As it stands now, there is nothing in the record that supports that the Supreme Court has reinterpreted or will reinterpret Double Jeopardy jurisprudence in the near feature. Therefore, the Court concludes that Defendant's prosecution for Counts 1, 2, 3, and 5 of the indictment does not violate the Double Jeopardy Clause of the Fifth Amendment.

III. RULING

For the foregoing reasons, the Court **DENIES** Defendant's Motion.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CRIMINAL MINUTES - GENERAL

Case No.	**CR 10-00923 (C) SJO**	Date	November 22, 2013

Present: The Honorable	S. James Otero
Interpreter	Not Required

Victor Paul Cruz	Not Present	Mack E. Jenkins; Christopher K. Pelham
Deputy Clerk	*Court Reporter/Recorder, Tape No.*	*Assistant U.S. Attorney*

U.S.A. v. Defendant(s):	Present	Cust.	Bond	Attorneys for Defendants:	Present	App.	Ret.
(31) Rondale Young		xx		Mark Windsor		xx	

Proceedings: **(IN CHAMBERS): ORDER DENYING DEFENDANT'S MOTION TO DISMISS COUNTS ONE, TWO, THREE, AND FIVE OF THE INDICTMENT PURSUANT TO THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT** [Docket No. 2234]

This matter is before the Court on Defendant Rondale Young's ("Defendant") Motion to Dismiss Counts One, Two, Three, and Five of the Indictment Pursuant to the Double Jeopardy Clause of the Fifth Amendment ("Motion"), filed October 22, 2013. The United States ("Government") filed a response to the Motion ("Opposition") on November 5, 2013. Defendant filed a Reply on November 12, 2013. For the following reasons, Defendant's Motion is **DENIED**.

I. FACTUAL AND PROCEDURAL BACKGROUND

On August 18, 2010, a grand jury indicted Defendant on one count of RICO[1] conspiracy in violation of 18 U.S.C. § 1962(d) and two counts involving a Violent Crime in Aid of Racketeering ("VICAR"): conspiracy to murder and murder in violation of 18 U.S.C. §§ 1959(a)(5) and 1959(a)(1). (Indictment 12-46, 53, 54, ECF No. 4.) On May 2, 2012, a grand jury returned a Second Superseding Indictment ("Second Indictment") alleging the same crimes against Defendant as those in the Indictment. (Second Indictment 9-24, 25-26, 27, ECF No. 1176.) All of the counts were predicated at least in part on the allegation that Defendant murdered F.C. in violation of California Penal Code section 187(a). (Second Indictment 9-27). The indictments came out of an investigation conducted by a joint task force of local law enforcement and federal agencies, including officers from the Newton Division of the Los Angeles Police Department. (Mot. 3.)

In January 2013, a California superior court jury acquitted Defendant of the murder of F.C. (Mot. 4.) FBI Agent Michael Brown, who appears to be the case agent in the instant case, testified for the prosecution in the state trial. (Mot. 4.) On January 24, 2013, Defendant was arraigned on the federal charges (Mins. of Post Indictment Arraignment 1, ECF No. 1935), and Defendant's counsel was appointed.

[1] *See generally* Racketeer Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C. §§ 1961-1968.

On September 25, 2013, a grand jury returned a Third Superseding Indictment ("Third Indictment"), charging Defendant with the same crimes as those charged in the Second Indictment, and adding counts for violations of 18 U.S.C. §§ 924(c)(1)(A) and (c)(1)(A)(iii). (*See generally* Third Indictment, ECF No. 2193.) Counts One, Two, Three, and Five of the Third Indictment are predicated on Defendant's involvement in the murder of F.C. in violation of California Penal Code section 187(a). (Mot. 5; Third Indictment 10-14.)

Defendant asserts in the instant Motion that the Government's prosecution will require the jury to determine, as an issue of fact, whether Defendant murdered F.C. in violation of California Penal Code section 187(a). (Mot. 8.) Because a California superior court jury has already considered the issue and found Defendant not guilty, Defendant argues that Counts One, Two, Three, and Five are precluded by the Double Jeopardy Clause of the Fifth Amendment. (Mot. 5-6.)

II. DISCUSSION

"The Double Jeopardy Clause of the Fifth Amendment provides 'nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.'" *United States v. Koon*, 34 F.3d 1416, 1438 (9th Cir. 1994), *rev'd in part on other grounds*, 518 U.S. 81 (1996). However, "under the doctrine of dual sovereignty, successive prosecutions based on the same underlying conduct do not violate the Fifth Amendment's Double Jeopardy Clause if the prosecutions are brought by separate sovereigns." *Id.*; *Heath v. Alabama*, 474 U.S. 82, 88 (1985). The doctrine is founded on the common-law concept that "[w]hen a defendant in a single act violates the 'peace and dignity' of two sovereigns by breaking the laws of each, he has committed two distinct 'offenses.'" *Heath*, 474 U.S. at 89 (quoting *United States v. Lanza*, 260 U.S. 377, 382 (1922)). Thus, "it cannot be truly averred that the offender has been twice punished for the same offense; but only that by one act he has committed two offenses, for each of which he is justly punishable." *Id.* The Supreme Court has affirmed that a state prosecution does not bar a federal one. *See Abbate v. United States*, 359 U.S. 187, 195 (1959); *United States v. Lanza*, 260 U.S. 377, 382 (1922).

The Ninth Circuit recognizes a narrow exception to this rule: "[i]f the second prosecution, otherwise permissible under the dual sovereignty rule, is not pursued to vindicate the separate interests of the second sovereign, but is merely pursued as a sham on behalf of the sovereign first to prosecute, it may be subject to a successful double jeopardy challenge." *United States v. Guy*, 903 F.2d 1240, 1242 (9th Cir. 1990); *United States v. Zone*, 403 F.3d 1101, 1104 (9th Cir. 2005) (stating that the exception has been adopted as the "controlling law" of the Ninth Circuit). This exception is referred to as the "*Bartkus* exception," in reference to the Supreme Court case where the exception was first suggested. *See Guy*, 903 F.2d at 1243; *see also Bartkus v. Illinois*, 359 U.S. 121, 123 (1959).

To allege double jeopardy under the *Bartkus* exception, "it is not sufficient for the defendant to show that there was cooperation between federal and state authorities; rather, the defendant must prove that the subsequent prosecuting entity is a 'tool' for the first, or the proceeding is a 'sham,' done at the behest of the prior authority." *Koon*, 34 F.3d at 1438 (internal citation omitted). The *Bartkus* exception is "limited to situations in which one sovereign so throughly dominates or manipulates prosecutorial machinery of another that the latter retains little or no volition in its own proceedings." *United States v. Guzman*, 85 F.3d 823, 827 (1st Cir. 1996). "[U]nder the criteria established by *Bartkus* itself it is extremely difficult and highly unusual to prove that a prosecution by one government is a tool, a sham or a cover for the other government." *United States v. Figueroa-Soto*, 938 F.2d 1015, 1019 (9th Cir. 1991); *see Zone*, 403 F.3d at 1105 ("The burden . . . of establishing that federal officials are controlling or manipulating the state processes is substantial.") (internal quotation omitted).

A. Analysis

Defendant argues that the Government should be barred from relitigating the issue of whether Defendant murdered F.C. in violation of California Penal Code section 187(a) because the "unique and unusual circumstances in this case demonstrate significant collusion between state and federal governments." (Mot. 8.) To demonstrate collusion, Defendant alleges the following facts: (1) the investigation of the case was conducted by both local Newton Division police officers and a federal task force; (2) FBI Agent Michael Brown was a witness for the prosecution at Defendant's state trial and is a case agent for the instant case; and (3) the Government took no action to secure Defendant's appearance in federal court until he was acquitted of the murder charges that formed the basis of the Government's federal charges. (Mot. 9.) Defendant further points to a declaration by Assistant United States Attorney Mack Jenkins ("AUSA Jenkins"), in which AUSA Jenkins states that he requested, twice, that the state prosecutor dismiss the state case and allow the Government to proceed on its racketeering charges. (Reply 5, EFC No. 2274; Decl. of Mack E. Jenkins in Supp. of Opp'n ("Jenkins Decl.") ¶¶ 2-3, 6, ECF No. 2263-2.) The state prosecutor declined both times and expressed the state's intention to move forward with its case. (Jenkins Decl. ¶¶ 3, 6.) The declaration also indicated that AUSA Jenkins and the state prosecutor both attempted to negotiate a cooperation agreement with Defendant, but negotiations fell through. (Jenkins Decl. ¶¶ 7-9.)

Defendant's allegations do not demonstrate that the current federal prosecution is a "sham" or that the Government is merely a "tool" of state prosecutors. At most, the alleged facts show collaboration between federal and state authorities. *See Koon*, 34 F.3d at 1439. However, collaboration between federal and state authorities is to be expected:

> [T]here may be very close coordination in the prosecutions, in the employment of agents of one sovereign to help the other sovereign in its prosecution, and in the timing of the court proceedings so that the maximum assistance is mutually rendered by the sovereigns. None of this close collaboration amounts to one government being the other's 'tool' or providing a 'sham' or 'cover.' Collaboration between state and federal authorities is 'the conventional practice.' No constitutional barrier exists to this norm of cooperative effort.

Figueroa-Soto, 938 F.2d at 1020 (quoting *Bartkus*, 359 U.S. at 123). The facts raised by Defendant demonstrate "the conventional practice" between state and federal authorities and are not enough to succeed on a double jeopardy claim. *See Zone*, 403 F.3d at 1103, 1105 (affirming denial of double jeopardy motion where the state and federal government participated in a joint task force and conducted weekly meetings to discuss and coordinate the investigation); *Figueroa-Soto*, 938 F.2d at 1017, 1020 (affirming denial of a double jeopardy motion where a federal DEA agent testified at the state prosecution). AUSA Jenkin's requests to dismiss the state case, and the state's subsequent refusals, only confirm the autonomy of the two prosecutions and highlight the state's independent desire to enforce its laws.

Because Defendant has not met the high burden of showing that the Government prosecution is a "sham" or that the Government is merely a "tool" of the state, Defendant's Motion is **DENIED**.[2]

[2] The Court acknowledges that it received Defendant's Ex Parte Application for Order to Compel Production of Documents ("Motion to Compel"), filed November 22, 2013. (*See generally* Motion to Compel, ECF No. 2310.) Defendant's Motion to Compel does not change the Court's analysis. Should the Government provide Defendant with evidence that he believes would affect the Court's analysis, Defendant is free to bring the evidence to the

B. Evidentiary Hearing

Defendant requests an evidentiary hearing to determine the extent of any link or collusion between federal and state prosecutions. (Mot. 9.) A defendant "must make more than 'conclusory allegations' of collusion" to qualify for an evidentiary hearing. *Koon*, 34 F.3d at 1439 (quoting *United States v. Russotti*, 717 F.2d 27, 31 (2d Cir. 1983)). Because Defendant has not presented any evidence of collusion between state and federal authorities and bases his Motion merely on conclusory assertions, Defendant's request for an evidentiary hearing is **DENIED**. *See Zone*, 403 F.3d at 1106 ("We deny [the defendant's] request for remand and an evidentiary hearing because he has not presented any evidence of undue coercion or collusion by federal authorities.").

III. RULING

For the reasons stated above, the Court **DENIES** Defendant's Motion.

IT IS SO ORDERED.

_____ : _____

Initials of Deputy Clerk _____

Court's attention in due course.