No. 17-7177

IN THE
SUPREME COURT OF THE UNITED STATES

MANUEL DE JESÚS GORDILLO-ESCANDÓN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari *to the United States Court of Appeals for the Fourth Circuit*

(CA4 No. 17-4481)
(D.S.C. No. 6:17-cr-00206-JFA-3)

Reply in Support of
Petition for *Writ of Certiorari*

Howard W. Anderson III
LAW OFFICE OF
HOWARD W. ANDERSON III, LLC
P.O. Box 661
Pendleton, SC 29670
(864) 643-5790 (P)
(864)332-9798 (F)
howard@hwalawfirm.com
Counsel of Record

COMES NOW Petitioner Manuel de Jesús Gordillo-Escandón and respectfully shows the Court as follows in further support of his petition for certiorari.

ADDITIONAL BACKGROUND

As the Government correctly notes, [Opp. at 5], Mr. Gordillo-Escandón has been tried and convicted during the pendency of this petition for certiorari but, as of today's date, not yet been sentenced. Over a vigorous objection from defense counsel at trial, the Government introduced into evidence Mr. Gordillo-Escandón's state-court plea colloquy and certified copies of his state convictions that were the subject of this Double-Jeopardy appeal. *See* D. Ct. Dkt. No. 143 (exhibit list) (Feb. 15, 2018).

ARGUMENT

The Government is wrong to suggest that the Court should not grant *certiorari* here just because the Court has previously declined to do so in other cases asking to reconsider the dual-sovereign exception in *Abbate v. United States*, 359 U.S. 187 (1959) and elsewhere. "Wisdom too often never comes, and so one ought not to reject it merely because it comes late." *Henslee v. Union Planters Nat. Bank & Trust Co.*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting). *See also Massachusetts v. United States*, 333 U.S. 611 (1948) (Jackson, J., dissenting) ("I see no reason why I should be consciously wrong today because I was unconsciously wrong yesterday."). As explained in Justice Ginsburg's concurrence in *Puerto Rico v. Sánchez Valle*, ___ U.S. ___, 136 S. Ct. 1863, 1877

(2016), whether the dual-sovereign exception should remain good law is a question that "warrants attention." *Certiorari* here would allow the Court to afford the question the attention it deserves.

To the extent that the Government suggests, with its citation to *Moore v. Illinois*, 55 U.S. (14 How.) 13 (1852), that the propriety of the dual-sovereign exception cannot be doubted, the Government overlooks the dissent in that case, which does just that:

> It is true, the criminal laws of the Federal and State Governments emanate from different sovereignties; but they operate upon the same people, and should have the same end in view. In this respect, the Federal Government, though sovereign within the limitation of its powers, may, in some sense, be considered as the agent of the States, to provide for the general welfare, by punishing offences under its own laws within its jurisdiction. It is believed that no government, regulated by laws, punishes twice criminally the same act. And I deeply regret that our government should be an exception to a great principle of action, sanctioned by humanity and justice.
>
> It seems to me it would be as unsatisfactory to an individual as it would be illegal, to say to him that he must submit to a second punishment for the same act, because it is punishable as well under the State laws, as under the laws of the Federal Government. It is true he lives under the aegis of both laws; and though he might yield to the power, he would not be satisfied with the logic or justice of the argument.

Id. at 22 (Mclean, J., dissenting).

The Government has pointed to no ratification-era understanding of the Fifth Amendment that would have allowed a distant federal government to subject a person already tried—and maybe even acquitted—in state court to

face the exact same charge in a federal court. "No person shall be… subject for the same offense to be twice put in jeopardy of life or limb…," U.S. Const. Amend. V, brooks no express exceptions. Blue penciling in an exception for federal prosecution after a state one was an error. *See generally United States v. Sprague*, 282 U.S. 716, 731 (1931) ("The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning; where the intention is clear there is no room for construction and no excuse for interpolation or addition." (citations omitted)).

Insofar as the Government contends that federalism concerns should prevent potential reconsideration of the question, that contention is without merit.

First, the question presented in this case concerns only a potential limit on the *federal* government's power to commit injustice—the original object of the Bill of Rights. *See, e.g.*, *Barron v. Baltimore*, 32 U.S. 243, 250 (1833) ("In almost every convention by which the constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government—not against those of the local governments."). The Court can leave for another day whether the Framers of the Fourteenth Amendment were likewise concerned with state injustice in the context of successive prosecutions.

Second, while the Government is correct that federalism was an important innovation of the Framers, the Government misses the point of that design.

"[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power….. [A] healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *New York v. United States*, 505 U.S. 144, 181 (1992) (quotations omitted). Allowing the federal government a second bite at the proverbial apple after a state prosecution threatens—rather than promotes—liberty.[1] For example here, the Government not only re-prosecuted but then introduced evidence of the conviction to help obtain a federal one, as it has done before, *see, e.g.*, *United States v. Riley*, 684 F.2d 542, 544 (8th Cir. 1982) (allowing introduction of evidence of state conviction even if it was "tantamount to directing a verdict"); *United States v. Frederick*, 702 F. Supp. 2d 32, 37 (E.D.N.Y. 2009) (collecting cases so holding). The Government thus gained a tactical advantage from the federal structure that is supposed to have restrained it. *See State v. Lyle*, 118 S.E. 803, 807 (S.C. 1923) ("Proof that a defendant has been guilty of another crime equally heinous prompts to a ready acceptance of and belief in the prosecution's theory that he is guilty of the crime charged. Its effect is to predispose the mind of the juror to believe the prisoner guilty, and thus effectually to strip him of the presumption of innocence.").

Insofar as the Government suggests that federal sentencing judges can mitigate the unfairness of a successive prosecution, the Government overlooks a

[1] Restricting federal power here would promote the overall constitutional design. "The States possess primary authority for defining *and enforcing* the criminal law." *Engle v. Isaac*, 456 U.S. 107, 128 (1982) (emphasis added).

critical point: "A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences…that has not been credited against another sentence." 18 U.S.C. § 3585(b). Unless that statute is unconstitutional or otherwise inapplicable, Mr. Gordillo-Escandón—incarcerated on his state sentence since December 2016, [App. 17, 20]—can receive no pre-sentence credit to the mandatory ten-year minimum sentence even if the sentencing judge wants to impose it.

CONCLUSION

"[A] new look by the High Court at the dual sovereignty doctrine and what it means today for the safeguards the Framers sought to place in the Double Jeopardy Clause would surely be welcome." *United States v. G.P.S. Automotive Corp.*, 66 F.3d 483, 499 (2d Cir. 1995) (Calabresi, J.). Given that the Government has identified no "vehicle problems" with this case, this Court should grant the petition for *certiorari* and review the important question presented.

Dated: March 15, 2018.

Respectfully submitted,

MANUEL DE JESÚS GORDILLO-ESCANDÓN

Howard W. Anderson III
CJA Counsel for Petitioner