No. _____

IN THE

Supreme Court of the United States

DONOVAN LETRELL HALL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

G. ALAN DUBOIS
FEDERAL PUBLIC DEFENDER
EASTERN DISTRICT OF NORTH CAROLINA

JACLYN L. DILAURO
ASSISTANT FEDERAL PUBLIC DEFENDER
Counsel of Record
EASTERN DISTRICT OF NORTH CAROLINA
150 Fayetteville St.
Suite 450
Raleigh, N.C. 27601
(919) 856-4236
jackie_dilauro@fd.org

Counsel for Petitioner

QUESTION PRESENTED

Whether the Double Jeopardy Clause of the Fifth Amendment prohibits the Federal Government from charging, convicting, and sentencing a person who has already been charged, convicted, and sentenced in the court of a State for the same conduct.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

UNITED STATES SENTENCING GUIDELINES

STATUTES

OTHER SOURCES

IN THE

Supreme Court of the United States

DONOVAN LETRELL HALL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Petitioner Donovan Letrell Hall respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit's opinion is unreported, but is available at ___ F. App'x ____, 2018 WL 1109633. Pet. App. 1a. The District Court's judgment is available at Pet. App. 10a.

JURISDICTION

The Fourth Circuit issued its opinion on February 28, 2018. Pet. App.1a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution 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 offense 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.

INTRODUCTION

The Double Jeopardy Clause of the Fifth Amendment protects individuals from successive prosecutions and punishments for the same conduct. That bedrock principle is a "fundamental ideal in our constitutional heritage." *Benton* v. *Maryland*, 395 U.S. 784, 794 (1969). And yet, over time, it has admitted of a gaping court-made exception. Known as the "separate sovereigns" exception, this Court has concluded that "a single act gives rise to distinct offenses—and thus may subject a person to successive prosecutions—if it violates the laws of separate sovereigns." *Puerto Rico* v. *Sanchez Valle*, 136 S. Ct. 1863, 1867 (2016).

Justices Ginsburg and Thomas recently called for reexamination of this Court's jurisprudence to cure the " 'affront to human dignity' " of "try[ing] or punish[ing] a person twice for the same offense" within the United States. *Id.* at 1877 (Ginsburg and Thomas, J.J., concurring) (quoting *Abbate* v. *United States*, 359 U.S. 187, 203 (1959)). In their concurring opinion, the Justices explained that the separate sovereigns exception should be eliminated: "[A] final judgment in a criminal case * * * should preclude renewal of the fray anyplace in the Nation." *Sanchez Valle*, 136 S. Ct. at 1877 (Ginsburg and Thomas, J.J., concurring).

Donovan Hall was subject to exactly the "renewal of the fray" Justices Ginsburg and Thomas agree should be precluded. And it resulted in an additional *nine years* in prison. On September 26, 2015, Mr. Hall unlawfully possessed a firearm. For

this one offense, on this one day, Mr. Hall was convicted twice—once in North Carolina state court and once in federal court. He received two sentences. The first was for fifteen to twenty-seven months, the second for 110 months.

The Court should grant certiorari to overrule *Abbate*, and conclude that the Double Jeopardy Clause retains the straightforward, original understanding of the Framers: No government within the United States shall prosecute or punish any person twice for the same conduct.

But even if the Court believes that plenary review is not warranted in Mr. Hall's case, it should hold the case pending disposition of other petitions that raise the issue of the ongoing validity of the separate sovereigns exception. The Court is presently considering at least five. *See Tyler* v. *United States*, No. 17-5410 (docketed July 28, 2017); *Ochoa* v. *United States*, No. 17-5503 (docketed Aug. 4, 2017); *Gamble* v. *United States*, No. 17-646 (docketed Nov. 2, 2017); *Bearcomesout* v. *United States*, No. 17-6856 (docketed Nov. 22, 2017); *Gordillo-Escandon* v. *United States*, No. 17-7177 (docketed Dec. 20, 2017).

STATEMENT

On September 26, 2015, Mr. Hall was arrested by Elizabeth City police officers in Pasquotank County, North Carolina. CAJA62[1]. The next month, he pleaded guilty to assault by strangulation and possession of a firearm by a felon. The Pasquotank County Superior Court consolidated these convictions with a conviction

---

1 "CAJA" refers to the Joint Appendix filed in the U.S. Court of Appeals for the Fourth Circuit.

for selling and delivering marijuana, arising out of an incident that occurred in January 2014, twenty months prior to the conduct at issue in the other two convictions. *Id.* Although the sentence applied to all three convictions, it was driven by the felon-in-possession offense because that offense was the highest felony class of the three: It is a Class G felony under North Carolina law, whereas the other two are Class H felonies. CAJA37; CAJA38; *see* N.C. Gen. Stat. § 14-415.1 (possession of a firearm by a felon); *id.* § 14-32.4(B) (assault by strangulation); *id.* § 90-95(A)(1) (sell/deliver marijuana). The court sentenced Mr. Hall to fifteen to twenty-seven months of imprisonment. CAJA62.

Nearly a year after the incident giving rise to these charges, Mr. Hall was indicted again, this time in federal court, for possessing a firearm after having been convicted of a crime punishable by imprisonment for a term exceeding one year, in violation of 18 U.S.C. § 922(g). CAJA9. The federal grand jury based this charge on the same events that resulted in his state-court conviction for possession of a firearm by a felon. In order to indict Mr. Hall in federal court, the United States Attorney's Office for the Eastern District of North Carolina sought and obtained a *Petite* waiver, because Mr. Hall had already been prosecuted in state court for "substantially the same act(s) or transactions." CAJA37; U.S. Dep't of Justice, United States Attorneys' Manual § 9-2.031 (updated July 2009), *available at*

https://www.justice.gov/usam/usam-9-2000-authority-us-attorney-criminal-division-mattersprior-approvals#9-2.031.[2]

In February 2017, Mr. Hall pleaded guilty without a plea agreement. CAJA5. The U.S. Probation Office then prepared a presentence report. It began with United States Sentencing Guideline § 2K2.1, calculating Mr. Hall's base offense level to be twenty-four because the instant offense was committed subsequent to two prior convictions for possession with intent to sell and deliver cocaine and one for selling and delivering marijuana. CAJA66. The Office added two points because the firearm Mr. Hall possessed had been stolen, although he did not know that at the time. CAJA66; CAJA28. It also added six points because, in its view, Mr. Hall assaulted a law enforcement officer in a manner creating substantial risk of serious bodily injury during the course of his offense or immediate flight therefrom. CAJA67; *see* U.S.S.G. § 3A1.2(c)(1). The Office removed three points for Mr. Hall's acceptance of responsibility, resulting in a total offense level of twenty-nine. CAJA67. With a criminal history category of VI, Mr. Hall's advisory guideline range would have been 151 to 188 months. *Id.* However, because the statutory

---

[2] Named for a 1960 case in this Court, a *Petite* waiver allows a federal prosecution to go forward even though an individual has already been prosecuted in state court for "substantially the same act(s) or transactions." United States Attorneys' Manual § 9-2.031; *see Petite* v. *United States*, 361 U.S. 529 (1960). The policy provides approval may be given where (1) the case involves a "substantial federal interest"; (2) the prior prosecution left that interest "demonstrably unvindicated"; and (3) the government believes the conduct constitutes a federal offense and "the admissible evidence probably will be sufficient to obtain and sustain a conviction." U.S. Attorneys' Manual § 9-2.031.

maximum sentence authorized for his offense of conviction was 120 months, that became his advisory guideline range. U.S.S.G. § 5G1.1(a).

Relevant to this petition, Mr. Hall argued to the Probation Office that he should receive a downward departure pursuant to U.S.S.G. § 5K2.23, which allows a sentencing court to depart downward where a discharged term of imprisonment was imposed for the same conduct giving rise to the federal charge. CAJA69. The Office noted his request in its final presentence report. *Id.*

Mr. Hall was sentenced in July 2017. The District Court began by allowing him to speak on his own behalf. He explained that he had already been in custody for two years on state and federal charges relating to this case, that it was the longest he had ever been in custody, and that he had "had a lot of time to think and look back at my life." CAJA25. He resolved to do better: "I don't want to keep being a tough guy. I want to do the right thing and make my family proud of me. I'm the only one who can make this change. And I'm ready." CAJA26.

The District Court then calculated Mr. Hall's advisory guideline range with an offense level of twenty-nine and a criminal history category VI as 151 to 188 months. Because the statutory maximum sentence applicable to his offense of conviction is 120 months, that became the new guideline. CAJA26.

Mr. Hall's counsel argued for a downward variance from the guideline range, arguing, relevant to this petition, that he should receive a lower sentence because he had already served fifteen months in state prison for the same conduct. CAJA28.

The Assistant United States Attorney argued against a downward variance, explaining that Mr. Hall's conduct put the officer and community at risk. CAJA32

The District Court expressed its frustration that a state court judge had not, for prior convictions, "put him in jail for life or 10 years or 20 years." CAJA35.

The Assistant United States Attorney responded that Mr. Hall should be punished for his "history" of prior offenses and should be sentenced to the statutory maximum of 120 months. CAJA36

Mr. Hall's counsel renewed her argument for a 105-month sentence, to account for the fifteen-month sentence he had already served in state prison. CAJA37. She noted that the Government had to get a *Petite* waiver to bring its case in federal court because the underlying conduct was "substantially the same." *Id.*

The Assistant United States Attorney explained that its *Petite* waiver was obtained to address an "unvindicated interest in federal prosecution" because Mr. Hall's state-court sentence was "only" fifteen to twenty-seven months long. CAJA37; CAJA62.[3] And he explained that Mr. Hall's state-court sentence also addressed some unrelated conduct. *Id.*

Mr. Hall's counsel reiterated that he pleaded guilty, accepted responsibility, and apologized to the officer, arguing that a sentence of fewer than 120 months would be adequate. CAJA40.

---

[3] Although the transcript reflects that the Assistant United States Attorney described a "15 to 21" month sentence, CAJA37, the presentence report accurately reflects that Mr. Hall's sentence was for "15 to 27 months." CAJA62.

Without citing or discussing any of the 18 U.S.C. § 3553(a) goals of sentencing, the District Court announced a sentence of 110 months of imprisonment, followed by three years of supervised release. CAJA40. It also ordered forfeiture of the firearm. CAJA41.

Mr. Hall's counsel implored one more time for the District Court to consider a sentence of 105 months, to give him credit for the time he served as a result of his state conviction. CAJA41. The District Court refused. *Id.*

Mr. Hall appealed his conviction and sentence to the United States Court of Appeals for the Fourth Circuit, arguing that his sentence was procedurally and substantively unreasonable. Acknowledging that the Fourth Circuit was bound by this Court's decision in *Abbate*, he also preserved the argument that his federal prosecution violated the Double Jeopardy Clause of the Fifth Amendment because he had already been convicted and sentenced in state court for the same conduct.

The Government argued that Mr. Hall's sentence was procedurally and substantively reasonable. It offered in response to Mr. Hall's double jeopardy argument only that "Abbate dictates the disposition of this issue." Gov. Br. 31.

The Fourth Circuit affirmed Mr. Hall's conviction and sentence in an eight-page, unpublished per curiam opinion. Pet. App.1a. The court addressed Mr. Hall's double jeopardy claim first, reviewing for plain error and denying relief, despite the fact that it was then aware of at least two petitions for certiorari presenting the issue of whether the separate sovereigns exception to the Double Jeopardy Clause allows a federal prosecution to go forward when there is "a prior state prosecution of

the same person for the same acts." Pet. App. 2a-3a (quoting *Abbate*, 359 U.S. at 194-196). The court offered no reasoning, stating only that "*Abbate* remains good law, and we reject this argument on that basis." Pet. App. 3a.

The court went on to conclude that Mr. Hall's sentence was procedurally and substantively reasonable. Pet. App. 3a-8a.

This petition followed.

REASONS FOR GRANTING THE PETITION

Donovan Hall was arrested in September 2015 and charged, convicted, and sentenced in North Carolina state court to fifteen to twenty-seven months of imprisonment for being a felon in possession of a firearm, among other things. Once that prosecution was complete, he began the process all over again in federal court, where he was again charged, convicted, and sentenced for being a felon in possession of a firearm on the same date that formed the basis of the state charges. This time he received a sentence of 110 months of imprisonment. Although that second sentence is currently authorized under this Court's decision in *Abbate* v. *United States*, that decision contravenes the text, original meaning, and purpose of the Double Jeopardy Clause and should be overruled, as recently recognized by Justices Ginsburg and Thomas.

I. THIS COURT SHOULD GRANT THE PETITION TO RECONSIDER THE ONGOING VALIDITY OF *ABBATE* V. *UNITED STATES* AND THE SEPARATE SOVEREIGNS EXCEPTION TO THE DOUBLE JEOPARDY CLAUSE

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb."

U.S. Const. amend. V. That Clause bars subsequent prosecutions, as well as successive punishments, for the same offense. *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969). This Court has called the protection it enshrines a "fundamental ideal in our constitutional heritage." *Benton*, 395 U.S. at 794.

For the past half-century, though, this Court has interpreted the Double Jeopardy Clause to contain a significant exception, known as the "dual-sovereignty doctrine" or the "separate sovereigns" exception. *Sanchez Valle*, 136 S. Ct. at 1867. That exception dictates that "a single act gives rise to distinct offenses—and thus may subject a person to successive prosecutions—if it violates the laws of separate sovereigns." *Id.*

The separate sovereigns exception took root in two cases from 1959, *Bartkus* v. *Illinois*, 359 U.S. 121, and *Abbate* v. *United States*, 359 U.S. 187. Bartkus had been tried and acquitted in federal court for robbery of a federally insured savings and loan association. *Bartkus*, 359 U.S. at 121-122. A year later, an Illinois grand jury indicted Bartkus on "substantially identical" facts in violation of that State's robbery statute. *Id.* at 122. Bartkus was tried and convicted. *Id.* The Court noted that the state and federal prosecutions were separately conducted and that the state prosecution thus was not "a sham and a cover" for a second, federal prosecution. *Id.*

If the Due Process Clause of the Fourteenth Amendment were to bar such "independent" prosecutions, and allow a prior federal prosecution to preempt a later one by a State, "the result would be a shocking and untoward deprivation of the

historic right and obligation of the States to maintain peace and order within their confines." *Id.* at 137. Declining to impose such a "deprivation," against the States, the Court found no due process violation, in part because the States were "obviously more competent" to decide for themselves whether someone who had already been tried and convicted or acquitted of a federal offense may properly be prosecuted in that State's courts. *Id.*

In *Abbate*, the tables were turned; the State prosecuted first. Several men were charged in the State of Illinois for conspiring to dynamite buildings belonging to a telephone company in three States. 359 U.S. at 187. The Illinois statute under which they were charged made it a crime to "conspire to injure or destroy the property of another." *Id.* The men pleaded guilty and were sentenced to three months' imprisonment. *Id.* The Federal Government then took its turn, charging the men with "conspiracy to destroy * * * certain works, property, and material[,] which were essential and integral parts of systems and means of communication operated and controlled by the United States." *Id.* at 189. The men were found guilty by a jury at trial. *Id.* The Fifth Circuit reversed some of the convictions on the basis of evidentiary issues, but affirmed others. *Id.* This Court granted certiorari to determine whether the federal prosecutions violated the Double Jeopardy Clause of the Fifth Amendment.

The Court held that they did not. That was so, it reasoned, because the States are free to enforce their laws through criminal prosecutions—and have, in fact, "the principal responsibility for defining and prosecuting crimes." *Id.* at 195. But that

power, however vast, cannot hamper the Federal Government's authority to enforce its own laws, especially when the federal interest is more seriously "impinged" than is the State interest. *Id.* Taken together, *Bartkus* and *Abbate* leave open the possibility that a defendant will face at least two prosecutions—both within the United States—whenever his conduct allegedly violates both federal law and the law of a State.

Bartkus and *Abbate* each relied, in part, on *United States* v. *Lanza*, in which the Supreme Court held, in a Prohibition-era case, that "in the absence of special provision by Congress, conviction and punishment in a state court under a state law for making, transporting and selling intoxicating liquors is not a bar to a prosecution in a court of the United States under the federal law for the same acts." 260 U.S. 377, 385 (1922). Both cases also repeat the errors of *Lanza*, which did not address the common law roots of the Double Jeopardy Clause and merely reasoned that the power of the Federal and State Governments each to enact criminal laws leads inexorably to permission for successive prosecutions. *Id.* at 142-143.

But this conclusion is inconsistent with the original understanding of the Double Jeopardy Clause, which makes clear that the Founders never intended for such a broad exception to swallow the Constitution's prohibition against successive prosecutions and punishments. The expansion of federal criminal law since these cases were decided provides a compelling illustration of why they would have resisted such a sweeping exception.

This Court has explained that it "must assur[e] preservation" of constitutional rights as they "existed when [the Bill of Rights] was adopted." *Jones* v. *United States*, 565 U.S. 400, 406 (2012) (internal quotation marks and citation omitted). So we turn first to the understanding of the Framers at the time the Double Jeopardy Clause was drafted. The Clause finds its origins in the English common law pleas of *autrefois acquit* and *autrefois convict*, allowing a defendant to plead a prior acquittal or conviction to bar a pending prosecution, regardless whether the previous prosecution was brought by the same sovereign or by another sovereign. *See United States* v. *Scott*, 437 U.S. 82, 87 (1978). For example, in *R.* v. *Roche*, 168 Eng. Rep. 169 (K. B. 1775), Roche was charged in England with murder after having been acquitted of that same murder in a Dutch colony. The King's Bench held that the Dutch colony's acquittal barred England's prosecution: "It is a bar, because a final determination in a Court having competent jurisdiction is conclusive in all Courts of concurrent jurisdiction." *Id.* at 169 n.a. English legal treatises from the time of the Founding confirm the common-law understanding that "an acquittal on a criminal charge in a foreign country may be pleaded in bar of an indictment for the same offence in England." Leonard MacNally, *The Rules of Evidence on Pleas of the Crown* 428 (1802); *see also* 2 William Hawkins, *A Treatise of the Pleas of the Crown* 372 (1721) ("[A]n Acquittal in any Court whatsoever, which has a Jurisdiction of the Cause, is as good a Bar of any subsequent Prosecution for the same Crime, as an Acquittal in the Highest Court.").

The Framers adopted the same approach as their English forebears. And they rejected a proposal that would narrow the common-law rule to allow a subsequent prosecution for the same offense, so long as only one of those prosecutions was pursuant to federal law. The original draft of the Double Jeopardy Clause provided: "No person shall be subject * * * to more than one trial or one punishment for the same offence." 1 Annals of Cong. 781 (1789). Representative George Partridge suggested adding "by any law of the United States," *id.* at 782, to the end of that sentence, which would have enshrined the separate sovereigns exception in the text of the Fifth Amendment. Congress rejected that attempt.

American courts followed suit. In *Houston* v. *Moore*, 18 U.S. 1 (1820), the defendant had been convicted by a state court martial for desertion. Rejecting Houston's motion to dismiss on the basis that desertion was a federal crime and a state conviction "might subject [him] to be twice tried for the same offence," *id.* at 13, the Court spoke plainly: "[I]f the jurisdiction of the two Courts be concurrent the sentence of either Court, either of conviction or acquittal, might be pleaded in bar of the prosecution before the other." *Id.*; *see also id.* at 30 (Story, J., dissenting) (explaining that if a trial in the State Court Martial ended in conviction or acquittal, a subsequent trial in the United States' Court Martial would be "against the manifest intent of the act of Congress, the principles of the common law, and the genius of our free government.").

Early state court decisions confirm this understanding. South Carolina's Constitutional Court of Appeals explained that a state conviction for counterfeiting

"could not possibly" leave a defendant open to a federal prosecution for the same offense "because it is the established comitas gentium, and is not unfrequently brought into practice, to discharge one accused of a crime, who has been tried by a court of competent jurisdiction." *State* v. *Antonio*, 7 S.C.L. 776, 781 (1816). That rationale only redoubled in light of the special relationship between the Union and its member States: "If this prevails among nations who are strangers to each other, could it fail to be exercised with us who are so intimately bound by political ties?" The court found exactly that principle embodied within the text of the Fifth Amendment. *Id.*; *see also State* v. *Randall*, 2 Aik. 89, 100-101 (Vt. 1827) (noting the "absurdity" of successive prosecutions and explaining that "[t]he court that first has jurisdiction, by commencement of the prosecution, will retain the same till a decision is made; and a decision in one court will bar any farther prosecution for the same offence, in that or any other court").

This understanding of the Double Jeopardy Clause is bolstered by the purpose and design of our federal system. After all, federalism is designed to "enhance[] freedom" and " 'secure[] to citizens the liberties that derive from the diffusion of sovereign power.' " *Bond* v. *United States*, 564 U.S. 211, 221 (2011) (quoting *New York* v. *United States*, 505 U.S. 144, 181 (1992)). The separate sovereigns exception gets that design exactly backward: There is something uniquely perverse about construing the Double Jeopardy Clause to assure the vindication of each government's asserted interests at the *expense of* individual liberty.

But even if the separate sovereigns exception had legitimate constitutional moorings at the time *Bartkus* and *Abbate* were decided, the ensuing fifty-nine years have shown the ship since has sailed. Federal criminal jurisdiction has expanded dramatically since then, increasing by orders of magnitude the situations in which dual prosecutions are possible. In 1999, a task force of the Criminal Justice Section of the American Bar Association, chaired by Edwin Meese III, found that "of all federal crimes enacted since 1865, over forty percent have been created since 1970." *The Federalization of Criminal Law*, 11 Fed. Sent. R. 194 (Feb. 1999). In the early 1980s, the U.S. Department of Justice counted 3,000 federal crimes. By 2007, there were 4,450. John S. Baker, *Revisiting the Explosive Growth of Federal Crimes*, Heritage Foundation (June 16, 2008).

And numerous judges on the lower courts have suggested that the Supreme Court should revisit this issue. *See, e.g.*, *United States* v. *All Assets of G.P.S. Auto. Corp.*, 66 F.3d 483, 499 (2d Cir. 1995) (Calabresi, J.) ("[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. *Grimes*, 641 F.2d 96, 101 (3d Cir. 1981) (explaining that a "reexamination" of the dual sovereignty doctrine "may be in order"); *Turley* v. *Wyrick*, 554 F.2d 840, 842-845 (8th Cir. 1977) (Lay, J., concurring) (collecting cases critical of the dual sovereignty doctrine and "expressing dismay" at being bound to follow a decision that permits double prosecutions that are "almost universal[ly] abhorren[t]").

To be sure, this Court recently decided a case against the backdrop of the separate sovereigns exception. *Sanchez Valle*, 136 S. Ct. at 1867. But Justices Ginsburg and Thomas called for further examination of that foregone conclusion, explaining that it "warrants attention in a future case in which a defendant faces successive prosecutions by parts of the whole USA." *Id.* at 1877 (Ginsburg and Thomas, J.J., concurring). This is just such a case, and this Court should take the opportunity to re-anchor a jurisprudence that has drifted farther and farther from the Framers' language and purpose over the past half-century.

II. THIS CASE IS A PROPER VEHICLE

This case presents a clean vehicle for deciding the question presented. The Government itself has acknowledged, by seeking and obtaining a *Petite* waiver, that Mr. Hall's state and federal convictions are based on "substantially the same act(s) or transactions." *See* United States Attorneys' Manual § 9-2.031.

The issue also is properly preserved. Mr. Hall argued to the District Court that he should receive a lower sentence in light of his prior state sentence based on the same conduct. And the issue was both pressed to and passed upon by the Fourth Circuit, which denied Mr. Hall relief exclusively because of this Court's separate sovereigns exception. Pet. App. 3a.

Finally, the question presented is outcome-determinative. If the separate sovereigns exception is rejected, the Federal Government was barred from prosecuting Mr. Hall: His conviction should be vacated and the underlying indictment dismissed with prejudice. Mr. Hall remains in federal prison for an

additional *nine years* because of the separate sovereigns exception; if this Court overrules that exception, he should be released.

The Court should grant the petition.

Even if the Court believes that plenary review is not warranted in Mr. Hall's case, it should hold the case pending disposition of other petitions that raise the issue of the ongoing validity of the separate sovereigns exception. The Court is presently considering at least five. *See Tyler* v. *United States*, No. 17-5410; *Ochoa* v. *United States*, No. 17-5503; *Gamble* v. *United States*, No. 17-646; *Bearcomesout* v. *United States*, No. 17-6856; *Gordillo-Escandon* v. *United States*, No. 17-7177. If the Court ultimately rejects the separate sovereigns exception, it should grant this petition, vacate the decision below, and remand for further proceedings.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

G. ALAN DUBOIS
FEDERAL PUBLIC DEFENDER
EASTERN DISTRICT OF NORTH CAROLINA

JACLYN L. DILAURO
ASSISTANT FEDERAL PUBLIC DEFENDER
Counsel of Record
EASTERN DISTRICT OF NORTH CAROLINA
150 Fayetteville St.
Suite 450
Raleigh, N.C. 27601
(919) 856-4236
jackie_dilauro@fd.org

Counsel for Petitioner

MAY 29, 2018