No. 16-636

# In the Supreme Court of the United States

CALVIN GARY WALKER, PETITIONER

*v.*

STATE OF TEXAS

*ON PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF APPEALS, NINTH DISTRICT*

## BRIEF IN OPPOSITION


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## QUESTIONS PRESENTED

1. Whether the Court should overrule the longstanding dual-sovereignty view of the Double Jeopardy Clause, where that view is immaterial to the sole, procedural issue that petitioner raised on appeal and, in any event, would not entitle him to relief because he never stood for retrial on the indicted federal offenses after seeking and obtaining a mistrial on them.

2. Whether the Court should resolve a phrasing question about the so-called "sham prosecution" exception to dual sovereignty, where that exception would not apply here under any circuit's formulation of it and where, again, petitioner would not be entitled to relief even treating all charges here as brought by a single sovereign.

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## OPINION BELOW

The opinion of the state court of appeals (Pet. App. 1a-27a) is reported at 489 S.W.3d 1. The order of the state trial court (Pet. App. 28a-33a) is not reported.

## JURISDICTION

The judgment of the state court of appeals was entered on March 9, 2016. A petition for discretionary review with the Texas Court of Criminal Appeals was denied on June 15, 2016. Pet. App. 34a. The time within which to file a petition for a writ of certiorari was extended to November 12, 2016, and the petition was timely filed before that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## STATEMENT

1. In 2011, the federal government secured an indictment charging petitioner with three counts of aiding and abetting mail fraud, in violation of 18 U.S.C. §§ 2 and 1341; six counts of aiding and abetting wire fraud, in violation of 18 U.S.C. §§ 2 and 1343; five counts of transferring fraudulently obtained funds in interstate commerce, in violation of 18 U.S.C. § 2314; eighteen counts of committing fraud upon programs receiving federal funds, in violation of 18 U.S.C. § 666; and five counts of laundering the funds obtained through those prohibited means, in violation of 18 U.S.C. § 1957. Indictment, *United States v. Walker*, No. 1:11-CR-67 (E.D. Tex. May 4, 2011), ECF No. 2. The indictment generally alleged that petitioner defrauded the Beaumont Independent School District while he was the district's exclusive contractor for electrician services, by submitting fraudulent invoices for

materials never purchased and by falsely inflating invoices for materials purchased. *Id.*

Petitioner proceeded to a jury trial. The jury could not reach a unanimous verdict, and the district court granted petitioner's motion for a mistrial. *See* Dec. 15, 2011 Minute Entry, *Walker*, *supra*, ECF No. 104.

Before any retrial on the indicted charges, the federal government filed an information charging the additional offense of willfully failing to pay income tax, in violation of 26 U.S.C. § 7203. Information, *Walker*, *supra*, ECF No. 151 (July 13, 2012). Four days later, petitioner agreed to plead guilty to that tax offense in exchange for the federal government agreeing to dismiss the other charges after sentencing for the tax offense. Plea Agmt. at 1, 4, *Walker*, *supra*, ECF No. 158 (July 17, 2012). As part of the plea agreement, the United States Attorney for the Eastern District of Texas committed not to prosecute petitioner for any other offense of which the United States Attorney had knowledge. *Id.* at 5. The plea agreement explicitly stated that it was "only binding on the United States Attorney's Office for the Eastern District of Texas and does not bind any other federal, state, or local prosecuting authority." *Id.* at 7.

Petitioner pleaded guilty to the tax offense, and the United States dismissed the other charges at petitioner's sentencing. Minute Entries of July 17, 2012 and Dec. 12, 2012, *Walker*, *supra*, ECF Nos. 155, 172. The district court sentenced petitioner to five years of probation. Judgment, *Walker*, *supra*, ECF No. 175 (Dec. 19, 2012).

2. In July 2014, a Jefferson County, Texas grand jury returned indictments charging petitioner with four counts of securing execution of a document by deception,

in violation of Texas Penal Code § 32.46; and two counts of money laundering, in violation of Texas Penal Code § 34.02. Pet. App. 2a; Indictments, *State v. Walker*, Nos. 14-19965, 14-19966, 14-19967, 14-19968, 14-19969, 14-19970 (Crim. Dist. Ct. Jefferson Cnty. July 29, 2014).[1] Like the dismissed federal charges—which went unadjudicated after the mistrial that petitioner sought—these state indictments allege that petitioner submitted fraudulent invoices to the Beaumont Independent School District and laundered the proceeds of that fraud. *Id.*; *see* Pet. App. 4a.

Petitioner filed, in state trial court, applications for writs of habeas corpus to dismiss the indictments based on an alleged violation of constitutional double-jeopardy rights. Pet. App. 28a. The trial court explained that petitioner "d[id] not question the continued legal viability of the 'dual sovereignty' doctrine" but instead argued for application of a "sham and cover" exception to that doctrine based on language in *Bartkus v. Illinois*, 359 U.S. 121 (1959). Pet. App. 29a. Specifically, although the federal government was represented by Assistant United States Attorney (AUSA) Robert Rawls in its prosecution of petitioner, petitioner alleged that Cory Crenshaw became an AUSA in the Eastern District of Texas after the plea agreement and around the time of the federal sen-

[1] The appellate record does not contain the indictments because petitioner did not designate them for inclusion. Pet. App. 2a n.1; *see* R.73 (*R* cites the electronic clerk's record in No. 14-19965). This Court has taken judicial notice of public court filings. *E.g.*, *Wells v. United States*, 318 U.S. 257, 260 (1943) (per curiam).

tencing; that Crenshaw was later appointed Criminal District Attorney of Jefferson County; and that Crenshaw was eventually cross-appointed as a Special AUSA while continuing as District Attorney to assist with a joint task force. Pet. App. 4a, 31a.

In a written order, the trial court rejected petitioner's double-jeopardy claim. Pet. App. 28a-33a. The trial court analyzed the pleadings and exhibits, holding that any "sham and cover" exception would not apply here. Pet. App. 29a-32a. The trial court found that the State was not manipulated by the federal government into obtaining the state indictments, that the state and federal prosecutor were not the same person, and that the initial federal prosecution was not a cover for the state prosecution. Pet. App. 32a.

3. Petitioner appealed from the trial court's order denying his habeas applications, and the state court of appeals affirmed. Pet. App. 1a-27a. Petitioner's "sole issue on appeal" did not challenge the substance of the trial court's double-jeopardy ruling but, instead, the procedure in trial court: Petitioner argued that the trial court erred by ruling "without first holding an evidentiary hearing and without notifying the parties of the trial court's intent to rule without a hearing." Pet. App. 8a.

Although petitioner stated that the lack of a hearing violated his due-process rights, the court of appeals held that petitioner failed to properly brief that claim as required by state appellate rules. Pet. App. 26a n.6 (citing Tex. R. App. P. 38.1(i): "We conclude that [petitioner] has failed to adequately brief his due process and compulsory process arguments.").

Accordingly, the court of appeals addressed the propriety of the trial court's procedure under state law only. Pet. App. 25a-26a. The court of appeals held that the trial court did not abuse its discretion in determining that "the facts alleged in [petitioner's] habeas petitions, even if proven true, do not show that the State's prosecution of [petitioner] is a 'sham and cover' for a second federal prosecution," and therefore the trial court was entitled to deny habeas relief without a hearing. Pet. App. 25a. The court of appeals reached its conclusion after a detailed examination of petitioner's argument that the state and federal governments must be deemed one sovereign in this case because the state prosecution was allegedly merely a "sham" and "cover" for a second federal prosecution. Pet. App. 14a. The court of appeals explained that petitioner had alleged "at most, permissible federal-state cooperation" and "no facts showing that state authorities have been so completely dominated, controlled, or manipulated by federal officials that they are no longer acting of their own volition." Pet. App. 24a-25a (quotation marks omitted).

4. The Texas Court of Criminal Appeals denied petitioner's request for discretionary review. Pet. App. 34a. Petitioner now seeks review of the state court of appeals' decision.

## SUMMARY OF THE ARGUMENT

I. Petitioner seeks review to challenge the Double Jeopardy Clause principle, "consistently ... endorsed" by this Court, "that a single act constitutes an 'offence' against each sovereign whose laws are violated by that act." *Heath v. Alabama*, 474 U.S. 82, 93 (1985). The Court should decline that request.

First, this dual-sovereignty doctrine does not affect the sole issue preserved for appeal. That sole issue is the procedural question whether the trial court erred in declining to hold an evidentiary hearing before ruling on the double-jeopardy claim. No amount of evidence would empower the trial court to overrule this Court's existing, controlling interpretation of the Double Jeopardy Clause. And the element-by-element test that petitioner seeks to use, instead of the threshold dual-sovereignty doctrine, does not require an evidentiary hearing but instead turns on comparing the elements of statutory offenses. Accordingly, petitioner's argument that this Court should overrule the dual-sovereignty doctrine could not possibly show any error in the trial court's choice not to hold a hearing. Because petitioner preserved for appeal only that procedural issue, as opposed to the merits of his double-jeopardy claim, this case is not a proper vehicle for reconsideration of the dual-sovereignty doctrine.

Second, even if petitioner had preserved a challenge to the substance of the trial court's double-jeopardy ruling, this case would still be a poor vehicle to reconsider the dual-sovereignty doctrine because it would not help petitioner. Even if all the charges here were brought by a single sovereign, there would be no double-jeopardy

violation. Petitioner secured a mistrial on the indicted federal offenses, and their non-merits dismissal does not preclude retrying petitioner on those offenses. Any objection to a retrial on those offenses would arise, not under the Double Jeopardy Clause, but instead under petitioner's plea agreement—which expressly does not bind the State (or even the federal government apart from one United States Attorney's Office). And the federal tax offense to which petitioner pleaded guilty is, on any view of the Double Jeopardy Clause, a separate offense from the state fraud and money-laundering offenses alleged here.

Third, putting aside both of these vehicle issues, petitioner presents no compelling reason for the Court to revisit the "well-established" principle (*United States v. Wheeler*, 435 U.S. 313, 316 (1978)) by which a State is not precluded from prosecuting violations of *its own* laws merely because the federal government has prosecuted violations of its laws. The foundation of the dual-sovereignty doctrine follows from our unique system of government, by which two sovereigns (the federal government and a State) have their own sets of laws applicable in the same territory. States do not derive their powers to prosecute from the federal government, and therefore they should not be subordinate to it. Rather, when enforcing their own laws, States are exercising the traditional police power "originally belonging to the states," and "preserved to them by the Tenth Amendment." *United States v. Lanza*, 260 U.S. 377, 382 (1922).

Petitioner's objections to the dual-sovereignty doctrine (*see* Pet. 10-18, 21) are mostly arguments explicitly or implicitly rejected by this Court long ago. Petitioner

argues that the doctrine needs a refresh for two reasons, but neither is compelling. First, an increase in the number of federal crimes (Pet. 18-20) cannot limit States' traditional police powers. To the contrary, it highlights the importance of the States' sovereignty. Similarly, cooperation between federal and state law-enforcement officials (Pet. 18-19, 28-29)—a longstanding practice that existed when the Court was upholding and extending the dual-sovereignty doctrine—does not impugn the States' sovereignty and does not counsel in favor of jettisoning the doctrine.

II. Petitioner also seeks review of his argument that the federal and state governments here must be treated as "one entity" for double-jeopardy purposes based on the facts of this case and language in *Bartkus*, 359 U.S. at 121. Pet. i. This is a poor vehicle to consider that issue because, again, petitioner's double-jeopardy claim would fail even if only one sovereign brought all the charges at issue. The Double Jeopardy Clause does not prevent trial for an offense after a mistrial that the defendant procured and a non-merits dismissal of the charge—which is what occurred here. *See infra* Part I.B.

Regardless, petitioner's argument for a fact-based exception to the dual-sovereignty doctrine also does not warrant review because there is no "conflict" between the state court's treatment of that issue here and decisions of federal courts of appeals. S. Ct. R. 10(b); *cf.* Pet. 25-27. As petitioner tacitly admits, *see* Pet. 27, after percolating for nearly 60 years, not a single court of appeals has found a "sham prosecution" that warrants treating state and federal governments as one sovereign.

## ARGUMENT

In the state court of appeals, the sole point of error raised by petitioner was that the trial court erred by ruling on his double-jeopardy claim without conducting a hearing or notifying him of its intent to rule without a hearing. Pet. App. 1a. The court of appeals rejected this sole point of error, and the Texas Court of Criminal Appeals declined review. Petitioner now asks this Court to overrule more than a century of precedent concerning the dual-sovereignty view of the Fifth Amendment's Double Jeopardy Clause. But that request would not affect the sole issue that petitioner preserved on appeal. Moreover, neither such an overruling of the dual-sovereignty doctrine nor application of the fact-based exception sought in petitioner's second question presented would entitle petitioner to relief on his double-jeopardy claim. The petition for a writ of certiorari should be denied.

### I. Reconsideration Of The Dual-Sovereignty View Of The Double Jeopardy Clause Is Inappropriate Here.

In the first question presented, petitioner seeks review to challenge the Double Jeopardy Clause principle, "consistently . . . endorsed" by this Court, "that a single act constitutes an 'offence' against each sovereign whose laws are violated by that act." *Heath*, 474 U.S. at 93. Review of that question is unwarranted for three main reasons: (1) it does not affect the sole issue that petitioner preserved on appeal, which concerns only the state-court procedure for adjudicating his double-jeopardy claim; (2) it also does not matter here because petitioner's dou-

ble-jeopardy claim would fail even if all of the charges at issue were brought by one sovereign; and (3) the dual-sovereignty doctrine has been repeatedly reaffirmed by this Court, follows from the unique structure of our Constitution, and does not warrant reconsideration.

### A. Petitioner's sole issue preserved on appeal is a procedural issue, unaffected by his new request to overrule the dual-sovereignty doctrine.

The dual-sovereignty doctrine is not properly before the Court in this case. Petitioner's sole issue on appeal was a challenge to the procedure by which the trial court adjudicated his double-jeopardy claim. Pet. App. 1a ("In his sole issue, appellant Calvin Gary Walker contends that the trial court erred by ruling on Walker's pretrial petitions for habeas corpus without conducting an evidentiary hearing and without notifying Walker of its intent to rule without a hearing."); Pet. App. 8a ("In his sole issue on appeal, Walker argues that the trial court erred in denying his request for pretrial habeas corpus relief without first holding an evidentiary hearing and without notifying the parties of the trial court's intent to rule without a hearing."). Indeed, petitioner preserved a challenge to that procedure under state law only, as opposed to federal due-process doctrine. Pet. App. 26a n.6.

Yet petitioner now asks this Court to "abolish[]" (Pet. 15) its longstanding precedent holding that an act is a separate "offence" under the Double Jeopardy Clause against each sovereign whose laws are violated. Pet. 8-24. That new argument is not implicated by the sole issue preserved on appeal. Petitioner sought an evidentiary hearing only to develop his fact-based argument for a

"sham" exception to the dual-sovereignty doctrine. *See supra* pp. 3-4. An evidentiary hearing would not have entitled the trial court to overrule the dual-sovereignty doctrine, nor was a hearing sought for that reason. And abolishing the dual-sovereignty doctrine would not entitle petitioner to an evidentiary hearing: the element-by-element analysis that petitioner argues should control even as to a violation of separate sovereigns' laws does not turn on factual findings but, rather, focuses on the elements of statutorily defined offenses. Pet. 16; *see Blockburger v. United States*, 284 U.S. 299 (1932).

Accordingly, any decision by this Court to overrule the dual-sovereignty doctrine could not possibly show error in the trial court's choice to forego an evidentiary hearing and proceed to a ruling based on the briefs filed—the only issue preserved on appeal under state appellate rules. Pet. App. 1a & 26a n.6 (describing sole argument on appeal); *see* Tex. R. App. P. 38.1(i). The continued validity of the dual-sovereignty doctrine is not implicated by the sole, procedural point of error on appeal. Petitioner did not raise a federal Double Jeopardy Clause point of error on appeal; that issue was neither raised nor litigated below. And this Court "ordinarily will not decide questions not raised or litigated in the lower courts." *City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987) (per curiam). This appeal is thus not a proper vehicle for any reconsideration of the dual-sovereignty doctrine.

### B. Petitioner's double-jeopardy claim would fail even without the dual-sovereignty doctrine.

Yet another reason makes this case an improper vehicle to hear either question presented. Under both questions presented, petitioner seeks to define the Fifth Amendment offense to which double-jeopardy protections attach using solely an element-comparison test, without regard for whether an act violates the laws of separate sovereigns. But petitioner's double-jeopardy claim would fail even under the test he advocates. Even if only a single sovereign were involved, petitioner could be tried again on the indicted charges after he obtained a mistrial due to a hung jury and an unopposed, non-merits dismissal followed. So petitioner's case would be unaffected by eliminating (the first question presented) or limiting (the second question presented) the dual-sovereignty doctrine.

1. Jeopardy on an offense attaches when the jury is sworn; "'[t]he conclusion that jeopardy has attached,' however, 'begins, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars retrial.'" *Martinez v. Illinois*, 134 S. Ct. 2070, 2075 (2014) (quoting *Serfass v. United States*, 420 U.S. 377, 390 (1975)). The "remaining question is whether the jeopardy ended in such a manner that the defendant may not be retried." *Id.*; *accord Richardson v. United States*, 468 U.S. 317, 325 (1984) ("the protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy").

This Court has long recognized that a mistrial sought and obtained by a defendant does not end his jeopardy

for an offense. "A defendant's motion for a mistrial constitutes 'a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact.'" *Oregon v. Kennedy*, 456 U.S. 667, 676 (1982) (quoting *United States v. Scott*, 437 U.S. 82, 93 (1978)). That general rule can be avoided only in "limited . . . cases in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial." *Kennedy*, 456 U.S. at 679. And a mistrial due to a genuinely deadlocked jury does not meet that exception. *See Richardson*, 468 U.S. at 324 ("we have constantly adhered to the rule that a retrial following a 'hung jury' does not violate the Double Jeopardy Clause"); *Arizona v. Washington*, 434 U.S. 497 509 (1978) ("[W]ithout exception, the courts have held that the trial judge may discharge a genuinely deadlocked jury and require the defendant to submit to a second trial."). So here, the mistrial obtained by petitioner after the jury deadlocked did not free him from jeopardy on the indicted charges.

The federal government then dismissed those charges without objection. That dismissal was a concession in a plea bargain—not a resolution in petitioner's favor of the merits of "some or all of the factual elements of the offense charged." *Scott*, 437 U.S. at 97 (quoting *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977)); *see* Plea Agmt. at 5-6, *Walker*, *supra*, ECF No. 158 (government's reservation of right to prosecute petitioner for all offenses, if plea agreement is violated). A dismissal like this one, not turning on factual guilt or innocence of the dismissed offense, is not equivalent to a jeopardy-ending acquittal. *See Scott*, 437 U.S. at 97. Ra-

ther, "[s]ubsequent to the declaration of a mistrial for reasons" allowing a retrial, "the state can dismiss criminal charges without forfeiting the right to retry them." *Arnold v. McCarthy*, 566 F.2d 1377, 1388 (9th Cir. 1978).

In short, neither the hung-jury mistrial nor the nonmerits dismissal creates a Double Jeopardy Clause bar to retrying petitioner on the indicted charges. *Id.*; *accord, e.g.*, *Chatfield v. Ricketts*, 673 F.2d 330, 332 (10th Cir. 1982) (per curiam) (rejecting claim "that the trial court violated the Double Jeopardy Clause by permitting the state to retry him for the first-degree kidnapping and violent crime counts after previously dismissing those counts at the state's request" after a mistrial); *Hysell v. Pliler*, No. 00-cv-01132-CRB, 2001 WL 940914, at *6 (N.D. Cal. Aug. 10, 2001) ("[T]he state initially chose not to retry the methamphetamine charges because petitioner had been convicted and would be serving time for possessing a firearm and a hypodermic needle. However, once petitioner obtained a retrial, the prosecutor was not barred from bringing the methamphetamine charge."); *Rhyne v. State*, 434 S.E.2d 76, 80 (Ga. Ct. App. 1993) ("The fact that the charge against defendant was dismissed after mistrial does not bar the State from reasserting the same charge and retrying defendant."); *De La Beckwith v. State*, 615 So. 2d 1134, 1147 (Miss. 1992) ("following a mistrial declared because of a hung jury, a *nolle prosequi* entered at the request of the State did not terminate the original jeopardy, and the State was not barred thereafter from seeking the reindictment of and reprosecuting the defendant from the same offense"); *State v. Brown*, No. E-88-13, 1989 WL 25542, at *5 (Ohio Ct. App. Mar. 17, 1989) ("the Double

Jeopardy Clause does not bar the state from reasserting the same charge it dismissed after a mistrial because of a hung jury").

2. Of course, petitioner's plea agreement here—as opposed to the Double Jeopardy Clause—does confer a limited right not to be retried on the charges on which the jury deadlocked. Plea Agmt. at 5, *Walker*, *supra*, ECF No. 158 (committing the Eastern District of Texas U.S. Attorney's Office not to prosecute petitioner for any offenses of which it then had knowledge). But rights under plea agreements are not Double Jeopardy Clause rights. *See Puckett v. United States*, 556 U.S. 129, 137 (2009) ("plea bargains are essentially contracts," with any breach by the Government entitling a defendant to "rescission of the agreement" or "resentencing at which the Government would fully comply with the agreement"); *see, e.g.*, *United States v. Hallam*, 472 F.2d 168, 169 (9th Cir. 1973) (per curiam) (relying on plea agreement rather than double-jeopardy rights to bar prosecution of an offense that the government agreed to dismiss and on which petitioner had not been tried). In any event, the plea agreement here expressly does not bind any State—or even any federal authority apart from one U.S. Attorney's Office. Plea Agmt. at 7, *Walker*, *supra*, ECF No. 158.

3. Finally, petitioner's guilty plea on the federal tax offense could not create a double-jeopardy bar to the state charges here, which are for different offenses under this Court's established *Blockburger* test. Pet. 16. Under *Blockburger*, violations of two statutory provisions are separate "offenses" for double-jeopardy purposes—and thus conviction of one offense cannot bar

prosecution for the other, separate offense—if each provision "requires proof of an additional fact which the other does not." 284 U.S. at 304. *Blockburger* thus provides that two offenses are separate if each statutory provision requires proof of a different fact, even where there is substantial factual overlap in the proof establishing each crime. *See United States v. Dixon*, 509 U.S. 688, 704 (1993) (overruling the "same conduct" analysis in *Grady v. Corbin*, 495 U.S. 508 (1990), and holding that the *Blockburger* analysis is the sole means to determine whether two crimes constitute the "same offense" for purposes of the Double Jeopardy Clause).

Here, the federal tax offense to which petitioner pleaded guilty is separate under *Blockburger* from the charged state offenses. This federal tax offense has three elements: (1) the law required the taxpayer to pay a tax, make a return, or supply tax information; (2) the taxpayer failed to do so at the time required by law; and (3) the failure was willful. 26 U.S.C. § 7203. The state fraud and laundering crimes charged here are not remotely similar. *See* Tex. Penal Code § 32.46 (securing-document-by-deception crime with the following elements: (1) intent to defraud or harm any person, (2) the defendant by deception (3) causes or induces certain specified execution or filing of documents); Tex. Penal Code § 34.02 (money-laundering crime with the following elements: the defendant (1) knowingly (2) takes certain actions regarding the proceeds of criminal activity, funds believed to be such proceeds, or actual or intended financing for criminal activity). Each of the three elements of the federal tax offense is a fact not required to prove the state fraud and laundering crimes charged here—and vice versa.

Because these are all separate offenses, petitioner's guilty plea to the tax offense could not possibly create a double-jeopardy bar to his trial on the offenses charged here.

### C. The longstanding dual-sovereignty doctrine does not warrant reconsideration.

Even putting aside the significant vehicle problems here, there is no need for this Court to revisit the "fundamental principle" (*Heath*, 474 U.S. at 93) "that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each," *Lanza*, 260 U.S. at 382.

#### 1. As this Court has recognized for over a century, the dual-sovereignty doctrine is inherent in our unique federal system.

a. The principle of dual sovereignty owes itself to the unique nature of our federal system, by which certain enumerated powers are given to the federal government, *e.g.*, U.S. Const. art. I § 8, with the rest reserved to the States, *id.* amend. X. These States, by "virtue of their original and unsurrendered sovereignty" (*Moore v. Illinois*, 55 U.S. (14 How.) 13, 15 (1852)) retain powers that "extend to all objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State," *The Federalist Papers*, No. 45, at 289 (James Madison) (Clinton Rossiter ed., 1961); *see also The Federalist Papers*, No. 32, at 194 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("[A]s the plan of the convention aims only at a partial union or consoli-

dation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States.").

In such a system, "[e]very citizen of the United States[,] is also a citizen of a State," and thus "may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either." *Moore*, 55 U.S. (14 How.) at 20; *accord United States v. Cruikshank*, 92 U.S. 542, 550-51 (1875) ("natural consequence of a citizenship . . . [to] pay the penalties which each exacts for disobedience to its laws").

"The dual sovereignty doctrine is founded on the common-law conception of crime as an offense against the sovereignty of the government. When 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 88 (quoting *Lanza*, 260 U.S. at 382). Because "[e]ach government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other," it follows naturally that a prosecution by one according to its laws cannot preclude prosecution by the other according to its own laws. *Lanza*, 260 U.S. at 382. This dual-sovereignty doctrine is, as Justice Holmes stated nearly a century ago, "too plain to need more than statement." *Westfall v. United States*, 274 U.S. 256, 258 (1927).

The Court has reaffirmed this understanding repeatedly. *See Heath*, 474 U.S. at 92 ("This Court has plainly and repeatedly stated that two identical offenses are *not* the 'same offence' within the meaning of the Double

Jeopardy Clause if they are prosecuted by different sovereigns."); *id.* ("[the doctrine] finds weighty support in the historical understanding and political realities of the States' role in the federal system"); *Wheeler*, 435 U.S. at 320 ("*Bartkus* and *Abbate* rest on the basic structure of our federal system, in which States and the National Government are separate political communities."); *Abbate v. United States*, 359 U.S. 187, 195 (1959) ("We decline to [overrule *Lanza*]. No consideration or persuasive reason not presented to the Court in the prior cases is advanced why we should depart from its firmly established principle."); *Bartkus*, 359 U.S. at 136 ("state and federal courts have for years refused to bar a second trial even though there had been a prior trial by another government for a similar offense ").

In short, there is no need to revisit this issue. Petitioner laments that this Court has not revisited this issue recently. *See* Pet. 14-15. It has not been for lack of opportunity. This Court has often denied invitations to reexamine the dual-sovereignty doctrine.[2]

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[2] *See Yahsi v. United States*, 134 S. Ct. 1902 (2014); *Roach v. Missouri*, 134 S. Ct. 118 (2013); *Gholikhan v. United States*, 562 U.S. 1244 (2011); *Mardis v. United States*, 562 U.S. 943 (2010); *Barrett v. United States*, 552 U.S. 1260 (2008); *Jackson v. United States*, 550 U.S. 952 (2007); *Alvarado v. United States*, 549 U.S. 817 (2006); *Leathers v. United States*, 543 U.S. 844 (2004); *Long v. United States*, 540 U.S. 822 (2003); *Angleton v. United States*, 538 U.S. 946 (2003); *Avants v. United States*, 536 U.S. 968 (2002); *Enas v. United States*, 534 U.S. 1115 (2002); *Sewell v. United States*, 534 U.S. 968 (2001); *Chaser v. United States*, 534 U.S. 942 (2001); *Howerin v. United States*, 528 U.S. 1083 (2000); *Guzman v. United States*, 519 U.S. 1020 (1996); *Wagner v. United States*, 510

b. Petitioner's attempt to give a new, contrary "original meaning" to the Double Jeopardy Clause relies almost entirely on English law. *See* Pet. 10-13. This ignores the fact that the contours of a doctrine involving the powers and obligations of separate sovereigns will necessarily reflect the "American experience, including our structure of federalism which had no counterpart in England." *United States v. Gillock*, 445 U.S. 360, 369 (1980); *cf. United States v. Brewster*, 408 U.S. 501, 508 (1972) ("Although the Speech or Debate Clause's historic roots are in English history, it must be interpreted in . . . the context of the American constitutional scheme of government rather than the English parliamentary system."). It is this fundamental asymmetry concerning the concept of dual sovereignty that led the Court to reject similar allusions as "dubious" "because they reflect a power of discretion vested in English judges not relevant to the constitutional law of our federalism." *Bartkus*, 359 U.S. at 128 n.9.

Under our unique federal system, "[w]e have here two sovereignties, deriving power from different sources, capable of dealing with the same subject matter within the same territory." *Lanza*, 260 U.S. at 382. It follows axiomatically that there often is "concurrent application of state and federal laws." *Abbate*, 359 U.S. at 190. As even critics of the dual-sovereignty doctrine have recognized, this was not true in England. *See, e.g.*, Harlan R. Harrison, *Federalism and Double Jeopardy: A Study in*

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U.S. 841 (1993); *Traylor v. United States*, 507 U.S. 1056 (1993); *Louisville Edible Oil Prod., Inc. v. United States*, 502 U.S. 859 (1991).

*the Frustration of Human Rights*, 17 U. Miami L. Rev. 306, 316 (1963) ("The common law in both the United States and in England has established the *territorial* theory of jurisdiction over crimes. In a federal system, if a crime is committed within the boundaries of a state, by definition it is also committed within the boundaries of the federal government. Thus it was easy to justify two prosecutions by saying that the 'peace and dignity' of two sovereigns was offended and therefore two crimes were committed. However, this is not true in Britain. In that country two sovereigns do not have *territorial* jurisdiction over a crime.") (citations omitted).

c. Petitioner and his supporting amici point to several recent scholarly articles questioning the dual-sovereignty doctrine. *See* Pet. 8 ("Scholars Urge This Court to Reexamine the Exception"); Pet. 9; *see also, e.g.*, NACDL Amicus Br. 20-22. This criticism is nothing new to the academy. *See, e.g.*, Jay A. Sigler, *Double Jeopardy: The Development of a Legal and Social Policy* 57-58 (Cornell Univ. Press 1969) (collecting critiques). Several of petitioner's arguments simply rehash arguments made decades ago in response to this Court's holdings in *Lanza*, *Bartkus*, and *Abbate*.[3] Thus, com-

[3] *See, e.g.*, Dean Roscoe Pound, *Cooperation in Enforcement of Law*, 17 A.B.A. J. 9, 14 (1931) (lamenting that *Lanza* provides "an easy way for prosecutors to make a record for convictions with a minimum of effort"); J.A.C. Grant, *Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons*, 4 UCLA. L. Rev. 1, 4 (1956) (attacking the "novel doctrine that dual offenses arise merely from the existence of duplicate laws"); Thomas Franck, *An International Lawyer Looks at the Bartkus Rule*, 34 N.Y.U. L. Rev.

plaints about a strained interpretation of "offense" (Pet. 16),[4] a failure to mirror practice in non-federal nation states (Pet. 11-12, 17), and allowing the prosecution two bites at the apple (Pet. 10, 21) have been considered and rejected by this Court. All the while, in the face of criticism directed at the doctrine by scholars, the Court expanded the dual-sovereignty doctrine in *Wheeler* and again in *Heath*.[5]

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1096 (1959); Walter T. Fisher, *Double Jeopardy, Two Sovereignties and the Intruding Constitution*, 28 U. Chi. L. Rev. 591 (1961); George C. Pontikes, *Dual Sovereignty and Double Jeopardy: A Critique of Bartkus v. Illinois and Abbate v. United States*, 14 W. Res. L. Rev. 700 (1963).

[4] Neither *Blockburger* nor its progeny address, much less purport to foreclose, an understanding of "offense" that would preclude treating the laws of separate sovereigns separately. *Contra* Pet. 16.

[5] Petitioner's contention that the Court "simply assumed, without ever deciding, that the [dual-sovereignty doctrine] continues to exist" following the incorporation of the Double Jeopardy Clause in the Fourteenth Amendment (Pet. 14 n.4) is belied by the expansion and endorsement of that doctrine in *Wheeler* and *Heath*. *See* 435 U.S. at 313, 320; 474 U.S. at 88-94. In fact, *Heath* gave the principle of dual sovereignty a ringing endorsement. *See, e.g.*, 474 U.S. at 92 (refusing to "discard [the] sovereignty analysis" in *Abbate*, and asserting that "[t]he Court's express rationale for the dual sovereignty doctrine . . . finds weighty support in the historical understanding and political realities of the States' role in the federal system and in the words of the Double Jeopardy Clause itself").

### 2. Expansion of federal criminal law does not warrant reconsideration of the dual-sovereignty doctrine.

In an attempt to add some sheen to their well-worn critiques of the dual-sovereignty doctrine, petitioner and his supporting amici argue that over-criminalization at the federal level has left the federal government prosecuting many of the same types of crimes as the States. *See* Pet. 9, 18-20; *see also, e.g.*, NACDL Amicus Br. 17.

Empirical studies provide reason to be cautious about assuming that an increase in federal criminal laws has led to an increase in federal criminal prosecutions. *See, e.g.*, Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 Emory L.J. 1, 18 (2012) ("If over-federalization were actually occurring at an alarming rate, one would reasonably expect to observe either an increase in the federal caseload without corresponding increases in state court caseloads, or at least a significant rise in the proportion of federal to state felony convictions each year. No such trends are reflected in the data."); *id.* at 19 ("Federal felony convictions represent a significant percentage of all felony convictions (state and federal combined) in just a few offense categories, all of which represent some compelling federal or interstate interest.").

Admittedly, it is problematic when "Congress federalizes . . . classic state and local issues." Edwin Meese III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 Tex. Rev. L. & Pol. 1, 5 (1997). But it is difficult to see why the solution to that problem would be a reinterpretation of the Double Jeopardy Clause that

*weakens* States' traditional police powers to prosecute crime—the classic component of that "residuum of sovereignty not delegated to the United States by the Constitution itself." *Coyle v. Oklahoma*, 221 U.S. 559, 567 (1911).

Petitioner's preferred reading of the Double Jeopardy Clause would curtail "the exercise of the power which every State is admitted to possess, of defining offenses and punishing offenders against its laws." *Moore*, 55 U.S. (How.) at 18. In the face of a "modern federalization of crime," Pet. 20, it would allow the federal government essentially to take the States' traditional police powers by adverse possession, turning the Double Jeopardy Clause into "a deft device for establishing a centralized government." *Bartkus*, 359 U.S. at 137.

This would, as the Court feared a half century ago, work a "marked change in the distribution of powers to administer criminal justice," effectively stripping States of their "principal responsibility for defining and prosecuting crimes." *Abbate*, 359 U.S. at 195. In the words of Justice Frankfurter, "It would be in derogation of our federal system to displace the reserved power of States over state offenses by reason of prosecution of minor federal offenses by federal authorities beyond the control of the States." *Bartkus*, 359 U.S. at 137.

This case presents a good example of the continued vitality of Justice Frankfurter's concern. Petitioner was charged in state court with fraud and money laundering, *see* Pet. App. 1a-2a—offenses far afield, and more serious in the eyes of the State, than the one misdemeanor count of failure to report income on his federal tax returns to which petitioner pleaded guilty in federal court.

### 3. Cooperation between federal and state law enforcement does not warrant upending the dual-sovereignty doctrine.

Petitioner also points to cooperation among federal and state prosecutors as a reason to reconsider the dual-sovereignty doctrine. Pet. 19. But such cooperation is hardly of recent vintage. Over half a century ago, the *Bartkus* Court noted that the federal prosecutor there had "acted in cooperation with state authorities," and observed that such cooperation was "conventional practice between the two sets of prosecutors throughout the country." 359 U.S. at 123.

More importantly, petitioner points to no authority establishing that voluntary cooperation somehow impinges on sovereignty. It does not. *See, e.g.*, *United States v. X.D.*, 442 F. App'x 832, 833 (4th Cir. 2011) (per curiam) ("Cooperation between sovereigns does not establish that one sovereign has ceded its prosecutorial discretion to the other sovereign."); *United States v. Djoumessi*, 538 F.3d 547, 550 (6th Cir. 2008) (same).

Petitioner's underlying argument, echoed by his amici, seems to be that increased cooperation means that state and federal "crime-fighting interests" are no longer distinct, and thus a dual-sovereignty doctrine is no longer necessary. Pet. 19. But this argument rests on a fundamental misunderstanding of why this Court recognized the dual-sovereignty nature of the Double Jeopardy Clause. It is beside the point whether the federal and state governments have distinct interests in prohibiting certain conduct. "A State's interest in vindicating its sovereign authority through enforcement of its laws

by definition *can never* be satisfied by another State's enforcement of *its* own laws." *Heath*, 474 U.S. at 93 (first emphasis added); *see also supra* pp. 17-19.

It would, in any event, be a mistake to assume that federal and state criminal interests are somehow perfectly aligned today. To take just one example, following the recent passage of Proposition 64, a Californian possessing 100 kilograms of marijuana intended for sale would face, at a state trial, conviction of a misdemeanor punishable by "imprisonment in a county jail for a period of not more than six months" and "a fine of not more than five hundred dollars." Cal. Health & Safety Code § 11359(b). By contrast, that same Californian would face, at a federal trial, conviction of a felony punishable by five to 40 years in prison and a fine of up to $5 million. 21 U.S.C. § 841(b)(1)(B)(vii). Such "disparity" is a reflection of our unique system of separate sovereigns, in which certain criminal acts will "impinge more seriously on a federal interest than on a state interest," *Abbate*, 359 U.S. at 195—and vice versa, *Bartkus*, 359 U.S. at 137.

## II. Review Of An Abstract Debate About Possible Exceptions To The Dual-Sovereignty Doctrine Is Unwarranted Here.

A. In the second question presented, petitioner asserts that there is a conflict among lower courts over the scope of a possible exception to the dual-sovereignty doctrine when state and federal governments bring successive prosecutions that a single government could not bring. *See* Pet. 25-27. Petitioner asserts that, "because of the federal-state task force, petitioner now faces a sec-

ond full trial and the prospect of life in prison for each charge." Pet. 24.

As explained above, however, petitioner could face a second trial even without the dual-sovereignty doctrine because his first trial ended in a mistrial that he sought due to a hung jury, after which an unopposed, non-merits dismissal followed. *See supra* Part I.B. This case is not a proper vehicle to consider any exception to the dual-sovereignty doctrine because it would not change the outcome of petitioner's double-jeopardy claim (and thus his entitlement to a hearing on that claim).

B. In any event, although there is some disagreement among circuit courts as to the existence of an exception to the dual-sovereignty doctrine for when a prosecution by one sovereign is a cover or sham for prosecution by another—as contemplated in dictum in *Bartkus*, 359 U.S. at 123-24—the minor differences in standards employed by those courts are ultimately immaterial in practice.

For instance, both this Court in *Bartkus* and all circuit courts that apply a sham exception have held or recognized that significant cooperation between two sovereigns does not alone provide a basis for applying such an exception. *E.g.*, *United States v. Rashed*, 234 F.3d 1280, 1284 (D.C. Cir. 2000); *United States v. Guzman*, 85 F.3d 823, 828 (1st Cir. 1996)); *United States v. Certain Real Property and Premises Known as 38 Whalers Cove*, 954 F.2d 29, 38 (2d Cir. 1992); *United States v. Piekarsky*, 687 F.3d 134, 149 (3d Cir. 2012); *United States v. X.D.*, 442 F. App'x. 832, 832-33 (4th Cir. 2011) (per curiam); *United States v. Moore*, 370 F. App'x. 559, 561-62 (5th Cir. 2010) (per curiam); *United States v. Djoumessi*, 538

F.3d 547, 550-51 (6th Cir. 2008); *United States v. Tirrell*, 120 F.3d 670, 677 (7th Cir. 1997); *United States v. Johnson*, 169 F.3d 1092, 1096 (8th Cir. 1999); *United States v. Lucas*, 841 F.3d 796, 803-04 (9th Cir. 2016) (listing several instances that do not indicate "sham" prosecutions) (*citing United States v. Figueroa-Soto*, 938 F.2d 1015, 1018-19 (9th Cir. 1991)); *United States v. Barrett*, 496 F.3d 1079, 1118-19 (10th Cir. 2007).

Likewise, the circuit courts that have considered the issue of the cross-designation of a state law-enforcement agent or district attorney as a federal official to assist with a federal prosecution have held that such facts alone do not bring a case within any *Bartkus*-based exception to the dual-sovereignty doctrine. *E.g.*, *United States v. Berry*, 164 F.3d 844, 846-47 (3d Cir. 1999); *United States v. Trammell*, 133 F.3d 1343, 1350 (10th Cir. 1998); *Figueroa-Soto*, 938 F.2d at 1019; *United States v. Paiz*, 905 F.2d 1014, 1024 (7th Cir. 1990); *United States v. Safari*, 849 F.2d 891, 893 (4th Cir. 1988); *see also United States v. Perchitti*, 955 F.2d 674, 677 (11th Cir. 1992). Likewise, no relief under any *Bartkus* exception exists when one sovereign requests that another instigate a subsequent prosecution. *E.g., Bartkus*, 359 U.S. at 123-24; *United States v. Harrison*, 918 F.2d 469, 472 (5th Cir. 1990); *Tirrell*, 120 F.3d at 677; *Rashed*, 234 F.3d at 1283-84; *United States v. Leathers*, 354 F.3d 955, 960-61 (8th Cir. 2004).

Tellingly, petitioner does not point to a single instance in which a court of appeals granted relief under a *Bartkus*-based exception, much less one on facts similar to his allegations here. That is not a coincidence. "The sham prosecution exception is more than narrow, it is

illusory." Michael A. Dawson, *Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine*, 102 Yale L.J. 281, 296 (1992). Indeed, "[n]o double jeopardy claim premised on the sham prosecution exception to the dual sovereignty doctrine has survived appeal." *Id.* There is no need for the Court to weigh in on an abstract difference that would not affect this case.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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