No. 22-5979

IN THE SUPREME COURT OF THE UNITED STATES

DEMETRICE R. DEVINE AND BRANDON JOWAN MANGUM, PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners are entitled to plain-error relief on their claims that their consecutive life sentences for conspiring to violate the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 et seq., in violation of 18 U.S.C. 1962(d) and 1963(a), murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(1) and 2, and murder with a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(j) and 2, violate the Double Jeopardy Clause.

2. Whether the court of appeals correctly determined that petitioners' sentences were substantively reasonable.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D.N.C.):

United States v. Devine, 16-cr-12-D-1 (Apr. 22, 2020)

United States v. Mangum, 16-cr-12-D-6 (June 5, 2020)

United States Court of Appeals (4th Cir.):

United States v. Devine, No. 20-4280 (July 7, 2022) (consolidated appeal)

United States v. Mangum, No. 20-4327 (July 7, 2022) (consolidated appeal)

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OPINION BELOW

The opinion of the court of appeals in petitioners' consolidated cases (Pet. App. 1a-28a) is reported at 40 F.4th 139.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 2022. A petition for rehearing was denied on August 2, 2022 (Pet. App. 31a-32a). The petition for a writ of certiorari was filed on October 31, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of North Carolina, petitioners were each convicted on one count of conspiring to violate the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 et seq., in violation of 18 U.S.C. 1962(d) and 1963(a); one count of murder in aid of racketeering, in violation of the Violent Crimes in Aid of Racketeering (VICAR) statute, 18 U.S.C. 1959(a)(1) and 2; one count of murder with a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(j) and 2; and one count of conspiring to distribute controlled substances, in violation of 21 U.S.C. 846. Pet. App. 33a-34a (Devine Judgment); id. at 41a-42a (Mangum Judgment). Petitioner Devine was additionally convicted on one count of conspiring to commit witness tampering, in violation of 18 U.S.C. 1512(b) and (k). Id. at 34a. The district court sentenced Devine to four consecutive life sentences plus a consecutive term of 240 months of imprisonment, to be followed by five years of supervised release. Id. at 35a-36a. The district court sentenced petitioner Mangum to three consecutive life sentences plus a consecutive term of 240 months of imprisonment, to be followed by five years of supervised release. Id. at 43a, 45a. The court of appeals affirmed. Id. at 1a-28a.

1. Petitioners were members of a semi-autonomous affiliate of the east-coast United Blood Nation gang called the Black Mob

Gangstas and the Donald Gee Family (collectively the BMG/DGF), which primarily operated in Raleigh, North Carolina. Pet. App. 3a; C.A. App. 166-168. Devine was the leader of the BMG/DGF beginning in the early 2000s. Pet. App. 3a. Mangum joined the BMG/DGF in the mid-2000s, and he rose within the organization's ranks to become a "three-star general." Id. at 4a; see id. at 3a-4a. During their tenure, the BMG/DGF gang engaged in a "reign of terror over the Haywood Street neighborhood" of Raleigh that included violence, robbery, prostitution, extortion, drug trafficking, and other crimes. Id. at 3a; see id. at 3a-4a.

On November 8, 2008, one of Devine's girlfriends was robbed. Pet. App. 4a. In response, Devine convened his fellow BMG/DGF members, handed a loaded gun to two of them, and instructed them to "put in work," which meant kill the perpetrator. Id. at 5a. Later that day, the two gang members went to a store where they believed the robber might be located. Id. at 5a. They opened fire on Adarius Fowler, a 16-year-old boy whom they mistakenly believed to be Devine's intended target. Ibid. Fowler bled out and died at the scene. Ibid. After his murder, the BMG/DGF members returned the gun to Devine. C.A. App. 1268.

On May 25, 2009, several BMG/DGF members, including Mangum and Devine's cousin (his "second-in-command"), gathered at a bus stop on Haywood Street to plan the murder of Rodriguez Burrell. Pet. App. 5a. Burrell was an 18-year-old member of the 9-Trey gang, a rival Blood affiliate, who had sold drugs in the heart of

the BMG/DGF's territory without paying them "rent." Ibid.; C.A. App. 468. At the meeting, Devine's cousin instructed Mangum and another BMG/DGF member to kill Burrell. Pet. App. 5a-6a. Later that night, Mangum walked by Burrell's house, where Burrell was sitting on the front porch, and asked if he had marijuana. Id. at 6a. Burrell's father, who was also sitting on the porch, said they did, but Mangum continued walking down the street. Ibid.; C.A. App. 588-589. Shortly afterward, the other BMG/DGF member approached the porch and repeatedly shot Burrell in the head while his father looked on. Pet. App. 6a; C.A. App. 589. Burrell died from his injuries. Pet. App. 6a. Soon after Burrell's murder, Mangum was promoted within the gang. Id. at 11a.

A federal grand jury in the Eastern District of North Carolina charged petitioners each with one count of conspiring to violate the RICO Act, in violation of 18 U.S.C. 1962(d) and 1963(a); one count of VICAR murder, in violation of 18 U.S.C. 1959(a)(1) and 2; one count of murder with a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(j) and 2; and one count of conspiring to distribute and possess with intent to distribute controlled substances, in violation of 21 U.S.C. 846. D. Ct. Doc. 690 (Sept. 11, 2019). Devine was also charged with one count of conspiring to commit witness tampering, in violation of 18 U.S.C. 1512(k). D. Ct. Doc. 690, at ¶ 33. Devine's VICAR murder and Section 924(j) charges stemmed from his role in the murder of Fowler, and Mangum's VICAR murder and Section 924(j)

charges stemmed from his role in the murder of Burrell. Id. at ¶¶ 26, 27, 30, 31. The murders were also included in the indictment as overt acts in furtherance of the RICO-conspiracy counts. Id. at ¶¶ 20.2, 20.10.

After a two-week trial, a jury found petitioners guilty on all counts. Pet. App. 7a.

2. The Probation Office's presentence reports calculated an advisory sentencing guidelines range of life imprisonment for each petitioner. Devine Presentence Investigation Report (PSR) ¶ 130; Mangum PSR ¶ 112. The Probation Office also noted that the statutory terms of imprisonment for petitioners' VICAR murder convictions were "mandatory life without release," and that the statutory maximum terms of imprisonment for petitioners' RICO conspiracy and Section 924(j) offenses were also life. Devine PSR ¶ 129; Mangum PSR ¶ 111.

a. At Devine's sentencing hearing, the district court found by a preponderance of the evidence that he had ordered Burrell's murder as well as Fowler's. Pet. App. 8a, 24a. Devine refused to accept responsibility for either killing. Id. at 7a. He yelled during the government's argument that it was all "lies" and told the victims' families that he "had nothing at all to do with y'all's kids getting hurt." Id. at 7a, 25a (citation omitted); Devine Sent. Tr. 8, 12.

Before announcing the sentence, the court noted the "overwhelming testimony at trial" that "painted a terrible picture

of a criminal organization that terrorized Raleigh and the people of Raleigh." Devine Sent. Tr. 24. The court then discussed the sentencing factors set forth in 18 U.S.C. 3553(a), including the "absolutely chilling" nature and circumstances of Fowler's murder, Devine Sent. Tr. 23; Devine's "[a]bsolutely horrific" criminal record, id. at 25-26; Devine's ability to keep running the gang during a previous term of incarceration, id. at 26; and the need to send a message to others that Devine "will never get out," ibid.

The district court determined that it should impose "the maximum sentence possible" on Devine "to reflect the serious nature of the crimes, the prolonged nature of the criminal activity, the need to justly punish this defendant, [and] the need to deter others." Devine Sent. Tr. 27. The court imposed consecutive life sentences for Devine's RICO-conspiracy, VICAR murder, Section 924(j), and drug-conspiracy convictions, plus a term of 240 months of imprisonment for his witness-tampering conviction, to be served consecutively to his life sentences. Id. at 28; Pet. App. 34a.

b. At Mangum's sentencing hearing, Mangum asked the district court to grant a downward variance and run the sentences for his RICO-conspiracy, Section 924(j), and drug-conspiracy convictions concurrently with the mandatory life sentence for VICAR murder. Mangum Sent. Tr. 13-14; see 18 U.S.C. 1959(a). Like Devine, Mangum did not accept responsibility for his crimes. Pet. App. 9a.

In assessing the Section 3553(a) factors, the district court recounted Mangum's "rank" in BMG/DGF and his role in the "horrifying" murder of Burrell in particular. Mangum Sent. Tr. 25-26. The court observed that the trial evidence "reflected the effect of a gang that for a time * * * essentially took over Haywood Street and made it a place where the law-abiding people didn't even feel they could go outside, culminating in many ways in the execution of an 18-year-old on his father's front porch." Id. at 28. The court also recounted Mangum's criminal history, which it described as one of "unabated violence," and emphasized that Mangum's criminal conduct continued after Burrell's murder. Id. at 27, 29-31.

The district court ultimately determined that a variance "would not be just in light of [Mangum's] crimes, in light of [his] criminal lifestyle, in light of all the people [he] harmed," and in light of its insufficiency to deter "all who might be thinking about whether to join a gang, whether to put in work for a gang, whether to murder a child for a gang." Mangum Sent. Tr. 32. The court accordingly sentenced Mangum to consecutive life sentences on the RICO-conspiracy, VICAR murder, and Section 924(j) counts, and to 240 months of imprisonment on the drug-conspiracy count, to be served consecutively to his life sentences. Id. at 33.

3. The court of appeals affirmed petitioners' convictions and sentences. Pet. App. 1a-28a.

a. On appeal, petitioners argued for the first time that the district court's imposition of consecutive life sentences violated the Double Jeopardy Clause. Pet. App. 17a, 20a. Specifically, they argued that their sentences for drug conspiracy, firearm murder under Section 924(j), and VICAR murder were for the "same offense" -- Devine's murder of Fowler and Mangum's murder of Burrell -- as their RICO-conspiracy convictions. Id. at 17a. They also argued that their Section 924(j) and VICAR murder sentences were punishments for the same crime. Id. at 20a.

The court of appeals rejected those arguments. Pet. App. 17a-21a. The court applied the rule of Blockburger v. United States, 284 U.S. 299 (1932), which treats two statutory provisions as defining separate offenses when "each provision requires proof of a fact which the other does not," id. at 304. See Pet. App. 17a. And the court determined that "Congress plainly intended separate punishments" for petitioners' multiple offenses. Ibid.; see id. at 17a-21a.

Addressing the RICO-conspiracy argument first, the court of appeals explained that RICO conspiracy requires an element distinct from petitioners' other offenses, and vice versa: "RICO conspiracy requires an agreement to commit multiple racketeering acts," whereas "firearms [murder under Section 924(j)] and VICAR murder require a murder, while drug conspiracy requires an agreement to distribute drugs, requirements not present for RICO

conspiracy." Pet. App. 18a. The court further explained that "[t]he available evidence of legislative intent confirms that Congress intended separate punishment for RICO conspiracy" and petitioners' other offenses, observing that the RICO statute "cautions that '[n]othing in [it] shall supersede any provision of Federal * * * law imposing criminal penalties * * * in addition to those provided for'" in the RICO statute. Id. at 19a (quoting Pub. L. No. 91-452, Tit. IX, § 904(b), 84 Stat. 947 (brackets in original)). And the court noted that "time and time again," courts of appeals have "rejected double jeopardy challenges for RICO and predicate drug offenses, RICO and other predicate offenses, and for RICO and VICAR offenses." Id. at 19a-20a (citing cases).

The court of appeals then explained that VICAR murder and murder with a firearm under Section 924(j) are likewise separate offenses with separate punishments. Pet. App. 20a-21a. The court observed that VICAR murder requires proof that the defendant's general purpose in carrying out the murder was to maintain or increase his position in a RICO enterprise (a requirement absent from Section 924(j)), while Section 924(j) requires proof that the defendant used a firearm to cause the death (a requirement absent from VICAR murder). Id. at 20a-21a. And the court again found no contrary indicia of legislative intent. Id. at 21a.

b. Petitioners additionally argued that their consecutive sentences were substantively unreasonable. Pet. App. 21a, 23a. The court of appeals rejected that argument. Id. at 21a-27a.

As an initial matter, the court of appeals found no categorical bar on the imposition of consecutive life sentences for a defendant "convicted of involvement in 'only' a single murder." Pet. App. 22a. The court observed that it had "repeatedly affirmed consecutive sentences in cases involving a single murder." Ibid. And it noted that "the imposition of a consecutive punishment over and above a life sentence wasn't just permissible; it was legally required in this case," because VICAR murder requires a mandatory life sentence, see 18 U.S.C. 1959(a)(1), and a Section 924(j) conviction requires a mandatory consecutive sentence in addition to the sentence for the underlying crime of violence (here, VICAR murder), see 18 U.S.C. 924(c)(1)(D)(ii) and (j). Pet. App. 22a-23a.

The court of appeals then found that, "under the totality of the circumstances," the district court had not abused its discretion in its overall determination of the sentence for each petitioner. Pet. App. 23a; see id. at 23a-27a. Citing the district court's "extensive explanation," id. at 23a, the court of appeals "readily conclude[d]" that Devine's sentence was substantively reasonable -- considering, among other things, "Devine's criminal culpability," which "was literally off the charts"; Devine's "contempt for law enforcement, for the courts, and for his victims"; and the fact that Devine "continued to lead the gang, to organize criminal activity, and to threaten and intimidate witnesses against him" while incarcerated. Id. at 25a;

see id. at 24a (emphasizing that Devine's sentence "needed to be sufficient to deter impressionable young men from joining gangs"). The court of appeals reached the same conclusion with respect to Mangum's sentence, in light of, among other things, Mangum's high-ranking position in the gang, his history of "'unabated violence,'" the fact that he "doubled down on violence and criminality" following Burrell's murder, and the district court's determination that a lesser sentence would not send a sufficiently strong message to those "'thinking about whether to join a gang, whether to put in work for a gang, whether to murder a child for a gang.'" Id. at 25a-27a (citations omitted).

ARGUMENT

Petitioners renew their argument (Pet. 7-15) that the Double Jeopardy Clause prohibited the district court from imposing consecutive life sentences for their RICO-conspiracy, VICAR murder, and Section 924(j) convictions. The court of appeals' decision is correct and does not conflict with any decision of this Court or another court of appeals. Petitioners' fact-bound contention (Pet. 2, 12-13) that their sentences are substantively unreasonable likewise lacks merit and does not warrant this Court's review. The petition for a writ of certiorari should be denied.

1. The Double Jeopardy Clause of the Fifth Amendment states that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. In the context of a single criminal prosecution, the clause "protects

against multiple punishments for the same offense." Albernaz v. United States, 450 U.S. 333, 343 (1981) (citation omitted). That guarantee precludes "the sentencing court from prescribing greater punishment than the legislature intended." Missouri v. Hunter, 459 U.S. 359, 366 (1983). It does not, however, prohibit the legislature from punishing the same act or course of conduct under different statutes. Albernaz, 450 U.S. at 344.

This Court has explained that "the 'rule of statutory construction' stated in [Blockburger v. United States, 284 U.S. 299 (1932)] is to be used 'to determine whether Congress has in a given situation provided that two statutory offenses may be punished cumulatively." Albernaz, 450 U.S. at 337 (citation omitted). The Blockburger test treats two criminal statutes as defining separate offenses when "each provision requires proof of a fact which the other does not." Ibid. (citation omitted). If that test is satisfied, it provides "conclusive" evidence that Congress intended to authorize consecutive punishments, absent a "clear indication of contrary legislative intent." Id. at 336, 340 (citation and internal quotation marks omitted).

2. a. Applying the Blockburger test here, the court of appeals correctly determined that the district court did not impermissibly impose multiple sentences for petitioners' multiple offenses. As the court explained, RICO conspiracy, VICAR murder, and Section 924(j) each require proof of a fact that the other offenses do not: RICO conspiracy requires the defendant's

agreement to commit a "pattern of racketeering activity," 18 U.S.C. 1962(a); see 18 U.S.C. 1962(d); VICAR murder requires the perpetration of violent acts "for the purpose of gaining entrance to or maintaining or increasing position in a[] [racketeering] enterprise," 18 U.S.C. 1959(a); and Section 924(j)(1) requires causing death "through the use of a firearm," 18 U.S.C. 924(j). See Pet. App. 18a.

The court of appeals also correctly observed that the "available evidence of legislative intent confirms" that Congress intended separate punishments for each of those offenses. Pet. App. 19a; see id. at 21a. Petitioners have not identified any evidence to the contrary. Instead, they contend (Pet. 8, 12) that Congress did not intend to permit additional punishment under Section 924(j) where a defendant has already received a mandatory life sentence for VICAR murder, citing Section 924(c)(1)(A)'s proviso that sentences provided apply "[e]xcept to the extent that a greater minimum sentence is otherwise provided * * * by any other provision of law," 18 U.S.C. 924(c)(1)(A). But Section 924(c)(1)(A) goes on to explicitly state that a defendant convicted of using or carrying a firearm during and in relation to a crime of violence must receive a Section 924 sentence "in addition to the punishment provided for such crime of violence." Ibid. The text of Section 924(c) thus authorizes multiple punishments for petitioners' VICAR murder and Section 924(j) offenses. Cf. Castillo v. United States, 530 U.S. 120, 130 (2000) (Section

924(c)'s "pre-eminent feature" is "the creation of a new mandatory term of imprisonment additional to that for the underlying crime of violence").[1]

b. Citing a district court decision, petitioners ask this Court to "adopt" a "modified" version of the Blockburger test that looks "beyond the text of the statute" and "consider[s] facts presented at trial when determining Congress' intent." Pet. 9-10 (discussing United States v. Gardner, 417 F. Supp. 2d 703, 710 (D. Md. 2006)). In particular, they urge an approach under which a court "must look at the specific allegations set forth at trial to determine if a defendant will essentially be punished more than once for the same conduct." Id. at 10.

That approach is squarely at odds with the Blockburger test's focus on the "statutory elements of the offense." Albernaz, 450 U.S. at 338; see Illinois v. Vitale, 447 U.S. 410, 416 (1980) ("[T]he Blockburger test focuses on the proof necessary to prove the statutory elements of each offense, rather than on the actual evidence to be presented at trial."); Iannelli v. United States,

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[1] This Court granted certiorari to determine whether the consecutive sentencing provision in 18 U.S.C. 924(c)(1)(D)(ii) applies when sentencing a defendant for causing death through use of a firearm in the course of violating Section 924(c), pursuant to 18 U.S.C. 924(j). See Lora v. United States, cert. granted, No. 22-49 (Dec. 9, 2022). Petitioners received consecutive sentences for their Section 924(j) offenses, but they have never argued (and do not argue in their petition) that Section 924(c)(1)(D)(ii)'s consecutive sentencing provision does not apply to a Section 924(j) offense. Indeed, their reliance on Section 924(c)(1) appears effectively to presuppose the opposite.

420 U.S. 770, 785 n.17 (1975) ("[T]he Court's application of the [Blockburger] test focuses on the statutory elements of the offense."); Brown v. Ohio, 432 U.S. 161, 166 (1977) (the Blockburger test "emphasizes the elements" of the offenses). Nor could the facts of a particular case be described as a "clear indication of * * * legislative intent" that only one punishment should be imposed for two Blockburger-distinct offenses. Albernaz, 450 U.S. at 340 (emphasis added).

Contrary to petitioners' contention (Pet. 10), this Court's decision in Whalen v. United States, 445 U.S. 684 (1980), does not support their proposal. In Whalen, the Court applied Blockburger to conclude that "Congress did not authorize consecutive sentences for rape" and for the lesser-included-offense of a "killing committed in the course of the rape" under D.C. law, finding that the two crimes did not each include a unique element. Id. at 693. In reaching that conclusion, the Court focused on the statutory elements of both offenses, reasoning that a "conviction for killing in the course of a rape cannot be had without proving all the elements of the offense of rape." Id. at 693-694. Thus, Whalen did not suggest that Blockburger has been "overtaken" by a "modified approach" requiring courts to "consider facts presented at trial." Pet. 10; cf. Albernaz, 450 U.S. at 338-339 (reaffirming, one year after Whalen, that courts apply the Blockburger elements test).

Petitioners also reference (Pet. 14-15) this Court's decision in Wooden v. United States, 142 S. Ct. 1063 (2022), but that decision is inapposite. Wooden is not a double jeopardy case, and the statutory provision at issue -- the Armed Career Criminal Act's "occasions" clause, which mandates a minimum penalty for 18 U.S.C. 922(g) offenders who have at least three prior convictions for felonies "committed on occasions different from one another," 18 U.S.C. 924(e)(1) -- is not implicated here.

Petitioners' invocation of the rule of lenity (Pet. 13-14) is likewise misplaced. That rule is a rule of statutory construction that "only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended." United States v. Castleman, 572 U.S. 157, 172-173 (2014) (quoting Barber v. Thomas, 560 U.S. 474, 488 (2010)). It is unclear precisely how it would fit into the constitutional multiple-punishment framework, and in any event, no grievous ambiguity exists about the separateness of the offenses here. The statutory provisions "are unambiguous on their face," and the legislative history gives "no reason to pause over the manner in which these provisions should be interpreted." Albernaz, 450 U.S. at 343; see ibid. (explaining that the rule of lenity has "no application" in such circumstances).

c. Petitioners' brief suggestion (Pet. 10) that the Second, Sixth, Eighth, and Ninth Circuits apply their proposed "modified"

version of Blockburger is incorrect. Petitioners appear to be referencing decisions mentioned by the district court on which they principally rely, see Gardner, 417 F. Supp. 2d at 710 (citing cases), but those decisions do not support the approach that petitioners advocate.

The Second Circuit's decision in United States v. Barton, 647 F.2d 224 (1981), applied the Blockburger elements test, see id. at 236-237, and the analysis in United States v. Seda, 978 F.2d 779 (1992), was later repudiated by that circuit, see United States v. Chacko, 169 F.3d 140, 146-147 (1999) (explaining that Seda's focus on the nature of the counts charged and the specifics of the indictment was mistaken). The Eighth Circuit's decision in United States v. Kragness, 830 F.2d 842 (1987), properly focused its double jeopardy inquiry on whether Congress intended cumulative punishments for the same offense, see id. at 864. And the Ninth Circuit's decision in United States v. Peacock, 761 F.2d 1313 (1985), abrogated on other grounds, Gomez v. United States, 490 U.S. 858 (1989), simply reflects the holding of Braverman v. United States, 317 U.S. 49 (1942), that where the trial evidence establishes a single agreement to commit multiple offenses (as opposed to multiple agreements), the defendant cannot be punished for multiple conspiracies. See Peacock, 761 F.2d at 1319.

Finally, the Sixth Circuit's decision in Pandelli v. United States, 635 F.2d 533 (1980), was decided before United States v. Albernaz, supra, clarified that Whalen's analysis of lesser-

included offenses did not represent a departure from a Blockburger element-focused analysis. The Sixth Circuit has since applied the correct approach to reject a defendant's "mistaken[] focus[] on the evidence submitted at trial" rather than "the proof necessary to establish the statutory elements." United States v. Callanan, 810 F.2d 544, 545-547, cert. denied, 484 U.S. 832 (1987); see id. at 547-548 (disagreeing with the proposition "that the 'historical Blockburger analysis' has been 'rejected' by the Supreme Court" (citation omitted)). And it is far from clear that even the approach in Pandelli -- which "look[ed] to the legal theory of the case or the elements of the specific criminal cause of action for which the defendant was convicted without examining the facts in detail," 635 F.2d at 538 -- would result in a different outcome here, where the offenses are so inherently distinct. See Pet. App. 18a-19a, 21a (providing concrete examples of the distinctions).

d. In any event, this case would be a poor vehicle for considering petitioners' first question presented, for at least two reasons.

First, petitioners failed to raise their double jeopardy challenge in the district court, and it is accordingly subject to plain-error review. See Fed. R. Crim. P. 52(b). Although the court of appeals did not rely on that standard, the government's brief pointed out the forfeiture, Gov't C.A. Br. 2, 59, and it continues to dictate the correct standard of review. As a

consequence, petitioners bore the burden of showing not only that (1) an error occurred, but that the error (2) was "plain," (3) affected their substantial rights, and (4) seriously affected the fairness, integrity or public reputation of the proceedings. Greer v. United States, 141 S. Ct. 2090, 2096-2097 (2021).

Even if an error occurred in this case, petitioners cannot show that it was plain. A plain error must be "clear or obvious, rather than subject to reasonable dispute." United States v. Marcus, 560 U.S. 258, 262 (2010) (citation omitted). Petitioners themselves acknowledge (Pet. 9) that they are asking the Court to "adopt" a "modified approach" to "the familiar test" of Blockburger; their entitlement to relief is certainly not clear or obvious. See Henderson v. United States, 568 U.S. 266, 278 (2013) (explaining that "lower court decisions that are questionable but not plainly wrong (at time of trial or at time of appeal) fall outside the * * * scope" of the plain-error rule).

Second, adopting petitioners' favored approach would have no practical effect on their terms of imprisonment -- as petitioners, who accept that they are each subject to at least one life sentence, themselves recognize. Pet. 11. And because petitioners no longer dispute the sentences for their drug-conspiracy convictions, see Pet. 11 n.1, and Devine does not challenge the sentence on his witness-tampering conviction, any ruling in their favor on the first question presented would leave in place substantial additional terms of imprisonment: life imprisonment

plus 240 months for Devine, to be served consecutively to each other and to Devine's other life sentence, and a consecutive 240-month term of imprisonment for Mangum.

3. Petitioners additionally contend (Pet. 2, 12-13) that the court of appeals erred in upholding their sentences as substantively reasonable. That fact-bound request for error correction, which is largely undeveloped in the petition, does not warrant this Court's review.

After ensuring that a district court has not committed any procedural error in imposing a sentence, an appellate court should "consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." Gall v. United States, 552 U.S. 38, 51 (2007). In doing so, the reviewing court must give "due deference to the district court's decision that the § 3553(a) factors, on a whole, justify" the sentence. Ibid. And a court of appeals may not set aside a sentence simply because it "might reasonably have concluded that a different sentence was appropriate" had it been in the district court's position. Ibid.

The court of appeals correctly applied those principles in declining to disturb petitioners' sentences here. The court of appeals thoroughly reviewed the district court's "extensive explanation of Devine's sentence," Pet. App. 23a, including its focus on the "absolutely chilling" "nature and circumstances" of Fowler's murder, ibid., Devine's "terrible" criminal history and "unremitting commitment to gang life," id. at 23a, 24a, his

responsibility for the Burrell murder, id. at 24a, and the need to deter "impressionable young men from joining gangs," ibid. Based on these and other factors, the court of appeals "readily conclude[d]" that Devine's sentence was substantively reasonable. Id. at 25a.

The court of appeals likewise thoroughly examined the district court's sentencing of Mangum and found no abuse of discretion. After reviewing the district court's explanation in depth, Pet. App. 25a-27a -- noting, in particular, the court's reliance on the "'horrifying'" circumstances of Burrell's "execution," id. at 25a-26a (citation omitted), Mangum's "high-ranking" position in the gang, id. at 25a, his history of "'unabated violence,'" id. at 26a (citation omitted), and the need for deterrence, id. at 27a -- the court of appeals reasonably found no abuse of discretion in the decision not to vary downward. Ibid. Petitioners' insistence "that once a sentence has been enhanced to life, there is no further punishment required," does not demonstrate any error in that analysis. Pet. 12.[2]

[2] Petitioners' "suggest[ion]" that the district court's choice of sentence should have been informed by Sentencing Guidelines § 3D1.1 (Pet. 12-13) is beside the point; they do not argue (and did not argue below) that the court committed procedural error in calculating their guidelines ranges. See Pet. App. 21a-22a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2023