No. 22-7098

IN THE SUPREME COURT OF THE UNITED STATES

RASHID TURNER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

KENNETH A. POLITE, JR.
Assistant Attorney General

SONJA M. RALSTON
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the lower courts correctly applied the good faith exception to the exclusionary rule, based on a factual finding that a premature search of petitioner's cellphone had not been any "sort of strategic action," but instead a "mistake" that the police "attempted to rectify" as soon as it was discovered.

2. Whether the Double Jeopardy Clause precludes conviction and sentencing under both the Hobbs Act, 18 U.S.C. 1951(a), and the Federal Bank Robbery Act, 18 U.S.C. 2113(a), for conduct that independently satisfies the distinct elements of each statute.

IN THE SUPREME COURT OF THE UNITED STATES

No. 22-7098

RASHID TURNER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-13) is not published in the Federal Reporter but is available at 2022 WL 4137756. The order of the district court is not published in the Federal Supplement but is available at 2019 WL 2287967.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 2022. A petition for rehearing en banc was denied on December 21, 2022 (Pet. App. 14). The petition for a writ of certiorari was filed on March 21, 2023. 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 Middle District of Florida, petitioner was convicted on one count of conspiring to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); three counts of Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); three counts of using, carrying, or brandishing a firearm during or in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(ii); and two counts of bank robbery, in violation of the Federal Bank Robbery Act (FBRA), 18 U.S.C. 2113(a). Pet. App. 15. The district court sentenced petitioner to 492 months of imprisonment, to be followed by five years of supervised release. Id. at 16-17. The court of appeals affirmed. Id. at 1-13.

1. In July 2017, petitioner met a co-conspirator in Fort Myers, Florida, where they "commiserated over their financial problems." Pet. App. 2. The meeting led to a months-long robbery spree. Ibid. Between August 2017 and December 2017, petitioner and two co-conspirators robbed a Family Dollar store, a Dollar General store, a Wells Fargo bank, and a Seacoast bank, each at gunpoint. Presentence Investigation Report ¶ 5.

During the Wells Fargo robbery, petitioner left his cell phone in a rented Hyundai. Pet. App. 2. After petitioner and an accomplice emerged from the bank, the accomplice realized that the keys to the Hyundai were still inside. Ibid. While the accomplice

went back to retrieve the keys, petitioner fled in another vehicle, leaving behind his phone. Ibid.

Petitioner got away, but the accomplice's delayed exit in the Hyundai resulted in police pursuit and the accomplice's apprehension after crashing the car. Pet. App. 3. The next day, petitioner replaced his phone, transferring his number to a new phone and deactivating the one that he had left behind in the Hyundai. Ibid.

Police obtained a warrant to search the Hyundai, discovered petitioner's "locked, password-protected" phone, and entered it into evidence. Pet. App. 3. About a week after the robbery, Detective Thomas Breedlove prepared an affidavit to obtain a separate warrant to search the phone. Ibid. Although his supervisor, Sergeant William Power, approved the warrant application, Detective Breedlove did not immediately present it to a judge. Ibid.

More than a month later, when a detective from the neighboring county in which the crash had occurred asked for information from the phone, Detective Breedlove discovered that the phone had not yet been searched. Pet. App. 3. Forgetting that he had never presented the warrant application to a judge, Detective Breedlove asked Sergeant Power (who was also trained in phone extraction) to search the phone. Ibid.; 5/20/19 Tr. (Tr.) 76-78, 109. Sergeant Power, assuming that the warrant application he had approved a

month earlier had been signed by a judge, carried out the search. Tr. 81, 108-109.

A few days later, after a follow-up inquiry from the neighboring-county detective that sought both the phone data and the warrant itself, Detective Breedlove realized that the warrant application was still in the file, unsigned. Tr. 83. Detective Breedlove immediately consulted Sergeant Power; they agreed that Detective Breedlove should amend the application to explain what had happened and present it to a judge, which he did that day. Tr. 83, 90, 125. In assessing the application, the state-court judge questioned Detective Breedlove to ensure that his affidavit did not contain any information from the phone. Tr. 83-84; see Pet. App. 3. Only after the judge made the determination to issue the warrant did Detective Breedlove share the phone's data with the inquiring detective, who eventually shared it with the FBI. Tr. 22-23, 25, 27.

2. A grand jury in the Middle District of Florida charged petitioner with one count of conspiring to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); four counts of Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); four counts of using, carrying, or brandishing a firearm during or in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(ii); and two counts of bank robbery, in violation of the FBRA, 18 U.S.C. 2113(a). Pet. App. 3-4.

Before trial, petitioner moved to suppress the evidence found on the phone that he had left in the Hyundai. D. Ct. Doc. 164 (May 6, 2019). The district court conducted a suppression hearing, where it heard from both detectives, Sergeant Power, and the FBI agent. It found that Detective Breedlove was credible in his "repentant" "countenance" and that it was "clear" that Detective Breedlove "did not engage in some sort of strategic action. Rather, he made a mistake and attempted to rectify it." Tr. 134. The court accordingly found that the officers had acted in good faith and that application of "the Fourth Amendment exclusionary rule" was not necessary "to incent these police officers who know quite well how to conduct themselves." Tr. 136.

In a subsequent written order, the district court also identified two additional grounds for denying petitioner's suppression motion. D. Ct. Doc. 209, at 5-14 (May 29, 2019). First, it found that petitioner had abandoned the phone, based on petitioner fleeing the robbery scene in a different vehicle, calling his coconspirator from a different phone as he was fleeing, promptly switching his number to a new phone, and never seeking the phone's return. Id. at 7. Second, the court found that the "inevitable or independent source doctrine" was satisfied. Id. at 10. Specifically, it determined that because police had prepared the warrant affidavit without any input from the warrantless search and because the neighboring county's investigation was closing in on petitioner even before they received the phone data, the phone's

contents would have inevitably, and legally, come to light. Id. at 11-13.

Petitioner also moved pretrial to dismiss the two bank-focused Hobbs Act counts, claiming that the Double Jeopardy Clause rendered the FBRA counts the exclusive basis for punishing that conduct. Pet. App. 4. After a hearing, the district court denied that motion as well. Ibid.

3. The jury found petitioner guilty of all charges except for those relating to the robbery of the Family Dollar store. Pet App. 5; see id. at 20. Following trial, petitioner moved for a new trial, asserting, among other grounds, that the trial court had erroneously allowed the jury to consider charges under both the Hobbs Act and the FBRA for the Wells Fargo bank robbery on November 18, 2017, and for the Seacoast bank robbery on December 4, 2017. D. Ct. Doc. 221, at 1-2 (June 13, 2019). The district court denied the motion. D. Ct. Doc. 222 (June 14, 2019).

The district court sentenced petitioner to a total of 492 months of imprisonment, consisting of concurrent 240-month sentences on the robbery counts and consecutive 84-month sentences on each of the three firearm counts. Pet. App. 16-17.

4. The court of appeals affirmed in an unpublished, per curiam opinion. Pet. App. 1-13.

Reviewing the denial of petitioner's motion to suppress the cell phone evidence, the court of appeals "agree[d]," on clear-error review, with the district court's findings that Detective

Breedlove had "'made a mistake'" and did not take "'some sort of strategic action'" in connection with the search. Pet. App. 8. It accordingly affirmed the district court's denial of the suppression motion on good-faith grounds, and did not address the district court's findings on abandonment or inevitable discovery. See id. at 7.

The court of appeals further determined that petitioner's sentences under the Hobbs Act and the FBRA did not violate the Double Jeopardy Clause. Pet. App. 11-13. Citing this Court's decision in Blockburger v. United States, 284 U.S. 299 (1932), and explaining that the double-jeopardy inquiry turned on "'a strictly textual comparison'" of the two statutes without reference to "legislative history," the court found that they set forth separate offenses because "each 'requires proof of an additional fact which the other does not.'" Pet. App. 12 (quoting United States v. Bobb, 577 F.3d 1366, 1373 (11th Cir. 2009), cert. denied, 560 U.S. 928 (2010), and United States v. Smith, 532 F.3d 1125, 1128 (11th Cir.), cert. denied, 555 U.S. 1007 (2008)). Specifically, the court observed that the Hobbs Act requires proof that a robbery or attempted robbery affected interstate commerce, while the FBRA requires proof that the robbery was perpetrated on a "'bank, credit union, or any savings and loan association.'" Id. at 13 (quoting 18 U.S.C. 2113); see id. at 12-13; 18 U.S.C. 1951(a).

ARGUMENT

Petitioner renews his contentions that detectives did not act in good faith when searching the phone they found in the Hyundai (Pet. 13-19) and that Hobbs Act robbery and federal bank robbery should be treated as the "same offence" for purposes of the Double Jeopardy Clause (Pet. 19-23). The court of appeals' unpublished, per curiam decision does not implicate any circuit conflict that warrants this Court's review. In any event, this case would be a poor vehicle for further review because alternative grounds support the district court's denial of petitioner's suppression motion, and petitioner -- who received concurrent terms of imprisonment and supervised release on the relevant counts -- fails to identify any meaningful adverse effect attributable to any double-jeopardy violation. The petition for a writ of certiorari should be denied.

1. The court of appeals correctly determined that even if a Fourth Amendment violation occurred in the search of the cell phone that petitioner left in his intended getaway car, the good-faith exception precluded petitioner's reliance on the exclusionary rule to suppress the evidence that phone contained. See Pet. App. 6-8.

a. The Fourth Amendment "protects the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,'" but "says nothing about suppressing evidence obtained in violation of this command." Davis

v. United States, 564 U.S. 229, 236 (2011); see Herring v. United States, 555 U.S. 135, 139 (2009). To "supplement the [Amendment's] bare text," this Court "created the exclusionary rule, a deterrent sanction that bars the prosecution from introducing evidence obtained by way of a Fourth Amendment violation." Davis, 564 U.S. at 231-232. But because the exclusion of reliable evidence has "significant costs," suppression of evidence "'has always been [the Court's] last resort, not [its] first impulse.'" Utah v. Strieff, 579 U.S. 232, 237-238 (2016) (quoting Hudson v. Michigan, 547 U.S. 586, 591 (2006)). The Court has thus deemed the exclusionary rule "applicable only where its deterrence benefits outweigh its substantial social costs." Id. at 237 (quoting Hudson, 547 U.S. at 591) (ellipses omitted).

Because suppression "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity," the Court has held that the exclusionary rule does not apply "where [an] officer's conduct is objectively reasonable." United States v. Leon, 468 U.S. 897, 919 (1984). Accordingly, "evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." Ibid. (citation omitted).

b. Here, following a suppression hearing at which it heard testimony from the officers involved, the district court found

that no such actual or constructive knowledge could be attributed to those officers. See Tr. 134-137.

Observing that Detective Breedlove's "countenance was one of repentan[ce]," the court found that "it's clear to me, as a matter of how I viewed his testimony, that he did not engage in some sort of strategic action." Tr. 134. "Rather, he made a mistake and attempted to rectify it" by informing the judge who ultimately issued the warrant about the circumstances that had led to that mistake. Ibid.; see id. at 85. The officer who actually conducted the search had also testified that he believed -- based on his prior review and approval of a warrant application that petitioner does not dispute was sufficient to establish probable cause -- that the warrant had already been issued. Id. at 81, 108-109. In those circumstances, the district court reasonably determined -- and the court of appeals "agree[d]" -- that "'the Fourth Amendment exclusionary rule did not require any further activity to incent these police officers who know quite well how to conduct themselves.'" Pet. App. 8 (brackets omitted). Instead, the officers' behavior was akin to the "negligent bookkeeping error" that this Court found insufficient to merit suppression in Herring v. United States. See 555 U.S. at 137.

Petitioner's argument (Pet. 14-15) for suppression is premised on the assertion that the conduct here was in fact grossly negligent or reckless. See Pet. 14 (contending that "the deterrent value of exclusion is strong and tends to outweigh the resulting

costs" when a Fourth Amendment violation is "deliberate, reckless, or grossly negligent") (citation omitted). But based on its evaluation of the officers' testimony and all of the surrounding circumstances, the district court found that their error reflected at most "perhaps negligence." Tr. 134. That determination was correct, and -- as the court of appeals recognized -- certainly not clearly erroneous. See Pet. App. 8.

Petitioner identifies no decision of this Court or any other court of appeals that has applied the exclusionary rule on facts similar to those present here. See Pet. 13-19. His challenge thus reflects a bare disagreement with the determinations of the court of appeals and district court that suppression in this case would not be worth the cost. That factbound disagreement with both lower courts provides no sound basis for this Court's review. See Sup. Ct. R. 10; United States v. Johnston, 268 U.S. 220, 227 (1925) (observing that this Court "do[es] not grant a certiorari to review evidence and discuss specific facts"); see also Kyles v. Whitley, 514 U.S. 419, 456-457 (1995) (Scalia, J., dissenting) ("[U]nder what we have called the 'two-court rule,' the policy [in Johnston] has been applied with particular rigor when district court and court of appeals are in agreement as to what conclusion the record requires.") (citing Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 336 U.S. 271, 275 (1949)).

c. Such review is particularly unwarranted in light of the district court's alternative determinations -- which petitioner

does not address -- that petitioner had abandoned the phone in the getaway vehicle and that the evidence on the phone would inevitably have been discovered even without the inadvertently warrantless search. See Tr. 136-137; D. Ct. Doc. 209, at 5-7 (abandonment); id. at 10-13 (inevitable discovery). Given those determinations, petitioner would not be entitled to relief on his Fourth Amendment claim even if this Court determined that the good-faith exception was inapplicable on the facts here.

2. Petitioner's double-jeopardy claim (Pet. 19-23) likewise does not warrant this Court's review.

a. The Double Jeopardy Clause protects against "multiple punishments for the same offense." Ohio v. Johnson, 467 U.S. 493, 498 (1984) (quoting Brown v. Ohio, 432 U.S. 161, 165 (1977)). "Where the same conduct violates two statutory provisions," therefore, courts must "determine whether the legislature * * * intended that each violation be a separate offense." Garrett v. United States, 471 U.S. 773, 778 (1985). The principal "canon of statutory construction" employed to answer that question is the "Blockburger rule." Id. at 779. Under that test, courts analyzing whether statutory provisions create "two distinct offenses" exposing a defendant to two distinct punishments ask whether "each statute requires proof of an additional fact which the other does not." Blockburger v. United States, 284 U.S. 299, 304 (1932) (citation omitted).

Here, petitioner expressly agrees with the lower courts' determination that the "elements of the Hobbs Act and FBRA are different because the Hobbs Act requires that the robbery interfere with interstate commerce while the FBRA requires that the robbery be of a bank." Pet. 21; see Pet. App. 12-13; see also 18 U.S.C. 1951(a) (Hobbs Act prohibition against robbery that "obstructs, delays, or affects commerce"); 18 U.S.C. 2113(a) (FBRA prohibition against robbery involving a "bank, credit union, or any savings and loan association"). The Hobbs Act also applies only to the robbery of "personal property," 18 U.S.C. 1951(b)(1), while the FBRA applies to robbery of "any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association, 18 U.S.C. 2113(a) (emphasis added).

Petitioner instead contends (Pet. 22) that courts should "apply the 'same elements' test" adopted by this Court in Blockburger "[o]nly if the legislative intent is unclear." And based on that premise, petitioner claims (ibid.) that here, a "House committee report" makes it "clear" that Congress intended that bank robbery "would be prosecuted exclusively under the" FBRA, such that there was no need for the court of appeals to compare the elements set out in the Hobbs Act and the FBRA in order to determine whether those statutes established separate offenses for purposes of the Double Jeopardy Clause. But even assuming that

sufficiently clear legislative history would be sufficient in this context, such clarity is absent in this case.

The committee report to which petitioner points (Pet. 22-23) relates to Congress's addition of extortion to Section 2113(a) of the FBRA in 1986, explaining that Congress made that amendment to resolve a circuit conflict over whether "crimes of extortion directed at federally insured banks" were covered by the FBRA, the Hobbs Act, or both. H.R. Rep. No. 797, 99th Cong., 2d Sess. 33 (1986) (House Report). The report expresses the view that, following the amendment, bank extortion was to be exclusively prosecuted under the FBRA. Ibid. But Congress made no changes to the robbery aspect of the statute, and the committee report does not state that robberies (rather than just extortions) should be prosecuted exclusively under the FBRA. See id. at 32 (noting that before the amendment, extortion was "prosecutable either under the bank robbery provision or the Hobbs Act").

b. Petitioner further suggests (Pet. 20-22) that review of his double-jeopardy claim is warranted to resolve an asserted circuit conflict. That suggestion is unsound. As the cases on which petitioner relies make clear, the issue arises infrequently, with the most recent case decided more than 15 years ago. Moreover, this case would be a poor vehicle in which to address it because the district court's choice to impose concurrent rather than consecutive sentences for petitioner's convictions under the Hobbs Act and the FBRA means that petitioner was not, as a

practical matter, meaningfully affected by the lower courts' resolution of the question presented.

First, the question presented arises only infrequently. Petitioner identifies (Pet. 20-22) only four published decisions in which courts have addressed similar questions since Section 2113(a) was adopted in 1948. See Act of June 25, 1948, ch. 645 § 2113(a), 62 Stat. 683, 796.* Two of those cases, however, involved not bank robbery but rather bank extortion. See United States v. Golay, 560 F.2d 866, 869-870 (8th Cir. 1977); United States v. Beck, 511 F.2d 997, 1000 (6th Cir.), cert. denied, 423 U.S. 836 (1975); see also p. 14, supra (discussing difference between bank robbery and bank extortion). And only one actually grants relief from a Hobbs Act robbery conviction, where the government had reprosecuted under that statute following an acquittal under the FBRA. See United States v. Holloway, 309 F.3d 649, 651-652 (9th Cir. 2002); see also United States v. McCarter, 406 F.3d 460, 464 (7th Cir. 2005) (finding insufficient prejudice to justify plain-error relief), overruled on other grounds by United States v. Parker, 508 F.3d 434 (7th Cir. 2007).

---

* In addition to the cases cited by petitioner, the Second Circuit also addressed the question presented in United States v. Maldonado-Rivera, 922 F.2d 934 (1990), cert. denied, 501 U.S. 1211 and 501 U.S. 1233 (1991). Consistent with the decision below, the Second Circuit reasoned that the Double Jeopardy Clause does not preclude the imposition of punishment for convictions under both Section 1951 and Section 2113, observing that the "distinct legislative goals [of the two statutes] confirm the presumption that Congress intended multiple punishments under these two sections." Id. at 983.

Second, the district court's decision to impose concurrent sentences for petitioner's Hobbs Act and FBRA convictions makes this case a poor vehicle in which to consider the double-jeopardy question. Because petitioner's terms of imprisonment under the FBRA and the Hobbs Act sentences will run concurrently, any error in imposing separate sentences for those convictions had no apparent practical effect on the length of his prison term. Pet. App. 16. The terms of supervised release likewise run concurrently. Id. at 17. Thus, the only additional sentencing consequence of the challenged Hobbs Act convictions was a pair of $100 special assessments. See Id. at 20. But the court could have elected to impose fines for petitioner's FBRA convictions substantially in excess of $200. See 18 U.S.C. 2113(a), 3571(d).

Rather than claiming any prejudice related to his sentence, petitioner instead claims (Pet. 23) that he "was prejudiced because he faced two counts for each bank robbery[,] which could give those counts more credibility to the jury before hearing any evidence." This Court has made clear, however, that "[w]hile the Double Jeopardy Clause may protect a defendant against cumulative punishments for convictions on the same offense, the Clause does not prohibit the [government] from prosecuting [a defendant] for such multiple offenses in a single prosecution." Johnson, 467 U.S. at 500. Even if petitioner's view of the question presented were correct, therefore, petitioner would not be entitled to a

retrial. Resolution of that question accordingly would thus be inappropriate in the circumstances of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

KENNETH A. POLITE, JR.
Assistant Attorney General

SONJA M. RALSTON
Attorney

JULY 2023