No. 24-1196

In the Supreme Court of the United States

DWAINE COLLYMORE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court permissibly imposed consecutive terms of imprisonment for petitioner's separate convictions for conspiring to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951(a), and attempting to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) and 2.

ADDITIONAL RELATED PROCEEDINGS

United States Court of Appeals (2nd Cir.):

United States v. *Collymore*, No. 19-596 (May 20, 2021)

Supreme Court of the United States:

Collymore v. *United States*, No. 21-6176 (June 27, 2022)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is available at 2024 WL 4707184. A prior opinion of the court of appeals is reported at 61 F.4th 295.

JURISDICTION

The judgment of the court of appeals was entered on November 7, 2024. A petition for rehearing was denied on February 19, 2025 (Pet. App. 44a-45a). The petition for a writ of certiorari was filed on May 20, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of New York, petitioner was convicted of conspiring to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951; attempting to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951

and 2; brandishing and discharging a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A) and 2; and causing the death of a person with a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(j)(1) and 2. Judgment 1-2. The district court sentenced petitioner to 525 months of imprisonment, to be followed by five years of supervised release. Judgment 3-4. The court of appeals affirmed. 856 Fed. Appx. 345.

This Court granted a petition for a writ of certiorari, vacated the judgment of the court of appeals, and remanded for further consideration in light of *United States* v. *Taylor*, 596 U.S. 845 (2022). 142 S. Ct. 2863. On remand, the court of appeals vacated petitioner's convictions for the two violations of Section 924, affirmed petitioner's convictions in all other respects, and remanded to the district court for resentencing. 61 F.4th 295. The district court resentenced petitioner to a total of 405 months of imprisonment, to be followed by three years of supervised release. Pet. App. 7a-9a. The court of appeals affirmed. *Id.* at 1a-3a.

1. a. On April 28, 2016, petitioner and an accomplice attempted to rob a marijuana business that operated out of a small Bronx apartment. Presentence Investigation Report (PSR) ¶ 13. Petitioner and his accomplice knocked on the door of the apartment they sought to rob, as if they were customers of the marijuana business. *Ibid.*

At the time, three unarmed men, including Carlos Vargas, were inside playing video games and making occasional marijuana sales. PSR ¶¶ 12-13. Vargas opened the door, and petitioner forced his way into the apartment brandishing a revolver. PSR ¶ 13. Vargas fought with petitioner and the two began to struggle over the

gun. *Ibid.* One of the other occupants of the apartment fled, pushing past petitioner's accomplice. *Ibid.* The third occupant struggled with petitioner's accomplice, forcing the accomplice out of the apartment, and then returned to help Vargas in his fight with petitioner. PSR ¶ 14.

By the time the third occupant returned, petitioner had overcome Vargas and left him on the floor stunned and in visible pain. PSR ¶ 14. Petitioner pointed his gun toward the third occupant and fired. *Ibid.* The shot narrowly missed, striking the apartment wall. *Ibid.* The third occupant fell to the ground and pretended to be dead. *Ibid.* Petitioner then leaned over Vargas and fired a bullet into Vargas's head at close range, killing him. PSR ¶¶ 14-15. Petitioner and his accomplice fled the scene. PSR ¶¶ 16-17.

b. A federal grand jury in the Southern District of New York returned an indictment charging petitioner with conspiring to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951 (Count One); attempting to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951 and 2 (Count Two); using, brandishing, and discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(i), (ii), and (iii) and 2 (Count Three); and causing the death of a person with a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(j)(1) and (2) (Count Four). Third Superseding Indictment 1-3. Petitioner pleaded guilty to all counts. C.A. App. 46-91.

In advance of sentencing, the Probation Office calculated petitioner's sentencing range under the Sentencing Guidelines to be 324 to 405 months of imprisonment on Counts One, Two, and Four, with a mandatory consecutive term of 120 months of imprisonment on Count

Three, resulting in a total advisory Guidelines range of 444 to 525 months of imprisonment. PSR ¶ 96. At the sentencing hearing, the district court agreed with the Probation Office's calculations. C.A. App. 182. But the court observed that it was difficult to "think of a more heinous, coldblooded crime." *Id.* at 180.

The district court explained that, in imposing the sentence, it was "guided by the severity, the heinousness of what [petitioner] did, the cold bloodedness of what [petitioner] did," but that it was "moved to remain within the guidelines, although I could have gone higher, because [petitioner] seem[ed] to have made some steps toward making something of [himself]" since his arrest. C.A. App. 183. But the court declined to go below the Guidelines "or even to be at the bottom end of them," because the court viewed the crime as being among those that "are just so horrible that they cry out for a really severe punishment." *Ibid.*

The district court ultimately imposed a sentence of 405 months of imprisonment on Count Four, to be followed by a consecutive sentence of ten years of imprisonment on Count Three, for a total term of imprisonment of 525 months. C.A. App. 185. The court additionally imposed 240 months of imprisonment on each of Counts One and Two, to be served concurrently. *Ibid.*

2. The court of appeals affirmed. 856 Fed. Appx. 345. This Court granted a petition for a writ of certiorari, vacated the judgment of the court of appeals, and remanded for further consideration in light of *Taylor*, which held that attempted Hobbs Act robbery is not a "crime of violence" that may serve as a predicate for a conviction under Section 924. 142 S. Ct. 2863; see *Taylor*, 596 U.S. at 851. On remand, the court of appeals vacated petitioner's Section 924 convictions, affirmed

petitioner's other convictions, and remanded to the district court for further resentencing. 61 F.4th 295, 299.

At the resentencing, the district court calculated petitioner's advisory guidelines range on Counts One and Two as 324 to 405 months of imprisonment. Pet. App. 40a. The court remarked that petitioner's murder of Vargas "is one of the crimes where the details are just seared into my brain. And I can really count on one hand the number of cases that * * * haven't left me. Your case is just one of those cases that hasn't left me. I don't think it is ever going to leave me. The horror of it." *Id.* at 37a. The court also explained that while it had previously imposed concurrent sentences on Counts One and Two, it had done so "because it was inconsequential to the result" in light of the Section 924 firearms charges. *Id.* at 27a.

The district court noted that with those counts vacated, whether the sentences were concurrent or consecutive would "make[] a difference to the result." Pet. App. 27a. The court observed that it could impose consecutive sentences on the two Hobbs Act counts and that it was appropriate to do so "given the nature of the ultimate crime that was committed here." *Id.* at 39a. The court thus imposed a sentence of 240 months of imprisonment on Count One and a consecutive sentence of 165 months of imprisonment on Count Two, for a total term of imprisonment of 405 months, to be followed by three years of supervised release. *Id.* at 40a-41a; see *id.* at 4a-9a.

3. The court of appeals affirmed petitioner's sentence in an unpublished summary order. Pet. App. 1a-3a. The court rejected petitioner's contention that Congress did not authorize consecutive sentences for attempted Hobbs Act robbery and conspiracy to commit

Hobbs Act robbery. *Id.* at 2a-3a. The court explained that it is only "[i]n a 'narrow' class of cases" that "consecutive sentences 'punish more severely than the language of [Congress's] laws clearly imports.'" *Id.* at 2a. (quoting *Prince* v. *United States*, 352 U.S. 322, 325, 329 (1957)) (second set of brackets in original). Citing circuit precedent, it described that "'limited rule'" as "'inapplicable' when 'each offense can be completed without contemplation of the other.'" *Ibid.* (quoting *United States* v. *Weingarten*, 713 F.3d 704, 710 (2d Cir. 2013)). And the court stated that "[o]ne can enter into a 'criminal agreement' to commit a robbery" for purposes of a conspiracy charge "without taking 'a substantial step towards its commission,'" for purposes of attempt. *Id.* at 3a (citations omitted).

ARGUMENT

Petitioner contends (Pet. 5-24) that the district court was prohibited from imposing consecutive sentences for his separate convictions for conspiring to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951(a), and attempting to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) and 2. But the court of appeals correctly applied the relevant precedents of this Court in affirming petitioner's consecutive sentences, and its decision does not conflict with the decision of any other court of appeals. Further review is unwarranted.

1. a. The court of appeals correctly recognized (Pet. App. 2a-3a) that the district court was permitted to impose consecutive sentences on petitioner's convictions for conspiring to commit Hobbs Act robbery and attempting to commit Hobbs Act robbery. This Court's decision in *Blockburger* v. *United States*, 284 U.S. 299 (1932), explains that "[a] single act may be an offense against two statutes; and if each statute requires proof

of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." *Id.* at 304 (citation omitted). That rule of statutory construction is "controlling" unless "there is a clear indication of contrary legislative intent." *Albernaz* v. *United States*, 450 U.S. 333, 340 (1981).

The court of appeals properly applied the *Blockburger* rule here. As petitioner acknowledges (Pet. 8), conspiring to commit Hobbs Act robbery and attempting to commit Hobbs Act robbery each require proof of a fact that the other does not. Pet. App. 3a. Conspiring to commit Hobbs Act robbery requires a defendant's agreement with others to commit the underlying offense. See *Ocasio* v. *United States*, 578 U.S. 282, 292 (2016). Attempting to commit Hobbs Act robbery requires a defendant to take a substantial step toward completing the crime. See *United States* v. *Taylor*, 596 U.S. 845, 851 (2022). The two offenses can therefore occur in isolation (a joint plan that does not progress to the point of an attempt, or an attempt without a joint plan), and even when related, each requires proof of facts that the other does not.

Nor can petitioner rebut the *Blockburger* presumption by pointing to any "clear indication" that Congress intended to preclude multiple punishments. *Albernaz*, 450 U.S. at 340. Under the language of the Hobbs Act, "conspiracy and attempt appear as distinct crimes." *United States* v. *Washington*, 653 F.3d 1251, 1263 n.12 (10th Cir. 2011), cert. denied, 565 U.S. 1128 (2012). As relevant here, Section 1951(a) punishes "[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or con-

spires so to do." 18 U.S.C. 1951(a). The use of the word "or" between attempt and conspire links two "self-contained units," each of which "describes a complete offense" that is distinct from the other. *United States* v. *Loniello*, 610 F.3d 488, 493 (7th Cir. 2010), cert. denied, 563 U.S. 929 (2011).

In addition, as the court of appeals noted, Congress generally "has not prohibited consecutive sentences for attempts and conspiracies that have the same object." Pet. App. 2a (quoting *United States* v. *Rahman*, 189 F.3d 88, 158 n.36 (2d Cir. 1999), cert. denied, 528 U.S. 1094 (2000)). This Court has explained that "[t]raditionally the law has considered conspiracy and the completed substantive offense to be separate crimes" for which "separate sentences can be imposed." *Iannelli* v. *United States*, 420 U.S. 770, 777 (1975). That reasoning applies equally to an attempt to complete the substantive offense upon which a conspiracy is predicated. Attempt and conspiracy "address different conduct, and 'along the continuum of different criminal activity, attempt crimes are closer to completed crimes than are conspiracy crimes.'" *United States* v. *Salahuddin*, 765 F.3d 329, 349 (3d Cir. 2014) (citation omitted).

Conspiracy is designed to prohibit "collective criminal agreement," which "presents a greater potential threat to the public than individual delicts." *Callanan* v. *United States*, 364 U.S. 587, 593 (1961). The prohibition on attempt, in contrast, is designed "to stop, deter and reform a person who has unsuccessfully attempted or is attempting to commit a crime." 2 Wayne R. LaFave, 2 *Substantive Criminal Law* § 11.2(b) (3d ed., Oct. 2024 update). For example, in this case, the conspiracy increased the risk of continued, repeated, or escalated criminal activities beyond one robbery, see *Cal-*

lanan, 364 U.S. at 593-594; the attempt created the risk of loss of property, injury or death—as the tragic results of the crime illustrate. Attempt and conspiracy are thus "directed to separate evils," "reinforc[ing]" the conclusion that Congress intended to permit consecutive sentences. *Albernaz*, 450 U.S. at 343.

b. Petitioner's contrary arguments lack merit. He asserts that the *Blockburger* test (Pet. 9-14) does not control because "under the Hobbs Act, [attempt and conspiracy] are provided for in the same statute, and same subsection of the statute, not separate statutory provisions." Pet. 8. But this Court has never limited *Blockburger*'s applicability to separate statutory provisions. And just as this Court has held that codification of two offenses in different subsections "d[id] not rise to the level of the clear statement necessary for [the Court] to conclude that * * * Congress intended to allow multiple punishments," *Rutledge* v. *United States*, 517 U.S. 292, 304 n.14 (1996), codification of two offenses in the same section does not show the opposite congressional intent.

Petitioner's reliance on *Prince* v. *United States*, 352 U.S. 322, 325, 329 (1957), is misplaced. Petitioner contends (Pet. 9-12) that *Prince* supplies the framework for determining the permissibility of consecutive sentences when two offenses are codified in the same statute. That is incorrect. In *Prince*, the Court considered "[w]hether the crime of entering a bank with intent to commit a robbery is merged with the crime of robbery when the latter is consummated." 352 U.S. at 324. The Court concluded that, based on the wording and history of the statute at issue, the unlawful entry and robbery crimes merged and permitted only a single sentence. *Id.* at 328-329. But the Court explained that the case

involved a "unique statute of limited purpose and an inconclusive legislative history" that "can and should be differentiated from similar problems in this general field raised under other statutes," and made clear that it was issuing a "narrow" decision. *Id.* at 325.

Consistent with *Prince*'s limiting language, the Court has declined to extend it in other cases and has instead continued to apply the *Blockburger* test. See, *e.g.*, *Gore* v. *United States*, 357 U.S. 386, 391-392 (1958) ("Of the Prince case, it suffices to say that the Court was dealing there 'with a unique statute of limited purpose.'") (citation omitted). Courts of appeals have likewise understood *Prince* as circumstance-specific. See, *e.g.*, *United States* v. *Weingarten*, 713 F.3d 704, 710 (2d Cir. 2013) ("*Prince*'s limited rule is inapplicable here, where the two offenses are distinct crimes and cannot be characterized as a preliminary step and a consummated act."); *Reynolds* v. *United States*, 288 F.2d 78, 79 (5th Cir.) (noting that the decision in *Prince* and similar cases "are not too helpful when we are called upon, as we are here, to determine the same question with respect to a different statute"), cert. denied, 368 U.S. 883 (1961).

The Hobbs Act is not similar to the "unique statute of limited purpose," *Gore*, 357 U.S. at 391-392 (citation omitted), at issue in *Prince*. Unlike the entry and robbery offenses there, "[t]he distinctiveness between a substantive offense and a conspiracy to commit is a postulate of our law." *Callanan*, 364 U.S. at 593. And under *Blockburger*, "no indication from Congress of an intent to impose cumulative punishments for separate offenses with the same maximum punishment," Pet. 17, is required—the burden is instead on petitioner to show a "clear indication" that Congress has forbidden cumula-

tive punishment. *Albernaz*, 450 U.S. at 340. He has not done so.

Petitioner cannot find support in "federal sentencing statutes and principles." Pet. 18 (capitalization omitted). Although he discusses (Pet. 17-20) a particular recommendation before Congress when it was considering the issue of consecutive and cumulative sentences, he ultimately acknowledges (Pet. 20) that Congress "t[ook] a narrower approach" when it legislated on the subject by enacting 18 U.S.C. 3584, which bars consecutive punishments only for "an attempt" to commit a crime and the completed crime—not a conspiracy and an attempt.

Nor can petitioner appeal to the rule of lenity. As the Court explained in rejecting an effort to preclude cumulative punishments for Hobbs Act conspiracy and a completed Hobbs Act extortion, that rule "only serves as an aid for resolving an ambiguity; it is not used to beget one." *Callanan*, 364 U.S. at 596. Much less can it supply the "clear indication," *Albernaz*, 450 U.S. at 340, required to overcome the *Blockburger* rule.

2. Petitioner asserts (Pet. 21-24) a disagreement in the circuits concerning the application of *Prince*. But any circuit disagreement is narrow and is not implicated by the decision below because none of the circuit cases petitioner cites involve the statute at issue here. And in any event, the summary order below is nonprecedential, see 2d Cir. I.O.P. 32.1.1(a), meaning that petitioner has not identified any court of appeals that has definitively addressed the question presented.

Petitioner purports to identify (Pet. 21-23) a decades-old lopsided conflict about whether Congress authorized multiple punishments for conspiracy and attempted possession of a controlled substance under 21

U.S.C. 846. But as both *Blockburger* and *Prince* indicate, the question of whether Congress has authorized multiple punishments is statute specific. See *Blockburger*, 284 U.S. at 304 (considering specific elements of statutes at issue); *Prince*, 352 U.S. at 325 (emphasizing that the Court is "dealing with a unique statute" that "should be differentiated" from "other statutes").

Petitioner's assertion of an intracircuit conflict in the court below—involving a case that likewise does not address the Hobbs Act, see *United States* v. *Gore*, 154 F.3d 34 (2d Cir. 1998) (addressing 21 U.S.C. 841)—also does not provide a sound basis for reviewing the unpublished summary order in this case. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties."). Nor is this Court's intervention warranted by a decision from a district court in that circuit, which assumed that sentences for Hobbs Act conspiracy and Hobbs Act attempted robbery should be concurrent. *Parkes* v. *United States*, No. 03-cr-01364, 2023 WL 4865616, at *6 (S.D.N.Y. July 31, 2023); see *Camreta* v. *Greene*, 563 U.S. 692, 709 n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.") (citation omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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