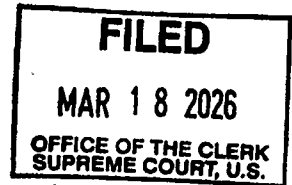


25-7464  
No. \_\_\_\_\_

ORIGINAL

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In the Supreme Court of the United States



\_\_\_\_\_  
RODERICK GUNN,  
Petitioner,

v.

UNITED STATES OF AMERICA,  
Respondent.

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

\_\_\_\_\_  
PETITION FOR A WRIT OF CERTIORARI

\_\_\_\_\_  
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## QUESTION PRESENTED

The language and underlying rationale of 18 U.S.C. § 3584(a) considered together with 28 U.S.C. § 994(1)(2) support the position that concurrent rather than consecutive sentences must be applied for the crime of conspiracy to commit Hobbs Act robbery [18 USC § 1951(a)], and the substantive offense of Attempted Hobbs Act robbery [18 USC § 1951(a)], when the attempt was the sole objective of the conspiracy. The concurrent-vs-consecutive sentencing decision has been addressed by § 212(a) of the Sentencing Reform Act of 1984 (reprinted in 18 USC § 3584(a)) twenty-three years after this Court's decision in *Callanan v. United States*, 364 U.S. 587 (1961). Section 3584 is framed as a conferral of limitation of authority to impose consecutive sentences [when] one offense is an attempt and the other the sole objective of the attempt.

After this Court pronounced its retroactive decisions in *United States v. Davis*, 588 U.S. 445 (2019), and *United States v. Taylor*, 596 U.S. 845 (2022), multiple firearms conviction and sentences have been vacated and the cases remanded for resentencing. However, courts are in conflict as to whether remaining predicates of conspiracy to commit Hobbs Act robbery and Attempted Hobbs Act robbery warrants concurrent-vs-consecutive sentences, a federal question *Callanan* left open, thus triggers the question presented here:

Whether 18 U.S.C. § 3584(a)'s "except clause" forbids consecutive sentencing for an attempted Hobbs Act robbery and conspiracy to commit Hobbs Act robbery, where the conspiracy is the sole object of the attempt, arising from the same statutory text, and therefore warrants a *Prince v. United States* application.

PARTIES TO THE PROCEEDINGS

1. Roderick Gunn, Petitioner.
2. Alton Davis, non-moving party (codefendant)
3. United States of America, Respondent.

RELATED PROCEEDINGS

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

United States v. Gunn, No. 24-2430-cr (Oct. 22, 2025)

United States District Court (S.D. N.Y.):

United States v. Gunn, No. 06-cr-911 (AKH) (May 6, 2024)

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- § 3553(a)(6)
- § 3584

21 U.S.C.

- § 846
- § 841(a)(1)

28 U.S.C.

- § 994(1)(1)(A)
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LEGISLATIVE DISCUSSION

S. Rep. No. 1516, 79th Cong, Sess; HR Rep No. 238, 79th Cong, 1st Sess,p.9

OTHER MATERIAL

Callanan v. United States (Dissenting Opinion)

## OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a) is reported at 162 F.4th 219 (2d Cir. Dec. 19, 2025). The decision of United States District Court (S.D.N.Y) is unavailable because the district court did not issue a written opinion in connection with the resentencing.

## JURISDICTION

The decision of the court of appeals was entered on December 19, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The relevant sections of 18 U.S.C. § 1951(a), 18 U.S.C. § 3584, and 28 U.S.C. § 994(1)(2) are reprinted in the Appendix. Pet. App. 1a-33a.

## INTRODUCTION

This case squarely presents an issue of national importance on which the courts of appeals are irreconcilably divided. It has been long and consistently recognized by this Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses. The power of Congress to separate the two and to affix to each a different penalty is well established. However, the question whether punishments imposed by a court after a defendant's conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has authorized. If a federal court exceeds its own authority by imposing multiple

punishments not authorized by Congress, it violates the constitutional principle of separation of powers in a manner that trenches particularly harshly on individual liberties." *Whalen v. United States*, 445 U.S. 684, 688-89 (1980). Simply put, the "except clause" of 18 U.S.C. § 3584(a) prohibits the imposition of consecutive sentences for a crime of attempt and for another offense that was the sole object of the attempt. The fact that courts nationwide acknowledged that Congress's intent in § 3584(a) "except" clause was to limit judicial authority in imposing consecutive sentences in particular cases, but the reality of the judicial proceedings demonstrate a lack of uniformity or adherence to Congress's Legislative intent in § 3584(a), this Court should intervene with its supervisory authority to resolve this conflict.

Resolution of this nationwide conflict will require this Court's review and proper interpretation of Congress's intent ratified in § 3584(a) "except" clause, which is also supported by 28 U.S.C. § 994(1)(2). Precise clarity is needed for the lower courts to know what application of this Court's precedents [e.g. *Prince* or *Callanan*], and/or [§ 3584(a)'s except clause] must be applied in these sentencing proceedings with conspiracy to commit Hobbs Act robbery and attempted Hobbs Act robbery, when the former predicate is the sole objective of the attempt.

The answers strongly favor granting certiorari in this case. Because numerous federal decisions have extensively ventilated the underlying issues and arguments since this Court's pronounced its decisions in *Davis* and *Taylor*, further percolation is necessary. Delay would only consume further judicial resources, and prolong the current situation in which outcomes of resentencing pursuant to the retroactive rule in *Davis* and *Taylor* relies upon for fair administration of justice.

For Mr. Gunn and the hundreds of other federal defendants previously convicted of conspiracy to commit Hobbs Act robbery and attempted Hobbs Act robbery as 18 U.S.C. § 924(c) and § 924(j) predicates, this Court's decision in Davis and Taylor permitted them to seek relief from unconstitutional firearm convictions and sentences that produces excessively long sentences, decades in prison remains the only outcome even after a vacatur of their unconstitutional firearm convictions and sentences. And this is the right case to resolve this nationwide conflict.

This case provides the Court a clear and unobstructed path to resolution of the merits. Because Mr. Gunn's §§ 924(c) and 924(j) convictions were vacated and dismissed under this Court's Davis/Taylor jurisprudence, and Callanan left open the answers to whether it was Congress's intent for consecutive sentences to be imposed for conspiracy to commit Hobbs Act robbery and attempted Hobbs Act robbery, that shares the same objective and arises from the same course of conduct, this case makes it even more the perfect case for resolution of this matter.

Equally important, a decision by this Court would resolve Mr. Gunn's motion and hundreds of resentencing before the lower courts in cases that the defendants' §§ 924(c)s and 924(j)s has been vacated post Davis and Taylor. Likewise, a decision by this Court will most definitely resolve the split among the lower courts regarding the proper application for concurrent-vs-consecutive sentences for crimes that stems from the same statute, that shares the same objectives.

#### STATEMENT

1. The Sentencing Reform Act of 1984 established the structure of the modern federal sentencing system. See Pub. L. No. 98-473 §§ 211-39, 98 Stat. 1837, 1987-2040 (1984). As part of that

law, Congress created the United States Sentencing Commission and directed it to "formulate and constantly refine national sentencing standards." *Kimbrough v. United States*, 552 U.S. 85, 108 (2007).

The Sentencing Guidelines comport with 28 U.S.C. § 994(1)(2) by aggregating as a single offense a charge of conspiracy to commit a crime and a charge for the underlying offense that was the sole object of the conspiracy. U.S.S.G. § 3D1.2(b) & Application Note 4. See S. Rep. No. 98-225 at 126 & n.311 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3309 & n.311 (discussing Section 3584 stating that attempt provision is the sole exception to general rule that "multiple terms of imprisonment may ... be imposed to be served either concurrently or consecutively," and noting that recommendation in National Commission Final Report to bar "imposition of consecutive sentences for criminal conspiracy ... and another offense that was the sole objective of the conspiracy" was "replaced by a directive to the Sentencing Commission in proposal 28 U.S.C. § 994(1) that the guidelines reflect the 'general inappropriateness' of such consecutive sentences").

In turn, 28 U.S.C. § 994(1) instructs the Commission to insure that its Guidelines reflect the appropriateness of imposing an incremental penalty for each offense when a defendant is convicted of multiple offenses committed in the same course of conduct that result in the exercise of ancillary jurisdiction over one or more of the offenses ... 28 U.S.C. § 994(1)(1)(A); see also, § 994(1)(2).

Nonetheless, courts that have insisted that sentences for multiple group counts must be consecutive to achieve "total punishment" under advisory Guidelines provision of U.S.S.G. § 5G1.2, have rejected Congress's Legislative intent enforced in § 994(1)(2) as a prohibition on consecutive sentencing in certain circumstances where attempt is one of the offenses and the object

of the conspiracy. The Second Circuit arrived at this conclusion in Mr. Gunn's appeal. However, to the contrary, twenty-seven years ago, the Second Circuit held the position Mr. Gunn raised in his pro se appellate brief, in *United States v. Kapaev*, 199 F.3d 596 599 (2d Cir. 1999). It held, "Section 3584 permits a sentencing court to impose either concurrent or consecutive sentences, except where one offense is an attempt and the other the object of the attempt." This earlier precedent recognizes that Congress established a limitation on consecutive sentences in particular cases with attempt offenses.

The lower courts decision (including the Second Circuit) are not in congruence with the Legislative intent established in § 3584(a) "except clause," nor 28 U.S.C. § 994(1)(2). The idea of Congress not forbidding consecutive sentences, does not mean there are not circumstances that consecutive sentences are prohibited. There is a limited exception to the rule of concurrent-vs-consecutive sentences, carved out in § 3584 "except clause," and should be followed by the lower courts.

2. In 2019, this Court invalidated conspiracy to commit Hobbs Act robbery as a qualified "crime of violence" within the meaning of § 924(c)(3)(A) ("Force Clause"), in *United States v. Davis*, 588 U.S. 445 (2019). Then in 2022, the Court invalidated attempted Hobbs Act robbery as a valid "crime of violence" predicate within the meaning of § 924(c)(3) Force Clause. These two decisions caused the vacatur of multiple firearm offenses under §§ 924(c) and 924(j), resulting in plenary resentencing.

Due to the Davis/Taylor decisions, courts are compelled to decide which application of law is the proper framework at resentencing. Some courts agrees with the framework established in *Prince v. United States*, 352 U.S. 322 (1957), while some applied

Callanan v. United States, 364 U.S. 587 (1961), but applies Callanan erroneously by inserting a claim this Court did not rule on. Put differently, this Court left open the question of multiple punishments for attempt and conspiracy under § 1951(a) in its decision in Callanan, in which it held that consecutive sentences for the conspiracy and substantive robbery offenses under the Hobbs Act were lawful. But in response to argument from the petitioner and a vigorous dissent in this 5-4 decision, the Court noted petitioner's concerns "that some of the other provisions of [§] 1951 seem to overlap and would not justify cumulative punishment for separate crimes" were "problems of statutory interpretation not now here," and [t]hat some of the substantive sections may be repetitive as being variants in phrasing of the same delict, or that petitioner could not be cumulatively punished for both an attempt to extort and a completed act of extortion, has no relevance to the legal consequences of two incontestably distinctive offenses, conspiracy and the completed crime that is its object." Callanan, 364 U.S. at 595-96.

In relying on Callanan, the Second Circuit seriously misapplied this Court's precedent. This is the very situation that Callanan warns about, 364 U.S. at 595-96, and this Court is asked now to clarify the application of its precedents [Prince and Callanan], taking into consideration the Legislative intent established in § 3584 except clause, where one offense is an attempt and the object of the conspiracy.

3. Section 3584 is framed not as a conferral of authority but as a limitation of authority that already exists. It says that the district court has discretion whether to make the sentences concurrent or consecutive [except] that it may not make consecutive sentences for an "offense that was the sole objective of the attempt."

The question presented here asks this Court to give full effect to the "except clause" of § 3584. See *United States v. Menasche*, 348 U.S. 528, 538-539 (1955) ("we must give effect to every clause and word of the Act"). This Court should allow this case to resolve one of the most important sentencing issue that has arisen since it ruled that conspiracy to commit Hobbs Act robbery and attempted Hobbs Act robbery are not categorically "crimes of violence" under § 924(c) Force Clause. Granting certiorari is not an act of flogging a dead horse, but to provide the proper roadmap for the lower courts to follow in unique cases as Mr. Gunn's that requires full effect of § 3584 except clause. This supervisory intervention is absolutely necessary to resolve a conflict that created unwarranted sentencing disparities among similar related defendants with similar offenses -- nationwide.

4. Mr. Gunn was charged along several others for participating in a Hobbs Act robbery conspiracy (Count 1), in violation of 18 U.S.C. § 1951, attempted Hobbs Act robbery (Counts 2 and 3), Use of Firearm in violation of 18 U.S.C. § 924(c), and Aiding and Abetting the Use of Firearm that Resulted in Death, in violation of 18 U.S.C. § 924(j), and conspiracy to Possess with intent to Distribute Marijuana, in violation of 21 U.S.C. § 846, 841.

The jury acquitted Mr. Gunn of the attempted robbery in Count 1, but convicted him of all other Counts. At his original sentencing hearing, the late William H. Pauley imposed a sentence of 20-years for both Hobbs Act offenses, life for the § 924(j), 10-years for the § 924(c) and 40-years for the drug trafficking offense, all to run concurrently with each other. After this Court pronounced *Davis and Taylor*, the district court vacated Mr. Gunn's firearm offenses (Counts 6 and 7), and resentenced him to 15-years for each Hobbs Act offense, to be served consecutively with each

other, and 5-years for the marijuana offense to be served concurrently with all other counts, producing a total of 30-years, to be served consecutively with Mr. Gunn's 141 months sentence in Case No. 03 Cr. 1277.

5. Mr. Gunn appealed the district court's imposition of consecutive sentences. In affirming the judgment, the Second Circuit erroneously relied on *United States v. Rahman*, 189 F.3d 88, 158, n.36 (2d Cir. 1999), that held, "Congress has not prohibited consecutive sentences for attempts and conspiracies that have the same object." Pet. Appx, 12a-13a. The Second Circuit rejected Mr. Gunn's argument that *Prince v. United States* required a different result, and concluded that *Callanan v. United States* (which reserved decision on this question) supported its ruling.

#### REASONS FOR GRANTING THE WRIT

This Court's review is necessary to resolve an entrenched circuit split on an important question of federal sentencing law, to provide the proper roadmap for imposing sentences in cases with an attempt and conspiracy stemming from the same statute with the same objective. The answer to that question will determine whether hundreds of federal inmates must serve cumulative and lengthy sentences that do not support Congress's intent carved out in § 3584(a) "except clause" and 28 U.S.C. § 994(1)(2). The answer to Mr. Gunn's question will also aid the lower courts in avoiding unwarranted sentencing disparities. See e.g. *Parkes v. United States*, No. 16-4771, 2023 WL 4865616, at \*6 n.58 (S.D.N.Y. July 31, 2023). In *Parkes*, Judge Lewis Kaplan concluded that attempted robbery and conspiracy to rob under the Hobbs Act could not be sentenced consecutively, in a post-Taylor case on virtually identical facts to Mr. Gunn's.

Certiorari is also warranted because the Second Circuit resolved an important federal question this Court left open in Callanan, and in doing so adopted a rule that conflicts with the framework this Court established in Prince and show a disregard to the legislative intent established in § 3584 "except clause." See Supreme Court Rule, 10(c).

Until this Court addresses the issue, and compel lower courts to give effect to § 3584 except clause, federal sentences for conspiracy to commit Hobbs Act robbery and attempted Hobbs Act robbery (post Davis and Taylor) will differ and lack proper legal application based on courts misapplication or misinterpretation of Prince, Callanan, § 3584, and § 994(1)(2).

There is no reason for further percolation: the facts in case laws revealed that appellate courts understood § 3584(a)'s limitation of consecutive sentences in certain circumstances, yet simply chose not to give it effect. The goal of this Court in construing any statute "is to ascertain congressional intent and give effect to the legislative will." *Philbrook v. Glodgett*, 412 U.S. 707, 713 (1975).

The Court should also grant the writ to clarify to what extent did § 3584 except clause brought about changes to the Prince/Callanan roadmap for how sentences are imposed in regards to the concurrent-vs-consecutive punishments imposed, especially, post *United States v. Davis* and *United States v. Taylor*. The decision below is incorrect because it misapplied Callanan, relied on a circuit precedent that was decided wrong, and failed to give effect to the Legislative will in § 3584 for the crime of an attempt.

A. The Decision Below Solidified an Intractable  
Circuit Split

The question presented implicates a deep circuit split that will not be resolved without this Court's intervention.

Between the passage of Prince's and Callanan's decisions, and Congress's enactment of § 3584(a), courts of appeals considered whether it was Congress's intent for pyramiding sentences for conspiracy and the substantive offense that arose out of the same course of conduct and shares the same objectives. The cases poses distinct circumstances. Some involved crimes that stemmed from the same statute, while others involved crimes that stemmed from different statutes, yet shares the same objective. There's another category of cases that involved conspiracy and the substantive offense of a completed crime, while others involved conspiracy and the substantive offense of an attempt (e.g. two inchoate crimes).

United States v. Gore, 154 F.3d 34 (2d Cir. 1988) represents the group that involved two distinct offenses that stemmed from the same drug trafficking statute, 21 U.S.C. § 841(a)(1). The Second Circuit in Gore, addressing multiple punishments under 21 U.S.C. § 841(a)(1) "concede[d] that Blockburger has not been applied yet by the Supreme Court in cases as this because we are not comparing 'separate statutes,' ... but rather we compare separate clauses within the same statute." Id. (citations omitted).

The Second Circuit looked beyond Blockburger to Prince to determine whether those separate offenses, which could support multiple convictions, may be punished cumulatively. Gore, 154 F.3d at 46-47 (holding that while convictions for distribution, in violation of 21 U.S.C. § 841(a)(1) were permissible under the Blockburger test, cumulative punishments were not permissible in

the absence of congressional intent so to punish a defendant where "the distribution itself is the sole evidence of possession").

United States v. Touw, 769 F.2d 571, 574 (9th Cir. 1985), represented another group. In Touw, the Ninth Circuit held that cumulative punishments for attempt and conspiracy to possess marijuana with intent to distribute, each arising under 21 U.S.C. § 846, were improper. Supported by its precedent in United States v. Palafox, 764 F.2d 558 (9th Cir. 1985), which examined and relied on the principles articulated in Prince, the Ninth Circuit reasoned that the facts underlying the attempt and conspiracy --i.e., joining together in attempting to purchase marijuana from federal agents-- represented a single act in furtherance of the target offense of possession with attempt to distribute. Touw, 769 F.2d at 572-574.

In United States v. Mendoza, 902 F.2d 693, 696-97 (8th Cir. 1990), the Eight Circuit relied on Palafox in holding that while "a defendant can be charged with multiple offenses under this section ..., Congress did not intend for a defendant to be cumulatively punished for two or more offenses based on the same act."

Other Courts of Appeals have disagreed with the Ninth Circuit's reason in Palafox and Touw and have declined to extend the holding to a cumulative punishment inquiry concerning attempt and conspiracy. See e.g., United States v. Crowder, 588 F.3d 929, 939-30 (7th Cir. 2009); United States v. Boykins, 966 F.2d 1240, 1245 (8th Cir. 1992); United States v. Barrett, 933 F.2d 355, 360-61 (6th Cir. 1991); and United States v. Savaiano, 843 F.2d 1280, 1292-93 (10th Cir. 1988) ("No court has held that separate consecutive sentences may never be imposed. However, the Ninth Circuit has held that there can only be one sentence when the dual convictions arise from a

single act, course of conduct, or transaction... That view has resulted in disagreement in that circuit as to the meaning of the rule, and continuing difficulty in ascertaining what is and what is not a single course of conduct.") (internal citations omitted).

B. The Question Presented is Important and Ripe  
for this Court's Review

The validity of 28 U.S.C. § 994(1)(2) and the enforcement of § 3584(a) "except clause" are important and recurring issues. Hundreds of prisoners have been sentenced or granted resentencing post Davis and Taylor, which trumps this federal sentencing law issue. Scores of those prisoners may be spared decades of unnecessary imprisonment on pyramiding sentences for conspiracy to commit Hobbs Act robbery and attempted Hobbs Act robbery, that are grossly excessive.

At the moment, the outcome of many post Davis/Taylor resentencing proceedings depends entirely on the circuits choice of application, whether Prince or Callanan, as well as lower courts understanding and enforcement of the Legislative will in § 3584s except clause.

The circuit split and misapplication of Callanan has created life-altering disparities for defendants and frustrates the explicit goal of national uniformity that drove the creation of the modern federal sentencing system. See e.g., 3553(a)(6) (the need to avoid unwarranted sentencing disparity). Review is of utmost importance, especially with the Sentencing Commission's amendment of the Relevant Conduct provision that prohibits the use of acquitted conduct at sentencing. Since the retroactive decisions in Davis and Taylor, numerous prisoners sentences has been vacated and

resentencing granted. However, at these resentencing proceedings where the firearms convictions were vacated, courts imposed consecutive sentences to regain the sentence it did away with upon vacatur of the unconstitutional firearm offenses in light of Davis and Taylor. With a proper roadmap, the lower courts will be equipped with the framework for fair administration of justice at these sentencing or resentencing proceedings.

Mr. Gunn's §§ 924(c) and 924(j) offenses were vacated and dismissed. Nonetheless, these offenses were considered in calculating his guidelines range, which allowed the court to invoke U.S.S.G. § 5G1.2, as part of its justification for consecutive sentencing. Pyramiding Mr. Gunn's sentences [15 + 15 years] is no different from entering via a back door after the law closed the front entrance.

There is no reason to delay review. The relevant arguments have been extensively ventilated in numerous opinions articulating the full range of reasoning. Further percolation would serve only to exacerbate the nationwide disparity and consume judicial resources on an issue that: (a) Callanan left open, (b) Prince provides a proper roadmap, but courts misapplies its holding, (c) courts failed to give effect to § 3584(a)s except clause, (d) courts of appeals has recognized that this Court haven't yet addressed cumulative punishment issues when the crimes stems from the same statute (conspiracy and attempts) with identical objectives and course of conduct, and (e) the circuit split will only deepens as §§ 924(c) and 924(j) convictions and sentences are being vacated on habeas motions or acquitted by juries, and defendants are sentenced to consecutive terms for the predicate offenses [conspiracy to commit Hobbs Act and attempted Hobbs Act robbery].

#### C. The Decision Below is Incorrect

The Second Circuit resolution of this issue rests on erroneous

application of Callanan and *United States v. Rahman*, 189 F.3d 88 (2d Cir. 1999). First, the Second Circuit incorrectly relied on *Rahman*, where it declined to extend 18 U.S.C. § 3584(a)'s consecutive sentences limitation to an attempted bombing offense and various conspiracy offenses arising from separate statutory schemes and from distinct courses of conduct. 189 F.3d at 158, n.36. In relying on *Rahman* in the instant appeal, the Second Circuit failed to make the distinction between *Rahman's* statutes of conviction and the distinct "course of conduct" and Mr. Gunn's crimes of conviction arising from the same statutory text with identical objectives that shared the same course of conduct.

In like manner, the Second Circuit erred in concluding that Callanan resolved the issues here. This Court left open in Callanan, the question of multiple punishments for attempt and conspiracy under § 1951(a). Callanan, 364 U.S. 587. In particular, this Court explicitly noted in Callanan that for other equations of offenses under § 1951, the question of congressional intent is not clear: "That some of the substantive sections may be repetitive as being variants in phrasing of the same delict, or that petitioner could not be cumulatively punished for both an attempt to extort and a completed extortion, has no relevance to the legal consequences of two incontestably distinctive offenses, conspiracy and the completed crime that is its object." *Id.* at 595-96. See also Pet. Appx 37a (Dissenting Opinion in Callanan).

This Court has explicitly left open the question presented here: Whether Section 3584(a)'s except clause forbids consecutive sentencing for attempt Hobbs Act robbery and conspiracy to commit Hobbs Act robbery that is the sole object of the attempt, arising from the same statutory text.

This Court's holding in Callanan is silent as to the question presented on appeal and in the instant writ. Nonetheless, the Second Circuit misinterpreted Callanan and implied what the Court did not say, as dispositive law in affirming Mr. Gunn's judgment. Drawing meaning from silence is particularly inappropriate in the sentencing contexts. *Kimrough v. United States*, 552 U.S. 85, 103. Yet that is exactly what the Second Circuit did when it relied on Callanan's silence as to whether two inchoate offenses that shares the same objective and arose from the same statutory text, should be punished with stacking sentences.

D. Legislative History of 18 U.S.C. § 1951 Clearly Demonstrated that it Was Not Congress's Intent to Pyramid Sentences for Inchoate Crimes Under the Hobbs Act

Congress did not intend for Hobbs Act attempt and conspiracy to be consecutively sentenced. A careful look at the legislative history of 18 U.S.C. § 1951 says that much. The Hobb Act is grounded in the Anti-Racketeering Act of 1934. See Pub. L. No. 73-376, 48 Stat. 979 (1934), 18 U.S.C. §§ 420a to 420e (1940 ed.), now as amended, 18 U.S.C. § 1951. Between 1934 when the Bill was first enacted and 1942, various amendments were made, to include addition of, and deletion of, provisions Congress deemed necessary. One significant change in the Act is that it increased the maximum penalty from ten to twenty years' imprisonment. This increase in the penalty created debates among the law makers. See Pet. Appx 35a (excerpts from Representatives debating the penalty phase of twenty-years). This demonstrated that many Members of Congress were seriously concerned by the severity of a penalty of twenty-years in prison for violating § 1951. Justice Stewart (dissent in Callanan) wrote:

Expressions such as "too drastic," "too severe," and "excessive" were used in describing what was referred to by one Member as "even a possible penalty of 20 years." 89 Cong Rec 3162, 3194, 3201, 3229.

Secondly, as Justice Stewart noted in Callanan, "it is clear that there was general agreement among both the proponents and the opponents of the legislation that twenty years was to be the maximum penalty that could be imposed upon a defendant convicted of violating the statute. 89 Cong Rec 3226. No one ever suggested that cumulative penalties could be inflicted." See Callanan, 364 U.S. at 600-601. Justice Stewart continued: "[I]n sum, then, we have here a statute which, as a matter of English language, can fairly be read as imposing a single penalty for each interference or threatened interference with interstate commerce by any or all of the prohibited means. We have evidence stemming from the very origin of the legislation that the unit of prosecution under the statute was to be each restraint of commerce, not each means by which the restraint was accomplished... Finally, we have every indication that when the Act was amended in 1946 Congress was agreed that but a single maximum sentence of twenty years could be imposed upon conviction, and that many Members of Congress considered even that penalty far too severe."

When Congress has the will it has no difficulty in expressing it ...When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should resolve in favor of lenity." 349 U.S. at 83. In *Ladner v. United States*, 358 U.S. 169, we said: "This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." 358 U.S. at 178.

The legislative history of the Hobbs Act, proves there is no indication that Congress intended to "pyramid penalties" for attempts and conspiracy. Accordingly, the question of Congressional intent is one of grave importance here.

E. This Case Presents an Ideal Vehicle

Mr. Gunn's case is the best vehicle to address this important federal question for three key reasons:

First, the case consists of two offenses arising from the same statutory text that shares the same objective and course of conduct.

Second, in § 3584(a), Congress has enacted an "except clause" that placed limitations on consecutive sentencing for an attempt, but lower courts fails to give effect to the except clause.

Third, Callanan left open the question raised herein, while Prince provided a framework that created a circuit split and misinterpretation of this Court's holding in Prince.

This Court's supervisory authority is relevant to resolve the circuit split and to bring uniformity to federal sentencing law regarding the issues raised.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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