No.

In the Supreme Court of the United States

GARY C. BERNACKI, SR.,

Petitioner,

v.

STATE OF CONNECTICUT,

Respondent.

On Petition for a Writ of Certiorari to the Connecticut Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Double Jeopardy Clause prohibits multiple punishments and successive prosecutions for the "same offence." The Clause applies with respect to two distinct statutory offenses when the two crimes have the "same elements" under *Blockburger* v. *United States*, 284 U.S. 299 (1932). "The same-elements test, sometimes referred to as the '*Blockburger*' test, inquires whether each offense contains an element not contained in the other; if not, they are the 'same offence' and double jeopardy bars additional punishment and successive prosecution." *United States* v. *Dixon*, 509 U.S. 688, 696 (1993).

The question presented is:

Whether the crimes of violating a court order by possessing a firearm and possessing a firearm in violation of a court order constitute the same offense under the *Blockburger* standard.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Gary C. Bernacki, Sr., respectfully petitions for a writ of certiorari to review the judgment of the Connecticut Supreme Court in this case.

OPINIONS BELOW

The opinion of the Connecticut Supreme Court (App., *infra,* 1a-63a) is reported at 52 A.3d 605 (2012). The opinion of the Connecticut Appellate Court (App., *infra*, 64a-75a) is reported at 998 A.2d 262 (2010).

JURISDICTION

The judgment of the Connecticut Supreme Court was entered on September 26, 2012. This Court's jurisdiction rests on 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

STATEMENT

This case concerns the application of the Double Jeopardy Clause in a frequently recurring context: the prosecution of a criminal defendant *both* for a criminal act and for violating a court order that prohibits the same act. Petitioner in this case was separately punished for two crimes: (1) possessing a firearm in violation of a domestic protective order; and (2) violating a domestic protective order that prohibited him from possessing a firearm.

In *United States* v. *Dixon*, 509 U.S. 688 (1993), a majority of this Court was not able to agree on how

the *Blockburger* "same-elements" test should apply when one of the two offenses is the crime of violating a court order. Chief Justice Rehnquist (joined by Justices O'Connor and Thomas) concluded that *Blockburger* requires comparison of the elements of the criminal act to the generic elements of the crime of violating a court order, without considering the specific provision of the court order that the defendant is charged with violating. *Id.* at 713-720 (Rehnquist, C.J., concurring in part and dissenting in part). Chief Justice Rehnquist reasoned that "*Blockburger*'s same-elements test requires us to focus, not on the terms of the particular court orders involved, but on the elements of contempt of court in the ordinary sense." *Id.* at 714.

By contrast, Justice Scalia (joined by Justice Kennedy) concluded that *Blockburger*'s "same-elements" test requires comparison of the elements of the criminal act to the specific proscriptions of the court order alleged to have been violated. *Dixon,* 509 U.S. at 697-703 (opinion of Scalia, J.). Justice Scalia reasoned that "the 'crime' of violating a [court order] cannot be abstracted from the 'element' of the violated condition." *Id.* at 698. The remaining four Justices all subscribed to different approaches for resolving the case that did not require them to address how the *Blockburger* standard applies in the context of prosecutions for violating a court order.[1]

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[1] Justice White (joined by Justices Stevens and Souter) concluded that "the Double Jeopardy Clause bars prosecution for an offense if the defendant already has been held in contempt for its commission." 509 U.S. at 720 (White, J., concurring in the judgment in part and dissenting in part). By contrast, Justice Blackmun concluded that the Double Jeopardy Clause should not bar dual prosecution of the offenses of contempt and

Not surprisingly, the divergent approaches in *Dixon* have produced squarely conflicting decisions, as well as widespread uncertainty and confusion, as appellate courts across the country apply the Double Jeopardy Clause in the frequently-recurring context of prosecutions for violations of court orders. Indeed, this conflict is mirrored in the opinions below: a bare majority of the Connecticut Supreme Court adopted the "generic elements" approach of Chief Justice Rehnquist, while the three dissenting Justices endorsed the "incorporation" approach of Justice Scalia to define the elements of a crime involving violation of a court order. Although the issue already has arisen in a significant number of cases, the frequency with which it will be addressed by lower courts will only grow given the increasing prevalence of domestic protective orders nationwide.

In the meantime, defendants like petitioner in this case will face double prosecution and multiple punishment—for the "crime" of doing an act that violates a court order and for the second "crime" of violating a court order because of the very same act—in direct contravention of the protections of the Double Jeopardy Clause. This Court should grant re-

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the underlying acts, because "[t]he purpose of contempt is not to punish an offense against the community at large but rather to punish the specific offense of disobeying a court order." *Id.* at 742 (Blackmun, J., concurring in the judgment in part and dissenting in part). Justice Souter (joined by Justice Stevens) wrote principally to express his disagreement with the Court's overruling in *Dixon* of *Grady* v. *Corbin*, 495 U.S. 508 (1990), and its rule applying the Double Jeopardy Clause in light of whether successive prosecution of two offenses involved the "same conduct" (apart from the "same elements" under traditional *Blockburger* analysis). *Id.* at 743-763 (Souter, J., concurring in the judgment in part and dissenting in part).

view to resolve the uncertainty produced by the conflicting approaches in *Dixon*—and clarify how the Double Jeopardy Clause applies to prosecutions involving violations of court orders.

A. Factual Background

In June 2005, following a contentious divorce, petitioner's daughter made allegations that led to issuance of a domestic protective order against petitioner. App., *infra*, 3a; Transcript of Sentencing ("Sent. Tr.") at 3, *State* v. *Bernacki*, Nos. CRO5 0130195 & CR05 1029701 (Conn. Super. Ct. May 23, 2008). The order in part directed petitioner to "surrender or transfer" all firearms in his possession. App., *infra*, 3a.

Respondent State of Connecticut did not pursue charges for the alleged conduct that triggered issuance of the protective order because petitioner's daughter turned out to be unreliable, and she has since apologized to petitioner. Sent. Tr. 6, 12.

In August 2005, the police in Shelton, Connecticut police received information that petitioner possessed firearms in violation of the protective order. App., *infra*, 4a. The police then searched petitioner's apartment and found two antique guns. *Ibid.* The guns were heirlooms from petitioner's father's military service in World War II and that petitioner intended to pass on to his son. *Ibid.*

B. Proceedings Below

1. Petitioner was charged in Connecticut Superior Court with criminal possession of a firearm in violation of a protective order (Conn. Gen. Stat.

§ 53a-217(a)(3)(A)),[2] and with criminal violation of a protective order (Conn. Gen. Stat. § 53a-223). App., *infra*, 5a.[3] Following a jury trial in early 2008, petitioner was convicted on both counts. *Ibid.*[4]

Prior to petitioner's sentencing, the foreman of the trial jury wrote to petitioner's counsel to express regret for the jury's verdict. The foreman stated that it was difficult for the jurors to vote to convict petitioner because "we felt that the law was being used to settle what amounted to a [d]omestic dispute" and because "[i]t seemed unfair [for petitioner] to get two charges for the same act." Sent. Tr. 5-6. The foreman added that since the trial he had "done some research on Jury Nullification," and that "[i]n retrospect maybe that is what we should have done." *Id.* at 6. "We* * * truly wish [petitioner] all the best." *Ibid.*

2. On May 23, 2008, petitioner appeared before the trial judge for sentencing. He told the court "how much I regret that I did not place the souvenirs my father gave me from World War II with someone"

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[2] Conn. Gen. Stat. § 53a-217 (a) provides in relevant part: "A person is guilty of criminal possession of a firearm * * * when such person possesses a firearm * * * and * * * (3) knows that such person is subject to (A) a restraining or protective order of a court of this state that has been issued against such person, after notice and an opportunity to be heard has been provided to such person, in a case involving the use, attempted use or threatened use of physical force against another person* * *."

[3] Conn. Gen. Stat. § 53a-223(a) provides: "A person is guilty of criminal violation of a protective order when an order issued pursuant to subsection (e) of section 46b-38c, or section 54-1k or 54-82r has been issued against such person, and such person violates such order."

[4] Petitioner was also charged but acquitted of a third charge for possession of machine gun. App., *infra*, 5a.

and that "[a]ll I can say is he got them fighting for our Country, the United States of America, and I was always very proud to tell his story." Sent. Tr. 11-12. The trial judge noted that "[t]his is, obviously, an unusual case and it's one where I normally try to stay detached from any personal observations or feelings, but here, as I am fairly certain that you, outside of this problem you got yourself into, you are not a danger to the community, as [are] many of the individuals who come before me to be sentenced." *Id.* at 14.

Because one of the charges against petitioner involved a mandatory minimum sentence, the judge was required to sentence petitioner to at least two years imprisonment. *See* Conn. Gen. Stat. § 53a-217(b). The judge imposed concurrent sentences on each count of four years imprisonment, with execution suspended after service of the mandatory minimum of two years imprisonment on the criminal-possession-of-a-firearm charge (Conn. Gen. Stat. § 53a-217(a)) and with execution suspended after service of one year imprisonment on the criminal-violation-of-a-protective-order charge (Conn. Gen. Stat. § 53a-223(a)). App., *infra*, 5a.[5]

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[5] Petitioner, a 55-year-old man who has no criminal history, has been on bond pending appeal and has not yet started serving his sentence of imprisonment. Although the Connecticut Supreme Court has denied petitioner a stay of execution of his sentence pending this petition for certiorari, petitioner has a motion pending before the trial court to defer service of his sentence on account of severe medical problems principally involving pancreatitis and diabetes, that have qualified him for Social Security disability benefits. If petitioner's double jeopardy challenge to his dual convictions were to be sustained by this Court, the trial court would have discretion upon re-sentencing to vacate the count of conviction that required a mandatory minimum sentence of two years and to impose a lesser sentence.

3. Petitioner appealed to the Appellate Court of Connecticut, arguing that his conviction and punishment for both crimes violated the Double Jeopardy Clause of the Fifth Amendment. The Appellate Court agreed with petitioner that his two counts of conviction involved the same offense, noting that petitioner "was charged with criminal violation of a protective order, which stemmed from his possessing firearms in violation of that order, and he was charged with criminal possession of a firearm while subject to a protective order," such that petitioner "could not have committed one of these crimes without having committed the other." App., *infra*, 70a. The court concluded, however, that there was no double jeopardy violation because the legislature "inten[ded] to provide cumulative punishments for the single act of possessing a firearm in violation of a protective order." *Id*. at 75a.

4. The Connecticut Supreme Court granted review and affirmed on different grounds by a 4-3 vote. App*., infra*, 1a-63a. The court unanimously rejected the Appellate Court's resolution of the case on the basis of legislative intent.[6] The majority and dissent both focused instead on whether the two crimes for which petitioner was punished constitute the "same offense" under *Blockburger*. They sharply disagreed about how to interpret this Court's decision in *Dixon*,

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See, *e.g*., *State* v. *Chicano*, 584 A.2d 425, 433 (Conn. 1990) (noting that "the decision of which conviction to negate is a question controlled by the intention of the sentencing court") (citing *Ball* v. *United States,* 470 U.S. 856 (1985)).

[6] Both the majority and dissenting opinions rejected the Appellate Court's conclusion that the legislature clearly intended to allow for multiple punishments under both counts of conviction. App*., infra*, 30a, 35a n.20.

and whether to apply the approach advanced by Chief Justice Rehnquist or by Justice Scalia.

The majority identified the central issue as "whether the *Blockburger* 'same offense' analysis should be conducted considering the language and elements of § 53a-223(a), which criminalizes the violation of a protective order in broad terms, or in light of the specific proscriptions in the underlying protective order violated by the defendant in the present case." App.*, infra*, 10a-11a.

After surveying the differences between the approaches of Chief Justice Rehnquist and Justice Scalia, the majority "conclude[d] that Chief Justice Rehnquist's *Blockburger* analysis in *United States* v. *Dixon* * * * is more consistent with Connecticut's contemporary double jeopardy jurisprudence and [we] adopt that approach as we confine our 'same offense' analysis in this case to the statutes and charging documents, without regard to the specific terms of the protective order that the defendant was convicted of violating under § 53a-223(a)." *Id.* at 17a-18a. The majority criticized Justice Scalia's approach on the ground that it "raises the concern of inconsistent and confusing double jeopardy analyses from case to case, depending on the vagaries of the protective orders at issue." *Id.* at 17a.

Proceeding under Chief Justice Rehnquist's approach, the majority analyzed the elements of each offense to determine whether either required proof of a fact that the other did not. App.*, infra*, 20a-21a. The majority concluded that the "broad language of § 53a-223(a) requires only the intent to perform the act constituting the violation, and says nothing about the possession of firearms; in contrast, the language of § 53a-217(a)(3) does not criminalize the violation

of the terms of a particular protective order, but rather, criminalizes the possession of a firearm by a person who "knows that such person is subject to (A) a restraining or protective order of a court of this state that has been issued against such person." *Id.* at 21a-22a.

The majority therefore concluded that the two crimes were not the "same offence" for Double Jeopardy purposes. App., *infra*, 26a.[7] The majority acknowledged that "there is a split among the states about the proper *Blockburger* analysis to apply in determining whether prosecutions for violations of both criminal contempt statutes and statutes criminalizing the underlying conduct violate constitutional double jeopardy protections." *Id.* at 18a n.13 (citing decisions "following Justice Scalia's approach" in *Dixon* and decisions "preferring the approach of Chief Justice Rehnquist").

5. Justice Eveleigh—joined by Justices Palmer and Harper—dissented, concluding that the two crimes charged against petitioner were the "same offense" for purposes of double jeopardy. In the dissenters' view, "Chief Justice Rehnquist's approach is

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[7] Noting that the *Blockburger* test creates only a rebuttable presumption of legislative intent concerning whether two crimes are the "same offense," the majority went on to analyze legislative history to determine whether the legislature clearly intended to preclude multiple punishments and found that it did not so intend. App., *infra*, 27a-35a. This conclusion concerning what the legislature *intended to preclude* is analytically distinct from the Appellate Court's different determination that the legislature *affirmatively intended to provide* for separate punishments for both offenses, a determination that—as noted above—was rejected by the Connecticut Supreme Court. App., *infra*, 30a n.20.

improper in a case involving violation of a court order and the underlying substantive crime." App., *infra*, 60a. It instead endorsed Justice Scalia's approach: "rather than a mechanical comparison of the general elements of the nonsummary contempt crime with the specific elements of the underlying substantive crime, I would 'compare the elements of the offense actually deemed to have been violated in th[e] contempt proceeding against the elements of the substantive criminal offense(s).'" *Ibid.* (quoting *Commonwealth* v. *Yerby*, 679 A.2d 217, 222 (Pa. 1996)).

The dissent reasoned that "[o]bviously, the defendant could not commit this crime [of violating a protective order] until a protective order setting out conditions was issued," as "[t]he statute by itself imposes no legal obligation on anyone, but requires a court order." App., *infra*, 61a. Therefore, "the crime of violation of a protective order cannot be abstracted from the element of the violated condition described in the order, so the terms of the court order must be incorporated into the crime." *Ibid.* The dissent noted and cited "many of our sister states [that] have come to the same conclusion and adopted Justice Scalia's analytical model." *Id.* at 60a.[8]

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[8] Apart from adopting the approach of Justice Scalia, the dissent also disputed at length the majority's application of Chief Justice Rehnquist's approach. App., *infra*, 47a-60a. The dissent "further agree[d] with the majority that, contrary to the conclusion reached by the Appellate Court, there is no clear indication in the legislative history to the effect that the legislature intended to impose multiple punishments for this offense, nor is there any clear indication that it did not." *Id.* at 36a-37a.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari to resolve the square conflict and widespread uncertainty among the lower courts about how the Double Jeopardy Clause applies when the government prosecutes both an act that violates a court order and a violation of a court order stemming from the same act. This Court's fractured opinions in *Dixon* have spawned conflicting approaches among lower courts. The need for clarification is especially urgent because of the increasing prevalence across the country of domestic protective orders as well as other forms of court orders that can serve as grounds for criminal prosecutions. Only this Court can resolve the conflict, which is a direct result of differing conclusions regarding the meaning of *Dixon*, producing disparate results under the Double Jeopardy Clause based solely on the jurisdiction in which the defendant is prosecuted. Further review is therefore plainly warranted.

A. The lower courts are deeply divided regarding how to apply *Dixon*.

State and federal courts nationwide have divided sharply in determining how, in light of the various opinions in *Dixon*, the Double Jeopardy Clause applies when one of the offenses at issue is premised on violation of a court order. The highest courts of Tennessee, New York, and now Connecticut have adopted Chief Justice Rehnquist's approach, concluding that only the generic elements explicitly listed in a statute should be considered for purposes of applying the *Blockburger* "same-elements" test. By contrast, the high courts of Pennsylvania and Florida, as well as the Eleventh Circuit, have utilized Justice Scalia's approach, treating the underlying legal con-

ditions or requirements of a court order to be treated as "elements" for purposes of *Blockburger* analysis.

This confusion has been widely noted. Numerous state and federal courts and academic commentators have expressed the view that guidance from this Court is needed with regard to this frequently-recurring, unsettled issue. Indeed, this confusion has driven the high court of one state—Texas—to utilize the unique approach of attempting to predict how each Justice who participated in *Dixon* would vote on the question, and adopting the outcome it believed a majority of those Justices would have supported. The disagreement and confusion among the lower courts makes clear that this Court's intervention is urgently needed.

1. The highest courts of Connecticut, Tennessee, and New York have adopted Chief Justice Rehnquist's "generic elements" approach.

With its decision below, the Connecticut Supreme Court joins the high courts of both Tennessee and New York in adopting Chief Justice Rehnquist's approach. In *State* v. *Winningham*, 958 S.W.2d 740 (Tenn. 1997), the Tennessee Supreme Court criticized Justice Scalia's approach as "unworkable," *id.* at 744, and concluded instead that "Chief Justice Rehnquist's application of *Blockburger* is better-reasoned and more easily adaptable to Tennessee case law." *Id.* at 745. Under that approach, "protection orders do not implicitly incorporate the statutory elements of any crime into the offense of contempt," and "[t]he *Blockburger* test focuses not on the terms of the particular order involved, but on the statutory elements of contempt in the ordinary sense." *Ibid.* (footnote omitted).

Accordingly, the Tennessee court concluded that it does not violate double jeopardy for a defendant to be convicted of arson after having been convicted of violating a protective order forbidding this conduct. *Winningham,* 958 S.W.2d at 741-742. The court concluded that "neither the Double Jeopardy Clause of the United States Constitution nor that of the Tennessee Constitution bars separate proceedings and punishments for contempt and the substantive offense underlying the contempt." *Id.* at 747.

Similarly, in *People* v. *Wood*, 742 N.E.2d 114 (N.Y. 2000), a case involving separate contempt charges springing from two different court orders, the New York Court of Appeals affirmed a "thoughtful" intermediate appellate court decision that expressly adopted Chief Justice Rehnquist's approach. *Id.* at 116 (relying on *People* v. *Wood*, 698 N.Y.S.2d 122, 126 (App. Div. 1999), aff'd, 95 N.Y.2d 509 (2000)). The Court of Appeals applied the same test, "focus[ing] on the proof necessary to prove the statutory elements of each offense charged against the defendant." *Id.* at 117 (citing *Dixon*, 509 U.S. at 714-716 (Rehnquist, C.J., concurring in part and dissenting in part)); see also *ibid.* ("A comparison of the two [contempt] statutes in this case similarly reveals that *each* provision does not contain an additional element which the other does not.").[9]

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[9] One other state high court has indicated support for this approach. See *State* v. *Brandt*, 713 S.E.2d 591, 598 (S.C. 2011) (the court "need not choose between the divergent views of Chief Justice Rehnquist and Justice Scalia" but "if we were to choose between the two" it would adopt "a traditional, strict application of the *Blockburger* 'same elements test'").

2. The high courts of Pennsylvania and Florida, as well as the Eleventh Circuit, have adopted Justice Scalia's "incorporation" approach.

In *Yerby*, the Pennsylvania Supreme Court adopted Justice Scalia's approach to resolve a double jeopardy challenge to the prosecution of the defendant for making terrorizing threats against his former girlfriend after he had previously been prosecuted for violating a protective order prohibiting him from threatening her. 679 A.2d at 218. The court rejected Chief Justice Rehnquist's approach because it would "render[] double jeopardy protections [for criminal contempt] illusory at best," *id.* at 220, concluding that his interpretation of the Double Jeopardy Clause, "while purporting to embrace the concept that criminal contempt convictions implicate double jeopardy protections, rings hollow." *Id.* at 221.

Instead, the court adopted Justice Scalia's standard as "the more sound approach, and the one that adheres most to the concerns behind the protection against successive prosecutions." *Yerby,* 679 A.2d at 221. Thus, "[r]ather than compare the general elements of contempt of court, we compare the elements of the offense actually deemed to have been violated in that contempt proceeding against the elements of the substantive criminal offense(s)." *Id.* at 222.

In *State* v. *Johnson*, 676 So. 2d 408 (Fla. 1996), the Florida Supreme Court similarly followed the approach advanced by Justice Scalia. In applying the *Blockburger* test to a case involving whether the Double Jeopardy Clause foreclosed prosecution of a defendant for aggravated stalking after he had been prosecuted for criminal contempt of a protective order enjoining him from contacting or entering the

house of a victim, the Florida Supreme Court explicitly approved (*id.* at 411) an intermediate appellate court's decision in *State* v. *Miranda*, 644 So. 2d 342 (Fla. Dist. Ct. App. 1994), which in turn expressly "adopt[ed] the approach taken in *Dixon* by Justice Scalia." *Id.* at 344. Consistent with Justice Scalia's incorporation approach, the Florida Supreme Court compared "the violated conditions of the injunction and the statutory language of the aggravated stalking offense." *Johnson*, 676 So.2d at 410-411.

One federal court of appeals has also followed Justice Scalia's approach. In *Delgado* v. *Florida Department of Corrections*, 659 F.3d 1311 (11th Cir. 2011), cert. denied, 133 S. Ct. 197 (2012), the Eleventh Circuit rejected the argument that a court faced with a Double Jeopardy challenge could "not look beyond the abstract statutory elements of two relevant offenses." *Id.* at 1322 n.7. The court concluded that this "rigid and categorical approach" "drastically oversimplifie[d]" the law and could not "be squared with" several of this Court's precedents, "all of which require something more than a copy of a state's criminal code in order to determine whether one charged offense is actually included in another." *Ibid.* Among the precedents cited was Justice Scalia's opinion in *Dixon*, which it described as "representing the controlling interpretation of *Blockburger*"—the court of appeals observed that "[t]he Government's argument in this case does not reflect the view of the Supreme Court, as illustrated by *Dixon*. Instead, it represents the dissenting view of Chief Justice Rehnquist from that case." *Ibid.*[10]

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[10] At least one other court—the Wisconsin Supreme Court—has indicated support for Justice Scalia's approach. See *State* v. *Kurzawa*, 509 N.W.2d 712, 721 (Wis. 1994) ("Neither can the

In sum, there is a square, deep and persistent conflict among appellate courts about how *Dixon* applies in Double Jeopardy cases involving prosecutions for violating court orders. And beyond these high court decisions, numerous intermediate appellate courts are in similar conflict. Intermediate courts in Ohio and South Carolina endorse Chief Justice Rehnquist's approach,[11] while intermediate courts in Arkansas, Georgia, Iowa, New Mexico, and North Carolina all endorse Justice Scalia's approach.[12]

3. Other courts and commentators have recognized the lower courts' confusion in interpreting Dixon.

Numerous courts that have not taken a position on how the Double Jeopardy Clause should be interpreted in light of *Dixon* have recognized the confusion engendered as a result of the fractured ruling by this Court. Thus, the Eighth Circuit in *United States* v. *Bennett*, 44 F.3d 1364, 1374 (8th Cir. 1995), cited the various opinions in *Dixon*, stated that "[a]lthough the *Blockburger* test is easily recited, it is not so easily applied," and observed "that courts are split on

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state prosecute an offense whose elements are 'incorporated' into the elements of an offense already prosecuted." (quoting *Dixon*, 509 U.S. at 698 (Scalia, J.)).

[11] See *Univ. of Cincinnati* v. *Tuttle*, 2009 WL 2836433, at *3 (Ohio Ct. App. 2009); *State* v. *Warren*, 500 S.E.2d 128, 135 (S.C. Ct. App. 1998), *rev'd on unrelated grounds*, 534 S.E.2d 687 (S.C. 2000).

[12] See *Penn* v. *State*, 44 S.W.3d 746, 748-49 (Ark. Ct. App. 2001); *Tanks* v. *State*, 663 S.E.2d 812, 814 (Ga. Ct. App. 2008); *State* v. *Rincon*, 817 N.W.2d 31, at *6 (Iowa Ct. App. 2012); *State* v. *Powers*, 967 P.2d 454, 455 (N.M. Ct. App. 1998); *State* v. *Gilley*, 522 S.E.2d 111, 116 (N.C. Ct. App. 1999) .

whether the test is to be applied by looking solely to the statutory elements of the offense, or by going beyond the statute and looking at the underlying facts or averments in the indictment." See also *United States* v. *Carrillo-Espinoza*, 24 F.3d 250 (table), 1994 WL 171150 (9th Cir. 1994) ("the justices [in *Dixon*] divided over whether it was appropriate to examine only the specific *statutory elements* of an offense in undertaking the *Blockburger* analysis, or whether, in some circumstances, the inquiry should be broadened" and declining to reach the issue).

Many state courts have similarly been unable to divine a clear principle from the *Dixon* opinions. The Nebraska Supreme Court concluded that *Dixon*'s "five separate" and "sharply divided" opinions provided no guidance. *State* v. *Huff*, 802 N.W.2d 77, 97 (Neb. 2011); see *id.* at 98 ("As it stands, however, *Dixon* leaves the matter far from clear."). Similarly, in *State* v. *Kraklio*, 560 N.W.2d 16 (Iowa 1997), the Iowa Supreme Court observed that "the *Blockburger* test is easily stated, but not so easily applied," and "[t]he difficulty was demonstrated in *Dixon,* where a divided Supreme Court announced its views in five separate opinions," in which "[t]he divisive question became which elements to compare." *Id.* at 19; see also *id.* at 20 (declining to "reconcile the splintered views expressed in *Dixon*").

Perhaps the greatest sign of confusion has been the response of the *en banc* Texas Court of Criminal Appeals, which resorted to creating a graphical chart of the varying opinions in *Dixon* and adopting a self-described "pragmatic" approach of attempting to guess how each of the Justices in *Dixon* would vote to resolve a case before the Texas court:

> The fractured nature of *Dixon* provides little guidance for courts to follow. However, it is still Supreme Court precedent and thus we are bound to follow it as best we can. Therefore, our analysis will be a pragmatic one: we will analyze each separate opinion in *Dixon* and apply the legal reasoning of each opinion to the facts before us to determine whether or not each justice in *Dixon* would find that appellee's subsequent prosecution is barred by double jeopardy; we will then tally the "votes" as determined from *Dixon* to determine whether a majority of members from that decision would find that appellee's subsequent prosecution is barred by double jeopardy.

Ex parte Rhodes, 974 S.W.2d 735, 739 (Tex. Crim. App. 1998) (en banc). Applying this chart-and-guess technique, the court found that criminal contempt predicated on violation of a custody order and interference with child custody were the same offense. *Id.* at 742 (tallying up votes using a chart).

Yet even that approach did not eliminate dissension, as varying judges of the Texas court chose sides between the approaches of Chief Justice Rehnquist and Justice Scalia. Compare *Ex parte Rhodes,* 974 S.W.2d at 742 (Keller, J., concurring) ("I believe that appellee prevails under Chief Justice Rehnquist's analysis, and I believe that the Chief Justice's double jeopardy approach is the correct one.") with *id.* at 747 (McCormick, J., dissenting) ("Justice Scalia's opinion [should be followed because it] is the 'holding of the court' since it contains the narrowest grounds that explains or supports the Court's judgment in *Dixon*.").

This confusion is not tolerable. As Chief Justice Abrahamson noted soon after this Court's fractured opinions in *Dixon*: "[F]ederal double jeopardy jurisprudence is in disarray," and "[w]hen it requires a chart to determine which paragraphs of a United States Supreme Court decision constitute the law of the land, you know you are in trouble." See *State* v. *Kurzawa*, 509 N.W.2d 712, 723 (Wis. 1994) (Abrahamson, J., concurring). The division and confusion among the lower courts has increased significantly since she wrote those words.

Scholars have similarly bemoaned *Dixon*'s lack of meaningful guidance. Professor Akhil Amar, for instance, has referred to the multiple opinions of *Dixon* as "mind boggl[ing]," noting that "[e]ven good Justices have bad days." Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 Yale L.J. 1807, 1832-1833 (1997). Professor Peter Henning has observed that "[t]he Court's failure [in *Dixon*] to agree on a cogent analysis * * * means that its decision[] [will] provide only minimal guidance to lower courts." Peter J. Henning, *Precedents in a Vacuum: The Supreme Court Continues to Tinker with Double Jeopardy*, 31 Am. Crim. L. Rev. 1, 3 (1993).

In sum, "*Dixon* does not constitute reform in the double jeopardy area, but rather demonstrates the continuing need for reform." Eli J. Richardson, *Eliminating Double-Talk From the Law of Double Jeopardy*, 22 Fla. St. U. L. Rev. 119, 122 (1994). The Court should grant review to provide the clear guidance needed by the lower courts.

C. The question presented is a matter of substantial and growing importance.

The question presented here regarding the standard for applying the Double Jeopardy Clause in cases involving a prosecution for violation of a court order arises with considerable frequency. The numerous appellate decisions addressing the issue, cited above (see pages 12-21, *supra*), confirm that fact. Indeed, the importance of the issue is self-evident given the wide variety of circumstances in which courts issue orders that prohibit the party subject to the order from engaging in specified criminal conduct.

Moreover, the particular context presented here—protective orders issued as a result of allegations of domestic violence—has seen a tremendous increase in activity. Across the nation, at least 234 state statutes authorize the issuance of some form of domestic violence protection order. Domestic Violence, 0030 SURVEYS 7 (Thomson Reuters/West Oct. 2012).

Tens of thousands of restraining orders are issued each year. Stop Abusive & Violent Env'ts, *Special Report: The Use and Abuse of Domestic Restraining Orders*, at 8 (Feb. 2011), http://tinyurl.com/cmm9pjm (estimating approximately annual issuance of approximately 900,000 final restraining orders). "Restraining orders are easy to obtain because state laws now define domestic violence broadly, judges seldom require proof of abuse, and statutes invoke a 'preponderance of evidence' standard." *Id.* at 1 (footnote omitted).

Studies of specific states and municipalities suggest that the number of protective orders issued has

increased significantly in recent years, and will continue to rise across the Nation.

- In Virginia, the number of restraining orders issued increased by 17% from 2010 to 2011, and now number over 70,000 across the State. See Justin Jouvenal, *Number of Requests for Restraining Orders Explodes in Virginia*, Wash. Post., Feb. 4, 2012, http://-tinyurl.com/btyr5su.
- In New York City, the number of restraining orders increased by a staggering 46% from 2004 to 2008. See Simon Akam, *Increase Is Seen in Number of Restraining Orders*, N.Y. Times, July 1, 2009, http://tinyurl.com/-mfdtr4.
- In petitioner's home state of Connecticut, over 30,000 family violence protective orders are issued per year; that figure has increased in three of the past four years. See Judicial Branch Statistics, *Protective/Restraining Orders*, State of Connecticut Judicial Branch, (Sept. 30, 2012), http://tinyurl.com/c752an8.

Observers attribute these increases to legislative efforts to loosen requirements on existing laws and expand upon such laws through new protections. Jouvenal, *supra*.

The increase in the total volume of orders has been accompanied by a corresponding surge in the number of orders prohibiting the possession of firearms. Indeed, many states have created a separate criminal penalty for those found in possession of firearms while subject to a protective order.

In Connecticut, those seeking a restraining order can indicate whether the other party "hold[s] a per-

mit to carry a pistol or revolver" or "possess[es] one or more firearms" on their applications for relief. State of Connecticut Judicial Branch, Family Forms, *Application of Relief from Abuse*, at 2, http://tinyurl.-com/chcn9bf. Connecticut General Statute § 53a-217, in turn, makes it a state felony for those subject to a restraining or protective order to possess a firearm.

More than twenty other states have followed Connecticut's example, including California, Delaware, and Maine. See Shannon Frattaroli, *Removing Guns From Domestic Violence Offenders: An Analysis of State Level Policies to Prevent Future Abuse*, Johns Hopkins Center for Gun Policy and Research, 8-10 (Oct. 2009), http://tinyurl.com/ckhsrk7; Legal Community Against Violence, *The 2010 Report: Recent Developments in Federal, State, and Local Gun Laws*, 22 (Aug. 2010), http://tinyurl.com/btpq5v4.[13] This combination—a proliferation of protective orders coupled with conditions prohibiting possession of firearms—enhances the likelihood of future double jeopardy conundrums stemming from dual prosecution of the act of possessing a firearm while subject to a protective order and the act of violating a protective order by possessing a firearm.

That is especially true given the volume of orders issued and the circumstances surrounding their issuances. In both Maryland and Hawaii, for instance, statistics indicate that judges grant nearly all applications for ex parte restraining orders. David H. Taylor et al., *Ex Parte Domestic Violence Orders of Protection: How Easing Access to Judicial Process Has*

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[13] Federal law also makes it a crime for a person subject to certain kinds of domestic protection orders to possess a firearm. 18 U.S.C. § 922(g)(8)).

Eased the Possibility for Abuse of the Process, 18 Kan. J.L. & Pub. Pol'y 83, 86-87 & n.15 (2008) (noting that "ex parte orders of protection are granted routinely at an extraordinarily high rate; in some jurisdictions, nearly one hundred percent").

Many orders are initially issued ex parte, with comparatively few procedural protections to respondents. Together, these circumstances have helped to create a system that even commentators have called a "tool for effectuating abuse." *Id.* at 87. In Virginia, recent changes in state laws have increased the availability of these orders,[14] and there is some concern that many of these new requests "are seemingly frivolous or calculated to gain leverage in pending litigation." Taylor, *supra,* at 87; Jouvenal, *supra.*

According to a clerk magistrate of the Boston Municipal Court, these orders are now provided for "every[one] * * * who comes in and wants to file a harassment order against * * * someone who just annoys them. * * * It's nuts. This is not what the law was intended to do. We don't have enough people to be handling all these things." David Abel, *Restraining-Order Filings Unbound*, Bos. Globe, Apr. 12, 2011, http://tinyurl.com/3lnnxpj.

In a system where judges are overburdened by heavy caseloads and public opinion presses for "action against domestic violence," unjustified orders inevitably will be issued. And as in this case, such

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[14] Prior to 2010, protective orders could only be issued against those with a family or household connection or individuals under arrest. Today, they are open to anyone in fear of any "act of violence, force or threat." Kenneth T. Cuccinelli, Attorney General of Virginia, *2011 Annual Report: Domestic and Sexual Violence in Virginia*, 58 (Dec. 2011), at http://tinyurl.com/cbpenjr.

orders can carry heavy consequences. Ensuring that clear, uniform standards govern double jeopardy challenges to multiple prosecutions or punishments resulting from these orders is therefore a matter of very significant public importance.

D. The Decision Below Is Wrong.

Review is further warranted because the Connecticut Supreme Court incorrectly applied *Blockburger* and this Court's other double jeopardy precedents.

The *Blockburger* test turns on whether two offenses can possibly be committed separately. If commission of either offense necessarily implies commission of the other—that is, if one offense is a lesser included offense of the other—then the two offenses are "the same." *Harris* v. *Okla.*, 433 U.S. 682, 682-683 (1977) (per curiam) (holding that the Double Jeopardy Clause applies "[w]hen * * * conviction of a greater crime * * * cannot be had without conviction of the lesser crime"); see also *Brown* v. *Ohio*, 432 U.S. 161, 169 (1977) ("Whatever the sequence may be, the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense.").

Petitioner could not criminally possess a firearm without also criminally violating his protective order. A person is guilty of criminal possession of a firearm when he or she (1) "possesses a firearm"; (2) is subject to a restraining or protective order;[15] and (3)

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[15] The statute states that the person must know he or she is subject to the order but does not explicitly state that he or she must actually be subject to the order. This element, however, is fairly implied.

"knows" that he or she is subject to the order. Conn. Gen. Stat. § 53a-217(a). A person is guilty of criminal violation of a protective order when he or she (1) is subject to a protective order; and (2) violates that order. Conn. Gen. Stat. § 53a-223(a). Under petitioner's protective order, he was forbidden from possessing a firearm. Thus, by satisfying the elements of Section 53a-217(a)—which requires possession of a firearm while subject to a protective order—he necessarily violated his protective order and satisfied the elements of Section 53a-223(a). The two offenses are therefore the same.[16]

Moreover, under *Whalen* v. *United States*, 445 U.S. 684 (1980), two offenses can be the same even if some factual situations exist in which they can be committed independently. *Id.* at 694 (holding that rape and felony murder are the same offense even though felony murder could be predicated on felonies other than rape). What matters is whether, "[i]n the present case," the two required proof of the same facts. *Ibid.*; see also *Blockburger*, 284 U.S. at 304 (offenses are the same unless "each provision requires proof of a fact which the other does not").

To hold otherwise would elevate formality over the protections that the Double Jeopardy Clause was meant to provide. As Justice Scalia recognized in *Dixon*, "the 'crime' of violating a [court order] cannot be

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[16] That situation is not unique to petitioner. It can arise with respect to almost every person subject to a protective order in Connecticut. Connecticut's form protective order includes a preprinted section forbidding possession of firearms. App., *infra,* 22a. Unless an idiosyncratic judge decided to cross out the firearm-prohibition section of the form before issuing the order,[16] any person who violates Section 53a-217(a) simultaneously violates Section 53a-223(a).

abstracted from the 'element' of the violated condition." *Dixon*, 509 U.S. at 698 (opinion of Scalia, J.).

Indeed, the Connecticut Supreme Court's rule would completely undermine the majority holding in *Dixon* that double jeopardy protections apply to criminal contempt prosecutions. See *Dixon,* 509 U.S. at 696 (majority op.). If a court cannot consider as an "element" the underlying violation of law that is proscribed by a protective order, then double jeopardy will never protect a defendant from double prosecution and punishment for violating the law and for violating a court order that prohibits the very same violation of the law. As one judge has explained:

> What a great new tool for allowing punishments greater than called for in the criminal law—just bring a guy into court and have a judge admonish him not to do something. Then when he does, punish him for contempt by giving him more time than he could get for the act itself. Then also punish him *again* for the act itself. Simply stating the obvious makes the answer obvious [under the Double Jeopardy Clause].

Univ. of Cincinnati v. *Tuttle*, 2009 WL 2836433, at *4 (Ohio Ct. App. 2009) (Painter, J., dissenting).

Petitioner was convicted of two offenses, but the conviction of one necessarily required conviction of the other—that means that the two offenses are "the same" under *Blockburger*. Indeed, it is precisely the situation the Double Jeopardy Clause was intended to forbid. "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence." *Ex parte Lange*, 85 U.S. 163, 168 (1873).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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