No. 12-759

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

REPLY BRIEF FOR PETITIONER

JEFFREY A. MEYER
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

GLENN W. FALK
New Haven Legal
Assistance Assoc. Inc.
426 State St.
New Haven, CT 06510
(203) 946-4811

ANDREW J. PINCUS
Counsel of Record
CHARLES A. ROTHFELD
MICHAEL B. KIMBERLY
PAUL W. HUGHES
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

STATUTES

REPLY BRIEF FOR PETITIONER

All seven Justices of the Connecticut Supreme Court concluded that the resolution of petitioner's double jeopardy claim turns upon the federal-law standard set forth in *Blockburger* v. *United States*, 284 U.S. 299 (1932). Pet. App. 9a, 38a n.4. All seven Justices also concluded that this Court's decision in *United States* v. *Dixon*, 509 U.S. 688 (1993), governs the application of *Blockburger* in this context, although they divided 4-3 regarding the proper interpretation of *Dixon*. Pet. 8-10. All seven Justices agreed that their disagreement mirrors a deep conflict among state and federal appellate courts regarding *Dixon*'s meaning. *Id*. at 9-10.

Respondent nonetheless contends that the Connecticut court's holding is based entirely on state law and therefore falls outside this Court's jurisdiction under 28 U.S.C. § 1257. In respondent's view, this Court has no jurisdiction to review a state court judgment that applies *Blockburger* and *Dixon* in the context of a double jeopardy claim asserting impermissible multiple punishment.

That contention is wrong for two separate reasons. First, this Court's decisions make clear that *Blockburger* supplies a federal-law standard for determining the permissibility of multiple punishment in the absence of an alternative state-law basis for demonstrating legislative intent. Here, the Connecticut Supreme Court expressly concluded that there was no alternative evidence of legislative intent and applied the federal *Blockburger* rule.

Second, this Court has repeatedly affirmed that state-law determinations based on the application of federal standards fall within this Court's jurisdic-

tion. There can be no doubt that the Connecticut court felt itself constrained by this Court's rulings in *Blockburger* and *Dixon* and based its decision entirely on those standards.

Respondent's second argument against certiorari is similarly baseless. It claims that decisions applying *Blockburger* in the context of successive prosecution claims are irrelevant because *Blockburger* applies differently when the question involves multiple punishment. But this Court in *Dixon* squarely rejected that position, observing that it would be "embarrassing to assert that the single term 'same offence' (the words of the Fifth Amendment at issue here) has two different meanings—that what *is* the same offense is yet *not* the same offense." *Dixon*, 509 U.S. at 704. The lower court conflict recognized in the opinions below and discussed in the petition is therefore squarely presented here, and warrants this Court's review.[1]

---

[1] Respondent asserts (at 8 n.5) that petitioner will not obtain any benefit from vindication of his constitutional protection against double jeopardy because under Connecticut law the two convictions would be merged and the greater sentence automatically apply. But respondent's principal argument—that the proper remedy under Connecticut law is merger of two convictions rather than vacation of one of them—was rejected by the Connecticut Supreme Court just last week in a decision issued after the filing of the brief in opposition. *State* v. *Polanco*, 2013 WL 1196588 (Conn. 2013), overrules *State* v. *Chicano*, 584 A.2d 425 (Conn. 1990), to the extent the latter decision permitted "merging" of greater/lesser offense convictions rather than vacating one of them. See also *Polanco*, 2013 WL 1196588 at *3 n.3 (noting that although "[t]he present case deals solely with the merger of convictions for greater and lesser included offenses * * * we are aware of no reason why our holding, of logical necessity, would not apply with equal force to

A. The Connecticut Supreme Court's application of the *Blockburger* standard presents a question of federal law.

Respondent's principal argument against certiorari is its contention that the judgment below rests exclusively on state law and therefore falls outside this Court's jurisdiction. Opp. 1, 5-10. But the Connecticut Supreme Court defined the "sole issue in this certified appeal" as whether petitioner's double convictions and punishments "violate[d] his federal and State constitutional protections against double jeopardy." Pet. App. 2a (emphasis omitted).[2]

The opinions below contain no indication that the Connecticut Supreme Court believed it was deciding anything other than a question of federal law. Both the majority opinion and the dissent relied on decisions of this Court; indeed, both concluded that the critical question was how to apply the *Blockburger* standard in light of the conflicting approaches set forth in *Dixon*. Pet. 8-10. And the court below pointed to numerous decisions of other federal and state appellate courts addressing that issue, none of which were applying Connecticut law. Pet. 9, 10.

---

other scenarios in which cumulative convictions violate the double jeopardy clause"). For the reasons discussed in the petition, Pet. 6-7 n.5, petitioner will have a strong argument that the conviction carrying the mandatory minimum sentence is the one that should be vacated.

[2] Respondent concedes (at 9 n.6) that the Connecticut Constitution does not have a double jeopardy clause and does not otherwise contend that the Connecticut Supreme Court relied independently on the Connecticut Constitution. See *State* v. *Thomas*, 995 A.2d 65, 71 n.7 (Conn. 2010) ("'The Connecticut constitution provides coextensive protection, with the federal constitution, against double jeopardy.'") (quoting *State* v. *Ferguson*, 796 A.2d 1118, 1134 (Conn. 2002)).

Respondent bases its argument on this Court's decision in *Missouri* v. *Hunter*, 459 U.S. 359 (1983), in which the Court concluded that "[w]ith respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Id.* at 366. The Court held that the Double Jeopardy Clause does not bar multiple punishments for two or more offenses that have the same elements under the *Blockburger* test if the state legislature "specifically authorizes cumulative punishment under two statutes." *Id.* at 368.[3]

Here, however, the Connecticut Supreme Court specifically determined that there was *no* such specific legislative authorization of multiple punishment. Pet. 9 n.7; Pet. App. 27a-35a. In such a case, as the court below acknowledged (Pet. App. 3a), the double jeopardy issue is wholly controlled by interpretation and application of the *Blockburger* same-elements test as interpreted by this Court in *Dixon*.

Respondent appears to read *Hunter* as meaning that even when there is no specific evidence of legislative intent, the application of the *Blockburger* test in the multiple punishment context is always a question of state law. On that view, a state court's application of *Blockburger* to resolve a multiple punishment claim could never be reviewed by this Court. That broad assertion is wrong for two reasons.

---

[3] *Hunter* involved convictions for a first-degree robbery and violation of an "armed criminal action" statute expressly providing that its penalty "shall be in addition to any punishment provided by law" for the underlying felony. 459 U.S. at 363.

First, in the context of multiple punishment claims, the *Blockburger* rule is a default standard that applies as a matter of *federal law* in the absence of specific contrary evidence of legislative intent. Nothing in *Hunter*—which held only that the federal default rule does not apply when there is evidence of specific legislative intent—even hints that the default rule is anything other than a principle of federal law, and no other decision of this Court supports respondent's view. (Respondent relies solely on *Hunter*.)

The Connecticut Supreme Court recognized as much in its decision in this case. In adopting the approach that Chief Justice Rehnquist espoused in *Dixon*, the majority below stated that it accorded with "our well established technical double jeopardy analysis after our discussion in *State* v. *Alvarez*, 257 Conn. 782, 778 A.2d 938 (2001)." Pet. App. 15a. Respondent points to this passage (at 1, 3) as evidence that the court below believed it was applying state law. But *Alvarez* involved a *Blockburger* double jeopardy claim based on impermissible successive prosecutions (see 778 A.2d at 943), a context that even respondent agrees involves application of federal double jeopardy law. By equating the two standards, the court below made clear that it was applying a federal-law rule in this case.[4]

---

[4] Of course, even if this vague reference created uncertainty regarding the law being applied—which it does not—that would provide no basis for declining jurisdiction here: "When 'a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, [this Court] will accept as the most reasonable explanation that the state court decided the case the

The lower federal courts also have recognized that the application of *Blockburger* in the multiple-sentencing context constitutes a question of federal law, conducting habeas review of state court interpretations of how to apply the *Blockburger* test. See, *e.g.*, *Dennis* v. *Poppel*, 222 F.3d 1245, 1250-1251 (10th Cir. 2000) (habeas review of state court's application of *Blockburger* where legislative intent to prescribe multiple punishments was otherwise unclear); *Daniels* v. *Bronson*, 932 F.2d 102, 106 (2d Cir. 1991) (same).[5]

---

way it did because it believed that federal law required it to do so.'" *Ariz.* v. *Evans*, 514 U.S. 1, 7 (1995) (quoting *Mich.* v. *Long*, 463 U.S. 1032, 1040-1041 (1983)); see also *Fla.* v. *Powell*, 559 U.S. 50, 130 S. Ct. 1195, 1202 (2010) (same); *Ohio* v. *Robinette*, 519 U.S. 33, 37 (1996) (same); *Penn.* v. *Labron*, 518 U.S. 938, 941 (1996) (per curiam) (same).

Overlooking that long line of decisions, respondent cites (at 7) *Coleman* v. *Thompson*, 501 U.S. 722 (1991), and *Lambrix* v. *Singletary*, 520 U.S. 518 (1997), to suggest this Court lacks jurisdiction. But those cases involved the different question of this Court's jurisdiction to review state court decisions that are predicated in part on state procedural defaults. They plainly have no application here.

[5] Respondent nevertheless claims (at 7) that federal courts have refused to consider the *Blockberger* issue on habeas. But respondent's reliance on the Sixth Circuit's decision in *White* v. *Howes*, 586 F.3d 1025 (6th Cir. 2009), is misplaced because, unlike this case, that decision involved a determination that the state legislature had specifically intended multiple punishments—as in *Hunter*—and there accordingly was no need to apply the *Blockburger* test. *Id.* at 1030-1031. Even more irrelevant is the Tenth Circuit's decision in *Mansfield* v. *Champion*, 992 F.2d 1098 (10th Cir. 1993), in which the court of appeals applied the *Blockburger* standard to grant habeas corpus relief on double jeopardy grounds in the multiple-sentencing context—the precise claim that petitioner advances here. *Id.* at 1100. The Seventh Circuit's decision in *McCloud* v.

Second, even if—contrary to our submission and the Connecticut Supreme Court's own determination—the application of *Blockburger* in the multiple-punishment context were technically a question of state law, this Court would have jurisdiction to review that determination. The Court has long recognized that it "retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law." *Three Affiliated Tribes of Fort Berthold Reservation* v. *Wold Eng'g, P.C.*, 467 U.S. 138, 152 (1984); see also *Mich.* v. *Long*, 463 U.S. 1032, 1038 n.4 (1983) (noting that "if, in our view, the state court felt compelled by what it understood to be federal constitutional considerations to construe * * * its own law in the manner that it did, then we will not treat a normally adequate state ground as independent, and there will be no question about our jurisdiction") (internal quotations omitted).

There can be no doubt that the decision below was more than "influenced" by this Court's rulings in *Dixon* and *Blockburger*. Both the majority and the dissenting Justices believed their decision was controlled by this Court's rulings and sought to apply them faithfully to the circumstances presented by this case. That is more than sufficient to support this Court's jurisdiction.

Moreover, there is a compelling reason for the Court to exercise that jurisdiction here, even if it

---

Deppisch, 409 F.3d 869 (7th Cir. 2005), is the only one cited by respondent that reaches the opposite conclusion. Even if that court were correct, however, and application of *Blockburger* were technically a matter of state law here, that would pose no obstacle to this Court's jurisdiction, as we next discuss in the text.

there is some possibility that the decision below was as a technical matter grounded in state law. As we explain below, respondent is wrong in suggesting that *Blockburger* and *Dixon* apply differently in the multiple punishment and successive prosecution contexts. Lower courts do not distinguish between the two types of claims—here, the Connecticut Supreme Court relied upon both multiple punishment and successive prosecution cases, as have other courts. This Court's failure to supervise the lower courts' application of these standards in the multiple-punishment context inevitably will lead to erroneous decisions in the successive-prosecution context. It is therefore necessary and appropriate for this Court to intervene now, in order to eliminate the significant uncertainty in the lower courts regarding the question presented in this case about the application of this Court's decision in *Dixon*.

B. There is a clear conflict regarding application of *Blockburger* and *Dixon* to crimes involving violations of court orders.

Respondent's second argument against certiorari is that there is no conflict warranting this Court's review. That contention rests entirely on respondent's contention that the decisions of lower courts that have addressed the application of *Blockburger* in the context of an offense involving violation of a court order in cases involving successive-prosecution claims are irrelevant to multiple-punishment claims. With those decisions "distinguished" on this ground, respondent asserts there is no conflict. Respondent is wrong for several reasons.

First, this Court in *Dixon* squarely rejected the claim that *Blockburger* applies differently depending

on whether the defendant's double-jeopardy claim involves multiple punishment or multiple prosecutions. The Court responded to Justice Souter's dissenting opinion, which it characterized as resting on a "theory of a 'successive prosecution' strand of the Double Jeopardy Clause that has a different meaning" from its multiple punishment strand:

> We have often noted that the Clause serves the function of preventing both successive punishment and successive prosecution, see, *e.g., North Carolina v. Pearce,* 395 U.S. 711 (1969), but there is *no* authority, except *Grady* [v. *Corbin*, 495 U.S. 508 (1990)], for the proposition that it has different meanings in the two contexts. That is perhaps because it is embarrassing to assert that the single term "same offence" (the words of the Fifth Amendment at issue here) has two different meanings—that what *is* the same offense is yet *not* the same offense.

509 U.S. at 704 (emphasis in original). *Grady*, of course, was overruled in *Dixon*. See also *Brown* v. *Ohio*, 432 U.S. 161, 166 (1977) ("If two offenses are the same under [*Blockburger*] for purposes of barring consecutive sentences at a single trial, they necessarily will be the same for purposes of barring successive prosecutions"). Accordingly, "the relevant question is whether in fact two offenses are the 'same' under *Blockburger*, regardless whether the question arises in a multiple prosecution or multiple punishment context." *Austin* v. *Cain*, 660 F.3d 880, 890 n.7 (5th Cir. 2011) (per curiam), cert. denied, 132

S. Ct. 1914 (2012). Respondent's contrary claim is plainly wrong.[6]

For the same reason, respondent is wrong in relying on the fact that this Court's decision in *Rutledge* v. *United* States, 517 U.S. 292 (1996), did not cite *Dixon*; and in pointing to lower court decisions *not involving court order offenses* in an attempt to demonstrate that those courts reject application of Justice Scalia's *Dixon* standard. The dispute in *Dixon* was confined to the application of *Blockburger* in the court-order context—so it is not at all surprising that there are no references to Justice Scalia's approach in other double jeopardy cases when neither offense rests on violation of a court order.[7] And the absence of such a reference says nothing about how any particular court would apply *Blockburger* in the court-order context.

The view of those courts can be determined only by looking to the cases in which they have addressed

---

[6] Rather than acknowledge this Court's contrary statements in *Dixon* and *Brown*, respondent relies solely on a *dissenting* opinion for its argument that *Blockburger* applies differently in the multiple-punishment context than the successive-prosecution context. See Opp. 11 n.8 (citing *Whalen* v. *United States*, 445 U.S. 684, 700 (1980) (Rehnquist, J., dissenting)).

[7] None of the cases relied upon by respondent involve a criminal conviction for violation of a court order. See *State* v. *Watkins*, 362 S.W.3d 530, 538 (Tenn. 2012) (reckless homicide and aggravated child abuse); *New York* v. *Gonzalez*, 781 N.E.2d 894, 896 (N.Y. 2002) (criminal sale of a controlled substance in the third degree and criminal sale of a controlled substance near school grounds); *Penn.* v. *Baldwin*, 985 A.2d 830, 831 (Penn. 2009) (possession of firearm without a license and carrying a firearm on the public streets); *Valdes* v. *State*, 3 So. 3d 1067, 1068 (Fla. 2009) (discharging a firearm within 1000 feet of another person and shooting into an occupied vehicle).

offenses based on court order violations—regardless whether they involve claims based on successive prosecution or multiple punishment, given this Court's statement in *Dixon* that *Blockburger* applies the same way in both contexts. And those are precisely the cases we cited in the petition.

Second, as the decision below makes clear, lower courts do not distinguish between successive prosecution and multiple punishment claims in applying the *Blockburger* standard. Both the majority and the dissent below looked to both types of decisions in applying *Blockburger* and *Dixon* here. That overlap confirms the existence of a conflict warranting this Court's review as well as the urgency of addressing that issue now so that both types of claims will be subjected to the same standard no matter where in the country they arise.

Moreover, respondent does nothing to dispute the petition's showing concerning the increasing frequency of double jeopardy claims in the court-order context and the national importance of this issue. Pet. 20-24. Given those facts, and the clear, acknowledged conflict regarding how *Blockburger* and *Dixon* apply in this significant category of cases—a conflict that only this Court can resolve—review is both necessary and appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JEFFREY A. MEYER
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

GLENN W. FALK
New Haven Legal
Assistance Assoc. Inc.
426 State St.
New Haven, CT 06510
(203) 946-4811

ANDREW J. PINCUS
Counsel of Record
CHARLES A. ROTHFELD
MICHAEL B. KIMBERLY
PAUL W. HUGHES
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Petitioner

MARCH 2012