No. 19-7113

In the

Supreme Court of the United States

RAYNARD GRAY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S SUPPLEMENTAL BRIEF

Nelson S. Ebaugh
Nelson S. Ebaugh, P.C.
3730 Kirby Dr, Ste 1200
Houston, Texas 77098
Tel. (713) 752-0700
Fax (713) 739-0500
nebaugh@ebaughlaw.com

Attorney for Petitioner

QUESTION PRESENTED

Whether bank robbery, in violation of 18 U.S.C. 2113(a), qualifies as a "crime of violence" within the meaning of 18 U.S.C. § 924(c)(3)(A), the so called "elements" clause.

PETITIONER'S SUPPLEMENTAL BRIEF

Petitioner respectfully calls the Court's attention to two new district court cases that were not available when he filed his certiorari petition.

In *United States v. Tucker*, No. 18 CR 0119 (SJ), 2020 WL 93951 (E.D.N.Y. Jan. 8, 2020), the district court found "that given the broad spectrum of attempt liability, the elements of attempt to commit robbery could clearly be met without any use, attempted use, or threatened use of violence." *Id*. at *6 (cleaned up). In reaching its holding, the *Tucker* court relied upon the dissent in *United States v. St. Hubert*, 918 F.3d 1174 (11th Cir. 2019) (en banc) where Judge Jill Pryor reasoned as follows:

> We can easily imagine that a person may engage in an overt act—in the case of robbery, for example, overt acts might include renting a getaway van, parking the van a block from the bank, and approaching the bank's door before being thwarted—without having used, attempted to use, or threatened to use force. Would this would-be robber have intended to use, attempt to use, or threaten to use force? Sure. Would he necessarily have attempted to use force? No.
>
> *Tucker*, 2020 WL 93951 at *6 (quoting *St. Hubert*, 918 F.3d 1174, 1212 (Pryor, dissenting from the denial of rehearing en banc) (emphasis in original)).

Further, Gray calls the Court's attention to *Lofton v. United States*, No. 6:16-cv-06324-MAT, 2020 WL 362348 (W.D.N.Y. Jan. 22, 2020) where the district court likewise held that "because attempted Hobbs Act robbery does not categorically entail the use, threatened use, or attempted use of force, . . . [Hobbs Act robbery] is not a crime of a violence under § 924(c)(3)(A) and cannot be a predicate for [a] § 924(c) conviction . . . ." *Id.* at *9.

Although *Tucker* and *Lofton* considered the question in the context of Hobbs Act robbery, their rationales extend to bank robbery in violation of 18 U.S.C. § 2113(a). In this case, Gray's "attempted robbery of the credit union on July 26" was thwarted because "its doors were locked." App., *cert petition*, 2a-3a. In any event, the court below held that Gray's attempted robbery qualified as a "crime of violence" under 18 U.S.C. § 924(c)(3)(A). App., *cert petition*, 9a. Given the clear-cut nature of the error in this case, this case presents an ideal vehicle for this Court to address whether bank robbery, in violation of 18 U.S.C. 2113(a), qualifies as a "crime of violence" within the meaning of 18 U.S.C. § 924(c)(3)(A).

CONCLUSION

Wherefore, it is respectfully requested that this Court grant a writ of certiorari to review the decision below.

Respectfully submitted,

/s/ Nelson S. Ebaugh
Nelson S. Ebaugh
State Bar No. 24007139
Nelson S. Ebaugh, P.C.
3730 Kirby Drive, Suite 1200
Houston, Texas 77098
Tel. (713) 752-0700
Fax (713) 739-0500
nebaugh@ebaughlaw.com

Attorney for Petitioner – CJA counsel, appointed under 18 U.S.C. § 3006A