No. _____

In the

Supreme Court of the United States

ASTON CHARLES BUTLER,
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

PETITION FOR A WRIT OF CERTIORARI

J. MATTHEW WRIGHT
* *COUNSEL OF RECORD*
FEDERAL PUBLIC DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
500 SOUTH TAYLOR STREET, SUITE 110
AMARILLO, TEXAS 79101
(806) 324-2370
MATTHEW_WRIGHT@FD.ORG

QUESTION PRESENTED

In *Prince v. United States*, 352 U.S. 322 (1957), this Court construed the first and second paragraphs of 18 U.S.C. § 2113(a)—bank robbery and entry into a bank with intent to commit a crime—as a single offense punishable by twenty years in prison. The Fifth Circuit nonetheless held that the two paragraphs define separate and divisible crimes.

Does 18 U.S.C. § 2113(a) define a single offense or two separate and divisible offenses?

PARTIES TO THE PROCEEDING

The parties to the proceeding are named in the caption.

DIRECTLY RELATED PROCEEDINGS

1. *United States v. Aston Charles Butler*, No. 3:17-CR-562 (N.D. Tex.)

2. *United States v. Aston Charles Butler*, No. 19-10065 (5th Cir.)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Aston Charles Butler petitions asks this Court to issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's opinion in this case was published at 949 F.3d 230. It is reprinted in the Appendix.

JURISDICTION

The Fifth Circuit issued its judgment on February 4, 2020. App., *infra*, 11a. On March 19, this Court extended the deadline to file certiorari to 150 days from the judgment. This Court has jurisdiction to review the Fifth Circuit's final decision under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the interpretation and application of 18 U.S.C. § 2113(a):

> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or
>
> Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny—
>
> Shall be fined under this title or imprisoned not more than twenty years, or both.

The case also involves the Armed Career Criminal Act, 18 U.S.C. § 924(e):

(e)

(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives [. . .]; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

INTRODUCTION

This petition poses an abstract question of federal statutory law with profound importance to Petitioner and to hundreds of others throughout the country: "whether the federal bank robbery statute describes two different offenses or two different means of committing the same offense." App., *infra*, 2a. Petitioner does not dispute that the first paragraph—prohibiting bank robbery and bank extortion—describes a violent felony. But the second paragraph—entry *with intent* to commit larceny or some other felony—does not describe a violent felony. The second paragraph does not describe a generic "burglary," 18 U.S.C. § 924(e)(2)(B)(ii), because it does not require proof of an *unlawful* entry. *See Descamps v. United States*, 570 U.S. 254, 264 (2013) (The ACCA's enumerated crime of "burglary" "requires an unlawful entry along the lines of breaking and entering."). Nor does the second paragraph require proof of the use, attempted use, or threatened use of physical force against another person. 18 U.S.C.§ 924(e)(2)(B)(i); *see United States v. McBride*, 826 F.3d 293, 296 (6th Cir. 2016) ("That language could certainly encompass many nonviolent felonies.").

The Government argued, and the Fifth Circuit held, that 18 U.S.C. § 2113(a) is divisible into (at least) two separate crimes. App., *infra*, 3a. All of the circuits that have addressed the question appear to agree that the two paragraphs of § 2113(a) are divisible into separate crimes. *See McBride*, 826 F.3d at 296 ("Section 2113(a) seems to contain a divisible set of elements."); *accord United States v. Moore*, 916 F.3d 231, 238 (2d Cir. 2019) ("The parties do not contest that § 2113(a) of the federal bank robbery statute is divisible, and we agree."); *United States v. Wilson*, 880 F.3d 80, 84 n.3 (3d Cir. 2018), *cert. denied*, 138 S. Ct. 2586 (2018) (accepting the district court's

undisputed determination "that § 2113(a) was a divisible statute because it contained two paragraphs, each containing a separate version of the crime"); *United States v. McGuire*, 678 F. App'x 643, 645 n.4 (10th Cir. 2017) ("Section 2113(a) includes at least two sets of divisible elements."); *see also United States v. Watson*, 881 F.3d 782, 785 n.1 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 203 (2018) (recognizing that the second paragraph is "not a crime of violence," but deeming that paragraph "divisible from the § 2113(a) bank robbery offense").

These decisions stand in sharp contrast to this Court's decision in *Prince v. United States*, 352 U.S. 322 (1957). This Court rejected the Government's argument that Congress made the second paragraph "a completely independent offense." 352 U.S. at 327. This tension will not be resolved until this Court settles the issue.

STATEMENT

Petitioner robbed five banks in May and June of 2010. Sealed 5th Cir. R. 267–269. That spate of bank robberies led to two convictions in Texas state court for robbery and four federal convictions under 18 U.S.C. § 2113(a). App., *infra*, 2a. He served concurrent sentences of three years in prison for these robberies crimes. Sealed 5th Cir. R. 267–269).

In March of 2017, police officers found him in possession of a firearm during a traffic stop. Sealed 5th Cir. R. 263. Federal authorities charged him with violating 18 U.S.C. § 922(g)(1), and he pleaded guilty. App., *infra*, 2a. "Although that crime ordinarily carries a maximum penalty of ten years in prison, [18 U.S.C. § 924(a)(2)], the Armed Career Criminal Act imposes a fifteen-year minimum when the defendant

has three prior convictions for violent felonies or serious drug offenses, [18 U.S.C. § 924(e)(1)]." App, *infra*, 2a.

Petitioner argued that he was not an Armed Career Criminal because § 2113(a) was not *categorically* violent. When analyzing prior convictions under the ACCA, courts "focus solely on whether the elements of the crime of conviction sufficiently match the elements of [the relevant federal definition], while ignoring the particular facts of the case." *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016) (discussing *Taylor v. United States*, 495 U.S. 575, 600–601 (1990)). Under the categorical approach, "[t]he prior conviction qualifies as an ACCA predicate only if the statute's elements are the same as, or narrower than, those of the [federal definition]." *Descamps*, 570 U.S. at 257. And in conducting this analysis, courts "must presume" that the defendant's prior conviction "rested upon nothing more than the least of the acts criminalized, and then determine whether even those acts are encompassed by the generic federal offense." *Moncrieffe v. Holder*, 569 U.S. 184, 190–191 (2013) (internal quotation omitted).

The Government contended that § 2113(a) defined not one crime, but two. Where a single state statute "contain[s] several different crimes, each described separately," the Government may use conviction records to prove the defendant "was convicted of" a separately described offense that satisfies the federal definition. *Moncrieffe*, 569 U.S. at 191. This is called the "modified categorical approach." But the modified approach cannot be used to narrow an *indivisible* statute—one that lists alternative means of committing a single offense..

Thus, the only issue is whether the two paragraphs of § 2113(a) describe alternative means of committing a single offense, or define truly separate offenses. If—as the Government argues, and the Fifth Circuit held—Subsection (a) defines multiple, divisible offenses, then Petitioner concedes that the indictment and plea papers from his 2011 federal prosecution invoke "first paragraph" bank robbery, which the Fifth Circuit has held to be a violent felony. But if the two paragraphs make up a single, indivisible offense, then that offense is *not* a violent felony. One can violate the second paragraph—e.g., by lawfully entering a bank with intent to commit larceny (or some other felony)—without committing a generic burglary, and without using, attempting to use, or threatening to use any physical force.

The district court described this area of law as "confusing," but held that the two paragraphs were divisible and that all four federal bank robberies were "violent felonies." 5th Cir. R. 167. The Fifth Circuit affirmed, holding in a published opinion that "Section 2113(a) is divisible." App., *infra*, 10a. This timely petition follows.

REASONS TO GRANT THE PETITION

I. THE COURT HAS ALREADY HELD THAT THE TWO PARAGRAPHS ARE *NOT* SEPARATE CRIMES.

The two paragraphs of 18 U.S.C. § 2113(a) represent different stages of the same offense, not two different crimes. The second paragraph "was inserted to cover the situation where a person enters a bank for the purpose of committing a crime, but is frustrated for some reason before completing the crime." *Prince*, 352 U.S. at 328. In *Prince*, "[t]he Government ask[ed]" the Court "to interpret this statute as amended

to make each a completely independent offense." *Prince*, 352 U.S. at 327. This Court rejected that approach:

> We hold, therefore, that when Congress made either robbery or an entry for that purpose a crime it intended that the maximum punishment for robbery should remain at 20 years, but that, even if the culprit should fall short of accomplishing his purpose, he could be imprisoned for 20 years for entering with the felonious intent.

Prince, 352 U.S. at 329. *Prince* rejected the Government's view that these are two "completely independent offense[s]." *Id.* at 327. That should settle the issue in Petitioner's favor.

The Fifth Circuit read *Prince* differently. Under the Fifth Circuit's reading, *Prince* did not hold that the two paragraphs made up only one crime. *Prince* instead recognized two crimes whose "punishment[s] would 'merge[ ]' such that he could not be sentenced consecutively." App., *infra*, 8a. The court followed similar reasoning in the Seventh Circuit's decision *United States v. Loniello*, 610 F.3d 488, 494 (7th Cir. 2010) ("Its holding, rather, is that the subsections of § 2113 do not allow cumulative sentences, even though they establish distinct offenses."),

But *Prince* did not say the *punishments* for the two paragraphs would merge; *Prince* explicitly said the *elements* would merge:

> It is a fair inference from the wording in the Act, uncontradicted by anything in the meager legislative history, that the unlawful entry provision was inserted to cover the situation where a person enters a bank for the purpose of committing a crime, but is frustrated for some reason before completing the crime. The gravamen of the offense is not in the act of entering, which satisfies the terms of the statute even if it is simply walking through an open, public door during normal business hours. Rather the heart of the crime is the intent to steal. *This mental*

> *element merges into the completed crime if the robbery is consummated.*

Prince, 352 U.S. at 328 (emphasis added).

It is true that *Prince* was chiefly concerned with aggregation of *punishment*, and that the two paragraphs are not "consecutively punishable in a typical bank robbery situation." *Id.* at 324. But, in reaching that conclusion, the Court plainly stated that the *elements* of the two paragraphs would "merge" in the event both were proven. That is exactly how the Court described *Prince*'s holding in *Heflin*:

> We held in *Prince v. United States*, *supra*, that the crime of entry into a bank with intent to rob *was not intended by Congress to be a separate offense from the consummated robbery*. We ruled that entering with intent to steal, which is 'the heart of the crime,' *id.*, 352 U.S. at page 328, 77 S.Ct. at page 407, 'merges into the completed crime if the robbery is consummated.' *Ibid.* We gave the Act that construction because we resolve an ambiguity in favor of lenity when required to determine the intent of Congress in punishing multiple aspects of the same criminal act.

Heflin v. United States, 358 U.S. 415, 419 (1959) (emphasis added).

II. THE REASONING OF *MATHIS* SUGGESTS THAT THE FIRST AND SECOND PARAGRAPHS ARE INDIVISIBLE.

Unlike many divisibility questions, this case concerns a federal statute. There is no need to *guess* how a state court might construe its own crime. The issue is governed entirely by this Court's own precedent. For the reasons explained above, *Prince* settles the matter.

But if there were any doubt, it should be resolved in Petitioner's favor. In *Mathis*, the Court explained the process lower courts should use when trying to decide whether a state offense is divisible. On balance, those steps support Petitioner's view that § 2113(a) is indivisible. First, even if the decision in *Prince* does not explicitly

settle the *unanimity* question at the heart of divisibility analysis, it at least *strongly suggests* that the two paragraphs form only one offense. Second, the two paragraphs' shared penalty strongly suggests indivisibility. Different statutory punishments *always* mean separate crimes: "[if] statutory alternatives carry different punishments, then . . . they must be elements." *Mathis*, 136 S. Ct. at 2256. Here, the first and second paragraphs of § 2113(a) share the same penalty. In fact, though they are described as "paragraphs" in this petition and elsewhere, they are grammatically part of a single sentence, with a single penalty provision.

There is one factor of *Mathis*'s analysis that favors the Government: if the Court were to take a "peek at the record documents," it would see that the indictment only alleged the first paragraph of § 2113(a). *Mathis*, 136 S. Ct. at 2256–2257; *see* 5th Cir. Sealed R. 186–189. But that cannot be dipositive. Prosecutors are not required to list all means of commission in an indictment. The final factor weighs in Petitioner's favor—any uncertainty about divisibility must be resolved to benefit the defendant. *Mathis*, 136 S. Ct. at 2256–2257.

III. THE QUESTION PRESENTED IS IMPORTANT TO BANK ROBBERY PROSECUTIONS AND TO THE UNIFORM ADMINISTRATION OF FEDERAL SENTENCING LAW.

The Seventh Circuit's decision in *Loniello* demonstrates the mischief of the "separate offenses" classification of § 2113(a). In that case, the defendants were *acquitted* of attempted bank robbery under the first paragraph, then charged under the second paragraph. 610 F.3d at 490. By classifying the two paragraphs as completely separate offenses (rather than as alternative means of proving a single

crime), *Loniello* allowed the defendants to be put in jeopardy twice for the very same attempted robbery.

Even in a run-of-the-mill prosecution for attempted bank robbery, it would be passing strange for Congress to insist that the jury unanimously agree on either the first or second paragraphs. Under the Government's view, a defendant should be acquitted if half the jurors believe beyond a reasonable doubt that he decided to rob the bank while standing in line, but failed, while the other half believe that he entered the bank with intent to rob it but never took a substantial step toward that end. That is not a natural reading of the statutory language.

The proper analysis of the first paragraph of § 2113(a) will also be important to prosecutions under 18 U.S.C. § 924(c). Congress has created an aggravated version of federal bank robbery where the defendant puts someone's life in danger by using a deadly weapon. 18 U.S.C. § 2113(d). But it is less clear whether § 2113(a) alone supports prosecution under § 924(c), especially after the residual clause of § 924(c)(3)(B) has been stricken. If Petitioner is correct—if the offense defined at subsection (a) is categorically non-violent for purposes of § 924(e) (the ACCA), then it would also be categorically non-violent for purposes of § 924(c). Granting the petition would allow the Court to resolve the proper analysis under two subsection of 924.

IV. THE QUESTION PRESENTED IS OUTCOME DETERMINATIVE HERE.

If Petitioner is correct—if § 2113(a) is indivisible—"that would mean four of Butler's six felony convictions would not be violent felonies, allowing him to escape the armed career criminal classification and its minimum sentence." App., *infra*, 5a. The maximum penalty for his crime would be 120 months, *see* 18 U.S.C. § 924(a)(2).

If the Fifth Circuit is correct—if the ACCA requires a mandatory minimum sentence of 180 months—then Petitioner must serve the entirety of that sentence, even though the district court acknowledged that prison term was longer than it would have imposed if it had the freedom to go lower. 5th Cir. R. 176 ("I think a sentence at the statutory minimum is more than sufficient, and if I were not bound by the mandatory minimum, I don't believe I would sentence the Defendant to that much time. We haven't talked that much about the offense conduct. I think it's relatively serious. I think it would call for a serious sentence, but I don't think it would get to 180 months if it were not for the minimum.").

CONCLUSION

Petitioner asks that this Court grant the petition and set the case for a decision on the merits.

Respectfully submitted,

J. MATTHEW WRIGHT
FEDERAL PUBLIC DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
500 SOUTH TAYLOR STREET, SUITE 110
AMARILLO, TEXAS 79101
MATTHEW_WRIGHT@FD.ORG
(806) 324-2370

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