No. _____

In the

Supreme Court of the United States

BLAKE TAYLOR,
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

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QUESTIONS PRESENTED

1.

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 has nonetheless held that the two paragraphs define separate and divisible crimes.

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

2.

Is attempted bank robbery under 18 U.S.C. § 2113(a) a "crime of violence" as defined in § 924(c)(3)(A)?

PARTIES TO THE PROCEEDING

The parties to the proceeding are named in the caption.

DIRECTLY RELATED PROCEEDINGS

1. *United States v. Blake Taylor*, No. 4:18-CR-231-1 (N.D. Tex.)

2. *United States v. Aston Charles Butler*, No. 19-10261 (5th Cir.)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

PETITION FOR A WRIT OF CERTIORARI

Petitioner Blake Taylor 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 not selected for publication in the Federal Reporter. It can be found at 844 Federal Appendix 705, and is reprinted in the Appendix.

JURISDICTION

The Fifth Circuit issued its judgment on February 5, 2021. On March 19, 2020, this Court extended the deadline to file certiorari to 150 days from the judgment. The Court was closed on July 5, 2021, making the petition due today. 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 18 U.S.C. § 924(c). That statute provides, in pertinent part:

> (c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--
>
> > (i) be sentenced to a term of imprisonment of not less than 5 years;
> >
> > (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
> >
> > (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.
>
> * * * *
>
> (3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and--
>
> > (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
> >
> > (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

INTRODUCTION

This petition poses two closely related questions of federal statutory law with profound importance to Petitioner and to hundreds of others throughout the country.

The first asks whether the two paragraphs of § 2113(a) describe two distinct offenses or multiple means of committing a single offense. The first paragraph of § 2113(a) prohibits substantive robbery and extortion as well as attempts to commit either offense. The second paragraph proscribes something more like a burglary—entry into a bank *with intent* to commit larceny or some other felony. The second paragraph plainly does not 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 has argued, and the Fifth has Circuit held, that 18 U.S.C. § 2113(a) is divisible into (at least) two separate crimes. *United States v. Butler*, 949 F.3d 230, 235 (5th Cir.), *cert. denied*, 141 S. Ct. 380 (2020). 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.

The second question presented is closely related to the one that will be resolved in *United States v. (Justin) Taylor*, __ S. Ct. __, 2021 WL 2742792 (U.S. July 2, 2021) (20-1459). The circuits are divided over whether an attempt to commit a crime of intimidation satisfies § 924(c)(3)(A). Petitioner's conviction under § 924(c) was predicated upon an attempted bank robbery. App., *infra*, 1a.

STATEMENT

Petitioner and an accomplice tried to rob a community bank in Fort Worth, Texas. App., *infra*, 2a. Before they could complete the robbery, Petitioner panicked and fired several shots, injuring multiple employees. App., *infra*, 2a. A federal grand jury indicted him for attempted bank robbery (in violation of 18 U.S.C. § 2113(a) & (d)) and discharging a firearm in furtherance of a crime of violence (in violation of § 924(c)). Petitioner moved to dismiss the § 924(c) count, arguing that the predicate crime under § 2113 did not count as a "crime of violence" without the unconstitutional residual clause found in § 924(c)(3)(B). He conceded that his argument was foreclosed by Fifth Circuit precedent, and the district court denied his motion.

After he pleaded guilty, Petitioner faced an advisory guideline range of 255—268 months.[1] The district court decided to impose a sentence more than twice as long as what the Guidelines recommended: 45 years in prison. Without the § 924(c) conviction, the statutory maximum would have been 25 years in prison. *See* 18 U.S.C. § 2113(d).

On appeal, Petitioner renewed his argument that his § 2113 offense could not satisfy the statutory "crime of violence" definition as narrowed by *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019). The Fifth Circuit affirmed, relying on two prior decisions: *Butler*, which held that § 2113(a) defined separate and divisible crimes, and *United States v. Smith*, 957 F.3d 590, 596 (5th Cir.), *cert. denied*, 141 S. Ct. 828 (2020), which held that any *attempt* to commit a § 924(c) "crime of violence" was "in and of itself a COV under the elements clause."

This timely petition follows.

REASONS TO GRANT THE PETITION

I. SECTION 2113(A)'S TWO PARAGRAPHS ARE *NOT* SEPARATE CRIMES.

A. This Court has already held that the two paragraphs create a single crime.

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

[1] The district court adopted Guideline calculations "yield[ing] an advisory imprisonment range of 135 to 168 months, to be followed by a mandatory minimum of ten years (120 months) for the firearm count." App., *infra*, 4a. Petitioner disputed the propriety of those calculations, but he will not re-hash those arguments here. He reserves the right to continue pressing his arguments on remand.

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 v. United States*, 352 U.S. 322, 327 (1957). 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 reads *Prince* differently. Under the Fifth Circuit's view, *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." *Butler*, 949 F.3d at 236. The Seventh Circuit embraced similar reasoning in *United States v. Loniello*, 610 F.3d 488, 494 (7th Cir. 2010): *Prince*'s "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).

B. The reasoning of *Mathis* suggests that the two 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 v. United States*, 136 S. Ct. 2243 (2016), the Court explained the process lower courts should use when trying to decide whether a statute is divisible into multiple separate offenses. 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. But that cannot be dipositive. Prosecutors are not required to list all possible 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.

C. The "separate offenses" interpretation of § 2113(a) leads to unfair and illogical outcomes.

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.

II. ALTERNATIVELY, THE COURT SHOULD HOLD THIS PETITION TO AWAIT THE OUTCOME OF *JUSTIN TAYLOR*.

This Court recently granted certiorari in *Justin Taylor* to decide whether *attempting* to commit a crime of intimidation satisfies § 924(c)'s elements clause. *See United States v. (Justin) Taylor*, __ S. Ct. __, 2021 WL 2742792 (U.S. July 2, 2021) (No. 20-1459). Though the predicate offense in *Justin Taylor* is Hobbs Act attempted robbery, 18 U.S.C. § 1951, the Fourth Circuit's opinion repeatedly discussed attempted bank robbery under § 2113(a) as another crime that can be committed by

attempting to intimidate. *See United States v. Taylor*, 979 F.3d 203, 208 (4th Cir. 2020). The Government's petition for certiorari in *Taylor* specifically noted this aspect of the Fourth Circuit's reasoning. *See* Petition 19–20, *United States v. Taylor*, No. 20-1459 (U.S. filed April 14, 2021). A decision affirming the Fourth Circuit's reasoning in *Taylor* would thus cast serious doubt on the reasoning adopted below.

CONCLUSION

Petitioner asks that this Court grant the petition and set the case for a decision on the merits. Alternatively, he asks the Court to hold this petition pending a decision in *Justin Taylor*.

Respectfully submitted,

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