NO. _____

In the

Supreme Court of the United States

Chris Eugene Cosner,

Petitioner,

v.

United States of America,

Respondent.

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

Fifth Circuit Case No. 16-60673

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This petition presents a straightforward case for certiorari review. The question presented is whether, under the categorical approach of the elements clause of 18 U.S.C. § 924(c), armed bank robbery constitutes a crime of violence, and whether robbery by intimidation (the least culpable conduct of 18 U.S.C. § 2113(a)) constitutes a crime of violence.

PARTIES TO THE PROCEEDING

Petitioner is Chris Eugene Cosner, who was a Defendant-Petitioner in the court below.

Respondent is the United States of America, who was the Plaintiff-Appelleein the court below.

COURT PROCEEDINGS

United States v. Chris Eugene Cosner, 1:15-CR-00096 Northern District of Mississippi; Judgment entered October 3, 2016.

United States v. Chris Eugene Cosner, Fifth Circuit Case Number 16-60673, 690 Fed. Appx. 292, entered on June 13, 2017.

United States v. Chris Eugene Cosner, Fifth Circuit Case Number 16-60673, Judgment reentered on April 6, 2021.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Chris Eugene Cosner ("Mr. Cosner") seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The petitioner, Mr. Cosner, respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, re-entered in the above-entitled proceeding on April 6, 2021. The Opinion and Judgment are attached hereto as composite Appendix 1. The published opinion of the Court of Appeals for the Fifth Circuit can be found at 690 Fed. Appx. 292 (5th 2017) . A copy of the published Opinion is attached as Appendix 3.

The district court entered a Judgment reflecting this sentence on October 3, 2016. A copy of the Judgment is attached hereto as Appendix 2.

JURISDICTION

The Opinion of the Fifth Circuit Court of Appeals in *United States v. Chris Eugene Cosner*, 690 Fed. Appx. 292, was entered on June 13, 2017, and on motion, was reentered April 6, 2021. This petition is filed within 150 of that date in compliance with Rule 13.1 of the Supreme Court Rules and the Court's Filing Deadlines Order related to COVID-19. *See* https://www.supremecourt.gov/orders/courtorders/031920zr_d1o3.pdf. The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the United States Constitution forbids the government from depriving an individual of life, liberty or property without due process of law. U.S. Const. Amend. V.

STATEMENT OF THE CASE

I. Procedural History

Petitioner was found guilty at trial of Count I: armed bank robbery pursuant to 18 U.S.C. §2113(a)&(d) and Count II: brandishing a firearm pursuant to 18 U.S.C. §924(c)(1)(A) in the United States District Court for the Northern District of Mississippi before the Honorable Sharion Aycock. Petitioner perfected his appeal to the United States Court of Appeals for the Fifth Circuit on October 11, 2016, in accordance with Rule 4(b) of the Federal Rules of Appellate Procedure. The United States Court of Appeals for the Fifth Circuit affirmed the district court's judgment on June 13, 2017. Petitioner's counsel failed to advise him of his right to petition this Court for writ of certiorari. Accordingly, on April 6, 2021, the United States Court of Appeals for the Fifth Circuit affirmed the district court's finding on this issue and recalled its mandate and reentered judgment to re-start the time for filing of this Petition for Writ of Certiorari.

II. Factual History

On the morning of July 1, 2015, around 9:07 a.m., a man entered the First American National Bank in Saltillo, Mississippi, wearing a disguise and carrying a firearm. He demanded money at gunpoint. The armed robber made away with approximately $4,115.31. Law enforcement had received an alarm from the bank and

quickly arrived on scene. One of the initial responding officers saw the robber exit the bank and head toward the woods. Petitioner was subsequently arrested in a wooded area. The bag, including the stolen money with an exploded red dye pack, was also recovered. Petitioner was indicted for (Ct. I) armed bank robbery and (Ct. II) brandishing a firearm in relation to a crime of violence on August 26, 2016. Petitioner was found guilty after a trial by jury on March 30, 2016, and sentenced to 30 years incarceration with 276 months per Count I and 84 months per Count II. This verdict and sentence were appealed to the United States Court of Appeals for the Fifth Circuit, which affirmed the district court. Petitioner now seeks a writ of certiorari on the issues of whether, under the categorical approach of the elements clause of 18 U.S.C. § 924(c), armed bank robbery constitutes a crime of violence, and whether robbery by intimidation (the least culpable conduct of 18 U.S.C. § 2113(a) constitutes a crime of violence.

REASONS FOR GRANTING THIS PETITION

The Supreme Court has granted certiorari in *United States v. Davis*, 139 S. Ct. 2319 (2019) and held that the residual clause of §924(c) is unconstitutionally vague. Likewise, the Supreme Court has granted certiorari in *Beckles v. United States*, 137 S. Ct. 886, 890-92 (2017) to resolve the conflict among the Court of Appeals on the question of whether the vagueness holding in *Johnson v. United States*, 135 S. Ct. 2551 (2015) applied to the residual clause in § 4B1.2(a) of the Guidelines and therein held that the advisory Guidelines were not subject to vagueness challenges under the Due Process Clause. The issue that the Supreme Court has not considered is the one

on which this Petitioner seeks resolution: whether, under the categorical approach of the elements clause of §924(c), armed bank robbery constitutes a crime of violence, and whether robbery by intimidation (the least culpable conduct of §2113(a)) constitutes a crime of violence. The underlying facts of this case provide the appropriate context for this Court to rule on these unresolved issues.

Petitioner's sentence under 18 U.S.C. §924(c) should be vacated per *Johnson v. United States*, 135 S. Ct. 2551 (2015) because armed bank robbery no longer qualifies as a "crime of violence." As such, Petitioner cannot be sentenced as a career offender. Similarly, the career offender guidelines, U.S.S.G. §§ 4B1.1 and 4B1.2, use identical residual clause language as found in § 924(e). Therefore, the residual clause must be found void for vagueness, pursuant to *Johnson*.

A. IN LIGHT OF *JOHNSON*, MR. COSNER'S § 924(c) CONVICTION SHOULD BE DISMISSED.

In *Johnson*, the Supreme Court faced a vagueness challenge to the Armed Career Criminal Act's definition of violent felonies. 135 S. Ct. at 2556. The Act includes a statutory sentencing enhancement for violators with three or more earlier convictions for a "violent felony." The Act defines violent felonies to include, among other things, "*burglary, arson, or extortion, [offenses] involv[ing] use of explosives, or [offenses] otherwise involv[ing] conduct that presents a serious potential risk of physical injury to another*." 18 U.S.C. § 924(e)(2)(B)(ii) (emphasis added). The italicized portion is known as the "residual clause." *Johnson*, 135 S. Ct. at 2556.

The *Johnson* opinion highlights two features of the Act's residual clause that together make the clause unconstitutionally vague. *Id.* at 2557. First, the Court

observed that "the residual clause leaves grave uncertainty about how to estimate the risk posed by a crime" under the categorical approach required by *Taylor v. United States*, 110 S. Ct. 2143 (1990). Second, the Court noted that the Act's "imprecise `serious potential risk' standard" was difficult to apply. *Id*. at 2558.

This Court ruled in *Welch v. United States,* 136 S. Ct. 1257, 1265 (2016) that *Johnson* is a substantiative decision that is retroactive in cases on collateral review. *Johnson* applied retroactively because it removed the legal grounds for the 15-year minimum sentence by removing some of the priors that were used to trigger that sentence.

This Court also ruled in *United States v. Davis*, 139 S. Ct. 2319 (2019) that the residual clause of §924(c)(3)(B) is unconstitutionally vague. Thus, the residual clause should not have been used in Petitioner's case to determine his crime was a crime of violence, but instead the categorical approach should have been used to determine if his crime was a crime of violence under the elements clause of §924(c)(3)(A).

The same reasoning in *Johnson* that applies to the residual and elements clause should apply to the statute of conviction, 18 U.S.C. § 924(c) for Petitioner. Petitioner's conviction does not satisfy the elements clause nor does it satisfy the residual clause. The relevant portion of § 924(c) defining a "crime of violence" has two clauses. The first clause – § 924(c)(3)(A) – is commonly referred to as the "element" clause. The other – § 924(c)(3)(B) – is commonly referred to as the "residual" clause[1]. The

[1] Under § 924(c)(3), "crime of violence" is defined as follows:
(3) For purposes of this subsection, the term "crime of violence" means an offense that is a felony and –

application of both these clauses to the instant case in a post-*Johnson/Welch* world is explained below.

1. Bank robbery no longer qualifies as a "crime of violence" under the residual clause.

Petitioner was found guilty of one count armed bank robbery and one count which required an underlying "crime of violence." For the purposes of §924(c), the armed bank robbery is that crime. The § 924(c) residual clause is materially indistinguishable from the ACCA residual clause (18 U.S.C. § 924(e)(2)(B)(ii)) that the Supreme Court in *Johnson* struck down as void for vagueness.

Although the residual clause language in the two statutes is slightly different, the proper analysis to void it as unconstitutional is the same as in *Johnson*. The ACCA residual clause, §924(e)(2)(B), required the court to evaluate the offense "by its nature," not by its elements and not by the defendant's actual conduct when committing the predicate offense. Justice Scalia, in *Johnson*, wrote that the residual clause denies fair notice to defendants and invites arbitrary enforcement by judges. *Johnson*, 135 S. Ct. at 2557. Section 924(c)(3) suffers from exactly the same problem as the ACCA residual clause: it requires the court to imagine what the ordinary "course" of the predicate crime involves in the abstract and then to engage in conjecture about whether the amount of risk the crime involves constitutes a

(A) has an element the use, attempted use, or threatened use of physical force against the person or property of another [known as the "element" clause], 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 [known as the "residual" clause].

"substantial risk" that physical force against the person or property of another may be used in the course of committing the predicate offense.

The type of risk – "substantial risk (§ 924(c)(3)) versus serious potential risk (*Johnson*/ACCA)" is completely irrelevant because the Supreme Court stated in *Welch* that *Johnson* turned on ordinary case approach, not the type of risk. 136 S. Ct. 1257, 1262 (2016).

The language in § 924(c) mirrors the language found in another residual clause context regarding defendants who have aggravated felonies under U.S.S.G. § 2L1.2 and 18 U.S.C. §16. It is of note for the purposes of this brief that an *en banc* Fifth Circuit recently held that the residual clause language in 18 U.S.C. § 16(b) was constitutional and not vague. *United States v. Gonzalez-Longoria*, 831 F.3d 670 (5th Cir 2016). In *Gonzalez-Longoria,* the Fifth Circuit compared the language of the ACCA to 18 U.S.C. §16(b). The Fifth Circuit found that although both the Act's residual clause and 18 U.S.C. § 16(b) similarly require a risk assessment under the categorical approach, the inquiry that a court must conduct under 18 U.S.C. § 16(b) is notably more narrow. The Act's residual clause requires courts, in imagining the ordinary case, to decide whether the ordinary case would present a "*serious potential risk of physical injury*." 18 U.S.C. § 924(e)(2)(B)(ii) (emphasis added). In contrast, 18 U.S.C. § 16(b) requires courts to decide whether the ordinary case "*involves a substantial risk that physical force against the person or property of another may be used in the course of committing* the offense." 18 U.S.C. § 16(b) (emphasis added).

Therefore, this Court must now make a decision in this case as to whether the residual language of 18 U.S.C. §924(c) - *"substantial risk that physical force against the person or property of another may be used in the course of committing the offense"* falls in the category of unconstitutionally vague, as the USSC found the ACCA language in *Johnson.*

2. Bank robbery no longer qualifies as a "crime of violence" under the elements clause.

The categorical approach applies in determining whether a conviction qualifies as a "crime of violence" under the elements clause. In determining whether an offense qualifies as a "crime of violence" under the elements clause, sentencing courts must employ the categorical approach. See *United States v. Davis*, 139 S. Ct. 2319 (2019); *Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013); *United States v. Jennings*, 195 F.3d 795, 797-98 (5th Cir. 1999)("In conducting this inquiry, we do not consider any facts specific to Jenning's case."); see also *United States v. Delgado-Enriquez*, 188 F.3d 592, 594-95 (5th Cir. 1999); *United States v. Acosta*, 470 F.3d 132, 135 (2d Cir. 2006). This approach requires that courts "look only to the statutory definitions – i.e., the elements – of a defendant's [offense] and not to the particular facts underlying [the offense]" in determining whether the offense qualifies as a "crime of violence." *Descamps*, 133 S. Ct. at 2283 (citation omitted); *Jennings*, 195 F.3d at 797-98, *Acosta*, 470 F.3d at 135. In addition, under the categorical approach, a prior offense can only qualify as a "crime of violence" if all of the criminal conduct covered by a statute, including "the least culpable act constituting a violation of the statute," matches or is narrower than the "crime of violence" definition. *United States v. Elizondo-*

Hernandez, 755 F.3d 779, 781 (5th Cir. 2014). If the most innocent conduct penalized by a statute does not constitute a "crime of violence," then the statute categorically fails to qualify as a "crime of violence."

As a result, post–*Davis & Descamp*s, for an offense to qualify as a "crime of violence" under the elements clause, the offense must have as an element the use, attempted use, or threatened use of "physical force" against another person. U.S.S.G. § 4B1.2(a)(1). "Physical force" means "violent force—that is, force capable of causing physical pain or injury to another person." *Johnson v. United States*, 130 S. Ct 1265, 1271 (2010) (emphasis in original). As further detailed below, Petitioner's conviction of brandishing a firearm in furtherance of a crime of violence categorically must be vacated.

3. The underlying "crime of violence," armed bank robbery, fails to meet the "physical force" test as stated in § 924(c)(3), and therefore cannot sustain Mr. Cosner's conviction under § 924(c)(1)(A).

Petitioner was found guilty of one count of § 924(c)(1)(A), and one count of armed bank robbery under 18 U.S.C. § 2113(a). Section 2113(a) states:

> (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. (emphasis added).

Because *Johnson* rendered the residual clause unconstitutional, the only possible option under which "armed bank robbery" can be deemed a "crime of violence" is under the physical force clause of § 924(c)(3)(A).

In another case also captioned *Johnson v. United States*, the Supreme Court defined the level of force required to meet the "physical force" requirement of § 924(e)(2)(B)(i), which is identically worded in comparison to § 924(c)(3)(A). 130 S. Ct. 1265 (2010). Here, this Court noted "[T]he phrase 'physical force' means **violent** force – that is, force capable of causing physical pain or injury to another person." *Johnson*, 130 S. Ct. at 1270(emphasis in original; citation omitted). "It plainly refers to force exerted by and through concrete bodies – distinguishing physical force from, for example, intellectual force or emotional force." *Id*. at 1270.

The plain language of the bank robbery statute allows robbery to be committed, at a minimum, "by intimidation." As stated above, the "physical force" language of § 924(c)(3)(A) requires "force capable of causing physical pain or injury to another person." *Johnson,* 130 S. Ct. at 1272 (2010). "It plainly refers to force exerted by and through concrete bodies – distinguishing physical force from, for example, intellectual force or emotional force." *Id*. at 1265.

Robbery "by intimidation", as is the instant case, is comparable to inflicting "intellectual force or emotional force" to commit the crime, and *Johnson* (2010) clearly holds that this does not meet the definition of "physical force" under § 924(e)(2)(B)(i). The Petitioner was never charged with shooting the gun at a bank teller or even touching anyone in the bank. Here we are dealing only with "intellectual or emotional force". Finding that armed bank robbery is not a crime of violence under § 924(c) is consistent with the Fifth Circuit's holdings in *United States v. Dentler*, 492 F.3d 306, 313 (5th Cir. 2007) (citation omitted) (holding that bank robbery under the second paragraph of § 2113(a) does not meet the crime of violence definitions in U.S.S.G. § 4B1.2(a) or 18 U.S.C. § 924(c).

Burglary, arson, extortion, and <u>any use of explosives</u> were crimes considered to be violent felonies at the time, but as the Government confirmed during trial, the pipe bomb was fake - therefore there is no issue as to use of explosives. While it does create the emotional force of fear, Petitioner's §2113(d) charge does not pass the physical force test of the elements clause - §2113(a).

Bank robbery fails to meet the definition of "crime of violence" under § 924(c). Committing the crime requires no physical force, and the residual clause is no longer a constitutional option to decide the crime of violence issue. Since the bank robbery conviction fits into neither of the categories defining "crime of violence," Petitioner's conviction under 18 U.S.C. § 924(c)(1)(A) and (D) cannot be the basis for a sentence as suggested by the PSI.

Petitioner was found guilty at trial by jury on March 30, 2016. Petitioner's date of conviction was established well before the Sentencing Commission's amended §924(e) residual clause to include robbery on August 1, 2016. When Petitioner was adjudicated guilty on March 30, 2016, there was no residual clause in effect that would make Petitioner's §2113(a) and §2113(d) a crime of violence to apply a §924(c) career enhancement to Petitioner's PSI. Therefore, Judge Aycock should not have applied the Sentencing Commission's amended residual clause to include robbery to Petitioner's sentence. The Sentencing Commission's amended residual clause is not retroactive back to November 2015 and should not be applied to Petitioner's case.

B. PETITIONER CANNOT BE CLASSIFIED AS A CAREER OFFENDER BECAUSE THE UNDERLYING OFFENSE IS NOT A CRIME OF VIOLENCE.

1. Since armed bank robbery is not a crime of violence under the residual clause or the elements clause, it cannot be sentenced as such.

For the same reasons set forth above, Petitioner cannot be deemed a career offender under U.S.S.G. §§ 4B1.1 and 4B1.2 because the underlying offense, armed bank robbery, is not a crime of violence. An offense qualifies as a "crime of violence" if it is "punishable by imprisonment for a term exceeding one year" and it:

> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another [known as the elements clause]; or
> (2) is burglary of a dwelling, arson, or extortion, involves use of explosives [known as the enumerated offenses clause], or otherwise involves conduct that presents a

> *serious potential risk of physical injury to another* [known as the residual clause].U.S.S.G. § 4B1.2(a) (emphasis added).

The Supreme Court held in *Johnson* that ACCA's residual clause 18 U.S.C. § 924(e)(2)(B)(ii), which is identical to the residual clause referenced above, was unconstitutionally void for vagueness in all applications. It follows from *Johnson* that the identical residual clause in the Guidelines is also void for vagueness. The argument that armed bank robbery is not a crime of violence under the force clause is the same as above.

2. Crimes that are enumerated in the Commentary to the Guidelines, but not in the body of the applicable Guidelines provision itself, cannot be considered crimes of violence in the career offender analysis.

U.S.S.G. § 4B1.2(a)(2) states a number of enumerated crimes of violence. Petitioner's relevant crime of conviction, armed bank robbery, is not enumerated in this Guidelines provision. However, robbery is an enumerated offense under the Commentary to § 4B1.2(a)(2). See U.S.S.G. § 4B1.2(a)(2), Application Note 1.

In *Stinson v. United States*, 113 S. Ct. 1913, 1915 (1993), the Supreme Court held, "[w]e decide that commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." Put another way, the Commentary may illuminate or illustrate a Guidelines provision's language, but it may not expand its scope or alter its meaning. *United States v. Shell*, 789 F.3d 335, 345 (4th Cir. 2015) (citing *Stinson*, 508 U.S. at 43) (holding "§ 4B1.2

provides a separate two-part definition of crime of violence in its text, with the commentary serving only to amplify that definition, and any inconsistency between the two resolved in favor of the text[.]"); *United States v. Rayo-Valdez*, 302 F.3d 314, 318 n.5 (5th Cir. 2002) (holding that the Commentary to the Guidelines carries the same force as the Guidelines provisions themselves "as long as the language and the commentary are not inconsistent.").

Prior to *Johnson*, when the residual clause of § 4B1.2(a)(2) was in force, including robbery as a crime of violence, the Commentary was consistent with the language of § 4B1.2(a)(2). It simply reflected the Sentencing Commission's determination in the residual clause that robbery "otherwise involves conduct that presents a serious potential risk of physical injury to another."

Now that the Supreme Court has declared the residual clause unconstitutionally vague under § 924(e), any Application Note purporting to define the residual clause's reach or enumerate its contents is irrelevant and inapplicable. The Application Note in issue does just that because it attempts to expand the residual clause to include a number of offenses, including robbery, that are not in the text of § 4B1.2. Therefore, Application Note 1 is inapplicable to Petitioner's case, and armed bank robbery cannot be considered an enumerated offense under § 4B1.2(a)(2).

VI. CONCLUSION

The Court should grant review for the above stated compelling reasons. Thus, the Petitioner respectfully requests that this Court grant the instant Petition for Writ of Certiorari.

RESPECTFULLY SUBMITTED:

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