

IN THE SUPREME COURT OF THE UNITED STATES

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CHRIS EUGENE COSNER, PETITIONER

v.

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d), is a "crime of violence" under 18 U.S.C. 924(c)(3).

(I)

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No. 21-5657

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C1-C2) is not published in the Federal Reporter but is reprinted at 690 Fed. Appx. 292. The court's re-entered judgment (Pet. App. A2) is not published in the Federal Reporter but is available at 2021 WL 4185960. The opinion and orders of the district court are unreported but are available at 2016 WL 5106979, 2016 WL 5108026, and 2021 WL 4185960.

JURISDICTION

The original judgment of the court of appeals (Pet. App. C1) was entered on June 13, 2017, and was re-entered (Pet. App. A2) on

April 6, 2021. By order of March 19, 2020, this Court extended the deadline for all petitions for a writ of certiorari due on or after that date to 150 days from the date of the lower court judgment or order denying a timely petition for rehearing. The petition for a writ of certiorari was not filed until September 9, 2021, more than 150 days after the court of appeals' re-entered judgment, and it is therefore out of time under Rule 13.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

#### STATEMENT

Following a jury trial in the United States District Court for the Northern District of Mississippi, petitioner was convicted on one count of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d), and one count of brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) (1) (A). Pet. App. B1. The court sentenced petitioner to 360 months of imprisonment, to be followed by five years of supervised release. Id. at B2-B3. The court of appeals affirmed. Id. at C1-C2.

1. On July 1, 2015, petitioner entered the First American National Bank in Saltillo, Mississippi carrying a gun and wearing a hood and a mask. Presentence Investigation Report (PSR) ¶ 6. He ordered the bank's customers to the floor and demanded that the tellers open the vault. Ibid. When a teller informed petitioner

that she lacked keys to the vault, he ordered the tellers to place money from their drawers into bags that he provided. Ibid. Petitioner warned the tellers against including any bait money or dye packs. Ibid. Petitioner also placed a white bag on the teller counter containing a device that resembled a pipe bomb. Ibid. Petitioner announced that the bag contained a bomb and threatened to detonate it if anyone called law enforcement or "did anything" within 10 minutes. PSR ¶ 7.

Petitioner then fled the bank with a bag of money. PSR ¶ 7. As he fled, bank employees saw smoke from a dye pack coming out of the bag with the money. Ibid. Shortly thereafter, a dentist at a nearby office observed a man hiding in the bushes. PSR ¶ 8. The dentist instructed an employee to call 911, retrieved a pistol from his car, and confronted petitioner holding a bag with smoke emanating from it. Ibid.

Multiple police officers arrived at the scene and arrested petitioner. PSR ¶ 9. In response to questioning, petitioner stated that the device he had left at the bank was "just a pipe with chalk crushed up and hooked to it." Ibid. Petitioner also provided officers with the general location where he had dropped his gun. Ibid. Officers went there and located a 9mm pistol and petitioner's bag, which contained the stolen money and an exploded dye pack. Ibid. Law enforcement later searched petitioner's residence, where they found an empty gun box that matched the

manufacturer and serial number of the gun that they had recovered at the scene. PSR ¶ 12.

2. A federal grand jury in the Northern District of Mississippi charged petitioner with one count of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d), and one count of using, carrying, and brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) (1) (A). Indictment 1-2. Petitioner proceeded to trial and the jury found him guilty on both counts. PSR ¶ 4.

Before sentencing, petitioner argued that his Section 924(c) conviction should be vacated on the theory that armed bank robbery is not a "crime of violence" under Section 924(c). D. Ct. Doc. 40, at 1 (Aug. 3, 2016). Section 924(c) (3) defines a "'crime of violence'" as a felony offense that either "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," 18 U.S.C. 924(c) (3) (A), or, "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," 18 U.S.C. 924(c) (3) (B). Petitioner argued that armed bank robbery does not qualify as a crime of violence under Section 924(c) (3) (A), and that Section 924(c) (3) (B) was unconstitutionally vague in light of Johnson v. United States, 576 U.S. 591 (2015), which held that the "residual clause" of the

Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(ii), is void for vagueness, 576 U.S. at 597. See D. Ct. Doc. 40, at 2-7.

The district court denied petitioner's motion. See 2016 WL 5108026. The court explained that petitioner's "underlying offense [of] conviction under [Section] 2113(a) and (d) qualifies as a crime of violence under the elements clause of" Section 924(c)(3)(A), because federal armed bank robbery requires "the use, attempted use, or threatened use of physical force against the person or property" of another. Id. at \*2-\*3 (citation omitted). The court likewise found that armed bank robbery is a "crime of violence" under the identically worded career-offender provision in Sentencing Guidelines § 4B1.2(a)(1) (2015), and accordingly applied that provision when calculating petitioner's recommended sentencing range under the Guidelines. 2016 WL 5108026, at \*3-\*4.

The district court sentenced petitioner to 360 months of imprisonment, consisting of 276 months on the armed bank-robbery count and a consecutive sentence of 84 months on the Section 924(c) count, to be followed by five years of supervised release. Pet. App. B2-B3.

3. In 2017, the court of appeals affirmed in an unpublished per curiam opinion. Pet. App. C1-C2. The court observed that petitioner's argument that his armed bank-robbery conviction did not qualify as a "'crime of violence'" under Section 924(c) was

"foreclosed" by circuit precedent recognizing that "federal bank robbery is \* \* \* categorically a 'crime of violence.'" Ibid. (citing United States v. Brewer, 848 F.3d 711, 714-716 (5th Cir. 2017)). The court also rejected petitioner's related contention that armed bank robbery did not qualify as a "crime of violence" under Sentencing Guidelines § 4B1.2(a)(1) (2015). Id. at C1. Petitioner did not file a petition for a writ of certiorari.

4. On March 19, 2021, petitioner filed a motion to recall the court of appeals' mandate. Petitioner asserted that, after the court of appeals issued its decision in June 2017, his attorney failed to advise him of his right to file a petition for a writ of certiorari in this Court. Petitioner asked the court of appeals to re-enter its previous judgment in order to restart the period for him to file a petition for a writ of certiorari. The court granted petitioner's motion, recalled its mandate, and re-entered its previous judgment. See Pet. App. A5-A6.

#### ARGUMENT

Petitioner contends (Pet. 3-12) that armed bank robbery is not a "crime of violence" under 18 U.S.C. 924(c)(3)(A). Even if this Court elects to disregard the untimeliness of the petition for a writ of certiorari, that contention lacks merit, and this Court has repeatedly denied review of petitions raising similar issues. The petition for a writ of certiorari should be denied.

1. The petition for a writ of certiorari is untimely, and it could be denied on that ground alone. The court of appeals re-entered its judgment on April 6, 2021, and the 150-day deadline for filing a petition for a writ of certiorari began to run on that date. See Sup. Ct. R. 13.1 and 13.3; p. 2, supra. Petitioner did not seek rehearing in the court of appeals and did not ask this Court for an extension of the time within which to file a petition for a writ of certiorari. Cf. Sup. Ct. R. 13.5. Thus, the time for filing a petition for a writ of certiorari expired on Friday, September 3, 2021. But the petition was not filed until September 9, and it is therefore out of time. Although this Court has discretion to consider an untimely petition for a writ of certiorari in a criminal case, see Schacht v. United States, 398 U.S. 58, 63-65 (1970), petitioner -- who is represented by counsel -- offers no explanation or justification for his untimeliness, and none is apparent from the record.

2. Even if the petition were timely, it would not warrant this Court's review. The court of appeals correctly recognized that armed bank robbery is a "crime of violence" under 18 U.S.C. 924(c) (3) (A).

A conviction for armed bank robbery requires proof that the defendant (1) took or attempted to take money from the custody or control of a bank "by force and violence, or by intimidation," 18 U.S.C. 2113(a), and (2) either committed an "assault[ ]" or

endangered "the life of any person" through "the use of a dangerous weapon or device" in committing the robbery, 18 U.S.C. 2113(d). For the reasons stated in the government's brief in opposition to the petition for a writ of certiorari in Johnson v. United States, No. 19-7079 (Apr. 24, 2020), armed bank robbery qualifies as a crime of violence under Section 924(c) because it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," 18 U.S.C. 924(c) (3) (A). See Gov't Br. in Opp. at 7-25, Johnson, supra (No. 19-7079).<sup>1</sup>

Petitioner argues (Pet. 9-12) that armed bank robbery does not qualify as a crime of violence under Section 924(c) (3) (A) on the theory that robbery "by intimidation" does not require a threat of violence or proof of knowing and intentional conduct. That argument lacks merit for the reasons explained at pages 9-20 of the government's brief in opposition in Johnson, supra (No. 19-7079). Every court of appeals with criminal jurisdiction, including the court below, has recognized that Section 924(c) (3) (A) and similarly worded provisions encompass federal bank robbery and armed bank robbery. See id. at 7-8. This Court has recently and repeatedly denied petitions for a writ of

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<sup>1</sup> We have served petitioner with a copy of the government's brief in opposition in Johnson, which is also available from this Court's online docket.

certiorari challenging that consensus, see id. at 7-8 & n.1,<sup>2</sup> and the same result is warranted here.

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<sup>2</sup> See also, e.g., Gambina v. United States, No. 20-7792, 2021 WL 4507913 (Oct. 4, 2021) (armed bank robbery); Davis v. United States, 141 S. Ct. 2841 (2021) (No. 20-7126) (aiding and abetting armed bank robbery); Cernak v. United States, 141 S. Ct. 2839 (2021) (No. 20-6447) (armed bank robbery); Jordan v. United States, 141 S. Ct. 2837 (No. 19-7067) (armed bank robbery); Fields v. United States, 141 S. Ct. 2828 (2021) (No. 20-7413) (armed bank robbery); Thomas v. United States, 141 S. Ct. 2827 (2021) (No. 20-7382) (armed bank robbery); Alvarez v. United States, 141 S. Ct. 2825 (2021) (No. 20-7235) (armed bank robbery); Douglas v. United States, 141 S. Ct. 2824 (2021) (No. 20-7223) (bank robbery); Dent v. United States, 141 S. Ct. 2824 (2021) (No. 20-7213) (armed bank robbery); Godwin v. United States, 141 S. Ct. 2823 (2021) (No. 20-7137) (bank robbery); Alexander v. United States, 141 S. Ct. 2822 (2021) (No. 20-7081) (armed bank robbery); Davis v. United States, 141 S. Ct. 2818 (2021) (No. 20-6742) (bank robbery); Ward v. United States, 141 S. Ct. 2817 (2021) (No. 20-6582) (armed bank robbery); Davis v. United States, 141 S. Ct. 2813 (2021) (No. 20-6284) (armed bank robbery); Northcutt v. United States, 141 S. Ct. 2808 (2021) (No. 20-5640) (armed bank robbery); Peterson v. United States, 141 S. Ct. 2806 (2021) (No. 20-5396) (armed bank robbery); Blanche v. United States, 141 S. Ct. 2791 (2021) (No. 19-8899) (aiding and abetting armed bank robbery); Velasquez v. United States, 141 S. Ct. 2791 (No. 19-8191) (armed bank robbery); Harvey v. United States, 141 S. Ct. 2790 (2021) (No. 19-8004) (attempted bank robbery); Simpson v. United States, 141 S. Ct. 2790 (2021) (No. 19-7764) (armed bank robbery); Ames v. United States, 141 S. Ct. 2789 (2021) (No. 19-7569) (bank robbery and armed bank robbery); Vidrine v. United States, 141 S. Ct. 2789 (2021) (No. 19-8044) (armed bank robbery); Cullett v. United States, 141 S. Ct. 2788 (2021) (No. 19-8190) (armed bank robbery); Rogers v. United States, 141 S. Ct. 2788 (2021) (No. 19-7320) (bank robbery); Gray v. United States, 141 S. Ct. 2788 (2021) (No. 19-7113) (armed bank robbery and attempted armed bank robbery); Johnson v. United States, 141 S. Ct. 2788 (2021) (No. 19-7079) (armed bank robbery); Chapnick v. United States, 141 S. Ct. 2765 (2021) (No. 20-7386) (armed bank robbery); Mitchell v. United States, 141 S. Ct. 1728 (2021) (No. 20-6622) (armed bank robbery).

3. Petitioner briefly argues (Pet. 12-14) that armed bank robbery is not a "crime of violence" under the career-offender provision in Sentencing Guidelines § 4B1.2(a)(1) (2015), which is identically worded to the definition of "crime of violence" in Section 924(c) and which the district court applied when sentencing petitioner. See p. 5, supra; Sentencing Guidelines § 4B1.2(a)(1) (2015) (defining "'crime of violence'" as any federal or state felony offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another"). Petitioner does not, however, seek this Court's review of that issue. See Pet. i. Even if he had, this Court ordinarily does not review decisions interpreting the Sentencing Guidelines, because the Sentencing Commission can amend the Guidelines to eliminate any conflict or correct any error. See Braxton v. United States, 500 U.S. 344, 347-349 (1991).

In any event, petitioner's argument about the Sentencing Guidelines lacks merit for the same reasons discussed above with respect to his challenge under Section 924(c)(3)(A). See pp. 7-9, supra. And moreover, petitioner's conviction for armed bank robbery would qualify as a "crime of violence" under Sentencing Guidelines § 4B1.2(a) (2015) irrespective of the question presented. When petitioner was sentenced, the official commentary to that guideline expressly stated that a "'[c]rime of violence' includes \* \* \* robbery." Sentencing Guidelines § 4B1.2, comment.

(n.1) (2015); see Beckles v. United States, 137 S. Ct. 886, 897-898 (2017) (Ginsburg, J., concurring) (explaining that “[the defendant’s] conduct was ‘clearly proscribed’” in light of the Guidelines commentary) (citation omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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