No. _____

In the

Supreme Court of the United States

_____

Lashawna Lashae Stewart,

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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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 holds 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

Petitioner is Lashawna Lashae Stewart, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Lashawna Lashae Stewart seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals was not published but is available at *United States v. Lashawna Lashae Stewart*, No. 22-10882, 2023 WL 1529816 (5th Cir. Feb. 3, 2023). It is reprinted in Appendix A to this Petition. The district court's judgment and sentence is attached as Appendix B.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on February 3, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY RULES PROVISIONS

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.

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." 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, however, does require proof of the use, attempted use, or threatened use of physical force against another person. *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. 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 4 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 OF THE CASE

On February 19, 2022, Lashawna Lashae Stewart robbed Texas Trust Credit Union in Grand Prairie, Texas, with a hand-written note stating "Give me the money. I have a gun." (*See* ROA.171). Police apprehended Ms. Stewart that same day and, (ROA.171), on January 7, 2015, Ms. Stewart was indicted on one count of federal bank robbery, in violation of 18 U.S.C. § 2113(a). (ROA.24–25). On May 11, 2022, Ms. Stewart pleaded guilty to the indictment. (ROA.55).

In its Presentence Report, U.S. Probation applied the Chapter Four "career offender" enhancement, under USSG § 4B1.1, which raised Ms. Stewart's adjusted offense level (before considering acceptance of responsibility) from 24 to 32. (ROA.174). It also raised Ms. Stewart's criminal history category from III to VI. (ROA.181). The enhancement was based on the probation officer's conclusion that the instant offense was a crime of violence and that Ms. Stewart had two prior felony convictions that were crimes of violence. (ROA.174).

Defense counsel filed written objections to the presentence investigation report's application of the career offender guideline. (ROA.198–201). Although conceding that the arguments was foreclosed by *United States v. Brewer*, 848 F.3d 711 (5th Cir. 2017), and *United States v. Butler*, 949 F.3d 230 (5th Cir. 2020), Ms. Stewart argued that the instant offense, federal bank robbery, was not a crime of violence because the offense neither contains the use or threatened use of physical force as a necessary element, (ROA.198–99). U.S. Probation filed an addendum to the presentence report, in which it declined to accept defense counsel's objection. (ROA.206). Although defense counsel raised objection again at the sentencing hearing, district judge overruled Ms. Stewart's objections "based on current precedent." (ROA.154–55).

After overruling Ms. Stewart's objection to the career offender enhancement, the district court accepted the presentence investigation report as written, (ROA.155), which recommended a sentencing range of 151 to 188 months. (ROA.191). Although Ms. Stewart's counsel argued for a sentence of 72 months' imprisonment, the district court sentenced Ms. Stewart within the Guideline imprisonment range to 160 months' imprisonment followed by a 3-year term of supervised release. (ROA.56). Had the judge sustained Ms. Stewart's objection, assuming all aspects of the presentence investigation report remained unchanged, Ms. Stewart's sentencing range, under the Guidelines, would have been 46 to 57 months.

On appeal, Ms. Stewart argued that the federal bank robbery statute, 18 U.S.C. § 2113(a) could not be used as a predicate offense to trigger the "career

offender" enhancement of USSG §4B1.1 because federal bank robbery is neither a controlled substance offense nor a crime of violence. Appellant's Br., *United States v. Stewart*, No. 10882 (5th Cir.) (filed Nov. 28, 2022). Upon the government's motion, the Fifth Circuit granted summary affirmance, citing *United States v. Butler*, 949 F.3d 230, 232–36 (5th Cir. 2020), and *United States v. Brewer*, 848 F.3d 711, 714–16 (5th Cir. 2017). [App. A at * 1–2].

REASON FOR GRANTING THIS 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 reads *Prince* differently. Under Fifth Circuit precedent, *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 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; instead, *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 2256–57; *see* (ROA.24). 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 2256–57.

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 implicating the career offender provision of USSG § 4B1.2. 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 a career offender enhancement.

CONCLUSION

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

Respectfully submitted this 1st day of May, 2023.

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