No. 25-5063

IN THE SUPREME COURT OF THE UNITED STATES

JOHN ARMSTRONG, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether bank robbery and attempted bank robbery, in violation of 18 U.S.C. 2113(a), are "crime[s] of violence" as defined in 18 U.S.C. 924(c)(3)(A).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (M.D. Fla.):

United States v. Armstrong, No. 19-cr-224 (Apr. 14, 2021)

United States Court of Appeals (11th Cir.):

United States v. Armstrong, No. 21-11252 (Dec. 15, 2021)

United States v. Armstrong, No. 21-11252 (Dec. 11, 2024)

Supreme Court of the United States:

Armstrong v. United States, No. 21-7933 (Oct. 3, 2022)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A34) is reported at 122 F.4th 1278. A prior vacated opinion of the court is available at 2021 WL 5919822.

JURISDICTION

The judgment of the court of appeals was entered on December 11, 2024. A petition for rehearing was denied on March 3, 2025 (Pet. App. C1-C2). On June 2, 2025, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including July 1, 2025. The petition for a writ of certiorari was not filed until July 3, 2025, and is out of time under Rule 13

of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Middle District of Florida, petitioner was convicted on one count of Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) and (b); two counts of bank robbery, in violation of 18 U.S.C. 2113(a); one count of attempted bank robbery, in violation of 18 U.S.C. 2113(a); and three counts of brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(ii). Judgment 1. The district court sentenced him to 420 months of imprisonment, to be followed by five years of supervised release. Judgment 3-4. After the court of appeals affirmed, this Court granted a petition for a writ of certiorari, vacated the court of appeals' judgment, and remanded for further consideration in light of United States v. Taylor, 596 U.S. 845 (2022). 143 S. Ct. 72. On remand, the court of appeals again affirmed. Pet. App. A1-A34.

1. In 2019, petitioner and others committed a series of gunpoint robberies in central Florida, targeting a convenience store and three banks. See C.A. App. 60-69 (stipulated factual basis for guilty plea). Petitioner carried out the first robbery alone. At around 2:00 A.M. on June 14, 2019, he "ran into a 7-Eleven convenience store wearing all black clothing and a blue and white mask," carrying a gun. Id. at 60. Petitioner pointed his

gun at the store's two employees and demanded money, using the gun to strike one of the employees in the head before the other employee opened and emptied the cash registers. Ibid. Petitioner stole about $350 and fled. Ibid.

On July 31, 2019, petitioner lay in wait in the bushes outside of a bank, wearing a mask and carrying a gun. C.A. App. 62. When a bank employee arrived for work, petitioner jumped out from the bushes and demanded entry. Ibid. Once inside, petitioner forced the employee and another teller to open the vault and to fill petitioner's bag and backpack with about $151,000 in cash. Ibid.

On September 25, 2019, petitioner tried a similar tactic at a second bank. C.A. App. 64. Petitioner and a coconspirator hid in bushes near the bank before daybreak, forced their way inside as tellers arrived for work, held the tellers at gunpoint, and ordered them to get money out of a safe. Id. at 64-66. The robbery was foiled when the bank's alarm went off. Id. at 66.

The following day, September 26, petitioner tried again at a third bank. C.A. App. 64. Petitioner and his coconspirator again hid in the bushes, forced their way inside as employees arrived, and demanded money at gunpoint. Id. at 66. This time, the men came away with about $22,000 in cash. Id. at 64.

2. A federal grand jury in the Middle District of Florida returned an indictment charging petitioner with Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) and (b); using, carrying, and brandishing a firearm during and in relation to ta crime of

violence (the Hobbs Act robbery), in violation of 18 U.S.C. 924(c)(1)(A)(ii); two counts of bank robbery, in violation of 18 U.S.C. 2113(a); two more counts of using, carrying, and brandishing a firearm during and in relation to a crime of violence (the bank robberies), in violation of 18 U.S.C. 924(c)(1)(A)(ii); one count of attempted bank robbery, in violation of 18 U.S.C. 2113(a); one additional count of using, carrying, and brandishing a firearm during and in relation to a crime of violence (the attempted bank robbery), in violation of 18 U.S.C. 924(c)(1)(A)(ii); one count of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 18 U.S.C. 924(a)(2) (2018); and one count of possessing cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1). Second Superseding Indictment 1-4, 6-11.

Petitioner pleaded guilty to each of the robbery or attempted robbery counts and three of the Section 924(c) counts. Judgment 1. In exchange, the government dismissed the remaining charges. Plea Agreement 3.

3. Before sentencing, petitioner objected to the imposition of any sentence for his Section 924(c) violations. See C.A. App. 74-75. Section 924(c) makes it a felony to use or carry a firearm "during and in relation to any crime of violence." 18 U.S.C. 924(c)(1)(A). Section 924(c) defines the term "crime of violence" in two parts, with both an elements-based clause and a residual clause covering other offenses: A "crime of violence" is any felony that "(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." 18 U.S.C. 924(c)(3). In United States v. Davis, 588 U.S. 445 (2019), this Court held that Section 924(c)'s residual clause is "unconstitutionally vague," id. at 448, leaving the elements clause as the only enforceable definition of a "crime of violence" for Section 924(c) purposes. Citing Davis, petitioner maintained at his sentencing that Section 924(c) as a whole was "void for vagueness." C.A. App. 74-75.

The district court found petitioner's objections to be foreclosed by circuit precedent, C.A. App. 175, and proceeded to sentence him to an aggregate term of 420 months of imprisonment, to be followed by five years of supervised release, Judgment 3-4.

4. The court of appeals affirmed. 2021 WL 5919822. The court explained that the holding of Davis applies only to the residual clause in Section 924(c)'s definition of "crime of violence," not to the elements clause, and that the elements clause itself is not "unconstitutionally void for vagueness." Id. at *1. The court further explained that its pre-Davis precedent already established that "bank robbery under § 2113(a) * * * categorically qualifies as a crime of violence under" the elements clause. Id. at *2. And the court saw no reason to distinguish

between the offenses of completed and attempted bank robbery for purposes of Section 924(c)'s elements clause. Ibid.

Petitioner filed a petition for a writ of certiorari. While that petition was pending, this Court held in United States v. Taylor that attempted Hobbs Act robbery is not a "crime of violence" under Section 924(c)'s elements clause. See 596 U.S. at 851. In so holding, the Court rejected the view that "the elements clause encompasses not only any offense that qualifies as a 'crime of violence' but also any attempt to commit such a crime." Id. at 853. The Court reasoned that "[t]he elements clause does not ask whether the defendant committed a crime of violence or attempted to commit one," but rather whether the offense that the defendant in fact committed has "as an element the use, attempted use, or threatened use of force." Ibid. Following Taylor, this Court granted certiorari in petitioner's case, vacated the court of appeals' judgment, and remanded for further consideration in light of Taylor. See 143 S. Ct. 72.

5. On remand, the court of appeals again affirmed. Pet. App. A1-A34. The court recognized that, under the categorical approach, an offense qualifies as a crime of violence under Section 924(c)'s elements clause only if a conviction for the offense "always" requires the government to prove "as an element of the offense, the use, attempted use, or threatened use of force." Id. at A8. And it found that the predicate offenses for petitioner's

Section 924(c) violations satisfied that test. Id. at A17, A22-A23.

As a threshold matter, the court of appeals assessed whether 18 U.S.C. 2113(a), which contains the offense of bank robbery, is "divisible or indivisible." Pet. App. A9. The court explained that an "indivisible statute is one which 'sets out a single (or "indivisible") set of elements to define a single crime,' even though it may also spell out 'various factual ways of committing some component of the crime.'" Ibid. (quoting Mathis v. United States, 579 U.S. 500, 504-506 (2016)). "A divisible statute, on the other hand, 'may list elements in the alternative, and thereby define multiple crimes.'" Id. at A9-A10 (quoting Mathis, 579 U.S. at 505). In applying a categorical approach to such a statute, a court may review "a limited set of documents," such as the indictment or plea agreement, to determine "which specific crime, comprising which elements, the defendant committed." Id. at A10.

The court of appeals determined that "§ 2113(a) is a divisible statute and that § 2113(a)'s first paragraph criminalizes the two separate offenses of bank robbery, on the one hand, and bank extortion, on the other." Pet. App. A11. Section 2113(a) states that "[w]hoever, 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" in the custody of a federally insured bank commits a felony. 18 U.S.C. 2113(a). The court observed that a "plain reading of the

text supports the conclusion that" taking property by force or intimidation and obtaining property by extortion are separate crimes and "not alternate means of committing one crime." Pet. App. A12. The court explained that the "distinction between 'taking' and 'obtaining' reflects the fundamental division between robbery and extortion, namely, that robbery involves taking possession of the property of another against his will while extortion involves taking possession of the property of another with consent -- albeit grudging or coerced." Ibid. (citing Ocasio v. United States, 578 U.S. 282, 297 (2016)). And the court found additional support for that understanding in the statutory history -- noting that Section 2113(a)'s first paragraph had originally prohibited only bank robbery but Congress had amended it in 1986 to reach bank extortion. Id. at A13-A14.

The court of appeals found that two of petitioner's Section 924(c) convictions rest on the predicate offense of Section 2113(a) bank robbery -- not bank extortion. Pet. App. A15-A16. The court then rejected petitioner's contention that Section 2113(a) bank robbery is not a crime of violence under the elements clause because such a robbery may be committed "by force and violence, or by intimidation." 18 U.S.C. 2113(a) (emphasis added). The court adhered to circuit precedent under which the "by intimidation" element, ibid., requires conduct from which "'an ordinary person in the [victim's] position reasonably could infer a threat of bodily harm,'" and explained that Section 2113(a) bank robbery

"fits neatly" into the elements clause because it requires proof of either the use of force or the threatened use of force. Id. at A16-A17 (citation omitted).

The court of appeals also rejected petitioner's challenge to his third Section 924(c) conviction, which rests on the offense of attempted bank robbery. Pet. App. A17-A23. The court recognized that Taylor had abrogated the circuit precedent on which the panel had relied in its earlier decision, under which any attempt to commit a crime of violence is itself also a crime of violence. Id. at A18. Considering the matter afresh, the court parsed the text of Section 2113(a) and found that the specific offense of attempted bank robbery nonetheless continues to satisfy Section 924(c)'s elements. Id. at A19. The court observed that "under the statutory text, one commits an attempted bank robbery when, by force and violence or by intimidation, he attempts to take money from a federally insured bank." Id. at A20. Although it noted disagreement among other circuits on the issue, the court emphasized "Congress criminalized only attempt[ed]" bank robberies that "occur 'by force and violence, or by intimidation.'" Ibid.; see id. at A21 n.5.

Judge Jordan concurred in part and dissented in part. Pet. App. A24-A34. He agreed with the majority that Section 2113(a) is divisible into the separate offenses of bank robbery and bank extortion, but he would have held that attempted bank robbery is not categorically a crime of violence. Id. at A24.

ARGUMENT

Petitioner renews his contention (Pet. 14-24) that bank robbery and attempted bank robbery, in violation of 18 U.S.C. 2113(a), are not categorically "crime[s] of violence" as that term is defined in 18 U.S.C. 924(c)(3)(A). Even if this Court were to disregard the untimeliness of the petition for a writ of certiorari, petitioner does not identify any compelling basis for further review. The court of appeals correctly determined that Section 2113(a)'s first paragraph is divisible into the separate offenses of bank robbery and bank extortion, and that attempted bank robbery is a "crime of violence" under Section 924(c)'s elements clause. The shallow and nascent circuit disagreement regarding the divisibility of Section 2113(a), see Pet. 14, does not warrant further review at this time. The petition should be denied.[1]

1. The petition for a writ of certiorari is untimely, and could be denied on that ground alone. This Court's Rules provide that a petition for a writ of certiorari seeking review of the judgment of a federal court of appeals "is timely when it is filed * * * within 90 days after entry of the judgment," Sup. Ct. R. 13.1, and that the time to file such a petition "runs from the date of the denial of rehearing" when any party files a timely

[1] Similar questions are presented in the petitions for writs of certiorari in Henderson v. United States, No. 25-13 (filed July 1, 2025), and Vines v. United States, No. 25-106 (filed July 25, 2025).

request for rehearing in the lower court, Sup. Ct. R. 13.3. The Court's Rules further provide that, "[f]or good cause, a Justice may extend the time to file a petition * * * for a period not exceeding 60 days." Sup. Ct. R. 13.5.

Here, the court of appeals entered its judgment on December 11, 2024, Pet. App. A1, and denied a timely petition for rehearing on March 3, 2025, id. at C1-C2. Petitioner's default deadline for seeking this Court's review was therefore Monday, June 2, 2025. See Sup. Ct. R. 30.1. On June 2, 2025, Justice Thomas extended the time to file a petition to and including July 1, 2025. According to the docket, however, the petition was not filed until July 3, 2025, and it is therefore out of time.[2]

This Court has discretion to consider an untimely petition for a writ of certiorari in a criminal case if "the ends of justice so require," Schacht v. United States, 398 U.S. 58, 64 (1970); see also Bowles v. Russell, 551 U.S. 205, 212 (2007). But petitioner, who is represented by counsel, offers neither explanation nor justification for the untimeliness of his petition, and none is apparent from the record.

2. Even if the petition were timely, it would not warrant this Court's review. With respect to the first question presented in the petition (Pet. 1, 14-20), the court of appeals correctly

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[2] Petitioner's materials -- including the certificate of service and motion for leave to proceed in forma pauperis -- are dated July 1, 2025, but the docket reflects that the petition was not filed until July 3 (and not docketed until July 9).

recognized that 18 U.S.C. 2113(a) "is a divisible statute" and that Section 2113(a)'s first paragraph "criminalizes the two separate offenses of bank robbery, on the one hand, and bank extortion, on the other." Pet. App. A11. Petitioner observes (Pet. 7) that those questions have also been raised by another petitioner in a parallel case arising from the same circuit, Henderson v. United States, petition for cert. pending, No. 25-13 (filed July 1, 2025). See p. 10 n.1, supra. For the reasons discussed in the government's brief in that case, the decision below is correct, and in any event the divisibility question does not warrant further review at this time. See Br. in Opp. at 9-17, Henderson, supra (No. 25-13) (Henderson Br. in Opp.).[3]

Petitioner principally contends (Pet. 16-17) that Section 2113(a) must be understood to define a single criminal offense that may be committed by means of either robbery or extortion because the statute prescribes the same range of penalties for bank robbery and bank extortion. That contention is unsound. When a criminal statute lists several alternatives and specifies different penalties for each of them, the alternatives "must be elements" of different criminal offenses. United States v. Harrison, 56 F.4th 1325, 1332 (11th Cir. 2023) (quoting Mathis v. United States, 579 U.S. 500, 518 (2016)). But "it does not follow that alternatives carrying the same punishment" are necessarily

[3] We have served petition with a copy of the government's brief in opposition in Henderson.

merely different means of committing the same offense. Id. at 1333 (emphasis added); see Murillo-Chavez v. Bondi, 128 F.4th 1076, 1084 (9th Cir. 2025) ("Divisibility is not vitiated simply because each subsection carries with it the same punishment."). Here, Section 2113(a) defines the different offenses of bank robbery and bank extortion using different verbs ("takes" or "obtains"), 18 U.S.C. 2113(a), which track a centuries-old distinction between common-law robbery and extortion, see Henderson Br. in Opp. at 9-13. That Congress chose to subject both offenses to the same range of penalties does not overcome the other textual and historical evidence establishing that the offenses are distinct.

Petitioner's remaining contentions (Pet. 17-20) lack merit. See Henderson Br. in Opp. at 13-17 (addressing the same arguments). Petitioner is correct (Pet. 14) that in United States v. Burwell, 122 F.4th 984 (2024), the D.C. Circuit departed from the otherwise-uniform consensus in the courts of appeals and concluded that Section 2113(a) is "indivisible as to extortion" and that the singular robbery/extortion offense is not a crime of violence under Section 924(c)(3)(A) because "extortion can be accomplished using a threat of something other than violence," id. at 989. But the D.C. Circuit's reasoning in that case is mistaken. Among other things, the D.C. Circuit failed to give effect to the differing terms "take" and "obtain," misread the statutory history, and overlooked the common-law roots from which Section 2113(a) is drawn. The recent and shallow disagreement in the courts of

appeals created by the D.C. Circuit's outlier decision in Burwell does not warrant further review at this time, including because the practical significance of Burwell remains unclear. See Henderson Br. in Opp. at 15-17.

3. With respect to the second question in the petition (Pet. 1, 21-24), the court of appeals correctly recognized that the definition of "crime of violence" in Section 924(c)(3)(A) encompasses not only the divisible crime of bank robbery, but also the crime of attempted bank robbery. See Pet. App. A17-A23. Petitioner is wrong to assert that the "circuit courts of appeals are split 5-3 over whether attempted bank robbery is a crime of violence." Pet. 21 (emphasis omitted). The only courts of appeals to have squarely addressed the question have agreed that attempted bank robbery is a crime of violence under Section 924(c)'s elements clause, because the statute requires proof that the defendant acted "by force and violence, or by intimidation." 18 U.S.C. 2113(a); see Henderson Br. in Opp. at 19 (citing decisions of the Second, Third, Fifth, and Seventh Circuits).

That result follows naturally from the text and structure of the statute, which make clear that the phrase "by force and violence, or by intimidation" modifies both "takes" and "attempts to take." 18 U.S.C. 2113(a); see Henderson Br. in Opp. at 17-18. Accordingly, to prove an attempted bank robbery, the government must prove that the defendant in fact acted "by force and violence, or by intimidation," not merely that the defendant intended to do

so and took a substantial step toward the commission of the offense. 18 U.S.C. 2113(a). That additional proof requirement distinguishes attempted bank robbery from the attempted Hobbs Act robbery offense at issue in United States v. Taylor, 596 U.S. 845 (2022). Contra Pet. 22.

As the government acknowledged in its brief in opposition in Henderson (at 20), the Fourth, Sixth, and Ninth Circuits have held that the government is not required to prove that the defendant acted by force and violence, or by intimidation, in order to sustain a conviction for attempted bank robbery under Section 2113(a). Cf. Pet. 21 & n.3 (citing the same decisions). The relevant decisions, however, did not contain extensive reasoning, did not directly address whether Section 2113(a) satisfies Section 924(c)'s elements clause, and predate Taylor. And at least since Taylor, the government has consistently taken the position that attempted bank robbery under Section 2113(a) does require proof of force and violence or intimidation -- as the Second, Third, Fifth, and Seventh Circuits have held. See Henderson Br. in Opp. at 20.

To the extent that petitioner contends (Pet. 22-23) that any other circuits have endorsed his view, he is mistaken. In the additional cases petitioner identifies from other circuits, the courts of appeals were addressing the distinction between a "substantial step" toward the commission of a bank robbery and "mere preparation," in the context of a challenge to the sufficiency of the evidence. United States v. Chapdelaine, 989

F.2d 28, 33 (1st Cir. 1993) (citations omitted), cert. denied, 510 U.S. 1046 (1994); see United States v. Carlisle, 118 F.3d 1271, 1273-1274 (8th Cir.), cert. denied, 522 U.S. 974 (1997); United States v. Johnson, 962 F.2d 1308, 1312 (8th Cir.), cert. denied, 506 U.S. 928 (1992), and 507 U.S. 974 (1993); United States v. Crawford, 837 F.2d 339, 340 (8th Cir. 1988) (per curiam); United States v. Prichard, 781 F.2d 179, 181-182 (10th Cir. 1986); United States v. Barriera-Vera, 303 Fed. Appx. 687, 693-696 (11th Cir. 2008) (per curiam). They were not considering the circumstances in which force or violence might be required, let alone in the context of whether attempted bank robbery is a Section 924(c) predicate.

None of those decisions would foreclose a future panel from recognizing that attempted bank robbery satisfies Section 924(c)'s elements clause. And even if they did, those circuits -- like the Fourth, Sixth, or Ninth -- could reconsider the issue in light of Taylor and further developments, potentially through en banc review. If a conflict on the application of Section 924(c) to the divisible attempted bank robbery offense were to develop, the Court could consider at that time whether certiorari would be warranted. But any intervention at this time would be premature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2025