No. 19-___

IN THE

Supreme Court of the United States

CHAVEZ SPOTTED HORSE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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June 25, 2019

QUESTION PRESENTED

In 18 U.S.C. § 113(a)(3), Congress has proscribed assault with a dangerous weapon. But this statute does not define "dangerous weapon," so the courts have done so. Many courts of appeals employ a strict definition: an object used in a manner likely to endanger life or inflict great bodily harm. This formulation places reasonable limits on which objects can qualify. Yet the Eighth Circuit is an outlier, employing a much broader definition: an object merely capable of inflicting any degree of bodily injury. This formulation places almost no limits on which objects can qualify.

The question presented is:

Of these two alternative definitions of "dangerous weapon" under 18 U.S.C. § 113(a)(3), which is correct: (1) an object used in a manner likely to endanger life or inflict great bodily harm; or (2) an object capable of inflicting bodily injury?

LIST OF PARTIES

The only parties to the proceeding are those appearing in the caption to this petition.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases

United States Court of Appeals Cases

District Court Cases

United States Code

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Chavez Spotted Horse respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the Eighth Circuit (App. 1a-11a) is reported at 916 F.3d 686. The district court's decision to reject Petitioner's proposed "dangerous weapon" jury instruction (App. 12a-16a) was an unreported trial ruling. The Eighth Circuit's order denying rehearing by panel and rehearing en banc (App. 19a) is unreported, but available at 2019 U.S. App. LEXIS 9345.

JURISDICTION

The court of appeals entered judgment on February 20, 2019. Spotted Horse's timely petition for rehearing was denied by the court of appeals on March 28, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 113(a)(3) proscribes "[a]ssault with a dangerous weapon, with intent to do bodily harm."

The due process clause of the U.S. Constitution's Fifth Amendment provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

A. Introduction.

This case presents one question: what is the definition of "dangerous weapon" under 18 U.S.C. § 113(a)(3)? The question has split the federal courts of appeals, with the Eighth Circuit employing a starkly different definition than the others.

And the split is important. The Eighth Circuit's definition is very broad: all it requires of an object is the mere "capability" to inflict any degree of "bodily injury." With this definition, nearly any item—regardless of its manner of use or ability to cause major injury—qualifies as a "dangerous weapon." In contrast, many other courts of appeals employ a strict definition: an object qualifies only if it is "used in a manner likely" to "endanger life or inflict great bodily harm." That definition places reasonable limits on which objects can qualify as "dangerous weapons" in a given case. This discrepancy is also vital because more federal assault prosecutions occur in the Eighth Circuit than anywhere other than the Ninth.

Here, the Eighth Circuit was given an opportunity to adopt the strict definition in what it viewed as a case of first impression. But the panel made the wrong choice, finding no error in a jury instruction using the broad definition. This Court should make the correct choice, resolving this significant issue.

And this case is an excellent vehicle for the Court to do so. The Petitioner was convicted for using three innocuous plastic items—a kitchen spoon, a window blind

wand, and a clothes hanger—to spank his niece on three distinct occasions. But the government failed to prove the bruising was caused by any particular object, and the parties stipulated the victim said he hit her just once with the hanger. So the broad instructional definition was fatal to Petitioner's chances of acquittal, whereas the strict definition may well have resulted in acquittal. The decision below exacerbated circuit splits, it was wrong, and it presents an ideal vehicle for the Court to address a significant issue. The Court should grant certiorari.

B. Background.

1. The government charged Chavez Spotted Horse with three counts of assault with a dangerous weapon under 18 U.S.C. § 113(a)(3), for using three plastic items—a spoon, a window blind wand, and a hanger—to spank his niece. App. 1a-3a. The evidence at trial showed Spotted Horse used each item to discipline his niece during three separate instances over a four-day span. *Id.* at 3a.

2. Before trial, Spotted Horse proposed a jury instruction defining "dangerous weapon." *Id.* at 5a. He drew his proposed definition from case law. *Id.* at 7a, 13a-14a. This was because the statute, § 113(a)(3), does not define "dangerous weapon," so courts have done so. *E.g., United States v. Farlee*, 757 F.3d 810, 815 (8th Cir.), *cert. denied*, 135 S. Ct. 504 (2014). The most seminal—and representative—case to define the term is probably *United States v. Guilbert*, which stated that an item

qualifies if it is "used in a manner likely to endanger life or inflict great bodily harm":

> The determination whether an object constitutes a 'dangerous weapon' turns not on the object's latent capability alone, but also on the manner in which the object was used. Objects that are not dangerous weapons *per se* are . . . 'dangerous weapons' within the meaning of 18 U.S.C. § 113(c) when *used in a manner likely to endanger life or inflict great bodily harm*.

692 F.2d 1340, 1343 (11th Cir. 1982) (citation omitted) (emphasis added) (discussing prior version of § 113(a)(3)), *cert. denied*, 460 U.S. 1016 (1983).

3. Under this representative definition, an object qualifies if it's a "dangerous weapon *per se*," like a gun or a knife. *Id.* (That part of the definition is not at issue in this case.) And if the object is not dangerous *per se*, it can still qualify if two conditions are met: (1) the object can "endanger life or inflict great bodily harm" (the "harm" prong); and (2) the defendant "use[s]" the object "in a manner likely to" cause that heightened degree of harm (the "use" prong). *Id.* This is a sensible, constrained definition.

4. Spotted Horse proposed this constrained definition of "dangerous weapon." App. 5a, 13a-14a. He drew that language from *United States v. Hollow*, 747 F.2d 481, 482 (8th Cir. 1984),[1] an Eighth Circuit case reviewing the sufficiency of

[1] Tracking *Hollow*'s language, Spotted Horse's proposed instruction included the phrase "serious bodily harm" rather than "great bodily harm." App. 5a, 7a. But the phrases are non-statutory, common sense terms that are synonymous. *See Guilbert*, 692 F.2d at 1343;

evidence. *Id.* at 7a, 13a-14a. And *Hollow*, in turn, drew this definition from *Guilbert*, 692 F.2d at 1343. *See Hollow*, 474 F.2d at 482.

5. The district court rejected Spotted Horse's proposed instruction. *Id.* at 5a, 14a, 16a. Instead, over Spotted Horse's objection, it defined "dangerous weapon" merely as "any object *capable* of being readily used by one person to inflict *bodily injury* upon another person." *Id.* at 5a, 18a (emphases added). This definition was very broad, because: (1) it did not require life-endangerment or great bodily harm; and (2) it was satisfied by mere latent capability—rather than use in a manner likely—to cause the required degree of injury. With this broad instruction, the jury found Spotted Horse guilty on all counts. *Id.* at 1a-2a.

6. On appeal, Spotted Horse argued the district court abused its discretion by using the broad definition. *Id.* at 7a. He argued the court should have used the strict definition set out in *Hollow*. *Id.* He noted the district court's broad definition was conceptually equivalent to definitions set out in post-*Hollow* Eighth Circuit opinions, which stated a "dangerous weapon" was just an "object *capable* of inflicting *bodily injury*." *Id.* (emphases added). These cases included *Farlee*, 757 F.3d at 815, and *United States v. LeCompte*, 108 F.3d 948, 953 (8th Cir. 1997). The definitions set out in these cases had the same deficiencies as the district court's

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United States v. Moore, 846 F.2d 1163, 1166 (8th Cir. 1988) (explaining meaning of *Hollow*'s definition, in 18 U.S.C. § 111 context).

definition. Spotted Horse claimed that *Hollow*'s definition controlled over the later definitions, as the earlier panel precedent. App. 7a. He also noted that other circuits to define the term use the strict definition. Def. Br. at 13-14, 2018 WL 2138372.

7. The Eighth Circuit panel held the district court did not abuse its discretion. App. 8a. It concluded: (i) there was no conflict between *Hollow* and the later cases, because they were "sufficiency of the evidence cases [that] did not focus on defining a 'dangerous weapon'"; (ii) that the Eighth Circuit's "choice of phrasing in a different context [sufficiency of the evidence] cannot be transplanted into a jury instruction context"; and (iii) that the instruction was not an abuse of discretion because it fairly tracked the language of the statute—which requires "intent to do bodily harm"—and was consistent with the later Eighth Circuit panel opinions. *Id.* The opinion did not discuss the weight of persuasive authority. *Id.* The court of appeals had jurisdiction under 28 U.S.C. § 1291.

8. Spotted Horse timely filed a petition for rehearing en banc or by the panel, and the court of appeals denied it. *Id.* at 19a. This petition for certiorari follows.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari for four reasons. First, the U.S. courts of appeals are split on the definition of "dangerous weapon" under § 113(a)(3). Most courts of appeals to define the term use the strict definition or a variant of it. Conversely, the Eighth Circuit is the only one to employ the broad definition.

Second, the issue is crucial. The Eighth Circuit's broad definition is unfairly expansive: virtually any object is "capable" of causing some minimal degree of "bodily injury." This is even true of a plastic clothes hanger, even when evidence shows the defendant hit the victim with it just one time, with no evidence it caused any injury—as in this case. And the issue is also vital because the Eighth Circuit has the second-highest rate of federal assault prosecutions in the nation.

Third, the decision below is wrong. The panel's choice to find no instructional error in using the broad definition defied the statutory text, the common law, nearly all persuasive authority, the canons of construction, and common sense.

Last, this case is a stark example of the broad definition's prejudicial effect. The jury was virtually compelled to conclude that the items Spotted Horse used were merely capable of causing some degree of bodily injury, satisfying the broad definition. But under the strict definition, it's entirely possible that the jury would have concluded at least one item—a spoon, a blind wand, and a hanger, none linked to one specific bruise—was not used in a manner likely to endanger life or inflict great bodily harm. This is especially so for the hanger, with which the victim told law enforcement Spotted Horse hit her one time. Because the prejudice of the broad instruction is so obvious here, this case is an ideal mechanism to resolve this issue.

A. The meaning of "dangerous weapon" under § 113(a)(3) has split the U.S. courts of appeals— and the Eighth Circuit is an outlier.

Most courts of appeals to define "dangerous weapon" under § 113(a)(3) use a variant of the strict definition. To recap, the strict definition states that if an object is not dangerous *per se*, it can still qualify as a "dangerous weapon" if: (1) the object can "endanger life or inflict great bodily harm" (the "harm" prong); and (2) the defendant "use[s]" the object "in a manner likely to" cause that heightened degree of harm (the "use" prong). *E.g.*, *Guilbert*, 692 F.2d at 1343 (cleaned up). In contrast, the Eighth Circuit is the only U.S. court of appeals to require neither the heightened harm prong nor the use prong. Instead, it defines "dangerous weapon" in terms of mere latent capability to cause any degree of bodily injury: "any object *capable* of being readily used by one person to inflict *bodily injury* upon another person." App. at 8a (emphases added); *Farlee*, 757 F.3d at 815. This makes the Eighth Circuit an extreme outlier in multiple contexts.

1) The panel created a circuit split on the meaning of "dangerous weapon" under § 113 in jury instruction cases.

By approving the broad definition, the panel created a circuit split on the definition of "dangerous weapon" under § 113(a)(3) in jury instruction cases. The opinion below is the only federal appellate decision to approve the full broad

definition in an instruction under § 113(a)(3). All other such opinions have approved forms of the strict definition:

- *United States v. Schoenborn*, 4 F.3d 1424, 1433 n. 6 (7th Cir. 1993);
- *United States v. Watts*, 798 F.3d 650, 653 (7th Cir. 2015) (harm prong); and
- *United States v. Payne*, 19 F.3d 1431 (4th Cir. 1994) (Table) (harm prong).

The panel created a circuit split on the meaning of assault with a "dangerous weapon" in jury instruction cases.

2) The panel perpetuated a circuit split on the meaning of "dangerous weapon" under § 113 in sufficiency cases.

The panel's approval of the broad definition did not just create a split in jury instruction cases—it also perpetuated a circuit split on what qualifies as a "dangerous weapon" under § 113 in sufficiency of the evidence cases. This is because the overwhelming majority of other circuit courts to define the term in sufficiency cases employ versions of the strict definition used in *Guilbert*:

- *United States v. Sturgis*, 48 F.3d 784, 787–89 (4th Cir. 1995);
- *United States v. Johnson*, 324 F.2d 264, 266 (4th Cir. 1963);
- *Shaffer v. United States*, 308 F.2d 654, 655 (5th Cir. 1962) (harm prong);
- *United States v. Gibson*, 896 F.2d 206, 210 n. 1 (6th Cir. 1990) (use prong);
- *United States v. Watts*, 798 F.3d 650, 653 (7th Cir. 2015) (harm prong);
- *United States v. Schoenborn*, 4 F.3d 1424, 1432-33 (7th Cir. 1993);
- *United States v. Rocha*, 598 F.3d 1144, 1154 (9th Cir. 2010);
- *United States v. Riggins*, 40 F.3d 1055, 1057 (9th Cir. 1994);
- *Guilbert*, 692 F.2d at 1343 (11th Cir. 1982); and
- *Medlin v. United States*, 207 F.2d 33, 32 (D.C. Cir. 1953).

Admittedly, the opinion below stated that the Eighth Circuit's sufficiency cases did not purport to define "dangerous weapon." App. 8a. That's wrong. In each

of the Eighth Circuit's post-*Hollow* sufficiency cases, the defendants argued the evidence was insufficient to convict under § 113(a)(3) (or prior versions) in part because they did not use the charged objects as "dangerous weapons," and the Circuit disagreed—holding the objects did qualify under the broad definition:

- *Farlee*, 757 F.3d at 815;
- *United States v. Steele*, 550 F.3d 693, 699 (8th Cir. 2008);
- *United States v. Peneaux*, 432 F.3d 882, 890 (8th Cir. 2005);
- *United States v. Phelps*, 168 F.3d 1048, 1055-56 (8th Cir. 1999); and
- *LeCompte*, 108 F.3d 948, 953.

And the same is true of the other circuit's sufficiency cases. *See supra*, p. 9. So both the other courts and the Eighth Circuit "squarely addressed" the definition of "dangerous weapon" under § 113 in the sufficiency context. *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993).[2] There is a circuit split on the definition of "dangerous weapon" in sufficiency cases.

Finally, other circuits also use the strict definition to address if district courts should have given lesser-included-offense instructions. *See United States v. Estrada-Fernandez*, 150 F.3d 491, 497 (5th Cir. 1998) (harm prong); *United States v. Abeyta*, 27 F.3d 470, 474 n. 7 (10th Cir. 1994) (harm prong).

On the question presented, the Eighth Circuit is an extreme outlier:

[2] Even the Notes on Use for the Eighth Circuit's § 113(a)(3) pattern instruction explain that other circuits use versions of the strict definition in conflict with the broad definition set out in *Farlee* and its Eighth Circuit forerunners. *See* Eighth Circuit Model Jury Instruction 6.18.113(3) (2017 ed.).

	Strict Definition	Broad Definition
Sufficiency of the Evidence Context	4th Circuit 5th Circuit (harm prong) 6th Circuit (use prong) 7th Circuit 9th Circuit 11th Circuit D.C. Circuit	8th Circuit
Jury Instruction Context	7th Circuit 4th Circuit (harm prong)[3]	8th Circuit
Lesser-Included Offense Context	5th Circuit (harm prong) 10th Circuit (harm prong)	

B. The issue is important. The Eighth Circuit's broad definition is unreasonable, and many assault prosecutions arise there.

This issue is also critically important. As a matter of policy, the strict definition makes much more sense. It places reasonable limits on what can qualify as a "dangerous weapon" in a given case. But the Eighth Circuit's broad definition has no reasonable limits. Consider the differences between the formulations:

Definition		Likelihood to harm based on use v. mere capability to harm	Degree of harm at issue
Strict (*e.g., Guilbert*)	An object…	used in a manner likely to…	endanger life or inflict great bodily harm
Broad (opinion below)	Any object…	capable of being readily used by one person to...	inflict bodily injury upon another person
Broad (Eighth Circuit sufficiency)	An object…	capable of…	inflicting bodily injury

[3] *Payne*, 19 F.3d 1431, cited above, is an unpublished table opinion.

These are significant discrepancies. The expansive definitions only require the mere capability to cause bodily injury. So under the expansive definition, the government could successfully prosecute an individual for felony assault with a dangerous weapon for giving someone a minor scratch with a cut toenail or for hitting someone a single time on the back with a plastic hanger—as long as the defendant intended to do some minimal degree of bodily harm. The government need not even prove the defendant placed the victim in fear, because "assault" under § 113(a)(3) includes both apprehension-causing-assault and actual-or-attempted-battery. *Hollow*, 747 F.2d at 482; *Guilbert*, 692 F.2d at 1343; Eighth Circuit Model Jury Instruction 6.18.113(3) (2017 ed.).

In these examples, the jury would be compelled to find assault with an object capable of causing some degree of bodily injury. Conversely, these scenarios would be unlikely successful prosecutions under the strict definition, because of its requirements that the object be (1) "used in a manner likely" to (2) "endanger life or inflict great bodily harm." The strict definition is reasonable. The broad definition places far too much faith in prosecutorial discretion.

Further, this issue is also vital because a substantial number of federal assault prosecutions occur within the Eighth Circuit. For example, there were 1,156 federal assault cases commenced in the twelve-month period ending March 31,

2018. *See* Federal Judicial Caseload Statistics 2018, Table D-3.[4] Of those, 174—or 15%—were commenced in the Eighth Circuit. *Id.* That is the second-highest number, behind only the enormous Ninth Circuit. Put bluntly, there were 55 more assault cases commenced in the Eighth Circuit in this time frame than in the D.C., First, Second, Third, and Eleventh Circuits—combined. *Id.* Also for the same period, the Eighth Circuit had the second-highest number of assault appeals filed. *See id.*, Table B-7. In fact, only trailing the Ninth, the Eighth Circuit has had the highest number of assault cases commenced in that month range for the last seven years in a row (2012 to 2018). *See* Federal Judicial Caseload Statistics, Archive.[5]

So beyond the circuit splits, the question presented here is also crucially significant. Certiorari is appropriate.

C. The decision below is wrong. Like other circuit courts, the panel should have required the strict—and reasonable—definition.

Certiorari is also appropriate because the decision below was incorrect. This case gave the Eighth Circuit an opportunity to adopt the strict definition, because the panel viewed the issue presented —whether to approve use of the broad

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[4] These tables can be accessed at: https://www.uscourts.gov/federal-judicial-caseload-statistics-2018-tables. A find-field (control+F) search for "assault" is useful.

[5] These tables can be accessed by clicking a given year on the following page, then selecting "Caseload Statistics [Year] Tables," and locating Table D-3: https://www.uscourts.gov/statistics-reports/analysis-reports/federal-judicial-caseload-statistics.

"dangerous weapon" definition in a jury instruction—as one of first impression. App. 7a-8a. But the panel made the wrong choice, finding no instructional error, despite the statute's text, the common law, the weight of persuasive authority, the rules of lenity and avoidance, and sensible policy.

First, the statute's text did not support the decision. The panel relied on the statute's final element—"with intent to do bodily harm"—to support its approval of the broad definition. App. 8a. But that element phrase does not support any definition of "dangerous weapon." That phrase defines the required mental state, not what qualifies as a "dangerous weapon." § 113(a)(3); *see also Guilbert*, 692 F.2d at 1344 ("intent to do bodily harm" is a separate element than the "dangerous weapon" requirement). The statute does not define "dangerous weapon."

Second, the panel-approved definition conflicts with the common law. Faced with a term undefined in the statute, the federal courts of appeals drew the definition of "dangerous weapon" from the common law, and that definition was the strict one. *Guilbert*, 692 F.2d at 1343, is cited by many of the above-discussed cases. *See, e.g., Riggins*, 40 F.3d at 1057; *Schoenborn*, 4 F.3d at 1432-33. And *Guilbert* drew its strict definition from *United States v. Johnson*, 324 F.2d 264, 266 (4th Cir. 1963). *Guilbert*, 692 F.2d at 1343. For its part, *Johnson* based its strict definition on older federal cases that in turn drew their (also strict) definitions from various state and federal judicial opinions. *Johnson*, 324 F.2d at 266 (citing cases such as *Tatum*

v. United States, 110 F.2d 555, 556, 556 n. 9 (D.C. Cir. 1940), and *United States v. Anderson*, 190 F.Supp. 589, 591 (D. Md. 1961)). All these cases—and those that cite them—define a "dangerous weapon" with similar language as, in essence, an object "used in a manner likely to endanger life or inflict great bodily harm." *Rocha*, 598 F.3d at 1154; *Schoenborn*, 4 F.3d at 1432-33; *Guilbert*, 692 F.2d at 1343; *Johnson*, 324 F.2d at 266. The Eighth Circuit's definition diverges from the common law—and consequently, from the overwhelming weight of persuasive authority.

Third, significant canons of statutory construction—lenity and avoidance—also fatally undercut the Eighth Circuit's definition. If there is any ambiguity in the question of what constitutes a "dangerous weapon" under § 113, the rule of lenity requires courts to favor the characterization more merciful to criminal defendants: the strict definition. *Skilling v. United States*, 561 U.S. 358, 410–11 (2010). So absent clear congressional indication otherwise—which does not exist—courts should use the strict construction. *Id.*

The canon of constitutional avoidance also comes down squarely on the side of the strict definition. When choosing between plausible interpretations of a statute, the canon of avoidance instructs courts to construe the statute to avoid a constitutionally problematic interpretation. *See Clark v. Martinez*, 543 U.S. 371, 380–81 (2005). Here, even if the broad definition were as plausible as the strict one (it is not), the canon of avoidance intensely favors the strict reading. This is because

the broad definition poses a substantial risk of rendering § 113(a)(3) void for vagueness under the due process clause.

Consider this question: under the broad definition, how could a defendant possibly distinguish between items that qualify as "dangerous weapons" and items that would not? She couldn't, because virtually any item is "capable" of inflicting some minimal degree of "bodily injury," even a pool noodle used to slap or a lemon slice squirted in an eye—or a plastic clothes hanger used to hit someone once with no proof it caused injury, as here. *See infra*, pp. 18-19. Thus, the broad definition renders § 113(a)(3) "so vague that it fails to give ordinary people fair notice of the conduct it punishes." *Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015) (citation omitted). And because the broad definition is so "standardless," it also "invites arbitrary enforcement." *Id.* (same). Right now, the liberty of American citizens—in Eighth Circuit federal enclaves who use any innocuous item to offensively touch someone—rests at the complete discretion of prosecutors. For either reason—lack of fair notice or arbitrary enforcement—the broad definition would violate due process. *See id.* So avoidance counsels against the broad definition. And for similar reasons—mainly, the need for reasonable limits on the phrase—so does common sense. *See supra*, pp. 11-12.

The decision below was wrong.

D. This case is an excellent vehicle to resolve the issue, because the broad definition compelled conviction, but the strict one did not.

This case is an ideal mechanism to answer the question presented, because the expansive definition made conviction certain, but the restrictive definition would have made acquittal likely. Recall that the jury convicted Spotted Horse under § 113(a)(3) for spanking the victim in three different incidents on three separate days over a four-day span, each time with a different plastic item: a kitchen spoon (Count Two), a blind wand (Count Four), and a clothes hanger (Count Six). App. 1a-3a; Dkt 79, pp. 11, 14, 17 (Instruction Nos. 10, 13, 16).[6]

Yet this evidence may well have resulted in acquittals under the restrictive definition. To start, the victim testified vaguely about how many times Spotted Horse hit her with each item. *See* Trial Transcript (TT) 179:23, 191:16-17 (spoon), 180:20, 183:18-20 (wand), 183:8-9, 248:5-18 (hanger).[7] Although the panel stated the hanger broke, App. 3a, there was no evidence of this at trial. The victim testified Spotted Horse hit her with a wooden backscratcher until *that* broke, but the backscratcher was not a charged instrument. App. 3a; TT 180:16, 182:10. And the government presented no evidence about which objects caused with bruises.

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[6] All citations to "Dkt." are to the district court docket at *United States v. Spotted Horse*, 1:17-cr-10005-CBK (D.S.D.). All materials cited in this petition are available on PACER. Spotted Horse cites to the docket and the trial transcript under Supreme Court Rule 12.7.

[7] The trial transcript is available at Dkt. 103.

Based on this proof, the jury couldn't determine how often Spotted Horse hit the victim during each incident or which objects caused which bruises. *See* Def. Reply Br. at 8-12, 2018 WL 3533114. The jury could have even found the back scratcher that broke—which was uncharged—may have caused most of the bruises. *See id.* So it's "entirely possible" the jury would've found at least one item was not used in a manner likely to endanger life or inflict serious bodily harm, under the strict definition. *See United States v. Whitehead*, 176 F.3d 1030, 1040 (8th Cir. 1999) (reviewing jury instruction deficiency for harmless error).[8]

Despite this, the panel—in one sentence, with no explanation—reached an alternative harmless-error conclusion: "In any event, any instructional error was harmless, given the nature and vast extent of P.M.'s injuries." App. 8a. The Court should not deny certiorari based on this alternative harmless-error conclusion. The conclusion is plainly wrong, and not just based on the above analysis. It's also clearly wrong because of three simple—and uncontestable—facts:

- Minimal, vague eyewitness testimony. The victim testified Spotted Horse hit her just five or six times with the plastic clothes hanger, and there was no evidence—despite the panel's mistaken factual assertion—that the hanger

[8] The district court defined "bodily injury" using a somewhat heightened degree of harm. Dkt 79, p. 21 (Instruction No. 20). But the opinion below does not mention this fact, so the law in the Eighth Circuit is that the full broad definition is sufficient in (1) the jury instruction context and (2) the sufficiency context. App. 8a; *Farlee*, 757 F.3d at 815. And notwithstanding the court's characterization of bodily injury, its incorrect "dangerous weapon" definition was still prejudicial because it did not require that the object be "used in a manner likely to" cause that degree of injury.

broke. TT 183:8-9. Spotted Horse did not recall the hanger episode. TT 240:8-9. The only other direct witness to the events, the victim's brother, heard the hanger incident, but offered no concrete testimony about it. TT 133:5-17.

- The Stipulation. The court admitted a stipulation stating that the victim told an officer that Spotted Horse hit her with the hanger just once. TT 248:5-18. Yet the judge never gave a limiting instruction, so the jury was free to use the stipulation as substantive proof of what occurred. TT 248:17-18.

- Bruising unlinked to hanger. The government offered proof of bruising, but it offered no evidence that the hanger caused any of the bruising.

These three facts are clear in the record. And on these irrefutable facts, acquittal was likely for the hanger charge (Count Six), especially because the jury could have found Spotted Horse hit the victim with the hanger just one time. Concluding the jury would still have found he used the hanger in a manner likely to endanger life or inflict great bodily harm would be to "speculate." *Whitehead*, 176 F.3d at 1040.

But under the broad definition, the jury was virtually compelled to convict: any object satisfied that definition of "dangerous weapon," and Spotted Horse hit the victim with the objects. *Guilbert*, 692 F.2d at 1343 ("assault" definition); *Hollow*, 747 F.2d at 482 (same); *Phelps*, 168 F.3d at 1056 (same); Dkt 79, p. 20 (Instruction No. 19) (same). The panel's alternative harmless-error conclusion was manifestly wrong. Failing to use the strict meaning here resulted in clear-cut prejudice, so this case is a worthy mechanism to answer the question presented.

CONCLUSION

Below, the Eighth Circuit exacerbated circuit splits on a question of critical importance by approving a broad definition of "dangerous weapon" under § 113(a)(3). The panel's broad definition conflicts with the statutory text, persuasive authority, the canons of construction, common law, and common sense—and it affects many defendants, because of the high volume of assault prosecutions in the Eighth Circuit. This case presents a great vehicle for the Court to resolve this issue. The Court should grant the petition.

Dated this 25th day of June, 2019.

Respectfully submitted,
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