NO.

IN THE SUPREME COURT OF THE UNITED STATES

ADAM SCOTT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Rene L. Valladares
Federal Public Defender
Amy B. Cleary*
Ellesse Henderson
Assistant Federal Public Defenders
Office of the Federal Public Defender
411 E. Bonneville, Ste. 100
Las Vegas, Nevada 89101
(702) 388-6577
Amy_Cleary@fd.org
*Counsel for Petitioner

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Question Presented for Review

At least five federal appellate courts, including the Ninth Circuit, have determined the use of a dangerous weapon automatically transforms assault into a crime of violence. Does applying this automatic rule ignore or misinterpret this Court's caselaw, given the variety of items that are classified as dangerous weapons and the variety of ways those weapons can be used?

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Petition for Certiorari

Petitioner Adam Scott respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit. Petitioner asks this Court to grant certiorari, vacate the Ninth Circuit's denial of a certificate of appealability, and remand for further proceedings.

Related Proceedings and Orders Below

The order denying Scott's motion to vacate under 28 U.S.C. § 2255 in the U.S. District Court for the District of Nevada and the order denying appellate relief in the Ninth Circuit Court of Appeals are attached in the Appendix: *United States v. Scott*, No. 3:12-cr-00051-RCJ-VPC, 2017 WL 58577 (D. Nev. Jan. 4, 2017); *United States v. Scott*, No. 17-15106 (9th Cir. March 2, 2020).

Jurisdictional Statement

The Ninth Circuit Court of Appeals entered its final order in Petitioners' cases on March 2, 2020. *See* Appendix. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(a). This petition is timely per Supreme Court Rule 13.3.

Relevant Constitutional and Statutory Provisions

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be

> deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 18 of the United States Code, Section 924(c)(3) defines "crime of violence" as:

> For purposes of this subsection, the term "crime of violence" means an offense that is a felony and –
>
> (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.

Title 18 of the United States Code, Section 113, entitled "[a]ssaults within maritime and territorial jurisdiction," criminalizes the following offense:

> Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished as follows:
>
> . . .
>
> (3) Assault with a dangerous weapon, with intent to do bodily harm, by a fine under this title or imprisonment for not more than ten years, or both.

Statement of the Case

Petitioner Adam Scott is currently serving a ten-year prison sentence, imposed without the benefit of this Court's decisions in *Johnson v. United States*, 135 S. Ct. 2551 (2015), and *United States v. Davis*, 139 S. Ct. 2319 (2019). These decisions dramatically limited which offenses qualify as crimes of violence under 18 U.S.C. § 924(c). As a result, Scott is serving a federal prison sentence despite no longer meeting the elements of the charge underlying his conviction.

A. Scott pled guilty to violating 18 U.S.C. § 924(c) and was sentenced to ten years' imprisonment.

On April 3, 2013, Scott pled guilty to use of a firearm in relation to a crime of violence under 18 U.S.C. § 924(c)(1)(A). ECF No. 23. The plea agreement specified the crime of violence as assault with a dangerous weapon under 18 U.S.C. § 113(a)(3). But the agreement did not identify whether the assault charge was a crime of violence under the "elements clause" or the "residual clause" of § 924(c)(3). Nor did the presentence report (PSR) identify the purportedly applicable § 924(c) clause, instead simply calculating Scott's guidelines sentence as ten years' imprisonment, the statutory minimum. *See* U.S.S.G. § 2K2.4(b).

Three months later, the district court adopted the PSR's recommendation and sentenced Scott to ten years of imprisonment, three years of supervised release, and fifty hours of community service. ECF Nos. 29, 30. Scott did not appeal. He remains incarcerated in Lompoc, California, with a projected release date of June 13, 2025.

B. This Court struck down as unconstitutionally vague "residual clauses" in various federal statutes, including 18 U.S.C. § 924(c).

More than two years after Scott was convicted and sentenced, this Court invalidated as unconstitutionally vague the residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e). *Johnson v. United States*, 135 S. Ct. 2551 (2015). The following year, this Court held *Johnson* announced a new substantive rule retroactively applicable to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257 (2016). Then, in *United States v. Davis*, this Court held the residual

clause of 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague under the Due Process Clause. *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019).

C. Despite this Court's decisions in *Johnson* and *Davis*, the district court denied Scott's motion to vacate under 28 U.S.C. § 2255, and the Ninth Circuit denied Scott a certificate of appealability.

Based on *Johnson*, Scott filed a motion to vacate his conviction and sentence in 2015, arguing federal assault under 18 U.S.C. § 113(a)(3) no longer qualifies as a crime of violence. ECF Nos. 32, 33. The district court denied the motion. *See* Appendix. The use of a dangerous weapon, the district court reasoned, categorically renders assault a crime of violence. *Id.* The district court additionally denied Scott a certificate of appealability.

Scott timely requested a certificate of appealability from the Ninth Circuit. While that request was pending, the Ninth Circuit decided in *United States v. Gobert*, 943 F.3d 878 (9th Cir. 2019), that federal assault under 18 U.S.C. § 113(a)(3) remains a crime of violence despite *Johnson* and *Davis*. Like the district court, the Ninth Circuit reasoned "a defendant charged with 'assault with a deadly or a dangerous weapon, *must have always* threatened the use of physical force.'" *Id.* at 881 (quoting *United States v. Juvenile Female*, 566 F.3d 943, 948 (9th Cir. 2009)). A short time later, the Ninth Circuit denied Scott's request for a certificate of appealability. *See* Appendix.

Reasons for Granting the Writ

At least five federal appellate courts, including the Ninth Circuit, have created a rule—branded the "deadly weapon rule" by the Sixth Circuit, *see Manners v. United States*, 947 F.3d 377, 380-81 (6th Cir. 2020); *United States v. Burris*, 912 F.3d 386, 405 (6th Cir.) (en banc), *cert. denied*, 140 S. Ct. 90 (2019)—categorically classifying assaults as crimes of violence if committed using a dangerous or deadly weapon. *See, e.g.*, *United States v. Bryant*, 949 F.3d 168, 180 (4th Cir. 2020); *Gobert*, 943 F.3d at 881-82; *United States v. Harris*, 853 F.3d 318, 321-22 (6th Cir. 2017); *United States v. Taylor*, 843 F.3d 1215, 1223-24 (10th Cir. 2016); *United States v. Whindleton*, 797 F.3d 105, 113-14 (1st Cir. 2015). Because this rule conflicts with this Court's crime-of-violence jurisprudence and creates confusion within the criminal justice system, this Court should grant Scott's petition for writ of certiorari. *See* U.S. Sup. Ct. R. 10(c) (compelling reasons exist to grant review in cases where "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court").

A. Automatically classifying armed assaults as crimes of violence conflicts with this Court's precedent concerning violent, physical force.

In order to qualify as a crime of violence under 18 U.S.C. § 924(c)(3)(A), an offense must have "as an element the use, attempted use, or threatened use of physical force against the person or property of another." In 2010, this Court explained the "physical force" required under an equivalent statute "means *violent*

force—that is, force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010). Nine years later, this Court reiterated the modifier "physical" in § 924(c)(3)(A) "plainly refers to force exerted by and through concrete bodies—distinguishing physical force, from, for example, intellectual force or emotional force." *Stokeling v. United States*, 139 S. Ct. 544, 552-54 (2019). Simple assault, like the simple battery statute this Court addressed in *Johnson*, generally does not meet this definition. By creating and applying a categorical rule that a dangerous or deadly weapon automatically transforms simple assault into a crime of violence, federal appellate courts are ignoring and misinterpreting this Court's precedent, an error justifying grant of Scott's petition for writ of certiorari. *See* U.S. Sup. Ct. R. 10(c).

1. Simple assault is not a crime of violence under this Court's caselaw.

The federal assault statute does not define "assault." *See generally* 18 U.S.C. § 113. But courts generally incorporate the common law definition of undefined statutory terms. *See United States v. Guilbert*, 692 F.2d 1340, 1343 (11th Cir. 1982); *see also United States v. Chipps*, 410 F.3d 438, 448 (8th Cir. 2005). At common law, assault could be committed in either of two ways: (1) by attempting to commit a battery, or (2) by committing "an act that puts another in reasonable apprehension of immediate bodily harm." *Guilbert*, 692 F.2d at 1343; *see United States v. Lewellyn*, 481 F.3d 695, 697 (9th Cir. 2007). Neither means of committing assault involves the violent, physical force this Court's precedent requires.

Turning first to attempted battery, the offense requires no more force than the battery statute this Court considered in 2010—*de minimus* force that might include spitting or an unwanted tap on the shoulder. *See Johnson*, 559 U.S. at 140-41; *United States v. Sommerstedt*, 752 F.2d 1494, 1496-97 (9th Cir.), *amended*, 760 F.2d 999 (9th Cir. 1985); *see also United States v. Fernandez*, 837 F.2d 1031, 1035 (11th Cir. 1988) (chasing and "bump[ing] into"); *United States v. Corbitt*, 675 F.2d 626, 628 (4th Cir. 1982) (a push); *United States v. Hightower*, 512 F.2d 60, 61 (5th Cir. 1975) (grabbing and tugging jacket); *United States v. Frizzi*, 491 F.2d 1231, 1232 (1st Cir. 1974) (spitting); *United States v. Alsondo*, 486 F.2d 1339, 1345 (2d Cir. 1973) ("menacingly" lifting hand and a shove), *rev'd on other grounds sub nom. United States v. Feola*, 420 U.S. 671 (1975). Attempted battery, then, is no more violent than completed battery, and it does not satisfy this Court's requirements for a crime of violence. *See Johnson*, 559 U.S. at 140-44; *United States v. Jones*, 914 F.3d 893, 903 (4th Cir. 2019); *United States v. Martinez*, 762 F.3d 127, 137 (1st Cir. 2014); *United States v. Dominguez-Maroyoqui*, 748 F.3d 918, 921 (9th Cir. 2014).

The second way of committing assault—committing "an act that puts another in reasonable apprehension of immediate bodily harm"—also does not constitute a crime of violence since "bodily harm" does not necessarily mean physical harm caused by physical, violent force. The federal assault statute does not define "bodily harm," instead only defining the more serious terms "substantial bodily injury" and "serious bodily injury." A separate federal criminal statute, however, does define "bodily injury" as:

(A) a cut, abrasion, bruise, burn, or disfigurement;

(B) physical pain;

(C) illness;

(D) impairment of the function of a bodily member, organ, or mental facility; or

(E) any other injury to the body, no matter how temporary.

18 U.S.C. § 1365(h)(4).

The requirement there only be "bodily injury," as opposed to "*substantial* bodily injury" or "*serious* bodily injury," means all that is required is *de minimis* injury. A defendant can cause *de minimis* injury without using violent force. And courts routinely conclude statutes are overbroad for purposes of crime-of-violence analysis despite elements involving bodily injury or harm. *See, e.g.*, *United States v. Mayo*, 901 F.3d 218, 227 (3d Cir. 2018) ("Mayo argues, and we must agree, that physical force and bodily injury are not the same thing, at least not as interpreted by Pennsylvania courts." (internal quotation marks, citation, and brackets omitted)); *United States v. Middleton*, 883 F.3d 485, 491 (4th Cir. 2018) (explaining a defendant could cause injury without necessarily using violent force).

In addition, this Court has made clear that mental injuries are not included in "physical force." This Court instead requires "physical force" to be "capable of causing physical pain or injury to another person." *Johnson*, 559 U.S. at 140; *see id. at* 138 ("The adjective 'physical' is clear in meaning . . . distinguishing physical force from, for example, intellectual force or emotional force."); *see also Stokeling*, 139 S. Ct. at 552; *Burris*, 912 F.3d at 397-400. Thus, an element requiring that a victim

be put in fear of injury, either physical or mental, does not necessarily require the intentional use of violent, physical force.

2. Adding as an element the use of a dangerous weapon does not automatically transform assault into a crime of violence.

Despite acknowledging in other cases that unarmed assaults are generally not crimes of violence, *Jones*, 914 F.3d at 903; *Burris*, 912 F.3d at 397-400; *Martinez*, 762 F.3d at 137; *United States v. Johnson*, 911 F.3d 1062, 1072-73 (10th Cir. 2018); *Dominguez-Maroyoqui*, 748 F.3d at 921, at least five appellate courts have concluded the use of a weapon categorically alters this analysis, automatically making the offenses crimes of violence. *See Bryant*, 949 F.3d at 180; *Gobert*, 943 F.3d at 881-82; *Harris*, 853 F.3d at 321-22; *Taylor*, 843 F.3d at 1223-24; *Whindleton*, 797 F.3d at 113-14.

This automatic rule ignores a crucial aspect of federal armed assault under 18 U.S.C. § 113(a)(3): the statute can include almost any kind of object as a dangerous weapon, and that object can be used in near-limitless ways. The statute does not define "dangerous weapon," but the United States Sentencing Guidelines do:

> "Dangerous weapon" means (i) an instrument capable of inflicting death or serious bodily injury; or (ii) an object that is not an instrument capable of inflicting death or serious bodily injury but (I) closely resembles such an instrument; or (II) the defendant used the object in a manner that created the impression that the object was such an instrument (e.g. a defendant wrapped a hand in a towel during a bank robbery to create the appearance of a gun).

U.S.S.G. § 1B1.1(E). Courts hold that nontraditional weapons, unloaded guns, and even fake guns meet this definition. *See McLaughlin v. United States*, 476 U.S. 16, 17–18 & n.3 (1986); *United States v. Sturgis*, 48 F.3d 784, 787-88 (4th Cir. 1995); *United States v. Moore*, 846 F.2d 1163, 1166 (8th Cir. 1988); *see also Guilbert*, 692 F.2d at 1343 ("[T]he term 'dangerous weapon' is not restricted to such obviously dangerous weapons as guns, knives, and the like, but can include virtually any object given appropriate circumstances."). And an object can be dangerous because of its potential to cause illness or mental injury, not only its potential to cause physical wounds. *See* 18 U.S.C. § 1365(h)(3) (including in definition of "serious bodily injury" "protracted loss or impairment of the function of a bodily member, organ, or *mental faculty*" (emphasis added)); *Sturgis*, 48 F.3d at 788-89 (suggesting that inmate with AIDS could commit assault with a dangerous weapon by biting prison guard because of potential to transmit deadly disease); *Moore*, 846 F.2d at 1166-67 (concluding that "'serious infection' is a form of "serious bodily harm,'" and, as a result, teeth can constitute a "deadly and dangerous weapon"). In fact, a defendant need not even make contact with another person to be guilty of federal armed assault. *See United States v. Herron*, 539 F.3d 881, 886 (8th Cir. 2008); *United States v. Anderson*, 190 F. Supp. 589, 591 (D. Md. 1961). And in cases with contact, it is unnecessary for the contact to be made with the actual weapon. *See United States v. Hollow*, 747 F.2d 481, 482 (8th Cir. 1984).

Under this broad definition of "dangerous weapon," courts have held the following objects to satisfy 18 U.S.C. § 113(a)(3): teeth, *see Sturgis*, 48 F.3d at 788;

Moore, 846 F.2d at 1166-67; a belt, *see United States v. Riggins*, 40 F.3d 1055, 1057 (9th Cir. 1994); a metal chair and a plastic chair, *see United States v. Johnson*, 324 F.2d 264, 266 (4th Cir. 1963); a car, *see United States v. Gibson*, 896 F.2d 206, 209-10 (6th Cir. 1990); a broken beer bottle and a pool stick, *see Guilbert*, 692 F.2d at 1343; a walking stick, *see United States v. Loman*, 551 F.2d 164, 169 (7th Cir. 1977); and shoes, *see United States v. Swallow*, 891 F.3d 1203, 1205 (9th Cir. 2018); *United States v. Bravebull*, 896 F.3d 897, 899 (8th Cir.), *cert. denied*, 139 S. Ct. 287 (2018); *United States v. Farlee*, 757 F.3d 810, 815 (8th Cir. 2014); *United States v. Steele*, 550 F.3d 693, 699 (8th Cir. 2008); *Riggins*, 40 F.3d at 1057. And a person could "use" one of these dangerous weapons by simply holding the object while also pushing someone, *see Hollow*, 747 F.2d at 482, waving or pointing the object, *see United States v. Verwiebe*, 874 F.3d 258, 260 (6th Cir. 2017); *United States v. Mills*, 835 F.2d 1262, 1263 (8th Cir. 1987); *Brundage v. United States*, 365 F.2d 616, 619 (10th Cir. 1966), or throwing the object and striking an automobile, *Anderson*, 190 F. Supp. at 591.

Consequently, through automatic application of the "deadly weapon rule," defendants are convicted under 18 U.S.C. § 113(a)(3) for a variety of crimes that do not constitute crimes of violence under 18 U.S.C. § 924(c), regardless of the nature of the weapon or the manner of its use.

B. This case presents an important federal question because of the serious implications for federal defendants.

A conviction under 18 U.S.C. § 924(c)(1)(A)(iii) for discharging a firearm during a crime of violence carries a mandatory consecutive punishment of ten years'

imprisonment. But it is not at all clear to criminal defendants, the government, or courts what type of conduct qualifies as a crime of violence. If crimes of violence under 18 U.S.C. § 924(c) do include federal armed assault, then courts and the government are interpreting this assault statute too broadly, to include nonviolent conduct.

For example, courts hold defendants are guilty of assault with a dangerous weapon when they use teeth and saliva capable of transmitting infection or other illness. *See Sturgis*, 48 F.3d at 788-89; *Moore*, 846 F.2d at 1166-67. Crucially, these cases depend not on the damage done by a bite wound, but on the damage done microscopically by the potential to spread a deadly disease. *See Sturgis*, 48 F.3d at 788-89; *Moore*, 846 F.2d at 1166-67. Thus, a defendant simply placing his or her mouth on a prison guard is sufficient, regardless of any force used to "bite." And it is easy to imagine other scenarios with equal or greater potential than a bite wound to spread disease, but that involve even less force such as throwing bodily fluids infected with a disease or intentionally coughing while infected with a virus. *See United States v. Curry*, No. 8:20-mj-01367-AAS, ECF No. 1 (M.D. Fla. Apr. 7, 2020) (criminal complaint alleging "biological weapons hoax" and including affidavit of belief that "COVID-19 virus satisfies the 'biological agent' definition in Title 18 of United States Code"); *United States v. Barela*, No. 3:20-mj-70470-MAG, ECF No. 1 (N.D. Ca. Apr. 21, 2020) (criminal complaint alleging Hobbs Act robbery under 18 U.S.C. § 1951 accomplished using intentional coughing); Memorandum from Deputy Attorney General Jeffrey A. Rosen for All Heads of Law Enforcement Components,

Heads of Litigating Divisions, and United States Attorneys (March 24, 2020), *available at* https://www.politico.com/f/?id=00000171-128a-d911-aff1-becb9b530000 (advising DOJ officials that "coronavirus appears to meet the statutory definition of a 'biological agent,'" and that, consequently, threats to spread the disease could "potentially implicate the Nation's terrorism-related statutes"). Without this Court's intervention, defendants will continue facing both an overbroad reading of federal armed assault and an overbroad reading of 18 U.S.C. § 924(c).

Scott's case provides an opportunity for this Court to clarify its precedent as it applies to federal armed assaults and crimes of violence under 18 U.S.C. § 924(c) This Court should therefore grant his petition for writ of certiorari. *See* S. Sup. Ct. R. 10(c).

Conclusion

This case presents a question of exceptional importance for defendants facing mandatory consecutive sentences under 18 U.S.C. § 924(c). The Ninth Circuit has joined at least three other circuits in ignoring this Court's crime-of-violence jurisprudence to create an automatic, categorical rule transforming non-violent offenses into crimes of violence without force. For the reasons set forth herein, Scott requests this Court grant this petition for certiorari.

Respectfully submitted,

RENE VALLADARES
Federal Public Defender
Amy B. Cleary
AMY B. CLEARY
Assistant Federal Public Defender