

APPENDIX

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3
4 **UNITED STATES DISTRICT COURT**

5 **DISTRICT OF NEVADA**

6 UNITED STATES OF AMERICA,

)

7 Plaintiff,

)

8 vs.

)

9 ADAM SCOTT,

)

ORDER

10 Defendant.

)

11)

12 A grand jury indicted Defendant Adam Scott of two counts each of assault with a
13 dangerous weapon, 18 U.S.C. § 113(a)(3),¹ and use of a firearm during and in relation to a crime
14 of violence, 18 U.S.C. § 924(c)(1)(A), based on Scott having shot a firearm at several Indian
15 victims (one of whom was struck in the abdomen) on the Fort McDermitt Indian Colony. (*See*
16 Indictment, ECF No. 8). Defendant pled guilty to one charge under § 924(c)(1)(A) pursuant to a
17 plea agreement, and the Court sentenced him to ten years imprisonment. (*See* J. 1–2, ECF No.
18 30). Defendant did not appeal and in fact waived all appeals or collateral attacks, including
19 habeas corpus motions under 28 U.S.C. § 2255, except claims of ineffective assistance of
20 counsel. (*See* Plea Agreement 8, ECF No. 24). Defendant has now filed a habeas corpus motion
21 under § 2255.

22 As noted, the right to bring the present motion has been waived. Even if not waived,
23 however, the claim would be without merit. Defendant argues the assault with a dangerous

24
25 ¹The Government used the word “deadly” in the Indictment, but the statute uses the word
“dangerous.”

1 weapon charged in Count 1 that formed the basis for his conviction under Count 2 was not a
 2 “crime of violence” under 18 U.S.C. § 924(c)(3) because the residual clause defining “crime of
 3 violence” is similar to the residual clause of § 924(e)(2), which the Supreme Court has struck
 4 down as unconstitutionally vague. *See Johnson v. United States (Johnson II)*, 135 S. Ct. 2551,
 5 2563 (2015). The definition of “crime of violence” applied to Defendant reads as follows, with
 6 the allegedly unconstitutionally vague residual clause emphasized:

7 (3) For purposes of this subsection the term “crime of violence” means an offense
 8 that is a felony and--

9 (A) has as an element the use, attempted use, or threatened use of physical
 10 force against the person of another, or

11 (B) *that by its nature, involves a substantial risk that physical force against
 12 the person or property of another may be used in the course of committing
 13 the offense.*

14 18 U.S.C. § 924(c)(3)(A)–(B) (emphasis added). The definition of “violent felony” at issue in
 15 *Johnson II* reads as follows, with the unconstitutionally vague residual clause emphasized:

16 (B) the term “violent felony” means any crime punishable by imprisonment for a
 17 term exceeding one year, or any act of juvenile delinquency involving the use or
 18 carrying of a firearm, knife, or destructive device that would be punishable by
 19 imprisonment for such term if committed by an adult, that--

20 (i) has as an element the use, attempted use, or threatened use of physical
 21 force against the person of another; or

22 (ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise
 23 involves conduct that presents a serious potential risk of physical injury to
 24 another*

25 *Id.* § 924(e)(2)(B)(i)–(ii) (emphasis added). The language of the two clauses is not identical, but
 26 even assuming for the sake of argument that the difference in language is not enough to rescue
 27 § 924(c)(3)(B) from constitutional infirmity, *Johnson II* is no aid to Defendant, because the
 28 physical-force clause of § 924(c)(3)(A) applies here.

Assault with a dangerous weapon under § 113(a)(3) “has as an element the use, attempted

1 use, or threatened use of physical force against the person of another," *id.* § 924(c)(3)(A), so long
 2 as by "assault" Congress meant what is meant under the common law. It did:

3 Because § 113 does not define "assault," we have adopted the common law
 4 definitions: (1) "a willful attempt to inflict injury upon the person of another," also
 5 known as "an attempt to commit a battery," or (2) "a threat to inflict injury upon the
 person of another which, when coupled with an apparent present ability, causes a
 reasonable apprehension of immediate bodily harm."

6 *United States v. Lewellyn*, 481 F.3d 695, 697 (9th Cir. 2007) (citing *United States v. Juvenile*
 7 *Male*, 930 F.2d 727, 728 (9th Cir. 1991); *United States v. Dupree*, 544 F.2d 1050, 1051 (9th Cir.
 8 1976)). Either of these two ways of committing an assault under § 113(a)(3) qualifies as a crime
 9 of violence under § 924(c)(3)(A), because they include as elements the attempt or threat to inflict
 10 injury upon the person of another, respectively. A conviction under § 113(a)(3) also necessitates
 11 a threat of "violent" force, *see Johnson v. United States (Johnson I)*, 559 U.S. 133, 140 (2010)
 12 ("We think it clear that . . . the phrase 'physical force' means violent force—that is, force capable
 13 of causing physical pain or injury to another person."), because the threat must be made by means
 14 of a "dangerous weapon," *see* 18 U.S.C. § 113(a)(3).

15 Force with a "dangerous weapon" is force necessarily capable of causing physical pain or
 16 injury. The Courts of Appeals to address the issue have uniformly ruled that assault- or battery-
 17 type crimes containing a dangerous weapon-type element necessarily satisfy *Johnson I*'s
 18 requirement that any force used, attempted, or threatened be "violent." *See United States v.*
 19 *Whindleton*, 797 F.3d 105, 111–16 (1st Cir. 2015); *United States v. Ovalle-Chun*, 815 F.3d 222,
 20 225–27 (5th Cir. 2016); *United States v. Anderson*, 695 F.3d 390, 399–401 (6th Cir. 2012);
 21 *United States v. Vinton*, 631 F.3d 476, 485–86 (8th Cir.), *cert. denied*, 132 S. Ct. 213 (2011);
 22 *United States v. Taylor*, --- F. 3d ----, 2016 WL 7187303, at *6 (10th Cir. 2016); *Turner v.*
 23 *Warden Coleman FCI (Medium)*, 709 F.3d 1328, 1341 (11th Cir. 2013); *United States v. Redrick*,
 24 841 F.3d 478, 484 (D.C. Cir. 2016). Assault with a deadly weapon under § 113(a)(3) requires

1 the assault to be committed “with” the deadly weapon; there can be no conviction simply because
2 one is armed with a deadly weapon while committing a simple assault or battery not involving
3 the weapon. *Cf. United States v. Werle*, 815 F.3d 614, 622 (9th Cir. 2016). Because the physical
4 force clause applies to Defendant’s offense, and because the offense requires “violent” force,
5 neither *Johnson I* nor *Johnson II* is any aid to Defendant.

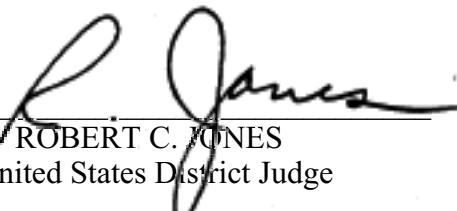
6 **CONCLUSION**

7 IT IS HEREBY ORDERED that the Motions to Vacate, Set Aside or Correct Sentence
8 Pursuant to 28 U.S.C. § 2255 (ECF Nos. 32, 33) are DENIED.

9 IT IS FURTHER ORDERED that a certificate of appealability is DENIED.

10 IT IS SO ORDERED.

11 Dated January 4, 2017.

12 
13 ROBERT C. JONES
14 United States District Judge

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MAR 2 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ADAM SCOTT,

Defendant-Appellant.

No. 17-15106

D.C. Nos. 3:16-cv-00361-RCJ
3:12-cr-00051-RCJ-VPC

District of Nevada,
Reno

ORDER

Before: SILVERMAN and WATFORD, Circuit Judges.

The stay entered on July 25, 2019 (Docket Entry No. 7), is lifted.

The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not made a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *United States v. Gobert*, 943 F.3d 878 (9th Cir. 2019).

Any pending motions are denied as moot.

DENIED.