No.

In The Supreme Court Of The United States

Jamie Joe Dulus,

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

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Questions Presented for Review

1. Federal assault with a dangerous weapon does not require as an element the use, attempted use, or threatened use, of violent physical force. Rather, the government can obtain a conviction under 18 U.S.C. § 113(a)(3) by proving only that the defendant committed an offensive touching while harboring an uncommunicated intent to commit nonphysical injury. The first question presented is whether the Circuits have interpreted the actus reus of assault with a dangerous weapon too narrowly and against its plain language by requiring violent physical force as an element.

2. The district court denied Dulus's motion to vacate conviction and sentence under 28 U.S.C. § 2255 as procedurally defaulted because Dulus did not bring the claim on direct appeal. Both the district court and the Ninth Circuit denied a certificate of appealability. The second and third questions presented are whether the Ninth Circuit contravened this Court's precedent and contributed to a Circuit split by declining to grant a certificate of appealability because:

a. Jurisdictional claims that the indictment failed to state an offense against the laws of the United States—and thus failed to confer jurisdiction over the criminal proceedings at all—cannot be waived or subject to procedural default; and

b. Dulus demonstrated cause and prejudice excusing any procedural default because the legal basis for his claim was not reasonably available at the time of direct appeal and Dulus is serving a mandatory consecutive 60-month sentence as a result of the unlawful conviction.

Related Proceedings

Petitioner Jamie Joe Dulus moved to vacate his 18 U.S.C. § 924(c) conviction under 28 U.S.C. § 2255 in the District of Nevada. The district court denied Dulus's motion to vacate and further denied a certificate of appealability (COA) on January 22, 2021 in *United States v. Dulus*, Case Nos. 2:17-cr-00409-JAD-VCF, 2:20-cv-01173-JAD (Dist. Ct. Dkt. 55). Pet. App. B. The Ninth Circuit denied Dulus a COA on August 13, 2021 in Case No. 21-15523 (App. Dkt. 3). Pet. App. A.

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Petition for Certiorari

Petitioner Jamie Joe Dulus petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Orders Below

The Ninth Circuit Court of Appeals order denying habeas relief to Petitioner Dulus is not published in the Federal Reporter and is not reprinted. *See* Pet. App. A.

The district court's order denying habeas relief to Petitioner Dulus is unreported but reprinted at: *United States v. Dulus*, No. 2:17-cr-00409, 2021 WL 230045 (D. Nev. Jan. 22, 2021). *See* Pet. App. B.

Jurisdiction

The Ninth Circuit Court of Appeals entered a final order denying habeas relief to Petitioner Dulus under 28 U.S.C. § 2255 on August 13, 2021. Pet. App. A: 1a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254. This petition is timely per Supreme Court Rule 13.1 because the petition is filed within 90 days of the Ninth Circuit's order denying discretionary review.

Constitutional and Statutory Provisions Involved

1. U.S. Const. amend. V: "No person shall . . . be deprived of life, liberty, or property, without due process of law.

2. Title 18, Section 924(c), of the United States Code provides in relevant part:

> (3) 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.

3. Federal assault with a dangerous weapon, 18 U.S.C. § 113(a)(3), provides:

(a) 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 Dulus is just one of the many defendants convicted and sentenced to mandatory minimum sentences under 18 U.S.C. § 924(c) where the predicate offense no longer qualifies as a crime of violence. Section 924(c) provides graduated, mandatory, consecutive sentences for using a firearm during and in relation to a crime of violence. Dulus has been sentenced to nearly seven years in prison; yet five years of this total consists solely of the mandatory consecutive sentence imposed under 18 U.S.C. § 924(c).

I. Petitioner Dulus is serving a mandatory minimum sentence imposed under 18 U.S.C. § 924(c).

Dulus pled guilty in 2018 pursuant to a plea agreement to one count of assault with a dangerous weapon under 18 U.S.C. § 113(a)(3) (Count One) and one count of use of a firearm during and in relation to a crime of violence under 18 U.S.C. § 924(c)(1)(A) (Count Two). Dist. Ct. Dkt. 24, 26, 27. The predicate offense underlying Count Two was Count One's assault with a dangerous weapon. Dist. Ct.

Dkt. 24. The district court sentenced Dulus to 21 months in custody for the assault, and a mandatory consecutive 60 months in custody for the § 924(c) conviction, for a total of 81 months' imprisonment. Dist. Ct. Dkt. 37, 47. Dulus did not file a direct appeal. Dulus's estimated release date is May 13, 2023, after which he will serve three years of supervised release.

II. Petitioner Dulus unsuccessfully sought to vacate his § 924(c) conviction and sentence under this Court's *Johnson* and *Davis* decisions.

In 2015, this Court held the Due Process Clause precluded imposing an increased sentence under the residual clause of the Armed Career Criminal Act's ("ACCA") violent felony definition. *Johnson v. United States*, 135 S. Ct. 2551 (2015). This Court later issued *Welch v. United States*, 136 S. Ct. 1257, 1267 (2016), holding *Johnson* announced a new substantive rule that applies retroactively to cases on collateral review. In June 2019, this Court issued *United States v. Davis*, 139 S. Ct. 2319 (2019), holding the similar residual clause of 18 U.S.C. § 924(c)(3)(B) violates the Constitution's guarantee of due process.

Dulus sought relief from his § 924(c) conviction by filing timely motions to vacate under 28 U.S.C. § 2255 in Nevada federal district court. Dist. Ct. Dkt. 51, 53. Dulus asserted that, under *Johnson* and *Davis*, assault with a dangerous weapon no longer qualifies as a crime of violence. Dist. Ct. Dkt. 51, 53. The district court found the claim procedurally defaulted and alternatively denied the motion on its merits. Pet. App. B. The district court further denied Dulus a COA. Pet. App. B.

Dulus timely appealed and requested a COA from the Ninth Circuit. The Ninth Circuit denied Dulus a COA, finding he did not state a constitutional claim debatable among jurists of reason. Pet. App. A.

Reasons for Granting the Petition

The Court should determine whether the Circuits properly interpret the federal assault with a dangerous weapon statute, 18 U.S.C. § 113(a)(3). At least three Circuits—the Sixth, Ninth, and Tenth—have held assault under § 113(a)(3) necessarily requires the use, attempted use, or threatened use of violent physical force. But this interpretation conflicts with § 113(a)(3)'s plain language and the Circuits' otherwise broad construction of the statutory terms. It is imperative this Court decide the proper interpretation of federal assault with a dangerous weapon, so defendants are not mandatorily incarcerated for an overbroad offense that does not fit the § 924(c) crime-of-violence statutory definition.

I. The Circuits have narrowed the scope of federal assault with a dangerous weapon, contravening the statute's plain language.

In *Davis*, 139 S. Ct. 2319, this Court struck 18 U.S.C. § 924(c)'s residual clause as vague and in violation of the Due Process Clause. U.S. Const. amend. V. Petitioner expects the government will concede, as it has done elsewhere, that *Davis* pronounced a substantive rule applying retroactively to motions to vacate brought under 28 U.S.C. § 2255. *See* Brief for the United States, *United States v. Davis*, S. Ct. No. 18-431, p. 52 (Feb. 12, 2019) ("A holding of this Court that Section 924(c)(3)(B) requires an ordinary-case categorical approach—and thus is

unconstitutionally vague—would be a retroactive substantive rule applicable on collateral review." (citing *Welch*, 136 S. Ct. at 1267)).[1]

Therefore, to qualify as a § 924(c) predicate crime of violence, Hobbs Act robbery must meet the physical force clause of the crime of violence definition at § 924(c)(3)(A). To qualify under the force clause, the offense must have "as an element the use, attempted use, or threatened use of physical force against the person or property of another." § 924(c)(3)(A). This means the offense must necessarily require two elements: (1) violent physical force capable of causing physical pain or injury to another person or property, *Stokeling v. United States*, 139 S. Ct. 544, 554 (2019) (citing *Johnson v. United States*, 559 U.S. 133, 140 (2010) (Johnson 2010)); and (2) the use of force must be intentional and not merely reckless or negligent, *Borden v. United States*, 141 S. Ct. 1817 (2021).

A. Assault with a dangerous weapon plainly does not require violent physical force.

Title 18 of the United States Code Section 113(a)(3) prohibits "[a]ssault with a dangerous weapon[] with intent to do bodily harm." But to obtain a conviction, the government need not prove any intentional use, attempted use, or threatened use of violent physical force. Instead, § 113(a)(3) requires only a nonviolent, offensive touching and uncommunicated intent to cause bodily harm.

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[1] Every Circuit to address this question in a published opinion agrees *Davis* applies retroactively. *See In re Thomas*, 988 F.3d 783, 788-89 (4th Cir. 2021); *King v. United States*, 965 F.3d 60, 64 (1st Cir. 2020); *In re Franklin*, 950 F.3d 909, 910-11 (6th Cir. 2019); *United States v. Bowen*, 936 F.3d 1091, 1100 (10th Cir. 2019); *In re Hammoud*, 931 F.3d 1032, 1039 (11th Cir. 2019); *Cross v. United States*, 892 F.3d 288, 294-94 (7th Cir. 2018).

1. Assault is satisfied by a mere offensive touching, which does not require violent force.

Assault under § 113 is satisfied by a mere offensive touching and thus does not categorically require *violent* force. Section 113 does not define "assault." But "[i]t is a settled principle of interpretation that, absent other indication, Congress intends to incorporate the well-settled meaning of the common-law terms it uses." *Sekhar v. United States*, 570 U.S. 729, 732 (2013) (citation and internal quotation marks omitted). Thus, the Circuits almost unanimously agree the term carries its meaning at common law.[2]

> Common law assault is satisfied by either:
>
> (1) "a willful attempt to inflict injury upon the person of another," also 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."

United States v. Lewellyn, 481 F.3d 695, 697 (9th Cir. 2007). Despite reference to "injury" and apprehension of bodily harm, in the Ninth Circuit, assault includes the

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[2] *See United States v. Verwiebe*, 874 F.3d 258, 261 (6th Cir. 2017), *abrogated by Borden v. United States*, 141 S. Ct. 1817 (2021); *United States v. Jackson*, 862 F.3d 365, 381 (3d Cir. 2017); *United States v. Watts*, 798 F.3d 650, 652–53 (7th Cir. 2015); *United States v. Lewellyn*, 481 F.3d 695, 697 (9th Cir. 2007); *United States v. White*, 273 F.3d 1107 (5th Cir. 2001); *United States v. Bayes*, 210 F.3d 64, 68–69 (1st Cir. 2000); *United States v. Chestaro*, 197 F.3d 600, 605 (2d Cir. 1999); *United States v. Gauvin*, 173 F.3d 798, 802 (10th Cir. 1999); *United States v. Guilbert*, 692 F.2d 1340, 1343 (11th Cir. 1982). The Fourth Circuit has so held in an unpublished opinion. *See United States v. Payne*, 723 F. App'x 211, 212 (4th Cir. 2018). The District of Columbia Circuit does not appear to have considered the definition of "assault" under § 113. Eighth Circuit precedent, however, contains "divergent statements about whether Congress intended to equate the term 'simple assault' in § 113(a)(5) with common-law assault." *United States v. Chipps*, 410 F.3d 438, 448 (8th Cir. 2005) (noting potential intra-Circuit conflict).

common law forms of battery and attempted battery, encompassing "noninjurious but intentional offensive contact (even if relatively minor)." *Id.* at 698. Even an act as minimal as "intentionally spitting in another person's face easily falls within the scope of an offensive touching." *Id.* at 699. Several other Circuits agree with the Ninth that a mere offensive or slightest touching qualifies as common law assault.[3]

A "mere offensive touching," however, does not "necessarily entail[] violent force" required for an offense to qualify as a crime-of-violence predicate. *United States v. Castleman*, 572 U.S. 157, 167 (2014). The elements clause requires at least "force capable of causing physical pain or injury," *Stokeling*, 139 S. Ct. at 553, and the "slightest offensive touching" does not constitute such violent force. *Johnson 2010*, 559 U.S. at 139. Thus, because assault under § 113(a) does not require violent force as an element, it fails to qualify as a predicate offense for 18 U.S.C. § 924(c).

That § 113(a)(3) prohibits "assault with a dangerous weapon" does not change the outcome, as the offense still requires no greater use or threat of force than an offensive touching. While the Ninth Circuit has held "an offensive touching that

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[3] *United States v. Jackson*, 862 F.3d 365, 381 (3d Cir. 2017); *United States v. Watts*, 798 F.3d 650, 654 (7th Cir. 2015); *United States v. Delis*, 558 F.3d 177, 178 (2d Cir. 2009); *United States v. Whitefeather*, 275 F.3d 741, 743 (8th Cir. 2002); *United States v. Bayes*, 210 F.3d 64, 69 (1st Cir. 2000); *United States v. Williams*, 197 F.3d 1091, 1096 (11th Cir. 1999). The Fourth Circuit has indicated it would reach the same conclusion. *See United States v. Payne*, 723 F. App'x 211, 212 (4th Cir. 2018). The Tenth Circuit however, stands in conflict, holding, rather than an offensive touching, "assault as used in § 113(a) requires an attempt or threat to inflict injury." *United States v. Muskett*, 970 F.3d 1233, 1241 n.9 (10th Cir. 2020) (citation and internal quotation marks omitted).

involves use or display of a deadly weapon . . . necessitates violent physical force," *United States v. Perez-Silvan*, 861 F.3d 935, 943 (9th Cir. 2017) (citation, alterations, and internal quotation marks omitted), for purposes of assault, courts construe the "dangerous weapon" element broadly to include "almost anything," such as walking sticks, leather straps, rakes, tennis shoes, rubber boots, dogs, rings, concrete curbs, clothes irons, and stink bombs." *United States v. Dayea*, 32 F.3d 1377, 1379 (9th Cir. 1994) (interpreting U.S.S.G. § 1B1.1).

As the Ninth Circuit holds, "the term 'dangerous weapon' . . . can include virtually any object given appropriate circumstances." *United States v. Rocha*, 598 F.3d 1144, 1154 (9th Cir. 2010) (citation omitted). For example, the Fourth Circuit holds even spittle can satisfy a "dangerous weapon" element. *See United States v. Sturgis*, 48 F.3d 784, 789 (4th Cir. 1995) (finding HIV-positive defendant's teeth a dangerous weapon where defendant attempted to infect others through saliva by biting). Yet spitting at another, even if sufficiently offensive to constitute battery, does not rise to violent physical force. *United States v. Dominguez-Maroyoqui*, 748 F.3d 918, 921 (9th Cir. 2014).

Indeed, as interpreted by the Ninth Circuit, a dangerous weapon need not necessarily be capable of causing physical harm. Rather, a "dangerous weapon" need only be "inherently dangerous," or "used in a manner likely to endanger life or inflict great bodily harm." *United States v. Smith*, 561 F.3d 934, 939 (9th Cir. 2009), *as amended* (Apr. 9, 2009) (en banc) (citation omitted). But as the Ninth Circuit acknowledges, "'great bodily harm'" for purposes of § 113 "is any harm that

involves . . . protracted loss or impairment of the function of a . . . *mental faculty*." *Id.* (emphasis added). Thus, the least conduct required for assault under § 113(a) is a mere offensive touching. That the defendant need have a "dangerous weapon" does not change this analysis, as the object need not be *physically* dangerous.

2. Intent to cause bodily injury does not require the use, attempted use, or threatened use of force.

An intent to cause bodily injury does not amount to a threat to use violent physical force, as required under the elements clause. "A willingness to use violent force is not the same as a threat to do so." *United States v. Parnell*, 818 F.3d 974, 980 (9th Cir. 2016) (finding Massachusetts armed robbery does not qualify as a violent felony under ACCA). In *Parnell*, the government argued that anyone who robs a bank harbors an "uncommunicated willingness or readiness" to use violent force. *Id.* at 980. The Ninth Circuit rejected the government's position, holding "[t]he [threat of violent force] requires some outward expression or indication of an intention to inflict pain, harm or punishment," while a theorized willingness to use violent force does not. *Id.*

Because assault with a dangerous weapon requires only intent to cause bodily injury, but does not require such intent be effectuated or communicated, § 113(a)(3) does not categorically require the use or threat of force.

3. "Bodily injury" includes nonphysical harm, which does not require physical force.

Section 113(a)(3)'s plain language, requiring "intent to do bodily harm," broadly includes intent to cause noncorporeal injury and thus does not categorically require intent to use *physical* force. In *Stokeling*, this Court reiterated that 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." 139 S. Ct. at 552 (quoting *Johnson 2010*, 559 U.S. at 140).

Section 113 does not define the standalone term "bodily injury." However, subsection (b) of the statute—"[d]efinitions"—expressly provides "'*substantial* bodily injury' means bodily injury which involves" a "*substantial* loss or impairment of the function of any . . . mental faculty." § 113(b)(1)(B) (emphases added). Thus, while the *degree* of harm intended distinguishes the term "bodily injury" from "substantial bodily injury," the *type* of harm does not. Here, the general "presumption that identical words used in different parts of the same act are intended to have the same meaning," *Env't Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007), counsels that mental, emotional, or psychological harm constitutes "bodily harm" under § 113(a)(3). Bodily injury under § 113 therefore includes nonphysical, mental injury.

Section 113 similarly defines "serious bodily injury" by reference to 18 U.S.C. § 1365. § 113(b)(2). Section 1365, in turn, defines "bodily injury" as including "illness" and "impairment of the function of a . . . mental faculty" and "*serious* bodily injury" as including "*protracted* loss or impairment of the function of a . . . mental faculty." § 1365(3)(D), (4)(C)-(D) (emphases added). A "legislative body generally uses a particular word with a consistent meaning in a given context." *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972). Thus, by incorporating § 1365, Congress again made clear that while the degree of harm between "bodily injury" and "serious

bodily injury" may vary, the type of harm does not. Bodily injury under § 113 therefore includes nonphysical, mental injury.

Had Congress intended to limit bodily injury in § 113 to purely physical harm, it knew how to do so. For example, Congress need not have included mental harm in its definition of "substantial bodily injury" or cross-referenced § 1365 to define "serious bodily injury." Or Congress could have explicitly excluded mental harm in its definition of "serious bodily injury." For example, the federal hate crime statute limits "bodily injury" by providing "the term 'bodily injury' has the meaning given such term in section 1365(h)(4) of this title, *but does not include* solely emotional or psychological harm to the victim." 18 U.S.C. § 249(c)(1) (emphasis added). Congress did none of these things in § 113, however. Thus, by broadly including mental harm as sufficient for "bodily injury," and without any limiting legislative language, "bodily injury" under § 113 includes nonphysical mental, emotional, or psychological harm.

B. To hold the offense is a crime of violence, Circuits have narrowly interpreted the federal assault statute, in conflict with its plain language.

To hold assault with a deadly weapon qualifies as a crime of violence under the elements clause, the Sixth, Ninth, and Tenth Circuits erroneously interpret the assault with a dangerous weapon statute to be limited to conduct involving violent physical force. *Muskett*, 970 F.3d at 1241-42; *Gobert*, 943 F.3d 878, 881-82 (9th Cir. 2019); *Verwiebe*, 874 F.3d at 261.

For example, in declaring federal assault with a dangerous weapon meets the § 924(c) elements clause's physical force requirement, the Tenth Circuit "[s]tated

simply, if one has attempted or threatened to inflict *injury* upon another person (thereby committing federal criminal assault), he has attempted or threatened physical force capable of causing physical pain or injury." *Muskett*, 970 F.3d at 1241. Similarly, the Ninth Circuit holds § 113(a)(3) requires a "threat to use violent physical force through the use of a dangerous weapon that reasonably caused a victim to fear immediate bodily injury, which . . . necessarily entails at least the 'threatened use of violent physical force' to qualify the offenses as crimes of violence under § 924(c)(3)(A)'s elements clause." *Gobert*, 943 F.3d at 882. And the Sixth Circuit reasoned "[i]f a crime already includes some use or threat of physical force, as is true here, the use of a dangerous weapon transforms that force into the type of violent force necessary to constitute a crime of violence." *Verwiebe*, 874 F.3d at 261.

The Sixth, Ninth, and Tenth Circuits failed to consider that the least conduct proscribed by common law assault, regardless of § 113(a)(3)'s "dangerous weapon" requirement, is a slight touching coupled with an uncommunicated intent to cause harm; not the requisite violent force required under § 924(c)'s elements clause.

Further, by limiting "bodily injury" under § 113 to physical injury, rather than broadly including mental, emotional, or psychological harm, the Circuits' interpretation of the statute impermissibly conflicts with the statutory plain language. When a statute's plain statutory language includes conduct broader than the crime of violence definition, "the inquiry is over" because the statute is facially overbroad. *Descamps v. United States*, 570 U.S. 254, 265 (2013). Because federal assault with a dangerous weapon does not *necessarily* require the use of intentional

physical force against a person or property of another—as an element—it does not qualify as a crime of violence under § 924(c)'s physical force clause. *Moncrieffe v. Holder*, 569 U.S. 184, 184 (2013). This Court's intervention is necessary to correct the Circuits' misapplication of the categorical approach.

II. Procedural default cannot bar Dulus's jurisdictional claim from collateral review.

"When, as here, the district court denies relief on procedural grounds, the petitioner seeking a COA must show both 'that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'" *Gonzalez v. Thaler*, 565 U.S. 134, 140–41 (2012) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). "The COA inquiry," this Court recently emphasized, "is not coextensive with a merits analysis." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). Rather, "the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Id.* (quoting *Miller–El v. Cockrell*, 537 U.S. 322, 327 (2003)).

Dulus met this threshold showing here, and the Ninth Circuit's COA denial contributes to a Circuit split and contravenes this Court's binding precedent.

A. Circuits are split about whether procedural default can bar a jurisdictional claim like Dulus's from collateral review.

Dulus's claim that the § 924(c) conviction lacked a lawful predicate offense is jurisdictional and therefore, not subject to procedural default.

Dulus challenges his Count Two § 924(c) conviction as illegal and unconstitutional because the predicate offense charged is not a crime of violence under § 924(c)'s elements clause, and thus the charge failed to state an offense. Dulus "seeks to raise a claim which, 'judged on its face' based upon the existing record, would extinguish the government's power to 'constitutionally prosecute' the defendant if the claim were successful." *Class v. United States*, 138 S. Ct. 798, 806 (2018). The failure to state an offense rendered the government without the power to prosecute Dulus for the § 924(c) offense. In sum, "the right that [Dulus] asserts . . . is the right not to be haled into court at all upon the felony charge." *Blackledge v. Perry*, 417 U.S. 21, 30, 94 S. Ct. 2098 (1974); *Menna v. New York*, 423 U.S. 61, 62 (1975). Absent a lawful crime-of-violence predicate, Dulus could not be prosecuted, convicted, or sentenced for the § 924(c) count *at all*.

Congress limits federal judicial jurisdiction, stating the "district courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States." 18 U.S.C. § 3231. Thus, if an indictment fails to allege a federal crime at all, that indictment fails to confer jurisdiction on the federal courts. However, there is a circuit split regarding indictment defects and their jurisdictional import in the post-conviction context.

At least two Circuits, the Ninth and the Eleventh, hold "[c]laims that the applicable statute is unconstitutional or that the indictment fails to state an offense are jurisdictional claims." *United States v. Montilla*, 870 F.2d 549, 552 (9th Cir. 1989), *amended at* 907 F.2d 115 (9th Cir. 1990) (internal quotation marks omitted);

see also United States v. St. Hubert, 909 F.3d 335, 341-44 (11th Cir. 2018) (finding defendant did not waive the argument that Hobbs Act robbery and attempted robbery are not crimes of violence under § 924(c)(3)(A) by pleading guilty because "this ground is jurisdictional"), *abrogated on other grounds by Davis*, 139 S. Ct. at 2336, *cert. denied*, 2020 WL 3038291 (June 8, 2020).

"Because parties cannot by acquiescence or agreement confer jurisdiction on a federal court," the Eleventh Circuit recognizes "a jurisdictional defect cannot be waived or procedurally defaulted." *McCoy v. United States*, 266 F.3d 1245, 1249 (11th Cir. 2001); *see also United States v. Griffin*, 303 U.S. 226, 229 (1938) ("[L]ack of jurisdiction of a federal court touching the subject matter of the litigation cannot be waived by the parties."). Similarly, in the Ninth Circuit, where a petitioner's post-conviction claim that the indictment failed to state an offense and deprived the court of jurisdiction was not raised on direct appeal, this "does not bar collateral attack . . . because the defect complained of is jurisdictional." *United States v. Mitchell*, 867 F.2d 1232, 1233 n.2 (9th Cir. 1989); *see also United States v. Ratigan*, 351 F.3d 957, 962-63 (9th Cir. 2003).

Conflicting with the Ninth and Eleventh Circuits, the First and Second Circuits have applied procedural default's cause and prejudice standard to jurisdictional claims. *Knight v. United States*, 37 F.3d 769, 773 (1st Cir. 1994); *Carvajal v. Artus*, 633 F.3d 95, 107 (2d Cir. 2011) (reviewing habeas motion brought under 28 U.S.C. § 2254). The Fifth Circuit "has stated in dicta that jurisdictional claims not raised on direct appeal are procedurally defaulted," but has not explicitly

decided the question. *United States v. Scruggs*, 691 F.3d 660, 667 n.15 (5th Cir. 2012) (acknowledging dicta and declining to reach the issue). And, the Ninth Circuit's order in Dulus's case, denying a COA where the district court held Dulus's jurisdictional claim procedurally defaulted—both creates an intracircuit conflict and contributes to the current intercircuit conflict.

This Court's intervention is necessary to instruct the Circuits that jurisdictional claims, which can never be waived, are therefore not subject to procedural default on collateral review.

B. Cause and prejudice exists excusing any procedural default.

"Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either 'cause' and actual 'prejudice' or that he is 'actually innocent.'" *Bousley v. United States*, 523 U.S. 614, 622 (1998) (citations omitted).

Dulus has cause for failing to appeal his original sentence, as the legal basis presented in his habeas petition was not reasonably available at the time of direct appeal. *Reed v. Ross*, 468 U.S. 1, 16 (1984). Cause for failing to raise an issue on direct appeal exists when, among additional reasons, a decision of this Court overturns longstanding and widespread practice that lower courts near unanimously approved. *Id.* at 17. Because *Davis*, decided June 2019, overturned longstanding and widespread precedent by holding 18 U.S.C. § 924(c)'s residual clause unconstitutional, it established a new constitutional claim not reasonably available to Dulus during his window for direct appeal in April 2018.

Further, the erroneous, unconstitutional conviction actually prejudiced Dulus by mandating a 60-month consecutive prison sentence he would not have otherwise received. Actual prejudice is established when the errors "created [not just] a *possibility* of prejudice, but that they worked to [the Petitioner's] *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170 (1982). But for the unconstitutionally vague definition of "crime of violence" in § 924(c)'s residual clause, Mr. Dulus would not have been convicted of and imprisoned for Count Two, because assault with a dangerous weapon is not a crime of violence under § 924(c)'s elements clause. Mr. Dulus meets the prejudice standard as he would not have been subject to a mandatory consecutive 60-month sentence.

The district court's order holding procedural default barred collateral review of Dulus's claim contravenes this Court's precedent. This Court's intervention should instruct the Ninth Circuit as to the proper application of procedural default.

III. Dulus raises an issue of exceptional importance this Court has not yet addressed, particularly given § 924(c)'s consecutive, mandatory minimum sentences.

The question presented is of exceptional important to federal courts and defendants because of the graduated mandatory minimum sentences ranging from five years to life imprisonment that § 924(c) requires. Dulus is just one of the thousands of defendants currently serving consecutive mandatory minimum sentences for § 924(c) convictions. According to the Sentencing Commission's latest statistics, approximately 21,700 individuals (14.3% of the federal prison population) are serving a § 924(c) mandatory sentence. U.S. Sent. Comm'n, *Quick Facts:*

Federal Offenders in Prison (March 2021).[4] In Fiscal Year 2020, over 2500 individuals were convicted of a § 924(c) offense, with an average sentence of 138 months (11½ years) in prison. U.S. Sent. Comm'n, *Quick Facts: 18 U.S.C. § 924(c) Firearms Offenses* (May 2021).[5]

While this Court has interpreted the elements clause over the years, this Court has not yet addressed whether the plain language of federal assault with a dangerous weapon necessarily meets the physical force definition of a crime of violence. The Circuits' overbroad interpretation that 18 U.S.C. § 113(a)(3) necessarily requires violent physical force warrants this Court's review and intervention.

Conclusion

Dulus requests that the Court grant this petition for a writ of certiorari.

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Respectfully submitted,
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[4] Available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/BOP_March2021.pdf.

[5] Available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Section_924c_FY20.pdf.