No._____

IN THE
SUPREME COURT OF THE UNITED STATES

JEROME STANLEY CARLOS, JR.

Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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DATE SENT VIA United States Postal Service: August 3rd, 2023

QUESTIONS PRESENTED

1. By denying Petitioner's defacto motion to expand the Certificate of Appealability, did the Ninth Circuit Court of Appeals err in holding that 18 U.S.C. § 113(a)(3) is a "crime of violence" under the "force clause" of 18 U.S.C. § 924(c)(3)?

PARTIES TO THE PROCEEDING

All parties to the proceedings are listed in the caption. The petitioner is not a corporation.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Jerome Stanley Carlos, Jr. ("Carlos"), respectfully requests that this petition for a writ of certiorari be granted, the judgment of the Ninth Circuit Court of Appeals be vacated, and the case be remanded for further proceedings consistent with petitioner's positions asserted herein.

OPINIONS BELOW

The underlying conviction and sentence was entered on September 5, 2006. (Appendix A, hereto)

On February 29, 2008, Carlos filed a Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255, which the district court denied on February 18, 2009. (CV 08-00418-NVW, Doc. 5)

On June 27, 2016, Carlos filed an application to the Ninth Circuit Court of Appeals for authorization to file a second or successive 28 U.S.C. § 2255 motion. On February 16, 2017, the Ninth Circuit granted the application, and transferred the matter to the district court for further proceedings. (CA 16-72106, Doc. 2) (Appendix B, hereto)

Accordingly, Carlos pursued his claim in the District Court, District of Arizona, case number CV 16-04583-PHX-NVW, challenging his 18 U.S.C. §

924(c) convictions on the ground that neither 18 U.S.C. § 113(a)(3) nor 18 U.S.C. 113(a)(6) were "crimes of violence" under 18 U.S.C. § 924(c)(3).

On September 4, 2019, the assigned Magistrate Judge issued her Report and Recommendation, denying relief. (Appendix C, hereto)

On September 30, 2019, the district court rejected the Magistrate Judge's Report and Recommendation, but denied relief on procedural grounds, and denied Carlos's request for a certificate of appealability. That order was entered on October 1, 2019. (Appendix D, hereto)

On October 2, 2019, Carlos filed a timely notice of appeal, appealing the October 1, 2019 judgment and order.

On January 8, 2020, Carlos filed an amended motion for a certificate of appealability, arguing that both the question of whether Carlos's § 2255 claims were procedurally defaulted or otherwise untimely, and the question of whether 18 U.S.C. § § 113(a)(3) and (a)(6) are "crimes of violence" are debatable against the backdrop of Ninth Circuit case law, that of other circuits, and the United States Supreme Court, and, therefore, this Court should grant a certificate of appealability. (CA 19-16944) (Appendix F, hereto)

On March 20, 2020, the Ninth Circuit Court of Appeals granted, in part, Carlos's amended motion for a certificate of appealability, certifying the following two issues for appeal:

(1) Whether the district court correctly determined that appellant's claim was untimely and procedurally defaulted due to appellant's failure to

raise a challenge to his § 113(a)(6)-based conviction under 18 U.S.C. § 924(c) based on the "force clause" in his appeal or in his initial 28 U.S.C. § 2255 motion; and

(2) Whether a conviction under 18 U.S.C. § 113(a)(6) qualifies as a "crime of violence" under the "force clause" of 18 U.S.C. § 924(c)(3).

(Appendix E, hereto)

The issues certified were briefed. So, too, were the following two uncertified issues:

(1) Did the district court err in determining that appellant's 28 U.S.C. § 2255 claim was untimely and procedurally defaulted due to appellant failing to challenge, during his direct appeal or his initial 28 U.S.C. § 2255 proceedings, his 18 U.S.C. § 113(a)(3)-based conviction under 18 U.S.C. § 924(c)?

(2) Does a conviction under 18 U.S.C. § 113(a)(3) qualify as a "crime of violence" under the force clause of 18 U.S.C. § 924(c)(3)?

(Appendix I, hereto)

On June 9, 2023, the Ninth Circuit granted relief on the certified issues, declaring that 18 U.S.C. § 113(a)(6) is not a "crime of violence" and, therefore, cannot qualify as a predicate offense under § 924(c)(3)(A). The Court remanded for resentencing. Regarding the uncertified issues, the Court construed the inclusion of those issues as a motion to expand the certificate of appealability, and denied relief on the ground that Carlos had failed to demonstrate that

reasonable jurists would find the district court's assessment of the uncertified constitutional claims debatable or wrong, citing *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003). (Appendix F, hereto)

JURISDICTION

The Order of the United States Court of Appeals for the Ninth Circuit denying relief was entered on June 9, 2023. That Court had jurisdiction pursuant to 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

18 U.S.C. § 924(c)

. . .

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

. . .

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

(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.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

18 U.S.C. § 113(a)

(a) Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished as follows:

(1) Assault with intent to commit murder or a violation of section 2241 or 2242, by a fine under this title, imprisonment for not more than 20 years, or both.

(2) Assault with intent to commit any felony, except murder or a violation of section 2241 or 2242, by a fine under this title or imprisonment for not more than ten years, or both.

(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.

(4) Assault by striking, beating, or wounding, by a fine under this title or imprisonment for not more than 1 year, or both.

(5) Simple assault, by a fine under this title or imprisonment for not more than six months, or both, or if the victim of the assault is an individual who has not attained the age of 16 years, by fine

under this title or imprisonment for not more than 1 year, or both.

(6) Assault resulting in serious bodily injury, by a fine under this title or imprisonment for not more than ten years, or both.

(7) Assault resulting in substantial bodily injury to a spouse or intimate partner, a dating partner, or an individual who has not attained the age of 16 years, by a fine under this title or imprisonment for not more than 5 years, or both.

(8) Assault of a spouse, intimate partner, or dating partner by strangling, suffocating, or attempting to strangle or suffocate, by a fine under this title, imprisonment for not more than 10 years, or both.

STATEMENT OF THE CASE

Petitioner, Jerome Stanley Carlos, Jr., is challenging his September 5, 2006 conviction for one count of possession of a firearm in relation to or in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(i), in case number 2:05-cr-00252-NVW, in the United States District Court for the District of Arizona. The sentencing Court's address is 401 West Washington Street, Phoenix, Arizona 85003.

On March 29, 2005, a federal grand jury in Phoenix, Arizona, returned a six-count indictment, in District Court, District of Arizona, case number 2:05-cr-00252-NVW, charging Carlos with Assault with a Dangerous Weapon, in violation of 18 U.S.C. §§ 1153 and 113 (a)(3) (Counts 1, 5); Assault Resulting in Serious Bodily Injury, in violation of 18 U.S.C. §§ 1153 and

113(a)(6) (Count 3); and Discharging a Firearm During a Crime of Violence, in violation of 18 U.S.C. § 924(c)(1)(A)(i, ii, and iii) (Counts 2, 4, 6)

After a jury trial, Carlos was convicted of one count of assault with a dangerous weapon, in violation of 18 U.S.C. §113(a)(3); one count of assault resulting in serious bodily injury, in violation of 18 U.S.C. §113(a)(6); and two counts of discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. §924(c)(1)(A)(iii) in District Court, District of Arizona, case number 2:05-cr-00252-PHX-NVW. He was sentenced to 336 months' imprisonment, which consisted of concurrent 120-month terms on Counts 1 and 3, and concurrent 216-month terms on Counts 2 and 4, to run consecutive to Counts 1 and 3, respectively. The Court also imposed a consecutive 36-month term of supervised release on each count, to run concurrently with one another.

CASE HISTORY

On June 27, 2016, Carlos filed an application in the Ninth Circuit Court of Appeals for authorization to file a second or successive 28 U.S.C. § 2255 motion. (CA 16-72106, Doc. 1) (Appendix G, hereto) On February 16, 2017, the Ninth Circuit granted the application, and transferred the matter to the district court for further proceedings. (CA 16-72106, Doc. 2) (Appendix B, hereto)

Accordingly, Carlos pursued his claim in District Court, District of Arizona, case number CV 16-04583-PHX-NVW, challenging his 18 U.S.C. § 924(c) convictions on the ground that neither 18 U.S.C. § 113(a)(3) nor 18 U.S.C. § 113(a)(6) were "crimes of violence" under 18 U.S.C. § 924(c)(3). (Appendix G, hereto) Specifically, Carlos asserted that neither statutory provision was a "crime of violence" under the "force clause" of 18 U.S.C. § 924(c)(3) because they did not necessarily require "violent force" – that is, force capable of causing physical pain.

On September 4, 2019, the assigned Magistrate Judge issued her Report and Recommendation, denying relief. (Appendix C, hereto) The Magistrate Judge held that Carlos had procedurally defaulted his claims by failing to raise them on direct appeal, and the default was not excusable because Carlos had not met the prejudice prong of the cause and prejudice exception to procedural default. Specifically, the Magistrate Judge held that both 18 U.S.C. §§ 113(a)(3) and § 113(a)(6) were "crimes of violence" under 18 U.S.C. § 924(c)(3)(A). That being so, Carlos failed to show prejudice, or actual innocence – the other exception to procedural default. Carlos filed objections to the Report and Recommendation.

On September 30, 2019, the district court rejected the Magistrate Judge's Report and Recommendation, but denied relief, and denied Carlos's request for a certificate of appealability. After acknowledging that the residual clause in § 924(c)(3)(B) was determined to be unconstitutional under

United States v. Davis, 139 S.Ct. 2319 (2019), and without specifically addressing whether 18 U.S.C. §§ 113(a)(3) and § 113(a)(6) are "crimes of violence" under § 924(c)(1)(A), the district court found the "force clause" claims to be procedurally defaulted because they were not raised on direct appeal, and were not raised in a § 2255 proceeding within the one-year limitations period set forth in 28 U.S.C. § 2255(f). That Order was entered on October 1, 2019. (Appendix D, hereto)

On October 2, 2019, Carlos filed a timely notice of appeal, appealing the October 1, 2019 judgment and order.

On January 8, 2020, Carlos filed an amended motion for a certificate of appealability, arguing that both the question of whether Carlos's § 2255 claims were procedurally defaulted or otherwise untimely, and the question of whether 18 U.S.C. §§ 113(a)(3) and (a)(6) are "crimes of violence" are debatable against the backdrop of Ninth Circuit case law, that of other Circuits, and the United States Supreme Court, and, therefore, this Court should grant a certificate of appealability. (CA 19-16944, Doc. 4) (Appendix H, hereto)

On March 20, 2020, the Ninth Circuit granted, in part, Carlos's amended motion for a certificate of appealability, certifying the following two issues for appeal:

(1) Whether the district court correctly determined that appellant's claim was untimely and procedurally defaulted due to appellant's

failure to raise a challenge to his § 113(a)(6)-based conviction under 18 U.S.C. § 924(c) based on the "force clause" in his appeal or in his initial 28 U.S.C. §2255 motion; and

(2) Whether a conviction under 18 U.S.C. § 113(a)(6) qualifies as a "crime of violence" under the "force clause" of 18 U.S.C. § 924(c)(3).

(CA 19-16944, Doc. 5-1) (Appendix E, hereto)

In his appellate brief, Carlos briefed the certified issues, and also briefed the following uncertified issues:

(1) Did the district court err in determining that appellant's 28 U.S.C. § 2255 claim was untimely and procedurally defaulted due to appellant failing to challenge, during his direct appeal or his initial 28 U.S.C. § 2255 proceedings, his 18 U.S.C. § 113(a)(3)-based conviction under 18 U.S.C. § 924(c)?

(2) Does a conviction under 18 U.S.C. § 113(a)(3) qualify as a "crime of violence" under the "force clause" of 18 U.S.C. § 924(c)(3)?

In its responsive brief, the government conceded that the district court erred in denying the motion as to the § 924(c) conviction associated with the § 113(a)(6) count.

On June 9, 2023, the Ninth Circuit granted relief on the certified issues, holding that an assault resulting in serious bodily injury under § 113(a)(6) can be committed recklessly, and therefore cannot qualify as a predicate offense

under § 924(c)(3)(A). (Appendix F, hereto) The Court construed the inclusion of the uncertified issues as a motion to expand the certificate of appealability, and denied relief on the ground that Carlos failed to demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong, citing *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003). The case was remanded for resentencing.

Counsel has moved the district court to stay the resentencing pending the outcome of this petition.

REASONS FOR GRANTING THE WRIT

Granting the Writ in this case would allow this Court to correct the error, if any, the Ninth Circuit Court of Appeals made in effectively holding that 18 U.S.C. § 113(a)(3) is categorically a "crime of violence" under the "force clause" of 18 U.S.C. § 924(c)(3).

ARGUMENT

In conceding the district court's error as to the § 113(a)(6)-based § 924(c) conviction, the government has necessarily waived any timeliness and procedural default arguments as to the § 113(a)(3)-based § 924(c) claim. Therefore, Carlos narrows the issues to whether 18 U.S.C. § 113(a)(3) is categorically a "crime of violence".

Thus, the question here is whether assault with a dangerous weapon, under 18 U.S.C. § 113(a)(3), can support a conviction under 18 U.S.C. § 924(c)

for using a firearm in furtherance of a "crime of violence". To qualify as a "crime of violence" under the "force clause" of § 924(c)(3), an assault with a dangerous weapon must include, as an element, the use, attempted use, or threatened use of *violent* physical force against a person or property.

The 2005 version of 18 U.S.C. § 113(a)(3) reads as follows:

> (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, and without just cause or excuse, by a fine under this title or imprisonment for not more than ten years, or both.

18 U.S.C. § 113(a)(3).

Count 1 of the indictment charged Carlos with "intentionally and recklessly assaulting Philabert L. White, Jr. with a dangerous weapon, that is, a shotgun, with intent to do bodily harm…[i]n violation of 18 United States Code, Sections 1153 and 113(a)(3)."

The jury was instructed that they had to find the following regarding the § 924(c) charge in Count 2:

> First, as to Count 2 – the defendant committed the crime of Assault with a Dangerous Weapon as alleged in Count 1;
>
> Second, the defendant knowingly discharged a firearm, that is, a shotgun;
>
> Third, the defendant discharged the firearm during and in relation to the crime; and
>
> Fourth, the acts occurred on or about March 3, 2005, in the District of Arizona.

> A defendant takes such action "in relation to the crime" if the firearm facilitated or played a role in the crime.

A review of § 113(a)(3)'s elements makes clear that there is no requirement that a jury determine that a defendant used, attempted to use, or threatened to use *violent* physical force before convicting him under that statute. At most, the first element simply requires some degree of unconsented-to touching, which may amount to the type of battery the Supreme Court found not to constitute a violent felony in *Johnson v. United States*, 559 U.S. 133 (2010) ("Johnson 2010"). For this reason, § 113(a)(3) does not categorically qualify as a "crime of violence" under 18 U.S.C. § 924 (c)(3)'s "force clause."

The government correctly observes, in its response to Carlos's § 2255 motion, that several Circuit Courts of Appeal have declared § 113(a)(3) to be a "crime of violence" under the force clause of § 924(c)(3). A three-judge panel of the Ninth Circuit has recently published an opinion so holding. *See United States v. Gobert*, 943 F.3d 878, 882 (9th Cir. 2019) (citing *United States v. Juvenile Female*, 566 F.3d 943, 948 (9th Cir. 2009), and *United States v. Calvillo-Palacios*, 860 F.3d 1285, 1289-93 (9th Cir. 2017)).

Because § 113(a)(3) can be violated without using, or threatening to use, force capable of inflicting pain or causing physical injury, *Gobert* cannot be reconciled with that Court's earlier decision in *United States v. Flores-Cordero*, 723 F.3d 1085 (9th Cir. 2013), or with the Supreme Court's decision in *Johnson 2010*, and should be reversed. Pending an *en banc* review of

Flores-Cordero and/or *Gobert*, the issue of whether § 113(a)(3) is a "crime of violence" arguably remains unsettled in the Ninth Circuit. *Greenbow v. Sec'y of Health & Human Servs.*, 863 F.2d 633, 636 (9th Cir. 1988), *overruled in part on other grounds* by *United States v. Hardesty*, 977 F.2d 1347, 1348 (9th Cir. 1992) (*en banc*) (*per curium*).

As noted, *supra*, *Juvenile Female* was decided before *Johnson 2010*, and did not address the *level of force* required to commit the crime. There, the panel focused, instead, on the *threat of injury* created by the defendant's conduct, rendering that case inapposite. *Calvillo-Palacios* involved a Texas statute penalizing the act of intentionally and knowingly threatening another with imminent bodily injury with the use of a deadly weapon during the commission of an assault. There, the defendant was convicted of an offense that had, as an element, an assault that "causes serious bodily injury to another" – "serious body injury being defined as "bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ". Texas Penal Code §§ 22.02(a)(1) and 1.07(a)(46). Section 113(a)(3) has no such requirements.

As noted earlier, because §113 does not define "assault", courts have given the term its established common law meaning. *See e.g., United States v. Lamott*, 831 F.3d at 1156 (common law assault is defined as (1) "A willful attempt to inflict injury upon the person of another, also known as an

attempt to commit 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", quoting *United States v. Dupree*, 544 F.2d 1050, 1051 (9th Cir. 1976).

Because assault by battery with a dangerous weapon does not categorically require the use of *violent* physical force, it is not a "crime of violence" under the "force clause" of 18 U.S.C. § 924(c)(3). For example, one could approach a victim from behind, strike a glancing blow with the butt of a gun intending to do bodily harm to the unwitting victim, but do so with too little force to cause physical pain or injury to the victim. Or, a person could fire a gun at an unconscious victim, grazing the victim's clothing, but not injuring, the victim, and causing no fear in the victim. Those scenarios are not farfetched, and that conduct would clearly be chargeable under § 113(a)(3), thus meeting the *Moncrieffe v. Holder*[1] standard of plausibility. *See*, *e.g.*, *United States v. LeCompte*, 108 F.3d 948, 953 (8th Cir. 1997) 18 U.S.C. § 113(a)(3) requires only that the government present evidence that the appellant assaulted the victim with an object capable of inflicting bodily injury, not that the victim actually suffered bodily injury as a result of the assault). Moreover, the acts just described would not necessarily have caused the victim to fear immediate bodily injury – a fact that appears to undermine the *Gobert* decision. In *Gobert*, the Ninth Circuit opined that the least

1 *Moncrieffe v. Holder*, 569 U.S. 184 (2013)

violent form of § 113(a)(3) is the *threat* to use violent physical force through the use of a dangerous weapon that reasonably causes a victim to fear immediate bodily injury, which necessarily entails at least the "threatened use of violent physical force", thereby qualifying the offense as a crime of violence under § 924(c)(3)(A)'s elements clause (citing *Cavillo-Palacios*, 860 F.3d at 1290, and *United States v. Juvenile Female*, 566 F.3d at 948. That is simply not true. Any manner of battery, involving force too little to meet the *Johnson 2010* threshold, using stealth, or involving an unwitting or unconscious victim, so the victim is not placed in fear of immediate injury during its commission, while aided in some way by a "dangerous weapon", could be less "violent" than a consciously *perceived threat* of injury from a "dangerous weapon", or an actual battery involving force meeting the *Johnson 2010* threshold. *Any* unconsented to touching of the victim, by stealth, and otherwise aided by a dangerous weapon, would take the act beyond the realm of an attempt, and expose the perpetrator to an aggravated assault charge.

Section 113(a)(3), as charged in this case, has only three elements: (1) That the defendant intentionally struck *or* wounded the victim; (2) that the defendant acted with the specific intent to do bodily harm; and (3) that the defendant used a "dangerous weapon." *United States v. Etsitty*, 130 F.3d 420, 427 (9th Cir. 1997). These elements are insufficient to establish a categorical match to § 924(c)(3)'s "force clause".

Almost anything could qualify as a "dangerous weapon" under the offense of assault with a dangerous weapon, including objects such as "walking sticks, leather straps, rakes, tennis shoes, rubber boots, dogs, rings, concrete curbs, cloth[ing] irons, and stink bombs." *United States v. Tissnolthtos*, 115 F.3d 759, 763 (10th Cir. 1997); *United States v. Dayea*, 32 F.3d 1377, 1379 (9th Cir. 1994). Even saliva could be considered a dangerous weapon, though the transfer of saliva to a victim could be accomplished with de minimus force under § 113(a)(3). See, e.g., *United States v. Sturgis*, 48 F.3d 784, 788 (4th Cir. 1995); *United States v. Moore*, 846 F.2d 1163, 1167 (8th Cir. 1988)

At common law, the element of force in the crime of battery was "satisfied by even the slightest offensive touching." *United States v. Castelman*, 134 S. Ct. 1405, 1410 (2014).

CONCLUSION

A violation of § 113(a)(3) can be committed without the use of *violent* physical force. Because § 113 does not define "assault", courts have given the term its established common law meaning. *See, e.g.*, *United States v. Lamott*, 831 F.3d at 1156 (common law assault is defined as: (1) "A willful attempt to inflict injury upon the person of another, also known as an attempt to commit 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", quoting *United States v. Dupree*, 544 F.2d at 1051. Because assault with a dangerous weapon does not categorically require the use, or threatened use, of *violent* physical force, and is not subject to the *Taylor*[2] modified categorical approach, it is not a "crime of violence" under 18 U.S.C. § 924(c)(1)(A).

While several Circuit Courts of Appeal have declared § 113(a)(3) to be a "crime of violence" under 18 U.S.C. § 924(c)(3), and a three-judge panel of the Ninth Circuit has recently published an opinion so holding, *see United States v. Gobert*, 943 F.3d at 882, because § 113(a)(3) can be violated without using, or threatening to use, force capable of inflicting pain or causing physical injury, this Ninth Circuit's decision in this case cannot be reconciled with the Supreme Court's decision in *Johnson 2010*. For these reasons, Carlos's § 113(a)(3)-based § 924(c) conviction cannot stand.

For the foregoing reasons, this Court should grant this petition for writ of certiorari, reverse the decision of the Ninth Circuit Court of Appeals, and remand the case with instructions to vacate Carlos's § 924(c) conviction and sentence.

RESPECTFULLY SUBMITTED this 3rd day of August, 2023, by

MICHAEL J. BRESNEHAN, P.C.

s/ Michael J. Bresnehan
Attorney for Petitioner/Appellant

2 *Taylor v. United States*, 495 U.S. 575 (1990)