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

APPENDIXES TO PETITION FOR A WRIT OF CERTIORARI

MICHAEL J. BRESNEHAN
Law Offices of Michael J. Bresnehan, P.C.
1761 East McNair Drive, Suite 101
Tempe, AZ 85283-5002
Telephone: (480) 345-7032
mbresnehan@hotmail.com
Attorney for Petitioner

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

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APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

United States of America

v.

Jerome Stanley Carlos, Jr.
Aliases: Anthony Carlos, Jerome S. Gutierrez, Jerome Stanly Carlos Jr., "Lil Man", "Mr. Lil Man"

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed on or After November 1, 1987)

No. CR 05-00252-001-PHX-NVW

Gerald A. Williams (AFPD)
Attorney for Defendant

USM#: 42233-008

THERE WAS A verdict of guilty on 11/3/05 as to Counts One, Two, Three and Four of the Indictment[1].

ACCORDINGLY, THE COURT HAS ADJUDICATED THAT THE DEFENDANT IS GUILTY OF THE FOLLOWING OFFENSE(S): violating Title 18, U.S.C. §113(a)(3) and 1153, CIR Assault with a Dangerous Weapon, a Class C Felony offense, as charged in Count One of the Indictment; Title 18, U.S.C. §924(c)(1)(A)(i, ii, and iii) Discharging a Firearm During a Crime of Violence, a Class A Felony offense, as charged in Count Two of the Indictment; Title 18, U.S.C. §113(a)(6) and 1153, CIR Assault Resulting in Serious Bodily Injury, a Class C Felony offense, as charged in Count Three of the Indictment; Title 18, U.S.C. §924(c)(1)(A)(i, ii, and iii), Discharging a Firearm During a Crime of Violence, a Class A Felony offense, as charged in Count Four of the Indictment.

IT IS THE JUDGMENT OF THIS COURT THAT the defendant is hereby committed to the custody of the Bureau of Prisons for a term of **THREE HUNDRED THIRTY- SIX (336) MONTHS** which consists of One Hundred Twenty (120) Months on Counts One and Three, concurrent; Two Hundred Sixteen (216) Months on Counts Two and Four, concurrent to each other, but consecutive to Counts One and Three. Upon release from imprisonment, the defendant shall be placed on supervised release for a term of **THREE (3) YEARS** on Counts One, Two, Three and Four, said counts to run concurrent to each other.

CRIMINAL MONETARY PENALTIES

The defendant shall pay to the Clerk the following total criminal monetary penalties:

SPECIAL ASSESSMENT: $400.00 **FINE:** $0.00 **RESTITUTION:** $0.00

The Court finds the defendant does not have the ability to pay a fine and orders the fine waived.

If incarcerated, payment of criminal monetary penalties are due during imprisonment at a rate of not less than $25 per quarter and payment shall be made through the Bureau of Prisons' Inmate Financial Responsibility Program. Criminal monetary payments shall be made to the Clerk of U.S. District Court, Attention: Finance, Suite 130, 401 West Washington Street, SPC 1, Phoenix, Arizona 85003-2118. Payments should be credited to the various monetary penalties imposed by the Court in

[1]On 11/3/05, at trial, the Court granted Defendant's Rule 29 Motion for Judgment of Acquittal as to Counts 5 and 6.

the priority established under 18 U.S.C. § 3612(c). The total special assessment of $400.00 shall be paid pursuant to Title 18, United States Code, Section 3013 for Counts One, Two, Three and Four of the Indictment.

Any unpaid balance shall become a condition of supervision and shall be paid within 90 days prior to the expiration of supervision. Until all restitutions, fines, special assessments and costs are fully paid, the defendant shall immediately notify the Clerk, U.S. District Court, of any change in name and address. The Court hereby waives the imposition of interest and penalties on any unpaid balances.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant is placed on supervised release for a term of **THREE (3) YEARS** on Counts One, Two, Three and Four, said counts to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

For offenses committed on or after September 13, 1994: The defendant shall refrain from any unlawful use of a controlled substance. Pursuant to 18 U.S.C. §3563(a)(5) and 3583(d) the defendant shall submit to one drug test within 15 days of release from imprisonment and such other periodic drug tests thereafter, as directed from time to time by the probation officer.

The defendant shall not possess a firearm, ammunition or other dangerous weapon as defined in 18 U.S.C. §921.

It is the order of the Court that, pursuant to General Order 05-36, which incorporates the requirements of USSG §§5B1.3 and 5D1.2, you shall comply with the following conditions:

1) You shall not commit another federal, state, or local crime during the term of supervision.
2) You shall not leave the judicial district or other specified geographic area without the permission of the Court or probation officer.
3) You shall report to the Probation Office as directed by the Court or probation officer, and shall submit a truthful and complete written report within the first five days of each month.
4) You shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
5) You shall support your dependents and meet other family responsibilities.
6) You shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
7) You shall notify the probation officer at least ten days prior to any change of residence or employment.
8) You shall refrain from excessive use of alcohol and are subject to being prohibited from the use of alcohol if ordered by the Court in a special condition of supervision.
9) You shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 801) or any paraphernalia related to such substances, without a prescription by a licensed medical practitioner. Possession of controlled substances will result in mandatory revocation of your term of supervision.
10) You shall not frequent places where controlled substances are illegally sold, used, distributed or administered, or other places specified by the Court.
11) You shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
12) You shall permit a probation officer to visit at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
13) You shall immediately notify the probation officer (within forty-eight (48) hours if during a weekend or on a holiday) of being arrested or questioned by a law enforcement officer.
14) You shall not enter into any agreement to act as an informer or a special agent of a law

enforcement agency without the permission of the Court.

15) As directed by the probation officer, you shall notify third parties of risks that may be occasioned by your criminal record or personal history or characteristics, and shall permit the probation officer to make such notification and to confirm your compliance with such notification requirement.

16) If you have ever been convicted of a felony, you shall refrain from possessing a firearm, ammunition, destructive device, or other dangerous weapon. If you have ever been convicted of a misdemeanor involving domestic violence, you shall refrain from possession of any firearm or ammunition. Possession of a firearm will result in mandatory revocation of your term of supervision. This prohibition does not apply to misdemeanor cases that did not entail domestic violence, unless a special condition is imposed by the Court.

17) Unless suspended by the Court, you shall submit to one substance abuse test within the first 15 days of supervision and thereafter at least two, but no more than two periodic substance abuse tests per year of supervision, pursuant to 18 U.S.C. §§ 3563(a)(5) and 3583(d);

18) If supervision follows a term of imprisonment, you shall report in person to the Probation Office in the district to which you are released within seventy-two (72) hours of release.

19) You shall pay any monetary penalties as ordered by the Court. You will notify the probation officer of any material change in your economic circumstances that might affect your ability to pay restitution, fines, or special assessments.

20) If you have ever been convicted of any qualifying federal or military offense (including any federal felony) listed under 42 U.S.C. § 14135a(d)(1) or 10 U.S.C. § 1565(d), you shall cooperate in the collection of DNA as directed by the probation officer pursuant to 42 U.S.C. § 14135a(a)(2).

The following special conditions are in addition to the conditions of supervised release or supersede any related standard condition:

1. You shall participate as instructed by the probation officer in a program of substance abuse treatment which may include testing for substance abuse. You shall contribute to the cost of treatment in an amount to be determined by the probation officer.

2. You shall submit your person, property (including but not limited to computer, electronic devices, and storage media), residence, office, or vehicle to a search conducted by a probation officer, at a reasonable time and in a reasonable manner.

3. You shall participate in a mental health program as directed by the probation officer which may include taking prescribed medication. You shall contribute to the cost of treatment in an amount to be determined by the probation officer.

4. You shall not contact the following victim(s), Philabert White, Kerrie Standsalone, and Razmei White, and the probation officer will verify compliance.

5. You shall not be involved with gang activity, possess any gang paraphernalia or associate with any person affiliated with a gang.

6. You shall abstain from all use of alcohol or alcoholic beverages.

THE DEFENDANT IS ADVISED OF DEFENDANT'S RIGHT TO APPEAL WITHIN 10 DAYS OF ENTRY OF JUDGMENT.

The Court may change the conditions of probation or supervised release or extend the term of supervision, if less than the authorized maximum, at any time during the period of probation or supervised release. The Court may issue a warrant and revoke the original or any subsequent sentence for a violation occurring during the period of probation or supervised release.

IT IS FURTHER ORDERED that the Clerk of the Court deliver two certified copies of this judgment to the United States Marshal of this district.

The Court orders commitment to the custody of the Bureau of Prisons. The defendant is remanded to the custody of the United States Marshal.

Date of Imposition of Sentence: **Tuesday, September 5, 2006**

DATED this 5th day of September, 2006.

Neil V. Wake
United States District Judge

RETURN

I have executed this Judgment as follows:_____

Defendant delivered on _____ to _____ at _____, the institution designated by the Bureau of Prisons, with a certified copy of this judgment in a Criminal case.

_____ By:_____
United States Marshal Deputy Marshal

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

FEB 16 2017

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

JEROME STANLEY CARLOS, Jr., Applicant, v. UNITED STATES OF AMERICA, Respondent.	No. 16-72106 D.C. No. 2:05-cr-252-PHX-NVW District of Arizona, Phoenix ORDER

Before: GOODWIN, FARRIS, and FERNANDEZ, Circuit Judges.

The application for authorization to file a second or successive 28 U.S.C. § 2255 motion makes a prima facie showing for relief under *Johnson v. United States*, 135 S. Ct. 2551 (2015). The application is granted. *See Welch v. United States*, 136 S. Ct. 1257, 1264-68 (2016) (*Johnson* announced a new substantive rule that has retroactive effect in cases on collateral review).

The Clerk shall transfer the proposed section 2255 motion filed on June 27, 2016, to the United States District Court for the District of Arizona to be processed as a section 2255 motion. The motion shall be deemed filed in the district court on June 27, 2016, the date the application was filed in this court. *See Orona v. United States*, 826 F.3d 1196 (9th Cir. 2016)

The Clerk shall serve this order and the application directly on the chambers

of the Honorable Neil V. Wake.

Upon transfer of the proposed section 2255 motion, the Clerk shall close this original action in this court.

No further filings will be entertained in this case.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

United States of America, Plaintiff/Respondent, v. Jerome Staley Carlos, Sr., Defendant/Movant.	No. CV-16-04583-PHX-NVW (ESW) CR-05-00252-PHX-NVW **REPORT AND RECOMMENDATION**

TO THE HONORABLE NEIL V. WAKE, SENIOR UNITED STATES DISTRICT JUDGE:

On February 16, 2017, the Ninth Circuit Court of Appeals granted Jerome Staley Carlos, Sr.'s ("Movant") application for authorization to file a second or successive "Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255" (the "Motion to Vacate").[1] (Doc. 3 at 1-2).[2] The undersigned has reviewed the Motion to Vacate (Doc. 3 at 9-16), the United States' Limited Response (Doc. 7), and Movant's Reply (Doc. 33). For the reasons explained herein, it is recommended that the Court dismiss this matter with

[1] Although this matter was transferred to the District Court in February 2017, the Ninth Circuit ordered the Motion to Vacate to be deemed filed on June 27, 2016 (the date Movant filed his application in the Ninth Circuit). (Doc. 3 at 1). The matter was reassigned to the undersigned on July 6, 2018. (Doc. 23).

[2] Citations to "Doc." are to the docket in CV 16-04583-PHX-NVW (ESW). Citations to "CR Doc." are to the docket in the underlying criminal case, CR-05-00252-PHX-NVW .

prejudice.

I. BACKGROUND

On November 3, 2005, a jury found Movant guilty on the following four counts:

i. Count 1: CIR-Assault with a Dangerous Weapon, a Class C Felony, in violation of 18 U.S.C. § 113(a)(3);

ii. Count 3: CIR-Assault Resulting in Serious Bodily Injury, a Class C Felony, in violation of 18 U.S.C. § 113(a)(6); and

iii. Counts 2 and 4: CIR-Use of a Firearm in a Crime of Violence, Class A Felonies, in violation of 18 U.S.C. § 924(c)(1)(A)(i, ii, and iii).

(CR Doc. 62). The Court sentenced Movant to (i) concurrent 120-month prison terms on Counts 1 and 3 and (ii) concurrent 216-month prison terms on Counts 2 and 4. (CR Doc. 116). The sentences on Counts 1 and 3 run consecutively to the sentences on Counts 2 and 4. (*Id.*).

In August 2007, the Ninth Circuit affirmed Movant's convictions and sentences. (CR Doc. 75). Movant thereafter filed a motion under 28 U.S.C. § 2255, which the Court denied. (CR Docs. 76, 87). In his pending second Motion to Vacate, Movant challenges the constitutionality of his convictions on Counts 2 and 4 (use of a firearm in a crime of violence in violation of 18 U.S.C. § 924(c)).

II. DISCUSSION

A. Convictions Under 18 U.S.C. § 924(c)

18 U.S.C. § 924(c) is a substantive criminal offense that sets forth mandatory sentences for defendants who "during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm . . . ." The term "crime of violence" is defined as:

> 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.

18 U.S.C. § 924(c)(3). Subsection A above is referred to herein as the "Elements/Force Clause."[3] Subsection B above is referred to herein as the "Residual Clause."

On June 24, 2019, the Supreme Court held that the Residual Clause of § 924(c) is unconstitutionally vague. *United States v. Davis*, 139 S.Ct. 2319 (2019). Despite the Residual Clause's unconstitutionality, Movant's § 924(c) convictions would be upheld if his predicate felonies (assault with a dangerous weapon and assault resulting in serious bodily injury) are "crimes of violence" under the Elements/Force Clause. The following summarizes the methodology to be used in making that analysis.

Courts apply a "categorical approach to determining which offenses are included under section 924(c) as 'crimes of violence.'" *United States v. Amparo*, 68 F.3d 1222, 1224 (9th Cir. 1995); *United States v. Piccolo*, 441 F.3d 1084, 1086-87 (9th Cir. 2006) ("In the context of crime of violence determinations under § 924(c), our categorical approach applies regardless of whether we review a current or prior crime."). The Ninth Circuit has explained that under the categorical approach, courts

> do not look to the particular facts underlying the conviction, but "compare the elements of the statute forming the basis of the defendant's conviction with the elements of" a "crime of violence." The defendant's crime cannot categorically be a "crime of violence" if the statute of conviction punishes any conduct not encompassed by the statutory definition of a "crime of violence."
>
> If the statute of conviction does not qualify as a categorical "crime of violence," [courts] sometimes then apply the modified categorical approach, which allows us to look to a narrow set of documents that are part of the record of conviction.

United States v. Benally, 843 F.3d 350, 352 (9th Cir. 2016) (citations omitted).

B. Statute of Limitations

A one-year statute of limitations applies to motions filed under 28 U.S.C. § 2255. Section 2255(f) provides that the one-year limitations period runs from the latest

[3] Courts and parties refer to Subsection A of 18 U.S.C. § 924(c)(3) interchangeably as the "elements clause" or the "force clause."

of:

> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255(f)(1)-(4). Satisfying the statute of limitations is not a jurisdictional prerequisite to filing a motion under 28 U.S.C. § 2255. *Pough v. United States*, 442 F.3d 959, 965 (6th Cir. 2006) ("[T]he one-year statute of limitations for filing a motion under § 2255 is not jurisdictional.").

The United States argues that the Motion to Vacate should be denied as untimely. (Doc. 7 at 12-18). The parties dispute the date on which the statute of limitations began to run. Relying on § 2255(f)(1), the United States asserts that the Motion to Vacate is untimely as it was filed more than one year after the date Movant's convictions became final. (*Id.*). Asserting that § 2255(f)(3) applies instead, Movant argues that the Motion to Vacate is timely as it was filed within one year of *Johnson v. United States*, 135 S.Ct. 2551 (2015) ("*Johnson II*").[4] (Doc. 3 at 14, ¶ 21).

Prior to *Davis*, courts in the Ninth Circuit relied on *United States v. Blackstone*, 903 F.3d 1020 (9th Cir. 2018) in concluding that the United States' timeliness argument is meritorious. *See Mancinas-Flores v. United States*, No. CV-16-03183-PHX-NVW, 2019

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[4] *Johnson II* did not involve § 924(c), but rather the Armed Career Criminal Act of 1984 ("ACCA"). The ACCA, 18 U.S.C. § 924(e)(1), sets forth a mandatory enhanced sentence for defendants who are convicted of being a felon in possession of a firearm or ammunition and have three or more previous convictions for a "violent felony or a serious drug offense."

WL 948975 (D. Ariz. Feb. 27, 2019) (concluding that *Blackstone* compelled dismissal of § 2255 motion on timeliness grounds) (citing *Blackstone*, 903 F.3d at 1028). Yet in light of *Davis*, it is arguable that this proceeding is timely under § 2255(f)(3). *See Yates v. United States*, No. C19-5151RBL, 2019 WL 3842742, at *1 (W.D. Wash. Aug. 15, 2019) (rejecting government's timeliness argument with respect to defendant's challenge to § 924(c) conviction, explaining that because *Davis* set out a new rule, the defendant's § 2255 motion if anything, was premature); *Figueroa v. United States*, No. 3:12-CR-00236-GPC, 2019 WL 3936128, at *2 (S.D. Cal. Aug. 20, 2019) (district court did not dismiss as untimely § 2255 motion challenging § 924(c) convictions in light if *Davis*); *In re Hammoud*, 931 F.3d 1032, 1039 (11th Cir. 2019) ("*Davis* announced a new substantive rule, and [*Welch v. United* States, 136 S.Ct. 1257 (2016)] tells us that a new rule such as the one announced in *Davis* applies retroactively to criminal cases that became final before the new substantive rule was announced.").

The Court, however, does not need to resolve whether this proceeding is timely in light of *Davis* as the following discussion explains that Movant's challenges to Counts 2 and 4 are procedurally defaulted. *See Aron v. United States,* 291 F.3d 708, 718 (11th Cir. 2002) ("[A] district court is not required to rule on whether an asserted statute of limitations bar applies if the § 2255 motion may be denied on other grounds."); *Sigouin v. United States*, Civ. No. 08–00323 JMS/KSC, 2008 WL 4862515, at *3 n.3 (D. Haw. Nov. 10, 2008) ("In light of the court's holding that Sigouin's claims lack merit or are procedurally barred, and because § 2255's time limit is not jurisdictional, the court does not reach the government's argument that Sigouin's motion was filed outside of § 2255's one-year time limit.").

C. Procedural Default

"A § 2255 movant procedurally defaults his claims by not raising them on direct appeal and not showing cause and prejudice or actual innocence in response to the default." *United States v. Ratigan*, 351 F.3d 957, 962 (citing *Bousley v. United States*, 523 U.S. 614, 622 (1998)). It is undisputed that Movant did not challenge on direct appeal the Court's

determination that his assault with a dangerous weapon and assault resulting in serious bodily injury convictions qualify as crimes of violence. The issue is whether the procedural default should be excused under the cause and prejudice or actual innocence exceptions.

To establish the prejudice prong of the cause and prejudice exception, Movant must "demonstrate[e] 'not merely that the errors . . . [in the proceedings] created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire [proceedings] with error of constitutional dimensions.'" *United States v. Braswell*, 501 F.3d 1147, 1150 (9th Cir. 2007) (emphasis in original). As discussed below, the undersigned finds that Movant has failed to satisfy the prejudice prong because assault with a dangerous weapon and assault resulting in serious bodily injury are crimes of violence under the Elements/Force Clause.

1. Movant's Challenge to Count 2 (Section 924(c) Conviction Predicated on Assault with a Dangerous Weapon in violation of 18 U.S.C. § 113(a)(3))

Movant cites *Johnson v. United States*, 559 U.S. 133 (2010) ("*Johnson I*") in arguing that assault with a dangerous weapon is not a crime of violence under the Elements/Force Clause. (Doc. 3 at 12, ¶ 18(a)). Section 924(c) was not at issue in *Johnson I*, but rather the "force" clause set forth in the ACCA, 18 U.S.C. § 924(e)(2)(B)(i). Section 924(e)(2)(B)(i) defines "violent felony" in part as an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another." The Supreme Court in *Johnson I* clarified that "physical force," as used in § 924(e)(2), "means *violent* force—that is, force capable of causing physical pain or injury to another person." *Id.* at 140. The undersigned will assume without deciding that *Johnson I*'s definition of "physical force" applies to the Elements/Force Clause of § 926(c)(3)(A). Therefore, in order to qualify as a crime of violence under the Elements/Force Clause, assault with a dangerous weapon must require the use, attempted use, or threatened use of violent physical force.

In arguing that assault with a dangerous weapon does not qualify as a crime of violence under the Elements/Force Clause, Movant asserts that it "can be committed

without the use or threatened use of violent force, because inflicting or threatening to inflict injury does not categorically require the use of violent physical force." (Doc. 3 at 12-13, ¶ 18(a)(iii)). Yet Supreme Court precedent requires the presentation of a "realistic probability, not a theoretical possibility" that assault with a dangerous weapon could be sustained without demonstrating that the defendant intentionally used or threatened to use violent force. *See Moncrieffe v. Holder*, 569 U.S. 184, 189-91 (2013).

A conviction for assault with a dangerous weapon pursuant to 18 U.S.C. § 113(a)(3) "requires the government to show that a defendant assaulted a victim with a dangerous weapon with *intent* to inflict bodily harm *and* reasonably caused the victim to fear immediate bodily harm." *United States v. Sutton*, 695 F. App'x 330, 331 (9th Cir. 2017) (emphasis in original). Section 113(a)(3) "involves violent force because it proscribes common law assault with a dangerous weapon, not simple common law assault." *United States v. Verwiebe*, 874 F.3d 258, 261 (6th Cir. 2017). The Ninth Circuit has "repeatedly found that threats involving deadly weapons qualify as crimes of violence." *United States v. Calvillo-Palacios*, 860 F.3d 1285, 1292 (9th Cir. 2017). In *Sutton*, 695 F. App'x at 331, the Ninth Circuit held that "all culpable conduct criminalized under § 113(a)(3) requires the use, attempted use, or threatened use of violent force."

The undersigned does not find that there is a realistic probability that an individual who had not used, attempted, or threatened "force capable of causing physical pain or injury to another person" would be convicted of assault with a dangerous weapon in violation of 18 U.S.C. § 113(a)(3). *Johnson I*, 559 U.S. at 140. Assuming *Johnson I* applies to this case, the undersigned concludes that assault with a dangerous weapon includes the necessary violent physical force element in order to qualify as a crime of violence under the Elements/Force Clause of § 924(c)(3)(A). *See, e.g., Sutton*, 695 F. App'x at 331; *United States v. Blatchford*, No. CR-16-08085-001-PCT-GMS, 2017 WL 2480703, at *2 (D. Ariz. June 7, 2017) ("Assault with a dangerous weapon is a crime of violence."); *United States v. Juvenile Female*, 566 F.3d 943, 948 (9th Cir. 2009) (stating that a defendant charged with assault with a deadly or a dangerous weapon, "must have

always 'threatened [the] use of physical force'") (quoting 18 U.S.C. § 16(a)). Accordingly, the undersigned finds that Movant has failed to establish the prejudice prong of the cause and prejudice exception. Because Movant has not satisfied the prejudice prong, the Court need not address the cause prong of the cause and prejudice exception. *See United States v. Dale*, 140 F.3d 1054, 1056 n.4 (D.C. Cir. 1998) (declining to decide whether defendant established cause for his procedural default where the defendant did not satisfy the prejudice prong). Further, as assault with a dangerous weapon is a crime of violence under the Elements/Force Clause, Movant's actual innocence claim fails as to Count 2. (Doc. 33 at 7). The undersigned recommends that the Court dismiss Movant's claim challenging his conviction on Count 2.

2. Movant's Challenge to Count 4 (Section 924(c) Conviction Predicated on Assault Resulting in Serious Bodily Injury in violation of 18 U.S.C. § 113(a)(6))

Movant's conviction on Count 4 is predicated on assault resulting in serious bodily injury. "The crime of assault resulting in serious bodily injury under 18 U.S.C. § 113 may be based on reckless conduct." *United States v. Kindelay*, No. CR05-00271-PHX-NVW, 2007 WL 2410343, at *2 (D. Ariz. Aug. 21, 2007) (citing *United States v. McInnis*, 976 F.2d 1226, 1234 (9th Cir. 1992); *United States v. Loera*, 923 F.2d 725, 728 (9th Cir. 1991)). Movant argues that "because assault resulting in serious bodily injury under § 113(a)(6) can be committed recklessly, it does not qualify as a 'crime of violence' under the force clause." (Doc. 3 at 13, ¶ 18(b)(iii)).

In *United States v. Begay*, No. 14-10080, 2019 WL 3884261, at *5 (9th Cir. Aug. 19, 2019), the Ninth Circuit explained that "a crime of violence under 18 U.S.C. § 924(c)(3) requires the intentional use of force." The Ninth Circuit overturned a § 924(c)(3) conviction predicated on second-degree murder, holding that "[b]ecause second-degree murder can be committed recklessly, rather than intentionally, it does not categorically constitute a crime of violence. *Id.* at *6.

Because assault resulting in serious bodily injury may be committed intentionally or recklessly, the undersigned finds that the range of conduct proscribed by 18 U.S.C. §

113(a)(6) is broader than that encompassed by the Elements/Force Clause of § 924(c). Therefore, the undersigned will employ the "modified categorical approach" to determine whether Movant's § 113(a)(6) conviction qualifies as a crime of violence under the Elements/Force Clause.

"Under the modified categorical approach, [the Court] conduct[s] a limited examination of documents in the record to determine if there is sufficient evidence to conclude that a defendant was convicted of the elements of the generically defined crime even though his or her statute was facially over-inclusive." *Ruiz-Morales v. Ashcroft*, 361 F.3d 1219, 1222 (9th Cir. 2004) (citation and internal quotation marks omitted). In utilizing the "modified categorical approach," the "focus [is] on the elements, rather than the facts, of a crime." *Descamps v. United States*, 570 U.S. 254, 263 (2013). In applying the modified categorical approach, courts may "consult a limited class of documents, such as indictments and jury instructions[.]" *Id.* at 257.

Here, the Court instructed the jury that the § 113(a)(6) charge required the United States to prove beyond a reasonable doubt that Movant "intentionally struck or wounded the victim." (Doc. 33-1 at 4). The documents of conviction thus indicate that Movant intentionally, rather than recklessly, used physical force in committing his assault. As a result, the undersigned finds that Movant's § 113(a)(6) conviction qualifies as a crime of violence under the Elements/Force Clause of § 924(c)(3)(A). Movant has failed to establish the prejudice prong of the cause and prejudice exception and also has failed to establish actual innocence. It is recommended that the Court dismiss Movant's claim challenging his conviction on Count 4.

III. CONCLUSION

Based on the foregoing,

IT IS RECOMMENDED that the Court dismiss the Motion to Vacate (Doc. 3 at 9-16) with prejudice.

IT IS FURTHER RECOMMENDED that the Court decline to issue a certificate of appealability because reasonable jurists would not find the Court's procedural ruling

debatable. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

This Report and Recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's judgment. The parties shall have fourteen days from the date of service of a copy of this Report and Recommendation within which to file specific written objections with the Court. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6, 72. Thereafter, the parties have fourteen days within which to file a response to the objections. Failure to file timely objections to the Magistrate Judge's Report and Recommendation may result in the acceptance of the Report and Recommendation by the District Court without further review. Failure to file timely objections to any factual determinations of the Magistrate Judge may be considered a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003); *Robbins v. Carey*, 481 F.3d 1143, 1146-47 (9th Cir. 2007).

Dated this 3rd day of September, 2019.

Honorable Eileen S. Willett
United States Magistrate Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Jerome Stanley Carlos, Jr.,

Petitioner,

v.

United States of America,

Respondent.

No. CV-16-04583-PHX-NVW (ESW)
CR-05-00252-PHX-NVW

ORDER AND DENIAL OF CERTIFICATE OF APPEALABILITY AND IN FORMA PAUPERIS STATUS

Before the Court are Petitioner's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence by Person in Federal Custody (Doc. 3), United States Magistrate Judge Willett's Report and Recommendation (Doc. 38) and Petitioner's Objections to the Magistrate's Report and Recommendation (Docs. 41). This originated as a motion in the Court of Appeals for a second or successive motion under 28 U.S.C. § 2255, which was granted and transferred to this Court. (Doc. 2.)

The Court has considered Petitioner's objections and reviewed the Report and Recommendation de novo. *See* Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1) (stating that the Court must make a de novo determination of those portions of the Report and Recommendation to which specific objections are made). The Court rejects the magistrate judge's Report and Recommendation and modifies it as follows. *See* 28 U.S.C. § 636(b)(1) (stating that the district court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate").

IT IS THEREFORE ORDERED that the Report and Recommendation of Magistrate Judge Willett (Doc. 9) is rejected. Some of the points discussed in the R&R are corrected, but it is easier to state the correct law rather than discuss the errors in the R&R.

1. **The Residual Clause.** The Residual Clause of the crime of violence definition of 18 U.S.C. § 924(c) is unconstitutionally vague. *United States v. Davis*, 139 S.Ct. 2319 (2019). However, the Solicitor General has determined that cases pending on collateral review will be governed by *Davis*. *Yates v. United States,* 2019WL3842724 at 2 (W.D.Wash. August. 15, 2019). If it were based on the Residual Clause of 18 U.S.C. § 924(c), the motion here would be "untimely" because premature if based on *Johnson v. United States*, 135 S.Ct. 2241 (2015), as held in *United States v. Blackstone*, 903 F.3d 1020 (9th Cir. 2018). But the prematurity/untimeliness is cured by *Davis*. The United States' errs is saying the § 2255 motion is untimely because filed more than one year after *Johnson.* It is timely because filed within a year (indeed, before) *Davis.* But the challenge in this case must also be to the Elements Clause of 18 U.S.C. § 924(c), not just the Residual Clause.

2. Though it is not a categorical rule, an issue on a later § 2255 motion must have been raised on direct appeal or is defaulted. *United States v. Ratigan*, 351 F.3d 957, 962 (9th Cir. 2003) (challenge to sufficiency of evidence). *Bousley v. United States,* 523 U.S. 614, 622 (1998), cited in the R&R, states a more stringent rule for challenges to guilty pleas. Petitioner was not required as a condition to a later § 2255 motion to challenge the Residual Clause years before they were held unconstitutional in *Davis*, which, like *Johnson*, overruled prior caselaw. However, the Residual Clause is of no consequence if the Elements Clause of 18 U.S.C. § 924(c) suffices for Petitioner's convictions on counts two and four.

3. Petitioner did not challenge on direct appeal the Elements Clause of the conviction on count Two for use of a firearm in a crime of violence, that it, assault with a dangerous weapon, 18 U.S.C. § 113(a)(3). Nor did he not challenge on direct appeal the Elements Clause of the conviction on count Four for use of a firearm in a crime of violence,

that it, assault resulting in serious bodily injury, 18 U.S.C. § 113(a)(6). The Elements Clause of those crimes are not implicated in the Supreme Court's decisions invalidating the Residual Clause of 18 U.S.C. § 924(c). Therefore, Petitioner's § 2255 motion is untimely because filed more than one year after those convictions. That time is not extended by any "right initially recognized by the Supreme Court . . . [that] has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255(f)(3).

4. Petitioner's § 2255 challenges on those counts are also barred because they were not raised on direct appeal, as they well could have been at that time.

5. The Court of Appeals' allowance of a second or successive § 2255 motion is expressly grounded on the retroactive effect of the *Johnson* case. But *Johnson* does not undercut, much less retroactively, the Elements Clause.

IT IS FURTHER ORDERED that Petitioner's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence by Person in Federal Custody (Doc. 1) is denied and dismissed with prejudice.

IT IS FURTHER ORDERED that the Clerk of the Court shall enter judgment accordingly and terminate this action.

The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not shown 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." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); see also 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Dated: September 30, 2019.

Neil V. Wake
Senior United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 20 2020

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

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JEROME STANLEY CARLOS, Jr. Defendant-Appellant.	No. 19-16944 D.C. Nos. 2:16-cv-04583-NVW 2:05-cr-00252-NVW-1 District of Arizona, Phoenix ORDER

Before: CLIFTON and NGUYEN, Circuit Judges.

Appellant's motion for leave to submit an amended motion for certificate of appealability (Docket No. 4) is granted. The amended motion for certificate of appealability is deemed filed.

After reviewing the underlying motion and concluding that it states at least one substantive claim debatable among jurors of reason, namely whether appellant's conviction for violating 18 U.S.C. § 924(c) must be vacated because assault as defined by 18 U.S.C. § 113(a)(6) is not a qualifying predicate crime of violence, we grant the amended request for a certificate of appealability (Docket No. 4) with respect to the following issue: whether the district court correctly determined that appellant's claim was untimely and procedurally defaulted because appellant failed to raise a challenge to his conviction under 18 U.S.C. § 113(a)(6) based on the force clause in his direct appeal or in his initial 28 U.S.C. § 2255

motion. *See* 28 U.S.C. § 2253(c)(3); *Gonzalez v. Thaler*, 565 U.S. 134 (2012); *Slack v. McDaniel*, 529 U.S. 473, 483-85 (2000); *Lambright v. Stewart*, 220 F.3d 1022, 1026 (9th Cir. 2000); *see also* 9th Cir. R. 22-1(e). The parties must also address 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). This case raises issues similar to those raised in *United States v. Deel*, No. 19-15665.

The opening brief is due June 23, 2020; the answering brief is due July 23, 2020; the optional reply brief is due within 21 days after service of the answering brief.

The Clerk will serve on appellant a copy of the "After Opening a Case - Counseled Cases" document.

APPENDIX F

NOT FOR PUBLICATION

FILED

JUN 9 2023

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JEROME STANLEY CARLOS, Jr., Petitioner-Appellant, v. UNITED STATES OF AMERICA, Respondent-Appellee.	No. 19-16944 D.C. Nos. 2:16-cv-04583-NVW 2:05-cr-00252-NVW-1 MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Neil V. Wake, District Judge, Presiding

Submitted June 7, 2023**
San Francisco, California

Before: MILLER and KOH, Circuit Judges, and MOLLOY,*** District Judge.

Jerome Stanley Carlos appeals the district court's denial of his federal habeas petition. We granted a certificate of appealability on Carlos's claim that his

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Donald W. Molloy, United States District Judge for the District of Montana, sitting by designation.

18 U.S.C. § 924(c) conviction must be vacated because his assault conviction under 18 U.S.C. § 113(a)(6) did not qualify as predicate crime of violence. We have jurisdiction under 28 U.S.C. §§ 1291, 2253(a), and 2255(d). We vacate the conviction and sentence, and we remand.

1. Carlos filed a second 28 U.S.C. § 2255 motion, challenging his conviction under 18 U.S.C. § 924(c) on the ground that 18 U.S.C. § 113(a)(6) is not a crime of violence. He contends that the district court erred when it denied the motion, finding the motion untimely and the claims procedurally barred. The government concedes this error. *See Jones v. United States*, 36 F.4th 974, 986 (9th Cir. 2022) (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)").

However, the government asserts that remand for resentencing is not necessary in light of Carlos's other conviction for which he received a concurrent sentence of 216 months' imprisonment. We disagree. It is our "customary practice" to "remand for resentencing" when the "sentencing package becomes 'unbundled.'" *United States v. Hanson*, 936 F.3d 876, 886–87 (9th Cir. 2019) (citations omitted). Here, the district court appears to have sentenced Carlos by "bundling" his multiple convictions. Thus, in our discretion, we vacate all of the sentences imposed by the district court and remand for it to resentence Carlos on

the remaining three counts. *See United States v. Jenkins*, 884 F.2d 433, 441 (9th Cir. 1989) (remanding for resentencing on unchallenged count where district court may have "regarded the sentences for the two counts as parts of a single 'sentencing package'" (citation omitted)); *see also United States v. Evans-Martinez*, 611 F.3d 635, 645 (9th Cir. 2010).

2. Carlos raises two uncertified issues in his opening brief, arguing that 18 U.S.C. § 113(a)(3) is not a crime of violence. Specifically, Carlos challenges our decision in *United Sates v. Gobert*, which held to the contrary. 943 F.3d 878, 882 (9th Cir. 2019). He argues that *Gobert* conflicts with *United States v. Flores-Cordero*, 723 F.3d 1085, 1088 (9th Cir. 2013), and the Supreme Court's decision in *Johnson v. United States*, 559 U.S. 133 (2010).

Where a petitioner briefs uncertified issues, we construe that action as a motion to expand the certificate of appealability. *See* 9th Cir. R. 22–1(e). We will only expand a certificate of appealability where "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

Carlos's arguments lack merit. Carlos has failed to demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller–El v. Cockrell*, 537 U.S. 322, 338 (2003) (citation omitted). Accordingly, we decline to expand the certificate.

VACATED and REMANDED.

APPENDIX G

JON M. SANDS
Federal Public Defender
KEITH J. HILZENDEGER #023685
Assistant Federal Public Defender
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
(602) 382-2700 voice
(602) 382-2800 facsimile
keith_hilzendeger@fd.org
Attorneys for Movant Carlos

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Jerome Stanley Carlos, Jr., Movant, vs. United States of America, Respondent.	No. Criminal No. 2:05-cr-252-PHX-NVW **Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255**

Background Data

1. Mr. Carlos is challenging his convictions for discharging a firearm during an in relation to a crime of violence, in violation of 18 U.S.C. § 924(c), in No. 2:05-cr-252-PHX-NVW, in the United States District Court for the District of Arizona. The convicting court's address is 401 West Washington Street, Phoenix, Arizona 85003.

2. The judgment of conviction was entered September 6, 2006.

3. Following a three-day jury trial, Mr. 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).

4. Mr. Carlos was sentenced to 336 months in prison, consisting of two concurrent terms of 120 months on the assault counts followed by 216 months on the § 924(c) counts.

5. Mr. Carlos took a direct appeal from his convictions and sentences. The Ninth Circuit affirmed his convictions and sentences on July 30, 2007. Mr. Carlos did not file for rehearing, nor did he file a petition for a writ of certiorari.

6. On February 29, 2008, Mr. Carlos filed a motion under 28 U.S.C. § 2255. This motion was docketed as No. 2:08-cv-418-PHX-NVW. This Court denied the motion on the merits on February 19, 2009. The Ninth Circuit denied a certificate of appealability on April 28, 2010. Mr. Carlos did not file a petition for a writ of certiorari.

7. This motion is being filed pursuant to the Ninth Circuit's order authorizing him to file a second or successive § 2255 motion. *See* 28 U.S.C. §§ 2244(b); 2255(h)(2).

8. Mr. Carlos reserves the right to amend this motion.

Claim for Relief—Convictions Under 18 U.S.C. § 924(c) Invalid Under *Johnson v. United States*

9. Following a three-day jury trial, Mr. 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). (Dkt. #30)*

10. At sentencing, the judge granted the government's written request for an upward departure (Dkt. #55) and imposed a total sentence of 336 months. This sentence consists of two concurrent terms of 120 months on the assault counts followed by two concurrent terms of 216 months on the § 924(c) counts. The sentences on the § 924(c) counts were concurrent because Mr. Carlos only used a firearm once. *See United States v. Rentz*, 777 F.3d 1105 (10th Cir. 2015) (en banc).

11. Mr. Carlos appealed his convictions. On July 30, 2007, the Ninth Circuit affirmed the convictions. (Dkt. #75) Mr. Carlos did not file a petition for rehearing. He did not file a petition for certiorari. Thus his convictions became final on October 29, 2007, when the

* All citations to the docket in this document refer to the record in the related criminal case.

time for filing a petition for certiorari expired. *See Clay v. United States*, 537 U.S. 522 (2003).

12. On February 29, 2008, this Court docketed a *pro se* motion to vacate sentence under 28 U.S.C. § 2255 from Mr. Carlos. (Dkt. #76) This motion raised four claims:

    a. ineffective assistance of counsel;

    b. double jeopardy;

    c. prosecutorial misconduct; and

    d. separation of powers violation.

13. This Court denied Mr. Carlos's § 2255 motion on the merits on February 19, 2009. (Dkt. #87) The Ninth Circuit denied a certificate of appealability on April 28, 2010.

14. Under 18 U.S.C. § 924(c)(3), a "crime of violence" is defined as a crime that is a felony and that:

    a. has as an element the use, attempted use, or threatened use of physical force against the person of another, 18 U.S.C. § 924(c)(3)(A), 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, 18 U.S.C. § 924(c)(3)(B).

15. The first prong of this definition is known as the "force clause."

16. The second prong of this definition ("that by its nature involves…") is known as the "residual clause."

17. In *Johnson v. United States*, 135 S. Ct. 2551 (2015), the Supreme Court held that the similarly-worded residual clause in 18 U.S.C. § 924(e), the Armed Career Criminal Act, was unconstitutionally vague. Consequently, any sentence enhancement based on the residual clause is illegal. (All unadorned references to "*Johnson*" in this document will refer to this 2015 case. Other cases named *Johnson* will be distinguished in short citations.)

18. In light of *Johnson*, neither of Mr. Carlos's assault convictions qualify as "crimes of violence." Accordingly, his § 924(c) convictions must be vacated.

a. The assault with a dangerous weapon conviction.

i. A violation of 18 U.S.C. § 113(a)(3) has three elements: "that the defendant intentionally struck or wounded the victim, acted with specific intent to do bodily harm, and used a dangerous weapon." *United States v. Etsitty*, 130 F.3d 420, 427 (9th Cir. 1997) (per curiam). Although the Ninth Circuit held in *United States v. Juvenile Female*, 566 F.3d 943 (9th Cir. 2009) that assault with a dangerous weapon under 18 U.S.C. § 111 was a "crime of violence" under 18 U.S.C. § 16(a) (which mirrors the force clause of the Guidelines' definition of the term), intervening precedent shows that the holding in *Juvenile Female* is no longer valid, and that as a result a violation of § 113(a)(3) does not qualify as a "crime of violence" under the force clause.

ii. In *United States v. Johnson* (*Johnson 2010*), 559 U.S. 133 (2010), the Supreme Court held that the level of force required to amount to a "crime of violence" is "*violent* force—that is, force capable of causing physical pain or injury to another person." *Id.* at 140. In *Juvenile Female*, by contrast, the Ninth Circuit held that another federal statute that punished assault with a dangerous weapon qualified under the force clause because that crime categorically involved a "willful attempt to inflict injury or a threat to inflict injury" on another person. 566 F.3d at 948 (quoting *United States v. Chapman*, 528 F.3d 1215, 1219–20 (9th Cir. 2008)). But because *Juvenile Female* did not address the level of *force* required, but instead with the threat of injury that the defendant's conduct entails, it has been implicitly overruled by *Johnson 2010*. *See United States v. Flores-Cordero*, 723 F.3d 1085, 1087–88 (9th Cir. 2013) (citing *Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc)).

iii. A violation of § 113(a)(3) can be committed without the use or threatened use of violent force, because inflicting or threatening to inflict injury does

not categorically require the use of violent physical force. Thus §113(a)(3) does not qualify as a "crime of violence" under the force clause.

iv. And because after *Johnson* the residual clause is unavailable, a violation of § 113(a)(3) does not qualify as a "crime of violence."

b. The assault resulting in serious bodily injury conviction.

i. The Ninth Circuit has held that a "defendant can be convicted of assault under section 113(f) [now codified at § 113(a)(6)] if a battery is proved." *United States v. Loera*, 923 F.2d 725, 728 (9th Cir. 1991). The Ninth Circuit adopted the common-law definition of battery as the definition of assault under § 113(a)(6), and at common law reckless conduct satisfied the *mens rea* element for battery. *See Loera*, 923 F.2d at 728.

ii. In *Leocal v. Ashcroft*, the Supreme Court held that driving under the influence of alcohol was not a "crime of violence" because the offense could be committed through mere negligence. *See* 543 U.S. 1, 9–10 (2004). Building on *Leocal*, the Ninth Circuit held that "to constitute a federal crime of violence an offense must involve the intentional use of force against the person… of another." *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1132 (9th Cir. 2006) (en banc).

iii. Thus, because assault resulting in serious bodily injury under § 113(a)(6) can be committed recklessly, it does not qualify as a "crime of violence" under the force clause.

iv. Moreover, assault resulting in serious bodily injury does not require the use of *violent* force, and so does not qualify as a "crime of violence" under *Johnson 2010* for the reasons set forth above with respect to assault under § 113(a)(3). Those reasons are incorporated herein by reference. *See also United States v. Scott*, No. EP-14-CR-42-PRM, 2014 WL 4403162, at *4 (W.D. Tex. Jul. 28, 2014).

v. And because after *Johnson* the residual clause is unavailable, a violation of § 113(a)(6) no longer qualifies as a "crime of violence."

19. Because neither of Mr. Carlos's assault convictions qualify as valid § 924(c) predicates after *Johnson*, his § 924(c) convictions must be vacated.

Affirmative Defenses Can Be Overcome

20. Because *Johnson* has announced a new substantive limitation on the government's ability to punish a criminal defendant, it applies retroactively to Mr. Carlos's case, which is final on direct review. *See Welch v. United States*, 136 S. Ct. 1257 (2016). This Court may therefore grant Mr. Carlos relief on his claims.

21. Because *Johnson* has been made retroactive to cases that are final on direct review, and this motion is being filed less than one year after *Johnson* was decided, this § 2255 motion is timely under 28 U.S.C. § 2255(f)(3). *See Dodd v. United States*, 545 U.S. 353 (2005).

22. To the extent that the claim in this motion attempts to relitigate an issue on which Mr. Carlos did not prevail on direct appeal, *Johnson* amounts to an intervening change in the law that supports reaching the merits of this claim here pursuant to the ends of justice. *See Sanders v. United States*, 373 U.S. 1, 16–17 (1963).

No Summary Dismissal Before the Government Answers

23. As Mr. Carlos has already explained, *Johnson* renders his § 924(c) convictions invalid. Nothing on the face of this motion, any attached exhibits, and the record of prior proceedings discloses that the government will rely on any particular affirmative defense in response to this motion. *Cf.* R. Governing Sec. 2255 Cases 4(b) (describing when a district court may summarily dismiss a § 2255 motion); *United States v. Withers*, 638 F.3d 1055, 1064 (9th Cir. 2011) (citing *Insyxiengmay v. Morgan*, 403 F.3d 657, 665 (9th Cir. 2005)) (suggesting that a § 2255 petitioner need not anticipate affirmative defenses in his initial motion).

24. The government's affirmative defenses are not jurisdictional, in the sense that the Court must reach the issue even if no party raises it. *See United States v. Jacobo Castillo*, 496 F.3d 947, 954 (9th Cir. 2007) (en banc). Rather, the government may waive reliance on its affirmative defenses by failing to assert them in a timely fashion. *See United States v. Tercero*, 734 F.3d 979, 981 (9th Cir. 2013) (citing *Norwood v. Vance*, 591 F.3d 1062, 1068 (9th Cir. 2010)).

25. The Supreme Court has held that district courts may raise affirmative defenses on their own motion in habeas cases. *See Day v. McDonough*, 547 U.S. 198, 209 (2006). But before doing so, the court "must accord the parties fair notice and an opportunity to present their positions." *Id.* at 210. Thus at the screening stage, this Court may not rely on the collateral-attack waiver (or any other affirmative defense) to dismiss this motion. The Court should therefore call for a response to this motion from the government.

Prayer for Relief

26. In light of *Johnson*, Mr. Carlos's convictions under 18 U.S.C. § 924(c) are unconstitutional. Accordingly, Mr. Carlos respectfully asks the Court to:

a. call for a response from the government;

b. vacate his § 924(c) convictions;

c. reduce his term of supervised release from five years to no more than three years, *see* 18 U.S.C. § 3583(b)(2); and

d. grant him any other relief that is just and practicable.

Respectfully submitted:

June 25, 2016.

JON M. SANDS
Federal Public Defender

s/Keith J. Hilzendeger
KEITH J. HILZENDEGER
Assistant Federal Public Defender
Attorney for Movant Carlos

CERTIFICATE OF SERVICE

I certify that on June 25, 2016, I caused the foregoing document to be filed with the Clerk of Court for the United States District Court for the District of Arizona using the CM/ECF system. I further certify that all case participants are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/Keith J. Hilzendeger
KEITH J. HILZENDEGER
Assistant Federal Public Defender
Attorney for Movant Carlos

APPENDIX H

LAW OFFICES OF MICHAEL J. BRESNEHAN, P.C.
Michael J. Bresnehan, Esquire
1761 E. McNair Drive, Ste. 101
Tempe, Arizona 85283-5002
(480) 345-7032
State Bar No.: 009415
mbresnehan@hotmail.com
Attorney for Defendant

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Jerome Stanley Carlos, Jr., Movant-Appellant, vs. United States of America, Respondent-Appellee.	No: 19-16944 D.C. No. 2:16-cv-04583-NVW D.C. No. 2:05-cr-00252-NVW District of Arizona, Phoenix AMENDED MOTION FOR A CERTIFICATE OFAPPEALABILITY

COMES NOW the Movant-Appellant, Jerome Stanley Carlos, Jr., by and through the undersigned attorney, and, pursuant to FRAP 22 and Circuit Rule 22-1, hereby moves this court for a certificate of appealability, all as set forth in the accompanying memorandum of points and authorities.

RESPECTFULLY SUBMITTED this 8th day of January, 2020, by

MICHAEL J. BRESNEHAN, P.C.

s/ Michael J. Bresnehan

Attorney for Movant-Appellant

MEMORANDUM OF POINTS AND AUTHORITIES

Movant-Appellant, Jerome Stanley Carlos, Jr., ("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-NVW. This Court affirmed his convictions on direct appeal. See *United States v. Carlos*, 243 F.App'x 290 (9th Cir. 2007). Carlos filed a motion under 28 U.S.C. §2255 challenging his convictions and sentences on February 29, 2008. The district court denied that motion on the merits, and denied a certificate of appealability and this Court later denied a request for a certificate of appealability in CA 09-15538.

Later, Carlos filed a motion in this Court for authorization to file a second or successive §2255 motion, asserting that his convictions under §924(c) are now illegal under *Johnson v. United States*, 135 S.Ct. 2551 (2015) ("*Johnson (2015)*") because they are not predicated on a "crime of violence", as that term is defined in the statute. In *Welch v. United States*, 136 S.Ct. 1257 (2016), the Supreme Court held that *Johnson (2015)* applies retroactively to cases that are final on collateral review.

This Court granted that application on June 27, 2016 (CA 16-72106), holding that Carlos had made a *prima facie* showing for relief under *Johnson (2015)*.

Accordingly, Carlos brought his claim in the District Court, District of Arizona, case number 2:16-cv-04583-NVW, asserting 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)(1)(A)(iii). Specifically, Carlos asserted that neither statutory provision was a "crime of violence" under the "force clause" of 18 U.S.C. §924(c)(3)(A) because they did not necessarily require "violent force" – that is, force capable of causing physical pain or injury to another person, as required under *United States v. Johnson*, 559 U.S. 133 (2010) ("*Johnson (2010)*"), and that §113(a)(6) could be committed with less than willful conduct, and, therefore, could not be a "crime of violence". Carlos further asserted that the "residual clause" of 18 U.S.C. §924(c)(3)(B) had been effectively declared unconstitutional in *Johnson* (2015).

DISTRICT COURT RULING

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), the district court found the "force clause" claim to be procedurally defaulted, as it was not raised on direct appeal, and was not raised in a §2255 proceeding within the one-year limitation period set forth in 28 U.S.C. §2255(f). (See exhibit "A" hereto)

Carlos contends that his failure to bring his "force clause" claims prior to *Johnson* (2015) is excusable, because any attempt to challenge his §924(c) convictions prior to *Johnson* (2015) would have been futile given the pre-*Johnson*

(2015) state of the law regarding the "residual clause", and its then-apparent applicability to Carlos's assault convictions.

Thus, the question of whether Carlos's claim based on the "force clause" was procedurally defaulted and/or untimely is at least debatable among reasonable judges. And while the district court did not rule on the *merits* of Carlos's "force clause" arguments, Carlos affirmatively asserts that his claims based on the "force clause" are at least debatable among reasonable judges.

BACKGROUND

Following a three-day 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). (Dkt. #30) ∗

At sentencing, the judge granted the government's written request for an upward departure (Dkt. #55) and imposed a total sentence of 336 months. This sentence consists of two concurrent terms of 120 months on the assault counts followed by two concurrent terms of 216 months on the §924(c) counts. The sentences on the §924(c) counts were concurrent because Carlos only used a firearm once. See *United States v. Rentz*, 777 F.3d 1105 (10th Cir. 2015) (*en banc*).

∗ All citations to the docket in this document refer to the record in the related criminal case.

Carlos appealed his convictions. On July 30, 2007, the Ninth Circuit affirmed the convictions. (Dkt. #75) Carlos did not file a petition for rehearing. He did not file a petition for certiorari. Thus, his convictions became final on October 29, 2007, when the time for filing a petition for certiorari expired. See *Clay v. United States*, 537 U.S. 522 (2003).

On February 29, 2008, this Court docketed a *pro se* motion to vacate the sentence under 28 U.S.C. § 2255 from Carlos. (Dkt. #76) This motion raised four claims:

a. Ineffective assistance of counsel;

b. double jeopardy;

c. prosecutorial misconduct; and

d. a separation of powers violation.

This Court denied Carlos's §2255 motion on the merits on February 19, 2009.(Dkt. #87) The Ninth Circuit denied a certificate of appealability on April 28, 2010.

On June 27, 2016, Carlos filed a motion for authorization to file a second or successive motion to vacate, set aside, or correct sentence under 28 U.S.C. §2255. On that same date, this Court granted that motion (CA 16-72106), and the motion was docketed.

On September 30, 2019, the district court denied relief, and denied Carlos's request for a certificate of appealability. That Order was entered on October 1, 2019. (Exhibit A hereto)

ARGUMENT

On June 27, 2016, this Court issued a certificate of appealability in CA 16-72106, holding that Carlos had made a *prima facie* showing for relief under *Johnson* (2015).

Carlos brought his claim in the district court. In its response, the government asserted that the claims Carlos was advancing to invalidate his two gun convictions relied on *Leocal v. Ashcroft*, 543 U.S. 1 (2004) and *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006) (en banc) – cases the government argued were available to Carlos at the time of his direct appeal to challenge the "force clause" of §924(c)(3). The government argued that a third case Carlos relied on – *Johnson 2010* – was decided more than a one year before Carlos filed the instant §2255 motion, and for all of those reasons, Carlos is barred, by procedural default, from raising those arguments now, and/or is barred by the one-year statute of limitations. The district court agreed.

Regarding Carlos's "force clause" argument, in *Leocal v. Ashcroft*, the Supreme Court held that driving under the influence of alcohol was not a "crime of violence" because the offense could be committed through mere negligence. *Id*. at 9-10. Building on *Leocal*, the Ninth Circuit held that "to constitute a federal crime of

violence an offense must involve the intentional use of force against the person…of another". *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1132 (9th Cir. 2006) (en banc). The Ninth Circuit had yet to hold that 18 U.S.C. §§113(a)(3) and (a)(6) required willful conduct. See, e.g., *United States v. Garcia-Jimenez*, 807 F.3d 1079, 1086 (9th Cir. 2015).

While *Leocal* and *Fernandez-Ruiz* were available for use during Carlos's appeal, any successful argument as to the "force clause" would have been met with the "cold shower" of the "residual clause", which, prior to *Johnson (2015)*, was considered to be constitutional. See, e.g., *James v. United States*, 550 U.S. 192 (2007) (Florida's attempted burglary statute qualified as a "violent-felony" under the (similarly worded) "residual clause" found in 18 U.S.C. §924(e)); *United States v. Spencer*, 724 F.3d 1133 (9th Cir. 2013) ("residual clause" in U.S.S.G. §4B1.2(a)(2) was not unconstitutionally vague). It should be noted that the district court judge in the instant case instructed the jury that, as a matter of law, both of the relevant charges were "crimes of violence". Thus, a successful challenge of the convictions under the "force clause" would have simply left the conviction intact under the "residual clause". See, also, *United States v. Juvenile Female*, 566 F.3d 943, 948 (9th Cir. 2009) (citing cases predating Carlos's appeal, and decided prior to *Johnson (2010)* (holding that assault, under 18 U.S.C. §111(b), involving a deadly or dangerous weapon, *or* resulting in bodily injury was a "crime of violence" under the (essentially identical) "residual clause" in 18 U.S.C. §16(b)). See, also, *United*

States v. Springfield, 829 F.2d 860, 863 (9th Cir. 1987). In *Springfield*, a defendant whose primary offense was involuntary manslaughter under 18 U.S.C. §1112 appealed a federal conviction under 18 U.S.C. §924(c) (use of a firearm in relation to a "crime of violence" as defined in 18 U.S.C. §924(c)(3)(B). *Id*. at 863 ("[I]nvoluntary manslaughter, which 'by its nature' involves the death of another person, is highly likely to be the result of violence. It thus comes within the intent, if not the precise wording, of section 924(c)(3)."). The *Springfield* case clearly would have foreclosed any argument that a crime requiring an act that resulted in serious bodily injury was not a "crime of violence" under §924(c)(3).

Johnson (2010) impacted only the "force clause" and not the "residual clause". Therefore, the filing of a §2255 motion based exclusively on *Johnson 2010* would also have been frivolous.

A defendant may overcome a claim of procedural default by demonstrating either cause and actual prejudice, or that he is actually innocent. *Bousley v. United States*, 523 U.S. 614, 622 (1998). Carlos asserts both in his §2255 motion.

Cause exists when an appeal would have been based on a claim that "is so novel that its legal basis is not reasonably available to counsel" *Reed v. Ross*, 468 U.S. 1, 16 (1984). There was no non-frivolous legal theory available to Carlos prior to *Johnson (2015)* to successfully attack his convictions because prior to *Johnson (2015)*, and certainly prior to the one-year statute of limitations under §2255(f) (October 28, 2008), the law was settled regarding the constitutionality of

§924(c)(3)(B). Moreover, as mentioned, *supra*, an attack solely on the applicability of §924(c)(3)(A) would have been fruitless because the jury instruction given in the instant case implicitly allowed the jury to convict under either §924(c)(3)(A) or (B).

Carlos's claim under *Johnson (2015)* was novel. A claim could be novel where a Supreme Court decision: (1) "explicitly overrule[s] one of th[e] Court's precedents"; (2) "may overtur[n] a longstanding and widespread practice to which th[e] Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved"; or (3) "disapprove[s] a practice that th[e] Court arguably has sanctioned in prior cases". *Reed v. Ross*, 468 U.S. at 17. (quotation marks omitted). As the Supreme Court itself recognized, *Johnson (2015)* expressly overruled *Supreme Court* precedent. See *Johnson*, 135 S.Ct. at 2563 ("We hold that imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process. Our contrary holdings in *James* and *Sykes* are overruled").

The absence of the decision in *Johnson (2015)* during Carlos's prior appellate and collateral proceedings provides cause for Carlos not challenging the constitutionality of his §924(c) convictions earlier. See, also, *English v. United States*, 42 F.3d 473, 478 (9th Cir. 1994) (Sec. 2255 claim was not procedurally defaulted by failure to bring novel claim on appeal).

Another absolute defense to claims of untimeliness and procedural default is actual innocence. *Brousley v. United States*, 523 U.S. 614, 622 (1998). In the wake

of *Johnson (2015)*, Carlos may finally claim that he is actually innocent. If that claim has merit, Carlos is not barred from advancing it, provided it was brought within one year of *Johnson*. That, in fact, occurred. The resulting prejudice here is obvious. The gun convictions added 216 months to Carlos's prison term.

Nevertheless, the government argued that Carlos can not establish "actual prejudice" because §924(c) remains a "crime of violence" under the "force clause". Carlos respectfully disagrees.

United States v. Juvenile Female, 566 F.3d 943 (9th Cir. 2009), cited by the government as support for the proposition that assault pursuant to 18 U.S.C. §113(a)(3) and (a)(6) are "crimes of violence", has been effectively abrogated by *Johnson (2010)*. As mentioned, *supra*, the Ninth Circuit Court of Appeals, in that case, concluded, *inter alia*, that assault on a federal officer, under 18 U.S.C. §111(b), constitutes a "crime of violence". Thus, the government argues, the same logic applied to assault with a dangerous weapon, pursuant to 18 U.S.C. §113(a)(3).

However, this Court in *Juvenile Female* did not address the *level of force* required to commit the crime. The panel focused, instead, on the *threat of injury* created by the defendant's conduct. Later, in *Johnson (2010)*, the Supreme Court held that the level of force required to constitute a "crime of violence" is *violent* force – that is, force capable of causing physical pain or injury to another person. *United States v. Johnson*, 559 U.S. at 140.

In 2013, the Ninth Circuit, in *United States v. Flores-Cordero*, 723 F.3d

1085, 1088 (9th Cir. 2013), relying on *Johnson (2010)*, held that a conviction under Ariz.Rev.Stat. §13-2508(A)(1) (resisting arrest) was *not* a "crime of violence" under U.S.S.G. §2L1.2(b)(1)(A). While that statute expressly required the use or threatened use of physical force against an officer, and Arizona case law had established that the statute required *actual* physical force or risk of physical injury, *State v. Womak*, 174 Ariz. 108 (Ariz.App. 1992), the *Flores* Court held that because that crime could be committed without using force capable of inflicting pain or causing physical injury, it was not categorically a "crime of violence".

A violation of §113(a)(3) can be committed without the use of *violent* 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 1153, 1156 (9th Cir. 2016). (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 attempting to inflict injury does not categorically require the use of *violent* physical force, it is not a "crime of violence" under 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 that person, thus causing the gun to

discharge, but do so with too little force to cause physical pain or injury to the victim.

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 18 U.S.C. §924(c)(3). A three-judge panel of this Court has just published an opinion so holding. See *United States v. Gobert*, 2019 WL 6313378 (9th Cir. Nov. 26, 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* can not be reconciled with this Court's decision in *United States v. Flores-Cordero*, *supra*, or with the Supreme Court's decision in *Johnson 2010*, and should be reversed. As noted, *supra*, *Juvenile Female* was decided before Johnson 2010, and did not address the *level of force* required to commit the crime. 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 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.

Likewise, a violation of §113(a)(6) can be committed without the use of *violent* force, and, consequently, it is not categorically a "crime of violence".

While the Ninth Circuit has not squarely addressed the question of whether §113(a)(6) is a "crime of violence" under §924(c)(1)(A), other circuits have found that statutes that criminalize the mere causing of bodily injury are not crimes of violence because someone could be injured without the use of physical force – poisoning is a prototypical example. See, e.g., *Whyte v. Lynch*, 807 F.3d 463, 467-72 (1st Cir. 2015); *United States v. Torres-Miguel*, 701 F.3d 165, 167-71 (4th Cir. 2012); *United States v. Villegas-Hernandez*, 468 F.3d 874, 879-82 (5th Cir. 2006); *United States v. Perez-Vargas*, 414 F.3d 1282, 1285-87 (10th Cir. 2005); *Chrzanoski v. Ashcroft*, 327 F.3d 188, 192-96 (2d Cir. 2003). See, also, *United States v. Scott*, 2014 WL 4403162 at *4 (W.D. Tex. July 28, 2014) (assault under 113(a)(6) is not a "crime of violence" because it may be committed through indirect force (e.g., poisoning) that causes serious bodily injury.

CONCLUSION

Both the question of whether Carlos's §2255 claim is 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 this Court's case law, that of other circuits, and that of the United States Supreme Court, and, therefore, this Court should grant a certificate of appealability.

RESPECTFULLY SUBMITTED this 8th day of January, 2020, by

MICHAEL J. BRESNEHAN, P.C.

s/ Michael J. Bresnehan

Attorney for Movant-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of January, 2020, I electronically filed the foregoing motion and related declaration in support of same with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users (Thomas Simon, Esq.) will be served by the appellate CM/ECF system.

I further certify that the defendant-appellant is not a registered CM/ECF user. I have caused one copy of the Motion to be mailed, postage prepaid, to: Jerome Stanley Carlos, Jr., Inmate Number 42233-008, USP Leavenworth, U.S. Penitentiary, Post Office Box 1000, Leavenworth, Kansas 66048.

MICHAEL J. BRESNEHAN, P.C.

s/ Michael J. Bresnehan

Attorney for Movant-Appellant

Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Jerome Stanley Carlos, Jr.,

Petitioner,

v.

United States of America,

Respondent.

No. CV-16-04583-PHX-NVW (ESW)
CR-05-00252-PHX-NVW

ORDER AND DENIAL OF CERTIFICATE OF APPEALABILITY AND IN FORMA PAUPERIS STATUS

Before the Court are Petitioner's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence by Person in Federal Custody (Doc. 3), United States Magistrate Judge Willett's Report and Recommendation (Doc. 38) and Petitioner's Objections to the Magistrate's Report and Recommendation (Docs. 41). This originated as a motion in the Court of Appeals for a second or successive motion under 28 U.S.C. § 2255, which was granted and transferred to this Court. (Doc. 2.)

The Court has considered Petitioner's objections and reviewed the Report and Recommendation de novo. *See* Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1) (stating that the Court must make a de novo determination of those portions of the Report and Recommendation to which specific objections are made). The Court rejects the magistrate judge's Report and Recommendation and modifies it as follows. *See* 28 U.S.C. § 636(b)(1) (stating that the district court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate").

IT IS THEREFORE ORDERED that the Report and Recommendation of Magistrate Judge Willett (Doc. 9) is rejected. Some of the points discussed in the R&R are corrected, but it is easier to state the correct law rather than discuss the errors in the R&R.

1. **The Residual Clause.** The Residual Clause of the crime of violence definition of 18 U.S.C. § 924(c) is unconstitutionally vague. *United States v. Davis*, 139 S.Ct. 2319 (2019). However, the Solicitor General has determined that cases pending on collateral review will be governed by *Davis*. *Yates v. United States,* 2019WL3842724 at 2 (W.D.Wash. August. 15, 2019). If it were based on the Residual Clause of 18 U.S.C. § 924(c), the motion here would be "untimely" because premature if based on *Johnson v. United States*, 135 S.Ct. 2241 (2015), as held in *United States v. Blackstone*, 903 F.3d 1020 (9th Cir. 2018). But the prematurity/untimeliness is cured by *Davis*. The United States' errs is saying the § 2255 motion is untimely because filed more than one year after *Johnson.* It is timely because filed within a year (indeed, before) *Davis.* But the challenge in this case must also be to the Elements Clause of 18 U.S.C. § 924(c), not just the Residual Clause.

2. Though it is not a categorical rule, an issue on a later § 2255 motion must have been raised on direct appeal or is defaulted. *United States v. Ratigan*, 351 F.3d 957, 962 (9th Cir. 2003) (challenge to sufficiency of evidence). *Bousley v. United States,* 523 U.S. 614, 622 (1998), cited in the R&R, states a more stringent rule for challenges to guilty pleas. Petitioner was not required as a condition to a later § 2255 motion to challenge the Residual Clause years before they were held unconstitutional in *Davis*, which, like *Johnson*, overruled prior caselaw. However, the Residual Clause is of no consequence if the Elements Clause of 18 U.S.C. § 924(c) suffices for Petitioner's convictions on counts two and four.

3. Petitioner did not challenge on direct appeal the Elements Clause of the conviction on count Two for use of a firearm in a crime of violence, that it, assault with a dangerous weapon, 18 U.S.C. § 113(a)(3). Nor did he not challenge on direct appeal the Elements Clause of the conviction on count Four for use of a firearm in a crime of violence,

that it, assault resulting in serious bodily injury, 18 U.S.C. § 113(a)(6). The Elements Clause of those crimes are not implicated in the Supreme Court's decisions invalidating the Residual Clause of 18 U.S.C. § 924(c). Therefore, Petitioner's § 2255 motion is untimely because filed more than one year after those convictions. That time is not extended by any "right initially recognized by the Supreme Court . . . [that] has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255(f)(3).

4. Petitioner's § 2255 challenges on those counts are also barred because they were not raised on direct appeal, as they well could have been at that time.

5. The Court of Appeals' allowance of a second or successive § 2255 motion is expressly grounded on the retroactive effect of the *Johnson* case. But *Johnson* does not undercut, much less retroactively, the Elements Clause.

IT IS FURTHER ORDERED that Petitioner's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence by Person in Federal Custody (Doc. 1) is denied and dismissed with prejudice.

IT IS FURTHER ORDERED that the Clerk of the Court shall enter judgment accordingly and terminate this action.

The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not shown 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." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); see also 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Dated: September 30, 2019.

Neil V. Wake
Senior United States District Judge

APPENDIX I

No. CA 19-16944

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. JEROME STANLEY CARLOS, JR., Movant-Appellant.	DC No. 2:16-cv-04583-NVW DC No. 2:05-cr-00252-NVW-1 District of Arizona

ON APPEAL FROM THE JUDGMENT AND SENTENCE
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

APPELLANT'S OPENING BRIEF

MICHAEL J. BRESNEHAN
Law Offices of Michael J. Bresnehan, P.C.
1761 East McNair Drive, Suite 101
Tempe, AZ 85283-5002
Telephone: (480) 345-7032
Attorney for Defendant-Appellant

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III. STATEMENT OF JURISDICTION

A. District Court Jurisdiction

The district court had jurisdiction under 28 U.S.C. § 2255 because the appellant, Jerome Stanley Carlos, Jr. (hereinafter referred to as "appellant" or "Carlos"), is in federal custody.

B. Court of Appeals Jurisdiction

Carlos appeals from the judgment and order of the United States District Court. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1291 and 1294.

C. Timeliness of Appeal

The district court entered a final judgment and order on September 30, 2019. A timely notice of appeal of that judgment and order was filed on October 2, 2019.

D. Bail Status

Carlos was committed to the custody of the Bureau of Prisons for a term of 336 months. No bond has been requested or set. His projected date of release is July 2, 2030.

IV. STATEMENT OF ISSUES PRESENTED FOR REVIEW

Certified

A. 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)(6)-based conviction under 18 U.S.C. § 924(c)?

B. Does a conviction under 18 U.S.C. § 113(a)(6) qualify as a "crime of violence" under the "force clause" of 18 U.S.C. § 924(c)(3)?

Uncertified

A. 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)?

B. 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)?

V. STATEMENT OF THE CASE

A. Nature of Case

On March 29, 2005, a federal grand jury in Phoenix, Arizona, returned a six

count indictment, in District Court, District of Arizona, case number CR 5-00252-PHX-NVW-1, 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) (2-ER-217-219).[1]

The government alleged that on March 3, 2005, 24-year-old Kerrie Dawn Standsalone and her five-month-old daughter were watching TV in the master bedroom of boyfriend Philabert White's home in Scottsdale, Arizona, within the confines of the Salt River Pima-Maricopa Indian Reservation, when Standsalone heard a gunshot. The shot shattered the exterior sliding glass door to the bedroom.

When Standsalone looked towards the door, she saw Carlos pull back the curtain/blanket, lean into the bedroom through the shattered glass door, point a shotgun at both Standsalone and her daughter, and, in an aggressive manner, command, "Where's Philabert?"

Philabert White, a 28-year-old Native American, was reading in the living room of his home when he heard a crash in the master bedroom. White ran to the

---

1 The abbreviation "ER" refers to the Excerpts of the Record, and will be preceded by the relevant volume number and followed by the relevant page number referenced in Appellant's Excerpts of the Record. The abbreviation "PSR" refers to the Presentence Investigation Report, and will be followed by the relevant page and/or paragraph numbers of that report.

bedroom, and there saw Carlos pointing a double-barreled pump shotgun at his girlfriend and daughter.

Carlos then pointed the shotgun at White's chest. As White turned to run from the bedroom, Carlos shot White in the right calf. Carlos then shot White a second time in the left leg. (2-ER-208)

Carlos plead not guilty to all counts in the indictment, and requested a trial.

B. Course of Proceedings

On November 1, 2005, the trial commenced. At the close of evidence, the district court granted a judgement of acquittal on Counts 5 and 6, finding the government had presented insufficient evidence to establish Carlos had the specific intent to do bodily harm to the second victim named in the indictment. (2-ER-207)

The jury was instructed as follows regarding Counts 1-4 of the indictment:

> **ASSAULT WITH A DANGEROUS WEAPON**
>
> The defendant is charged in Count 1 of the Indictment with Assault with a Dangerous Weapon in violation of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:
>
> First, the defendant intentionally struck or wounded the victim, or used a display of force that reasonably caused the victim to fear immediate bodily harm;
>
> Second, the defendant acted with the specific intent to do bodily harm to the victim;
>
> Third, the defendant used a shotgun;

Fourth, the act occurred on or about March 3, 2005, in the District of Arizona, within the confines of the Salt River Pima-Maricopa Indian Reservation; and

Fifth, the defendant is an Indian.

A shotgun is a dangerous weapon if it is used in a way that is capable of causing death or serious bodily injury.

ASSAULT RESULTING IN SERIOUS BODILY INJURY

The defendant is charged in Count 3 of the Indictment with Assault Resulting in Serious Bodily Injury in violation of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant intentionally struck or wounded the victim;

Second, as a result, the victim suffered serious bodily injury;

Third, the act occurred on or about March 3, 2005, in the District of Arizona, within the confines of the Salt River Pima-Maricopa Indian Reservation; and

Fourth, defendant is an Indian.

The term "serious bodily injury" means bodily injury which involves a substantial risk of death; extreme physical pain; protracted and obvious disfigurement; or protracted loss of impairment or impairment of the function of a bodily member, organ or mental faculty.

DISCHARGING A FIREARM DURING A CRIME OF VIOLENCE

The defendant is charged in Counts 2 and 4 of the Indictment with Discharging a Firearm During a Crime of Violence in violation of the United States Code. In order for the defendant to be found

guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, As to Count 2 – the defendant committed the crime of Assault with a Dangerous Weapon as alleged in Count 1;

As to Count 4 – the defendant committed the crime of Assault Resulting in Serious Bodily Injury as alleged in Count 3;

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.

On November 3, 2005, the jury returned guilty verdicts on the remaining counts of the indictment.

On November 9, 2005, Carlos filed a Motion for Judgment of Acquittal or New Trial. Carlos alleged, pursuant to Fed.R.Evid. 403, that the district court had improperly admitted evidence of Carlos's gang affiliation and gang-related activities. On November 21, 2005, the government responded to Carlos's motion. On December 6, 2005, the district court denied Carlos's motion.

On July 13, 2006, the government filed a Motion for Upward Departure, and on July 31, 2006, Carlos responded to the government's motion. On September 5,

2006, the district court granted the government's motion, and sentenced Carlos 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. (1-ER-47)

Carlos filed a timely Notice of Appeal on September 7, 2006. Carlos raised two issues on appeal:

(1) Did the district court abuse its discretion in admitting evidence of Carlos's gang affiliation and gang related activity as proof of motive pursuant to Fed.R.Evid. 403?

(2) Did the district court abuse its discretion in denying Carlos's related Motion for New Trial?

(C.A. No. 06-10549, Doc. 8) (2-ER-205-216)

On July 30, 2007, the Ninth Circuit Court of Appeals affirmed Carlos's conviction. (C.A. No. 06-10549, Doc. 19); *see*, *also*, *United States v. Carlos* 243 F.Appx 290 (9th Cir. 2007). (1-ER-45-46) The mandate issued on August 21, 2007. Carlos did not file a petition for rehearing, nor did he file a petition for a writ of certiorari.

On February 29, 2008, Carlos filed a Motion to Vacate, Set Aside or Correct

Sentence Under 28 U.S.C. § 2255, alleging the following:

(1) Carlos's trial lawyer provided ineffective assistance of counsel in violation of the Sixth Amendment when he contradicted Carlos's alibi defense by stating in open court that Carlos was present at the scene of the crime. Carlos's lawyer further failed to object to the prosecution's evidence of past crimes;

(2) the district court violated the Double Jeopardy Clause by twice relying on the same factor to enhance Carlos's sentence;

(3) the prosecutor committed misconduct when he presented evidence of past crimes even though Carlos had not been convicted of those crimes; and

(4) Carlos's sentence was invalid because Congress violated the Separation of Powers Clause when it delegated authority to the United States Sentencing Commission to create the United States Sentencing Guidelines.

(CV 08-00418-PHX-NVW, Doc. 1) (2-ER-185-204)

On January 30, 2009, the assigned Magistrate Judge filed a Report and Recommendation, recommending Carlos's motion be denied. In the Report, the Magistrate Judge found Carlos had procedurally defaulted on grounds two, three and four, as Carlos had failed to raise those grounds on direct appeal without

demonstrating cause and prejudice or actual innocence. The Magistrate Judge further found, as to ground one, that Carlos had failed to establish evidence of a valid claim of ineffective assistance of counsel. (1-ER-38-44) On February 19, 2009, the district court, without a hearing, denied Carlos's motion, and denied a certificate of appealability. (1-ER-34, 36-37) Carlos appealed, and on April 28, 2010, the Ninth Circuit Court of Appeals denied Carlos's request for a certificate of appealability. (C.A. 09-15538, Doc. 3) (1-ER-33) Carlos did not file a petition for a writ of certiorari.

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. (C.A. No. 16-72106, Doc. 1) (1-ER-19-32) On February 16, 2017, the Ninth Circuit granted the application, and transferred the matter to the district court for further proceedings. (C.A. No. 16-72106, Doc. 2) (1-ER-17-18)

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)(1)(A). 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

or injury to another person, as required under *Johnson v. United States*, 559 U.S. 133 (2010) ("*Johnson 2010*"). Carlos further asserted that the "residual clause" of 18 U.S.C. § 924(c)(3)(B) had been effectively declared unconstitutional in *Johnson v. United States,* 576, U.S. 591 (2015) ("*Johnson 2015*"). (2-ER-161-184)

On April 21, 2017, the government filed a limited response to Carlos's motion. (2-ER-115-160) Carlos filed a reply. (2-ER-91-114)

C. Disposition

On September 4, 2019, the assigned Magistrate Judge issued her Report and Recommendation, denying relief. 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. (1-ER-7-16) Carlos filed objections to the Report and Recommendation. (2-ER-80-90)

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). (1-ER-4-6) That Order was entered on October 1, 2019. (1-ER-4-6)

On October 2, 2019, Carlos filed a timely notice of appeal, appealing the October 1, 2019 judgment and order. (2-ER-220-222)

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. (C.A. 19-16944, Doc. 4) (2-ER-61-79)

On March 20, 2020, this Court 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).

(C.A. 19-16944, Doc. 5-1) (1-ER-2-3)

VI. SUMMARY OF ARGUMENTS

Certified

Carlos's failure to bring his "force clause" claim relating to his conviction on Count 4 prior to *Johnson 2015* is excusable because any attempt to challenge his § 113(a)(6)-based § 924(c) conviction prior to *Johnson 2015* would have been futile given the pre-*Johnson 2015* state of the law regarding the "residual clause" of § 924(c)(3), and its then-apparent applicability to Carlos's assault convictions.

A violation of § 113(a)(6) can be committed recklessly, and without the use of *violent* physical force, and, consequently, it is not categorically a "crime of violence", and is not subject to the *Taylor* modified categorical approach.

Additionally, this Court recently decided *Jones v. United States*, 36 F.4th 974, 986 (9th Cir. 2022), which held that, in light of the Supreme Court's decision in *Borden v. United State*s, 141 S. Ct. 1817 (2021), a conviction under 18 U.S.C. § 113(a)(6) cannot serve as a predicate "crime of violence" under § 924(c)(1)(A)

because a violation of § 113(a)(6) can be committed recklessly. *Id.* at 986.

For these reasons, Carlos's § 113(a)(6)-based § 924(c) conviction cannot stand.

Uncertified

Carlos's failure to bring his "force clause" claim relating to his conviction on Count 2 prior to *Johnson 2015* is excusable because any attempt to challenge his § 113(a)(3)-based § 924(c) conviction prior to *Johnson 2015* would have been futile given the pre-*Johnson 2015* state of the law regarding the "residual clause" of § 924(c)(3), and its then-apparent applicability to Carlos's assault conviction.

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 1153, 1156 (9th Cir. 2016) (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 with a dangerous weapon does not categorically require the use, or threatened use, of *violent* physical force, and is not subject to the *Taylor* 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)(1)(A), and a three-judge panel of this Court has just published an opinion so holding, *see United States v. Gobert*, 943 F.3d 878, 882 (9th Cir. 2019), 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 this Court's decision in *United States v. Flores-Cordero*, 723 F.3d 1085, 1088 (9th Cir. 2013), or with the Supreme Court's decision in *Johnson 2010*, and should be reversed. Until this Court reconciles *Gobert* and *Flores-Cordero*, the issue remains unsettled in this circuit, and *Gobert* does not foreclose relief here.

For these reasons, Carlos's § 113(a)(3)-based § 924(c) conviction cannot stand.

VII. ARGUMENTS

Certified

A. THE DISTRICT COURT ERRED 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 § 113(a)(6)-BASED CONVICTION UNDER 18 U.S.C. § 924(c).

1. Standard of Review

This Court reviews *de novo* the district court's denial of a § 2255 motion. *United States v. Aguirre-Ganceda,* 592 F.3d 1043, 1045 (9th Cir. 2010). Factual findings made in conjunction with its decision on the motion are reviewed for clear error. *Sanchez v. United States*, 50 F.3d 1448, 1452, (9th Cir. 1995). Pure questions of law are reviewed *de novo*. *United States v. Olsen*, 704 F.3d 1172, 1178 (9th Cir. 2013)

2. Argument

On June 27, 2016, this Court issued a certificate of appealability in C.A. 16-72106, holding that Carlos had made a *prima facie* showing for relief under *Johnson 2015* regarding his two § 924(c) convictions. Thereafter, Carlos pursued his claims through a 28 U.S.C. § 2255 motion in the district court. In its response, the government noted that the claims Carlos was advancing to invalidate his two gun convictions relied on *Leocal v. Ashcroft*, 543 U.S. 1 (2004) and *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006) (*en banc*) – cases the government argued were available to Carlos at the time of his direct appeal to challenge the applicability of the "force clause" of § 924(c)(3) to his two assault convictions. The government argued that a third case Carlos relied on – *Johnson 2010* – was decided more than a one year before Carlos filed his § 2255 motion, and for all of

those reasons, Carlos was barred, by procedural default, from raising those arguments, and/or was barred by the one-year statute of limitations. The district court agreed, and denied relief.

Regarding Carlos's "force clause" argument, in *Leocal v. Ashcroft*, the Supreme Court held that driving under the influence of alcohol was not a "crime of violence" because the offense could be committed through mere negligence. *Id*. at 9-10. Building on *Leocal*, the Ninth Circuit held that "to constitute a federal crime of violence an offense must involve the *intentional* use of force against the person…of another". *Fernandez-Ruiz v. Gonzales*, 466 F.3d at 1132. It should be noted that at the time Carlos filed his direct appeal, and, later, his first 28 U.S.C. § 2255 motion, the Ninth Circuit had yet to hold that either 18 U.S.C. §§ 113(a)(3) or (a)(6) required willful conduct. *See, e.g., United States v. Garcia-Jimenez*, 807 F.3d 1079, 1086 (9th Cir. 2015).

While *Leocal* and *Fernandez-Ruiz* were available for use during Carlos's appeal, any successful argument as to the "force clause" would have been met with the "cold shower" of the "residual clause" of § 924(c)(3), which, prior to *Johnson 2015*, was considered to be constitutional. *See*, e.g., *James v. United States*, 550 U.S. 192 (2007) (Florida's attempted burglary statute qualified as a "violent-felony" under the (similarly worded) "residual clause" found in 18 U.S.C. § 924(e)); *United States v. Spencer*, 724 F.3d 1133 (9th Cir. 2013)

("residual clause" in U.S.S.G. § 4B1.2(a)(2) was not unconstitutionally vague); *Sykes v. United States*, 564 U.S.1, 15 (2011) (holding that the residual clause of the ACCA "states an intelligible principle and provides guidance that allows a person to conform his or her conduct to the law") (citation and internal quotation marks omitted).

It is noteworthy that the district court judge in the related criminal case instructed the jury that, as a matter of law, both of the assault charges were "crimes of violence". (1-ER-53) Thus, a successful challenge of the convictions under the "force clause" would have simply left the convictions intact under the "residual clause". *See, e.g., United States v. Juvenile Female*, 566 F.3d 943, 948 (9th Cir. 2009) (citing cases predating Carlos's first appeal, and *Johnson 2010,* and holding that assault, under 18 U.S.C. §111(b), involving a deadly or dangerous weapon, *or* resulting in bodily injury, was a "crime of violence" under the (essentially identical) "residual clause" of 18 U.S.C. § 16(b)). *See, also, United States v. Springfield*, 829 F.2d 860, 863 (9th Cir. 1987). In *Springfield*, a defendant whose primary offense was involuntary manslaughter under 18 U.S.C. § 1112 appealed a federal conviction under 18 U.S.C. § 924(c) (use of a firearm in relation to a "crime of violence" as defined in 18 U.S.C. § 924(c)(3)(B)). ("[I]nvoluntary manslaughter, which 'by its nature' involves the death of another person, is highly likely to be the result of violence. It thus comes within the intent,

if not the precise wording, of § 924(c)(3).”). *Id*. at 863. The *Springfield* case clearly would have foreclosed any argument that a crime requiring an act that resulted in serious bodily injury was not a “crime of violence” under § 924(c)(1)(A).

Johnson 2010 impacted only the “force clause”, and not the “residual clause” of § 924(c)(3). Therefore, the filing of a § 2255 motion based exclusively on *Johnson 2010* would have been frivolous.

A defendant may overcome a claim of procedural default by demonstrating either cause and actual prejudice, or that he is actually innocent. *Bousley v. United States*, 523 U.S. 614, 622 (1998). Carlos asserted both in his second § 2255 motion.

Cause exists when an appeal would have been based on a claim that “is so novel that its legal basis was not reasonably available to counsel.” *Reed v. Ross*, 468 U.S. 1, 16 (1984); *Murray v. Carrier*, 477 U.S. 478, 488 (1986). There was no non-frivolous legal theory available to Carlos prior to *Johnson 2015* to successfully attack his § 924(c) convictions because prior to *Johnson 2015*, and certainly prior to the one-year statute of limitations under § 2255(f) (October 28, 2008), the law was settled regarding the constitutionality of § 924(c)(3)(B). As mentioned, *supra*, an attack solely on the applicability of § 924(c)(3)(A) to the underlying assault charge would have been fruitless because the then-prevailing

law would still have compelled a conviction based on § 924(c)(3)(B)("residual clause").

A claim would be considered "novel" when based upon the same reasoning as that in a subsequent Supreme Court decision that (1) "explicitly overrule[d] one of [the Court's] precedents"; (2) "overturn[ed] a longstanding and widespread practice to which [the] Court ha[d] not spoken, but which a near-unanimous body of lower court authority ha[d] expressly approved"; or (3) "disapprove[d] a practice that th[e] Court arguably ha[d] sanctioned in prior cases". *Reed v. Ross*, 468 U.S. at 17. As the Supreme Court itself recognized, *Johnson 2015* expressly overruled *Supreme Court* precedent. *See Johnson v. United States,* 576 U.S. at 606 ("We hold that imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process. Our contrary holdings in *James* and *Sykes* are overruled").

The absence of the *Johnson 2015* decision during Carlos's prior appellate and collateral proceedings provides cause for Carlos not challenging the constitutionality of his § 924(c) convictions earlier. *See, also, English v. United States*, 42 F.3d 473, 478 (9th Cir. 1994) (§ 2255 claim was not procedurally defaulted by failure to bring novel claim on appeal).

Another absolute defense to claims of untimeliness and procedural default is actual innocence. *Bousley v. United States*, 523 U.S. at 622. In the wake of

Johnson 2015, Carlos may finally claim that he is actually innocent. If that claim has merit, Carlos is not barred from advancing it, provided it was brought within one year of *Johnson 2015*. That, in fact, occurred. The resulting prejudice here is obvious. The gun conviction added 216 months to Carlos's prison term.

Nevertheless, the government argued that Carlos cannot establish prejudice or actual innocence because 18 U.S.C. § 113(a)(6) remains a "crime of violence" under the "force clause". For the reasons that follow, Carlos respectfully disagrees.

B. A CONVICTION UNDER 18 U.S.C. § 113(a)(6) DOES NOT QUALIFY AS A "CRIME OF VIOLENCE" UNDER THE "FORCE CLAUSE" OF 18 U.S.C. § 924(c)(3).

1. Standard of Review

This court reviews *de novo* the district court's denial of a § 2255 motion. *United States v. Aguirre-Ganceda,* 592 F.3d at 1045. Factual findings made in conjunction with its decision on the motion are reviewed for clear error. *Sanchez v. United States,* 50 F.3d at 1452. Pure questions of law are reviewed *de novo*. *United States v. Olsen*, 704 F.3d at 1178.

2. Argument

As indicated, above, in addition to the "residual clause," § 924(c)(3)(A) ("force clause") defines the term "crime of violence" to include any crime that

"has as an element, the use, attempted use, or threatened use of physical force against the person or property of another". The Supreme Court's decisions in *Johnson 2015,* and later in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), did not speak to this provision. Defendants who have predicate convictions that meet the definition of "crime of violence" under § 924(c)(3)'s "force clause" do not have a *Johnson 2015/Dimaya* claim.

In order to determine whether an offense qualifies as a "crime of violence" under § 924(c)(3)(A)'s "force clause," courts apply the categorical approach set forth in *Taylor v. United States*, 495 U.S. 575 (1990). *See United States v. Amparo*, 68 F.3d 1222, 1225 (9th Cir. 1995); *United States v. Piccolo*, 441 F.3d 1084, 1086-87 (9th Cir. 1995) ("[I]n the context of "crime-of-violence" determinations under § 924(c), our categorical approach applies regardless of whether we review a current or prior crime."). The categorical approach requires courts to "look to the elements of the offense rather than the particular facts underlying the defendant's own [case]." *United States v. Dominguez-Maroyoqui,* 748 F.3d 918, 920 (9th Cir. 2014). In identifying the elements of a statute, courts consider the language of the statute and judicial opinions interpreting it. *Rodriguez-Castellon v. Holder*, 733 F.3d 847, 853 (9th Cir. 2013).

Under the categorical approach laid out in *Taylor*, a court "must presume that the [offense] rest[s] upon nothing more than the least of the acts criminalized

and then determine whether even those acts are encompassed by the generic federal offense." *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013). If the elements of the offense "criminalize a broader swath of conduct" than the conduct covered by the generic federal definition, the offense cannot qualify as a "crime of violence," even if the particular facts underlying the defendant's own case might satisfy that definition. *Dominguez-Maroyoqui*, 748 F.3d at 920. "[E]ven the least egregious conduct the statute [of conviction] covers must qualify." *United States v. Gonzales-Aparicio*, 663 F.3d 419, 425 (9th Cir. 2011). However, there must be a realistic probability the statute would be used to criminalize that conduct. *Moncrieffe v. Holder*, 569 U.S. at 191.

When dealing with a "divisible" statute, a court may go beyond the categorical approach and apply the "modified categorical approach." Under the modified categorical approach, a court may "examine a limited class of documents to determine which of a statute's alternative elements formed the basis of the defendant's prior conviction." *Descamps v. United States*, 133 S.Ct. 2276, 2284 (2013). A statute is divisible when it contains "multiple, alternative elements of functionally separate crimes," rather than just "alternative means of committing the same crime." *Ramirez v. Lynch*, 810 F.3d 1127, 1134 (9th Cir. 2016). "[T]he key question [a court] must ask when determining a statute's divisibility is whether a jury would have to be unanimous in finding those separate elements."

Id. at 1133. Where a statute is not categorically a "crime of violence," and is not divisible, the analysis ends there. *Descamps*, 133 S.Ct. at 2283.

Where, as here, the government failed to argue that § 113(a)(6) is divisible, this Court need not conduct a modified categorical analysis. *See United States v. Walton*, 881 F.3d 768, 774-75 (9th Cir. 2018). In any event, for the reasons that follow, Carlos posits that § 113(a)(6) is not categorically a "crime of violence," and is not divisible.

To qualify as a "crime of violence" under § 924(c)(3)'s "force clause," an offense must require proof, as a necessary element, that the defendant used, attempted to use, or threatened to use physical force. *Johnson v. United States*, 559 U.S. at 140. Force, in this context, refers to "violent force – that is, force capable of causing physical pain or injury to another person." *Id.* It must be intentionally applied, not just recklessly or negligently. *Leocal v. Ashcroft*, 543 U.S. at 12-13.

Section 113(a)(6) reads, in pertinent part, 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:
> …
> (6) Assault resulting in serious bodily injury, by a fine under this title or imprisonment for not more than ten years, or both.

18 U.S.C. § 113(a)(6).

Count 3 of the indictment charged Carlos with "intentionally and recklessly

assault[ing] Philabert L. White, Jr., resulting in serious bodily injury…[i]n violation of 18 United states Code, Sections 1153 and 113(a)(6)."

The jury was instructed that they had to find the following regarding the § 924(c) charge in Count 4:

> First, as to Count 4 – the defendant committed the crime of Assault Resulting in Serious Bodily Injury as alleged in Count 3;
>
> 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.

(1-ER-53)

United States v. Juvenile Female, *supra*, cited by the government in its response to Carlos's § 2255 motion as support for the proposition that assault, pursuant to 18 U.S.C. § 113(a)(6), is a "crime of violence", has been effectively abrogated by *Johnson 2010*. In *Juvenile Female*, this Court concluded, *inter alia*, that assault on a federal officer, under 18 U.S.C. § 111(b), constitutes a "crime of violence". Thus, the government argued, the same logic applies to assault under 18 U.S.C. § 113(a)(6).

However, this Court in *Juvenile Female* did not address the *level of force* required to commit the crime. The panel focused, instead, on the *threat of injury* created by the defendant's conduct. *Johnson 2010* clearly abrogated *Juvenile Female* by holding that the level of force required to constitute a "crime of violence" is *violent* force – that is, force capable of causing physical pain or injury to another person. *Johnson v. United States*, 559 U.S. at 140.

In 2013, this Court, in *United States v. Flores-Cordero*, 723 F.3d at 1088, relying on *Johnson 2010*, held that a conviction under Ariz.Rev.Stat. § 13-2508(A)(1) (resisting arrest) was *not* a "crime of violence" under U.S.S.G. § 2L1.2(b)(1)(A). While that statute expressly required the use or threatened use of physical force against a peace officer, and Arizona case law had established that the statute required *actual* physical force or risk of physical injury, *State v. Womak*, 174 Ariz. 108 (Ariz.App. 1992), the *Flores* Court held that because that crime could be committed without using force capable of inflicting pain or causing physical injury, it was not categorically a "crime of violence".

A violation of § 113(a)(6) 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 attempting to inflict injury does not categorically require the use of *violent* physical force, it is not a "crime of violence" under 18 U.S.C. § 924(c)(3). Notably, Carlos was not charged with *threatening* to inflict injury upon the person of another.

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) (quoting *Johnson v. United States*, 559 U.S. at 139-40). The "battery" element of § 113(a)(6) does not appear to be divisible, and, thus, the modified categorical approach in *Taylor* is inapplicable. Because less than *violent* physical force will support a conviction under § 113(a)(6), it is not categorically a "crime of violence" under § 924(c)(1)(A).

Other circuits have found that statutes that criminalize the mere causing of bodily injury are not "crimes of violence" because someone could be seriously injured without the perpetrator using violent physical force – poisoning being a prototypical example. *See, e.g., Whyte v. Lynch*, 807 F.3d 463, 467-72 (1st Cir. 2015); *United States v. Torres-Miguel*, 701 F.3d 165, 167-71 (4th Cir. 2012); *United States v. Villegas-Hernandez*, 468 F.3d 874, 879-82 (5th Cir. 2006); *United States v. Perez-Vargas*, 414 F.3d 1282, 1285-87 (10th Cir. 2005); *Chrzanoski v.*

Ashcroft, 327 F.3d 188, 192-96 (2nd Cir. 2003). *See, also, United States v. Scott*, 2014 WL 4403162 at *4 (W.D. Tex. July 28, 2014) (assault under 113(a)(6) is not a "crime of violence" because it may be committed through indirect force (e.g., poisoning) that causes serious bodily injury.

Additionally, the Ninth Circuit has held that *reckless* conduct will sustain a conviction under § 113(a)(6). *United States v. Loera*, 923 F.2d 725, 730 (9th Cir. 1991). So has the Tenth Circuit, *United States v. Zunie*, 444 F.3d 1230, 1235 (10th Cir. 2006), the Sixth Circuit, *United States v. Verwiebe*, 874 F.3d 258, 264 (6th Cir. 2017), and the Eighth Circuit. *United States v. Ashley*, 255 F.3d 907, 911 (8th Cir. 2000). However, mere recklessness is not sufficient to support a "crime of violence" under 18 U.S.C. § 924(c)(3)(A).

Since the filing of appellant's original opening brief, the United States Supreme Court handed down its decision in *Borden v. United State*s, 141 S. Ct. 1817 (2021).

In *Borden*, a plurality of the Court (Justices Kagan, Breyer, Sotomayor and Gorsuch) concluded that a criminal offense with a *mens rea* of recklessness does not qualify as a "violent felony" under the ACCA's elements clause. *Id.* at 1822-1834. In reaching that conclusion, the plurality focused on the phrase "against another", holding that that phrase, when modifying a volitional action like the "use of force", demands that the perpetrator direct his force at another individual.

Reckless conduct, according to the plurality, is not aimed in that prescribed manner. *Id.* at 1826-1831. Citing *Leocal v. Ashcroft*,[2] the plurality affirmed that when read against the words "use of force", the "against" phrase – the definition's "critical aspect" – suggests a higher degree of intent than (at least) negligence. *Id.* at 1833.

The plurality also noted that the ordinary meaning of the term "violent felony" – which the elements clause defines – also informs this construction. Citing *Leocal v. Ashcroft* and *Johnson v. United States,*[3] the plurality noted that in those decisions the Court had construed the terms "violent felony" and "crime of violence" to mark out a narrow category of violent, active crimes that are best understood to involve a purposeful or knowing mental state – a deliberate choice of wreaking harm on another, rather than mere indifference to risk. *Id.* at 1830. Citing *Begay v. United States*,[4] the plurality went on to note that classifying reckless crimes as "violent felonies" would also conflict with ACCA's purpose – that is to address the special danger created when a particular type of offender – a violent criminal – possesses a gun, adding that an offender who has repeatedly committed "purposeful, violent, and aggressive" crimes poses an uncommon danger of using a gun deliberately to harm a victim. *Id.* at 1822.

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2 *Leocal v. Ashcroft*, 543 U.S. 1 (2004).
3 *Johnson v. United States*, 559 U.S. 133 (2010).
4 *Begay v. United States*, 553 U.S. 137 (2008).

The plurality distinguished the holding in *Voisine v. United States*[5] by observing that the relevant statute there was not a "violent felony", but, rather, a misdemeanor crime of domestic violence. It focused not on those convicted of serious felony offenses, but, instead, of garden-variety assault or battery misdemeanors – including acts that one might not characterize as violent in a nondomestic context. *Id.* at 1824-25.

Acknowledging that some states recognize mental states (often called "depraved heart" or "extreme recklessness") between reckless and knowledge, the plurality declined to address whether offenses with those mental states fall within the elements clause. *Id.,* n.4.

Justice Thomas, concurring in the judgment, concluded that ACCA's elements clause does not encompass Borden's conviction for reckless aggravated assault. Importantly, Justice Thomas concluded that a crime that can be committed through mere recklessness does not have as an element the "use of physical force" because that phrase has a well-understood meaning applying only to intentional acts designed to cause harm. *Id.* at 1834-36. Thus, he departed from the plurality by focusing on the "use of force" clause, rather than the "against the person of another" clause, of 18 U.S.C. § 924(e)(1) to reach his decision.

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5 *Voisine v. United States*, 136 S.Ct. 2272 (2016).

Additionally, this Court recently decided *Jones v. United States*, 36 F. 4th at 986, which held that, in light of the Supreme Court's decision in *Borden*, a conviction under 18 U.S.C. § 113(a)(6) cannot serve as a predicate "crime of violence" under §924(c)(1)(A) because a violation of §113(a)(6) can be committed recklessly. *Id.* at 986.

Borden and *Jones* both support Carlos's arguments that 18 U.S.C. §113(a)(6) is not a "crime of violence," and that his claims are neither untimely nor procedurally defaulted. With the arrival of *Jones*, Carlos can better show prejudice and actual innocence to overcome any procedural default.

Moreover, there is some recent authority suggesting that *Borden* announced a new substantive rule, retroactive under *Teague v. Lane*, 489 U.S. 288 (1989). *See, eg. United States v. Toki,* 23 F. 4th 1277, 1281 (10th Cir. 2022); *In re Albertie*, 2021 U.S. App. LEXIS 26162, at *7 (11th Cir. Aug. 30, 2021) ("*Borden* announced a new rule of substantive law that is retroactively applicable under *Teague* [and the Suspension Clause] to cases on collateral review."). If this is so, then *Borden* would support Carlos's procedural default and timeliness arguments, as well.

Because Carlos's § 113(a)(6) conviction was not a "crime of violence," this Court should vacate the district court's judgment of guilt and sentence on Count 4 of the indictment, and remand with instructions to resentence Carlos.

Uncertified

A. THE DISTRICT COURT ERRED 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 § 113(a)(3)-BASED CONVICTION UNDER 18 U.S.C. § 924(c).

1. Standard of Review

This Court reviews *de novo* the district court's denial of a § 2255 motion. *United States v. Aguirre-Ganceda,* 592 F.3d at 1045. Factual findings made in conjunction with its decision on the motion are reviewed for clear error. *Sanchez v. United States*, 50 F.3d at 1452. Pure questions of law are reviewed *de novo*. *United States v. Olsen*, 704 F.3d at 1178.

2. Argument

Carlos adopts and incorporates, herein, the arguments presented, *supra,* pertaining to his claim that bringing a § 924(c)(3)(A) ("force clause") claim to challenge his § 924(c) conviction prior to *Johnson 2015* would have been futile given the pre-*Johnson 2015* state of the law regarding the "residual clause" of § 924(c)(3), and its then-apparent applicability to Carlos's assault conviction.

B. A CONVICTION UNDER 18 U.S.C. § 113(a)(3) DOES NOT QUALIFY AS A "CRIME OF VIOLENCE" UNDER THE "FORCE CLAUSE" OF 18 U.S.C. § 924(c)(3).

1. Standard of Review

This court reviews, *de novo*, the district court's denial of a § 2255 motion. *United States v. Aguirre-Ganceda,* 592 F.3d at 1045. Factual findings made in conjunction with its decision on the motion are reviewed for clear error. *Sanchez v. United States,* 50 F.3d at 1452. Pure questions of law are reviewed *de novo*. *United States v. Olsen*, 704 F.3d at 1178.

2. Argument

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.

See 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.

(1-ER-53)

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 2015*. 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 this Court has just published an opinion so holding. *See United States v. Gobert*, 943 F.3d at 882 (citing *United States v. Juvenile Female*, 566 F.3d at 948, 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 this Court's decision in *United States v. Flores-Cordero*, *supra*, 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 at 1051.).

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 that person, but do so with too little force to cause physical pain or injury to the victim. That scenario is not farfetched, and that conduct would clearly be chargeable under § 113(a)(3), thus meeting the *Moncrieffe v. Holder* 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 act just described would not necessarily have caused the victim to fear immediate bodily injury – a fact that appears to undermine the *Gobert* decision. There, this Court opined that the least 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 1285, 1290 (9th Cir. 2017), 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 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 violence 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" underlying 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).

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. at 1410.

Moreover, for the same reasons that indirect force (e.g., poisoning)

arguably would not meet the *Johnson 2010* threshold for "violent force" under § 113(a)(6), they would not meet that threshold in the context of § 113(a)(3). And yet, certain poisons could be considered "dangerous weapons".

Because Carlos's § 113(a)(3) conviction was not categorically a "crime of violence," this Court should vacate the district court's judgment of guilt and sentence on Count 2 of the indictment, and remand with instructions to resentence Carlos.

VIII. CONCLUSION

Certified

Carlos's failure to bring his "force clause" claim relating to his conviction on Count 4 prior to *Johnson 2015* is excusable because any attempt to challenge his § 113(a)(6)-based § 924(c) conviction prior to *Johnson 2015* would have been futile given the pre-*Johnson 2015* state of the law regarding the "residual clause" of § 924(c)(3), and its then-apparent applicability to Carlos's assault convictions.

A violation of § 113(a)(6) can be committed recklessly, and without the use of *violent* physical force, and, consequently, it is not categorically a "crime of violence", and is not subject to the *Taylor* modified categorical approach.

Additionally, this Court recently decided *Jones v. United States*, 36 F.4th at 986, which held that, in light of the Supreme Court's decision in *Borden*, a conviction under 18 U.S.C. § 113(a)(6) cannot serve as a predicate "crime of

violence" under § 924(c)(1)(A) because a violation of § 113(a)(6) can be committed recklessly. *Id.* at 986.

For these reasons, Carlos's § 113(a)(6)-based § 924(c) conviction cannot stand.

Uncertified

Carlos's failure to bring his "force clause" claim relating to his conviction on Count 2 prior to *Johnson 2015* is excusable because any attempt to challenge his § 113(a)(3)-based § 924(c) conviction prior to *Johnson 2015* would have been futile given the pre-*Johnson 2015* state of the law regarding the "residual clause" of § 924(c)(3), and its then-apparent applicability to Carlos's assault conviction.

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* 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)(1)(A), and a three-judge panel of this Court has just 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, *Gobert* cannot be reconciled with this Court's decision in *United States v. Flores-Cordero*, 723 F.3d 1085, 1088 (9th Cir. 2013), or with the Supreme Court's decision in *Johnson 2010*, and should be reversed. Until this Court reconciles *Gobert* and *Flores-Cordero*, the issue remains unsettled in this circuit, and *Gobert* does not foreclose relief here.

For these reasons, Carlos's § 113(a)(3)-based § 924(c) conviction cannot stand.

This Court should vacate both of Carlos's § 924(c) convictions and sentences, and remand with instructions to resentence Carlos.

MICHAEL J. BRESNEHAN, P.C.

s/ Michael J. Bresnehan
Attorney for Defendant/Appellant

IX. **UNITED STATES COURT OF APPEALS**
FOR THE NINTH CIRCUIT

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XI.

UNITED STATES COURT OF APPEALS
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