No. 23A-_____

In the Supreme Court of the United States

NICHOLAS NEWMAN,

Applicant,

v.

UNITED STATES OF AMERICA

ON APPLICATION FOR A CERTIFICATE OF APPEALABILITY TO THE HONORABLE NEIL M. GORSUCH, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT

APPLICATION FOR A CERTIFICATE OF APPEALABILITY

R. Reeves Anderson
ARNOLD & PORTER
KAYE SCHOLER LLP
Suite 3100
1144 Fifteenth Street
Denver, CO 80202

Justin Garratt
ARNOLD & PORTER
KAYE SCHOLER LLP
44th Floor
777 South Figueroa Street
Los Angeles, CA 90017-5844

Andrew T. Tutt
Counsel of Record
Anora Wang
Meredith Volpe
Caleb Thompson
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Avenue, NW
Washington, DC 20001
(202) 942-5000
andrew.tutt@arnoldporter.com

Lisa Cordara
ARNOLD & PORTER
KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019

Counsel for Applicant Nicholas Newman

QUESTIONS PRESENTED

1. Whether reasonable jurists could debate whether assault against a federal officer under 18 U.S.C. § 111 can be committed with a mens rea of recklessness (or, instead, requires the government to prove intentionality), when the statute provides that assault against a federal officer can be committed by means of "simple assault," when numerous other federal assault crimes require mere recklessness, when the United States has taken the position for more than four decades that the best reading of the statute is that it can be committed recklessly, and when no controlling Tenth Circuit precedent forecloses that construction of the statute.

2. Whether reasonable jurists could debate whether a collateral attack waiver in a plea agreement is unenforceable when it would prevent a habeas petitioner from obtaining habeas relief from a crime of which he is actually innocent, when the Fourth Circuit has repeatedly held that collateral attack waivers are unenforceable in such cases, and no controlling Tenth Circuit precedent forecloses such a holding.

PARTIES TO THE PROCEEDINGS

Applicant Nicholas Newman was petitioner in the district court and appellant in the court of appeals proceedings.

United States was the respondent in the district court proceedings and appellee in the court of appeals proceedings.

Because Applicant is not a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.

TABLE OF CONTENTS

INTRODUCTION 2
STATEMENT 6
REASONS FOR GRANTING THE APPLICATION 8
I. ASSAULT ON A FEDERAL OFFICER UNDER § 111(b) CAN BE COMMITTED RECKLESSLY. 9
   A. The statute under which Mr. Newman pleaded guilty can be violated by reckless conduct. 9
   B. The correct resolution of this question affects the safety of thousands of federal officers. 15
II. THE COLLATERAL ATTACK WAIVER IN MR. NEWMAN'S PLEA AGREEMENT IS UNENFORCEABLE. 16
CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

Cases

Autry v. Estelle,
464 U.S. 1301 (1983) 1, 2

Borden v. United States,
141 S. Ct. 1817 (2021) 7, 8, 9, 11, 12

Davis v. Jacobs,
454 U.S. 911 (1981) 1

Elonis v. United States,
575 U.S. 723 (2015) 11-12

Herrera v. Collins,
506 U.S. 390 (1993) 17

Morency v. City of Allentown,
No. 19-5304, 2020 WL 1935640 (E.D. Pa. Apr. 22, 2020) 11

Price v. U.S. Dep't of Just. Att'y Office,
865 F.3d 676 (D.C. Cir. 2017) 18

Schlup v. Delo,
513 U.S. 298 (1995) 17

Silk v. United States,
955 F.3d 681 (8th Cir. 2020) 13

Slack v. McDaniel,
529 U.S. 473 (2000) 1

Thompson v. United States,
No. 14-0340, 2020 WL 1905817 (N.D. Tex. Apr. 17, 2020) 5

Town of Newton v. Rumery,
480 U.S. 386 (1987) 18

United States v. Adams,
814 F.3d 178 (4th Cir. 2016) 5, 9, 15, 16-17

United States v. Bettcher,
911 F.3d 1040 (10th Cir. 2018) 14

Cases—Continued **Pages**

United States v. Butler,
No. 21-20027, 2022 WL 16714129 (D. Kan. Nov. 4, 2022) 14

United States v. Cornette,
932 F.3d 204 (4th Cir. 2019) 5, 6, 17

United States v. Delis,
558 F.3d 177 (2d Cir. 2009)... 11, 13

United States v. Feola,
420 U.S. 671 (1975) 3, 4, 12, 14, 15

United States v. Hanson,
618 F.2d 1261 (8th Cir. 1980) 5, 15

United States v. Henderson,
No. 18-08112-001, 2018 WL 10216422 (D. Ariz. June 11, 2018)....................................... 12

United States v. Hernandez-Hernandez,
817 F.3d 207 (5th Cir. 2016) 13-14

United States v. Kendall,
876 F.3d 1264 (10th Cir. 2017) 4, 8, 13, 14

United States v. Mann,
899 F.3d 898 (10th Cir. 2018) 12

United States v. McCulligan,
256 F.3d 97 (3d Cir. 2001).. 3

United States v. McDaniel,
85 F.4th 176 (4th Cir. 2023)...4-5, 14, 15

United States v. McKinney,
60 F.4th 188 (4th Cir. 2023).. 5, 6, 9, 17

United States v. Medearis,
65 F.4th 981 (8th Cir. 2023)..5, 15

United States v. Montoya,
770 F. App’x 436 (10th Cir. 2019) 14

United States v. Murphy,
705 F. App’x 775 (10th Cir. 2017) 14

Cases—Continued **Pages**

United States v. Newman,
No. 23-3120, 2023 WL 8520092 (10th Cir. Dec. 8, 2023) 4

United States v. Olthoff,
No. 11-0354, 2012 WL 928587 (D. Minn. Mar. 19, 2012) 12

United States v. Pettigrew,
468 F.3d 626 (10th Cir. 2006) 12

United States v. Taylor,
514 F.3d 1092 (10th Cir. 2008) 4

United States v. Torres,
828 F.3d 1113 (9th Cir. 2016) 5

United States v. Winder,
926 F.3d 1251 (10th Cir. 2019) 11

United States v. Wing,
730 F. App'x 592 (10th Cir. 2018) 14

United States v. Wolfname,
835 F.3d 1214 (10th Cir. 2016) 14

United States v. Zunie,
444 F.3d 1230 (10th Cir. 2006) 12

Vicky M. v. Ne. Educ. Intermediate Unit 19,
486 F. Supp. 2d 437 (M.D. Pa. 2007) 11

Webster v. Fall,
266 U.S. 507 (1925) 4, 14

Williams v. United States,
568 F. Supp. 3d 1115 (W.D. Wash. 2021) 5

Withrow v. Williams,
507 U.S. 680 (1993) 17

Statutes

18 U.S.C.
§ 16(a) ... 9
§ 111 ... 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15
§ 111(a) ... 6, 7, 10, 12, 13
§ 111(b) ... 2, 3, 4, 8, 9, 11, 13, 14
§ 113(a)(1) ... 10
§ 113(a)(2) ... 10
§ 113(a)(3) ... 10
§ 113(a)(4) ... 10, 12
§ 113(a)(5) ... 10, 11, 12-13
§ 113(a)(6) ... 10, 12
§ 113(a)(7) ... 10
§ 113(a)(8) ... 10
§ 117 ... 13
§ 924(c) ... 6, 7, 8

28 U.S.C.
§ 2253(c) ... 1, 7
§ 2255 ... 7

Miss. Code Ann. § 97-3-7 (West 2019) ... 11

Model Penal Code § 211.1(1) ... 10, 11

N.H. Rev. Stat. § 631:2-a (West 1979) ... 11

N.J. Stat. Ann. § 2C:12-1 (West 2022) ... 11

18 Pa. Stat. and Cons. Stat. Ann. § 2701 (West 2014) ... 11

S.D. Codified Laws § 22-18-1 ... 11

Vt. Stat. Ann. tit. 13, § 1023 (West 1981) ... 11

Other Authorities

Brief for the United States, *United States v. Feola*,
420 U.S. 671 (1975) (No. 73-1123), 1974 WL 186001 ... 3, 4

Brief for the United States, *United States v. McCulligan*,
256 F.3d 97 (3d Cir. 2001) (No. 00-2562), 2001 WL 34113551 ... 3

FBI, *Federal Topic Page, in* Law Enforcement Officers Killed and
Assaulted, 2022 (2023) ... 3, 16

Other Authorities—Continued **Pages**

Final Report of The National Commission on Reform of Federal Criminal Laws (1971) 4, 10

H. Rep. No. 73-1455 (1934) 15

Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments,* 38 U. Chi. L. Rev. 142 (1970) 17

Robert L. Stern, et al., Supreme Court Practice (8th ed. BNA 2002) 2

S. Rep. No. 73-535 (1934) 15

TO THE HONORABLE NEIL M. GORSUCH, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE OF THE U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT

Pursuant to Supreme Court Rule 22.1, Applicant Nicholas Newman respectfully requests a Certificate of Appealability. The United States District Court for the District of Kansas issued an opinion denying habeas relief on April 28, 2023. A copy of that memorandum and order attached as Exhibit A. The United States Court of Appeals for the Tenth Circuit denied a certificate of appealability and dismissed the appeal on December 8, 2023. A copy of that order is attached as Exhibit B. The Tenth Circuit denied a timely Petition for Rehearing En Banc on March 8, 2024. A copy of that order is attached as Exhibit C.

Jurisdiction is founded on 28 U.S.C. § 2253(c)(1) which authorizes each justice of this Court to issue a certificate of appealability. A certificate of appealability should issue if "reasonable jurists could debate whether (or, for that matter, agree that) the [habeas] petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000) (internal quotation marks omitted); *see Autry v. Estelle*, 464 U.S. 1301, 1302 (1983) (White, J., in chambers) (concluding that a habeas petitioner had raised a "substantial question" that did not "lack[] substance," and thus "I am compelled to issue a certificate of probable cause to appeal, as I am authorized to do under § 2253."); *Davis v. Jacobs*, 454 U.S. 911, 918 (1981) (Rehnquist, J., dissenting) (certificate should issue if "any Member of this Court believes [the case] to be deserving of a certificate of probable cause").

INTRODUCTION

Applicant seeks a certificate of appealability (COA) on two questions: (1) whether, in a prosecution for assault on a federal officer with a deadly weapon under 18 U.S.C. § 111(b), the prosecution must prove that the defendant knowingly or purposely caused physical harm to the officer, or alternatively, the prosecution need prove only a mens rea of recklessness to establish guilt; and (2) whether reasonable jurists could debate that a collateral attack waiver in a plea agreement is unenforceable when it would prevent habeas relief in a case where the petitioner is actually innocent of the underlying crime. Both are questions that reasonable jurists could debate—indeed, the United States has long agreed with Applicant's position on the first question, and the Fourth Circuit has adopted Applicant's position on the second question. Thus, these questions not only are subject to debate; they are being debated *right now*. A COA should thus issue to permit the Tenth Circuit to consider in the first instance these issues of broad importance.

While not a common occurrence, justices of this Court can and have granted COAs when the circumstances warrant. *See* Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, Supreme Court Practice 755 (8th ed. BNA 2002); *see also Autry*, 464 U.S. 1301. Your Honor has the authority to grant the application individually, or, in the alternative, to refer this application to the full Court.

This case presents an important legal question that implicates the physical safety of federal law enforcement officers. The assault on a federal officer statute, 18 U.S.C. § 111, as the name suggests, criminalizes assaults on federal officers. For decades it has served as an essential bulwark protecting the lives and physical safety of law enforcement officers. And for more than four decades the United States has taken the position that the best

interpretation of 18 U.S.C. § 111 is that it can be violated through reckless conduct. Notwithstanding that the Tenth Circuit has no controlling precedent on the question, the panel below denied Applicant a COA on the grounds that no reasonable jurist could debate that 18 U.S.C. § 111 can *only* be violated with a mens rea of purpose. That holding—which the Tenth Circuit reached without even soliciting input from the United States—was error. The question of whether recklessness is sufficient to violate 18 U.S.C. § 111(b) is both debatable and exceptionally important.

The question of the burden of proof in a prosecution under 18 U.S.C. § 111 is indisputably important. Congress enacted § 111 to provide "uniformly vigorous protection of federal personnel" to the "maximum" extent while engaged in their duties. *United States v. Feola*, 420 U.S. 671, 684 (1975). The ongoing relevance of that congressional goal is reflected in the data: in the last five years, 9,163 federal officers have been assaulted or killed. FBI, *Federal Topic Page, in* Law Enforcement Officers Killed and Assaulted, 2022, at 4 (2023) (hereinafter "Federal LEOKA").

The Tenth Circuit's decision contradicts the position of the federal government, which for fifty years has held the view that the statute criminalizes reckless assault, *see, e.g.*, Brief for the United States at 30-34, *United States v. McCulligan*, 256 F.3d 97 (3d Cir. 2001) (No. 00-2562), 2001 WL 34113551; Brief for the United States at 10-11 & n.7, *United States v. Feola*, 420 U.S. 671 (1975) (No. 73-1123), 1974 WL 186001. Although the United States was the appellee, the Tenth Circuit issued its opinion *sua sponte* without waiting for or soliciting the government's position. To Applicant's knowledge, the United States has not changed its interpretation on the requisite *mens rea* under § 111, a position that

happens to align with Applicant's. In the leading case interpreting § 111, *United States v. Feola*, 420 U.S. 671 (1975), the United States argued that the statute could be violated by "*negligently* caus[ing] bodily injury to another human being by means of a firearm, destructive device or other weapon the use of which against a human being was likely to cause death or serious bodily injury." *Final Report of The National Commission on Reform of Federal Criminal Laws* at 176 (1971) (emphasis added) (cited in Brief for the United States at *11 n.7, *United States v. Feola*, 420 U.S. 671 (1975) (No. 73-1123), 1974 WL 186001).

The Tenth Circuit gave two reasons for its holding, but neither persuades. First, it believed that it already decided the question in *United States v. Kendall*, 876 F.3d 1264 (10th Cir. 2017). *See United States v. Newman*, No. 23-3120, 2023 WL 8520092, at *3 (10th Cir. Dec. 8, 2023) (hereinafter "Op."). But no party in that case briefed the question of the necessary *mens rea* to violate 18 U.S.C. § 111(b), meaning, under Circuit precedent governing precedent, *Kendall* should not be treated as controlling on this question. *See Webster v. Fall*, 266 U.S. 507, 511 (1925); *accord United States v. Taylor*, 514 F.3d 1092, 1099 (10th Cir. 2008) (Gorsuch, J.) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.").

Second, the Tenth Circuit stated that two other circuits have recently held that § 111(b) "requires an intentional assault," Op. *3. Those cases are inapposite, as Applicant would have explained if given the opportunity. One addressed a pre-1994 version of the statute, which has since been amended in a manner that leaves no doubt that it reaches

reckless assaults, *see United States v. McDaniel*, 85 F.4th 176, 183 (4th Cir. 2023) (evaluating § 111 "as it existed" at the time of conviction in 1993); the other relied on precedent interpreting the pre-1994 version without accounting for the critical change in the statutory language. *See United States v. Medearis*, 65 F.4th 981, 987 (8th Cir. 2023) (relying on *United States v. Hanson*, 618 F.2d 1261 (8th Cir. 1980) for the proposition that "[a] defendant must intentionally assault someone under § 111").

Finally, the Tenth Circuit declined to decide whether a COA should issue on the question whether Applicants' collateral attack waiver is unenforceable. Op. *2-*3. But a COA should obviously issue on that question. Numerous courts outside the Tenth Circuit have refused to enforce waivers in circumstances, just like those here, where an appellant raised a challenge to a conviction following a change in law. *See United States v. McKinney*, 60 F.4th 188, 192-93, 192-93 (4th Cir. 2023) (a waiver does not bar claim for relief where subsequent law invalidates a prior conviction); *United States v. Cornette*, 932 F.3d 204, 208-10 (4th Cir. 2019) (similar); *United States v. Adams*, 814 F.3d 178, 185 (4th Cir. 2016); *Williams v. United States*, 568 F. Supp. 3d 1115, 1126 (W.D. Wash. 2021) (similar); *Thompson v. United States*, No. 14-0340, 2020 WL 1905817, at *3 (N.D. Tex. Apr. 17, 2020) (similar); *see also United States v. Torres*, 828 F.3d 1113 (9th Cir. 2016) (reversing the lower court and allowing the defendant to challenge his sentence despite an appeal waiver based on the Supreme Court's ruling in *Johnson*). The Tenth Circuit has no precedent to the contrary, and as the multitude of courts holding waivers unenforceable in these circumstances show, the question is at least one that reasonable jurists could debate.

A COA should be issued to allow a full airing of these issues on the merits on appeal.

STATEMENT

Applicant Nicholas Newman was involved in several small-scale drug and firearms transactions with undercover agents from the Bureau of Alcohol, Tobacco, and Firearms ("ATF"). AA47-48, 66-69, 105-06.[1] In the last of these transactions, while seated in a parked car with an undercover agent, Mr. Newman reached toward a firearm to show an agent how to load it. AA103. The agent, fearful that Mr. Newman was reaching for the firearm to use it, suddenly grabbed for it as well. AA95.

A struggle ensued. AA95-96. For twenty-three seconds, the agent and Mr. Newman fought to get the firearm away from one another. AA96. Fearing for his own life, Mr. Newman eventually wrestled the firearm from the agent's hands, injuring her thumb in the process. AA57, 99. Moments later, federal agents waiting nearby swarmed the scene and arrested Mr. Newman. AA99.

On May 19, 2021, Mr. Newman pleaded guilty to one count of forcible assault of a federal officer using a dangerous weapon in violation of 18 U.S.C. §§ 111(a)(1) and (b), and one count of using, carrying, possessing, or brandishing a firearm in furtherance of a crime of violence in violation of 18 U.S.C. §§ 924(c)(1)(A), 924(c)(3)(A), and 2.[2] Op. *1. On

[1] "AA" citations are to the Appellant's Appendix filed on October 23, 2023 and available on the Court of Appeals docket.

[2] The plea agreement included a collateral attack waiver that is also at issue in this appeal, but the Tenth Circuit did not reach the question whether a certificate of appealability should issue on that question. In the Fourth Circuit, the waiver would be unenforceable on the facts of this case. *See, e.g.*, *McKinney*, 60 F.4th at 192-93; *Cornette*, 932 F.3d at 208-10.

September 27, 2021, the district court sentenced Mr. Newman to 120 months on the § 111 count and 60 months on the § 924(c) count, totaling 180 months of imprisonment.[3] Op. *1.

One year later, Mr. Newman moved under 28 U.S.C. § 2255 to vacate his 18 U.S.C. § 924(c) conviction and remand for an evidentiary hearing on his sentence. Op. *1. Specifically, Mr. Newman asserted that he is innocent of his 18 U.S.C. § 924(c) conviction after *Borden v. United States*, 141 S. Ct. 1817 (2021), which held that crimes that can be committed with a *mens rea* of recklessness are categorically <u>not</u> crimes of violence. Op. *1 (citing *Borden*, 141 S. Ct. at 1821-22). Mr. Newman argued that because 18 U.S.C. § 111(a)(1) and (b) can be committed recklessly, they are not crimes of violence capable of supporting an 18 U.S.C. § 924(c) conviction. Op. *1.

On April 28, 2023, the district court dismissed Mr. Newman's motion and denied a COA. Op. *1. The district court held that the collateral attack waiver in his guilty plea is enforceable and that 18 U.S.C. § 111(b) qualifies as a predicate crime of violence. Op. *1.

Mr. Newman then requested a COA from the Tenth Circuit to challenge the district court's denial of his 28 U.S.C. § 2255 motion. *See* 28 U.S.C. § 2253(c)(1)(B). He sought to raise two arguments on appeal: (1) the collateral attack waiver provision in his plea agreement is unenforceable; and (2) he is actually innocent of his 18 U.S.C. § 924(c) conviction because 18 U.S.C. § 111 does not qualify as a crime of violence after *Borden*. Op. *2.

[3] The district court recently reduced Mr. Newman's sentence on the 18 U.S.C. § 111 count from 120 months to 109 months in accordance with a change to the sentencing guidelines. *See* Dist. Ct. Dkt. 85. Mr. Newman's 60-month consecutive sentence on the 18 U.S.C. § 924(c) count remains intact. *See id.*

The Tenth Circuit reached only Mr. Newman's argument that § 111 does not qualify as a crime of violence after *Borden*. Op. *2–3. The Circuit determined that, in *United States v. Kendall*, 876 F.3d 1264 (10th Cir. 2017), it already held that a conviction under 18 U.S.C. § 111(b) "requires a more culpable *mens rea* than mere recklessness." Op. *3. It "further note[d] that at least two post-*Borden* decisions from … sister circuits have held that 18 U.S.C. § 111(b) requires an intentional assault and, thus, qualifies as a predicate crime of violence to sustain a conviction under 18 U.S.C. § 924(c)." Op. *3. The Circuit concluded that "[g]iven this authority, no reasonable jurist would debate" that 18 U.S.C. § 111(b) cannot be committed with a *mens rea* of recklessness. Op. *3. It issued its *per curiam* order before the United States filed any responsive brief in this appeal. On February 21, 2024, Mr. Newman timely filed a petition for rehearing en banc. The Tenth Circuit denied that petition on March 8, 2024.

REASONS FOR GRANTING THE APPLICATION

A COA should issue. The scope of the assault-on-a-federal-officer statute is an exceptionally important issue that implicates the physical safety of thousands of federal law enforcement officers. The United States has long agreed with Mr. Newman's position on the best reading of the statute and should have the opportunity to provide the Court its views here. The Tenth Circuit erred in its analysis of the statutory question in this case. The text of the post-1994 federal assault statute, as explained *infra*, strongly indicates that Congress intended for the statute to reach reckless assaults. The Tenth Circuit in *Kendall* did not consider that text because the minimum *mens rea* of the statute was not at issue, and the two other circuits that the Circuit looked to for persuasive authority either applied the pre-1994 statute or relied on precedent construing the pre-1994 statute. Moreover,

reasonable jurists could debate the question whether Mr. Newman's collateral attack waiver is unenforceable because numerous reasonable jurists have already held, in circumstances almost identical to those here, that they are unenforceable. *See, e.g.*, *Adams*, 814 F.3d at 182-83; *McKinney*, 60 F.4th at 192-93.

I. ASSAULT ON A FEDERAL OFFICER UNDER § 111(b) CAN BE COMMITTED RECKLESSLY.

A. The statute under which Mr. Newman pleaded guilty can be violated by reckless conduct.

This Court held in *Borden* that a criminal offense with a mens rea of recklessness does not qualify as a valid predicate for Armed Career Criminal Act (ACCA) sentencing enhancement as a crime of violence. 141 S. Ct. 1817, 1822. Crimes of violence require "as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 16(a). "The term crime of violence in § 16(a) cannot be said naturally to include … crimes of recklessness or negligence." *Borden*, 141 S. Ct. at 1830 (internal quotation marks omitted). The use of physical force applies "'only to intentional acts designed to cause harm.'" *Id.* at 1835 (Thomas, J., concurring).

This Court has yet to address whether 18 U.S.C. § 111 constitutes a valid predicate for "crime of violence" enhancement since *Borden*, 141 S. Ct. 1817.

Section 111 of Title 18 provides:

> **(a) In General.** Whoever—
>
> > **(1)** forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of official duties; or

> **(2)** forcibly assaults or intimidates any person who formerly served as a person designated in section 1114 on account of the performance of official duties during such person's term of service,
>
> shall, where the acts in violation of this section constitute only simple assault, be fined under this title or imprisoned not more than one year, or both, and where such acts involve physical contact with the victim of that assault or the intent to commit another felony, be fined under this title or imprisoned not more than 8 years, or both.
>
> **(b) Enhanced Penalty.**
> Whoever, in the commission of any acts described in subsection (a), uses a deadly or dangerous weapon (including a weapon intended to cause death or danger but that fails to do so by reason of a defective component) or inflicts bodily injury, shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 111(a)-(b) (emphases added).

The statutory text of § 111 establishes that it extends to reckless conduct. Since it was amended in 1994, the statute has specifically criminalized "simple assault," § 111(a), a term of art distinct from the unadorned word "assault" that Congress otherwise uses in the federal criminal code. *See, e.g.*, 18 U.S.C. §§ 113(a)(1)-(8). "Simple assault" appears to have been lifted into the statute from either the Model Penal Code ("MPC") or the *Final Report of The National Commission on Reform of Federal Criminal Laws* (1971) (or both). Both sources define "simple assault" as a crime that can be accomplished with a mens rea less than intentionality: "recklessly" in the MPC, § 211.1(1), and "negligently" in the Final Report, at 176. State criminal codes which employ the same phrase give it the same

meaning,[4] and the Tenth Circuit itself has employed the MPC definition of "simple assault" for statutory interpretation purposes in at least one case, albeit pre-*Borden*. *See United States v. Winder*, 926 F.3d 1251, 1255 (10th Cir. 2019) (interpreting a Wyoming officer assault statute). The term "simple assault" also appears in 18 U.S.C. § 113(a)(5), which can also be committed recklessly. *See United States v. Delis*, 558 F.3d 177, 180-81 (2d Cir. 2009).

Because every type of assault under § 111 can be committed as a "simple assault" plus an aggravating element, *see supra*, no form of assault on a federal officer is a categorical crime of violence. As relevant here, for example, assault on a federal officer with a deadly weapon, criminalized in § 111(b), can be committed by committing simple (i.e. reckless) assault with a deadly weapon, such as by driving a car recklessly through a group of federal officers.

This conclusion is bolstered by the longstanding rule that "[w]hen interpreting federal criminal statutes that are silent on the required mental state," courts "read into the statute only that mens rea which is necessary to separate wrongful conduct from otherwise

---

[4] For example, Pennsylvania's "simple assault" statute expressly incorporates reckless infliction of battery and negligent infliction of injury with a deadly weapon. *See* 18 Pa. Stat. and Cons. Stat. Ann. § 2701 (West 2014) ("[A] person is guilty of assault if he[] attempts to cause or intentionally, knowingly or recklessly causes bodily injury to another."); *Vicky M. v. Ne. Educ. Intermediate Unit 19*, 486 F. Supp. 2d 437, 457-58 (M.D. Pa. 2007) ("In Pennsylvania the common law torts of assault and battery are consolidated under the term 'assault.'" (citing 18 Pa. Stat. and Cons. Stat. Ann. § 2701)). "Section 2701 was derived from Section 211.1 of the Model Penal Code," "eliminat[ing] … the distinction between 'assault' and 'battery.'" *Morency v. City of Allentown*, No. 19-5304, 2020 WL 1935640, at *7 n.21 (E.D. Pa. Apr. 22, 2020). New Jersey's assault statute also defines "simple assault" as a reckless infliction of injury or negligent infliction of injury with a deadly weapon. N.J. Stat. Ann. § 2C:12-1 (West 2022). Same with New Hampshire, South Dakota, Vermont, and Mississippi. N.H. Rev. Stat. § 631:2-a (West 1979); S.D. Codified Laws § 22-18-1; Vt. Stat. Ann. tit. 13, § 1023 (West 1981); Miss. Code Ann. § 97-3-7 (West 2019).

innocent conduct." *Elonis v. United States*, 575 U.S. 723, 736 (2015) (cleaned up). Section 111 does not enumerate a requisite mens rea; in its absence, the ordinary presumption is, therefore, that each element of the crime can be committed recklessly. *See, e.g.*, *id.* at 745 (Alito, J., concurring in part and dissenting in part).

Finally, imposing a mens rea of recklessness adheres to the legislative purpose of § 111 to broadly protect federal officers. Through § 111, Congress sought to provide "uniformly vigorous protection of federal personnel" to the "maximum" degree. *United States v. Feola*, 420 U.S. 671, 684 (1975). Courts in construing § 111 must "effectuate the congressional purpose of according maximum protection to federal officers by making prosecution for assaults upon them cognizable in the federal courts." *Id.* Consistent with this understanding, the United States indicts individuals under § 111 on the basis of reckless conduct. *See, e.g.*, *United States v. Henderson*, No. 18-08112-001, 2018 WL 10216422, at *1 (D. Ariz. June 11, 2018) (indictment under 18 U.S.C. § 111 for "reckless[]" assault); *United States v. Olthoff*, No. 11-0354, 2012 WL 928587, at *1 (D. Minn. Mar. 19, 2012) (upholding 18 U.S.C. § 111(a) conviction for reckless assault).

It would be counterintuitive to conclude that assault on a federal officer requires a more demanding mens rea than virtually all other federal assault statutes. Other federal statutes criminalizing assault can be violated recklessly. For example, assault causing serious bodily injury, 18 U.S.C. § 113(a)(6), can be committed recklessly. *See United States v. Mann*, 899 F.3d 898, 901 (10th Cir. 2018); *United States v. Zunie*, 444 F.3d 1230, 1235 (10th Cir. 2006). Assault by wounding, 18 U.S.C. § 113(a)(4), can be committed recklessly. *See United States v. Pettigrew*, 468 F.3d 626, 639 & n.5 (10th Cir. 2006). Simple assault, 18

U.S.C. § 113(a)(5), can be committed recklessly. *See Delis*, 558 F.3d at 180-81. Domestic assault by a habitual offender, 18 U.S.C. § 117, can be committed recklessly. *See Silk v. United States*, 955 F.3d 681, 684 (8th Cir. 2020). Of all the federal assault crimes, one would expect that assault on a federal officer would if anything be the one with the broadest compass to effectuate its purpose of protecting federal officials from harm.

The Tenth Circuit denied a COA in this case on the basis of three cases, but none of them are controlling. It cited *United States v. Kendall*, 876 F.3d 1264, 1270 (10th Cir. 2017), as having held that 18 U.S.C. § 111(b) requires a more culpable mens rea than mere recklessness, and thus that the statute satisfies *Borden*'s definition of a crime of violence. *See* Op. *3. But no party briefed or argued the question of the necessary mens rea to violate 18 U.S.C. § 111(b) in *Kendall*. As the Court explained in *Kendall*, "Kendall claims one can violate [§ 111(b)] … without the use, attempted use, or threatened use of violent physical force—the degree of force required to commit a crime of violence." 876 F.3d at 1267. In other words, the dispute in *Kendall* centered on the requisite *actus reus*. The question of the necessary intent to violate the statute was not briefed or argued. To be sure, the *Kendall* panel quoted a Fifth Circuit case that was about intent, but only for the proposition that § 111 necessarily requires force, not that it requires intent. *See id.* at 1270. And that case—the Fifth Circuit case—applied an idiosyncratic Fifth Circuit rule under which § 111(a) can be committed recklessly but § 111(b) cannot be, even though § 111(b) assault is defined as § 111(a) assault with a deadly weapon. *See United States v. Hernandez-Hernandez*, 817 F.3d 207, 214 (5th Cir. 2016) (quoted in *Kendall*, 876 F.3d at 1270, and then quoted from *Kendall* in Op. *3).

Kendall is therefore not controlling precedent on this question. *See Webster v. Fall*, 266 U.S. 507, 511 (1925) (cases are not precedent for unargued propositions); *accord United States v. Wolfname*, 835 F.3d 1214, 1219-20 (10th Cir. 2016) (so holding in a § 111 case). Outside of this case, the Tenth Circuit has never treated *Kendall* as precedential on the question of the mens rea necessary to violate § 111(b). *See McDaniel*, 85 F.4th at 186 (omitting *Kendall* from a list of "sister courts of appeals [that] have addressed the mens rea element of § 111(b)" while citing *Kendall* elsewhere in the opinion); *see also United States v. Bettcher*, 911 F.3d 1040, 1043-45 (10th Cir. 2018) (not treating *Kendall* as controlling on the question of mens rea); *United States v. Butler*, No. 21-20027, 2022 WL 16714129, at *4-5 (D. Kan. Nov. 4, 2022) (same). Instead, *Kendall* has always been described as having addressed the distinct question of whether § 111(b) requires the use of violent physical force. *See, e.g.*, *United States v. Montoya*, 770 F. App'x 436, 438 (10th Cir. 2019); *United States v. Wing*, 730 F. App'x 592, 597 (10th Cir. 2018); *United States v. Murphy*, 705 F. App'x 775, 776 (10th Cir. 2017). If the scope of *Kendall*'s precedential effect is unclear, at a minimum a COA should issue to permit the Tenth Circuit to determine on the merit whether it is *in fact* controlling precedent rather than summarily declare that it forecloses a potentially meritorious appeal.

The Tenth Circuit also erred when it pointed to two recent out-of-circuit cases that held § 111 cannot be committed recklessly. The first, *United States v. McDaniel*, was construing a pre-1994 version of § 111, which this Court had held in *Feola* required proof of "an intent to assault." 85 F.4th at 186 (quoting *Feola*, 420 U.S. at 684). In the second case, *United States v. Medearis*, the Eighth Circuit applied its precedent governing the pre-1994

version of § 111—which did not include a prohibition on "simple assault"—as if it applied the same way to the post-1994 version of the statute. 65 F.4th 981, 987 (8th Cir. 2023) (quoting *Hanson*, 618 F.2d at 1265). No party raised for the Eighth Circuit in *Medearis* that an intervening change in the text of the statute precluded the application of the Eighth Circuit's pre-1994 precedent. As a consequence, the Eighth Circuit's holding is not persuasive on the question before the Court in this case, which is whether the *post*-1994 version of § 111—which can be committed by means of "simple assault"—can be violated through mere recklessness.

These are complex legal arguments that deserve to be addressed on the merits with the benefit of adversarial briefing.

B. The correct resolution of this question affects the safety of thousands of federal officers.

The question of the appropriate *mens rea* to violate § 111 is indisputably important. The federal officer assault statute was enacted, and later expanded, to protect federal personnel. This Court recognized in *Feola* that in order "to effectuate the congressional purpose" courts should construe § 111 to "accord[] maximum protection to federal officers." 420 U.S. 671, at 684. Congress enacted the statute to ratchet up protections for federal officers; to ensure that the federal government would "not be compelled to rely upon the courts of the States, however respectable and well disposed, for the protection of its investigative and law-enforcement personnel." S. Rep. No. 73-535, at 2 (1934); *see also* H. Rep. No. 73-1455, at 2 (1934).

The statute's protections remain critical. There are thousands of assaults on federal officers each year. Since 1972, the FBI has published annual reports detailing assaults

against federal officers in the line of duty. FBI, *About Law Enforcement Officers Killed and Assaulted, in* Federal LEOKA, 2022 at 1. Between 2018 and 2022, 9,163 federal officers were assaulted. FBI, *Federal Topic Page, in* Federal LEOKA, 2022, at 4. Over 42% of these assaults were carried out with "personal weapons," such as "hands, fists, or feet." *See* FBI, *Table 74-Extent of Injury of Victim Officer by Type of Weapon, 2018–2022, in* Federal LEOKA, 2022. Of the 9,136 assaults, over 25% resulted in injury or death. *Id*. To the extent that dispositional information was reported, about 89% of known assailants were criminally charged in 2022; about 72% in 2021; and about 76% in 2020. FBI, *Table 79-Department, Agency, and Office by Disposition of Known Offender, 2022, in* Federal LEOKA, 2022; FBI, *Table 79-Department, Agency, and Office by Disposition of Known Offender, 2021*, *in* Federal LEOKA, 2021; FBI, *Table 79-Department, Agency, and Office by Disposition of Known Offender, 2020, in* Federal LEOKA, 2020.

II. THE COLLATERAL ATTACK WAIVER IN MR. NEWMAN'S PLEA AGREEMENT IS UNENFORCEABLE.

Mr. Newman's collateral attack waiver is unenforceable because it would unconstitutionally bar review when the defendant makes a cognizable claim of actual innocence. This case is on all fours with multiple Fourth Circuit cases that have held that a collateral attack waiver is unenforceable when the underlying claim is that the prisoner is actually innocent of a crime for which he was convicted. *See, e.g.*, *Adams*, 814 F.3d at 182 ("A proper showing of 'actual innocence' is sufficient to satisfy the 'miscarriage of justice' requirement."). In *Adams*, for example, a prisoner argued that an intervening change in law invalidated the prisoner's § 922(g) conviction because an underlying crime was no longer a valid predicate for the § 922(g) conviction. 814 F.3d at 185. The Fourth Circuit held

that if the prisoner's claim of actual innocence was cognizable, it would work a miscarriage of justice to enforce the waiver to bar the claim. *Id.* at 182-83 (holding that an actual innocence claim is outside the scope of appeal waiver to prevent a miscarriage of justice). Other Fourth Circuit cases are similar. *See McKinney*, 60 F.4th at 192-93 (a cognizable claim of actual innocence is enough for miscarriage-of-justice); *Cornette*, 932 F.3d at 208-10 (waiver does not bar an actual innocence claim based on subsequent change in law). This case is materially indistinguishable from those cases.

Courts have adopted an "actual innocence" rule for good reason: no greater miscarriage of justice could occur than imprisoning a person for a crime of which they are innocent. Innocence is the "ultimate equity," *Withrow v. Williams,* 507 U.S. 680, 700 (1993) (O'Connor, J., concurring in part and dissenting in part, joined by Rehnquist, C.J.), and so courts have always ensured "that federal constitutional errors do not result in the incarceration of innocent persons," *Herrera v. Collins*, 506 U.S. 390, 404 (1993). Indeed, as Judge Friendly observed 50 years ago, and as this Court more recently confirmed, innocence is different because "the one thing almost never suggested on collateral attack is that the prisoner [is] innocent of the crime." *Schlup v. Delo*, 513 U.S. 298, 322 (1995) (quoting Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments,* 38 U. Chi. L. Rev. 142, 145 (1970)). Thus, in virtually every context, in the narrow range of cases where a colorable claim of innocence is alleged, courts have held that Congress implicitly permitted those claims to proceed even if the language of a statute otherwise seems to categorically bar them. It would be bizarre to apply a contrary presumption to collateral attack waivers inserted by federal prosecutors in plea agreements.

The government also has absolutely *no interest* in preventing a person who is actually innocent from obtaining release. Only those provisions of a plea agreement that reflect the state's legitimate interests could arguably be enforceable in a plea agreement. A "prosecutor is permitted to consider only legitimate criminal justice concerns in striking [a plea] bargain—concerns such as rehabilitation, allocation of criminal justice resources, the strength of the evidence against the defendant, and the extent of [a defendant's] cooperation with the authorities." *Town of Newton v. Rumery*, 480 U.S. 386, 401 (1987) (O'Connor, J., concurring); *see also id.* at 397 (majority opinion) (evaluating the degree to which an agreement in the criminal context "further[ed] legitimate prosecutorial and public interests"). "This set of legitimate interests places boundaries on the rights that [prosecutors can seek to have criminal defendants] bargain[] away in plea negotiations." *Price v. U.S. Dep't of Just. Att'y Office*, 865 F.3d 676, 681 (D.C. Cir. 2017). To be sure, collateral attack waivers have been defended as advancing twin interests in conservation of prosecutorial resources and finality of criminal convictions. But neither of those interests justifies enforcing a collateral attack waiver in circumstances where the person against whom the waiver is asserted is actually innocent of the crime for which they are incarcerated.

Even if the Tenth Circuit ultimately disagrees with Mr. Newman's position on the enforceability of his collateral attack waiver, at minimum reasonable jurists could debate the question, and a COA thus should issue.

* * * * *

To be sure, cases in which a Circuit fails to issue a COA in a nonfrivolous appeal, requiring the intervention of a justice of this Court, are rare. But they do exist. This is such a case. In the decision below, the Tenth Circuit applied too high a standard, contradicting the position taken by federal government for the past 50 years and issuing its opinion *sua sponte* without waiting for or soliciting the government's position. Applicant's arguments are substantial, and reasonable jurists could debate them. That is all that Congress required for the issuance of a COA.

CONCLUSION

For the foregoing reasons, Applicant respectfully requests the issuance of a Certificate of Appealability.

Respectfully submitted,

<u>*s/Andrew T. Tutt*</u>

Andrew T. Tutt
Counsel of Record
Anora Wang
Meredith Volpe
Caleb Thompson
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Avenue, NW
Washington, DC 20001
(202) 942-5000
andrew.tutt@arnoldporter.com

Lisa Cordara
ARNOLD & PORTER
KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019

R. Reeves Anderson
ARNOLD & PORTER
KAYE SCHOLER LLP
Suite 3100
1144 Fifteenth Street
Denver, CO 80202

Justin Garratt
ARNOLD & PORTER
KAYE SCHOLER LLP
44th Floor
777 South Figueroa Street
Los Angeles, CA 90017-5844

Counsel for Applicant Nicholas Newman