No. 23A866

IN THE SUPREME COURT OF THE UNITED STATES

NICHOLAS NEWMAN, APPLICANT

v.

UNITED STATES OF AMERICA

OPPOSITION TO APPLICATION FOR A CERTIFICATE OF APPEALABILITY

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ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Kan.):

United States v. Newman, 20-cr-20014 (Sept. 28, 2021) (entering judgment of conviction and sentence)

United States v. Newman, 20-cr-20014 (Dec. 8, 2023) (dismissing in part and denying in part 28 U.S.C. 2255 motion and denying certificate of appealability)

United States v. Newman, 20-cr-20014 (Jan. 25, 2024) (granting 18 U.S.C. 35motion for sentence reduction)

United States Court of Appeals (10th Cir.):

United States v. Newman, 23-3120 (Mar. 8, 2024) (denying certificate of appealability)

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The Solicitor General respectfully files this response in opposition to the application for a certificate of appealability.

STATEMENT

In 2021, following a guilty plea in the United States District Court for the District of Kansas, applicant was convicted on one count of forcibly assaulting a federal officer with a deadly or dangerous weapon, in violation of 18 U.S.C. 111(a)(1) and (b); and one count of using or carrying a firearm during and in relation to a crime of violence, or possessing a firearm in furtherance of the same, in violation of 18 U.S.C. 924(c)(1)(A). Judgment 1. The district court sentenced applicant to 180 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court subsequently reduced his term of imprisonment to 169 months of imprisonment under 18 U.S.C. 3582(c)(2). D. Ct. Doc. 85 (Jan. 25, 2024).

In 2022, applicant filed a motion under 28 U.S.C. 2255 to vacate his Section 924(c) conviction, which the district court

dismissed in part and denied in part on the merits. Appl. App. Ex. A. The court denied applicant a certificate of appealability (COA). Id. at A18. The court of appeals also denied a COA. Appl. App. Ex. B.

1. In January 2020, undercover agents with the Bureau of Alcohol, Tobacco, Firearms and Explosives sought to make controlled narcotics and firearms purchases from "the more dangerous or prolific gang members" in Kansas City, Kansas. Sent. Tr. 42-45. Applicant was one such individual. Id. at 6, 47. Over the course of three controlled buys from applicant, two female undercover agents bought marijuana, ecstasy, methamphetamine, and a loaded gun. Id. at 10-11, 28, 48.

On February 6, 2020, the same undercover agents agreed to purchase another gun from applicant in a grocery store parking lot. Am. Presentence Investigation Report (Am. PSR) ¶ 10. The agents arrived at the lot and waited in their car. Id. ¶ 11. Applicant arrived and waved a vehicle with three other people to park behind the agents' car. Id. ¶ 12; Sent. Tr. 14, 53. He asked the agents for the money; they said that they wanted to see the gun before paying. Am. PSR ¶ 13.

After retrieving the firearm from the other car, applicant entered the agents' car and sat in the front passenger seat. Am. PSR ¶ 13. One agent sat in the driver's seat and the other in the back passenger seat. Ibid. Applicant seemed "nervous" as he gave a pistol without a magazine to the agent in the driver's seat, who

placed the gun on the floorboard and handed over $400. Sent. Tr. 18, 54; see Am. PSR ¶ 13. As applicant counted the money, it "looked like * * * he was trying to figure out what he was going to do next"; he then appeared to "look[] down towards the firearm." Sent. Tr. 54-56. The agents asked about the missing magazine, and applicant responded that "he had [the loaded magazine] on him." Am. PSR ¶ 13.

Applicant "then reached down," "grabbed the gun," and "tried to pull the firearm away." Am. PSR ¶ 13. The agent in the driver's seat grabbed the gun as well, and a "violent struggle ensued." Ibid. The agents "fear[ed] for [their]" lives, ibid., believing applicant was trying to "rob" or "shoot" them, Sent. Tr. 59. Surveillance units eventually arrived and restrained applicant. Am. PSR ¶ 14. During the struggle, the agent in the driver's seat suffered an injury to her dominant hand requiring surgery and can no longer hold a firearm in that hand, preventing her from working in the field. Id. ¶ 17; Sent. Tr. 19.

2. A grand jury in the District of Kansas charged applicant with two counts of distributing methamphetamine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); three counts of distributing marijuana, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(D); one count of using or carrying a firearm during and in relation to, or possessing a firearm in furtherance of, a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A); two counts of possessing a firearm and ammunition following a felony conviction, in viola-

tion of 18 U.S.C. 922(g)(1); one count of assault with intent to rob a federal officer while putting the officer's life in danger by use of a dangerous weapon, in violation of 18 U.S.C. 2114(a); one count of forcibly assaulting a federal officer with a deadly or dangerous weapon and inflicting bodily injury, in violation of 18 U.S.C. 111(a)(1) and (b); and one count of using or carrying a firearm during and in relation to, or possessing a firearm in furtherance of, a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A). Second Superseding Indictment 1-6. Applicant's Section 2114 and Section 111 counts were both charged as predicate crimes of violence for the second (crime of violence) Section 924(c) count. Id. at 5-6.

In May 2021, applicant pleaded guilty to the Section 111 count and the related Section 924(c) count pursuant to a binding plea agreement under Federal Rule of Criminal Procedure 11(c)(1)(A) and (C). Plea Agreement 1-2; Plea Tr. 22-23. Section 111 provides:

> (a) IN GENERAL--Whoever--
>
> (1) forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title [i.e., a federal officer] while engaged in or on account of the performance of official duties;
>
> * * *
>
> 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.

In the plea agreement, the parties stipulated to dismissal of the remaining counts and a term of imprisonment between 120 and 180 months. Plea Agreement 1-2, 4-5. Applicant also "knowingly and voluntarily waive[d]" his "right to * * * collaterally attack any matter in connection with this prosecution, his conviction, or the components of the sentence to be imposed," except "with regards to ineffective assistance of counsel or prosecutorial misconduct." Id. at 8. The district court reviewed and ensured that applicant understood those provisions before accepting his guilty plea. Plea Tr. 9, 23.

At sentencing, the district court accepted the plea agreement and sentenced applicant to 180 months of imprisonment, to be followed by five years of supervised release. Sent. Tr. 109; Judgment 2-4. The government dismissed the other nine counts. Sent. Tr. 111. At no point during or prior to sentencing did applicant move to withdraw his Section 924(c) guilty plea based on the then-recent decision in Borden v. United States, 593 U.S. 420 (2021), which held that a statute allowing for conviction based on a reckless application of force does not qualify as a "violent felony" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e).

3. In 2022, applicant moved under 28 U.S.C. 2255 to vacate his Section 924(c) conviction based on Borden. D. Ct. Doc. 71 (Sept. 27, 2022). He claimed "actual[] innocen[ce]" of that crime on the theory that his predicate Section 111 offense -- forcibly assaulting a federal officer with a deadly or dangerous weapon and inflicting bodily injury -- was an offense that could be committed recklessly, and was therefore not a crime of violence after Borden. Id. at 4. Applicant further alleged that his counsel had performed ineffectively by failing to inform him of Borden's pending status during plea negotiations. Id. at 5. The government opposed applicant's motion, invoking the collateral-review waiver in the plea agreement and explaining that applicant's Section 111(a)(1) and (b) offense remained a crime of violence after Borden. D. Ct. Doc. 74, at 3-13 (Oct. 28, 2022).

The district court denied applicant's motion and denied a COA. Appl. App. Ex. A. The court enforced applicant's collateral-review waiver as to his Borden claim. Id. at A5-A11. It recognized that such waivers remain effective even after "a change in the law subsequent to the defendant's plea" and that applicant had "received a lesser sentence after the government agreed to dismiss" the nine other charges in his case. Id. at A9-A10. In addition, in rejecting applicant's ineffective-assistance claims, the court found applicant's assertion of actual innocence to be "without merit," reasoning that Section 111(a)(1) and (b) "'requires a finding the defendant intentionally used, attempted to use, or

threatened to use physical force against the person of another'" and therefore "remain[ed] a crime of violence after Borden." Appl. App. A14-A15 (quoting United States v. Kendall, 876 F.3d 1264, 1270 (10th Cir. 2017), cert. denied, 584 U.S. 945 (2018)). And the court denied applicant a COA because no reasonable jurist would debate whether to enforce his collateral-review waiver or whether Section 111(a)(1) and (b) remains a crime of violence. Id. at A18.

4. The court of appeals denied a COA. Appl. App. Ex. B. The court observed that, to qualify for a COA, applicant needed to show that "reasonable jurists could debate the validity" of both "the correctness of the district court's procedural ruling" regarding the collateral-attack waiver and applicant's "underlying constitutional claim" regarding his Section 924(c) conviction. Id. at B4. The court saw no need to address the collateral-attack waiver, however, because "no reasonable jurist would debate the district court's dismissal of [applicant's] motion with respect to his actual innocence claim." Id. at B6; see id. at B4. The court cited its own precedent, and two post-Borden decisions from other circuits, concluding that a conviction under Section 111(a)(1) and (b) requires the intentional use of physical force against another person. Id. at B5-B6.

The court of appeals subsequently denied applicant's petition for rehearing. Appl. App. Ex. C.

5. The unextended due date for applicant to file a petition

for a writ of certiorari seeking review of the court of appeals' denial of a COA is June 6, 2024. Sup. Ct. R. 30.1. Applicant has not yet filed such a petition.

ARGUMENT

Applicant contends (Appl. 8-18) that the lower courts erred in denying him a COA. A COA may issue only if a prisoner has made "a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). As this Court explained in Slack v. McDaniel, 529 U.S. 473 (2000), that "substantial showing" requires the prisoner to demonstrate "that reasonable jurists could debate" his entitlement to relief on the merits as well as resolution of relevant procedural issues. Id. at 483-484. Applicant has made neither showing here: reasonable jurists would debate neither the enforcement of his collateral-attack waiver nor the merits of his underlying claim. Nor has applicant identified exceptional circumstances that would warrant obtaining a COA directly from a Circuit Justice, as opposed to pursuing the ordinary course of filing a petition for certiorari seeking the Court's review of the court of appeals' decision denying one.

I. APPLICANT'S EXTRAORDINARY REQUEST FOR A COA SHOULD BE DENIED

Certificates of appealability "are rarely, if ever, granted by Circuit Justices." Stephen M. Shapiro et al., Supreme Court Practice 18-7 n.12 (11th ed. 2019) (Supreme Court Practice). Although a Circuit Justice or the full Court may grant a COA, 28

U.S.C. 2253(c)(1),[1] it appears that no Circuit Justice has exercised that discretion since the enactment of the current COA requirement in the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 102, 110 Stat. 1217-1218. Indeed, it appears the last time a Circuit Justice exercised his authority to issue a certificate of probable cause was over 40 years ago. See Autry v. Estelle, 464 U.S. 1301, 1302 (1983) (White, J., granting Section 2253 certificate of probable cause).

That absence of precedent makes sense in light of this Court's decision in Hohn v. United States, 524 U.S. 236 (1998), recognizing this Court's statutory certiorari jurisdiction under 28 U.S.C. 1254(1) to review a court of appeals' denial of a COA. Id. at 253; see Supreme Court Practice 18-7 n.12. Since Hohn, the Court has since regularly exercised that jurisdiction to review whether a COA should have issued. See, e.g., Edwards v. Vannoy, 593 U.S. 255, 261 (2021); Tharpe v. Sellers, 583 U.S. 33, 34-35 (2018) (per curiam); Buck v. Davis, 580 U.S. 100, 114-115 (2017); Welch v. United States, 578 U.S. 120, 127-128 (2016).

Original applications to Circuit Justices for a COA are an awkward and burdensome means to review the merits of an applicant's

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[1] See Anderson v. Collins, 495 U.S. 943, 943 (1990) (denying application for certificate of probable cause presented to an individual Justice and referred to the Court); cf. In re Burwell, 350 U.S. 521, 522 (1956) (per curiam) (explaining that statutory authorization of circuit "judge" to grant certificate of probable cause empowered court of appeals to grant one).

Section 2255 motion or supervise the courts of appeals' interpretations of the standard for issuing COAs. Such applications often raise several legal and factual claims in complicated, lengthy, and old cases. See, e.g., Blanton v. Quarterman, 287 Fed. Appx. 407, 408 (5th Cir. 2008) (per curiam) (seeking a COA for ten claims). Addressing such issues in deciding original COA applications under the Slack standard would require a Circuit Justice to review the case, determine the appropriate legal standards for each claim, and apply them in frivolous or fact-specific cases. Cf. Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923) (explaining that the Court should confine its attention to issues of broad public importance).

Moreover, the potentially onerous procedure that applicant seeks to invoke here would substitute, or superimpose, a rushed application in a context that already allows for a more considered assessment by the full Court. Should a Circuit Justice decline to issue a COA, applicants -- like the one here -- will often still have the opportunity to seek certiorari review of the court of appeals' COA denial. See Hohn, 524 U.S. at 253. Should the prisoner be unsuccessful with one Justice, he may simply file a certiorari petition and seek full-Court review of the determination that no COA should issue.

Applicant provides no sound reason why that inefficient procedure is justified, at least in the absence of extraordinary circumstances. It would require consideration of the same claims

twice (once in an original application, then again in a petition for a writ of certiorari); potentially, prisoners might even use the COA mechanism to avoid the time limits for filing a petition for a writ of certiorari. The Court should not open the door to such maneuvers. Cf. In re Burwell, 350 U.S. 521, 522 (1956) (per curiam) (leaving to a court of appeals' discretion whether a Section 2253 application for a certificate of probable cause should be considered by a panel, one judge, or "in some other way * * * within the scope of [that court's] powers"); see South Carolina v. North Carolina, 558 U.S. 256, 267 (2010) (noting that this Court exercises its original jurisdiction "sparingly" and retains "substantial discretion" to decide whether a claim warrants "an original forum in this Court," in part because such actions tax the Court's "limited resources" and divert attention from the Court's "primary responsibility as an appellate tribunal") (internal quotation marks and citations omitted).

Here, even without an extension, applicant has over a month and a half to file a petition for a writ of certiorari. See pp. 7-8, supra. As a result, any rare and unusual circumstances that might conceivably warrant a grant of an original application for a COA are not present. Cf. Autry, 464 U.S. at 1302 (granting an application for a certificate of probable cause and stay of imminent execution where another pending case before the Court could have affected the applicant's capital sentence).

II. PETITIONER'S APPLICATION FOR A COA LACKS MERIT

Even assuming applicant's extraordinary request warrants consideration, the application lacks merit on multiple independent grounds.

A. No Reasonable Jurist Would Disregard Applicant's Collateral-Attack Waiver

As a threshold matter, the collateral-attack waiver in petitioner's plea agreement forecloses his collateral attack here.

1. This Court has repeatedly recognized that a defendant may validly waive constitutional and statutory rights as part of a plea agreement so long as his waiver is knowing and voluntary. See, e.g., Ricketts v. Adamson, 483 U.S. 1, 9-10 (1987) (waiver of right to raise double-jeopardy defense); Town of Newton v. Rumery, 480 U.S. 386, 389, 397-398 (1987) (waiver of right to file action under 42 U.S.C. 1983). As a general matter, statutory rights are subject to waiver in the absence of some "affirmative indication" to the contrary from Congress. United States v. Mezzanatto, 513 U.S. 196, 201 (1995). Likewise, even the "most fundamental protections afforded by the Constitution" may be waived. Ibid.

In accord with those principles, the courts of appeals have uniformly enforced knowing and voluntary waivers of the right to appeal or collaterally attack a sentence.[2] As those courts have

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[2] See United States v. Teeter, 257 F.3d 14, 21-23 (1st Cir. 2001); United States v. Riggi, 649 F.3d 143, 147-150 (2d Cir. 2011); United States v. Khattak, 273 F.3d 557, 560-562 (3d Cir.

recognized, such waivers benefit defendants by providing them with "an additional bargaining chip in negotiations with the prosecution." United States v. Teeter, 257 F.3d 14, 22 (1st Cir. 2001); see United States v. Elliott, 264 F.3d 1171, 1174-1175 (10th Cir. 2001); United States v. Guillen, 561 F.3d 527, 530 (D.C. Cir. 2009). And appeal waivers correspondingly benefit the government by enhancing the finality of judgments and discouraging meritless appeals. See United States v. Andis, 333 F.3d 886, 889 (8th Cir.) (en banc), cert. denied, 540 U.S. 997 (2003); Teeter, 257 F.3d at 22. Collateral-review waivers have the same benefits. See, e.g., DeRoo v. United States, 223 F.3d 919, 923 (8th Cir. 2000) ("The 'chief virtues' of a plea agreement * * * are promoted by waivers of collateral appeal rights as much as by waivers of direct appeal rights. Waivers preserve the finality of judgments and sentences, and are of value to the accused to gain concessions from the government.") (citation omitted).

This case illustrates the mutual benefits of such waivers.

2001); United States v. Marin, 961 F.2d 493, 495-496 (4th Cir. 1992); United States v. Melancon, 972 F.2d 566, 567-568 (5th Cir. 1992); United States v. Toth, 668 F.3d 374, 377-378 (6th Cir. 2012); United States v. Woolley, 123 F.3d 627, 631 (7th Cir. 1997); United States v. Andis, 333 F.3d 886, 889-890 (8th Cir.) (en banc), cert. denied, 540 U.S. 997 (2003); United States v. Navarro-Botello, 912 F.2d 318, 320-322 (9th Cir. 1990), cert. denied, 503 U.S. 942 (1992); United States v. Hernandez, 134 F.3d 1435, 1437 (10th Cir. 1998); United States v. Bushert, 997 F.2d 1343, 1347-1350 (11th Cir. 1993), cert. denied, 513 U.S. 1051 (1994); United States v. Guillen, 561 F.3d 527, 529-532 (D.C. Cir. 2009).

In exchange for applicant's plea and waiver of his rights to appeal and collaterally attack his convictions and sentence, the government agreed to dismiss nine other counts. Plea Agreement 1-2, 5; Second Superseding Indictment 1-4. Those dismissed counts included another 18 U.S.C. 924(c) count and related drug-trafficking counts, as well as a charge of robbing a federal officer under 18 U.S.C. 2114(a). See pp. 3-4, supra; Second Superseding Indictment 1-6; see also 18 U.S.C. 2114(a) (robbery by placing a federal employee's life in jeopardy by use of a dangerous weapon).

2. Applicant argues (Appl. 16-18) that reasonable jurists may refuse to enforce his collateral-review waiver due to a "miscarriage of justice" based on his "actual innocence." He is mistaken. Even if such an implied exception to collateral-attack waivers exists, no reasonable jurist would find it met here.

In focusing on the requirements of 18 U.S.C. 111(a)(1) and (b) to sustain his claim of innocence, applicant inappropriately seeks to benefit from the happenstance of the particular predicate crime included in the plea agreement. The charge under Section 924(c) on which he was indicted and pleaded guilty included two predicate offenses -- not only aggravated assault of a federal officer, see 18 U.S.C. 111(a)(1) and (b), but also robbery of a federal officer, see 18 U.S.C. 2114(a). See Plea Tr. 22-23 (listing both predicates, not just the Section 111 offense, in describing the Section 924(c) charge to which applicant pleaded guilty); Second Superseding Indictment 5-6. Applicant offers no argument

that assault with the use of a dangerous weapon in violation of Section 2114(a), which requires "intent to rob," 18 U.S.C. 2114(a), is not a crime of violence under 18 U.S.C. 924(c)(3)(A). See United States v. Buck, 23 F.4th 919, 929-930 (9th Cir. 2022) (joining every circuit to have addressed the question in holding that a Section 2114(a) conviction with the dangerous-weapon element constitutes a crime of violence). The formal dismissal of the Section 2114(a) count does not justify disregarding the underlying conduct reflected by that charge to set aside the collateral-attack waiver. See United States v. Rodriguez-Moreno, 526 U.S. 275, 280 (1999) (explaining that Section 924(c) charge itself includes the elements of an underlying offense). Nor, for that matter, has applicant addressed the propriety of disregarding his collateral-attack waiver when the government, in exchange for the plea, voluntarily dismissed a second Section 924(c) count based on drug trafficking.

"It is not a miscarriage of justice to refuse to put [applicant] in a better position than [he] would have been in if all relevant actors had foreseen [Borden v. United States, 593 U.S. 420 (2021)]." Oliver v. United States, 951 F.3d 841, 847 (7th Cir. 2020). Nor can applicant demonstrate "actual innocence" under these circumstances. Such a claim would require him to "demonstrate that, 'in light of all the evidence,' 'it is more likely than not that no reasonable juror would have convicted him'" on the contested count, and his showing must focus on his "factual

innocence, not [the] mere legal insufficiency" of his conviction. Bousley v. United States, 523 U.S. 614, 622-623 (1998) (quoting Schlup v. Delo, 513 U.S. 298, 327-328 (1995)); see House v. Bell, 547 U.S. 518, 538 (2006) (emphasizing that the Schlup standard is demanding and seldom met).

Where "the Government has forgone more serious charges in the course of plea bargaining," a "showing of actual innocence must also extend to those charges." Bousley, 523 U.S. at 624. And even if courts may disagree as to whether such a showing would also extend to equivalent charges, see United States v. Caso, 723 F.3d 215, 222 n.3 (D.C. Cir. 2013), a prisoner who fails to show actual innocence of such charges is, at the least, not entitled to any "miscarriage of justice" exception to a collateral-attack waiver. The absence of any claim that applicant is actually innocent of either the Section 2114(a) robbery, or the Section 924(c) count premised on his drug trafficking, differentiates applicant's case from the Fourth Circuit cases that he cites in support of his contention that his "actual innocence" claim justifies setting aside his express collateral-attack waiver. Appl. 16-17; see United States v. McKinney, 60 F.4th 188, 191 (4th Cir. 2023); United States v. Adams, 814 F.3d 178, 181 (4th Cir. 2016).

Applicant has not shown that he is factually innocent of conduct that would satisfy the elements of Section 2114(a). The conduct that applicant admitted at the plea colloquy is consistent with a Section 2114(a) crime: although applicant disclaimed an

intent to assault, he did not deny his intent to divest a federal officer of property (the gun) that he had "sold" to her. See Plea Tr. 18-20. Thus, as the district court recognized at sentencing, "this was a robbery," Sent. Tr. 88, in which applicant "showed up with the intent to rob," id. at 90-91. Likewise, applicant has not attempted to make an actual-innocence showing on the other Section 924(c) count predicated on separate drug-trafficking crimes -- all of which the government dismissed in return for applicant's plea and waiver of his right to collaterally attack this Section 924(c) conviction.

Because reasonable jurists accordingly would not find any obstacle to the enforcement of applicant's knowing and voluntary collateral-review waiver, see p. 5, supra, a COA should not issue for that reason alone.

B. No Reasonable Jurist Would Debate The Merits Of Applicant's Claim

Even assuming away that procedural hurdle, applicant's request for a COA should be denied because his underlying claim for relief is unsound. Applicant contends (Appl. 9-15) that his conviction under Section 111(a)(1) and (b) required only the reckless use of force, precluding the conviction's categorization as a crime of violence under Borden. However, no authority casts doubt on the unanimous view of the courts of appeals -- shared by the United States -- that such convictions require a defendant to have taken a knowing and forcible act.

1. Section 111(a)(1) imposes criminal penalties on anyone who "forcibly assaults, resists, opposes, impedes, intimidates, or interferes with" any federal officer or employee "while engaged in or on account of the performance of official duties." All six categories of prohibited conduct require the defendant to act "forcibly." The statute also sets forth three offense tiers carrying different penalties. Where a defendant's "acts in violation of this section constitute only simple assault," he shall be "imprisoned not more than one year." 18 U.S.C. 111(a). "[W]here such acts involve physical contact with the victim of that assault or the intent to commit another felony," the defendant shall be "imprisoned not more than 8 years." Ibid. And where a defendant, "in the commission of any acts described in subsection (a), uses a deadly or dangerous weapon * * * or inflicts bodily injury," he shall be "imprisoned not more than 20 years." 18 U.S.C. 111(b).

Because Sections 111(a)(1) and (b) are silent as to mens rea, the Court applies a "presumption in favor of scienter." Carter v. United States, 530 U.S. 255, 268 (2000); see United States v. Feola, 420 U.S. 671, 685-686 (1975). That presumption requires that courts "read into the statute only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" Carter, 530 U.S. at 269 (citation omitted). Where a statute includes the use of force as an element (here, through the term "forcibly"), a general-intent requirement serves to separate wrongful and innocent conduct. See id. at 268-270 (general-intent

requirement sufficient for statute prohibiting taking items of value "by force and violence or intimidation" from a bank).

This Court's decision in Feola, which interpreted a previous (but similarly worded) version of Section 111, accordingly explained that a defendant violates Section 111 only if he harbors the general "criminal intent to do the acts therein specified." 420 U.S. at 686. And as relevant here, that "general intent" requires a defendant to knowingly take a forcible act. See Carter, 530 U.S. at 268-270. The courts of appeals are thus all in agreement that defendants convicted under Section 111(a)(1) and (b) must knowingly or intentionally take forcible acts.[3]

The court of appeals therefore did not err in denying applicant a COA on his Borden argument that his Section 111(a)(1) and (b) offense required only the reckless application of force. Alt-

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[3] See United States v. Taylor, 848 F.3d 476, 494-495 (1st Cir.), cert. denied, 582 U.S. 909 (2017); United States v. Davis, 690 F.3d 127, 137 (2d Cir. 2012), cert. denied, 568 U.S. 1107 (2013); United States v. Bullock, 970 F.3d 210, 215 (3d Cir. 2020); United States v. McDaniel, 85 F.4th 176, 186 (4th Cir. 2023); United States v. Hernandez-Hernandez, 817 F.3d 207, 215 (5th Cir. 2016); United States v. Milliron, 984 F.3d 1188, 1195 (6th Cir.), cert. denied, 141 S. Ct. 2653 (2021); United States v. Woody, 55 F.3d 1257, 1265-1266 (7th Cir.), cert. denied, 516 U.S. 889 (1995); United States v. Medearis, 65 F.4th 981, 987 (8th Cir.), cert. denied, 144 S. Ct. 363 (2023); United States v. Acosta-Sierra, 690 F.3d 1111, 1123 (9th Cir. 2012), cert. denied, 568 U.S. 1183 (2013); United States v. Kendall, 876 F.3d 1264, 1270 (10th Cir. 2017), cert. denied, 584 U.S. 845 (2018); United States v. Ettinger, 344 F.3d 1149, 1155 (11th Cir. 2003); United States v. Arrington, 309 F.3d 40, 46 (D.C. Cir. 2002), cert. denied, 537 U.S. 1241 (2003).

hough "[t]he COA inquiry * * * is not coextensive with a merits analysis," a prisoner seeking a COA must still show that jurists of reason "'could conclude the issues presented are adequate to deserve encouragement to proceed further.'" Buck, 580 U.S. at 115 (citation omitted). Applicant's argument that his Section 111 offense permits conviction based on a reckless mens rea did not deserve such encouragement, particularly given that no circuit has embraced it.

2. Applicant cites no authority holding that a conviction under Section 111(a)(1) and (b) may arise absent at least a knowing and forcible act. Instead, he attempts to locate a reckless mens rea element in the statute primarily based on Congress's 1994 addition of a "simple assault" clause to Section 111's penalty structure. Appl. 10-11, 14-15. But there is no indication that Congress intended to extend the reach of the third-tier offense, in violation of Section 111(b), to pure reckless conduct through the "simple assault" language added in 1994.

Before 1994, Section 111 had a two-tier punishment structure. It punished defendants who forcibly committed the six actions described in Section 111(a)(1) with up to three years of imprisonment, with an increased maximum sentence of ten years of imprisonment where "any such acts" involved a deadly or dangerous weapon. Act of June 25, 1948, ch. 645, § 111, 62 Stat. 688. In 1994, Congress amended Section 111's penalty structure to its current three-tier form by carving out less-severe forms of the Section

111 offense into their own category. It introduced the phrase "simple assault" to encompass misdemeanor violations, punishable by no more than a year in prison; "all other cases" would continue to be punishable by up to three years; and offenses involving a dangerous or deadly weapon would remain punishable by up to ten years, as would any act that "inflicts bodily injury." Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320101(a), 108 Stat. 2108; see Federal Judiciary Protection Act of 2002, Pub. L. No. 107-273, Div. C, Tit. I, § 11008(b), 116 Stat. 1818 (increasing second- and third-tier penalties). Then, in 2008, Congress amended the statute to specifically limit the second tier to cases involving physical contact or felonious intent by striking the phrase "in all other cases" from Section 111(a) and inserting "where such acts involve physical contact with the victim of that assault or the intent to commit another felony." Court Security Improvement Act of 2007, Pub. L. No. 110-177, § 208(b), 121 Stat. 2538.

Rather than signaling an effort to loosen the mens rea requirement, the addition of the phrase "simple assault" in 1994 simply ensures that certain less culpable types of conduct are not classified as felonies. The phrase functions "as a term of art," calling on courts to read the six types of conduct in Section 111(a)'s misdemeanor offense "through the common-law lens of 'simple assault' as excluding cases involving forcible physical contact or the intent to commit a serious felony." United States v.

Gagnon, 553 F.3d 1021, 1027 (6th Cir.), cert. denied, 558 U.S. 822 (2009). But it does not expand the scope of Section 111's felony liability.

The 2008 amendment, which expressly limits second-tier offense to cases that "involve physical contact with the victim of that assault or the intent to commit another felony," 18 U.S.C. 111(a) (Supp. I 2008), was a congruent effort to restrict the scope of the felony penalties to crimes with serious features beyond those required for "simple assault." See United States v. Williams, 602 F.3d 313, 317 (5th Cir.) ("The [2008] change in the statutory language * * * supports the conclusion that § 111(a)(1) prohibits more than assault, simple or otherwise."), cert. denied, 562 U.S. 1044 (2010). Nothing suggests that Congress meant to widen the mens rea of the offense beyond the boundaries outlined in Feola.

Applicant's contention (Appl. 11-13) that Section 111 must be interpreted to carry the same meaning as statutes punishing "assault" "within the special maritime and territorial jurisdiction of the United States," 18 U.S.C. 113, or "domestic assault," 18 U.S.C. 117, lacks merit. Whatever might be said about those other statutes, statutory context -- such as Section 111's unique "forcibly" element -- matters for mens rea purposes. See Carter, 530 U.S. at 268-269 (the presumption of scienter must be "[p]roperly applied" to the specific statute in question, including its "actus

reus").[4] Nor, in any event, does applicant provide any sound reason why "forcibl[e]" assault "us[ing] a deadly or dangerous weapon," or "forcibl[y]" "inflict[ing] bodily injury," can be committed recklessly. 18 U.S.C. 111(a); cf. Borden, 593 U.S. at 424-425 (plurality opinion) (examining Tennessee law with express mens rea of recklessness and without requirement that conduct be "forcible").

3. Applicant is wrong in suggesting (Appl. 3-4, 12) that the government has previously taken the position that the current version of Section 111(a)(1) and (b) permits a conviction based on the reckless application of force.

To begin with, the government has never represented to this Court that a defendant may violate Section 111 without a knowing use of force. The government merely argued in Feola that it need not prove that a "defendant knew that the victim of his assault was a federal officer" -- i.e., a jurisdictional fact that makes assault a federal crime. U.S. Br. at 10-11, Feola, supra (No. 73-1123) (emphasis added); see id. at 11 n.7. (citing the Final Report of The National Commission on Reform of Federal Criminal Laws (1971) (Final Report) for that same limited proposition). Contrary

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[4] Because Congress's 1994 insertion of the "simple assault" language into Section 111(a) did not alter the statute's mens rea requirements, the Fourth Circuit's 2023 decision in McDaniel and the Eighth Circuit's 2023 decision in Medearis -- which the court of appeals relied on below, see Appl. App. B6 -- remain relevant.

to applicant's suggestion (Appl. 4), the government's Feola brief did not quote a different portion of the Final Report arguing that negligently causing bodily injury sufficed.

The government's appellate brief in United States v. McCulligan, 256 F.3d 97 (3d Cir. 2001) (Appl. 3), likewise does not reflect an understanding that recklessness may sustain a Section 111(a) and (b) conviction under the current statute. As demonstrated by the jury instructions in McCulligan, the government's theory in that case was that the defendant acted "intentionally." 256 F.3d at 100; see U.S. Br. at 5, 9, McCulligan, supra (No. 00-2562) (McCulligan Br.). The government's pre-2008 suggestion, in support of a different point (involving physical contact), that Section 111(a)'s "simple assault" language drew on the Model Penal Code, see McCulligan Br. at 31, was wrong -- and rejected by the Third Circuit, see 256 F.3d at 103-104.

Applicant's citation (Appl. 12) of two district-court prosecutions is also misplaced. In United States v. Olthoff, No. 11-cr-0354 (D. Minn. Mar. 19, 2012), the Section 111 offense rested on a stipulation that the defendant "knowingly" took "forcibl[e]" acts. 2012 WL 928587, at *2; see id. at *2 n.4. And the indictment in United States v. Henderson, No. 18-cr-8112 (D. Ariz. June 11, 2018), likewise alleged that the defendant "knowingly" and "intentionally" -- not just "recklessly" -- took "forcibl[e]" acts, 2018 WL 10216422, at *1.

Even if the government's views on the question presented here

were previously unclear, the current position of the United States, informed by the unanimous view of the courts of appeals, is that conviction under Section 111(a) and (b) requires the knowing use of force. Nor does the government anticipate that correctly interpreting Section 111(a) and (b) to require a knowing use of force will often prevent the prosecution of a defendant who in fact "forcibly assaults, resists, opposes, impedes, intimidates, or interferes with" a federal officer or employee." See Appl. 12.

CONCLUSION

The application for a certificate of appealability should be denied.

Respectfully submitted.

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