No. 23A866

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

REPLY IN SUPPORT OF 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

TABLE OF CONTENTS

INTRODUCTION 1

I. THIS IS THE PARADIGM CASE FOR THE ISSUANCE OF A COA UNDER 28 U.S.C. § 2253(c)(1) 2

II. REASONABLE JURISTS COULD DEBATE WHETHER APPLICANT'S COLLATERAL WAIVER IS UNENFORCEABLE 5

III. REASONABLE JURISTS COULD DEBATE WHETHER § 111(b) CAN BE COMMITTED WITH A MENS REA OF RECKLESSNESS 8

A. The Inclusion of "Simple Assault" in § 111 Means That It Can Be Violated by Reckless Conduct 9

B. That § 111 Is a "General Intent" Crime Conclusively Establishes It Can Be Violated by Reckless Conduct 12

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

Cases

Banister v. Davis,
140 S. Ct. 1698 (2020) 4

Borden v. United States,
593 U.S. 420 (2021) 15, 17

Bousley v. United States,
523 U.S. 614 (1998) 6

Carter v. United States,
530 U.S. 255 (2000) 14

Gagnon v, United States,
558 U.S. 822 (2009) 9

Gumbs v. United States,
141 S.Ct. 1282 (2021) 14

Jim v. United States,
493 U.S. 827 (1989) 14

Johnson v. United States,
559 U.S. 133 (2010) 11

Kleinbart v. United States,
513 U.S. 978 (1994) 14

Labrador v. Poe by & through Poe,
No. 23A763, 2024 WL 1625724 (U.S. Apr. 15, 2024) 4

Loera v. United States,
502 U.S. 854 (1991) 15

Miller–El v. Cockrell,
537 U.S. 322 (2003) 19

Milliron v. United States,
141 S.Ct. 2653 (2021) 14

Slack v. McDaniel,
529 U.S. 473 (2000) 1, 2

Cases—Continued **Pages**

United States v. Adams,
814 F.3d 178 (4th Cir. 2016) 5, 6, 7

United States v. Ashley,
255 F.3d 907 (8th Cir. 2001) 15

United States v. Bailey,
444 U.S. 394 (1980) 14

United States v. Bradley,
400 F.3d 459 (6th Cir. 2005) 7

United States v. Caso,
723 F.3d 215 (D.C. Cir. 2013) 6

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

United States v. Duran,
96 F.3d 1495 (D.C. Cir. 1996) 18

United States v. Gagnon,
553 F.3d 1021 (6th Cir. 2009) 9, 10

United States v. Graham,
431 F.3d 585 (7th Cir. 2005) 14

United States v. Gumbs,
964 F.3d 1340 (11th Cir. 2020) 14

United States v. Gustus,
926 F.3d 1037 (8th Cir. 2019) 13, 14

United States v. Jim,
865 F.2d 211 (9th Cir. 1989) 14

United States v. Kendall,
876 F.3d 1264 (10th Cir. 2017) 17

United States v. Kleinbart,
27 F.3d 586 (D.C. Cir. 1994) 14

United States v. Loera,
923 F.2d 725 (9th Cir. 1991) 15

Cases—Continued **Pages**

United States v. McCulligan,
256 F.3d 97 (3d Cir. 2001) 8

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

United States v. Melhuish,
6 F.4th 380 (2d Cir. 2021) 14

United States v. Milliron,
984 F.3d 1188 (6th Cir. 2021) 14

United States v. Stands Alone,
11 F.4th 532 (7th Cir. 2021) 10

United States v. Wheeler,
831 F. App'x 53 (3d Cir. 2020) 14

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

United States v. Zunie,
444 F.3d 1230 (10th Cir. 2006) 15, 16, 17

Watson v. Dugger,
945 F.2d 367 (11th Cir. 1991) 15

Welch v. United States,
578 U.S. 120 (2016) 1

Wheeler v. United States,
141 S.Ct. 1708 (2021) 14

Statutes

18 U.S.C.
§ 111 .... 3, 10, 11
§ 111(a) 11
§ 111(b) 1, 8, 9, 12
§ 113(5) 13
§ 113(a)(5) 9, 11
§ 1153(a) 16

Statutes—Continued **Pages**

28 U.S.C.
§ 1254(1) 4
§ 2253(c)(1) 2
§ 2255 1

Rules

Sup. Ct. R. 10 4

Other Authorities

Appellee's Brief, *United States v. Sampson*,
41 F. App'x 112 (9th Cir. 2002) (No. 00-50689), 2002 WL 32107193 14

Brief for Appellee United States of America, *United States v. Johnson*,
2023 WL 8358590 (6th Cir. Nov. 2, 2023) (No. 22-6036), 2023 WL 3726613 13

Brief for Appellee United States of America, *United States v. Melhuish*,
6 F.4th 380 (2d Cir. 2021) (No. 19-485), 2020 WL 4001404 13

Brief for Appellee, *United States v. Duran*,
96 F.3d 1495 (D.C. Cir. 1996) (No. 95-3096), 1996 WL 34483282 .... 14, 19

Brief for the Appellant United States, *United States v. Mann*,
899 F.3d 898 (10th Cir. 2018), 2017 WL 4510952 15

Brief for the United States in Opposition, *Gustus v. United States*,
141 S. Ct. 130 (2020) (No. 19-939), 2020 WL 2199824 13

Brief for the United States in Opposition, *Williams v. United States*,
562 U.S. 1044 (2010) (No. 10-212), 2010 WL 4035360 13

Brief for the United States, *Borden v. United States*,
593 U.S. 420 (2021) (No. 19-5410), 2020 WL 4455245 15

Brief for the United States, *Voisine v. United States*,
579 U.S. 686 (2016) (No. 14-10154), 2016 WL 1238840 .... 14, 15

Brief for United States as Appellee, *United States v. Santiago*,
834 F. App'x 417 (9th Cir. 2021) (No. 19-10403), 2020 WL 5659164 13

Brief for United States, *Long v. United States*,
No. 19-2387 (6th Cir. 2020), 2020 WL 2236230 13

Other Authorities—Continued **Pages**

Brief of Appellee the United States of America, *United States v. Bates*, 960 F.3d 1278 (11th Cir. 2020) (No. 18-12533), 2018 WL 6011287 13

Brief of Appellee, *United States v. Gustus*, 926 F.3d 1037 (8th Cir. 2019) (No. 18-2303), 2018 WL 4296239 13

Brief of Appellee, *United States v. Jennings*, 61 F.3d 897 (3d Cir. 1995) (No. 94-7370), 1994 WL 16168069 13

Brief of Appellee, *United States v. Wilkins*, 25 F.4th 596 (8th Cir. 2022) (No. 20-2404), 2021 WL 3961119 13

Brief of the Plaintiff-Appellee United States of America, *United States v. Weekes*, 517 F. App'x 508 (6th Cir. 2013) (No. 11-5150), 2012 WL 900855 14

Brief of United States, *United States v. Wolfname*, 835 F.3d 1214 (10th Cir. 2016) (No. 15-8025), 2016 WL 279133 11

Final Brief of Plaintiff / Appellee, *United States v. Kimes*, 246 F.3d 800 (6th Cir. 2001) (No. 00-5144), 2000 WL 35595067 13

Model Penal Code 9, 10

Final Report of The National Commission on Reform of Federal Criminal Laws (1971) 9

INTRODUCTION

The United States could have done the right thing: admitted that the Tenth Circuit applied too high a standard in denying Applicant a COA and that the questions presented are debatable. The parties then could have gone back to the Tenth Circuit without a fight and Applicant would have the opportunity to make his case. That is how this is supposed to work. But in a misguided effort to avoid ceding that even a single issue could be *debatable*, the United States has taken an untenable position, one that misapprehends the assault on a federal officer statute, the COA standard, and the role of justices of this Court in ensuring that all litigants, not only the high profile ones, are treated fairly under the law.

Applicant merely seeks a certificate of appealability (COA), that is, *the opportunity to appeal* an erroneous denial of a petition for a writ of habeas corpus under 28 U.S.C. § 2255. The standard for the issuance of a COA is undemanding. As the United States concedes, it requires a prisoner to demonstrate only "that reasonable jurists could debate" his entitlement to relief on the merits. Opp. 8 (quoting *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000)). The COA requirement is supposed to screen out *frivolous* appeals, not potentially meritorious ones. *See Welch v. United States*, 578 U.S. 120, 127 (2016). Yet if the United States's 27-page, 6,000-word opposition brief proves anything, it is that this appeal is non-frivolous and that the issues presented are hotly debated.

The United States barely engages with the standard at all, and instead seeks to win this case on the merits at the COA stage by preventing Applicant from even presenting his case to an appellate court. But reasonable jurists could debate whether 18 U.S.C. § 111(b) can be violated recklessly, *contra* Opp.17-25. And they could debate whether Applicant's collateral attack waiver is unenforceable, *contra* Opp.12-17. The only question presented

in this Application is whether Applicant's entitlement to relief is debatable. It plainly is. Most of the government's brief is a smokescreen of novel arguments and a plea for tactical delay. It is astonishing for the United States to argue that no reasonable jurist could debate the questions presented while simultaneously relying on so many non-controlling cases and cherry-picked out-of-circuit precedents without even acknowledging the widespread debates in the lower courts about how to resolve the issues raised here. Most astonishing, though, is the government's apparent reversal of its prior position about the scope of a criminal statute—from which we infer that officials within the United States government are debating these questions *right now* while telling this Court that such questions are beyond debate.

Applicant requests that Your Honor grant this application or refer it to the full Court for consideration.

I. THIS IS THE PARADIGM CASE FOR THE ISSUANCE OF A COA UNDER 28 U.S.C. § 2253(c)(1)

The United States concedes that Congress authorized individual justices to grant COAs. Opp.8-9 & n.1. And the United States concedes that the standard for granting a COA is set forth in *Slack*, 529 U.S. at 483-84, Opp.8. Absolutely *nothing* prevents a circuit justice from issuing a COA in an appropriate case where the *Slack* standard is met. The United States cites no rule, precedent, or other authority to the contrary.

There is good reason to believe that Congress intended the same COA standard to apply to circuit justices and circuit judges. The statute discusses them in the very same sentence. *See* 28 U.S.C. § 2253(c)(1) ("Unless a circuit justice or judge issues a certificate of appealability ...."). And everyone recognizes the standard for their issuance is supposed

to be readily met in nonfrivolous cases. But even if, as the United States argues, COAs should only be granted by justices in cases involving "issues of broad public importance," Opp.10, or only in "rare and unusual circumstances," Opp.11, the United States declines to define that standard and tellingly fails to argue that this case would not meet it. That's because the question whether 18 U.S.C. § 111 can be committed with a *mens rea* of recklessness implicates the safety of thousands of federal law enforcement officers. In fact, the United States encourages Applicant to petition for certiorari *in this very case*. Opp.11.

Rather than engage with the text of the COA statute—which expressly authorizes justices of this Court to grant COAs where appeals are non-frivolous—the United States argues that *all* requests for COAs should be forced onto the Court's merits docket. Opp.9-11. That proposition is exactly backward. Funneling all COA denials to the merits docket would make the Court's task in reviewing COA applications *more* burdensome, not less, and would force a quintessentially non-merits request onto the merits docket where it would be required to meet an unreasonably demanding and discretionary standard just to be considered. Arguments about whether a litigant should have the opportunity to take an appeal, and whether the legal arguments in a case are debatable, do not belong on the merits docket. The path envisioned by the Solicitor General would create a *de facto* "GVR docket" at the certiorari stage to address a new category of petitions that seek only COAs, not plenary review.

The United States argues it is burdensome and awkward for individual justices to consider COA applications. Opp.9. But the entire *Court* reviewing a petition for certiorari to determine if a COA should have been granted is far more "awkward and burdensome" (Opp. 9)

than a single justice reviewing a COA application to see if it meets the *Slack* standard. The standard is not supposed to be demanding, and the burden of reviewing applications is not either. A single justice is well suited to assess whether an issue is debatable without soliciting input or "debate" from his or her colleagues. That is why, in some circuits, COA applications are reviewed by individual circuit judges, sometimes without the benefit of any briefing at all. The suggestion that this is some kind of "extraordinary" procedural maneuver is also risible. This Court, and individual justices, routinely resolves non-merits issues on the non-merits docket (resolving for example requests for preliminary relief in individual cases, *see, e.g.*, *Labrador v. Poe by & through Poe*, No. 23A763, 2024 WL 1625724 (U.S. Apr. 15, 2024), and of course, applications for extension of time). Requests for COAs are quintessential non-merits requests.

The United States also argues there is potential for redundancy or gamesmanship because COA applicants can also file petitions for certiorari. Opp.10. But where a petitioner seeks to re-raise arguments already made in a failed Application for a COA, it would presumably take "no time at all" to deny it. Transcript of Oral Argument at 31, *Banister v. Davis*, 140 S. Ct. 1698 (2020) (No. 18-6943) (Gorsuch, J.). The notion that permitting a COA Applicant to also file a petition for certiorari—a filing that is governed by a different legal standard (Sup. Ct. R. 10) under a different statute (28 U.S.C. § 1254(1))—somehow burdens the Court, beggars belief. Opp.10-11. The Court has no trouble denying requests for rehearing—it has not seen fit to abolish them on the basis of the supposed burden of reviewing such requests.

The United States' only remaining argument is that it is "rare" for a justice to grant a COA application. Opp.11. So what? That observation does not change the legal analysis one bit. It is equally "rare" that Supreme Court counsel are engaged and willing to pursue a habeas COA on behalf of an indigent prisoner. But here we are. This is a case where a COA should have issued. And the United States *affirmatively concedes* that Your Honor has the authority to grant the COA or refer this Application to the full Court. All Applicant seeks is the *opportunity to appeal*, and all Applicant needs to do so is a one-line order stating the "Application for a COA is granted." This request is far from "extraordinary." Opp.8,10,12.

II. REASONABLE JURISTS COULD DEBATE WHETHER APPLICANT'S COLLATERAL WAIVER IS UNENFORCEABLE

Reasonable jurists could debate whether Applicant's collateral attack waiver is unenforceable. That is why the Tenth Circuit did not reach this question below: Applicant made multiple, colorable constitutional arguments that would preclude enforcement of his collateral attack waiver. The United States strains to generate an argument to the contrary, but ultimately cannot deny that the Fourth Circuit's decisions in *United States v. McKinney*, 60 F.4th 188 (4th Cir. 2023) and *United States v. Adams*, 814 F.3d 178 (4th Cir. 2016) are squarely on point and conclusively establish that the enforceability of Applicant's waiver is a debatable question.

Again the question at this juncture is only whether this question is *debatable*. The United States makes a lot of noise about the enforceability of waivers in general, Opp.12-14, and about whether persuasive precedent from this Court or circuits outside the Tenth Circuit might preclude Applicant from invoking the miscarriage of justice exception on the

facts of this case, Opp.14-16. But for all the government's smokescreen about dismissed charges and "factual" versus "actual" innocence, the irrefutable fact is that the judges of the Fourth Circuit—presumably reasonable jurists—have held that collateral attack waivers are unenforceable where they would prevent a collateral attack in precisely these circumstances: where the invalidation of a predicate crime means that a prisoner *did not in fact commit* the crime to which he pled guilty. *See United States v. McKinney*, 60 F.4th 188, 192 (4th Cir. 2023) (explaining that, "in *Adams*, we found that, in light of intervening precedent invalidating a § 922(g) conviction because it was no longer based on a valid predicate, the defendant made 'a cognizable claim of actual innocence'").

The United States argues that because this case involved dismissed criminal charges that *could* have supported a hypothetical § 924(c) conviction, just not *this* § 924(c) conviction, that "differentiates applicant's case from the Fourth Circuit cases." Opp.16. That is the government's entire argument for denying the debatability of a COA on this question. As an initial matter, this argument is bizarre because the government made this *exact* argument in *Adams* and the Fourth Circuit rejected it, so it does not "differentiate[]" this case from *Adams* at all. *See Adams*, 814 F.3d at 183-84 (rejecting argument that *Bousley* requires a showing of innocence of dismissed counts relating to distinct criminal conduct).[1] In any case, this is a quintessential for-the-merits argument that comes *after*

[1] The United States' new argument from *Bousley v. United States*, 523 U.S. 614, 622-623 (1998) is misplaced for numerous reasons. *Bousley* is about what must be shown to obtain habeas corpus *on the merits* on a defaulted actual innocence claim, not what must be shown to establish that a collateral attack waiver is unenforceable. *See id.* And as the United States admits, whether *Bousley* (or *Bousley*-by-analogy) even applies here is *debatable*. *See* Opp.16 (citing *United States v. Caso*, 723 F.3d 215, 222 & n.3 (D.C. Cir. 2013) (Garland,

issuance of a COA. And as merits arguments go, it is a weak one. We have no idea what the strength of the United States's case was for its § 2114(a) robbery charge, or the § 924(c) count premised on alleged drug trafficking. After all, the United States voluntarily *dropped these charges* in exchange for his guilty plea. Opp.17.

The government casts itself as the victim of this Court's decision in *Borden*, which rendered Applicant innocent of the § 924(c) conviction the government procured, because had the government foreseen *Borden*, it might not have voluntarily dismissed other offenses (of which Applicant is presumed innocent). But that is just a byproduct of plea bargaining. "Plea bargains always entail risks for the *parties*—risks relating to what evidence would or would not have been admitted at trial, risks relating to how the jury would have assessed the evidence and risks relating to future developments in the law." *United States v. Bradley*, 400 F.3d 459, 464 (6th Cir. 2005) (Sutton, J.) (emphasis added). The United States offers no persuasive reason—and certainly no *controlling case*—holding that Applicant should serve 5 more years in federal prison for a crime he did not commit

---

C.J.) (noting circuit split on whether innocence of equally-and-less-serious dismissed charges must be shown)). But most importantly, *Bousley* was referring to "more serious charges" for the same underlying criminal conduct. *Bousley* was not (as the United States, frighteningly, appears to understand it) an invitation to federal prosecutors to charge defendants with every serious crime they can think of, only to drop the unrelated counts in the course of plea bargaining, as an insurance policy against future actual innocence claims. *See United States v. Adams*, 814 F.3d 178, 183-4 (4th Cir. 2016) (rejecting government's argument that court of appeals should "require that Adams show [under *Bousley*] that he is also factually innocent of the charges contained in the five dismissed counts of the indictment" because "[h]ere, the dismissed counts related to separate allegations of different criminal conduct. Neither *Bousley* nor *Lyons* nor common sense requires *Adams* to show that he is actually innocent of other, dissimilar charged conduct in order to show that he is actually innocent of being a felon in possession of a firearm, when he was not, in fact, a convicted felon when he possessed the firearm.").

because of the United States' choices about which charges to drop when it struck a plea bargain with him.

Again, the only question *for now* is whether Applicant's claim to the unenforceability of his collateral attack waiver is *debatable*. The Fourth Circuit has said Applicant's position is correct; other jurists disagree. A COA should issue on Applicant's challenge to his collateral attack waiver.

III. REASONABLE JURISTS COULD DEBATE WHETHER § 111(b) CAN BE COMMITTED WITH A MENS REA OF RECKLESSNESS

Reasonable jurists could debate whether 18 U.S.C. § 111(b) can be violated recklessly. The United States now takes the position that it cannot be, stating, after nine pages of exposition, that "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."[2] Opp.25 (emphasis added). But the United States' position flies in the face of the statute's text, would weaken the protections for federal law enforcement officers if adopted, and appears to turn on a hyper-technical distinction between the "knowing use of force" in the abstract, Opp.25, and "knowing" use of force *directed against another person*. Contrary to its representations here, the United States has definitively and consistently taken the position that one does not need to "know" they are going to injure any person to violate § 111. *See infra* pp.11-12, 16-17. So whatever work

[2] The United States disagrees with Applicant's description of the United States' prior position based on its past charging decisions and court submissions. Opp.23-24. Those materials and representations seem to stand for the propositions for which Applicant cited them; and the United States now disavows some of them. *See* Opp.24 (disavowing position taken in *United States v. McCulligan*, 256 F.3d 97 (3d Cir. 2001)).

this fine-grained distinction between "knowing use of force" and knowing force against another person is supposed to be doing (other than winning this particular case), it does nothing to overcome the fact that reasonable jurists could *absolutely* debate whether 18 U.S.C. § 111(b) can be violated recklessly. Thus a COA should issue on this question.

A. The Inclusion of "Simple Assault" in § 111 Means That It Can Be Violated by Reckless Conduct

To begin, the United States has no good answer to what "simple assault" is doing in this statute or what it is supposed to mean if not a *mens rea* of recklessness. The United States now apparently favors the interpretation from *United States v. Gagnon*, 553 F.3d 1021, 1027 (6th Cir. 2009), *cert. denied*, 558 U.S. 822 (2009) that "simple assault" "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.'" Opp.21-22 (quoting *Gagnon*, 553 F.3d at 1027). In other words, according to the United States, "simple assault" has *no basis* in the Model Penal Code, the *Final Report of The National Commission on Reform of Federal Criminal Laws* (1971), or even the common law. It is not even "assault." Rather, it is a two-word "term of art" applicable to § 111 only, that has no roots in any other corner of the law. That is far-fetched, as merely reading the statute shows that the acts in violation of § 111 can be "simple assault" which in virtually every other place in the law (MPC, the *Final Report*, the common law, 18 U.S.C. § 113(a)(5)) can be committed *either* by intentional conduct or a reckless battery.[3]

---

[3] The courts of appeals have fared no better than the United States in providing a coherent explanation of the work "simple assault" is doing in the statute. Some take the same view

Gagnon is a strange case for the United States to rely on, because under *Gagnon*'s interpretation, "simple assault" can be committed without *any mens rea at all*. In *Gagnon*, the defendant argued that he had not committed an "assault" but had merely "forcibly resisted, impeded, and interfered with an officer." *Gagnon*, 553 F.3d at 1022; *see also id.* at 1027. Specifically, "agents tried to force Gagnon to sit down, he resisted, and they handcuffed him." *Id.* at 1022; *see also id.* at 1027 & n.7 (simple assault charge was supported because "Gagnon acted defiantly while being detained and taken away"; court did not need to resolve whether his spitting at the officers was assault). The court of appeals held that these acts, e.g. "imped[ing]" an officer, are "simple assaults" under the statute. *Id.* at 1027. The court of appeals expressly stated in *Gagnon* that in cases where a "defendant unlawfully resisted a federal agent where 'the physical conduct is initiated by the arresting officer rather than the arrestee,'" that constitutes misdemeanor simple assault on the officer *by the defendant*. *Id.* (explaining that it would be merely simple assault because "in those cases, the arrestee would not have 'forcibly' initiated the physical contact"). The court of appeals went on to explain that if the resistance involved "pushing, punching, or headbutting" that would be felony assault on a federal officer. *Id.* The facts of *Gagnon* are

---

as *Gagnon*, that "simple assault" is a term of art specific to § 111, while others take different positions. *See Gagnon*, 553 F.3d at 1025-26 & n.6 (expressly splitting with the Ninth Circuit on the interpretation of "simple assault"); *see also id.* at 1022 ("This case turns on the surprisingly vexing determination of what distinguishes a 'simple assault' from 'all other cases' under 18 U.S.C. § 111"); *see also United States v. Stands Alone*, 11 F.4th 532, 535 (7th Cir. 2021) (agreeing with *Gagnon*); *United States v. Wolfname*, 835 F.3d 1214, 1218-19 1221 n.3 (10th Cir. 2016) (disagreeing with *Gagnon*). Indeed, *Gagnon* ultimately concludes that "misdemeanor 'simple assaults' under § 111 refer to cases where a defendant has forcibly performed one of the prohibited actions of § 111(a) *without forcibly or intentionally creating physical conduct himself*." 553 F.3d at 1027 (emphasis added). That imports an *even lower mens rea* than recklessness.

of course quite similar to *this very case* (save this case involved a deadly weapon). Under the *Gagnon* interpretation of simple assault which the United States now endorses (Opp.21-22), not even a reckless *mens rea* is needed to commit a "simple assault" because a fleeing arrestee tackled by a federal agent is guilty of "simple assault" under *Gagnon* because he is "forcibly resist[ing]" by knowingly using his feet to propel himself away.[4]

Notwithstanding that Applicant wins under *Gagnon*—because it means there is no *mens rea* at all for "simple assault"—that reading still makes a hash of the statute. The most straightforward reading of § 111 is that "simple assault," like "simple assault" in 18 U.S.C. § 113(a)(5), "includes completed common-law battery." *United States v. Delis*, 558 F.3d 177, 180 (2d Cir. 2009) (Livingston, J.) (explaining how to interpret "simple assault" in 18 U.S.C. § 113(a)(5)).

Thus, where the "simple assault" involves mere recklessly inflicted offensive touching, it is a misdemeanor punishable by up to 1 year in prison. *See* 18 U.S.C. § 111(a). Where "that assault" involves "physical contact" (meaning more than mere offensive touching) the maximum term is 8 years. *See id.*; *cf. Johnson v. United States*, 559 U.S. 133,

---

[4] *See* Brief of United States at 10, *United States v. Wolfname*, 835 F.3d 1214 (10th Cir. 2016) (No. 15-8025), 2016 WL 279133, at *10 ("The issue of whether a defendant can be convicted of violating 18 U.S.C. § 111 for forcibly committing one of the five prohibited acts other than assault, without having also committed an underlying assault, involves questions some appellate courts have described as 'surprisingly vexing' …. Of the courts that have acknowledged the complexity of § 111, many have ultimately concluded that the statute plainly prohibits more forms of forcible conduct than merely assault."); *see id.* at *12 ("Although all six actions require the defendant to act 'forcibly,' only one constitutes assault. The other five prohibited actions involve forcible behavior that threatens federal officers or obstructs their official activities but do not necessarily constitute a formal assault.").

140 (2010) ("the phrase 'physical force' means *violent* force"). And where the acts involve use of a "deadly weapon" the maximum term is 20 years. *See* 18 U.S.C. § 111(b).

That reading of the statute has the benefit of making sense of the words "simple assault" and fitting them all within their common-law and MPC backdrop (while grading the punishments based on their relative severity). It also makes each of the punishment tiers proportionate to the gravity of the underlying offense: incidental reckless contact is less serious than reckless physical contact which is less serious than reckless contact involving a deadly weapon. And it provides broad reach to a critically important criminal statute intended to protect the thousands of federal officers who put their lives in danger every day across the United States.

B. That § 111 Is a "General Intent" Crime Conclusively Establishes It Can Be Violated by Reckless Conduct

But one need not even reach the "simple assault" issue to conclude that the statute can be violated by reckless conduct, because, contrary to the United States' claims, Opp. 19, 23, numerous courts *and the United States* have taken the position that § 111 is a "general intent" crime, *and* have taken the position that "general intent" crimes have a *mens rea* of recklessness. Even putting aside whether "simple assault" imports reckless touching (or, as the United States would have it, touching with no *mens rea* at all), the fact that courts nationwide agree that § 111 is a general intent crime, and that general intent crimes can be committed recklessly, conclusively establishes that it can be violated through reckless conduct.

The United States has consistently argued that § 111 is a general intent crime, both to this Court and to the circuit courts. The United States says it in opposition in this very

case. Opp.18-19. And the United States has taken that position in other briefs in this court as well. *See* Brief for the United States in Opposition at 20, *Williams v. United States*, 562 U.S. 1044 (2010) (No. 10-212), 2010 WL 4035360, at *20 (arguing that "[e]ven if petitioner did not intend to strike and injure the officers during her struggle to break free, she would be guilty of violating Section 111 if she intentionally resisted the officers' lawful attempts to handcuff her" (citing and relying on 18 U.S.C. § 113(5) and *United States v. Delis*, 558 F.3d 177, 184 (2d Cir. 2009)); *see also* Brief for the United States in Opposition at 5-14, *Gustus v. United States*, 141 S. Ct. 130 (2020) (No. 19-939), 2020 WL 2199824, at *5-*14.

The United States has also consistently taken this position in briefs in the circuit courts.[5] Brief for Appellee United States of America at 22, *United States v. Johnson*, 2023 WL 8358590 (6th Cir. Nov. 2, 2023) (No. 22-6036), 2023 WL 3726613, at *22 ("§ 111 establishes a 'general intent crime.'"); Brief for United States as Appellee at 37, *United States v. Santiago*, 834 F. App'x 417 (9th Cir. 2021) (No. 19-10403), 2020 WL 5659164, at *37 (noting that "every circuit to directly analyze the issue has held § 111 is a general intent crime" and "the great weight of authority supports this Court's … [prior holdings] that

[5] *See also* Brief of Appellee, *United States v. Wilkins*, 25 F.4th 596 (8th Cir. 2022) (No. 20-2404), 2021 WL 3961119; Brief for Appellee Untied States of America, *United States v. Melhuish*, 6 F.4th 380 (2d Cir. 2021) (No. 19-485), 2020 WL 4001404; Brief for United States, *Long v. United States*, No. 19-2387 (6th Cir. 2020), 2020 WL 2236230; Brief for Appellee, *United States v. Gustus*, 926 F.3d 1037 (8th Cir. 2019) (No. 18-2303), 2018 WL 4296239; Brief of Appellee the United States of America, *United States v. Bates*, 960 F.3d 1278 (11th Cir. 2020) (No. 18-12533), 2018 WL 6011287; Final Brief of Plaintiff / Appellee, *United States v. Kimes*, 246 F.3d 800 (6th Cir. 2001) (No. 00-5144), 2000 WL 35595067; Brief of Appellee, *United States v. Jennings*, 61 F.3d 897 (3d Cir. 1995) (No. 94-7370), 1994 WL 16168069. Thus the United States has long argued that voluntary intoxication is not a defense to § 111 even when the intoxication would prevent a person forming a *mens rea* of knowledge.

§ 111 is a general intent crime"); Brief of the Plaintiff-Appellee United States of America at 4, *United States v. Weekes*, 517 F. App'x 508 (6th Cir. 2013) (No. 11-5150), 2012 WL 900855, at *8 ("Section 111(a)(1) requires only a general intent, which 'may be inferred from the doing of the act.'"); Appellee's Brief, *United States v. Sampson*, 41 F. App'x 112 (9th Cir. 2002) (No. 00-50689), 2002 WL 32107193, at *33 ("The analogous federal offense of assault on a federal officer, in violation of 18 U.S.C. § 111, is a general intent crime."); Brief for Appellee at 52, *United States v. Duran*, 96 F.3d 1495 (D.C. Cir. 1996) (No. 95-3096), 1996 WL 34483282, at *52 (stating "it is settled that section 111 is a general intent crime").

Several courts of appeals have also held that § 111 is a general intent crime. *See United States v. Jim*, 865 F.2d 211, 215 (9th Cir. 1989), *cert. denied*, 493 U.S. 827 (1989) ("We hold that § 111 is a general intent crime[.]"); *see also United States v. Milliron*, 984 F.3d 1188, 1195 (6th Cir. 2021), *cert. denied*, 141 S.Ct. 2653 (2021); *United States v. Melhuish*, 6 F.4th 380, 394 (2d Cir. 2021); *United States v. Gumbs*, 964 F.3d 1340, 1350 (11th Cir. 2020), *cert. denied*, 141 S.Ct. 1282 (2021); *United States v. Wheeler*, 831 F. App'x 53, 56 (3d Cir. 2020), *cert. denied*, 141 S.Ct. 1708 (2021); *United States v. Gustus*, 926 F.3d 1037, 1040 (8th Cir. 2019), *cert. denied*, 141 S.Ct. 130 (2020); *United States v. Graham*, 431 F.3d 585, 590 (7th Cir. 2005); *United States v. Kleinbart*, 27 F.3d 586, 592 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 978 (1994).

And the United States, contrary to the position it now takes, has also represented to this Court that general intent crimes can be committed with a *mens rea* of recklessness. As the United States told the Court in *Voisine v. United States*, 579 U.S. 686 (2016):

> While there is some historic ambiguity to the term, compare *United States v. Bailey,* 444 U.S. 394, 403-404 (1980), with *Carter v. United States,* 530 U.S.

> 255, 268 (2000), "general intent" traditionally encompassed not only purposeful, but also knowing and reckless conduct.

Brief for the United States at 18, *Voisine v. United States*, 579 U.S. 686 (2016) (No. 14-10154), 2016 WL 1238840, at *18. And as it stated in *Borden v. United States*, 593 U.S. 420 (2021):

> This Court has accordingly "described reckless conduct as morally culpable" in "a wide variety of contexts." *Elonis v. United States,* 135 S. Ct. 2001, 2015 (2015) (Alito, J., concurring in part and dissenting in part) (citing *Farmer,* 511 U.S. at 835-836; *Garrison v. Louisiana,* 379 U.S. 64, 75 (1964); *New York Times Co. v. Sullivan,* 376 U.S. 254, 279-280 (1964); *Tison v. Arizona,* 481 U.S. 137, 157 (1987)). The recklessness default is also expressly codified in many state criminal codes. And even as to jurisdictions that use common-law terminology to describe mens rea, the Model Penal Code has observed - contrary to petitioner's description (Br. 4) - a "rough correspondence" between its own default of recklessness "and the common law requirement of 'general intent.'" Model Penal Code § 2.02 (sub-sec. (3) note) (1985).

Brief for the United States at 16, *Borden v. United States*, 593 U.S. 420 (2021) (No. 19-5410), 2020 WL 4455245, at *16. The United States has also told circuit courts that general intent crimes correspond to a *mens rea* of recklessness. *See* Brief for the Appellant United States at 18 n.3*, United States v. Mann*, 899 F.3d 898 (10th Cir. 2018) (No. 17-2117), 2017 WL 4510952, at *18 n.3 ("Because … reckless acts all require that a person act intentionally with conscious awareness of the likely result … these acts all suffice to establish 'general intent' to commit a crime.").

Several courts of appeals have thus held that "general intent" crimes correspond to a *mens rea* of recklessness. *See United States v. Zunie*, 444 F.3d 1230, 1234 (10th Cir. 2006); *see also United States v. Ashley*, 255 F.3d 907, 912 (8th Cir. 2001); *see also United States v. Loera*, 923 F.2d 725, 730 (9th Cir. 1991) , *cert. denied*, 502 U.S. 854 (1991); *Watson v. Dugger*, 945 F.2d 367, 370 (11th Cir. 1991).

The Tenth Circuit itself has held that "[w]hat the common law would traditionally consider a 'general intent' crime, such as assault resulting in serious bodily injury, encompasses crimes committed with purpose, knowledge, or recklessness." *United States v. Zunie*, 444 F.3d 1230, 1234 (10th Cir. 2006). In *Zunie* the Tenth Circuit considered the *mens rea* necessary to commit assault resulting in serious bodily injury in § 113(a)(6). *Zunie* involved a reckless assault (a serious car accident as a result of drunken speeding) committed against a Zuni Indian family on the Zuni reservation. 444 F.3d at 1232-33. Because the defendant and the victims were Zuni Indians and the collision occurred on the Zuni Reservation, the Major Crimes Act ("MCA"), 18 U.S.C. § 1151 et. seq., limited the range of criminal charges. *See* 18 U.S.C. § 1153(a). The federal government ultimately convicted the defendant of assault resulting in serious bodily injury in § 113(a)(6). *Zunie*, 444 F.3d at 1233. On appeal, the defendant argued that insufficient evidence supported the jury's verdict because the government failed to prove that he acted with knowledge or purpose, which he argued were necessary to convict him of assault under § 113(a)(6). *Id.* at 1233-36. The Tenth Circuit rejected this argument. *See id.* It noted that it had already held that § 113(a)(6) "is a general intent crime." *Id.*. After extensively discussing the relationship between the common-law *mens reas* of "specific" and "general" intent and the Model Penal Code *mens reas* of purpose, knowledge, recklessness, and negligence, the Tenth Circuit laid down a rule for determining the MPC *mens rea* for common-law "general intent" crimes: in the Tenth Circuit, "[w]hat the common law would traditionally consider a 'general intent' crime, such as assault resulting in serious bodily injury, encompasses crimes committed with purpose, knowledge, or recklessness." *Id.* at 1234. The Tenth

Circuit therefore held that "a finding of … recklessness supports a conviction for assault resulting in serious bodily injury" and "sufficient evidence" supported a finding that the defendant acted recklessly. *Id.* at 1235.[6]

The United States' argument that "conviction under Section 111(a) and (b) requires the knowing use of force" (Opp.25) founders on the fact that this supposed "knowing use of force" apparently need not be knowingly *against another* which was exactly the issue this Court addressed in *Borden*. 593 U.S. at 429 ("The phrase 'against another,' when modifying the 'use of force,' demands that the perpetrator direct his action at, or target, another individual."); *id.* at 432 (explaining that if a knowing act—running a red light—results in "contact with another person" "the reckless driver has not directed force at another"). Whether a "knowing" use of force, as the United States means it, ends up being "against another," can be a result of *reckless* conduct. Using word games to elide this distinction is unfortunate.[7]

---

[6] Notably, the government's Opposition hardly engages with controlling Tenth Circuit precedent. It certainly makes no attempt to defend the Tenth Circuit panel's reliance on *United States v. Kendall*, 876 F.3d 1264 (10th Cir. 2017) as decisive on the question of recklessness under § 111(b). As extensively addressed in the Application, the panel's reliance on *Kendall* was misguided because the necessary *mens rea* under § 111(b) was never actually briefed and argued by the parties, nor had the Tenth Circuit ever previously treated *Kendall* as controlling when discussing this very issue. App.4, 14. At minimum, applicant argued that a COA should issue to permit the Tenth Circuit to determine, on the merits, whether *Kendall* is precedential on this significant question. App.14. The government responded to these arguments in its Opposition with silence.

[7] *See also, e.g.*, Opp.19 (stating that "'general intent' requires a defendant to knowingly take a forcible act" when the when the relevant question is *not* whether the use of force is "knowing" but whether its use "against another" is knowing or reckless); Opp.23 (stating that "the government has never represented to this Court that a defendant may violate Section 111 without a knowing use of force" when the relevant question is *not* whether the use of force is "knowing" but whether its use "against another" is knowing or reckless). It

One need look no further than *United States v. Duran*, 96 F.3d 1495 (D.C. Cir. 1996) to see this too-fine distinction in action. In *Duran* the D.C. Circuit upheld the conviction of a defendant under § 111 for firing a gun over the White House lawn. *See id.* at 1509-11. Four secret service agents were stationed on the lawn but "there was no evidence that he aimed at them, *or even saw them*." *Id.* at 1509 (emphasis added). The Court held that "the jury could reasonably have concluded that Duran's purpose in firing a barrage of bullets as he ran along the fence was to fend off Secret Service agents he knew *or had every reason to believe* would be present *somewhere* on the North Lawn, in order to prevent them from apprehending him before he had a chance to reload his weapon." *Id.* at 1510 (emphasis added). "Duran was indifferent as to whether his scattered shots actually hit any of the officers, because his sole purpose was to keep them far enough away from himself that he would have time to reload." *Id.* at 1511. The Court held that § 111 applied because the statute evinces an "intent to make the use of a deadly or dangerous weapon sufficient, *even for defendants who were not attempting to cause, and who did not purposely or knowingly cause, bodily injury*, to boost the crime above the level of 'simple assault.'" *Id.* (emphasis added).

In reaching that result, the D.C. Circuit was adopting *the United States' argument* that § 111 incorporates the "well-settled principle that even criminal recklessness toward unseen victims is sufficient to support a conviction of a general intent crime" and that the

---

appears that the parties agree that driving a car recklessly through a group of federal officers violates § 111(b), and disagree only as to the terminology that would be used to explain why—the United States would apparently call it a "knowing use of force" because driving a car involves the knowing use of force.

convictions must stand because "the resulting assaults upon each of the section 111 victims were natural and probable consequences of that volitional act, and because appellant acted with reckless disregard for the possibility of injury to the officers and, indeed, with reckless disregard for the virtual certainty that his actions would interfere with and impede the officers' performance of their official duties." Brief for Appellee at 50-52, *United States v. Duran*, 96 F.3d 1495 (D.C. Cir. 1996) (No. 95-3096), 1996 WL 34483282, at *51-52.

* * * * *

At bottom the question in this case is whether Applicant should have the right to argue his appeal *at all*. Obtaining a certificate of appealability is not supposed to "require a showing that the appeal will succeed," and a court is not supposed to "decline the application … merely because it believes the applicant will not demonstrate an entitlement to relief." *Miller–El v. Cockrell,* 537 U.S. 322, 337 (2003). The COA standard is met in this case.

Courts nationwide would certainly benefit from the issuance of an opinion demonstrating the correct application of the COA standard, but that is by no means necessary to resolve this application. A one-line order granting a COA is all that Applicant seeks, and with it the opportunity to argue his appeal in the Tenth Circuit.

CONCLUSION

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

Respectfully submitted,

s/Andrew T. Tutt

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