NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2017

PHILLIP ANGEL GARCIA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

Mallory Gagan
Attorney for Petitioner
FEDERAL PUBLIC DEFENDER
111 Lomas NW, Suite 501
Albuquerque, NM 87102
(505) 346-2489
mallory_gagan@fd.org

SERVICE TO:

Solicitor General of the United States
Department of Justice
950 Pennsylvania Ave. NW, Room 5616
Washington, D.C. 20530-0001

June 18, 2018

NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2017

PHILLIP ANGEL GARCIA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

QUESTIONS PRESENTED FOR REVIEW

I. Is a state robbery offense that includes as an element the requirement of overcoming victim resistance by use of force a violent felony under the elements clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i), if state appellate courts have specifically held that the amount of force used to overcome resistance is immaterial?

II. What amount of force satisfies this Court's definition of "physical force" in the elements clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i), in *Johnson v. United States*, 559 U.S. 133, 140 (2010), as violent force—that is, force capable of causing physical pain or injury to another person?

NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2017

PHILLIP ANGEL GARCIA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

DECLARATION OF COUNSEL

Pursuant to Supreme Court Rule 29.2, I, Mallory Gagan, Assistant Federal Public Defender for the District of New Mexico, declare under penalty of perjury that I am a member of the bar of this court and counsel for petitioner, Phillip Angel Garcia, and that I caused to be mailed a copy of the petition for writ of certiorari to this court by first class mail, postage prepaid by depositing the original and ten copies in an envelope addressed to the Clerk of this Court, in the United States Post Office at 1135 Broadway Blvd. NE, Albuquerque, New Mexico, at approximately 5:00 p.m. on June 18, 2018.

s/ Mallory Gagan
Mallory Gagan
Attorney for Petitioner
FEDERAL PUBLIC DEFENDER
111 Lomas NW, Suite 501
Albuquerque, NM 87102
(505) 346-2489
mallory_gagan@fd.org

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Federal Statutes

Other Authorities

NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2017

PHILLIP ANGEL GARCIA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner Phillip Angel Garcia respectfully requests a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit affirming the district court's denial of his motion filed pursuant to 28 U.S.C. § 2255.

OPINION BELOW

The opinion of the Tenth Circuit Court of Appeals, *United States v. Garcia*, 10th Cir. No. 17-2019, 877 F.3d 944 (10th Cir. 2017), affirming the denial of Mr. Garcia's motion filed pursuant to 28 U.S.C. § 2255 challenging his sentence under the Armed Career Criminal Act ("ACCA") was filed on December 18, 2017. It is attached to this petition as Appendix A. The Tenth Circuit's March 19, 2018 denial of Mr. Garcia's petition for rehearing en banc and panel rehearing is attached as Appendix B. The district

court's February 1, 2017 memorandum opinion and order overruling the magistrate judge's amended proposed findings and recommended disposition is attached as Appendix C. The district court's February 1, 2017 judgment denying Mr. Garcia's § 2255 motion is attached as Appendix D. The magistrate judge's November 1, 2016 amended proposed findings and recommended disposition is attached as Appendix E. The district court's October 1, 2008 judgment imposing the ACCA sentence is attached as Appendix F.

JURISDICTIONAL STATEMENT

The district court had jurisdiction of the cause under 28 U.S.C. § 2255. Upon granting a certificate of appealability, the Tenth Circuit had jurisdiction of the appeal under 28 U.S.C. § 2253. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The Tenth Circuit entered its order denying Mr. Garcia's petition for rehearing en banc and panel rehearing on March 19, 2018. Pursuant to Supreme Court Rules 13.1 and 13.3 and 28 U.S.C. §2101(c), this petition is timely filed if filed on or before June 18, 2018.

FEDERAL AND STATE STATUTORY PROVISIONS INVOLVED

The federal statutory provision involved in this case is:

18 U.S.C. § 924(e), which provides in part:

> **(1)** In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony ... committed on occasions different from one another, such person shall be ... imprisoned not less than

fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—...

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, ... that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; ....

The New Mexico statutory provision involved in this case is:

N.M. Stat. Ann. § 30-16-2, which provides in part as follows:

.

Robbery consists of the theft of anything of value from the person of another or from the immediate control of another by use or threatened use of force or violence.

Whoever commits robbery is guilty of a third degree felony.

INTRODUCTION

This case presents an issue very similar to the issue this Court is considering in *Stokeling v. United States*, *cert. granted*, 138 S. Ct. 1438 (Apr. 2, 2018) (No. 17-5554). In *Stokeling*, this Court will decide whether Florida robbery that has as an element overcoming victim resistance by the use of force of any degree is a violent felony under the elements clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(i). This case concerns whether New Mexico robbery, which has as an element overcoming victim resistance by use of force, is a violent felony under the ACCA's elements clause. The New Mexico Court of Appeals has held New Mexico robbery can be committed by the use of any degree of force as long as it overcomes resistance.

In this case, the Tenth Circuit Court of Appeals held New Mexico robbery meets the prerequisites of the ACCA's elements clause because pushing with any amount of force or momentarily struggling over a purse constitutes the use of violent force capable of causing physical pain or injury to another person under this Court's definition of "physical force" in the ACCA's elements clause in *Johnson v. United States*, 559 U.S. 133, 140 (2010) ("*Johnson I*"). In addressing the issue in *Stokeling*, this Court will explore what kind of force satisfies the elements clause in the robbery context. If this Court decides *Stokeling* in the petitioner's favor, it is reasonably probable that decision will undermine the basis upon which the Tenth Circuit's holding in this case relied. In

that circumstance, it would be an appropriate exercise of this Court's discretion to grant certiorari in this case, vacate the Tenth Circuit's decision and remand for reconsideration in light of the *Stokeling* holding ("GVR"). For these reasons, this Court should hold this petition pending *Stokeling*'s resolution.

If the *Stokeling* decision does not justify a GVR, this Court should grant certiorari in this case to resolve the question what amount of force satisfies this Court's "physical force" definition in *Johnson I*. The circuit courts are hopelessly divided on that question, especially with respect to the use of force during robbery. Some circuit courts, as did the Tenth Circuit in this case, stress the "capable" part of the *Johnson I* definition and find "physical force" in the most minor uses of force. Others take to heart *Johnson I*'s emphasis on the violent nature of the force required to constitute "physical force" and require more than the insubstantial uses of force involved in such conduct as pushing, touching an arm causing the victim to stumble or a momentary struggle over a purse. This Court should step in to provide guidance on the issue of how much force must be used before it reaches the level of violent force under *Johnson I*.

STATEMENT OF THE CASE

A. *The District Court Proceedings*

Phillip Angel Garcia pleaded guilty to firearm possession after a felony conviction in violation of 18 U.S.C. § 922(g)(1). Appendix ("App.") A at 2. In 2008, the district court imposed a 188-month prison term for that offense pursuant to the ACCA. App. F at

2. Under the ACCA, the statutory sentence range for a defendant who is convicted of a § 922(g)(1) violation rises from zero to ten years, *see* 18 U.S.C. § 924(a)(2), to 15 years to life, if the defendant has three prior convictions for a "violent felony." 18 U.S.C. § 924(e)(1). An offense is a "violent felony" if it fits within one of three categories: (1) it "has as an element the use, attempted use, or threatened use of physical force against the person of another" ("the elements clause"), 18 U.S.C. § 924(e)(2)(B)(i); (2) it "is burglary, arson, or extortion or involves use of explosives," 18 U.S.C. § 924(e)(2)(B)(ii); or (3) it "otherwise involves conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. § 924(e)(2)(B)(ii). The third "otherwise" category is known as the residual clause. The district court imposed an ACCA sentence based on Mr. Garcia's three prior felony convictions for arson, residential burglary and deadly weapon possession by a prisoner. App. A at 2.

Subsequently, this Court held in *Johnson v. United States*, 135 S. Ct. 2251 (2015) ("*Johnson II*"), that the residual clause was unconstitutionally vague. *Id.* at 2256-63. In *Welch v. United States*, 136 S. Ct. 1257, 1264-68 (2016), this Court held the *Johnson II* rule applied retroactively on collateral review.

Within a year of the *Johnson II* decision, Mr. Garcia filed his first motion to vacate his sentence under 28 U.S.C. § 2255, relying on *Johnson II*. App. A at 2. He contended his ACCA sentence depended on the unconstitutionally vague residual clause because the deadly weapon offense was a "violent felony" due to that clause. App. A at 4. He argued

his New Mexico third degree robbery conviction could not be substituted since New Mexico robbery does not satisfy the elements clause. He pointed out *Johnson I* defined "physical force" as "*violent* force . . . capable of causing physical pain or injury to another person." 559 U.S. at 140 (emphasis in original). He maintained New Mexico robbery does not have as an element the use of force that meets that standard because the New Mexico Court of Appeals established that the use of any amount of force that overcomes a victim's resistance is enough to commit robbery.

The government initially conceded New Mexico robbery did not satisfy the elements clause and therefore Mr. Garcia was entitled to relief. Volume ("Vol.") IV[1] at 57, 61, 102, 104-06. The magistrate judge agreed with Mr. Garcia and recommended granting the § 2255 motion. App. E. The government withdrew its concession right before the district court handed down its decision. Vol. IV at158-65. The district court acknowledged Mr. Garcia's ACCA sentence violated due process, but held the error was harmless because robbery satisfies the elements clause under *Johnson I*. App. A at 5-6; App. C at 36-62. Accordingly, the district court entered judgment denying Mr. Garcia's § 2255 motion. App. D.

B. *The Tenth Circuit Proceedings*

On appeal to the Tenth Circuit, Mr. Garcia repeated the arguments he made in district court. The Tenth Circuit granted a certificate of appealability, App. A at 6, but

[1] Volume IV is part of the Tenth Circuit record on appeal. It contains relevant district court pleadings.

rejected Mr. Garcia's arguments. The Tenth Circuit paid little attention to this Court's emphasis in *Johnson I* on the "*violent*" nature of "physical force." 559 U.S. at 140-41. Instead, the Tenth Circuit stressed that "significantly" the "physical force" definition "does not require the force used to *actually* cause physical pain or injury, only that it be *capable* of doing so." App. A at 10 (emphases in original). The Tenth Circuit noted this Court's indication in a parenthesis in *Johnson I* that "a slap in the face" might constitute the use of "physical force." App. A at 9 (citing *Johnson* I, 559 U.S. at 143). The Tenth Circuit relied on Justice Scalia's reference in his concurrence in *United States v. Castleman*, 134 S. Ct. 1405 (2014)—a concurrence with which the majority disagreed—to "hitting, slapping, shoving, grabbing, pinching, biting, and hair pulling," as examples of the use of "physical force." App. A at 9-10 (citing *Castleman*, 134 S. Ct. at 1421).

The Tenth Circuit accepted that, if to commit robbery in New Mexico the amount of force used to overcome a victim's resistance was immaterial, then New Mexico robbery would not meet the elements clause's requirements. App. A at 11, 16, n. 9. The Tenth Circuit acknowledged "language in the New Mexico cases suggesting any quantum of force which overcomes resistance would be sufficient to support a robbery conviction." App. A at 22. But the panel disregarded what the New Mexico Court of Appeals repeatedly said in that regard, explaining "what is said is less important than what is done." App. A at 22.

So the Tenth Circuit examined particular cases and found none that convinced it New Mexico convicts people of robbery for the use of less than violent force capable of causing physical pain or injury, as *Johnson I* defined "physical force." The Tenth Circuit reviewed the only New Mexico Supreme Court case "offering direct guidance," *State v. Clokey*, 533 P.2d 1260 (N.M. 1976). App. A at 13. In that case, New Mexico's highest court held the state had presented sufficient evidence to "support[] the verdict of the jury that the snatching of the purse was accompanied by force sufficient to convert the crime from larceny to robbery." *Id.* at 1260. The *Clokey* court did not discuss the specific facts of the case. But the undisputed facts from the docketing statement in *Clokey* are that the defendant ran toward a woman who was carrying her purse under her left arm, in one continuous motion pushed the purse she was carrying through her arm, touching her arm causing her to stumble, and ran away with the purse. *United States v. King*, 248 F. Supp. 3d 1062, 1070 (D.N.M. 2017) (quoting *New Mexico v. Clokey*, No. 2479, Docketing Statement at 1-2 (N.M. App. filed Mar. 22, 1976)). The victim offered no resistance. *Id.*

The Tenth Circuit was "doubtful" the touch in *Clokey* was a "shove" or "grab" capable of causing physical pain or injury under Justice Scalia's *Castleman* concurrence. App. A at 14 & n. 7. However, the Tenth Circuit suggested the touch "may have been a force *capable* of causing pain or injury by setting in motion a chain of events leading to that result." App. A at 14-15 (emphasis in original). On the other hand, the Tenth Circuit acknowledged *Clokey* might be viewed as involving "mere jostling," rather than the use

of *Johnson I* violent force. App. A at 15. Due to the lack of detailed analysis in *Clokey*, the Tenth Circuit chose to review what it considered "the nuanced approach adopted in later, more precisely reasoned" New Mexico Court of Appeals cases. App. A at 15.

The Tenth Circuit looked at *State v. Sanchez*, 430 P.2d 781 (N.M. Ct. App. 1967). In that case, the defendant put his fist against the victim's back and took the victim's wallet from the victim's pocket. *Id.* at 781. The court noted "the issue is not how much force was used." *Id.* at 782. The court stressed the force involved "must be the moving cause" of the victim parting with his property. *Id.*. It found "no direct evidence" or inferences that the fist in the back caused the victim to part with his property." *Id.* Accordingly, the court found insufficient evidence of robbery. *Id.*

The *Sanchez* court did not hold that touching or jostling is never sufficient force to satisfy the robbery force element. In *State v. Curley*, 939 P.2d 1103 (N.M. Ct. App. 1997), and *State v. Lewis*, 867 P.2d 1231 (N.M. Ct. App. 1993), the New Mexico Court of Appeals described *Sanchez* as holding that the force involved was not the lever used to take the property. *Curley*, 939 P. 2d at 1105; *Lewis*, 867 P.2d at 1233. The *Curley* court also cited *Sanchez* for the conclusion that "[i]n our cases where we have not found sufficient force to be involved, the victim did not resist the property being taken from his person." 939 P.2d at 1105. Nonetheless, while the Tenth Circuit acknowledged *Sanchez*'s "primary point" is that force was not used to overcome the victim's resistance, it "glean[ed] from the applied facts . . . that 'force,' for purposes of a New Mexico

robbery conviction, involves something more than incidental 'touching or jostling.'" App. A at 17 (quoting *Sanchez*, 430 P. 2d at 782).

The Tenth Circuit also reviewed the *Curley* decision. In *Curley*, the state presented evidence the defendant pushed or shoved the victim, causing her to lean an unspecified distance, which may have helped the defendant to then take her purse, which was on the top of the victim's hand. 939 P.2d at 1104, 1107. The New Mexico Court of Appeals held the evidence was sufficient to support the robbery conviction. *Id.* at 1107.

The New Mexico Court of Appeals reversed the robbery conviction in *Curley* on the grounds that the district court erroneously refused to submit a lesser-included larceny jury instruction. *Id.* That instruction was warranted because the pushing might have been independent of the taking due to the defendant's drunkenness and the purse grabbing, absent the push, was accomplished without any resistance from any part of the victim's body. *Id.* at 1104, 1107. The Tenth Circuit found the *Curley* defendant's shove of unknown intensity constituted *Johnson I* force because Justice Scalia listed "shoving" in his *Castleman* concurrence as *Johnson I* force. App. A at 18-19 (citing *Castleman*, 134 S. Ct. at 1421).

The Tenth Circuit explicitly disagreed with "cases such as" *United States v. Gardner*, 823 F.3d 793 (4th Cir. 2016), in which the Fourth Circuit concluded North Carolina robbery was not a violent felony by relying on a North Carolina case upholding a robbery conviction when a defendant pushed a store clerk's shoulder, causing her to fall

onto shelves. App. A at 19 n. 11 (citing *Gardner*, 823 F.3d at 803-04). Shoving a person and causing her to fall involves force capable of producing pain or injury, the Tenth Circuit insisted. App. A at 19 n. 11.

The Tenth Circuit considered *State v. Verdugo*, 164 P.3d 966 (N.M. Ct. App. 2007), as well. In that case, the New Mexico Court of Appeals held the state presented enough evidence of robbery where the defendant drove up alongside a victim while she was walking and took her purse following "[m]aybe a couple of seconds" struggle that broke the purse strap. *Id.* at 974; *King*, 248 F. Supp. 3d at 1071 (quoting *State v. Verdugo*, N.M. App. No. 25,534, Partial Transcript of Proceedings at TR-94 (N.M. App. filed Sept. 28, 2005)). The Tenth Circuit felt the force used in *Verdugo* was "certainly capable of causing physical pain or injury to the victim." App A at 21.

The Tenth Circuit opined that, when a victim "cling[s]" to property and resists the force used to take away that property, the offender taking the property has used "physical force" under *Johnson I*. App. A at 20. In that regard, the Tenth Circuit expressed agreement with the Seventh Circuit's admonition in *United States v. Jennings*, 860 F.3d 450, 457 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 701 (2018), that the force used need not be enough to cause "more serious injuries" to satisfy the lower *Johnson I* standard of having the capacity to inflict physical pain on the victim. App. A at 20. In *Jennings*, in reliance in part on Justice Scalia's *Castleman* concurrence, the Seventh Circuit rejected the defendant's contention that "physical force" does not include "relatively limited force

or infliction of minor injuries." 860 F.3d at 456-57.

As a result of its analysis of New Mexico cases and belief that only minimal force is sufficient to trigger application of the ACCA's elements clause, the Tenth Circuit held there was no realistic probability New Mexico would uphold a robbery conviction where the defendant used less than *Johnson I* force. App. A at 22. Accordingly, the Tenth Circuit affirmed the district court's denial of Mr. Garcia's § 2255 motion. App. A at 23.

ARGUMENT FOR ALLOWANCE OF THE WRIT

I. This Court should hold this petition pending this Court's resolution of *Stokeling v. United States*.

A. *Introduction*

This case and *Stokeling v. United States*, *cert. granted*, 138 S. Ct. 1438 (Apr. 2, 2018) (No. 17-5554), are very similar. Both cases involve state robberies that the state's appellate courts have held could be committed by the use of any degree of force to overcome resistance. In both cases, the defendants contend the state robberies do not have as an element the use of sufficient force to satisfy this Court's definition of "physical force" in the elements clause of the Armed Career Criminal Act ("ACCA"): "*violent* force—that is, force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010) (*Johnson I*") (emphasis in original). In both cases, the circuit courts took an expansive view of what constitutes "physical force" under *Johnson I.*

This Court's decision in *Stokeling* will necessarily turn on this Court's

determination of how much force is "physical force." Consequently, a ruling by this Court in the *Stokeling* petitioner's favor will probably give rise to a reasonable probability the Tenth Circuit would reject its broad conception of *Johnson I* force that underpinned its decision in this case and rule that Mr. Garcia is entitled to relief. It would then be an appropriate use of this Court's discretion to grant certiorari, vacate the Tenth Circuit judgment and remand for reconsideration in light of the *Stokeling* decision ("GVR"). Accordingly, this Court should hold this petition pending its resolution of the *Stokeling* case.

B. *"Physical force" in the ACCA's elements clause means violent force, not whatever is capable of causing any pain or injury.*

The ACCA increases the statutory sentencing range for a defendant convicted of being a felon in possession of a firearm from zero to ten years of imprisonment, 18 U.S.C. § 924(a)(2), to a mandatory minimum of 15 years to life. 18 U.S.C. §§ 922(g) & 924(e)(1). The ACCA applies when a defendant has three prior convictions for "violent felonies." 18 U.S.C. § 924(e)(1). After this Court held the residual clause was unconstitutionally vague, *see Johnson v. United States*, 135 S. Ct. 2551, 2556-63 (2015) ("*Johnson II*"), an offense is a "violent felony" only if it either satisfies the "physical force" clause of 18 U.S.C. § 924(e)(2)(B)(i) or is an enumerated offense under 18 U.S.C. § 924(e)(2)(B)(ii). *See id.* at 2563. The enumerated clause is not relevant in this case since robbery is not an enumerated offense. Under the "physical force" clause, a felony offense is a "violent felony" when it "has as an element the use, attempted use, or

threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i).

To decide whether an offense satisfies a "violent felony" definition, the categorical approach applies. *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016). Under that approach, only the elements matter. *Id.* As a consequence, every conviction for the offense must "necessarily" meet the predicate offense definition. *Id.* at 2255. Sentencing courts must presume the conviction "'rested upon [nothing] more than the least of th[e] acts' criminalized." *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013) (quoting *Johnson I*, 559 U.S. at 137) (brackets supplied in *Moncrieffe*).

In *Johnson I*, this Court defined the term "physical force" in the elements clause. In deriving that definition, this Court noted the "physical force" context was a statutory definition of "v*iolent* felony." 559 U.S. at 140 (emphasis in original). This Court emphasized "violent." Consequently, the Court reasoned, "physical force means "v*iolent* force—that is, force capable of causing physical pain or injury to another person." *Id.* (emphasis in original). Again this Court emphasized "violent." This Court observed that "violent" in 18 U.S.C. § 924(e)(2)(B) "connotes a substantial degree of force." *Id.* This Court cited to a definition of "violent" as "[c]haracterized by the exertion of great physical force or strength." *Id.* (quoting 19 *Oxford English Dictionary* 656 (2d ed. 1989). "When the adjective 'violent' is attached to the noun 'felony,' its connotation of strong physical force is even clearer," this Court explained. *Id.* This Court cited *Black's Law*

Dictionary's definition of "violent felony" as "[a] crime characterized by extreme physical force, such as murder, forcible rape, and assault and battery with a dangerous weapon." *Id.* at 140-41 (quoting *Black's Law Dictionary* 1188 (9th ed. 2009)).

In *United States v. Castleman*, 134 S. Ct. 1405 (2014), this Court noted the term "domestic violence" "encompass[es] acts that one might not characterize as 'violent' in a nondomestic context." *Id.* at 1411. In support of that proposition this Court cited to a Department of Justice publication defining physical forms of domestic violence to include "[h]itting, slapping, shoving, grabbing, pinching, biting, [and] hair pulling." *Id.* (citing Department of Justice, Office on Violence Against Women, *Domestic Violence*). This Court stressed: "Indeed, 'most physical assaults committed against women and men by intimates are relatively minor and consist of pushing, grabbing, shoving, slapping and hitting.'" *Id.* at 1411-12 (quoting Department of Justice, P. Tjaden & N. Thoennes, *Extent, Nature and Consequences of Intimate Partner Violence* 11 (2000)).

This Court explained that these "[m]inor uses of force may not constitute 'violence' in the generic sense." *Id.* at 1412. This Court pointed out *Johnson I* cited with approval *Flores v. Ashcroft*, 350 F.3d 666 (7th Cir. 2003). *Castleman*, 134 S. Ct. at 1412 (citing *Johnson I*, 559 U.S. at 140). The *Castleman* Court observed that the *Flores* court said it was 'hard to describe . . . as 'violence' 'a squeeze of the arm [that] causes a bruise.'" *Castleman*, 134 S. Ct. at 1412 (quoting *Flores*, 350 F.3d at 670). Thus, the use of "physical force" involves more than conduct capable of causing minor pain or injury.

See United States v. Walton, 881 F.3d 768, 773 (9th Cir. 2018) ("mere potential for some trivial pain or slight injury will not suffice" as "physical force"). It must earn the designation as "violent."

C. *A decision by this Court in favor of the petitioner in* Stokeling *will probably affect the outcome in Mr. Garcia's case.*

In *Stokeling,* this Court granted certiorari on the question "[i]s a state robbery offense that includes 'as an element' the common law requirement of overcoming 'victim resistance' categorically a 'violent felony' under the only remaining definition of that term in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i) (an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another'), if the offense has been specifically interpreted by state appellate courts to require only slight force to overcome resistance." Petition for Writ of Certiorari at ii, *Stokeling* (Aug. 4, 2017). Mr. Stokeling has pointed out throughout that Florida robbery can be committed by any degree of force that overcomes the victim's resistance; the amount of the force is immaterial. *Id.* at 14-19, 23-26; Reply to the Brief in Opposition at 1, *Stokeling* (Dec. 27, 2017); Petitioner's Brief at 13-14, 26-37, *Stokeling* (June 11, 2018). Mr. Stokeling noted many states, including New Mexico, have a similar robbery element and argued a decision in his case would have ramifications for the ACCA's application with respect to robbery convictions throughout the country. Petition for Writ of Certiorari at 14; Reply to the Brief in Opposition at 8-10.

Mr. Stokeling argued that the Eleventh Circuit had erroneously ruled Florida

robbery has as an element the use of enough force to constitute "physical force" under *Johnson I* simply because Florida robbery requires enough force to overcome resistance. Petition for Writ of Certiorari at 11-12, 23; Reply to the Brief in Opposition 12-15; Petitioner's Brief at 32-33. During the certiorari process, the government maintained the Eleventh Circuit's decision was correct. The government did not take issue with the petitioner's description of Florida law. The parties simply disagreed about what amount of force satisfies the *Johnson I* "physical force" standard, including concerning a purse tug-of-war and victim bumping. Mr. Stokeling contended Florida robberies do not necessarily involve the use of *Johnson I* force. The government contended otherwise. Petition for Writ of Certiorari at 24-26, *Stokeling*; United States' Brief in Opposition at 9, 12-13, *Stokeling* (Dec. 13, 2018); Petitioner's Reply to the Brief in Opposition at 2, 9-10, 14.

In Mr. Stokeling's recently-filed opening brief, he suggested "physical force" is force "reasonably expected to cause pain or injury." Petitioner's Brief at 23-24, 43. Mr. Stokeling stressed the violent nature of *Johnson I*'s definition that does not include minor uses of force, as Mr. Garcia has pointed out under Section B above. *Id.* at 3-5, 11-15, 18-21, 25-26. Mr. Stokeling countered the government's undue reliance on the "capable" part of that definition. Such reliance would mean virtually any force constitutes "physical force," he argued. *Id.* at 12, 22-25. Mr. Stokeling concluded that, since the amount of force used to commit Florida robbery is immaterial, Florida robbery is not a "violent

felony" under the ACCA's elements clause. *Id.* at 26-44. Mr. Stokeling pointed to several examples of Florida robberies that he contended did not involve sufficiently violent force, including robberies involving a purse tug-of-war, pushing and bumping. *Id.* at 29-31, 33-41.

Mr. Garcia's case presents very similar issues to those raised in *Stokeling*. As in Florida, in New Mexico appellate courts have held that, as long as a defendant takes property by using force to overcome resistance, the defendant is guilty of robbery, regardless of the amount of force used. *State v. Martinez*, 513 P.2d 402, 403 (N.M. Ct. App. 1973) ("The amount or degree of force is not the determinative factor."); *State v. Segura*, 472 P.2d 387, 387 (N.M. Ct. App. 1970) (same); *State v. Sanchez*, 430 P.2d 781, 782 (N.M. Ct. App. 1967) ("the issue is not how much force was used"). The committee commentary to the relevant state uniform jury instruction says the same thing. NMRA UJI 14-1620, committee commentary ("the amount of force is immaterial").

Because the amount of force is immaterial, the New Mexico Court of Appeals has observed that the following minimal uses of force constitute robbery: removing a pin from the victim's clothing if the clothing resists the taking, *State v. Curley*, 939 P.2d 1103, 1105-06 (N.M. Ct. App. 1997); purse snatching if any body part resists, i*d.* at 1105 (citing *State v. Clokey*, 553 P.2d 1260, 1260 (N.M. 1976)); and jostling, *Martinez*, 513 P.2d at 403; *Segura*, 472 P.2d at 387-88.

Just as Mr. Stokeling has argued before this Court, Mr. Garcia has persistently

argued his state robbery does not have as an element the use of sufficient force to qualify under the ACCA's elements clause. Just as the Eleventh Circuit dealt with Mr. Stokeling's argument, the Tenth Circuit rejected Mr. Garcia's argument by employing an expansive view of what amount of force is "physical force." The Tenth Circuit relied on the "capable" part of the *Johnson I* definition and Justice Scalia's *Castleman* concurrence with which the majority disagreed and disregarded the violent part of the *Johnson I* definition. App. A at 9-10, 14-15 & n. 7, 18-19 & n.11, 21. As a consequence, the Tenth Circuit held that pushing to any extent, a momentary tug-of-war over a purse and touching that caused someone to tumble qualified as "physical force." App. A at 14-15, 18-19, 21.

This case and Mr. Stokeling's case then both turn on the assessment of what amount of force meets the ACCA's elements clause in the context of a robbery offense that state appellate courts have held requires the use of no more force than necessary to overcome resistance of any amount. Thus, if this Court rules in *Stokeling* that Florida robbery does not have as an element the use of sufficient force to constitute "physical force," a good chance exists that that ruling would undermine the basis of the Tenth Circuit's decision in Mr. Garcia's case that minor uses of force constitute "physical force."

D. *This Court should hold this petition pending its resolution of* Stokeling.

"Where intervening developments . . . reveal a reasonable probability that the

decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is . . . potentially appropriate." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996); *see also Tyler v. Cain*, 533 U.S. 656, 666 n. 6 (2001) (noting the *Lawrence* standard). This Court's decision in the petitioner's favor in *Stokeling* would satisfy that GVR standard. For the reasons discussed under Section C above, there would be a reasonable probability that favorable decision would call into doubt the Tenth Circuit's reliance on a broad view of what constitutes "physical force" to hold New Mexico robbery is a "violent felony." Subverting that view would leave the Tenth Circuit with no choice but to grant Mr. Garcia's § 2255 motion, vacate his ACCA sentence and remand for resentencing without application of the ACCA. No procedural issues would stand in the way of that outcome.

For these reasons, this Court should hold this petition pending its resolution in *Stokeling*. If this Court rules in the petitioner's favor in *Stokeling*, this Court should grant certiorari in this case, vacate the Tenth Circuit's judgment and remand to the Tenth Circuit for reconsideration in light of the *Stokeling* decision.

II. This case presents an important question of federal law which has not been, but should be, settled by this Court and concerning which the circuit courts of appeal are in conflict: what amount of force satisfies this Court's definition of "physical force" in the elements clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i), in *Johnson v. United States*, 559 U.S. 133, 140 (2010).

A. *Introduction*

If the *Stokeling* decision does not justify a GVR, this Court should grant certiorari in this case to resolve the question what amount of force satisfies this Court's "physical force" definition in *Johnson I*. The Tenth Circuit held New Mexico robbery falls within the ACCA's elements clause based on an expansive idea of what constitutes *Johnson I* force. For that holding it relied heavily on the "capable" part of the *Johnson I* definition and Justice Scalia's opining in his *Castleman* concurrence, with which the majority disagreed, that "hitting, slapping, shoving, grabbing, pinching, biting, and hair pulling" amount to "physical force." App. A at 9-10, 14-15 & n. 7, 18-19 & n.11, 21 (citing *Castleman*, 134 S. Ct. at 1421, and *Johnson I*, 559 U.S. at 140. Because of that approach, the Tenth Circuit found touching someone and causing the person to stumble, pushing to any degree, and a momentary struggle for a purse all fit the *Johnson I* "physical force" definition. App. A at 14-15, 18-19, 21. The Tenth Circuit ignored the violent nature of "physical force" that this Court emphasized in *Johnson I* and *Castleman*.

While other circuit courts address the "physical force" issue in a way similar to the way the Tenth Circuit did in this case, others appreciate the robust amount of force required to constitute "physical force." The Tenth Circuit explicitly recognized in this

case that its position on pushing differs with the Fourth Circuit's. App. A at 19 n. 11. Other circuits disagree with the Tenth Circuit regarding pushing, touching that causes a stumble and momentarily struggling for a purse. If this Court's *Stokeling* decision does not resolve this split in the circuit courts, then this Court should grant certiorari in this case to provide guidance on how much force is the violent force this Court invoked in *Johnson I*.

B. *The circuit courts are in conflict regarding the question what amount of force constitutes "physical force."*

A number of circuit courts disagree with the Tenth Circuit's holding that touching someone and causing the person to stumble, pushing to any degree, and a momentary struggle for a purse involve enough force to satisfy *Johnson I*'s definition of "physical force." The Tenth Circuit explicitly acknowledged its conflict with the Fourth Circuit regarding pushing. The Tenth Circuit stated its position clashed with "cases such as" *United States v. Gardner*, 823 F.3d 793, 803-04 (4th Cir. 2016), in which the Fourth Circuit concluded a defendant who pushed a store clerk's shoulder, causing her to fall onto shelves, to commit a robbery did not use "physical force." App. A at 19 n. 11. The Tenth Circuit's position on pushing and touching in a way that causes the victim to stumble also conflicts with the Ninth Circuit's determination in *Walton* that "physical force" was not involved when a defendant pushed the robbery victim just enough to knock the victim off balance to get the victim out of the way. 881 F.3d at 773; *see also United States v. Flores-Cordero*, 723 F.3d 1085, 1087-88 (9th Cir. 2013) (struggling to

keep from being handcuffed and kicking an officer do not equal *Johnson I* "physical force").

The Tenth Circuit's holding that momentarily struggling over a purse meets the *Johnson I* standard also contrasts with other circuit courts' stand. In *Walton*, the Ninth Circuit opined that the defendant did not use "physical force" when the defendant rushed toward the victim, tugged her purse a couple of times, yanked her purse off of her arm, and ran away. 881 F.3d at 773. Similarly, in *United States v. Winston*, 850 F.3d 677 (4th Cir. 2017), the Fourth Circuit found no "physical force" when the offender tapped the victim on the shoulder, jerked her around by pulling her shoulder, but not enough to cause her to fall, took her purse and ran. *Id.* at 684-86; *accord United States v. Molinar*, 881 F.3d 1064, 1070 (9th Cir. 2017) (a struggle over a wallet, involving yanking and pulling, causing the victim's arm to fly back did not involve the use of "physical force"); *United States v. Yates*, 866 F.3d 723, 729-30 (6th Cir. 2017) (same conclusion where a robber ran up to the victim, grabbed her purse, jerked her arm and ran off).

Even other judges in the Tenth Circuit have staked out positions different from those of the panel that decided Mr. Garcia's case. In *United States v. Nicholas*, 686 F. App'x 570 (10th Cir. 2017), the panel expressed approval of a finding of no "physical force" where the defendant bumped the victim's shoulder, yanked her purse and engaged in a slight struggle over the purse. *Id.* at 575-76. In *United States v. Lee*, 701 F. App'x 697 (10th Cir. 2017), the panel cited with approval *Gardner*'s pushing finding and held

that wiggling and struggling during an arrest and clipping an officer's hand with a rearview mirror while speeding off in a truck were not sufficiently violent to satisfy the elements clause. *Id.* at 699-702. In *United States v. Ama*, 684 F. App'x 738 (10th Cir. 2017), the panel observed that chasing after and bumping a victim with some force or "jolting" a victim's arm does not amount to *Johnson I* force. *Id.* at 741-42; *see also United States v. Lee*, 886 F.3d 1161, 1170-71 (11th Cir. 2018) (Jordan, J., concurring) (disagreeing with the Eleventh Circuit position on Florida robbery and opining that pushing does not involve substantial, violent force); *United States v. Fennell*, 2016 WL 4491728, at * 6 (N.D. Tex. Aug. 25, 2016) (unpublished) (in the course of deciding Texas "bodily injury" robbery is not a"violent felony," indicating no "physical force" was involved when a defendant grabbed a victim's wallet and twisted it out of her hands, causing a wrist bruise during the struggle), *aff'd*, 695 F. App'x 780, 781 (5th Cir. 2017) ("we are persuaded that the district court did not commit reversible error").

On the other hand, other circuit courts agree with the Tenth Circuit's approach in this case. The Eighth Circuit en banc held bumping a victim from behind, momentarily struggling with her and yanking a purse out of her hands involved the use of "physical force." *United States v. Swopes*, 886 F.3d 668, 671-72 (8th Cir. 2018) (en banc); *See also United States v. Pettis*, 888 F.3d 962, 965-66 (8th Cir. 2018) (jostling and a forceful pull on a boy's coat involves "physical force"). Similarly, in *United States v. Jennings*, 860 F.3d 450 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 701 (2018)—a case the Tenth Circuit

cited with approval in Mr. Garcia's case, App. A at 20—the Seventh Circuit acknowledged Minnesota cases "sustain robbery convictions based on the use . . . of relatively limited force or infliction of minor injuries, but still found Minnesota robbery falls within the elements clause. *Id.* at 456-57. The Seventh Circuit found "physical force" was involved in pushing a victim against a wall and, in another case, yanking the victim's arm and pulling on it when she resisted the taking of her purse. *Id.* at 456; *see also Perez v. United States*, 885 F.3d 984, 989 (6th Cir. 2018) (forming a human wall blocking the victim's path as the victim attempted to pursue a pickpocket threatened "physical force").

The circuit court conflict is founded on a fundamental difference in approaches. Those courts that understand this Court's emphasis on the violent nature of "physical force" find minor uses of force do not match *Johnson I*'s definition. *See Walton*, 881 F.3d at 773; *United States v. Middleton*, 883 F.3d 485, 492 (4th Cir. 2018) ("the word 'violent' in [the ACCA] connotes a [crime with a] substantial degree of force," "such as murder, forcible rape, and assault and battery with a dangerous weapon" (quoting *Johnson I*, 559 U.S. at 140)). Those courts that rely on the "capable" part of the *Johnson I* definition and Justice Scalia's *Castleman* concurrence, as did the Tenth Circuit in this case, see "physical force" in virtually any use of force beyond offensive touching. *See Pettis*, 888 F.3d at 965; *Jennings*, 860 F.3d at 457.

As the Sixth Circuit has said, the circuit courts are "twisted in knots trying to

figure out whether a crime . . . involves physical force capable of causing [pain or] injury." *Perez*, 885 F.3d at 991. This Court needs to step in to resolve the deep-seated conflict regarding how much force must be used before it reaches the level of violent force under *Johnson I*.

C. *The Tenth Circuit was wrong to find New Mexico robbery is a "violent felony."*

The Tenth Circuit affirmed the district court's denial of Mr. Garcia's § 2255 motion by disregarding this Court's tremendous emphasis in *Johnson I* on the "*violent*" nature of "physical force" in the ACCA's elements clause. *Johnson I*, 559 U.S. at 140-41 (emphasis in original). As discussed under section B of Point I, this Court observed that the term "physical force" must be interpreted in light of the term it was defining, "violent felony." Therefore, "physical force" is "*violent* force." *Id.* at 140 (emphasis in original). "Violent force" is a substantial degree of force," a force "characterized by the exertion of great physical force or strength." *Id.* (citing and paraphrasing 19 *Oxford English Dictionary* 656). To help describe the violent force it was talking about, this Court cited *Black's Law Dictionary*'s definition of "violent felony" as "extreme physical force, such as murder, forcible rape and assault and battery with a dangerous weapon." *Id.* at 140-41. (quoting *Black's Law Dictionary* 1188).

Touching that causes someone to stumble, momentarily struggling to take a purse or every pushing does not by any stretch of the imagination equal the "*violent* force" this Court portrayed in *Johnson I*. *Id.* at 140-41 (emphasis in original). Yet the Tenth Circuit

found each of those actions to be "physical force," App. A at 14-15, 18-19, 21, by ignoring the gravamen of this Court's *Johnson I* holding: the involvement of violence.

In doing so, the Tenth Circuit contravened the ACCA's purpose. This Court said in *Begay v. United States*, 553 U.S. 137 (2008), "[a]s suggested by its title, the Armed Career Criminal Act focuses upon the special danger created when a particular type of offender—a violent criminal or drug trafficker—possesses a gun." *Id.* at 146. "[A] prior crime's relevance to the possibility of future danger with a gun" exists when it "show[s] an increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger." *Id.* Where such a crime does not reflect that increased likelihood, there is "no reason to believe that Congress intended a 15-year mandatory prison term." *Id.* The uses of minimal force the Tenth Circuit held were the uses of "physical force" do not by a long shot evidence the offenders are the kinds of people who might deliberately point a gun at someone and pull the trigger. Congress reserved the severe ACCA punishment for more dangerous offenders.

The Tenth Circuit's reliance on the "capable" part of *Johnson I*'s "physical force" definition, App. A at 10, 14-15, 21, brings to mind the resort to speculation this Court condemned in *Johnson II*, 135 S. Ct. at 2556-63. The Tenth Circuit's dependence on Justice Scalia's *Castleman* concurrence, App. A at 18-19, is way off base. In that concurrence, Justice Scalia argued the term "physical force" in the definition of a "misdemeanor crime of domestic violence," 18 U.S.C. § 921(a)(33)(A)(ii), had the same

meaning as "physical force" in the ACCA's elements clause, 18 U.S.C. § 924(e)(2)(B)(i). 134 S. Ct. at 1416-21. The *Castleman* majority disagreed. It held a "misdemeanor crime of domestic violence" included conduct that was less violent than the conduct covered by the ACCA's elements clause. *Id.* at 1410-13. So, for the Tenth Circuit to base its ruling regarding the meaning of the elements clause on Justice Scalia's concurrence makes no sense.

Justice Scalia believed "hitting, slapping , shoving [and] grabbing" constituted *Johnson I* "physical force." *Id.* at 1421. But the *Castleman* majority expressed the opposite point of view. It referred to "pushing, grabbing, shoving, slapping and hitting," as "[m]inor uses of force that may not constitute violence in the generic sense." *Id.* at 1411-12 (first quote from Tjaden, *supra*, at 11). The *Castleman* majority goes on to give as an example of such a minor, nonviolent use of force, the squeezing of an arm that causes a bruise. *Id.* at 1412.

The Tenth Circuit's founded its holding that New Mexico robbery is a "violent felony" on its determination that minor uses of force are enough to trigger the ACCA's application. For the reasons stated above, that determination conflicts with *Johnson I* and the ACCA's text and purposes. The Tenth Circuit's ruling in this case is therefore wrong.

D. *If this Court decides the* Stokeling *decision does not warrant a GVR, this Court should grant certiorari in this case.*

This Court's grant of certiorari in *Stokeling* demonstrates the importance of the issue this case presents: how much force satisfies the *Johnson I* definition of "physical

force." With the residual clause out of the picture thanks to *Johnson II*, a non-enumerated-clause, non-drug offenses, such as robbery, cannot be a "violent felony" absent inclusion in the elements clause. Consequently, after *Johnson II*, the elements clause has become the ACCA's principal battleground. As a result, what constitutes "physical force" plays a critical role in ACCA jurisprudence. It is crucial then that this Court resolve the circuit split on that issue.

This case provides an excellent vehicle to address the meaning of "physical force." There are no procedural obstacles. If New Mexico robbery is not a"violent felony," then Mr. Garcia is unquestionably entitled to the grant of his § 2255 motion and resentencing without the ACCA's application.

For these reasons, should a GVR not be called for after this Court's decision in *Stokeling*, this Court should grant certiorari in this case.

CONCLUSION

Under Point I, defendant-petitioner Phillip Angel Garcia requests that this Court hold this petition pending *Stokeling*'s resolution and upon that resolution, grant certiorari in this case, vacate the Tenth Circuit's decision and remand for reconsideration in light of the *Stokeling* holding. Under Point II, if a GVR is not appropriate after *Stokeling*, Mr. Garcia requests that this Court grant certiorari in this case.

Respectfully submitted,

FEDERAL PUBLIC DEFENDER
111 Lomas NW, Suite 501
Albuquerque, NM 87102
(505) 346-2489
mallory_gagan@fd.org

s/ Mallory Gagan
Mallory Gagan
Attorney for Petitioner