NO. ____________________

SUPREME COURT OF THE UNITED STATES

October Term 2017

ROBERT SERRANO,

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,

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950 Pennsylvania Ave. NW, Room 5616
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July 10, 2018

NO. ____________________

SUPREME COURT OF THE UNITED STATES

October Term 2017

ROBERT SERRANO,

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?

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SUPREME COURT OF THE UNITED STATES

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DECLARATION OF COUNSEL

Pursuant to Supreme Court Rule 29.2, I, Peter E. Edwards, 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, ROBERT SERRANO, 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, at approximately 5:00 p.m. on July 10, 2018.

s/ Peter E. Edwards

Peter E. Edwards
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NO. ____________________

SUPREME COURT OF THE UNITED STATES

October Term 2017

ROBERT SERRANO,

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UNITED STATES OF AMERICA,

Respondent.

PARTIES TO THE PROCEEDING

The only parties to the proceeding are those appearing in the caption to this petition.

NO.___________________________________

SUPREME COURT OF THE UNITED STATES

October Term 2017

ROBERT SERRANO,

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v.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner Robert Serrano, through his attorney who was appointed pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A, respectfully moves this Honorable Court to grant leave to continue to proceed *in forma pauperis*. In support of this motion, counsel declares under penalty of perjury:

1. The Federal Public Defender Organization for the District of New Mexico is organized pursuant to 18 U.S.C. § 3006A(h)(2)(A).

2. Pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A, the United States Court of Appeals for the Tenth Circuit appointed the Federal Public Defender Organization for the District of New Mexico on May 18, 2017, to represent Petitioner in an appeal of the denial of his Motion to Vacate and Correct Sentence under 28 U.S.C. § 2255.

3. One of the duties of counsel appointed in the Tenth Circuit is to represent Petitioner in a Petition for a Writ of Certiorari if the Petitioner so requests.

4. The Magistrate Judge for the District of New Mexico entered an Order on May 13, 2011, determining Petitioner was indigent and granting his financial affidavit for appointment of counsel and to proceed without prepayment of fees or other costs. The district court reappointed below-signed counsel on May 10, 2016 to represent petitioner in proceedings related to his Motion to Vacate and Correct Sentence under 28 U.S.C. § 2255. Pursuant to Tenth Circuit Rule 24.1, a party who has been permitted to proceed in an action in District Court *in forma pauperis* may proceed on appeal without further authorization unless the District Court certifies otherwise.

5. Following the issuance of the Tenth Circuit's opinion in this case, Petitioner's appointed Assistant Federal Public Defender is presenting this Petition to this Court upon Petitioner's request.

6. Upon information and belief of counsel, Petitioner continues to be indigent.

s/ Peter E. Edwards

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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). 14

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NO. _____________

SUPREME COURT OF THE UNITED STATES

October Term 2017

ROBERT SERRANO,

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 ROBERT SERRANO 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. Serrano*, — Fed. Appx. —, 2018 WL 1770692 (10th Cir. April 13, 2018), affirming the denial of Mr. Serrano's motion filed pursuant to 28 U.S.C. § 2255 challenging his sentence under the Armed Career Criminal Act ("ACCA") was filed on April 13, 2018. It is attached to this petition as Appendix A.

JURISDICTIONAL STATEMENT

The district court had jurisdiction of the cause under 28 U.S.C. § 2255. The Tenth Circuit had jurisdiction to consider Mr. Serrano's request for a grant of a certificate of appealability pursuant to 28 U.S.C. § 2253. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The Tenth Circuit entered its decision affirming the denial of Mr. Serrano's Motion pursuant § 2255 and denying the request for a certificate of appealability on April 13, 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 July 12, 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 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.

Whoever commits robbery while armed with a deadly weapon is, for the first offense, guilty of a second degree felony and, for second and subsequent offenses, is guilty of a first 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), and is identical to that raised in *Garcia v. United States*, 877 F.3d 944 (10th Cir. 2017), *petition for certiorari filed,* Docket No. 17-9469. In *Stokeling*, this Court will decide whether Florida robbery, which 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 affirmed the district court by relying on its earlier decision in *United States v. Garcia,* 877 F.3d 944, 956 (10th Cir. 2017), *petition for certiorari filed,* Docket No. 17-9469, in which it 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 *Garcia*, on which the panel 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, like the Tenth Circuit, 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 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 AND THE FACTS

Mr. Serrano pled guilty to one count of possessing firearm in violation of 26 U.S.C. §§ 5845(a)(2), 5861(d) and 5871; and one count of felon-in-possession of a firearm, in violation of 18 U.S.C. §§ 922(b)(1) and 924(a)(2), on December 7, 2011.

The Presentence Report calculated Mr. Serrano's offense level as 31, with criminal history category VI, and a resulting guidelines range of 188 to 235 months. He was classified as an armed career criminal under 18 U.S.C. § 924(e)(1) because he was at least eighteen years old at the time of the instant offense, he was a felon in possession of a firearm, and the probation officer concluded he had at least three prior convictions for crime of violence or drug trafficking crimes. The presentence report relied on the following convictions: 1) New Mexico armed robbery in 1993; 2) New Mexico trafficking cocaine and conspiracy to traffic cocaine in 2000; and 3) aggravated battery against a household member in 2005.

The plea agreement included a provision waiving appeal and collateral attack rights. The agreement was pursuant to Fed.R.Crim.P. 11(c)(1)(C), and the parties agreed the appropriate sentence was 15 years. Without the determination that Mr. Serrano was subject to the Armed Career Criminal Act, however, the maximum sentence would have been 10 years.

On June 26, 2015, this Court invalidated the residual clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), as being unconstitutionally vague. *Johnson v.*

United States, 135 S.Ct. 2551, 2563 (2015) (*Johnson II*). That case created a new substantive constitutional right that has been made retroactively applicable to cases on collateral review. *Welch v. United States*, 136 S.Ct. 1257, 1268 (2016).

Mr. Serrano *pro se* timely filed a Motion to Vacate and Correct Sentence Pursuant to 28 U.S.C. § 2255 on June 23, 2016. He contended he was entitled to be resentenced without the ACCA enhancement based on *Johnson II* because his prior convictions for armed robbery and aggravated battery against a household member were not violent felonies. Following the district court's appointment of counsel to represent Mr. Serrano, ROA 1 at 17-18, he filed a supplement to the 2255 motion. In it, he contended that his New Mexico convictions for aggravated battery on a household member and armed robbery lacked the necessary element of use, attempted use or threatened use of physical force against the person of another and therefore were no longer crimes of violence for purposes of the ACCA. He did not dispute that he had two qualifying convictions for serious drug offenses.

Following full briefing, the Magistrate Judge determined Mr. Serrano was not entitled to relief because New Mexico robbery had an element of use of force. The Magistrate Judge did not consider whether aggravated battery against a household member had an element of use, attempted use, or threatened use of force.

Mr. Serrano timely objected to the Magistrate Judge's Proposed Findings and Recommended Disposition. The District Court overruled the objections and adopted the

Magistrate Judge's Proposed Findings and Recommended Disposition. The Court accordingly denied Mr. Serrano's Motion and denied a certificate of appealability.

The Tenth Circuit affirmed the district court's decision and denied Mr. Serrano a certificate of appealability. The Court stated only:

> In a recently published opinion from this court, *United States v. Garcia*, 877 F.3d 944, 956 (10th Cir. 2017), we held that a New Mexico third-degree § 30-16-2 conviction "has as an element the use or threatened use of physical force against another person." Thus, § 30-16-2 qualifies as a "violent felony under the ACCA's Elements Clause in § 924(e)(2)(B)(i)." *Garcia*, 877 F.3d at 956. Because Garcia is dispositive, Serrano has not made the required substantial showing for this court to grant his COA.

United States v. Serrano, 2018 WL 1770962, at *2 (10th Cir. Apr. 13, 2018) (footnote omitted).

Like the lower courts, the Tenth Circuit did not consider whether New Mexico aggravated battery on a household member qualified as a violent felony.

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. Serrano 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. Serrano'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. Serrano 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. Serrano'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, *id.* 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. Serrano 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, in *Garcia*, the Tenth Circuit rejected Mr. Serrano'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. *Garcia*, 877 F.3d at 949-50, 952-53 & n. 7, 954-55 & 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." *Id.* at 952-55.

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. Serrano's case that minor uses of force constitute "physical force." [1]

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 a 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

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[1]The fact that Mr. Serrano's prior conviction is armed robbery does not distinguish it from the conviction at issue in *Garcia* because New Mexico law requires only that the defendant was "armed," or possess a weapon, during the commission of the offense, but does not require that the weapon be used or displayed. *See* N.M.S.A. 1978, § 30-16-2 ("whoever commits robbery while armed with a deadly weapon . . ."); NMRA UJI 14-1621 (including element that defendant "was armed," but not any requirement of use or display of weapon). The quantum of force necessary for the conviction is not increased.

would leave the Tenth Circuit with no choice but to reconsider Mr. Serrano's § 2255 motion, consider whether aggravated battery on a household member under New Mexico law is a violent felony, and potentially 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 has 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." *Garcia*, 877 F.3d at 949-50, 952-53 & n. 7, 954-55 & n.11, 21. 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. *Garcia*, *supra*. 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. *Garcia*, 877 F.3d at 955 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." *Garcia*, 877 F.3d at 955 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. *United States v. Walton*, 881 F.3d 768, 773 (9th Cir. 2018); *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. Serrano's case. In *United States v. Nicholas*, 686 Fed.Appx. 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 Fed.Appx. 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 Fed.Appx. 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 Fed.Appx. 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), 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."*

In *Garcia*, which the Tenth Circuit followed in *Serrano*, the Tenth Circuit disregarded 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," 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 examples of minimal force the Tenth Circuit held were uses of "physical force" are not by a long shot evidence that 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 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 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 holding in *Garcia*, which it applied in this case, on 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. 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 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. Serrano is unquestionably entitled to a remand to the Tenth Circuit for consideration of whether his aggravated battery on a household member conviction is a violent felony.

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 Robert Serrano 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. Serrano requests that this Court grant certiorari in this case.

Respectfully submitted,

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