NO._____

SUPREME COURT OF THE UNITED STATES

October Term 2017

MARTIN MICHAEL YBARRA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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July 10, 2018

NO._____

SUPREME COURT OF THE UNITED STATES

October Term 2017

MARTIN MICHAEL YBARRA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

QUESTIONS PRESENTED FOR REVIEW

Mr. Ybarra was sentenced as an armed career criminal based on his prior convictions for federal bank robbery in violation of 18 U.S.C. § 2113(a). The issues presented are:

I. Is federal bank robbery in violation of 18 U.S.C. § 2113, which can be accomplished by "intimidation," a violent felony under the elements clause under the elements clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i), if federal appellate courts have specifically held that "intimidation" can be implied?

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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PARTIES TO THE PROCEEDING

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

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DECLARATION OF COUNSEL

Pursuant to Supreme Court Rule 29.2, I, Jane Greek, Assistant Federal Public Defender, declare under penalty of perjury that I am a member of the bar of this Court and counsel for Petitioner, **MARTIN MICHAEL YBARRA**, and I personally mailed the Petition for a Writ of Certiorari to this Court by depositing the original and ten copies in an envelope addressed to the Clerk of this Court, sealed the envelope, and sent it by United States Postal Service, postage prepaid, at approximately 4 p.m. on July 10, 2018.

/s/Jane Greek
Attorney for Petitioner

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NO._____

SUPREME COURT OF THE UNITED STATES

October Term 2017

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v.

UNITED STATES OF AMERICA,

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

Petitioner **MARTIN MICHAEL YBARRA** respectfully requests this Court to issue a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit to review the opinion of *United States v. Ybarra*, — Fed.Appx. —, 2018 WL 1750547 (10th Cir. April 12, 2018).

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, *United States v. Ybarra*, — Fed.Appx. —, 2018 WL 1750547 (10th Cir. April, 12, 2018), is attached hereto as Appendix A.

JURISDICTIONAL STATEMENT

The Tenth Circuit's decision was filed April 12, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), which grants the United States Supreme Court jurisdiction to review by writ of certiorari all final judgments of the Courts of Appeals. Jurisdiction is also conferred upon this Court by 28 U.S.C. § 1651(a), which grants the United States Supreme Court jurisdiction to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Pursuant to Supreme Court Rules 13.1, 13.3, 13.4, and 30, and 28 U.S.C. § 2101(c), this Petition is timely if filed on or before July 11, 2018.

APPLICABLE CONSTITUTIONAL, STATUTORY AND GUIDELINES PROVISIONS

The Question Presented above pertains to the following provisions:

I. 18 U.S.C. § 924(e) states in pertinent 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 or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and 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[.]

II. 18 U.S.C. § 2113 states in pertinent part:

> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association . . . Shall be fined under this title or imprisoned not more than twenty years, or both.

STATEMENT OF THE CASE AND THE FACTS

Mr. Ybarra pled guilty pursuant to a plea agreement to one count of felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). His base offense level was calculated as 33 because he was determined to be an armed career criminal under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). He was granted a three-level reduction for acceptance of responsibility, resulting in a total offense level of 30. His criminal history category was IV. Accordingly, taking into consideration the 15-year mandatory minimum sentence under the ACCA, the PSR stated that his advisory guideline range was calculated as 180-188 months.

Without the ACCA enhancement, Mr. Ybarra's adjusted offense level would have been 26. With the three-level reduction for acceptance of responsibility, he would have had a total offense level of 23. A total offense level of 23 and criminal history category IV, his advisory guideline range would have been 70-87 months.

On June 26, 2015, this Court invalidated the residual clause of the ACCA as being unconstitutionally vague. *Johnson v. United States*, 135 S.Ct. 2551 (2015). Mr. Ybarra *pro se* timely filed a Motion to Correct Sentence Pursuant to 28 U.S.C. § 2255 on June 13,

2016.He argued he was entitled to be resentenced without the ACCA enhancement following *Johnson* because his prior bank robbery convictions no longer qualified as violent felonies.

Following full briefing, the Magistrate Court determined Mr. Ybarra was not entitled to relief. The Magistrate Court first considered whether the waiver of collateral attack rights in the plea agreement was enforceable. The Court reasoned that the waiver should not be enforced for two reasons: 1) Following invalidation of the ACCA's residual clause, "sentences for some defendants with plea agreements who previously qualified under the ACCA now 'exceed the statutory maximum,' resulting in a miscarriage of justice." Appendix A at 8 (citing *United States v. Hahn*, 359 F.3d 1315, 1327 (10th Cir. 2004)). 2) The government had not sought to enforce the waiver. *Id.* (citing *United States v. Calderon*, 428 F.3d 928, 930-31 (10th Cir. 2005); *United States v. Evans*, 361 Fed.Appx. 4, 7 (10th Cir. 2010) (unpublished)). *Id.*

Accordingly, the Magistrate Court considered whether federal bank robbery satisfies ACCA's force clause, which states that offenses that have "as an element the use, attempted use, or threatened use of physical force against the person of another" are violent felonies for purposes of the ACCA. 18 U.S.C.A. § 924 (e)(2)(B)(i). Appendix A at 8. The Court rejected Mr. Ybarra's argument that federal bank robbery does not require violent force. It accepted that "the Tenth Circuit has found sufficient evidence of bank robbery by intimidation in situations that did not involve actual force or violence or even *explicit* threats of such." Appendix A at 11 (emphasis in original). However, it noted the definition of "by means of intimidation" in Tenth Circuit Pattern Jury Instruction 2.77, and also that this Court has

"defined intimidation in the context of § 2113(a) as 'an act by defendant reasonably calculated to put another in fear, or conduct and words ... calculated to create the impression that any resistance or defiance by the [individual] would be met by force." Appendix A at 12 (quoting *United States v. Lajoie*, 942 F.2d 699, 701 n.5 (10th Cir. 1991) (internal quotation marks omitted). Based on these definitions, the Court said:

> Given that intimidation occurs in the context of a bank robbery when a defendant says or does something "in such a way that a person of ordinary sensibilities would be fearful of bodily harm," the Court is satisfied that federal bank robbery by intimidation has as an element the threatened use, albeit sometimes implicit, of physical force against the person of another.

Appendix A at 12-13.

The Court also rejected the argument that federal bank robbery does not require that the physical force or threats of physical force be directed "against the person of another," as required by the force clause. The Court reasoned that the "[b]oth the express elements of § 2113(a) and the applicable pattern jury instruction contemplate that federal bank robbery involves the intentional taking 'from the person or presence of [a] person ... by means of force and violence or intimidation." Appendix 1 at 13 (citing § 2113(a); Tenth Circuit Pattern Jury Instructions No. 2.77). Accordingly, "the Court has little difficulty finding that federal bank robbery involves something more than force against property that 'a person happens to occupy at the time.'" *Id.*

Mr. Ybarra also argued that § 2113(a) is not a violent felony because a person can be convicted of bank robbery without intending to intimidate. Relying on *United States v.*

McNeal, 818 F.3d 141 (4th Cir. 2016), the Magistrate Court concluded that, even if § 2113(a) does not require specific intent to intimidate, "taking money or property from the presence of bank personnel, even by intimidation, requires something more than recklessness." Appendix A at 16.

Finally, the Magistrate Court pointed to other decisions holding that § 2113(a) is a crime of violence under the nearly identical force clause of the U.S.S.G. § 4B1.2 and 18 U.S.C. § 924(c). Appendix A at 16-17. The Court declined to follow *Doriety v. United States*, 16-cv-0924, Doc. 12 (W.D. Wash. Nov. 10, 2016) (unpublished), and *Knox v. United States*, 2017 WL 347469 (W.D. Wash. 2017) (unpublished), which held that federal bank robbery is not a crime of violence under the career offender guideline. The Court reasoned that, unlike the Western District of Washington, it was not bound by Ninth Circuit precedent, and it did not "agree that bank robbery by intimidation does not necessarily involve a threat of violent physical force." Appendix A at 18. Accordingly, it recommended that Defendant's motion be denied and his claims dismissed with prejudice. Appendix A at 19.

Mr. Ybarra timely objected to the Proposed Finding and Recommended Disposition. The District Court issued an Order Overruling Defendant's Objections and Adopting the Chief Magistrate Judge's Proposed Findings and Recommended Disposition on July 25, 2017. Appendix B. The Court rejected Mr. Ybarra's argument that federal bank robbery does not necessarily require proof of violent physical force, and found that:

> *Johnson I* and *Castleman*, taken together, instruct that a threat to use *indirect* physical force during a bank robbery, such as a threat to use poison, still qualifies as a threat to use violent,

> physical force under the ACCA. After all, the administration of poison would, no doubt, have a harmful, violent effect on the body of the one who ingests it. Furthermore, given the Tenth Circuit's recent acknowledgment that even a "slap on the face," may rise to the level of violent, physical force, it would be incongruous to hold that the administration of poison would not also satisfy *Johnson I* physical force.

Appendix B at 6-7 (citations omitted). The Court also agreed with the Magistrate Court that "that federal bank robbery, even by intimidation, has as an element the threatened use of force of the type contemplated by *Johnson I* [*Johnson v. United States*, 559 U.S. 133 (2010)]" even if the threats are sometimes implicit. Appendix B at 10.

The Court rejected Mr. Ybarra's argument that § 2113(a) does not require that any threatened force or violence be directed *at a person*, as required by the ACCA's elements clause, but only that the taking be from a person or the presence of a person. The Court reasoned that this was a "hypertechnical reading" that "defies common sense" because "[f]or, to whom or against what would a defendant's threat of force, violence or intimidation be directed but to human gatekeeper of the bank's money?" Appendix B at 11.

Finally, the Court concluded that this Court, when it denied a certificate of appealability in *United States v. McGuire*, 678 Fed.Appx. 643 (10th Cir. 2017) (unpublished), "adopted the majority view on this issue and would find that federal bank robbery constitutes a 'violent felony' under the ACCA's identical force clause." Appendix B at 13. Accordingly, the Court overruled Mr. Ybarra's objections, adopted the Magistrate Judge's Proposed Findings and Recommended Disposition, and denied Mr. Ybarra's Motion to Vacate and

dismissed his claims with prejudice. However, the Court granted a certificate of appealability. *Id.*

The Tenth Circuit Court of Appeals affirmed Mr. Ybarra's conviction and sentence. Relying on an earlier decision and cases from other circuits, it held that "the federal bank-robbery statute requires 'the use, attempted use, or threatened use of physical force against the person of another'" within the meaning of 18 U.S.C. § 924(e)(2)(B)(i). 2018 WL 1750547, *2 (Appendix C). It rejected Mr. Ybarra's arguments that federal bank robbery by intimidation could be committed without any threatened use of violent physical force against the person of another. Furthermore, it affirmed its holding in *United States v. Ontiveros*, 875 F.3d 533 (10th Cir. 2017), that *United States v. Castleman*, 134 S.Ct. 1405 (2014), applied to the Armed Career Criminal Act, and accordingly rejected Mr. Ybarra's argument that a threat of bodily harm does not necessarily include as an element the threat of physical force. 2018 WL 1750547, *3-4.

REQUEST FOR WRIT OF CERTIORARI

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

A. Introduction.

This case raises issues similar to those in *Stokeling v. United States, cert. granted*, 138 S.Ct. 1438 (April 2, 2018) (No. 17-5554). In *Stokeling*, this Court will decide whether Florida robbery that has an element of overcoming victim resistance by any degree of use of force is a violent felony under the elements clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B)(i). As in *Stokeling*, this case raises the issue of whether a robbery statute has an element the use or threatened use of "physical force" sufficient to satisfy this Court's definition of "physical force" in the elements clause of the ACCA, which this Court has said is "*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). As in *Stokeling*, the circuit court 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 favor of the petition in *Stokeling* will give rise to a reasonable probability that the Tenth Circuit would reject its broad conception of *Johnson I* force that is the basis for its decision in Mr. Ybarra's case and rule that Mr. Ybarra is entitled to relief. It would then be an appropriate use of this Court's discretion to grant certiorari, vacate the Tenth Circuit's judgment, and remand for

reconsideration (GVR) in light of *Stokeling*. Accordingly, this Court should hold this petition pending resolution of *Stokeling*.

B. "Physical force" for purposes of ACCA's elements clause means violent force, not mere threat of force that might cause any bodily harm.

A violation of 18 U.S.C. § 922(g)(1) carries a statutory maximum penalty of 10 years imprisonment. 18 U.S.C. § 924(a)(2). The ACCA, however, provides that a person convicted of violating 18 U.S.C. § 922(g)(1) who "has three previous convictions ... for a violent felony or a serious drug offense, or both, ... shall be ... imprisoned not less than fifteen years ...". 18 U.S.C. § 924(e)(1). That statute defines "violent felony" as "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 ... .

18 U.S.C. § 924(e)(2)(B)(i)-(ii). "Clause (i) is referred to as the 'force clause,' and the portion of clause (ii) following the enumerated offenses is called "the 'residual clause."' *United States v. Hart*, 674 F.3d 33, 41 (1st Cir. 2012). Robbery is not an enumerated offense, and thus that clause is not relevant in this case.

In *Johnson v. United States*, 135 S.Ct. 2551, 2556-63 (2015)(*Johnson II*), this Court held that the "residual clause" was unconstitutionally vague and "that imposing an increased sentence under the residual clause of the [ACCA] violates the Constitution's guarantee of due

process." 135 S.Ct. at 2563. *Johnson* announced a new substantive rule that applies retroactively to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257, 1264-65, 1268 (2016). The holding did not, however, "call into question application of the [ACCA] to the four enumerated offenses, or the remainder of the [ACCA]'s definition of a violent felony." *Johnson*, 135 S. Ct. at 2563.

The issue presented here is whether federal bank robbery in violation of 18 U.S.C. § 2113(a) contains "an element of the use, attempted use, or threatened use of physical force against the person of another" so that it is a violent felony following abrogation of the residual clause. *See* § 924(e)(2)(B)(i). To determine whether federal bank robbery satisfies this use of force clause, the Court must apply the categorical approach and examine only the elements of the offense, without regard to a defendant's specific conduct. *Descamps v. United States*, 133 S.Ct. 2276, 2283 (2013). Under that approach, only the elements matter. *Mathis v. United States*, 136 S.Ct. 2243, 2249 (2016). Consequently, every conviction for the offense must "necessarily" meet the predicate offense definition. *Id.* 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 of "violent."

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

Similarly, Mr. Ybarra has consistently contended that federal bank robbery, even when committed "by force and violence, or by intimidation," does not qualify as an ACCA violent felony because: 1) bank robbery can be committed with *de minimis* force or no force at all; 2) the term "intimidation" does not inherently require the threatened use of physical force but simply threat of injury; and 3) the statute does not require that any use or threatened or attempted use of force be directed against the person of another. Like the Eleventh Circuit in Mr. Stokeling's case, the Tenth Circuit rejected Mr. Ybarra's argument by employing an expansive view of what constitutes "physical force," relying on its decision in *United States v. Ontiveros*, 875 F.3d 533 (10th Cir. 2017), which in turn improperly applied *Castleman* in the ACCA context, as further discussed below.

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. Ybarra's case that federal bank robbery necessarily includes an element of violent use of 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. Ybarra'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 that federal 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 its decision in *Ontiveros*, 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." *Ybarra*, 2018 WL 1750547, *4 (citing to *Ontiveros*, 875 F.3d at 536, in turn citing to *Castleman*, 134 S.Ct. at 1409). Because of that approach, the Tenth Circuit found acts that might cause injury fit the *Johnson I* "physical force" definition. 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 has explicitly recognized that its position differs from that taken in other circuits. *See United States v. Garcia*, 877 F.3d 944 (10th Cir. 2017) (stating it was "not persuaded by cases such as cases such as [*United States v.*] *Gardner*, 823 F.3d 793, 803-04 (4th Cir. 2016), which concluded that North Carolina robbery was not a violent felony under the ACCA by relying in part on a North Carolina case upholding "a conviction when a defendant pushed the shoulder of an electronics store clerk, causing her to fall onto shelves while the defendant took possession of a television." *United States v. Garcia*, 877 F.3d 944, 954 n.11 (10th Cir. 2017). 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 has stated its position clashed with "cases such as" *Gardner*, 823 F.3d at 803-04, 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." 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. Ybarra'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 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 federal robbery is a "violent felony."

The Tenth Circuit affirmed the district court's denial of Mr. Ybarra'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).

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.*

A robbery statute that requires proof of *de minimis*, or even no, physical force is not a violent felony. In *United States v. Eason*, 829 F.3d 633 (8th Cir. 2016), the Eighth Circuit considered whether a prior conviction for robbery under Arkansas law was a violent felony under the ACCA. The Court said it did not, stating:

> The Arkansas robbery statute, § 5-12-102, states "[a] person commits robbery if, with the purpose of committing a felony or misdemeanor theft or resisting apprehension immediately after committing a felony or misdemeanor theft, the person employs or threatens to immediately employ physical force upon another person." *Id.* Physical force under Arkansas law is defined as "any ... [b]odily impact, restraint, or confinement; or [t]hreat of any bodily impact, restraint, or confinement." Ark. Code Ann. § 5-12-101. After *Johnson*, this definition, on its face, falls short of requiring "force capable of causing physical pain or injury to another person."

Id. at 640-41. It seems that the threat possibility in the Arkansas law is what removes it from the force requirement. This is exactly like the "intimidation" portion of § 2113(a).

Similarly, the statutory language of § 2113(a) does not require that any particular quantum of force be used, attempted or threatened. Indeed, convictions for violating this statute have been upheld where no force or violence occurred or was even explicitly threatened. For example, the Tenth Circuit upheld the defendant's conviction for violating § 2113(a) where the unarmed defendant entered a bank and presented a note to the teller stating, "This is a bank robbery. Put the money in the bank bag and keep your foot off the

button." *United States v. Lewis*, 628 F.2d 1276, 1277 (10th Cir. 1980). In *United States v. Slater*, 692 F.2d 107 (10th Cir. 1982), the defendant, who was not wearing a mask,

> entered a federally insured savings and loan building in Colorado. He walked unhesitatingly behind the counter and began to remove cash from the tellers' drawers. He did not speak or interact with anyone, beyond telling a bank manager to "shut up" when she asked him what he was doing. The bank personnel, who had been trained to remain calm and to cooperate in such a situation, were neither hurt nor overtly threatened with harm. All testified to being badly frightened, however.

Id. at 108-09. The Tenth Circuit affirmed his conviction for bank robbery by force or intimidation.

Similarly, in *United States v. Kelley*, 412 F.3d 1240 (11th Cir. 2005), the defendant was found guilty of bank robbery by intimidation where he "slammed the counter," even though "he did not possess a weapon, did not produce a demand note, did not speak to a teller, and physically took the money himself instead of requiring a bank teller to hand it over." *Id.* at 1244-45. *See also United States v. McCarty*, 36 F.3d 1349, 1357 (5th Cir. 1994) (robbery by intimidation did not require proof of express verbal threat or threatening display of weapon, or proof of actual fear). Thus, federal bank robbery can occur without any use, attempted use or explicit threatened use of force.

At least one court has held that "bank robbery under § 2113(a) *inherently* contains a threat of physical force." *United States v. Armour*, 840 F.3d 904, 909 (7th Cir. 2016) (emphasis added)). Such reasoning is in fact a return to the days of the residual clause, in which a court had to determine whether an offense that did not otherwise qualify as a violent

felony nonetheless "involve[d] conduct that present[ed] a serious potential risk of physical injury to another[.]" 18 U.S.C. § 924(e)(2)(B)(ii). The correct focus here is on whether a conviction under § 2113(a) *necessarily* includes as an element "the use, attempted use, or threatened use of physical force against the person of another." § 924(e)(2)(B)(i). An *inherent* threat of harm as perceived by the observer is not the same as an element of use of force. *See In re Smith*, 829 F.3d 1276, 1283 (11th Cir. 2016) (Pryor, J., dissenting). It is not even necessary for the defendant to say anything or do any threatening act to be found guilty of robbery by intimidation. *See Kelley*, 412 F.3d at 1244-45; *McCarty*, 36 F.3d at 1357.

D. The term "intimidation" does not inherently threaten the use of violent physical force because physical injury can be caused without the use of physical force.

Mr. Ybarra contended that "fear of bodily harm" on the part of the victim was not the same as the threatened use of violent physical force by the defendant. As pointed out by Judge Pryor, construing the identical phrase in the federal carjacking statute, 18 U.S.C. § 2119:

> Although on its face, the term "intimidation" seems coterminous with "threatened use of physical force" as it appears in the elements clause, our precedent indicates that may not necessarily be the case. This Court previously has held that whether a defendant engaged in "intimidation" is analyzed from the perspective of a reasonable observer rather than the actions or threatened actions of the defendant. It is thus possible for a defendant to engage in intimidation without ever issuing a verbal threat by, for example, slamming a hand on a counter, as occurred in *Kelley*. This, to me, raises a question regarding whether it is possible to commit the offense of carjacking without ever using, attempting to use, or threatening to use physical force as described in the elements clause.

In re Smith, 829 F.3d 1276, 1283 (11th Cir. 2016) (Pryor, J., dissenting from denial of petitioner's application to file a second or successive 28 U.S.C. § 2255 motion) (citing *United States v. Kelley*, 412 F.3d 1240, 1244-45 (11th Cir. 2005)). *Slater, supra,* and *Kelley* make clear that "intimidation" does not require any actual, communicated threat of use of violent force, but merely conduct that may be perceived as potentially causing harm by a reasonable observer. In rejecting this argument, the Tenth Circuit relied on *United States v. Castleman,* 134 S.Ct. 1405 (2014), saying:

> the district court's approach was consistent with the Supreme Court's approach in *United States v. Castleman*, —— U.S. ——, 134 S.Ct. 1405, 188 L.Ed.2d 426 (2014).
>
> There, the Supreme Court explained that "the knowing or intentional causation of bodily injury necessarily involves the use of physical force." *Castleman*, 134 S.Ct. at 1414. We applied *Castleman* in *United States v. Ontiveros*, 875 F.3d 533 (10th Cir. 2017), *petition for cert. filed* (U.S. Apr. 4, 2018) (No. 17-8367). In *Ontiveros*, we explained that *Castleman* had "specifically rejected the contention that 'one can cause bodily injury without the use of physical force.' " 875 F.3d at 536 (quoting *Castleman*, 134 S.Ct. at 1409). We went on to apply *Castleman* to violent felonies under the Armed Career Criminal Act. *Id.* at 538. Under *Ontiveros*, we reject Mr. Ybarra's argument that the threat of bodily harm does not include as an element the threat of physical force.

Ybarra, 2018 WL 1750547, *3-4.

However, *Castleman* is explicitly inapplicable to the ACCA context. The issue in *Castleman* was whether a particular offense fell within the scope of 18 U.S.C. § 922(g)(9). That statute prohibits a person who has been convicted of a "misdemeanor crime of domestic violence" from possessing a firearm or ammunition. *See* § 922(g)(9). The Court held that the *Johnson I* definition of "force" that is applicable in the ACCA context did not apply to § 922(g)(9) for four reasons.

First, this Court noted that "because perpetrators of domestic violence are 'routinely prosecuted under generally applicable assault or battery laws,' ... it makes sense for Congress to have classified as a 'misdemeanor crime of domestic violence' the type of conduct that supports a common-law battery conviction," whereas it was "'unlikely' that Congress meant

to incorporate" that same definition in the definition of violent felony. *Castleman*, 134 S.Ct. at 1411 (citation omitted).

Second, this Court distinguished the definition of violent felony used in *Johnson I*, stating that "whereas the word 'violent' or 'violence' standing alone 'connotes a substantial degree of force,' that is not true of 'domestic violence'" because it is "a term of art encompassing acts that one might not characterize as 'violent' in a nondomestic context," including pushing, grabbing, shoving, and hitting. *Id.* (citations omitted). The Court further stated that such "[m]inor uses of force may not constitute 'violence' in the generic sense," and cited with approval *Flores v. Ashcroft*, 350 F.3d 666, 670 (7th Cir. 2003). *Id.* at 1412.

Third, this Court said that "unlike in *Johnson*—where a determination that the defendant's crime was a 'violent felony' would have classified him as an "armed career criminal"—the statute here groups those convicted of 'misdemeanor crimes of domestic violence' with others whose conduct does not warrant such a designation." *Id.* (citations omitted). Thus, the Court saw "no anomaly" in including domestic abusers convicted of generic assault or battery with other persons prohibited from gun ownership. *Id.*

Finally, this Court observed that "a contrary reading would have rendered § 922(g)(9) inoperative in many States at the time of its enactment" because most domestic abusers were, and still are, generally prosecuted under statutes that prohibit "mere offensive touching." *Id.* at 1413 (citations omitted).

Most importantly, this Court expressly stated that its analysis in *Castleman* did not apply in other contexts. *See Castleman*, 134 S.Ct. at 1411 n.4. It observed:

> The Courts of Appeals have generally held that mere offensive touching cannot constitute the "physical force" necessary to a "crime of violence," just as we held in *Johnson* that it could not constitute the "physical force" necessary to a "violent felony." Nothing in today's opinion casts doubt on these holdings, because—as we explain—"domestic violence" encompasses a range of force broader than that which constitutes "violence" *simpliciter*.

Id. (citations omitted).

Thus, contrary to the Tenth Circuit's conclusion, *Castleman* and *Johnson* do not instruct that threats to use indirect physical force qualify as threats to use violent physical force for purposes of the ACCA. *See United States v. Rico-Mejia*, 859 F.3d 318, 322-23 (5th Cir. 2017) (stating that "*Castleman* does not disturb this court's precedent regarding the characterization of crimes of violence"); *Whyte v. Lynch*, 807 F.3d 463, 470 (1st Cir. 2015) (noting that "'[p]hysical force' can mean different things depending on the context in which it appears," and observing that similar language was construed differently in *Johnson* and *Castleman* because of the statutory context). Rather, prior case law construing *Johnson I* remains unchanged by *Castleman*.

In fact, the opinion in *Castleman* demonstrates that this Court has never adopted a causation-of-injury-necessitates-violent-force rule. Justice Scalia concurred specially to set forth his opinion that the case should have been decided by applying *Johnson*'s definition of violent force, which in his view is that "'intentionally or knowingly caus[ing] bodily injury' ... categorically involves the use of 'force capable of causing physical pain or injury to another person.'" 134 S.Ct. at 1417 (Scalia, J., concurring). The *Ontiveros* panel pointed to

Justice Scalia's concurrence in support of its holding. *Ontiveros*, 875 F.3d at 538. But the *Castleman* majority rejected Justice Scalia's interpretation of *Johnson*, saying "[w]hether or not the causation of bodily injury necessarily entails violent force–a question we do not reach–mere offensive touching does not" and "whether or not that is so–a question we do not decide–these forms of injury do necessitate force in the common-law sense." *Id.* at 1413, 1414. Thus, *Castleman* establishes that *Johnson* did not decide this issue and that courts are wrong to rely on *Johnson* as support for a holding that causation of injury necessarily requires violent force. *See United States v. Vail-Bailon*, 868 F.3d 1293, 1319 (Rosenbaum, J., dissenting) (*Castleman* confirms that the Supreme Court has not decided whether causation of injury requires violent force).

Further, *Castleman*'s ruling that offensive touching satisfies the force requirement of 18 U.S.C. § 921(a)(33)(A)'s definition of "misdemeanor crime of domestic violence" and that the use of poison would satisfy that definition does not mean that the use of poison to cause injury amounts to violent, physical force under the ACCA. In fact, under *Castleman*'s reasoning, the use of poison to injure someone does not involve violent force.

The Court's reasoning in *Castleman* began with its decision in *Johnson*, where the court found the common-law definition of "force" to be a "'comical misfit'" with the term "violent felony." 134 S.Ct. at 1410 (quoting *Johnson*, 559 U.S. at 145). By contrast, the Court found that "the common-law meaning of 'force' fits perfectly" for the definition of "misdemeanor crime of violence." *Id.* The Court gave, as one reason for that conclusion, that "whereas the word 'violent' or 'violence' standing alone 'connotes a substantial degree of

force,' ... that is not true of 'domestic violence.'" *Id.* at 1411 (quoting 559 U.S. at 140). And futher, it explained that "[m]inor uses of force," such as a squeeze to the arm that causes a bruise, "may not constitute 'violence' in the generic sense." *Id.* at 1412.

When the Court considered the situation in which a person causes bodily injury by deceiving a person into drinking a poisoned beverage "'without making contact of any kind,'" the Court considered only the "common-law concept of 'force,'" a concept that *Johnson* makes clear is inapplicable to the definition of violent felony. *Id.* at 1414. And, relying on cases interpreting the common-law offense of battery, it held that indirectly using force by poisoning someone amounts to "force" "in the common-law sense." *Id.* at 1414-15. Then, the Court rejected Castleman's argument that, even if the indirect use of force is sufficient, employing poison to cause injury did not amount to a "use" of force as required by the statute. *Id.* at 1415. But it did not hold that using poison requires violent force; it held that "the act of employing poison knowingly as a device to cause physical harm" is a "use of force" in the common-law sense. *Id.* And it held that, in the common-law sense, "[t]hat the harm occurs indirectly, rather than directly (as with a kick or punch), does not matter." *Id.* The Court summed up its rejection of Castleman's argument about the term "use" by explaining that the "word 'use'" does not "somehow alter[] the meaning of 'force.'" *Id.* But nothing in the Court's opinion suggests that its discussion of the meaning of the term "use" means that causing injury by poisoning requires violent force.

While the Court in *Castleman* said nothing about whether an indirect use of force can amount to "violent" force, *Johnson* does have something to say about that–because *Johnson*

held that the common-law concept of force does not apply to the definition of violent felony. *Johnson*, 559 U.S. at 140. And it held, as the Court reiterated in *Castleman*, that "violence" "connotes a substantial degree of force." *Castleman*, 134 S.Ct. at 1411 (quoting *Johnson*, 559 U.S. at 140). While the indirect use of force is sufficient to establish "force" under the common-law definition applicable to crimes of domestic violence, the substantial degree of force required to establish a violent felony does not allow that leap. In the context of violent felonies, the Fifth Circuit reached the correct result when it held that "*Castleman*'s analysis is not applicable to the physical force requirement for a crime of violence, which 'suggests a category of violent, active crimes' that have as an element a heightened form of physical force that is narrower in scope than that applicable in the domestic violence context." *United States v. Rico-Mejia*, 859 F.3d 318, 321-23 (5th Cir. 2017) (quoting *Castleman*, 134 S.Ct. at 1411 n.4).

E. Federal bank robbery does not require proof that any use, attempted use or threatened use of physical force be directed at the person of another.

To be a violent felony, the use, attempted use or threatened use of physical force must be directed "against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). Section 2113(a) includes as an element "force and violence, or [] intimidation," but does not specify who or what must be the target of that force and violence, or intimidation. An offense that includes an element of use of force may nonetheless not be a crime of violence if the force is not necessarily directed at a person. *See United States v. Ford*, 613 F.3d 1263 (10th Cir. 2010). *Ford* considered whether the defendant's prior conviction for criminal discharge of a firearm

at an occupied building or vehicle was a violent felony for purposes of the ACCA. The Tenth Circuit noted that, because this was not an enumerated offense, it had to qualify under either the use of force clause or the residual clause. *Id.* at 1271. This Court said the offense did not qualify under the force clause because "[t]he Kansas statute requires force against a building or vehicle, but not against the person inside, as clause (i) requires." *Id.* A statute that can be satisfied merely by directing force against property that a person happens to occupy at the time is "one step removed" from the ACCA's against-a-person requirement. *Id.*[1] *See also United States v. Estrella*, 758 F.3d 1239, 1251-52 (11th Cir. 2014) (Florida offense of shooting at a building or vehicle, occupied or unoccupied, was not a crime of violence under U.S.S.G. § 2L1.2's use of force clause). As the Eleventh Circuit recognized, "[O]nly those prior convictions that are necessarily and in all circumstances crimes *against persons* are supposed to trigger the enhancement. Statutes that would permit conviction when the defendant targets only property do not meet the elements-based crime of violence definition." *Estrella*, 758 F.3d at 1252 (emphasis added).

F. 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,

[1]The Court's subsequent conclusion that the offense qualified as a violent felony under the residual clause is now, obviously, overruled by *Johnson*.

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 federal robbery is not a "violent felony," then Mr. Ybarra 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 warranted after this Court's decision in *Stokeling*, this Court should grant *certiorari* in this case.

CONCLUSION

Under Point I, Defendant-Petitioner Martin Michael Ybarra 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 decision in *Stokeling*. Under Point II, if a GVR is not appropriate after the decision in *Stokeling*, this Court should grant this Petition and review and reverse the Tenth Circuit's decision in his case.

Respectfully submitted,

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