No. _____

In the

Supreme Court of the United States

LEONARD MARQUEZ, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the

United States Court of Appeals

for the Tenth Circuit

Petition for Writ of Certiorari

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Questions Presented

I. Did the Tenth Circuit determine a New Mexico residential burglary is "burglary" under 18 U.S.C. § 924(e)(2)(B)(ii) in a way that contravenes this Court's mandate that a sentencing court may impose an Armed Career Criminal Act (ACCA) sentence on an accused only if the government proves with certainty that his prior offenses necessarily satisfy a predicate offense definition?

II. New Mexico courts have held that the state's aggravated assault statute does not have any mens rea element with respect to the victim. Does the Tenth Circuit's decision that the offense nonetheless has as an element the use, attempted use, or threatened use of violent force against the person of another so as to qualify as a 'violent felony' under the ACCA, 18 U.S.C. § 924(e)(2)(B)(i), conflict with the decisions of the Fourth, Fifth, Seventh, Ninth and Eleventh Circuits that have held that an offense must have as an element a mens rea relating to the victim to fall within the ACCA's force clause?

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Petition for Writ of Certiorari

Leonard Marquez petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit in his case.

Opinions Below

The Tenth Circuit's decision in *United States v. Leonard Marquez*, Case No. 17-2221, affirming the district court's denial of Marquez's 28 U.S.C. § 2255 motion challenging his Armed Career Criminal Act (ACCA) sentence, was not published.[1] The district court's memorandum opinion denying the motion was not published.[2]

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[1] App. 1a-3a. "App." refers to the attached appendix. "Vol." refers to the record on appeal which is contained in three volumes. Marquez refers to the documents and pleadings in those volumes as Vol. I-III followed by the page number found on the bottom right of the page (e.g. Vol. III at 89). 'PSR' refers to the presentence report found in Volume III of the record on appeal.

[2] App. 4a-15a.

Jurisdiction

On June 26, 2018, the Tenth Circuit affirmed the district court's decision to deny Marquez's § 2255 motion challenging his ACCA sentence.[3] This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Pertinent Constitutional and Statutory Provisions

U.S. CONSTITUTION, Amendment V

No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

18 U.S.C. § 924(e)

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

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[3] App. 1a-3a.

(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; ....

New Mexico Statutes

The New Mexico statutory provision involved in this case is N.M. Stat. Ann. § 30-16-3, which provides as follows:

Burglary consists of the unauthorized entry of any vehicle, watercraft, aircraft, dwelling or other structure, movable or immovable, with the intent to commit any felony or theft therein.

A. Any person who, without authorization, enters a dwelling house with intent to commit any felony or theft therein is guilty of a third degree felony.

B. Any person who, without authorization, enters any vehicle, watercraft, aircraft or other structure, movable or immovable, with intent to commit any felony or theft therein is guilty of a fourth degree felony.

The New Mexico Uniform Jury Instruction involved in this case is:

NMRA Crim. UJI 14-1631, which provides as follows:

A "dwelling house" is any structure, any part of which is customarily used as living quarters.

The other New Mexico statutory provision involved in this case is N.M. Stat. Ann. § 30-3-2, which provides as follows:

Aggravated assault consists of either:

A. unlawfully assaulting or striking at another with a deadly weapon;

B. committing assault by threatening or menacing another while wearing a mask, hood, robe or other covering upon the face, head or body, or while disguised in any manner, so as to conceal identity; or

C. willfully and intentionally assaulting another with intent to commit any felony.

Whoever commits aggravated assault is guilty of a fourth degree felony.

Statement of the Case

Marquez pleaded guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). The district court imposed a 15-year prison term on Marquez for that offense pursuant to the ACCA. App. 2a. Under the ACCA, the statutory sentence range for a defendant, such as Marquez, who is convicted of violating 18 U.S.C. § 922(g)(1), rises from zero to ten years, *see* 18 U.S.C. § 924(a)(2), to a mandatory minimum of 15 years to life, if he has three prior convictions for a "violent felony." 18 U.S.C. § 924(e)(1). An adult felony offense is a "violent felony" if it fits within one of three categories: (1) it "has as an element the use, attempted use, or threatened use of physical force against the person of another," 18 U.S.C. § 924(e)(2)(B)(i); (2) it "is burglary, arson, or extortion or involves use of explosives," 18 U.S.C. § 924(e)(2)(B)(ii); or (3) it "otherwise involves conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. § 924(e)(2)(B)(ii). The third "otherwise" category is known as the residual clause. The district court imposed an ACCA sentence based on the probation office's conclusion that Marquez's New Mexico convictions for residential burglary, aggravated assault, and attempted robbery were violent felonies. App. 5a.

Subsequently, this Court held in *Johnson v. United States*, 135 S. Ct. 2251 (2015), that the ACCA's residual clause was unconstitutionally vague and therefore increasing a defendant's sentence under the clause denies due process of law. *Id.* at 2556-63. Later, in *Welch v. United States*, 136 S. Ct. 1257 (2016), this Court held the *Johnson* rule was retroactively applicable to cases on collateral review. *Id.* at 1264-68.

Relying on *Johnson*, Marquez moved to vacate his sentence under 28 U.S.C. § 2255. App. 2a. He contended his ACCA sentence depended on the unconstitutionally vague residual clause contrary to due process because New Mexico residential burglary described in N.M. Stat. Ann. § 30-16-3(A) does not satisfy the force clause in

§ 924(e)(2)(B)(i), and is not generic burglary under § 924(e)(2)(B)(ii). He also argued that his aggravated assault conviction under N.M. Stat. Ann. § § 30-3-2 does not have the "against the person of another" element required by the ACCA's force clause.[4]

At all relevant times, the New Mexico burglary statute provided as follows:

> Burglary consists of the unauthorized entry of any vehicle, watercraft, aircraft, dwelling or other structure, movable or immovable, with the intent to commit any felony or theft therein.
>
> A. Any person who, without authorization, enters a dwelling house with intent to commit any felony or theft therein is guilty of a third degree felony.
>
> B. Any person who, without authorization, enters any vehicle, watercraft, aircraft or other structure, movable or immovable, with intent to commit any felony or theft therein is guilty of a fourth degree felony.

N.M. Stat. Ann. § 30-16-3. New Mexico's uniform criminal jury instructions define "dwelling house" as "any structure, any part of which is customarily used as living quarters." NMRA Crim. UJI 14-1631.

Marquez argued a New Mexico 'dwelling house' included structures such as vehicles, watercraft and aircraft. As a result, Marquez reasoned, a § 30-16-3(A) burglary is not generic burglary under the ACCA because under *Taylor v. United States*, 495 U.S. 575, 598-99 (1990), and *Shepard v. United States*, 544 U.S. 13, 15-16 (2005), generic burglary encompasses unlawful entry into a building or structure, but not unlawful entry into motor vehicles, boats or airplanes. App. 8a-12a. The district court denied Marquez's § 2255 motion. It held § 30-16-3(A) did not include entry into non-generic places. App. 11a-13a.

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[4] In post-conviction litigation, the government did not argue the attempted robbery conviction could be used to enhance Marquez's sentence under the ACCA. The district court, therefore, did not discuss that offense in its decision denying Marquez's § 2255 motion. App. 4a-15a.

Marquez also contended that a New Mexico Court of Appeals decision, *State v. Branch*, 417 P.3d 1411 (N.M. Ct. App. 2018), showed *United States v. Ramon Silva*, 608 F.3d at 669-74 (10th Cir. 2010), *abrogated on other grounds, as recognized by United States v. Marquez*, 728 F. App'x 884 (2018), relied on an incorrect interpretation of New Mexico law when it held New Mexico aggravated assault is a 'violent felony' under the ACCA's force clause. In *Branch*, the court held to establish the defendant's guilt, the prosecution did not have to prove any nexus between the defendant and the victim. 417 P.3d at 1147-49. Consequently, Marquez said, New Mexico aggravated assault does not satisfy the 'against the person of another' part of the force clause. In spite of *Branch*, the district court said *Ramon-Silva* obligated it to find that the offense was a violent felony according to the ACCA's force clause. App. 14a.

On appeal, the Tenth Circuit affirmed. The panel said it was bound by *United States v. Tuerrieta*, 875 F.3d 1340 (10th Cir. 2017), which held that New Mexico residential burglary "fits within the ACCA's enumerated crime of burglary."[5] App. 2a. Similarly, it was compelled by *Ramon-Silva* and *United States v. Maldonado-Palma*, 839 F.3d 1244 (10th Cir. 2016) to find that New Mexico aggravated assault is a violent felony as defined in § 924(e)(2)(B)(i)'s force clause. App. 2a-3a. The court did not discuss *Branch*'s impact on its precedent.

The district court had jurisdiction pursuant to 18 U.S.C. § 3231, and the Tenth Circuit had jurisdiction pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291.

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[5] This court has granted certiorari in two cases to address the question whether burglary of a nonpermanent or mobile structure that is adapted or used for overnight accommodation can qualify as "burglary" under the ACCA. *United States v. Sims*, ___ S. Ct. ___, 2018 WL 1901590 (Apr. 23, 2018) (No. 17-766); *United States v. Stitt*, ___ S. Ct. ___, 2018 WL 1901589 (Apr. 23, 2018) (No. 17-765).

Reasons for Granting the Writ

I. The Tenth Circuit Court of Appeals determined New Mexico residential burglary is "burglary" under 18 U.S.C. § 924(e)(2)(B)(ii) in a way that is in conflict with this Court's mandate that a sentencing court may impose an Armed Career Criminal Act ("ACCA") sentence only if the government proves with certainty that an accused's prior convictions necessarily satisfy a predicate offense definition.

A. Introduction

In this case, by relying exclusively on its decision in *Turrieta*, the Tenth Circuit Court of Appeals did not comply with this Court's demand for certainty that an accused's prior offense necessarily satisfies the ACCA's predicate offense definition before a conviction for that offense may be used to impose an ACCA sentence. Instead, in using *Turrieta*, the Tenth Circuit went out of its way to find New Mexico residential burglary is an ACCA generic burglary. In *Turrieta*, the court disregarded proof that New Mexico residential burglary includes unlawful entry into vehicles, watercraft and aircraft. It also misinterpreted New Mexico case law. It relied on irrelevant matters. This Court should grant certiorari to make clear its demand for certainty imposes a meaningful restraint on lower courts' determination whether an offense meets a predicate offense definition.

B. An offense is a 'violent felony' under the enumerated offense clause only when the government proves for certain that the offense's elements necessarily satisfy the ACCA definition.

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). The ACCA defines a violent felony as a "crime punishable by imprisonment 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).

In *Johnson v. United States*, 135 S. Ct. 2551 (2015), this Court held the clause that begins with "otherwise" in § 924(e)(2)(B)(ii)—commonly known as the residual clause—is unconstitutionally vague. *Id.* at 2556-63. Following *Johnson* then an offense is a violent felony only if it either satisfies the "physical force" clause of § 924(e)(2)(B)(i) or is an enumerated offense under § 924(e)(2)(B)(ii). *Id.* at 2563 ("Today's decision does not call into question application of the Act to the four enumerated offenses, or the remainder of the Act's definition of a violent felony.").

The district court did not find that New Mexico residential burglary was a violent felony as defined by the force clause. Indeed, the only way this offense might constitutionally be a violent felony is if it is the enumerated offense of "burglary" in § 924(e)(2)(B)(ii).

A defendant has been convicted of an ACCA "burglary" if the offense "corresponds in substance" to the generic definition of burglary. *Taylor*, 495 U.S. at 599. In *Taylor*, this Court explored what "burglary" means. This Court held "burglary" has a "uniform definition independent of the labels employed by the various States' criminal codes." *Id.* at 592. Congress meant by "burglary" "the generic sense in which the term is now used in the criminal codes of most States." *Id.* at 598. That means "burglary" is an offense that "contains at least the following elements: an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Id.*

This Court made clear in *Taylor* that certain "places . . . other than buildings" were not places that would make the offense a "burglary," even if entered unlawfully with the intent to commit a crime. 495 U.S. at 599. Those disqualified places include booths, tents, automobiles, boats and railroad cars. *Id.* at 591, 599. The Court later clarified in *Shepard v. United States*, 544 U.S. 13 (2005), that the ACCA "makes burglary a violent felony only if committed in a building or enclosed space . . . not in a boat or motor vehicle." *Id.* at 15-16. The Court will further clarify the "burglary" definition in *United States v. Sims*, ___ S. Ct. ___, 2018 WL 1901590 (Apr. 23, 2018) (No. 17-766); *United States v. Stitt*, ___ S. Ct. ___, 2018 WL 1901589 (Apr. 23, 2018) (No. 17-765). Specifically, the Court will address the question whether burglary of a nonpermanent or mobile structure that is adapted or used for overnight accommodation can qualify as "burglary" under the ACCA. In *Turrieta*, the Tenth Circuit assumed generic burglary did not include entry into vehicles, watercraft and aircraft any part of which is customarily used as living quarters. 875 F.3d at 1344-45. This Court's decision in these pending cases necessarily will affect the Tenth Circuit's examination of New Mexico burglary in *Turrieta*.

To determine whether an offense is an enumerated offense, such as burglary, courts apply the categorical approach. *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). Under that approach, courts decide solely whether the elements of the crime of conviction sufficiently match the elements of generic burglary, while ignoring the case's particular facts. *Id.* Elements are the "'constituent parts' of a crime's legal definition—the things the 'prosecution must prove to sustain a conviction.'" *Id.* (quoting *Black's Law Dictionary* 634 (10th ed. 2014)). If the prior offense's elements include conduct broader than generic burglary, then the offense is not "burglary" under the ACCA. *Id.* at 2257. Courts applying the categorical approach must "focus on the minimum conduct criminalized by the state statute." *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013).

The burden is on the government to prove a prior conviction qualifies under the ACCA. *United States v. Span*, 789 F.3d 320, 324 (4th Cir. 2015). This Court has emphasized that burden includes satisfying the demand for certainty that a defendant is necessarily subject to the ACCA. In *Shepard*, this Court explained that "respect for congressional intent and avoidance of collateral trials require that evidence of generic conviction be confined to records of the convicting court approaching the certainty of the record of conviction in a generic crime State." 544 U.S. at 23. The *Shepard* plurality also pointed out that the Court's ruling avoided the danger to the Sixth Amendment jury trial right inherent in a sentencing court increasing a defendant's maximum sentence based on facts "too far removed from the conclusive significance of a prior judicial record," that carries with it the "certainty of a generic finding." *Id.* at 24-25.

Similarly, in *Mathis*, this Court held that, if reference sources do not "plainly" demonstrate that a statute contains a list of elements, rather than means, then "a sentencing judge will not be able to satisfy '*Taylor*'s demand for certainty' when determining whether a defendant was convicted of a generic offense." *Mathis*, 136 S. Ct. at 2257 (quoting *Shepard*, 544 U.S. at 21). In sum, the ACCA does not apply to a defendant unless the sentencing court is certain the defendant was convicted of at least three offenses that necessarily contain the elements that satisfy a predicate offense definition.

C. In light of the ACCA's demand for certainty, New Mexico residential burglary includes entry into a vehicle, watercraft, aircraft or similar structure.

The New Mexico burglary statute provides as follows:

> Burglary consists of the unauthorized entry of any vehicle, watercraft, aircraft, dwelling or other structure, movable or immovable, with the intent to commit any felony or theft therein.
>
> A. Any person who, without authorization, enters a dwelling house with intent to commit any felony or theft therein is guilty of a third degree felony.

> B. Any person who, without authorization, enters any vehicle, watercraft, aircraft or other structure, movable or immovable, with intent to commit any felony or theft therein is guilty of a fourth degree felony.

N.M. Stat. Ann. § 30-16-3.

Burglary subsection A has elements that are divisible from § 30-16-3's subsection B, given the difference in penalties between the two. *See Mathis*, 136 S. Ct. at 2256 ("If statutory alternatives carry different punishments, then . . . they must be elements."). Marquez was convicted of violating subsection A of § 30-16-3. App. 5a. Keeping in mind the ACCA's demand for certainty, an examination of the relevant case law and statutory construction principles shows "dwelling house" in § 30-16-3(A) includes places, such as vehicles, watercraft and aircraft that take New Mexico residential burglary outside the bounds of generic burglary.

New Mexico defines "dwelling house" as "any structure, any part of which is customarily used as living quarters." NMRA Crim. UJI 14-1631; *State v. Ross*, 665 P.2d 310, 313 (N.M. Ct. App. 1983) (citing UJI 14-1631 with approval). No state case definitively holds what "structures" can be "dwelling houses." But an analysis of the uniform jury instruction, statutory language, statutory framework and case law reveals the wide breadth of the meaning of "dwelling house" to include the other structures itemized in the rest of § 30-16-3.

First, the state's express definition of "dwelling house" suggests an expansive interpretation of the term. The definition refers to "any" "structure." NMRA Crim. UJI 14-1631. The word "any" "naturally carries 'an expansive meaning.'" *SAS Institute, Inc. v. Iancu*, 138 S. Ct. 1348, 1354 (2018) (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997)); *see also State ex rel. Reynolds v. Aamodt*, 800 P.2d 1061, 1062 (N.M. 1990) (the phrase "at any time" was "clear and unambiguous language" permitting the submission of an extension-of-time application after the expiration of the last extension); *State v. Compton*, 726 P.2d 837, 849 (N.M. 1986) (jury instruction requiring jurors to consider

"any" mitigating circumstances gave the jury "broad discretion to consider *any* factor in mitigation of the death penalty" (emphasis in original)), *overruled on other grounds by*, *State v. Tollardo*, 275 P.3d 110, 121, n. 6 (N.M. 2012).

"Any" means "'one or some indiscriminately of whatever kind.'" *Gonzales*, 520 U.S. at 5 (quoting *Webster's Third New International Dictionary* 97 (1976)). The New Mexico Court of Appeals in *State v. Lara*, 587 P.2d 52 (N.M. Ct. App. 1978), applied the broad meaning of the dwelling house definition when it held that burglary of a garage attached to a house was a "dwelling house" burglary even though there was no access to the residence from the garage. The court stressed a "dwelling house" was "any" structure, "any part of which" is customarily used as living quarters. *Id.* at 53. Thus, "dwelling house" in § 30-16-3(A) includes any structure of whatever kind as long as part of it is customarily used as living quarters.

Second, the New Mexico Court of Appeals' decision in *State v. Foulenfont*, 895 P.2d 1329 (N.M. Ct. App. 1995), shows how far the "dwelling house" term stretches. In that case, the court applied to § 30-16-3 the ejusdem generis principle that where general words follow an enumeration of things of a particular and specific meaning, the general words are construed as applying to things of the same kind or class as those specifically mentioned. 895 P.2d at 1332. Based on that principle the court held the term "other structure" that follows "vehicle, watercraft, aircraft, dwelling" in § 30-16-3's introductory paragraph means "an enclosure similar to a vehicle, watercraft, aircraft or dwelling." *Id.* The New Mexico Supreme Court approved *Foulenfont*'s reasoning in *State v. Office of Public Defender ex rel. Muqqddin*, 285 P.3d 622, 629-30 (N.M. 2012).

Foulenfont confirms that a vehicle, a watercraft or an aircraft is as much a "structure" as is a dwelling. In other words, the word "structure" includes those things as well as enclosures similar to them. Consequently, the accepted definition of "dwelling house"—"any structure, any part of which is customarily used as living quarters," NMRA

Crim. UJI 14-1631—must include a vehicle, watercraft, aircraft or similar structure. This conclusion is consistent with the "'normal rule of statutory construction' to interpret 'identical words used in different parts of the same act [as having] the same meaning.'" *State v. Jade G.*, 154 P.3d 659, 667 (N.M. 2007) (quoting *Department of Revenue of Ore. v. ACF Industries, Inc.*, 510 U.S. 332, 342 (1994) (brackets in *Jade G.*)).

Third, the fact that "other" "structure" is in the preamble and subsection B following vehicle, watercraft and aircraft demonstrates vehicles, watercraft and aircraft must be "structures." The definition of "dwelling house" includes "any structure" like vehicles, watercraft and aircraft. *See Muqqddin*, 285 P.3d at 633 (referring to vehicles, watercraft and aircraft as "enumerated structures").

Fourth, it conforms with the burglary statute's privacy-protection purpose for the legislature to increase punishment for unlawful entry into a structure the victim uses as a home regardless of the kind of structure. Protection of the security of habitation is relevant when construing New Mexico's burglary statute. *Muqqddin*, 285 P.3d at 632. That statute's purpose is "to protect against the feeling of violation and vulnerability that occurs when a burglar invades one's personal space." *Id.* at 633. The New Mexico legislature decided the invasion of one's personal space in the home deserved greater protection than the invasion of non-residences, prompting it to increase the degree of felony from fourth, § 30-16-3(B) to third, § 30-16-3(A). "[R]espect for the sanctity of the home . . . has been embedded in our traditions since the origins of the Republic." *Payton v. New York*, 445 U.S. 573, 601 (1980).

In terms of privacy interests, it should not matter what type of structure constitutes the victim's home. *See* 3 Wayne R. LaFave, *Substantive Criminal Law* § 21.1 & n. 55 (2d ed. 2016) (dwelling houses under the common law included "all dwellings, regardless of their size or worth"). New Mexico designated unlawful entry of a vehicle as a third degree

felony when any part of the vehicle is customarily used as living quarters because of the heightened privacy intrusion such an entry entails.

Fifth, New Mexico cases regarding shooting at a "dwelling" in violation of N.M. Stat. Ann. § 30-3-8(A) indicate a "dwelling house" includes a vehicle such as a mobile home or a trailer. New Mexico defines "dwelling" in § 30-3-8(A) the same as New Mexico defines "dwelling house" in § 30-16-3(A). NMRA Crim. UJI 14-341, n. 3 (if the "dwelling" alternative is applicable, "UJI 14-1631, definition of dwelling, must be given"); *State v. Coleman*, 264 P.3d 523, 528 (N.M. Ct. App. 2011) (in a shooting-at-a-dwelling case, "the jury was properly instructed" when the trial court submitted UJI 14-1631). In *Coleman*, the court observed that the offense's elements were willful shooting at a dwelling and knowledge that the dwelling was a dwelling. 264 P.3d at 528. The dwelling the defendant was convicted of shooting at was a trailer. *Id.* The defendant in *State v. Varela*, 993 P.2d 1280 (N.M. 1999), was convicted of shooting at a dwelling, namely, a mobile home. *Id.* at 1283, 1284; *see also State v. Highfield*, 830 P.2d 158, 159 (N.M. Ct. App. 1992) (defendant convicted of shooting at inhabited dwelling, which was a mobile home or trailer). In New Mexico, as a matter of law, trailers and mobile homes are vehicles. *See United States v. Hamilton*, 889 F.3d 688, 698 (10th Cir. 2018) (trailer); *Castendet-Lewis v. Sessions*, 855 F.3d 253, 264 (4th Cir. 2017) (trailers); *United States v. Lamb*, 847 F.3d 928, 931 (8th Cir. 2017) (motor homes), *cert. denied*, 138 S. Ct. 1438 (2018). For all of these reasons, "dwelling house" in § 30-16-3(A) encompasses vehicles, watercraft, aircraft and other similar structures. New Mexico residential burglary, therefore, is not "burglary" under § 924(e)(2)(B)(ii).

D. The Tenth Circuit's holding that New Mexico residential burglary does not include entry into a vehicle, watercraft, aircraft or similar structure conflicts with this Court's demand for certainty that an offense necessarily satisfies an ACCA predicate offense definition.

The Tenth Circuit did not abide by this Court's mandate that, before imposing an ACCA sentence, a court must be certain the defendant has three convictions for offenses that necessarily satisfy an ACCA predicate offense definition. Instead, the Tenth Circuit took the opposite tack, interpreting New Mexico law in the light most favorable to applying the ACCA. The Tenth Circuit's opinion evidences that approach by virtue of the numerous errors the court made on its way to concluding New Mexico residential burglary does not include entry into vehicles, watercraft, aircraft or similar structures.

First, the Tenth Circuit entirely overlooked the fact, discussed above, that New Mexico's express definition of "dwelling house"—"any structure, any part of which is customarily used as living quarters," NMRA Crim. UJI 14-1631—suggests an expansive interpretation of the term. *See SAS Institute, Inc.*, 138 S. Ct. at 1354 (2018) (the word "any" "naturally carries 'an expansive meaning'"(quoting *Gonzales*, 620 U.S. at 5)).

Second, in *Turrieta*, the Tenth Circuit missed *Foulenfont*'s importance and misread Turrieta's argument in that regard. It said: "the only pertinent holding in *Foulenfont* was that an unenclosed space like a fenced area does *not* constitute a structure." 875 F.3d at 1344. (emphasis in original). That conclusion is unfounded. The *Foulenfont* court based its finding that fenced areas are not structures on reasoning that is critical to understanding the residential burglary provision, § 30-16-3(A). The court held the term "other structure" that follows "vehicle, watercraft, aircraft, dwelling" in § 30-16-3's introductory paragraph means "an enclosure similar to a vehicle, watercraft, aircraft or dwelling." 895 P.2d at 1332. That determination was indispensable to the *Foulenfont* court's ultimate decision that fenced areas were not "other structures" because they were not similar to vehicles, watercraft, aircraft and dwellings. *Id.*

Contrary to the Tenth Circuit's reasoning, the legal steps taken by the *Foulenfont* court to arrive at its final conclusion, such as defining the meaning of "structure," matter. It does not make sense to erase every step on the logical trail that led to the jurisprudential destination, as if those steps were never taken. So the Tenth Circuit was mistaken when it contended the *Foulenfont* "decision stat[ed] only what was *not* burglary of any kind." 875 F.3d at 1344 (emphasis in original). *Foulenfont* also defined what burglary was by defining "structure." Importantly, the New Mexico Supreme Court in *Muqqddin* approved *Foulenfont*'s approach. *Muqqddin*, 285 P.3d at 629-30. The Tenth Circuit ignored the real significance of that fact.

Foulenfont's holding makes apparent that a vehicle, a watercraft or an aircraft is as much a "structure" as a dwelling is. In other words, the word "structure" includes those things as well as enclosures similar to them. Consequently, the accepted definition of "dwelling house"—"any structure, any part of which is customarily used as living quarters," NMRA Crim. UJI 14-1631—must include a vehicle, watercraft, aircraft or similar structure. The Tenth Circuit missed this point by unreasonably confining *Foulenfont*'s meaning to its ultimate conclusion and disregarding the indispensable path to that conclusion.

Third, in that same vein, the Tenth Circuit misunderstood the significance of *Muqqddin*'s reference to vehicles, watercraft and aircraft as "enumerated structures." 285 P.3d at 633. The Tenth Circuit noted that those "structures" are explicitly included in part (B), not part (A), of § 30-16-3. 875 F.3d at 1344, n. 1. While this is true, the distinction is meaningless. *Muqqddin*'s reference shows the New Mexico Supreme Court considers vehicles, watercraft and aircraft to be "structures," which are what "dwelling houses" are too.

Fourth, the Tenth Circuit overlooked the "'normal rule of statutory construction' [is] to interpret 'identical words used in different parts of the same act [as having] the same

meaning.'" *Jade G.*, 154 P.3d at 667 (quoting *Department of Revenue of Ore.*, 510 U.S. at 342). This means that, since in the burglary statute vehicles, watercraft and aircraft are "structures," then dwelling houses in the burglary statute, which are "structures," must also include vehicles, watercraft and aircraft. The Tenth Circuit ignored this syllogism.

Fifth, the Tenth Circuit wrongly described Marquez's position as "blur[ring] the difference between the two forms of burglary." 875 F.3d at 1343. That comment demonstrates the Tenth Circuit disregarded the indisputable point that it conforms with the burglary statute's privacy-protection purpose for the legislature to increase punishment under § 30-16-3(A) for unlawful entry into a structure the victim uses as a home regardless of the type of structure. *See Muqqddin*, 285 P.3d at 632 (protection of the security of habitation is relevant when construing New Mexico's burglary statute).

Sixth, the Tenth Circuit mistakenly relied on the dictionary meaning of "house" and the common law meaning of "dwelling house." 875 F.3d at 1343. The Tenth Circuit opined that "[w]e do not ordinarily think of a 'house' (as in the term 'dwelling house') as referring to a vehicle, watercraft, or aircraft." *Id.* The Tenth Circuit also observed that at common law "dwelling house" referred to a building. *Id.* Those propositions are irrelevant. New Mexico has defined "dwelling house" its own way: "any structure, any part of which is customarily used as living quarters." NMRA Crim. UJI 14-1631. In other words, New Mexico did not define "dwelling house" as a dictionary would, nor as the common law did. The New Mexico Supreme Court has said that, while not intending a radical departure from the common law, the legislature by enacting § 30-16-3 intended to expand beyond the common law the prohibited spaces that can be burglarized. *Muqqddin*, 285 P.3d at 630. Moreover, as the Tenth Circuit conceded, 875 F.3d at 1346, New Mexico defines "dwelling" in N.M. Stat. Ann. § 30-3-8(A) the same way as New Mexico defines "dwelling house." Thus, the meaning of the word "house" has no relevance to the meaning of the term "dwelling house" in New Mexico law.

Seventh, the Tenth Circuit exaggerated the import of *State v. Ruiz*, 617 P.2d 160 (N.M. Ct. App. 1980), *superseded by statute on other grounds as recognized in*, *State v. McCormack*, 682 P.2d 742, 744-45 (N.M. Ct. App. 1984). The court said it "had little reason to expect the New Mexico Supreme Court to decide the issue differently than the New Mexico Court of Appeals did in *Ruiz*." App. A at 10, n. 2. But there are compelling reasons why the Supreme Court would decide differently than the *Ruiz* court did, even assuming arguendo the *Ruiz* court actually decided a "dwelling house" is only real property.

In *Ruiz*, after reversing the defendant's burglary conviction on other grounds, *id.* at 162-67, the New Mexico Court of Appeals opined that the trial court could have properly given a lesser-included, criminal trespass instruction if the defendant had proffered a correctly-worded instruction. *Id.* at 168-69. In discussing whether criminal trespass of the lands of another was necessarily included in burglary of a dwelling house, the appellate court said that, because the case involved the latter offense, the court was not concerned with vehicles, watercraft, aircraft or other structures. *Id.* at 167. It reasoned in part that a person who burglarizes a dwelling house also trespasses on "lands" because "lands" include buildings and fixtures and is synonymous with real property. *Id.* at 168. The *Ruiz* decision gave no indication either party argued a "dwelling house" could include a vehicle, watercraft or aircraft. There would have been no point in doing so, since the structure burglarized in *Ruiz* was not a vehicle, watercraft, aircraft or something similar. It was real property. *Id.* at 162, 168.

Indisputably, the *Ruiz* court did not face any of the powerful reasons why "dwelling houses" include vehicles, watercraft and aircraft. The combination of the post-*Ruiz* decisions in *Foulenfont* and *Muqqddin*, the broad nature of the definition of "dwelling house," and the privacy interests underlying the extra punishment for residential burglary are much more persuasive evidence of the "dwelling house" boundaries than the remarks

in *Ruiz* that did not address that issue under the fire of adversarial testing. Accordingly, it is extremely unlikely New Mexico's highest court would follow *Ruiz*.

This compelling critique of the Tenth Circuit's resolution of the question whether New Mexico residential burglary is generic burglary establishes the Tenth Circuit's decision conflicts with this Court's precedent requiring certainty that an offense necessarily qualifies as an ACCA predicate offense before imposing an ACCA sentence.

E. This case squarely presents an important question of federal law this Court should resolve.

The ACCA requires a district court to impose a "much more severe penalty" than it would otherwise impose—from a zero-to-ten-year range, *see* 18 U.S.C. § 924(a)(2), to a 15-years-to-life range, 18 U.S.C. § 924(e)(1). *Welch v. United States*, 136 S. Ct. 1257, 1261 (2016). For that reason this Court has considered proper application of the ACCA so critical it has granted certiorari to address the ACCA's interpretation many times. *See Sims*; *Stitt*; *Stokeling v. United States*, 138 S. Ct. 1438 (2018); *Mathis; Welch*; *Johnson*, 135 S. Ct. 2551 (2015); *Descamps v. United States*, 570 U.S. 254 (2013); *Sykes v. United States*, 564 U.S. 1 (2011), *overruled by*, *Johnson v. United States*, 135 S. Ct. 2551(2015); *Johnson v. United States*, 559 U.S. 133 (2010); *Chambers v. United States*, 555 U.S. 122 (2009); *Begay v. United States*, 553 U.S. 137 (2008); *James v. United States*, 550 U.S. 192 (2007), *overruled by*, *Johnson v. United States*, 135 S. Ct. 2551 (2015); *Shepard*; *Taylor*. That case list includes recent certiorari grants involving the meaning of "burglary" implicated in this case. *See Sims*; *Stitt*.

Marquez has shown that, if the Tenth Circuit had conformed its decision-making process to this Court's certainty mandate, the Tenth Circuit would have held he is not subject to the ACCA. The circuit court's unsound approach made a difference to this case's outcome.

For these reasons, this case squarely presents an important issue of federal law relevant to every case in which the sentencing court must address whether the ACCA applies: how federal courts should approach their task of determining whether an offense satisfies an ACCA's predicate offense definition.

F. This Court should grant certiorari in this case.

The Tenth Circuit did not live up to its obligation to approve an ACCA sentence only if it is certain the defendant has three convictions for offenses that necessarily satisfy an ACCA predicate offense definition. That deficiency resulted in Marquez serving an unwarranted ACCA sentence. This Court should grant certiorari to correct the Tenth Circuit's flawed analysis and provide direction to the lower courts on the important question of federal law this case squarely presents.

II. Because New Mexico courts expressly have held that the prosecution is not required to prove any threat, or any conduct at all, directed toward the victim of an aggravated assault, the Tenth Circuit Court of Appeals' decision, that the offense nonetheless has as an element the use, attempted use or threatened use of violent force, is in conflict with five other circuits that have held a state offense must have as an element a mens rea relating to the victim to come within the force clause.

Citing with approval Tenth Circuit Judge Hartz's dissent in *United States v. Ramon Silva*, 608 F.3d 663, 674-78 (10th Cir. 2010), *abrogated on other grounds, as recognized by United States v. Marquez*, 728 F. App'x 884 (2018), the New Mexico Court of Appeals has definitively ruled that to prove New Mexico aggravated assault with a deadly weapon ("AADW") the state is "not required to prove any threat – or any conduct at all – directed toward the [victim]." *State v. Branch*, 417 P.3d 1141, 1147-49 (N.M. Ct. App. 2018). Had the Fourth, Fifth, Seventh, Ninth and Eleventh Circuits reviewed whether this offense comes within § 924(e)(2)(B)(i)'s force clause definition, settled precedent would have dictated a decision that New Mexico AADW is not a violent felony. The courts would have contradicted the Tenth Circuit because the offense is missing the "against the person of another" component essential to the force clause. *See e.g. United States v. Parral-Dominguez*, 794 F.3d 440, 445-46 (4th Cir. 2015) (discharging a firearm offense did not satisfy force clause because it could be committed without targeting or threatening to target occupant); *United States v. Alfaro*, 408 F.3d 204, 209 (5th Cir. 2005) (shooting into occupied dwelling under Virginia law does satisfy sentencing guidelines force clause definition in § 2L1.2, because accused could commit offense "merely by shooting a gun at a building that happens to be occupied" without deliberately shooting, attempting to shoot, or threatening to shoot another person); *United States v. Jaimes-Jaimes*, 406 F.3d 845, 849-50 (7th Cir. 2005) (offense did not fall within "against the person of another" element of guidelines' force clause because shooting at building or vehicle required only

that shooter should have realized there might be a human being present); *United States v. Narvaez–Gomez*, 489 F.3d 970, 976-77 (9th Cir. 2007) (discharging firearm at occupied dwelling under California law is categorically not a crime of violence because it may be committed with "purely reckless conduct" toward another person); *United States v. Estrella*, 758 F.3d 1239, 1248-54 (11th Cir. 2014) (government did not prove defendant's conviction for shooting at a vehicle satisfied against a person requirement in guideline's force clause because not apparent which of offense's mens rea elements formed basis of conviction – with knowledge damage would likely be done to property or to a person).

Branch undermines the Tenth Circuit's state law interpretation in *Ramon Silva* which held that New Mexico AADW is a violent felony as defined by the force clause. When the panel decided Marquez's appeal, it was bound by the latest New Mexico appellate court interpretation of the elements of aggravated assault. *Black & Veatch Corporation v. Aspen Insurance (Uk) Ltd.*, 882 F.3d 952, 967 (10th Cir. 2018). According to *Branch*, New Mexico AADW does not require any mens rea whatsoever – negligent, reckless, general intent, specific intent or otherwise – that has any nexus to another person. 417 P.3d at 1147-49. Thus, Marquez's AADW conviction is not a violent felony. This Court should grant certiorari to reconcile this circuit conflict and correct the Tenth Circuit's law that otherwise will continue to prescribe many years of unlawful punishment.

A. New Mexico aggravated assault with a dangerous weapon does not have as an element a mens rea nexus to another person.

The categorical approach applies to determine whether an offense qualifies as a violent felony" under the ACCA's force clause, which includes an offense that "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). *United States v. Deiter*, 890 F.3d 1203, 1211 (10th Cir. 2018). Under that approach, only the elements matter. *Mathis*, 136 S. Ct. at 2249. Accordingly, every conviction for the offense must "necessarily" satisfy the force clause

definition. *See Mathis*, 136 S. Ct. at 2255; *United States v. Degeare*, 884 F.3d 1241, 1244 (10th Cir. 2018). Sentencing courts must "focus on the minimum conduct criminalized by the state statute." *Moncrieffe*, 569 U.S. at 191.

In New Mexico, an assault consists of "any unlawful act, threat or menacing conduct which causes another person to reasonably believe that he is in danger of receiving an immediate battery." N.M. Stat. Ann. § 30-3-1(B). An assault is aggravated when it is committed with a deadly weapon. N.M. Stat. Ann. § 30-3-2(A). A deadly weapon is "any firearm . . .; or any weapon which is capable of producing death or great bodily harm . . . ; or any other weapons with which dangerous wounds can be inflicted." N.M. Stat. Ann. § 30-1-12(B).

In *Branch*, the New Mexico Court of Appeals made clear that a person can commit AADW by an "unlawful act" without a mens rea nexus to another person. In that case, the defendant was convicted of aggravated battery of his son by shooting and injuring him. He was also convicted of AADW of his wife, who was walking with the son at the time of the shooting, on the theory that the defendant's conduct caused his wife to reasonably believe he was about to batter her as well. 417 P.3d at 1145, 1146. The defendant challenged his AADW conviction on the ground that there was insufficient evidence of a nexus between his mens rea and his wife. He argued his intent was solely against his son. At the very least, the state should have to prove he acted recklessly towards his wife, the defendant argued. *Id.* at 1147. The New Mexico Court of Appeals rejected the defendant's arguments. No element of the offense required any intent with respect to the wife, the court held. *Id.* at 1147-49.

The Court of Appeals reasoned as follows. It noted that the New Mexico Supreme Court had previously affirmed an aggravated assault conviction in a "nearly identical" bystander-assault case in *State v. Manus*, 597 P.2d 280, 284 (N.M. 1979), *overruled on other grounds*, *Sells v. State*, 653 P.2d 162 (N.M. 1992). The Court of Appeals pointed

out *Manus* stood for the proposition that "[t]he [s]tate was not required to prove that [the defendant] intended to assault [the bystander], but only that he did an unlawful act which caused [the bystander] to reasonably believe that she was in danger of receiving an immediate battery, that the act was done with a deadly weapon, and that it was done with general criminal intent." *Branch*, 417 P. 3d at 1148 (quoting *Manus*, 597 P.2d at 284) (brackets added in *Branch*). The Court of Appeals explained this meant "[t]here is no nexus required between Defendant and [the victim]." *Id.* "Liability under the statute is only limited by the requisite mental state of conscious wrongdoing and by the requirement that the victim's fear must be reasonable." *Id.*

Consequently, the evidence supported the defendant's conviction. *Id.* at 1148-49. The defendant committed the unlawful act of shooting his son. That caused his wife, who was standing next to his son, to reasonably believe she was also going to be shot. "Nothing more is required." *Id.* at 1149.

The defendant protested that the evidence did not show he made any threats or exhibited any menacing conduct towards his wife. That did not matter, the court ruled. He was convicted of an alternative method of committing aggravated assault, an "unlawful act" that "does not rely on threatening or menacing conduct," the court observed. *Id.* Under *Manus*, the "state was not required to prove any threat – or any conduct at all – directed toward the bystander." *Id.* It was enough that the defendant acted unlawfully when he shot his son. *Id.*

Significantly, in support of its holding, the New Mexico Court of Appeals cited with approval Judge Hartz's interpretation of New Mexico law regarding AADW in his dissent in *Ramon Silva*. The court noted Judge Hartz's conclusion that "a person [in New Mexico] who intentionally handles a weapon in a manner that induces fear of battery can be guilty of assault even if he merely wants to show off his dexterity in handling the

weapon, without any interest in inducing fear." *Branch*, 417 P.3d at 1148 (quoting *Ramon Silva*, 608 F.3d at 675).

In sum, New Mexico AADW requires "no nexus . . . between" the defendant and the victim, *id.*; the "state [is] not required to prove any threat – or any conduct at all– directed toward the" victim, *id.* at 1149. The general criminal intent, that is, the conscious wrongdoing, relates to the act itself, without any regard to its relationship to the victim, intentional, reckless, negligent or otherwise. In other words, as Judge Hartz understood, someone can be guilty of AADW who commits an unlawful act with conscious wrongdoing by handling a weapon in a manner that induces fear of battery without any mens rea of any sort related to the person whose fear has been induced. *Ramon Silva*, 608 F.3d at 675; N.M. Stat. Ann. § 30-7-4(A)(3) (prohibiting negligent use of a deadly weapon by handling a firearm in a negligent manner); s*ee also United States v. Miera*, 2013 WL 6504297, at ** 13-18 (D.N.M. Nov. 22, 2013) (unpublished) (agreeing with Judge Hartz's dissent in *Ramon Silva* that under New Mexico law aggravated assault does not require a scienter directed toward the victim).

Tenth Circuit precedent obligated Marquez's panel to follow the decision of an intermediate state court absent convincing evidence that the New Mexico Supreme Court would decide otherwise. *McCracken v. Progressive Direct Insurance Company*, 896 F.3d 1166, 1173 (10th Cir. 2018). All the evidence points to the New Mexico Supreme Court holding the same opinion as the *Branch* court. The *Branch* court followed the New Mexico Supreme Court's reasoning in *Manus*. *Branch*, 417 P.3d at 1148. New Mexico's Supreme Court cited with approval the opinion of the court of appeals in Branch's initial appeal in which it found that "'[l]iability under the [aggravated assault] statute is only limited by the requisite mental state of conscious wrongdoing and by the requirement that the victim's fear must be reasonable.'" *State v. Ramirez*, 409 P.3d 902, 910 (N.M. 2017) (quoting *State v. Branch*, 387 P.3d 250, 256 (N.M. Ct. App. 2016)). The New Mexico

Supreme Court also quashed the granting of the Branch's certiorari petition. *Branch*, 417 P.3d at 1145. It is apparent then there is no convincing evidence the New Mexico Supreme Court would decide the *Branch* issue any differently than the New Mexico Court of Appeals did. Therefore, the Tenth Circuit should have accepted and followed that court's decision defining the elements of New Mexico's aggravated assault statute.

B. According to the reasoning of the Fourth, Fifth, Seventh, Ninth and Eleventh Circuits, New Mexico AADW does not satisfy the ACCA's elements clause.

The *Branch* holding has a determinative effect on whether New Mexico AADW is a "violent felony" under the ACCA's elements clause. To fit within that clause an offense must have as an element the use, attempted use or threatened use of physical force *against* another person. § 924(e)(2)(B)(i); *see also Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) (stressing the analogous phrase in 18 U.S.C. § 16(a)). When an offense has no mens rea of any kind directed towards a person, the offense does not meet the force clause's requirements.

In other words, as five other circuits have found, to fall within the force clause, an offense must have as an element mens rea relating to another person. For example, in *Parral-Dominguez*, the Fourth Circuit discussed whether the North Carolina offense of discharging a firearm into an occupied building satisfied the sentencing guidelines § 2L1.2's force clause – a clause with language identical to the ACCA's force clause. 794 F.3d at 445-46. The court ruled it did not because proof that the accused intended to target or threaten the building's occupant was not necessary. 794 F.3d at 445, 447. Thus, the statute categorically did not have as an element the use or attempted use of physical force against the person of another. *Id.*

Similarly, in *Alfaro*, the Fifth Circuit held Virginia's discharging a firearm into an occupied building did not require the use, threatened use, or attempted use of force against the person of another. 408 F.3d at 209. The court said since the offense could be

committed without shooting, attempting to shoot, or threatening to shoot another person, it did not satisfy the force clause's expectation that force be used "against the *person* of another." *Id.* (emphasis in original). This also was the holding of the Seventh Circuit in *Jaimes-Jaimes*, 406 F.3d at 849-50. There the court found that Wisconsin's discharging a firearm into a vehicle or building offense is established with proof that the accused should have realized there might be a person present. *Id.* at 50. The prosecution was not required to prove, as the force clause expects, that physical force was deliberately used against another person. *Id.*

The Ninth Circuit said an offense that may be committed recklessly toward another person categorically is not one with an element of deliberate use or threatened use of force against the person of another. *Narvaez–Gomez*, 489 F.3d at 976-77. It concluded that California's discharging a firearm at an occupied dwelling was not a crime of violence as defined in the sentencing guidelines § 2L1.2's force clause. The offense did not involve the intentional use of force against another person because it could be perpetrated by purely reckless conduct. *Id*. Likewise, in *Estrella*, the Eleventh Circuit found the government failed to prove Florida's shooting at a vehicle offense required force directed against another person. 758 F.3d at 1253-54. The offense's mens rea element did not satisfy the force clause in § 2L1.2 because the offense can be committed with knowledge that damage would be done only to property. *Id.*

The decisions of these five circuits conflict directly with the Tenth Circuit's. "[I]t does not make sense to say that a person is volitionally using physical force *against* someone . . . when he neither intended to hit the person or thing nor consciously disregarded the risk that he might do so." *United States v. Trinidad-Aquino*, 259 F.3d 1140, 1145 (9th Cir. 2001) (emphasis in original). In New Mexico, to prove a defendant guilty of AADW, the prosecution does not have to show the defendant had any particular mens rea with respect to the victim. *Branch*, 417 P.3d at 1147-49. In five other circuits

this offense categorically would not fall within the force clause and Marquez would not have been given an ACCA sentence. This entrenched conflict can be resolved only by this Court.

C. Because *Ramon Silva* is based on an incorrect interpretation of New Mexico law, it was wrongly decided and conflicts with the reasoning of five other circuits.

Branch establishes the Tenth Circuit's view of state law in *Ramon Silva* regarding the mens rea element of New Mexico AADW was clearly wrong. In *Ramon Silva*, the court held New Mexico AADW satisfied the force clause. 608 F.3d at 669-74. That holding relied on its declaration that "apprehension-causing aggravated assault requires proof of more than the display of dexterity in handling a weapon; the crime requires proof that a defendant purposefully threatened or engaged in menacing conduct *toward* a victim, with a weapon capable of producing death or great bodily harm." 608 F.3d at 674 (emphasis in original). Unlike Judge Hartz in his dissent, the *Ramon Silva* majority disregarded the unlawful act part of assault, *see* N.M. Stat. Ann. § 30-3-1(B), that *Branch* emphasized is a part of the assault statute, just as much as threats and menacing conduct are[6]. *Branch*, 417 P.3d at 1149.

Branch demonstrates that in *Ramon Silva* the Tenth Circuit relied on an incorrect idea of New Mexico AADW's elements. According to *Branch*, that crime does *not* "require[] proof that a defendant purposefully threatened or engaged in menacing conduct *toward* a victim," as the majority in *Ramon Silva*, 608 F.3d at 674, said. *Branch*, 417 P.3d at 1149. Rather, the "state [is] not required to prove any threat—or any conduct at all—directed toward the" victim. *Id.* at 1148. That the *Branch* court cited with approval Judge Hartz's dissent confirms the conflict between the *Ramon Silva* ruling and New Mexico law. *Id.*

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[6] The government never submitted state record documentation to determine which kind of assault Marquez violated and never argued the statute is divisible.

Correctly understood, "the minimum conduct criminalized by" the New Mexico AADW statute, *see Moncrieffe*, 569 U.S. at 191, has no mens rea element with respect to the victim. As demonstrated under section II (A) above, that means that offense is not a violent felony as defined in the ACCA's force clause.

D. This Court should grant Marquez's petition to overturn circuit precedent that is based on a misinterpretation of state law and that, consequently, conflicts with other circuits' decisions.

The Court should not let stand a wrongly decided case, *Ramon Silva*, that has required, and will continue to require, the imposition of the ACCA's severe punishment on many defendants. *See Welch*, 136 S. Ct. at 1261 (referring to an ACCA sentence as a "much more severe penalty" than a non-ACCA sentence). Ensuring that the ACCA apply only in circumstances consistent with the Constitution and Congress's intent is an exceptionally important goal. That is why this Court has sought to address the ACCA's meaning numerous times. *See United States v. Sims*, 138 S. Ct. 1592 (2018) (S. Ct. No. 17-766); *United States v. Stitt*, 138 S. Ct. 1592 (S. Ct. No. 17-765); *Stokeling v. United States*, 138 S. Ct. 1438 (S. Ct. No. 17-5554); *Mathis; Welch*; *Johnson*, 135 S. Ct. at 2556-57 (listing five other ACCA Supreme Court cases); *Descamps v. United States*, 570 U.S. 254 (2013); *Johnson v. United States*, 559 U.S. 133 (2010); *Shepard v. United States*, 544 U.S. 13 (2005). It is also important that the Court overturn *Ramon Silva* to remedy its unecessary conflict with the decisions of other circuits.

Conclusion

For the foregoing reasons, Marquez requests the Court grant his petition for writ of certiorari.

Respectfully submitted,

STEPHEN P. MCCUE
Federal Public Defender

DATED: September 21, 2018

s/ Benjamin A. Gonzales
By: BENJAMIN A. GONZALES*
Assistant Federal Public Defender

Attorneys for the Petitioner
* Counsel of Record

Appendix

FILED
United States Court of Appeals
Tenth Circuit

June 26, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

LEONARD G. MARQUEZ,

Defendant - Appellant.

No. 17-2221
(D.C. Nos. 1:16-CV-00641-JAP-SMV and 1:07-CR-00286-JAP-1)
(D. N.M.)

ORDER DENYING A CERTIFICATE OF APPEALABILITY

Before **LUCERO**, **HARTZ**, and **McHUGH**, Circuit Judges.

Defendant Leonard Marquez seeks a certificate of appealability (COA) to appeal the denial by the United States District Court for the District of New Mexico of his motion for relief under 28 U.S.C. § 2255. *See* 28 U.S.C. § 2253(c)(1)(B) (requiring COA to appeal denial of relief under § 2255). We decline to grant a COA and dismiss the appeal.

A COA will issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This standard requires "a demonstration that . . . includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks omitted). In other

words, the applicant must show that the district court's resolution of the constitutional claim was either "debatable or wrong." *Id.*

In 2011, Defendant was sentenced to a term of 15 years under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), for being a felon in possession of a firearm following three prior convictions for violent felonies. The ACCA defines a *violent felony* as one that:

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another [the elements clause]; or
> (ii) is burglary, arson, or extortion, involves use of explosives [the enumerated-offenses clause], or otherwise involves conduct that presents a serious potential risk of physical injury to another [the residual clause].

Id.

After the Supreme Court decided in *Johnson v. United States*, 135 S. Ct. 2551 (2015), that the residual clause is unconstitutionally vague, Defendant filed his motion under § 2255 challenging the sentencing court's characterization of his prior convictions for New Mexico burglary and New Mexico aggravated assault as violent felonies. The district court denied the motion on the ground that New Mexico burglary is a violent felony under the enumerated-offenses clause and New Mexico aggravated assault is a violent felony under the elements clause.

In this court, Defendant acknowledges that his claims are contrary to circuit precedent: Our decision in *United States v. Turrieta*, 875 F.3d 1340, 1347 (10th Cir. 2017), held that New Mexico residential burglary fits within the ACCA's enumerated crime of burglary. And we held in *United States v. Ramon Silva*, 608 F.3d 663, 670–671 (10th Cir. 2010), *abrogated on other grounds by Mathis v. United States*, 136 S. Ct. 2243

(2016), that New Mexico's crime of aggravated assault is a violent offense under the elements clause of the ACCA. *See also United States v. Maldonado-Palma*, 839 F.3d 1244, 1249–50 (10th Cir. 2016) (aggravated assault with a deadly weapon under NMSA 1978, § 30–3–2(A) is a crime of violence under the elements clause of USSG § 2L1.2 (2015)), *cert. denied*, 137 S. Ct. 1214 (2017).

Defendant argues that our precedents were wrongly decided. But we cannot overturn our precedents. *See United States v. Badger*, 818 F.3d 563, 569 (10th Cir. 2016). Accordingly, no reasonable jurist could debate the correctness of the district court's denial of relief.

We therefore **DENY** Defendant's request for a COA and **DISMISS** this appeal.

Entered for the Court

Harris L Hartz
Circuit Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

v.

No. CIV 16-641 JAP/SMV
No. CR 07-286 JAP

LEONARD G. MARQUEZ,

Defendant.

ORDER ADOPTING MAGISTRATE JUDGE'S PROPOSED FINDINGS AND RECOMMENDED DISPOSITION

On May 5, 2017, United States Magistrate Judge Stephen M. Vidmar filed Proposed Findings and Recommended Disposition (PFRD) (Civ. No. 16), recommending that Defendant Leonard Marquez's Motion to Correct Sentence Pursuant to 28 U.S.C. § 2255 (Civ. No. 1) be denied. Marquez objected to the PFRD on July 25, 2017. (Civ. No. 21). The government neither objected to the PFRD nor responded to Marquez's objections. On September 18, 2017, this case was reassigned from Senior District Judge C. Leroy Hansen to Senior District Judge James A. Parker. The Court conducted a *de novo* review of the portions of the PFRD to which Marquez objects and will overrule the objections, adopt the PFRD, deny Marquez's Motion, and dismiss this § 2255 proceeding with prejudice.

Background

On February 16, 2007, Marquez was charged with being a felon in possession of a firearm, 18 U.S.C. §§ 922(g)(1), 924(a)(2). Presentence Report ("PSR") at 3. On September 8, 2010, he pleaded guilty to the offense. *Id*

The PSR stated that Marquez qualified as an armed career criminal under the Armed Career Criminal Act ("ACCA") because he had at least three prior violent felony convictions: two for New Mexico residential burglary,[1] NMSA 1978, § 30-16-3(A), and one for New Mexico aggravated assault with a deadly weapon, NMSA 1978, § 30-3-2(A), and one for New Mexico attempted robbery, NMSA 1978, §§ 30-16-2, 30-28-1. The PSR indicated that all four convictions qualified as violent felonies under § 924(e)(2)(B) of the ACCA. PSR at 7–8, 31.

With the armed career criminal enhancement, Marquez's offense level was 33. *Id.* at 7. Based on a downward adjustment for acceptance of responsibility, his total offense level was 30. With a criminal history category of VI, Marquez's guideline imprisonment range was 168–210 months. *Id.* at 8, 31. On March 29, 2011, the Court sentenced Marquez to 180 months imprisonment. Marquez did not appeal his sentence. This is Marquez's first § 2255 Motion.

United States Supreme Court decisions of *Johnson and Welch*

In *Johnson v. United States* ("*Johnson II*"), 135 S. Ct. 2551, 2557 (2015), the Supreme Court held that the so-called "residual clause" of the definition of "violent felony" in the ACCA was unconstitutionally vague. The ACCA defined "violent felony" as follows:

> 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

[1] The PSR indicated that Marquez had two prior New Mexico residential burglary convictions (both of which qualified as violent felonies and contributed to his armed career criminal designation, along with his convictions for aggravated assault and attempted robbery). PSR at 7–8; *see also* PSR at 10–11, 18–19. In his § 2255 Motion, Marquez stated that he had just one residential burglary conviction, though he cited to the PSR for this point. § 2255 Motion at 1–2, 19. Marquez subsequently referred to multiple prior burglary "convictions," acknowledging more than one. Reply at 10 (Civ. No. 15).

> (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) (emphasis added). The closing words of this definition, italicized above, have come to be known as the "residual clause."

In *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016), the Supreme Court determined that the ruling in *Johnson II* was substantive (as opposed to procedural) and, therefore, had "retroactive effect in cases on collateral review." Accordingly, *Welch* opened the door for individuals sentenced under the residual clause of the ACCA's violent-felony definition to move under § 2255 to vacate their sentences as unconstitutional.

Summaries of Parties' Arguments and Judge Vidmar's PFRD

Marquez argued, in part, that his prior convictions only qualified as violent felonies under the now-invalidated residual clause and that, he is, therefore, entitled to be resentenced. The government contended that his two residential burglary convictions qualified under the ACCA's so-called "enumerated clause," which designated certain specific crimes as violent felonies.[2] Response at 5 (Civ. No. 8). The government asserted that whether Marquez's third conviction for aggravated assault with a deadly weapon qualified as an ACCA violent felony under the so-called "force clause" of the ACCA depended on the Tenth Circuit's decision in *United States v. Maldonado-Palma*, 839 F.3d 1244 (10th Cir. 2016), *cert. denied*, 137 S.Ct. 1214 (2017), which was then pending.[3,4] *Id.* at 2–4.

[2] The government did not contend that New Mexico residential burglary qualified under the ACCA's "force clause."
[3] The government also requested a stay of proceedings pending a decision in *Maldonado-Palma*. Response at 2–4. *Maldonado-Palma* was decided shortly after the government filed its Response and before Marquez replied. The government's request for a stay of proceedings will therefore be denied as moot.

A. New Mexico residential burglary is a violent felony under the enumerated clause of § 924(e)(2)(B)

In finding that Marquez's two earlier convictions for New Mexico residential burglary qualified as ACCA violent felonies, Judge Vidmar first determined that the pertinent state statute, NMSA § 30-16-3, was divisible and then applied the modified categorical approach to decide that Marquez was convicted for New Mexico residential burglary under § 30-16-3(A). PFRD at 8–9. After a thorough analysis, Judge Vidmar rejected Marquez's broad interpretation of New Mexico's residential burglary statute, *id.* at 11–20, concluding that the burglary of a dwelling under § 30-16-3(A) "meets the generic definition of 'burglary'" and that a New Mexico residential burglary conviction qualified as an enumerated ACCA violent felony, "irrespective of the now-unconstitutional residual clause." *Id.* at 20.

B. New Mexico aggravated assault with a deadly weapon is a violent felony under the force clause of § 924(e)(2)(B)

In finding that Marquez's conviction for New Mexico assault with a deadly weapon qualified as an ACCA violent felony, Judge Vidmar observed that the parties did not dispute that Marquez was convicted of aggravated assault with a deadly weapon under NMSA § 30-3-2(A). PFRD at 21. Judge Vidmar then recited the Tenth Circuit Court's holding in *Maldonado-Palma* that a conviction of aggravated assault with a deadly weapon under the force clause of Sentencing Guideline § 2L1.2 was categorically a crime of violence. Judge Vidmar reasoned that the holding in *Maldonado-Palma* applied "in equal measure to the identically worded force

[4] The government did not argue that Marquez's attempted robbery conviction could be used to enhance his sentence. It conceded that it would not rely upon this conviction to enhance Marquez's sentence "for purposes of this case alone." Response at 2.

clause of the ACCA's definition of violent felony" and that *Maldonado-Palma* compelled the conclusion that New Mexico aggravated assault with a deadly weapon qualified as an ACCA violent felony under the force clause. *Id.* at 22, 23. Stated differently, the ACCA's now-invalidated residual clause played no role in the determination of whether the pertinent crime constituted an ACCA violent felony. *Id.* at 23.

Having determined that Marquez's two convictions for New Mexico residential burglary and one conviction for New Mexico aggravated assault with a deadly weapon qualified as ACCA violent felonies, Judge Vidmar found that Marquez was properly sentenced and recommended that his § 2255 Motion be denied.

Analysis of Marquez's Objections

A. Legal Standard

A district judge must "make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C). "[O]bjections to the magistrate judge's report must be both timely and specific to preserve an issue for de novo review by the district court[.]" *United States v. 2121 E. 30th St.*, 73 F.3d 1057, 1060 (10th Cir. 1996). To preserve an issue, a party's objections to a PFRD must be "sufficiently specific to focus the district court's attention on the factual and legal issues that are truly in dispute." *Id.*

B. Objections

1. *New Mexico Residential Burglary*

While *Johnson II* invalidated the residual clause of the ACCA, it did not impact the enumerated offenses listed in 18 U.S.C. § 924(e)(2)(B)(ii), which include "burglary." In *Mathis v. United States*, 136 S.Ct. 2243, 2248 (2016), the Supreme Court held that the enumerated crimes in § 924(e)(2)(B)(ii) referred only to their "generic versions – not to all variants of the offense." Thus, for burglary to qualify as an ACCA violent felony, the offense had to "contain the following elements: an unlawful or unprivileged entry into … a building or other structure, with intent to commit a crime." *Id.* If a statute "swept more broadly than the generic crime," a conviction under that law would not support a sentencing enhancement under the ACCA. *Descamps v. United States*, 133 S.Ct. 2276, 2283, *reh'g denied,* 134 S.Ct. 41 (2013). But, a conviction under a statute with these elements or with a narrower version of these elements would satisfy the definition of a generic burglary sufficient to justify sentencing enhancement under the ACCA. *Id.* at 2781.

In analyzing pertinent state and federal law, Judge Vidmar properly employed the modified categorical approach in comparing the elements of the crime of conviction with the elements of the generic crime. PFRD at 6–10. He concluded that New Mexico residential burglary, i.e., the unauthorized entry of a dwelling house with the intent to commit any felony or theft therein, was substantially the same as, or narrower than, generic burglary. *Id.* at 10.

Marquez objects to Judge Vidmar's finding that New Mexico residential burglary is substantially similar to generic burglary and, therefore, qualifies as a violent felony under the

enumerated clause of § 924(e)(2)(B). Objections at 2–12. More specifically, Marquez contends that residential burglary under NMSA § 30-16-3(A) does not extend to the burglary of the structures listed in the non-residential burglary subsection under NMSA § 30-16-3(B), even if used for habitation. *Id.* at 2–7. Marquez maintains that all the structures listed in subsection B can be read into subsection A by dint of the fact that New Mexico's Uniform Jury Instruction 14-1631 defines "dwelling house" as "*any structure*, any part of which is customarily used as living quarters." *Id.* at 2 (emphasis added) (internal quotation marks omitted). He urges the Court to apply New Mexico courts' interpretations of the meaning of "*other structure*" under § 30-16-3(B) in evaluating the meaning of "dwelling house" under § 30-16-3(A).

Similar to Magistrate Judge Vidmar, this Court observes that Marquez offered no case law to support his interpretation of § 30-16-3(A). Instead, Marquez cited only to case law evaluating convictions under subsection B of the statute. *See* Objections at 2–3 *citing State v. Foulenfont*, 1995-NMCA-028, ¶ 2, 119 N.M. 788 (evaluating whether a fenced-in area "comes within the definition of 'structure' in Section 30-16-3(B)").[5] Marquez also relied on *State v. Office of Public Defender ex rel. Muqqddin*, 2012-NMSC-029, ¶ 61, 285 P.3d 622, but in *Muqqddin*, the state court was evaluating whether penetrating the gas tank of a vehicle and removing its tires satisfied the "entry" element of burglary of a vehicle under subsection B.

[5] Marquez argues that the court in *Foulenfont* was analyzing the "all-encompassing introductory paragraph that precedes" subsections A and B when it interpreted "other structure" to mean "an enclosure similar to a vehicle, watercraft, aircraft, or dwelling." Objections at 4. But, there is no question that the court in *Foulenfont* was tasked with deciding if the pertinent crime "fit within the definition of burglary set forth in NMSA 1978, Section 30–16–3(B)…." *Foulenfont*, 1995-NMCA-028, ¶ 2, 119 N.M. at 789. Moreover, a person cannot be convicted under the introductory section—a person may be convicted of either residential burglary under § 30-16-3(A), a third-degree felony, or non-residential burglary under § 30-16-3(B), a fourth-degree felony.

Marquez has not identified any case where New Mexico state courts have applied the term "other structure" to a conviction under subsection A of § 30-16-3.

Nor does Marquez's reliance on New Mexico case law interpreting statutes outside of § 30-16-3 persuade the Court that Magistrate Judge Vidmar's findings and recommendations were incorrect. For example, Marquez cites two cases that evaluated convictions under New Mexico's separate *aggravated* burglary statute, § 30-16-4. Objections at 4–5 (citing *State v. Alvarez-Lopez*, 2004-NMSC-030, 136 N.M. 309, and *State v. Romero*, 1998-NMCA-057, 125 N.M. 161). But, those decisions shed little or no light on the interpretation of the statutory elements in § 30-16-3(A).

Marquez also argues that the New Mexico cases cited by Magistrate Judge Vidmar do not support the Magistrate Judge's findings and recommendations. Objections at 6–8. The Court has reviewed the cases in question, *State v. Ervin*, 1981-NMCA-068, ¶¶ 1–4, 96 N.M. 366, 367, *State v. Lara*, 1978-NMCA-112, ¶¶ 4–5, 92 N.M. 274, 275, and *State v.* Ruiz, 1980-NMCA-123, 94 N.M. 771, *superseded by statute on other grounds as stated in State v. McCormack*, 1984-NMCA-042, ¶ 12, 101 N.M. 349, 351–352, and finds that Marquez's objections are without merit. Marquez's interpretations of New Mexico case law and jury instructions fail to convince the Court that NMSA § 30-16-3(A) "sweeps more broadly than the generic crime," such that Marquez's conviction for New Mexico residential burglary would not support a sentencing enhancement under the ACCA.

Finally, the Court has carefully considered but rejects Marquez's additional argument regarding the scope of generic burglary and/or that New Mexico' residential burglary statute is

overbroad, his position that the New Mexico residential burglary is not divisible, his objection to the application of the modified categorical approach, and his disagreement with Magistrate Judge Vidmar's interpretation of *United States v. Spring*, 80 F.3d 1450, 1462 (10th Cir. 1996). *See* Objections at 8–12. In short, Judge Vidmar did not err in relying on the Tenth Circuit's decision in *Spring*. The Magistrate Judge acknowledged the well-established rule that generic burglary excludes the burglary of vehicles, i.e., movable structures used for transportation. PFRD at 17–18. Magistrate Judge Vidmar explained the rule adopted by the Tenth Circuit that a vehicle used as a habitation satisfied generic burglary, and he identified subsequent Tenth Circuit case law affirming that principle. *Id.* at 18–19. Thus, Marquez's objections as to the scope of generic burglary are unavailing.

In sum, the Court will overrule Marquez's objections and will adopt Judge Vidmar's findings and recommendations as to New Mexico residential burglary. Marquez has raised no more than a theoretical possibility that § 30-16-3(A) could be applied to conduct outside the generic definition of burglary; he has not shown a realistic probability that New Mexico courts would apply this statute to conduct that falls outside the generic definition of the crime. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). For the reasons stated above, the

Court concludes that New Mexico residential burglary, § 30-16-3(A), qualifies as an ACCA violent felony under the enumerated clause of § 924(e)(2)(B).[6]

2. *New Mexico Aggravated Assault with a Deadly Weapon*

Marquez objects to Judge Vidmar's finding that New Mexico aggravated assault with a deadly weapon, § 30-3-2(A), qualifies as a violent felony under the force clause of § 924(e)(2)(B). As discussed *supra*, Judge Vidmar believed that the Tenth Circuit's recent decision in *Maldonado-Palma* controlled the outcome. *See* PFRD at 22–23. In *Maldonado-Palma*, the Tenth Circuit Court found that New Mexico aggravated assault, § 30-3-2(A), qualified as a "crime of violence" under the Sentencing Guidelines' identically worded force clause. 839 F.3d at 1248–50.

Marquez urges that a recent decision of the New Mexico Court of Appeals, *State v. Branch*, 2016-NMCA-071, 387 P.3d 250, *cert. granted*, __ P.3d __ (No. 35,951, 7/28/16), undercuts the holdings of *Maldonado-Palma* and *Ramon Silva*, 608 F.3d 663, 671 (10th Cir. 2010) and thus compels a different result. Objections at 12–16. In short, Marquez argues that according to the reasoning of *Branch*, aggravated assault in New Mexico does not require proof of the defendant's intent to assault the victim—only that the victim reasonably believed he or she was in danger. *Id.* at 14–15. Because the Tenth Circuit's analysis in *Maldonado-Palma* and *Ramon Silva* rested on the principle that the use of physical force must be intentionally directed

[6] The undersigned judge has reached this conclusion in a prior case, *Turrieta v. United States*, No. CIV 16-395 JAP/KK, [Doc. 10] at 6–8 (D.N.M. Oct. 28, 2016). Moreover, judges in this District have agreed that § 30-16-3(A) qualifies as an enumerated violent felony or as a crime of violence. *See, e.g.*, *United States v. Alires*, No. CR 14-3902 JB, [Doc. 43] at 28–36 (D.N.M. May 1, 2017); *United States v. Tolentino*, No. CIV 16-0583 MV/LAM, [Doc. 16] at 11–12 (D.N.M. June 12, 2017); *Sandoval v. United States*, No. CIV 16-0410 LH/CG, [Doc. 16] at 7 (D.N.M. Apr. 18, 2017); *United States v. Sedillo*, No. CIV 16-0426 MCA/LAM, [Doc. 18] at 11–13 (D.N.M. Mar. 6, 2017).

"*toward* a victim," Marquez contends these cases are at odds with New Mexico case law interpreting its assault statute, and thus were wrongly decided. *Id.* at 14. Marquez asserts that *Branch* constitutes an "intervening state court opinion" that "effectively overrules" *Maldonado-Palma* and *Ramon Silva*. *Id.* at 15–16.

Whatever the merit of Marquez's argument as to the substantive significance of *Branch*,[7] this Court is bound by the Tenth Circuit's decision in *Maldonado-Palma*. *Branch* was decided before *Maldonado-Palma; Branch* does not undermine the precedential value of *Maldonado-Palma*.[8] *See United States v. Miera*, 2013 WL 6504297, at *18 (D.N.M. Nov. 22, 2013) (questioning the Tenth Circuit's opinion in *Ramon Silva* but concluding that the court "is not, however, free to disregard the majority's conclusion that aggravated assault with a deadly weapon in New Mexico is a violent felony" under the force clause of the ACCA).

Like Magistrate Judge Vidmar, this Court finds that the Tenth Circuit Court's decision in *Maldonado-Palma* is controlling precedent that the New Mexico offense of aggravated assault with a deadly weapon under NMSA § 30-3-2(A) qualifies as an ACCA crime of violence under the force clause of § 924(e)(2)(B). Therefore, the Court will overrule Marquez's objections and adopt Judge Vidmar's findings and recommendations.

[7] In an earlier decision, the undersigned judge considered and rejected arguments similar to Marquez's, ruling that *Ramon Silva* and *Maldonado-Palma* are not inconsistent with *Branch*. *United States v. Sanchez*, No. CIV 16-0659 JAP/GBW, [Doc. 20] at 22–24 (D.N.M. July 5, 2017).

[8] Moreover, while the Tenth Circuit Court, in *Maldonado-Palma*, examined New Mexico law for guidance in interpreting the elements of the crime, it did not discuss the New Mexico Court of Appeals' decision in *Branch*.

IT IS THEREFORE ORDERED that:

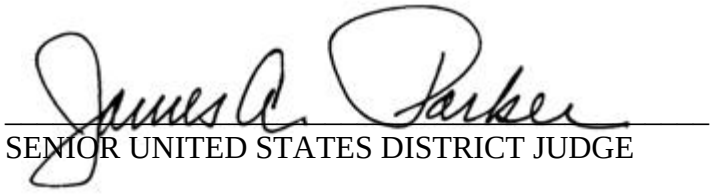
1) The United States' request for a stay of proceedings (Doc. No. 8) is DENIED as moot;

2) MR. MARQUEZ'S OBJECTIONS TO THE MAGISTRATE JUDGE'S PROPOSED FINDINGS AND RECOMMENDED DISPOSITION (Doc. No. 21) are OVERRULED;

3) the Magistrate Judge's PROPOSED FINDINGS AND RECOMMENDED DISPOSITION (Doc. No. 16) are ADOPTED;

4) Defendant's MOTION TO CORRECT SENTENCE PURSUANT TO 28 U.S.C. § 2255 (Doc. No. 1) is DENIED; and

5) This case will be DISMISSED, with prejudice, and a Final Judgment will be entered concurrently with this Memorandum Opinion and Order.



SENIOR UNITED STATES DISTRICT JUDGE

No. _____

In the

Supreme Court of the United States

LEONARD MARQUEZ, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the

United States Court of Appeals

for the Tenth Circuit

Certificate of Service

I, Benjamin A. Gonzales, hereby certify that on September 21, 2018, a copy of the petitioner's Motion for Leave to Proceed in Forma Pauperis and Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit were mailed postage prepaid, to the Solicitor General of the United States, Department of Justice, Room 5614,

950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001, counsel for the Respondent.

Respectfully submitted,

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DATED: September 21, 2018

s/ Benjamin A. Gonzales

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