No. 18-_____

In the Supreme Court of the United States

Manuel Pereira-Gomez,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the New York State offense of robbery is a "crime of violence," that is, an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another." U.S.S.G. § 2L1.2, appl. note 1(B)(iii) (Nov. 1, 2014). This question has divided the Second Circuit, in this case, and the Sixth Circuit, in Perez v. United States, 885 F.3d 984 (6th Cir. 2018), from the First Circuit, in United States v. Steed, 879 F.3d 440 (1st Cir. 2018).

In addition, this issue is presently before this Court in Stokeling v. United States, No. 17-5554 (argued Oct. 9, 2018), in the context of the application of the identical "elements" clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i), to Florida robbery. Florida robbery has been held to require the same degree of force as New York robbery. See People v. Sailor, 480 N.E.2d 701, 710-11 (N.Y. 1985).

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OPINIONS AND ORDERS BELOW

The order of the United States Court of Appeals for the Second Circuit is reported at 903 F.3d 155 and appears at Pet. App. 1a–12a. The decision of the United States District Court for the Eastern District of New York is not reported, but appears at Pet. App. 13a–24a.

JURISDICTION

The District Court had jurisdiction under 18 U.S.C. § 3231 and entered a judgment of conviction on March 29, 2017. The Second Circuit had jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a), and affirmed the judgment on September 7, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. art. I, § 9 provides, in relevant part:

> No Bill of Attainder or ex post facto Law shall be passed.

U.S. Const. amend. V provides, in relevant part:

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

Former section 2L1.2 of the United States Sentencing Guidelines (Nov. 1, 2014) provides, in relevant part:

§2L1.2 Unlawfully Entering or Remaining in the United States

(a) Base Offense Level: 8

(b) Specific Offense Characteristic

(1) Apply the Greatest:

If the defendant previously was deported, or unlawfully remained in the United States, after --

(A) a conviction for a felony that is ... (ii) a crime of violence, ... increase by 16 levels if the conviction receives criminal history points under Chapter Four or by 12 levels if the conviction does not receive criminal history points.

...

Application Notes

1. Application of Subsection (b)(1) --

...

(B) Definitions -- For purposes of subsection (b)(1):

...

(iii) "Crime of violence" means ... any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.

N.Y. Penal Law § 160.00 provides:

Robbery is forcible stealing. A person forcibly steals property and commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of:

1. Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or

2. Compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny.

N.Y. Penal Law § 160.10 provides, in relevant part:

A person is guilty of robbery in the second degree when he forcibly steals property and when:

1. He is aided by another person actually present; ....

N.Y. Penal Law § 110.00 provides:

A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime.

STATEMENT OF THE CASE

1. Following a new conviction, a federal defendant often faces an enhanced sentence if he or she has a prior conviction for a crime defined as a "violent felony" or a felony "crime of violence." See, e.g., Johnson v. United States, 135 S. Ct. 2551 (2015) ("2015 Johnson"). In petitioner's case, his conviction for illegal reentry into the United States, 8 U.S.C. § 1326(a) and (b)(2), which stemmed from his being found in New York in 2015, was enhanced when the district court ruled that his 1997 New York state felony conviction for attempted robbery in the second degree was a "crime of violence." At that time, a "crime of violence" for purposes of an illegal reentry conviction was defined, in relevant part, as any felony offense under federal, state, or local law that "has as an element the use, attempted use, or threatened use of physical force against the person of another." U.S.S.G. § 2L1.2, appl. note I(B)(iii) (Nov. 1, 2014). This is called the "elements" clause, and is identical to the elements clause in the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(i).

In determining whether a prior conviction satisfies this definition, a court applies "a 'categorical' approach that asks whether the least of conduct made criminal by the state statute

falls within the scope of activity that the federal statute penalizes." Stuckey v. United States, 878 F.3d 62, 67 (2d Cir. 2017). This inquiry requires a two-step analysis. First, a court must identify the "elements of the statute forming the basis of the defendant's conviction." Descamps v. United States, 133 S. Ct. 2276, 2281 (2013). The categorical approach dictates that a court looks "only to the statutory definitions of the prior offenses, and not to particular facts underlying those convictions." Taylor v. United States, 495 U.S. 575, 600 (1990).[1] "A defendant's actual conduct is irrelevant to the inquiry," because "the adjudicator must 'presume that the conviction rested upon nothing more than the least of the acts criminalized'" under the state statute. Mellouli v. Lynch, 135 S. Ct. 1980, 1986 (2015) (quoting Moncrieffe v. Holder, 133 S. Ct. 1678, 1684 (2013)). Second, a court "compare[s] the minimum conduct necessary for a state conviction with the conduct that constitutes a 'violent felony' under the ACCA." Stuckey, 878 F.3d at 67. "If the state statute 'sweeps more broadly' -- i.e., it punishes activity that the federal statute does not encompass -- then the state crime cannot count as a predicate 'violent felony.'" Id. (quoting Descamps, 133 S. Ct. at 2283).

[1] The parties agreed below that since no documents were produced to indicate which subdivision of second-degree robbery formed the basis of petitioner's robbery conviction, it is subdivision one that is relevant. See Mathis v. United States, 136 S. Ct. 2243 (2016) (outlining the modified categorical approach).

In addition, this Court has adopted a narrow construction of the term "physical force" as used to define a violent felony or felony crime of violence. "[I]n the context of a statutory definition of 'violent felony,' the phrase 'physical force' means 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) ("2010 Johnson").

Not all force is "violent force," and "[m]inor uses of force may not constitute 'violence' in the generic sense." United States v. Castleman, 134 S. Ct. 1405, 1412 (2014). For example, "a squeeze on the arm that causes a bruise" is "hard to describe ... as violence," id. (quoting Flores v. Ashcroft, 350 F.3d 666, 670 (7th Cir. 2003)); so too, "relatively minor" "physical assaults" such as "pushing, grabbing, shoving, slapping, and hitting," id. at 1411-12. Rather, a violent felony or felony crime of violence "suggests a category of violent, active crimes." Johnson, 559 U.S. at 140 (quoting Leocal v. Ashcroft, 543 U.S. 1, 11 (2004)). "Even by itself," the Court continued, "the word 'violent' in § 924(e)(2)(B) connotes a substantial degree of force. ... When the adjective 'violent' is attached to the noun 'felony,' its connotation of strong physical force is even clearer." Id. at 140. To qualify under ACCA's elements clause, therefore, or the cognate definition here, a crime must be "violent" and "active," must involve "violent force" "capable

of causing pain or injury" and "strong enough to constitute 'power,'" and must entail "extreme physical force" akin to that involved in "murder" and "forcible rape." Id. at 140-42. As will be explicated below, the level of force required for a conviction of New York robbery falls well short of violent physical force.

2. Petitioner was charged with being found in the United States, on or about September 5, 2015, having previously been deported after a conviction for an aggravated felony and without having obtained permission from the Secretary of Homeland Security to apply for readmission. He pleaded guilty on March 23, 2016, to the charge in the indictment. There was no plea agreement.

At the plea proceeding, the parties explained to the district judge that although a plea agreement had been proposed, they could not agree. While the government believed that petitioner's prior New York conviction for attempted robbery in the second degree (N.Y. Penal Law § 110.00/160.10) qualified as a "crime of violence," pursuant to the then current version of U.S.S.G. § 2L1.2(b)(1)(A)(ii), defense counsel disagreed. Since this made a significant difference in the guideline range, a plea agreement could not be reached.

In the course of the plea allocution, petitioner, a citizen of El Salavador, admitted he had been deported from the United

States in 2008 and had returned in 2009. On September 5, 2015, he was arrested for driving while intoxicated. Previously, in 1997, he had been convicted of attempted robbery in the second degree.

Before sentencing both the defense and the government filed sentencing letters.

In the defense letter, counsel argued that, under the 2014 Guidelines Manual, petitioner's conviction for attempted robbery in the second degree was not a crime of violence. Counsel argued, inter alia, that attempted robbery in the second degree did not have "as an element the use, attempted use, or threatened use of physical force against the person of another." U.S.S.G. § 2L1.2, appl. note 1(B)(iii) (Nov. 1, 2014). Thus, in counsel's view, the correct guideline range was 15 to 21 months. And, as counsel argued at sentencing, because this range is lower than the range under the November 1, 2016 Guidelines Manual, use of the higher guideline range would violate ex post facto. See U.S.S.G. § 1B1.11 (court to use Guideline Manual in effect on the date of sentencing unless use of that manual would result in an ex post facto violation).

The government calculated the guideline range under the 2014 guidelines as 57 to 71 months, counting the attempted robbery conviction as a crime of violence. It calculated the post-November 1, 2016 range as 46 to 57 months.

At sentencing, on March 29, 2017, the district court ruled that the attempted robbery conviction constituted a crime of violence under the former guideline. The district court also rejected defense counsel's contention that New York robbery did not qualify as an enumerated offense because New York robbery is broader than generic robbery. Since those conclusions resulted in a range of 57 to 71 months under the former guideline, the court used the current manual. See U.S.S.G. § 1B1.11. The court then sentenced petitioner to 46 months' imprisonment.

On appeal, the Second Circuit affirmed petitioner's sentence. United States v. Pereira-Gomez, 903 F.3d 155 (2d Cir. 2018). The court first held that New York robbery did not qualify as generic robbery for purposes of the former guidelines' list of enumerated offenses. The circuit found that the generic definition of robbery includes a requirement that the stolen property be taken from the person or in the presence of the owner or victim. New York had deliberately eliminated the person or presence requirement in the general revision of its penal law in the 1960's in order to expand the definition of robbery. The new definition put New York outside the contemporary, generic understanding of the term. Id. at 161-64.

This holding did not aid petitioner, however, because the court also concluded that petitioner's attempted robbery

conviction did qualify as a crime of violence under the elements clause. Id. at 161, 164-66.

As to the latter ruling, the court recognized that "[n]ot all criminal offenses involving actual, attempted, or threatened physical contact" qualify as crimes of violence under the elements clause (which the court referred to as the "force" clause). Id. at 164-65. The court further acknowledged that to qualify as a crime of violence, the offense had to involve "'violent force -- that is, force capable of causing physical pain or injury to another person,'" and that this meant more than a requirement of "'any intentional physical contact.'" Id. at 165 (quoting 2010 Johnson, 559 U.S. at 138, 140) (emphases in Johnson). Nevertheless, the court noted, the New York robbery statute requires the use or threat of enough force to prevent resistance to the taking of or to compel the owner to deliver up property. This, in the court's view, sufficed to establish that New York robbery requires the "violent force" referenced in 2010 Johnson. Id. at 165.

Lastly, the circuit rejected petitioner's argument that under New York law a defendant could be convicted of attempted robbery without reaching the point where any force at all was used or threatened, pointing to cases where defendants had been convicted after they were arrested on the way to a planned robbery, based on information from an informant. The court

rejected this argument as well, stating only that an attempt would require that the crime be "'so near to its accomplishment that in all reasonable probability the crime itself would have been committed, but for timely interference." Id. at 166 (quoting People v. Mahboubian, 543 N.E.2d 34 (Ct. App. 1989)).

REASONS FOR GRANTING THE WRIT

A sharp Circuit split has arisen on the question whether New York's baseline definition of robbery (i.e., forcible stealing) satisfies the elements clause. Compare United States v. Steed, 879 F.3d 440, 450–51 (1st Cir. 2018) (holding that New York attempted second-degree robbery, N.Y. Penal Law §§ 110.00/160.10, is not a crime of violence under the elements clause of the career offender guideline) with petitioner's case and Perez v. United States, 885 F.3d 984, 986 (6th Cir. 2018) (holding that New York second-degree robbery, N.Y. Penal Law § 160.10(1), is a violent felony under the elements clause of the ACCA, 18 U.S.C. § 924(e)(2)(B)(i)). The Sixth Circuit has acknowledged the split. Perez, 885 F.3d at 990.

This square conflict, on an important, recurring question of federal statutory interpretation, warrants this Court's review. New York robbery is a common predicate for enhanced punishment, and uncertainty regarding the correct answer to the question presented has resulted in disparate treatment of identically-situated federal prisoners. On the merits, New York robbery is

not a crime of violence or a violent felony. New York robbery can be committed with low-level uses of force such as blocking, bumping, and tugging, well short of the "violent" physical force 2010 Johnson held necessary under the elements clause. In the alternative, this petition should be held for Stokeling v. United States, No. 17-5554 (argued Oct. 9, 2018), which presents the question whether Florida robbery, which requires the same level of force as New York robbery, satisfies the elements clause of the ACCA.

I. The First, Second, and Sixth Circuits Have Split on the Question Whether New York Robbery Satisfies the Elements Clause.

A. As noted, the First and Sixth Circuits have split on the question whether New York robbery satisfies the elements clause. In Steed, the First Circuit held that a prior New York State conviction for attempted second-degree robbery, N.Y. Penal Law §§ 110.00/160.10(2)(a), is not a crime of violence under the elements clause of the career offender guideline, § 4B1.2(a)(1). 879 F.3d at 450-51.[2] Specifically, Steed reasoned that New

[2] Steed relied on First Circuit precedent interpreting the elements clauses of the Guidelines and the ACCA interchangeably, due to their identical language. See 879 F.3d at 446 (citing United States v. Hart, 674 F.3d 33, 41 n.5 (1st Cir. 2012)). This approach is standard. See, e.g., James v. United States, 550 U.S. 192, 206 (2007) (explaining that "the Sentencing Guidelines' ... definition of a predicate 'crime of violence' closely tracks ACCA's definition of 'violent felony'"); see also, e.g., United States v. Reyes, 691 F.3d 453, 458 & n.1 (2d Cir. 2012); United States v. Montes-Flores, 736 F.3d 357, 363 (4th Cir. 2012); United States v. Mata, 869 F.3d 640, 644 (8th Cir. 2017) (all interpreting elements clauses interchangeably).

York's definition of forcible stealing, see N.Y. Penal Law § 160.00, although it excludes stealthy seizures, encompasses a purse snatching just sufficient to produce awareness in the victim. See 879 F.3d at 449. That level of force, Steed explained, was held insufficient to meet the elements clause in United States v. Mulkern, 854 F.3d 87 (1st Cir. 2017). Consequently, Steed concluded, "[A]s we read the relevant New York precedents, there is a realistic probability that Steed's conviction was for attempting to commit an offense for which the least of the acts that may have constituted that offense included 'purse snatching, per se.'" 879 F.3d at 450 (quoting People v. Santiago, 62 A.D.2d 572, 579 (2d Dep't 1978), aff'd, 48 N.Y.2d 1023 (1980)). Because "such conduct falls outside the scope" of the elements clause, "we cannot say that, under the categorical approach, Steed's conviction was for an offense that the force clause of the career offender guideline's definition of a 'crime of violence' encompasses." Steed, 879 F.3d at 450–51.

In acknowledged conflict with Steed, the Sixth Circuit later held that a prior New York State conviction for second-degree robbery, § 160.10(1), is a violent felony under ACCA's elements clause. Perez, 885 F.3d at 986. Perez expressly disagreed with Steed, explaining that in its view Steed does not "account for" the possibility that conduct not involving the use of violent

force might involve the threatened use of such force. See 885 F.3d at 989–90.

The conflict among Steed on the one hand and Perez and the decision below on the other, with respect to New York robbery, crystalizes the broader division among the Circuits that has arisen (in the wake of 2015 Johnson) on which state robbery offenses satisfy the elements clause. Numerous Circuits have held that state robbery offenses, like New York's, that can be committed with just enough force to prevent or overcome resistance to the taking, do not qualify as elements-clause predicates. E.g., United States v. Geozos, 870 F.3d 890, 901 (9th Cir. 2017) (Florida); United States v. Strickland, 860 F.3d 1224, 1227 (9th Cir. 2017) (Oregon); United States v. Yates, 866 F.3d 723, 729 (6th Cir. 2017) (Ohio); United States v. Winston, 850 F.3d 677, 682–86 (4th Cir. 2017) (Virginia); United States v. Eason, 829 F.3d 633, 641–42 (8th Cir. 2016) (Arkansas); United States v. Gardner, 823 F.3d 793, 803–04 (4th Cir. 2016) (North Carolina); and United States v. Parnell, 818 F.3d 974, 979 (9th Cir. 2016) (Massachusetts). Other Circuits have held that simple robbery offenses do qualify. E.g., United States v. Pettis, 888 F.3d 962 (8th Cir. 2018) (Minnesota); United States v. Swopes, 886 F.3d 668, 671 (8th Cir. 2018) (Missouri); United States v. Harris, 844 F.3d 1260, 1262 (10th Cir. 2017) (Colorado); United States v. Armour, 840 F.3d 904, 907 (7th Cir. 2016) (Indiana);

United States v. Fritts, 841 F.3d 937, 943 (11th Cir. 2016) (Florida). To be sure, variation in state statutory and case law accounts for some of this division. But as the splits on New York robbery (Steed versus Perez) and Florida robbery (Geozos versus Fritts) make clear, the division stems, most fundamentally, from the Circuits' divergent and incompatible applications of 2010 Johnson's definition of violent force. Thus, this petition offers an excellent opportunity to resolve the Steed/Perez split and to further clarify 2010 Johnson.

B. On the merits, petitioner's prior New York State conviction for attempted second-degree robbery is not a crime of violence. N.Y. Penal Law § 160.10 (subd. 1) provides: "A person is guilty of robbery in the second degree when he forcibly steals property and ... is aided by another actually present." Section 160.00, in turn, defines forcible stealing:

> A person forcibly steals property and commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of:
>
> 1. Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or
>
> 2. Compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny.

And § 110.00, in its turn, defines attempts: "A person is guilty of an attempt to commit a crime when, with intent to

commit a crime, he engages in conduct which tends to effect the commission of such crime."

Petitioner's conviction is not an elements-clause predicate because the "physical force" sufficient to meet § 160.00's definition of "forcible stealing" is categorically less than the "violent force ... capable of causing physical pain or injury" that is necessary to satisfy the elements clause under 2010 Johnson, 559 U.S. at 140. The argument is straightforward. Under New York's baseline definition of robbery, § 160.00, the "physical force" necessary to accomplish a "forcible stealing" may be quite modest, and falls well short of "violent force." For example, a defendant commits robbery by engaging in a brief tug-of-war over property: "Proof that the store clerk grabbed the hand in which defendant was holding the money and the two tugged at each other until defendant's hand slipped out of the glove holding the money was sufficient to prove that defendant used physical force." People v. Safon, 560 N.Y.S.2d 552 (App. Div. 1990). In addition, a pick pocketing turns into a robbery if a defendant or his accomplices block the path of the pick pocketing victim in order to prevent or slow the victim's pursuit. See People v. Bennett, 631 N.Y.S.2d 834 (App. Div. 1995). "The requirement that a robbery involve the use, or the threat of immediate use, of physical force does not mean that a weapon must be used or displayed or that the victim must be physically

injured or touched." Id.; accord People v. Patton, 585 N.Y.S.2d 431 (App. Div. 1992) (By "blocking the victim's passage," defendant "aided in codefendant's retention of the property, and thereby participated in the robbery."). Likewise, robbery has occurred if the defendant "bumped his unidentified victim, took money, and fled while another forcibly blocked the victim's pursuit." People v. Lee, 602 N.Y.S.2d 138, 139 (App. Div 1993).

Because New York robbery requires no more force than blocking, bumping, or pushing the victim, or engaging in a brief tug-of-war over the property, it does not require the kind of substantial force that is the hallmark of the "violent force" required by Johnson, 559 U.S. at 140, and consequently, by the elements clause at issue here. As one district judge has written, "Merely standing in someone's way does not involve the use of physical force capable of causing substantial physical pain or injury. And neither pulling away when someone grabs your hand, ... nor a shove that only causes someone to step backward, amounts to 'substantial' or 'strong' physical force." Austin v. United States, 280 F. Supp. 3d 567, 574 (S.D.N.Y. 2017) (Rakoff, J.); accord United States v. Moncrieffe, 167 F. Supp. 3d 383, 404 (E.D.N.Y. 2016) (Weinstein, J.) ("The 'forcibly stealing' element ... common to all New York robbery offenses, includes de minimis levels of force which do not fall within the federal definition

of a 'crime of violence'" in the elements clause.). Accordingly, the writ of certiorari should be granted.

II. In the Alternative, this Petition Should Be Held for Stokeling v. United States, No. 17-5554.

In the alternative, this petition should be held for Stokeling. Stokeling presents the question whether the level of force required to commit Florida robbery suffices to satisfy the violent force requirement of 2010 Johnson, and thus qualifies as an elements-clause predicate. Like New York robbery, Florida robbery can be committed with minimal physical force, as long as the force suffices to overcome resistance. See Robinson v. State, 692 So. 2d 883, 886 (Fla. 1997). Indeed, the New York Court of Appeals has had occasion to rule that Florida robbery requires the level of force mandated by N.Y. Penal Law § 160.00 and therefore a Florida robbery conviction qualifies as a prior felony conviction in New York's recidivist sentencing scheme. See People v. Sailor, 480 N.E.2d 701, 710-11 (Ct. App. 1985).

Further, during the oral argument in Stokeling, the government told the Justices that if Mr. Stokeling prevailed, the robbery statutes of "over 40 states" "would be knocked out" as elements-clause predicates. See Tr. of Oral Argument 51-52 in Stokeling, supra (U.S. Oct. 9, 2018). For the identities of those 40 states, the government referred the Court to a list of state robbery statutes in its appendix; the list includes New York robbery. See Gov't Br. 23a (U.S. Aug. 3, 2018) (citing §

160.00(1)). Thus, the application of Stokeling to petitioner's case is clear.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted. In the alternative, the petition should be held for Stokeling.

Dated: New York, New York
December 6, 2018

Respectfully submitted,

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Appendix

903 F.3d 155
United States Court of Appeals, Second Circuit.

UNITED STATES of America, Appellee,
v.
Manuel PEREIRA-GOMEZ, aka Manuel Jesus Pereira, aka Manuel Pereiro, aka Manny Pereira, Defendant-Appellant.

No. 17-952-cr
|
August Term 2017
|
Submitted: March 9, 2018
|
Decided: September 7, 2018

Synopsis

Background: Defendant pleaded guilty in the United States District Court for the Eastern District of New York, Joan M. Azrack, J., to illegal reentry into the United States after previously having been deported after the commission of an aggravated felony. Defendant appealed.

Holdings: The Court of Appeals, José A. Cabranes, Circuit Judge, held that:

[1] defendant's prior New York conviction for attempted robbery was not a crime of violence that warranted enhancement under enumerated offenses provision of Sentencing Guideline applicable to illegal reentry, but

[2] defendant's prior New York conviction for attempted robbery was a crime of violence under the Guideline's force clause.

Affirmed.

West Headnotes (17)

[1] Sentencing and Punishment
Retroactive Operation

A sentencing court typically applies the Guidelines Manual in place at the time of sentencing. U.S.S.G. § 1B1.1 et seq.

Cases that cite this headnote

[2] Constitutional Law
Sentencing guidelines

There is an ex post facto violation when a defendant is sentenced under Sentencing Guidelines promulgated after he committed his criminal acts and the new version provides a higher applicable Guidelines sentencing range than the version in place at the time of the offense. U.S. Const. art. 1, § 9, cl. 3; U.S.S.G. § 1B1.1 et seq.

Cases that cite this headnote

[3] Sentencing and Punishment
Operation and effect of guidelines in general

The Sentencing Guidelines merely guide district courts in exercising their sentencing discretion, but they do not constrain that discretion. U.S.S.G. § 1B1.1 et seq.

Cases that cite this headnote

[4] Criminal Law
Review De Novo

Criminal Law
Sentencing

When reviewing Sentencing Guidelines calculations, Court of Appeals ordinarily applies a de novo standard to legal conclusions and accepts the sentencing court's factual findings unless they are clearly erroneous. U.S.S.G. § 1B1.1 et seq.

Cases that cite this headnote

[5] Sentencing and Punishment
Offense or adjudication in other jurisdiction

Defendant's prior New York conviction for attempted robbery in the second

degree was not a "crime of violence" under the "enumerated offenses" provision of Sentencing Guideline applicable to his conviction for reentry into the United States following deportation, and thus the prior conviction did not support sentence enhancement under that provision; generic robbery contained an element not found in New York's robbery statute, namely that the stolen property be taken from the person or in the presence of the owner or victim. N.Y. Penal Law §§ 110.00, 160.10; U.S.S.G. § 2L1.2.

2 Cases that cite this headnote

[6] Sentencing and Punishment
Crime of violence

Where the Sentencing Guidelines enumerate an offense as a "crime of violence," the court undertakes what is known as the "categorical approach," under which the court looks only to the statutory definitions, in other words, the elements, of a defendant's prior offenses, and not to the particular facts underlying those convictions., and the court then compares the elements of the statutory offense to the generic, contemporary definition of the offense. U.S.S.G. § 1B1.1 et seq.

Cases that cite this headnote

[7] Sentencing and Punishment
Crime of violence

A prior conviction will constitute a crime of violence for a sentencing enhancement only if the statute's elements are the same as, or narrower than, those of the generic offense.

Cases that cite this headnote

[8] Sentencing and Punishment
Grade, degree or classification of other offense

Sentencing and Punishment
Offenses Usable for Enhancement

The court applies the same categorical approach to determine whether a prior conviction warrants a sentence enhancement irrespective of whether the sentencing enhancement is pursuant to the Armed Career Criminal Act (ACCA) or the Sentencing Guidelines. 18 U.S.C.A. § 924(e); U.S.S.G. § 1B1.1 et seq.

Cases that cite this headnote

[9] Sentencing and Punishment
Offense or adjudication in other jurisdiction

In cases in which the defendant was previously convicted under a complicated state statute that criminalizes multiple acts in the alternative, thereby requiring a sentencing court to deduce which of these elements was integral to the defendant's conviction, the court applies what is known as the "modified categorical approach" to determine whether the prior state conviction warrants a federal sentence enhancement, which requires the court to look to a limited class of documents, for example, the indictment, jury instructions, or plea agreement and colloquy, to determine what crime, with what elements, a defendant was convicted of.

Cases that cite this headnote

[10] Sentencing and Punishment
Crime of violence

A defendant's prior crime of conviction will not qualify as a crime of violence warranting a sentence enhancement under the "enumerated offenses" provision of Sentencing Guideline applicable to unlawfully entering or remaining in the United States, if the statute he was convicted of violating sweeps more broadly than the generic crime. U.S.S.G. § 2L1.2.

Cases that cite this headnote

[11] Sentencing and Punishment
Crime of violence

Under the "enumerated offenses" analysis for determining whether a defendant's prior conviction was for a crime of violence warranting a sentence enhancement under

the "enumerated offenses" provision of Sentencing Guideline applicable to unlawfully entering or remaining in the United States, a court asks whether the offense of conviction is substantially similar to, or narrower than, the generic definition of the offense. U.S.S.G. § 2L1.2.

Cases that cite this headnote

[12] Sentencing and Punishment

Grade, degree or classification of other offense

The generic definition of an offense, for purposes of applying the categorical approach to sentence enhancements, is the contemporary understanding of the term, and this understanding will often be the sense in which the term is now used in the criminal codes of most States, but in some cases, courts also consult other sources, including federal criminal statutes, the Model Penal Code, scholarly treatises, and legal dictionaries.

Cases that cite this headnote

[13] Robbery

Taking from person or presence of another

The generic definition of robbery includes, as an element, that the stolen property be taken from the person or in the presence of the owner or victim.

Cases that cite this headnote

[14] Sentencing and Punishment

Offense or adjudication in other jurisdiction

Robbery and attempted robbery in any degree under New York law were "crimes of violence" under the "force clause" of Sentencing Guideline applicable to convictions for reentry into the United States following deportation, and thus, prior New York convictions for robbery and attempted robbery warranted sentence enhancements under the Guideline; forcible stealing was common to all degrees of robbery under New York law, and forcible stealing, in turn, required using or threatening the immediate use of physical force upon another person. N.Y. Penal Law §§ 110.00, 160.10; U.S.S.G. § 2L1.2.

2 Cases that cite this headnote

[15] Sentencing and Punishment

Crime of violence

To determine whether a particular prior conviction is a crime of violence warranting sentence enhancement under the "force clause" of Sentencing Guideline applicable to unlawfully entering or remaining in the United States, the federal sentencing court applies the categorical approach or its modified counterpart, and the court considers whether the predicate offense has as an element the use, attempted use, or threatened use of physical force against the person of another; in so doing, the court focuses on the minimum criminal conduct necessary for conviction under a particular statute. U.S.S.G. § 2L1.2.

2 Cases that cite this headnote

[16] Sentencing and Punishment

Crime of violence

Not all criminal offenses involving actual, attempted, or threatened physical contact qualify as crimes of violence warranting sentence enhancement under the "force clause" of Sentencing Guideline applicable to unlawfully entering or remaining in the United States, since the phrase "physical force" in the "force clause" means violent force, that is, force capable of causing physical pain or injury to another person. U.S.S.G. § 2L1.2.

Cases that cite this headnote

[17] Criminal Law

Attempts

"Criminal attempt" under New York law requires that the action taken by an accused be so near to its accomplishment that in all reasonable probability the crime itself would have been committed, but for timely interference. N.Y. Penal Law § 110.00.

Cases that cite this headnote

***158** On Appeal from the United States District Court for the Eastern District of New York

Attorneys and Law Firms

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Before: Cabranes and Carney, Circuit Judges, and Caproni, District Judge. [*]

Opinion

José A. Cabranes, Circuit Judge:

Defendant-appellant Manuel Pereira-Gomez ("Pereira") appeals from a March 29, 2017 judgment of the United States District Court for the Eastern District of New York (Joan M. Azrack, *Judge*). The District Court convicted Pereira, following his plea of guilty, of illegal reentry into the United States after previously having been deported after the commission of an aggravated felony, in violation of 8 U.S.C. §§ 1326(a) and 1326(b)(2), and sentenced him principally to 46 months' incarceration to be followed by three years of supervised release. On appeal, Pereira argues that the District Court erred when it concluded that his prior New York conviction for attempted robbery in the second degree, in violation of N.Y. Penal Law §§ 110.00 [1] and 160.10, [2] qualified as a "crime of violence" for enhancement purposes under Section 2L1.2 of the November 1, 2014 ***159** United States Sentencing Guidelines ("2014 Guidelines"). [3]

This case presents two questions:

(1) Whether attempted robbery in the second degree under New York law is a "crime of violence" under the "enumerated offenses" of application note 1(B)(iii) to Section 2L1.2 of the November 1, 2014 edition of the Sentencing Guidelines; and, if not,

(2) Whether attempted robbery in the second degree under New York law is a "crime of violence" under the "force clause" of application note 1(B)(iii) to Section 2L1.2 of the November 1, 2014 edition of the Sentencing Guidelines.

We conclude that attempted robbery in the second degree, in violation of N.Y. Penal Law §§ 110.00 and 160.10, is not a "crime of violence" under the "enumerated offenses," but is a "crime of violence" under the "force clause." [4]

Accordingly, we **AFFIRM** the District Court's judgment.

I. BACKGROUND

In 1997, Pereira pleaded guilty in New York state court to attempted robbery in the second degree. He was subsequently deported from the United States on three occasions. After reentering the United States a fourth time, he was arrested for, *inter alia*, felony offenses of driving while intoxicated and aggravated unlicensed operation of a motor vehicle. On October 21, 2015, Pereira was indicted for having been found in the United States, on or about September 5, 2015, after having been previously deported from the United States following a conviction for an aggravated felony. [5]

On March 23, 2016, Pereira pleaded guilty to the charges against him. He and the government, however, were unable to reach a plea agreement because they disputed the applicable advisory Guidelines range.

[1] **[2]** At the time of sentence, Pereira argued that the District Court should apply ***160** the 2014 Guidelines, which were in place when he violated 8 U.S.C. §§ 1326(a) and 1326(b)(2), because the 2014 Guidelines set forth a lower advisory range than the November 1, 2016 Guidelines Manual ("2016 Guidelines") in effect at the time of Pereira's sentencing. [6] He further contended that under the 2014 Guidelines, his 1997 conviction

for attempted robbery in the second degree was not a "crime of violence" that triggered a 16-level prior offense enhancement under Guidelines Section 2L1.2(b)(1)(A).[7] Finally, Pereira argued that, absent the 16-level enhancement, his total adjusted offense level was 10, yielding an advisory Guidelines range of 15 to 21 months' imprisonment.

The government calculated Pereira's advisory Guidelines range under both the 2014 and the 2016 Guidelines. Under the 2014 Guidelines, the government argued, Pereira's 1997 conviction qualified as a "crime of violence"—thus resulting in a 16-level enhancement and a total adjusted offense level of 21. Based on Pereira's criminal history category of IV, the government arrived at a 2014 Guidelines advisory range of 57 to 71 months' imprisonment. Under the 2016 Guidelines, by contrast, the government argued that Pereira's total offense level fell to 19 with a corresponding advisory range of 46 to 57 months' imprisonment.[8]

[3] The District Court sentenced Pereira on March 29, 2017. It determined that Pereira's prior conviction was a "crime of violence" under the 2014 Guidelines. The District Court then applied the 2016 Guidelines, which produced a lower range, and sentenced Pereira principally to 46 months' imprisonment to be followed by three years of supervised release.[9]

This appeal followed.

*161 II. DISCUSSION

On appeal, Pereira argues that the District Court erred in finding that his prior New York state conviction for attempted robbery in the second degree is a "crime of violence" under Section 2L1.2 of the 2014 Guidelines. Specifically, he contends that his prior conviction does not qualify as a "crime of violence" under either the "enumerated offenses" or the "force clause" of application note 1(B)(iii) of Section 2L1.2.

We agree with Pereira that his prior conviction is not a "crime of violence" under the "enumerated offenses" in application note 1(B)(iii). We conclude, however, that his prior conviction *is* a crime of violence under the application note's "force clause." Accordingly, we affirm the judgment of the District Court.

A. Standard of Review

[4] When reviewing Guidelines calculations, we ordinarily "apply a *de novo* standard to legal conclusions and we accept the sentencing court's factual findings unless they are clearly erroneous."[10] But where a defendant raises arguments for the first time on appeal, "we review his claims for plain error."[11] We apply the plain error standard "less stringently in the sentencing context, where the cost of correcting an unpreserved error is not as great as in the trial context."[12]

B. The "Enumerated Offenses" Analysis

[5] We first consider whether Pereira's prior conviction is a "crime of violence" under the "enumerated offenses" in application note 1(B)(iii) to Section 2L1.2 of the 2014 Guidelines. We conclude that it is not.

* * *

[6] **[7]** **[8]** Where the Guidelines enumerate an offense as a "crime of violence," we undertake what is known as the "categorical approach."[13] We "look only to the statutory definitions—*i.e.*, the elements—of a defendant's prior offenses, and *not* to the particular facts underlying those convictions."[14] We then compare the elements of the statutory offense to "the generic, contemporary" definition of the offense.[15] A prior conviction will constitute a "crime of violence" for a sentencing enhancement "only if the statute's elements are the same as, or narrower than, those of the generic offense."[16]

[9] In some cases, however, the defendant is convicted under a more complicated statute that criminalizes multiple acts in the alternative—thereby requiring a sentencing court to deduce which of these elements "was integral to the defendant's conviction."[17] In these circumstances, we apply what is known as the "modified categorical approach." This requires us to "look[ ] to a limited class of documents (for ***162** example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of."[18]

Here, because Pereira was convicted under a statute that criminalizes multiple acts in the alternative, we adopt the modified categorical approach. The government concedes that Pereira's certificate of disposition "does not specify which subsection of N.Y. Penal Law § 160.10 was charged." [19] Ordinarily, we would therefore be required to determine "the least of the acts proscribed by the statute." [20] We need not do so here, however, because the outcome of that analysis does not affect our conclusion.

* * *

[10] **[11]** Regardless of which particular aggravating factor set forth in N.Y. Penal Law § 160.10 applies, we must consider whether the statute under which Pereira was convicted is the same as, or narrower than, the generic offense of robbery. [21] His crime of conviction will not qualify as a "crime of violence" under the "enumerated offenses" if the statute he was convicted of violating "sweeps more broadly than the generic crime." [22]

[12] The generic definition of an offense "is the 'contemporary understanding' of the term." [23] This understanding will often be the "sense in which the term is now used in the criminal codes of most ***163** States." [24] In some cases, however, "courts also consult other sources, including federal criminal statutes, the Model Penal Code, scholarly treatises, and legal dictionaries." [25]

[13] Surveying these sources, we conclude that the generic definition of robbery includes, as an element, that the stolen property be taken "from the person or in the presence of" the owner or victim. The statutes and decisions of the highest courts in at least twenty-seven states and the District of Columbia include the presence element in their definitions of robbery. [26] The presence element is also found in law treatises [27] and legal dictionaries. [28] And the United States Code includes a presence element in its definition of robbery. [29]

New York, however, deliberately revised its robbery statute to eliminate the presence element. [30] In 1961, the New York Legislature "created a Temporary State Commission whose purpose was to revise and simplify the existing Penal Law." [31] The Commission proposed eliminating the " 'from the person or in the presence of' limitation [because it] would exclude a variety ***164** of forcible thefts that were 'robberies in spirit.' " [32] The New York Legislature subsequently adopted the proposal, expanding the definition of robbery by not including a presence element. Under New York law, robbery can now be committed through the use or threat of force to compel another "to deliver up" property not in his presence, or simply "to engage in other conduct which aids in the commission of the larceny." [33]

Because generic robbery contains an element not found in New York's robbery statute, the New York statute "sweeps more broadly than the generic crime." [34] Accordingly, robbery under New York law does not qualify as a crime of violence under the "enumerated offenses" in application note 1(B)(iii) to Section 2L1.2 of the 2014 Guidelines. [35]

Pereira, of course, was convicted of attempted robbery in the second degree in violation of N.Y. Penal Law §§ 110.00 and 160.10, not simple robbery. But none of the aggravating factors set forth in N.Y. Penal Law § 160.10 creates a requirement of presence. [36] Nor does New York's definition of criminal attempt. [37]

We therefore hold that Pereira's prior conviction for attempted robbery in the second degree in violation of N.Y. Penal Law §§ 110.00 and 160.10 is not a "crime of violence" under the "enumerated offenses" in application note 1(B)(iii) to Section 2L1.2 of the 2014 Guidelines.

C. The "Force Clause" Analysis

[14] We must next consider whether Pereira's prior conviction qualifies as a "crime of violence" under the "force clause" of application note 1(B)(iii) to Section 2L1.2 of the 2014 Guidelines. We conclude that it does.

[15] To determine whether a particular prior conviction is a "crime of violence" under the "force clause," we again apply the categorical approach or its modified counterpart. [38] But the analysis differs from that applied to an "enumerated offense." Instead of asking whether the statutory elements of the predicate offense "are the same as, or narrower than, those of the generic offense," [39] we consider whether the predicate offense "has as an element the use, attempted use, or threatened use of physical force

against the person of another." [40] In so doing, we focus on "the minimum criminal conduct necessary for conviction under a particular statute." [41]

[16] Not all criminal offenses involving actual, attempted, or threatened physical contact qualify as "crimes of violence" under the "force clause." In *Johnson v. United States*, the Supreme Court clarified that the phrase "physical force" in the "force ***165** clause" of the Armed Career Criminal Act, 18 U.S.C. § 924(b)(2)(B), "means *violent* force—that is, force capable of causing physical pain or injury to another person." [42] The battery statute at issue there had, as an element, that the defendant "actually and intentionally touched the victim." [43] The Supreme Court held that this statute did not qualify as a "crime of violence" because it could be committed "by *any* intentional physical contact, no matter how slight." [44]

Pereira argues that, after *Johnson*, we must overturn our earlier holding in *United States v. Spencer* that robbery under New York law is a "crime of violence" under the "force clause." [45] We disagree.

Unlike the battery statute in *Johnson*, New York's robbery statute cannot be violated "by *any* intentional physical contact, no matter how slight." [46] New York defines robbery as "forcible stealing," which requires "us[ing] or threaten[ing] the immediate use of physical force upon another person." [47] That level of physical force must be enough "to prevent resistance to the taking or to compel the owner to deliver up the property." [48] By its plain language, then, New York's robbery statute includes as an element the use of violent force.

The New York Court of Appeals recently supplied support for this interpretation of New York robbery in *People v. Jurgins*. [49] Jurgins challenged his second felony offender adjudication on the grounds that his prior Washington, DC conviction for attempted robbery was "not equivalent to any New York felony." [50] He argued that robbery under Washington, DC law—unlike robbery under New York law—could be committed by such little force as "sudden or stealthy seizure" or a "snatching." [51] The Court of Appeals agreed with the parties that "taking 'by sudden or stealthy seizure or snatching,' would not be considered a robbery or other felony in New York, inasmuch as it is akin to pickpocketing, or the crime of jostling, which is a misdemeanor in this state." [52]

Pereira identifies several New York Appellate Division decisions that could be read to suggest that robbery does not necessarily involve the use of violent force. For example, Pereira cites a case in which defendants were convicted of robbery by forming "a human wall that blocked the victim's path," [53] and another in which the ***166** defendant physically "block[ed] the victim's passage." [54]

Pereira minimizes the conduct presented in these cases. The "human wall" was no mere obstacle to the victim's pursuit of the robber; it constituted a threat that pursuit would lead to a violent confrontation. So too did blocking the victim's passage in the latter case. Only by backing down in the face of these threats did the victims avoid physical force.

[17] Finally, Pereira argues his prior offense of *attempted* robbery in the second degree does not qualify as a "crime of violence" because "attempted robbery can be committed without the defendant using, attempting to use, or threatening to use physical force." [55] This argument misrepresents criminal attempt under New York law. Regarding attempt, the state's highest court requires that the action taken by an accused be "so near to its accomplishment that in all reasonable probability the crime itself would have been committed, but for timely interference." [56]

In short, we conclude that "robbery" as it is defined in N.Y. Penal Law § 160.00, qualifies as a "crime of violence" under the "force clause" of application note 1(B)(iii) to Section 2L1.2 of the 2014 Guidelines. Because that definition of robbery—forcible stealing—is common to all degrees of robbery under New York law, we hold that robbery in any degree is a crime of violence under the "force clause" of application note 1(B)(iii) to Section 2L1.2 of the 2014 Guidelines. We also hold that attempted robbery under New York law is a "crime of violence" under the "force clause."

III. CONCLUSION

To summarize, we hold as follows:

(1) Attempted robbery in the second degree, in violation of N.Y. Penal Law §§ 110.00 and 160.10, is not a "crime of violence" under the "enumerated offenses" of application note 1(B)(iii) to Section 2L1.2 of the November 1, 2014 edition of the Sentencing Guidelines; and

(2) Robbery and attempted robbery in any degree under New York law are "crimes of violence" under the "force clause" of application note 1(B)(iii) to Section 2L1.2 of the November 1, 2014 edition of the Sentencing Guidelines.

For the foregoing reasons, we **AFFIRM** the District Court's judgment.

All Citations

903 F.3d 155

Footnotes

* Judge Valerie Caproni, of the United States District Court for the Southern District of New York, sitting by designation.

1 N.Y. Penal Law § 110.00 provides: "A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime."

2 N.Y. Penal Law § 160.10 provides:

> A person is guilty of robbery in the second degree when he forcibly steals property and when:
>
> 1. He is aided by another person actually present; or
>
> 2. In the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime:
>
> (a) Causes physical injury to any person who is not a participant in the crime; or
>
> (b) Displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm; or
>
> 3. The property consists of a motor vehicle, as defined in section one hundred twenty-five of the vehicle and traffic law.
>
> Robbery in the second degree is a class C felony.

3 Both Pereira and the government assume that the November 1, 2015 version of the United States Sentencing Guidelines ("2015 Guidelines") was in place when Pereira committed the offenses at issue in this appeal. But the October 21, 2015 Indictment—itself filed before November 1, 2015—charged that the offenses were committed "[o]n or about September 5, 2015," when the 2014 Guidelines were in place. App'x at 8. We therefore refer to the 2014 Guidelines, not the 2015 Guidelines, when discussing the version of the Guidelines in place when Pereira violated 8 U.S.C. §§ 1326(a) and 1326(b)(2). As the Guidelines provisions at issue in this case are identical in the 2014 and 2015 Guidelines, this correction does not affect our analysis.

4 Application note 1(B)(iii) of Section 2L1.2 of the November 2014 Guidelines provided:

> "Crime of violence" means any of the following offenses under federal, state, or local law: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced), statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, *or any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another*.
>
> The "force clause" is emphasized above.

5 *See* note 3 and accompanying text, *ante*.

6 A sentencing court typically applies the Guidelines Manual in place at the time of sentencing, which here would be the 2016 Guidelines. However, "there is an *ex post facto* violation when a defendant is sentenced under Guidelines promulgated after he committed his criminal acts and the new version provides a higher applicable Guidelines sentencing range than the version in place at the time of the offense." *Peugh v. United States*, 569 U.S. 530, 533, 133 S.Ct. 2072, 186 L.Ed.2d 84 (2013). Accordingly, the sentencing court would be required to apply the 2014 Guidelines if that version provided a lower sentencing range than the 2016 Guidelines. *See also* note 4, *ante*.

7 In the 2014 Guidelines, Section 2L1.2(b)(1)(A) provided:

> If the defendant previously was deported, or unlawfully remained in the United States, after—
>
> (A) a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense, increase by **16** levels if the conviction

receives criminal history points under Chapter Four or by **12** levels if the conviction does not receive criminal history points.

8 The government computed a lower sentence range under the 2016 Guidelines because Section 2L1.2(b)(1) of the 2016 Guidelines eliminated the use of the term "crime of violence," and instead based the enhancement primarily on the length of the sentence imposed for the prior offense.

9 As the Supreme Court reminds us, the Guidelines merely "guide district courts in exercising their [sentencing] discretion ..., but they do not constrain that discretion." *Beckles v. United States*, —— U.S. ——, 137 S.Ct. 886, 894, 197 L.Ed.2d 145 (2017) (internal quotation marks and alterations omitted). Because Pereira's sentence falls within the statutory range, the District Court had the discretion to impose that sentence regardless of whether Pereira's prior conviction was, in fact, a "crime of violence" under the 2014 Guidelines.

10 *United States v. Walker*, 595 F.3d 441, 443 (2d Cir. 2010).

11 *United States v. Zillgitt*, 286 F.3d 128, 131 (2d Cir. 2002).

12 *United States v. Jones*, 878 F.3d 10, 14–15 (2d Cir. 2017) ("*Jones II* ") (internal quotation marks omitted).

13 *Id.* at 18.

14 *Descamps v. United States*, 570 U.S. 254, 261, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013) (emphasis in original) (internal quotation marks omitted); *see also United States v. Genao*, 869 F.3d 136, 144 (2d Cir. 2017) (same). *Descamps* involved the Armed Career Criminal Act ("ACCA"), not the Guidelines, but "we apply the same categorical approach irrespective of whether the enhancement is pursuant to the ACCA or the Guidelines." *Walker*, 595 F.3d at 444 n.1.

15 *Taylor v. United States*, 495 U.S. 575, 598, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990).

16 *Descamps*, 570 U.S. at 257, 133 S.Ct. 2276.

17 *Mathis v. United States*, —— U.S. ——, 136 S.Ct. 2243, 2249, 195 L.Ed.2d 604 (2016).

18 *Id.*; *see also Shepard v. United States*, 544 U.S. 13, 26, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005).

19 Appellee Br. at 4 n.2.

20 *Jones II*, 878 F.3d at 17 (internal quotation marks and alteration omitted).

21 This Court, discussing the so-called residual clause of former Guidelines Section 4B1.2(a)(2), recently observed that "it would seem that ... robbery of *any degree* in New York qualifies as a crime of violence." *Jones II*, 878 F.3d at 17 (emphasis in original); *see also United States v. Dove*, 884 F.3d 138, 152 (2d Cir. 2018) (describing *Jones II* as holding "that New York robbery, regardless of degree, is categorically a crime of violence pursuant to the residual clause"). The "residual clause" in effect allowed the rule to apply to situations not explicitly enumerated within it. The holding in *Jones II* does not control in this case because Section 2L1.2 of the 2014 Guidelines does not include a "residual clause."

A court must be careful to distinguish between the categorical approach as applied to the two clauses. Under the "residual clause" analysis, a court asks whether the offense of conviction "involves conduct that presents a serious potential risk of physical injury to another." *Jones II*, 878 F.3d at 15 (quoting U.S.S.G. § 4B1.2(a)(2) (2015)); *see also Johnson v. United States*, —— U.S. ——, 135 S.Ct. 2551, 2557, 192 L.Ed.2d 569 (2015) ("Deciding whether the residual clause covers a crime thus requires a court to picture the kind of conduct that the crime involves in 'the ordinary case,' and to judge whether that abstraction presents a serious potential risk of physical injury."(internal citation omitted)).

In contrast, under the "enumerated offenses" analysis, a court asks whether the offense of conviction is substantially similar to, or narrower than, the generic definition of the offense. *See Mathis*, 136 S.Ct. at 2248 ("To determine whether a prior conviction is for generic burglary (or other listed crime) courts apply what is known as the categorical approach: They focus solely on whether the elements of the crime of conviction sufficiently match the elements of generic burglary, while ignoring the particular facts of the case.").

A court also applies the categorical approach to the "force clause." As will be discussed further below, the "force clause" analysis asks whether the predicate offense "has as an element the use, attempted use, or threatened use of physical force against the person of another." U.S.S.G. § 2L1.2, cmt. 1(B)(iii) (2014); *see also Stuckey v. United States*, 878 F.3d 62, 70 (2d Cir. 2017).

22 *Descamps*, 570 U.S. at 261, 133 S.Ct. 2276.

23 *United States v. Castillo*, 896 F.3d 141, 150 (2d Cir. 2018) (quoting *Taylor*, 495 U.S. at 593, 110 S.Ct. 2143).

24 *Taylor*, 495 U.S. at 598, 110 S.Ct. 2143.

25 *Castillo*, 896 F.3d at 150.

26 *See, e.g.*, Alaska Stat. § 11.41.510(a) ("immediate presence and control of another"); Ariz. Rev. Stat. § 13-1902(A) ("from his person or immediate presence"); Cal. Penal Code § 211 ("personal property in the possession of another, from his person or immediate presence"); Colo. Rev. Stat. § 18-4-301(1) ("from the person or presence of another"); D.C.

Code § 22-2801 ("from the person or immediate actual possession of another"); Fla. Stat. § 812.13(1) ("from the person or custody of another"); Ga. Code Ann. § 16-8-40(a) ("from the person or the immediate presence of another"); Idaho Code § 18-6501 ("from his person or immediate presence"); Ill. Comp. Stat. Ch. 720, § 5/18-1(a) ("from the person or presence of another"); Ind. Code § 35-42-5-1 ("from another person or from the presence of another person"); Kan. Stat. § 21-5420(a) ("from the person or presence of another"); La. Rev. Stat. § 14:65(A) ("from the person of another or that is in the immediate control of another"); *Ball v. State*, 347 Md. 156, 699 A.2d 1170, 1183 (1997) ("from his person or in his presence"); Minn. Stat. § 609.24 ("from the person or in the presence of another"); Miss. Code § 97-3-73 ("in his presence or from his person"); Neb. Rev. Stat. § 28-324(1) ("from the person of another"); Nev. Rev. Stat. § 200.380(1) ("from the person of another, or in the person's presence"); N.M. Stat. § 30-16-2 ("from the person of another or from the immediate control of another"); Okla. Stat. tit. 21, § 791 ("from his person or immediate presence"); *State v. Rolon*, 45 A.3d 518, 525 (R.I. 2012) ("from the person of another, or in his presence" (internal quotation marks omitted)); *State v. Rosemond*, 356 S.C. 426, 589 S.E.2d 757, 758 (2003) ("from the person of another or in his presence"); S.D. Cod. Laws § 22-30-1 ("from the other's person or immediate presence"); Tenn. Code § 39-13-401(a) ("from the person of another"); Vt. Stat., tit. 13, § 608(a) ("from his or her person or in his or her presence"); *Pierce v. Commonwealth*, 205 Va. 528, 138 S.E.2d 28, 31 (1964) ("from his person or in his presence"); Wash. Rev. Code § 9A.56.190 ("from the person of another or in his or her presence"); W. Va. Code § 61-2-12(c)(1) ("from the person or presence of another"); Wis. Stat. § 943.32(1) ("from the person or presence of the owner").

27 *See, e.g.*, 3 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 20.3 (3d ed. 2017) (Robbery includes the requirement "that the property be taken from the person or presence of the other.").

28 *See, e.g.*, *Robbery*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The illegal taking of property from the person of another, or in the person's presence, by violence or intimidation; aggravated larceny.").

29 18 U.S.C. § 1951(b)(1) ("from the person or in the presence of another").

30 *See People v. Smith*, 79 N.Y.2d 309, 313–14 & n.3, 582 N.Y.S.2d 946, 591 N.E.2d 1132 (1992) (summarizing statutory history).

31 *Id.* at 313, 582 N.Y.S.2d 946, 591 N.E.2d 1132.

32 *Id.* at 314, 582 N.Y.S.2d 946, 591 N.E.2d 1132.

33 N.Y. Penal Law § 160.00(2).

34 *Descamps*, 570 U.S. at 261, 133 S.Ct. 2276.

35 *Id.* at 257, 133 S.Ct. 2276.

36 *See* N.Y. Penal Law § 160.10.

37 *See id.* § 110.00 ("A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime.").

38 *See Stuckey*, 878 F.3d at 66–67. As discussed above, the statute at issue criminalizes multiple acts in the alternative. We therefore apply the modified categorical approach.

39 *Descamps*, 570 U.S. at 257, 133 S.Ct. 2276.

40 U.S.S.G. § 2L1.2, cmt. 1(B)(iii) (2014); *see also Stuckey*, 878 F.3d at 70.

41 *United States v. Hill*, 890 F.3d 51, 55 (2d Cir. 2018) (internal quotation marks omitted).

42 559 U.S. 133, 140, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010) (emphasis in original).

43 *Id.* at 137, 130 S.Ct. 1265 (internal quotation marks and alterations omitted).

44 *Id.* at 138, 130 S.Ct. 1265 (emphasis in original) (internal quotation marks omitted).

45 *United States v. Spencer*, 955 F.2d 814, 820 (2d Cir. 1992). In *United States v. Jones*, this Court initially reversed *Spencer* on the basis of perceived supervening Supreme Court guidance. *United States v. Jones*, 830 F.3d 142 (2d Cir.), *vacated*, 838 F.3d 296 (2d Cir. 2016) ("*Jones I* "). But *Jones I* was subsequently vacated and our ruling in *Spencer* was reinstated. *See Massey v. United States*, 895 F.3d 248, 251 n.6 (2d Cir. 2018) (describing sequence of events).

46 *Johnson*, 559 U.S. at 138, 130 S.Ct. 1265 (emphasis in original) (internal quotation marks omitted).

47 N.Y. Penal Law § 160.00.

48 *People v. Jurgins*, 26 N.Y.3d 607, 614, 26 N.Y.S.3d 495, 46 N.E.3d 1048 (2015).

49 *Id.*

50 *Id.* at 610, 26 N.Y.S.3d 495, 46 N.E.3d 1048.

51 *Id.* at 614–15, 26 N.Y.S.3d 495, 46 N.E.3d 1048.

52 *Id.* at 614, 26 N.Y.S.3d 495, 46 N.E.3d 1048.

53 *People v. Bennett*, 219 A.D.2d 570, 631 N.Y.S.2d 834, 834 (1st Dep't 1995).

54 *People v. Patton*, 184 A.D.2d 483, 585 N.Y.S.2d 431, 431 (1st Dep't 1992).

55 Appellant Br. at 16.

56 *People v. Mahboubian*, 74 N.Y.2d 174, 196, 544 N.Y.S.2d 769, 543 N.E.2d 34 (1989) (internal quotation marks omitted); *see also People v. Bracey*, 41 N.Y.2d 296, 300, 392 N.Y.S.2d 412, 360 N.E.2d 1094 (1977) ("[I]t must be proven that the defendant acted to carry out his intent.").

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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:
UNITED STATES OF AMERICA

CR-15-548

-against- :

United States Courthouse
Central Islip, New York

MANUEL PEREIRA-GOMEZ,

Defendant. :

March 29, 2017
- - - - - - - - - - - - - - - - - - X 11:00 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOAN M. AZRACK
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government: BRIDGET M. ROHDE
Acting United States Attorney
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Central Islip, New York 11722
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Assistant United States Attorney

For the Defendant: FEDERAL DEFENDERS of NEW YORK
BY: RANDI CHAVIS, ESQ.

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Proceedings recorded by mechanical stenography.
Transcript produced by computer.

Mary Ann Steiger, CSR
Official Court Reporter

THE CLERK: Calling criminal case 2015-548, United States of America vs. Manuel Periera-Gomez.

Counsel, please state your appearances.

MR. TIERNEY: For the Government, Raymond Tierney.

Good morning, your Honor.

THE COURT: Good morning.

MS. CHAVIS: Randi Chavis, Federal Defenders, on behalf of Mr. Pereira-Gomez.

Good morning, your Honor.

THE COURT: Good morning.

Are both sides ready to proceed?

MR. TIERNEY: Yes, your Honor.

MS. CHAVIS: Yes, your Honor.

MR. TIERNEY: Your Honor, can I just, prior to starting, I indicated in my sentencing memorandum that the defendant pled pursuant to a plea agreement.

I wasn't the U.S. Attorney assigned to the case when he pled. I'm informed by defense counsel that he just took a straight plea. There's no plea agreement in this case.

THE COURT: Thank you. Okay.

In preparation for today's sentencing, I reviewed the transcript of the plea and I reviewed the presentence report and I reviewed the submission.

Is there anything else I need to have, Ms. Chavis?

MS. CHAVIS: No, your Honor.

THE COURT: Anything else?

MR. TIERNEY: No, your Honor.

THE COURT: So, Mr. Gomez, have you read the presentence report?

THE DEFENDANT: Yes.

THE COURT: Did you and Ms. Chavis have enough time to discuss it?

THE DEFENDANT: Yes.

THE COURT: Are there any corrections that need to be put in?

THE DEFENDANT: No.

THE COURT: Mr. Tierney?

MR. TIERNEY: The only other thing, your Honor, and I apologize for this, my amended guidelines calculation on page 7, I believe my calculation is right, but I just have, underneath the base offense level, I have plus deportation after conviction for a felony for which the sentence was five years.

It should be deportation -- I'm sorry -- conviction prior to deportation. I have the right guideline section. I just have the inaccurate verbiage that corresponds to that guideline section.

MS. CHAVIS: If I could have a moment, your Honor.

(Pause in proceedings.)

THE COURT: What document is that in?

MR. TIERNEY: It's in my sentencing memo.

MS. CHAVIS: Could I have one moment, your Honor?

THE COURT: Yes.

(Pause in proceedings.)

MS. CHAVIS: Thank you, your Honor.

THE COURT: Okay.

Now, tell me again, what were you referring to on page 7?

MR. TIERNEY: On page 7 my calculation starts with the base offense level plus eight, and then my first plus, it reads deportation after conviction. It should be prior to deportation conviction for a felony.

THE COURT: Yes.

MR. TIERNEY: And I have the right section.

THE COURT: In terms of the calculation, I'm going to apply the 2016 guidelines and I agree with the calculation that's in the Government's letter on page 7; base offense level eight, plus 10 and plus 4, equals 22, minus 3 is a 19 for 46 to 57 months.

Do you agree with that calculation?

MS. CHAVIS: Yes, your Honor, that's the calculation under the amendments that were effective November 1st and those apply.

THE COURT: Okay.

Mr. Tierney, do you agree with those calculations?

MR. TIERNEY: I do, your Honor.

THE COURT: I will adopt the PSR and the guideline calculation.

Would you like to be heard, Ms. Chavis.

MS. CHAVIS: Well, your Honor, in my letter of August 2nd of 2016, I did ask your Honor to consider that Mr. Pereira's conviction for attempted robbery is not eligible for the 16 level crime of violence under the old guidelines.

If your Honor were to accept that argument, the guidelines would actually be lower than the new guidelines and the ex post facto rule would apply and the old guidelines would be in effect.

THE COURT: Anything else?

MS. CHAVIS: I will rely on what I have in my letter as to why I believe it's appropriate for the Court to make that determination.

As far as what sentencing I think the Court should impose, regardless of what guideline range your

Honor feels is appropriate, the Government, in their letter, pointed to Mr. Pereira-Gomez' past and urges your Honor to impose a sentence that reflects the activity that occurred in his life basically until he was 20 years old.

I think it's very important to note that all the priors, the significant and most serious priors that Mr. Pereira-Gomez has on his record all occurred until he was age 20. 1996 is the last time he had a conviction for something other than driving while intoxicated.

And I submitted a bunch of letters to the Court from many people who have attested to Mr. Pereira-Gomez' character now.

He's now, in those 20 years, he has amply demonstrated, other than the illegal conduct of returning to the country without permission, that he's no longer the young, very stupid, and, unfortunately, violent kid he was until he was 20.

And I think it's appropriate to impose a guideline sentencing based on conduct that was run out basically by Mr. Pereira-Gomez when he was a young man. He's a very responsible father. He's a hard worker.

He understands certainly, this being his first conviction for illegal reentry, that the consequences of returning are severe, and that the family that's so important to him will lose his presence and his financial

support.

Unlike many other people Mr. Pereira-Gomez, when he returns to his country, will have some options available to him. He's been here since he's 9. His command of the English language is excellent. Being a dual-language speaker will aid him in finding decent employment once he returns to his country.

In addition, as I say in my letter, his daughter, although she's still young, is certainly old enough to travel now and he has every expectation that she will be able to maintain the relationship she has with her father by traveling to see him. His mother has become a citizen and she will be able to visit him as well. So many of the reasons that he felt compelled to return here are no longer as strong as they were when he came back for the conduct that's the basis of this crime.

I believe that an appropriate sentence to take into consideration all of those factors is for the Court to adopt the 46 to 57 range and to impose a sentence at the low end of the range.

THE COURT: How long has he been in custody?

MS. CHAVIS: 17 months.

THE COURT: Would you like to say something, Mr. Gomez?

THE DEFENDANT: Yes.

First of all, I would like to thank my family for being here today to support me. I would like to thank you and Randi Chavis.

I hope after all this is over, thank God, I will never come back to this courtroom. I don't have to come back to this country. My daughter will travel with her mom and I would like to thank everybody.

THE COURT: Mr. Tierney, what's your view on the convictions and the enhancement?

MR. TIERNEY: Well, I would say, your Honor, that it would, under Johnson and I think Beckles that was decided, I think it would apply and so I think the guidelines would be higher under the old guidelines. I think he would be looking at an applicable guideline range of between 57 to 71 months.

However, because of the ex post facto rule he would receive the benefit of the 2018 guidelines where the guidelines are 46 to 57 months.

And so I would think the combination of Beckles and the new guidelines he belongs within that 46 to 57 range and that's the applicable guidelines in this case.

The juris prudence in Johnson does not support not counting that crime of violence as a 16 point enhancement under the old guidelines. So because he's got a worse guideline sentencing under the old guidelines, we

turn to the new guidelines and he receives the benefit of the new guidelines which, again, is 46 to 57 months.

Now, because he hasn't pled guilty to a plea agreement and because of his record, which is extensive, we argue for an above guideline sentence.

Of course, your Honor, if the Court isn't inclined to go above the applicable guidelines, certainly the Government feels that a guideline sentence to the upper level of that guideline to be applied to this case should be done; namely, 46 to 57, somewhere towards the 57 months would be an appropriate sentence in this case.

And I say that, your Honor, because of the defendant's history and I tried to set it forth in my letter. I am not going to go through it, but suffice it to say it started in 1989 when he was 15 years old with a violent act and then culminated in 2015 with a felony DWI. It is an extensive record which includes three prior deportations in 2001, 2006 and 2008.

And while defense counsel points out that most of his or all of his violent acts were committed prior to that 1996-1997 conviction; I would say, your Honor, that his two subsequent convictions both for felony DWI, that poses an entirely different but just as acute risk to public safety when an individual gets behind the wheel and drives while intoxicated and endangers pedestrians and

other drivers.

Given the defendant's history, given his persistent documented history of placing his own interests above that of society, we feel that a guideline sentence to the upper level of the guidelines is most appropriate in this case.

MS. CHAVIS: If I could briefly respond, I want to make it clear by moving forward today with sentencing, I am not in any way abandoning the argument --

THE COURT: I know that.

MS. CHAVIS: The only reason I'm not waiting for the Second Circuit to re-decide Jones is because if Jones is decided in Mr. Pereira's favor, he's already served --

THE COURT: I understood that, I assumed that.

MS. CHAVIS: I do still believe that Judge Walker's comments about forcibly aided by another actually present does not constitute a crime of violence as an element, that isn't an element of force, and it would be appropriate for your Honor to make that finding.

THE COURT: I disagree. I agree with the Government's analysis. I understand why you're going forward today.

I have considered the relevant factors set out in Title 18, United States Code, Section 3553(a), which include, among others, the nature and circumstances of the

offense, and the history and characteristics of the defendant, and the need for the sentence imposed to reflect the seriousness of the offense, and to promote respect for the law, provide a just punishment for the offense, to afford deterrence to criminal conduct, and to protect the public from further crimes of the defendant.

I have considered the advisory sentencing guidelines issued by the Sentencing Commission and the applicable range in this case as well as the policy states.

In this case, Mr. Gomez was deported multiple times including once after the commission of a violent offense and also was arrested and convicted of a felony DWI.

After three illegal reentries to the United States, I cannot minimize the seriousness of this conduct. He has defied United States law and comes back into this country illegally on three separate occasions and has committed crimes here.

However, my considerations also include his family circumstances. And to his credit, he's got a supportive family and it seems he has, to a large degree, changed his life.

But I can't overlook the lawlessness of his conduct here; and as such I will sentence Mr. Gomez within

the 2016 guidelines to 46 months in custody to be imposed and to run consecutively to any undischarged term of imprisonment. I don't know if there is any. There's not, right?

MS. CHAVIS: Right.

THE COURT: It's just referred that way in the PSR.

Three years supervised release with the following conditions:

The defendant shall comply with deportation proceedings. And, if deported, shall not illegally reenter the United States. He shall not possess a firearm, ammunition or destructive device, and I impose the $100 special assessment.

Anything else?

MS. CHAVIS: Not on behalf of Mr. Pereira-Gomez.

MR. TIERNEY: Nothing further.

THE COURT: No open counts, right?

MR. TIERNEY: No, your Honor.

THE COURT: Okay. Thank you.

(Proceedings in this matter are concluded.)