No. _____

In the

Supreme Court of the United States

ARTHUR SANCHEZ, 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 For Review

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

II. What amount of force satisfies this Court's definition of "physical force," that is, force capable of causing physical pain or injury to another person as described in *Johnson v. United States*, 559 U.S. 133, 140 (2010)?

III. 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?

IV. New Mexico courts have held that the state's aggravated battery statute can be violated by unlawful touching alone. Unlawful touch that results in bodily injury is an element of aggravated battery. But does New Mexico aggravated battery have as an element the use of violent, physical force as described in *Johnson v. United States*, 559 U.S. 133, 140 (2010)?

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In the

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ARTHUR SANCHEZ, Petitioner

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Petition for Writ of Certiorari

Arthur Sanchez 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. Arthur Sanchez*, Case No. 17-2200, affirming the district court's denial of Sanchez's 28 U.S.C. § 2255 motion challenging his Armed Career Criminal Act (ACCA) sentence, was not published.[1] Sanchez filed a petition for rehearing en banc and panel

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[1] App. 1a-5a. "App." refers to the attached appendix. "Vol." refers to the record on appeal which is contained in four volumes. Sanchez refers to the documents and pleadings in those volumes as Vol. I-IV followed by the page number found on the bottom right of the page (e.g. Vol. II at 89). "Doc." refers to the number of the document on the district court criminal docket sheet in No. 13-CR-961-JAP, unless otherwise indicated.

rehearing which the court denied.[2] The district court's memorandum opinion denying Sanchez's § 2255 motion was not published.[3]

Jurisdiction

On September 5, 2018, the Tenth Circuit affirmed the district court's decision to deny Sanchez's § 2255 motion challenging his ACCA sentence.[4] On October 4, 2018, the circuit court denied his petition for rehearing en banc and panel rehearing. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). According to this Court's Rules 13.1 and 13.3 and 28 U.S.C. § 2101(c), this petition is timely if filed on or before January 1, 2019.

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

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

[2] App. 6a.

[3] App. 7a-22a.

[4] App. 1a-5a.

sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—...

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

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

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

New Mexico Statutes

The New Mexico statutory provisions involved in this case are:

N.M. Stat. Ann. § 30-16-2, Robbery

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

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

Whoever commits robbery is guilty of a third degree felony.

N.M. Stat. Ann. § 30-3-2, Aggravated Assault

N.M. Stat. Ann. § 30-3-2, states 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.

N.M. Stat. Ann. § 30-3-5, Aggravated Battery

N.M. Stat. Ann. § 30-3-5 describes the offense as follows:

A. Aggravated battery consists of the unlawful touching or application of force to the person of another with intent to injure that person or another.

B. Whoever commits aggravated battery, inflicting an injury to the person which is not likely to cause death or great bodily harm, but does cause painful temporary disfigurement or temporary loss or impairment of the functions of any member or organ of the body, is guilty of a misdemeanor.

C. Whoever commits aggravated battery inflicting great bodily harm or does so with a deadly weapon or does so in any manner whereby great bodily harm or death can be inflicted is guilty of a third degree felony.

Introduction

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

Here, the Tenth Circuit Court of Appeals held New Mexico robbery meets the prerequisites of the ACCA's elements clause. App. 3a. Its conclusion was based exclusively on its earlier decision in *United States v. Garcia*, 877 F.3d 944 (10th Cir. 2017), *petition for cert. filed* June 18, 2018 (No. 17- 9469). In that case the court ruled that pushing with any amount of force or momentarily struggling over a purse constitutes the use of violent force capable of causing physical pain or injury to another person and fits this Court's definition of "physical force" as set forth in *Johnson v. United States*, 559 U.S. 133, 140 (2010) ("*Johnson I*"). 877 F.3d at 856.

In addressing the issue in *Stokeling*, this Court will explore what kind of force satisfies the elements clause in the robbery context. If this Court decides *Stokeling* in the petitioner's favor, it is reasonably probable that decision will undermine the basis upon which the Tenth Circuit's holding in this case relied. In that circumstance, it would be an appropriate exercise of this Court's discretion to grant certiorari in this case, vacate the Tenth

Circuit's decision and remand for reconsideration in light of the *Stokeling* holding ("GVR").

The robbery question presented here has already been asked. As noted earlier, another petition for writ of certiorari is pending before the Court. *Garcia*, No. 17-9469. There, the government conceded that the Tenth Circuit decision "may be affected by this Court's resolution of *Stokeling* . . . ." Thus, it agreed with Garcia that his petition should be "held pending the decision in *Stokeling* and then disposed of as appropriate in light of that decision." Mem. of U.S. 2. Sanchez raises the same issue as Garcia. In fact, the ruling that his New Mexico robbery conviction falls within the elements clause is exclusively based on the Tenth Circuit decision in *Garcia*. With *Garcia* under challenge pending *Stokeling*, there is little reason to apply *Garcia* here as settled law. Nor is there reason for the government to take a different position in this case.

For all these reasons, this Court should hold Sanchez's petition pending *Stokeling*'s resolution.

If the *Stokeling* decision does not justify a GVR, this Court should grant certiorari in this case to resolve the question what amount of force satisfies this Court's "physical force" definition in *Johnson I*. The circuit courts are hopelessly divided on that question, especially with respect to the use of force during robbery. Some circuit courts, as did the Tenth Circuit in this case, stress the "capable" part of the *Johnson I* definition and find "physical force" in the most minor uses of force. App. 2a-4a. Others take to heart *Johnson I*'s emphasis on the violent nature of the force required to constitute "physical force" and require more than the insubstantial uses of force involved in such conduct as pushing, touching an arm causing the victim to stumble or a

momentary struggle over a purse. This Court should step in to provide guidance on the issue of how much force must be used before it reaches the level of violent force under *Johnson I*.

Statement of the Case

A. The District Court Proceedings

Under the ACCA, the statutory sentence range for a defendant who is convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), rises from zero to ten years, *see* 18 U.S.C. § 924(a)(2), to 15 years to life, if the defendant has three prior convictions for a "violent felony." 18 U.S.C. § 924(e)(1). An offense is a "violent felony" if it fits within one of three categories: (1) it "has as an element the use, attempted use, or threatened use of physical force against the person of another" (the elements clause), 18 U.S.C. § 924(e)(2)(B)(i); (2) it "is burglary, arson, or extortion or involves use of explosives," (the enumerated clause), 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," (the residual clause), 18 U.S.C. § 924(e)(2)(B)(ii).

In 2014, Sanchez received a 15-year prison term under the ACCA based on three 'violent felony' convictions. Those convictions were for the New Mexico offenses of third degree robbery, aggravated assault with a deadly weapon and aggravated battery with a deadly weapon.

Subsequently, this Court held in *Johnson v. United States*, 135 S. Ct. 2551 (2015) (*Johnson II*), that the residual clause was unconstitutionally vague. *Id.* at 2256-63. In *Welch v. United States*, 136 S. Ct. 1257, 1264-68 (2016), this Court held the *Johnson II* rule applied retroactively on collateral review.

Within a year of the *Johnson II* decision, Sanchez filed his first motion to vacate his sentence under 28 U.S.C. § 2255. App. 1a. Relying on *Johnson II*,

he asserted his ACCA sentence violated due process because the court used the unconstitutionally vague residual clause to find that his three prior convictions were violent felonies.

The government initially conceded Sanchez was entitled to relief because New Mexico robbery does not satisfy the elements clause of 18 U.S.C. § 924(e)(2)(B)(i). Vol. II at 48. Eventually, the government withdrew its concession and contended all three of Sanchez's prior convictions met the prerequisites of the ACCA's elements clause. Id. at 79, 140. Sanchez argued none of them did. Vol. II at 25, 58, 116, 145. He said: New Mexico aggravated assault does not have a mens rea element with respect to another person; and New Mexico robbery and New Mexico aggravated battery do not have as an element the use of violent force capable of causing pain or injury under *Johnson I*. Id. Ultimately, the district court agreed with the government, adopted the magistrate judge's proposed findings and recommended disposition and dismissed Sanchez's § 2255 motion with prejudice. App. 6a-22a.

B. The Tenth Circuit Proceedings

On appeal to the Tenth Circuit, Sanchez repeated the arguments he made in the district court. The court was not persuaded by any of them. It relied expressly on *United States v. Garcia*, 877 F.3d 944 (10th Cir. 2017), to find that his New Mexico robbery conviction satisfied § 924(e)(2)(B)(i)'s elements clause. App. 3a. In that decision, the court held that New Mexico robbery "'categorically matches the definition of 'physical force' the Supreme Court assigned in *Johnson I*' and 'has as an element the use or threatened use of physical force against another person.'" *Id.* (quoting *Garcia*, 877 F.3d at 956).

As a result of its analysis of New Mexico cases and belief that minimal force alone is sufficient to trigger application of the ACCA's elements clause, the Tenth Circuit held there was no realistic probability New Mexico would uphold a robbery conviction where the defendant used less than *Johnson I* force. App. 3a. The court also found that New Mexico aggravated assault and aggravated battery were violent felonies because, in its view, both are committed by threatening the use of force. Id. Accordingly, the court affirmed the district court's dismissal of Sanchez's § 2255 motion. App. 4a.

Argument for Allowance of the Writ

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

A. Introduction

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

This Court's decision in *Stokeling* will necessarily turn on its determination of how much force constitutes physical force. Consequently, a ruling by this Court in the *Stokeling* petitioner's favor will probably give rise to a reasonable probability the Tenth Circuit would reject its broad conception

of *Johnson I* force that underpinned its decision in this case and rule that Sanchez is entitled to relief. It would then be an appropriate use of this Court's discretion to grant certiorari, vacate the Tenth Circuit judgment and remand for reconsideration in light of the *Stokeling* decision ("GVR"). Accordingly, this Court should hold this petition pending its resolution of the *Stokeling* case.

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

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

To decide whether an offense satisfies a violent felony definition, the categorical approach applies. *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016). Under that approach, only the elements matter. *Id.* As a consequence, every conviction for the offense must "necessarily" meet the predicate offense definition. *Id.* at 2255. Sentencing courts must presume

the conviction "'rested upon [nothing] more than the least of th[e] acts' criminalized." *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013) (quoting *Johnson I*, 559 U.S. at 137) (brackets supplied in *Moncrieffe*).

In *Johnson I*, the Court explained the statutory definition of 'violent felony' gave the phrase 'physical force' its context. 559 U.S. at 140. The statute's emphasis on 'violent' led the Court to conclude that 'physical force' meant "violent force." *Id.* It also said that "violent" in § 924(e)(2)(B) "connotes a substantial degree of force." *Id.* "When the adjective 'violent' is attached to the noun 'felony,' its connotation of strong physical force is even clearer," the Court explained. *Id.* It added that *Black's Law Dictionary* defined "violent felony" as "[a] crime characterized by extreme physical force." *Id.* at 140-41.

In *United States v. Castleman*, 572 U.S. 157 (2014), the Court again discussed the significance of characterizing a felony as 'violent.' It said that certain conduct, although forceful would not be violent: "Minor uses of force may not constitute 'violence' in the generic sense." *Id.* at 165. Noting that *Johnson I* cited *Flores v. Ashcroft*, 350 F.3d 666 (7th Cir. 2003), with approval, the Court observed that it was ""hard to describe . . . as 'violence' 'a squeeze of the arm [that] causes a bruise.'" *Castleman*, 572 U.S. at 165-66 (quoting *Flores*, 350 F.3d at 670). It emphasized that "'most physical assaults committed against women and men by intimates are relatively minor and consist of pushing, grabbing, shoving, slapping and hitting.'" *Id.* at 165 (quoting Department of Justice, P. Tjaden & N. Thoennes, Extent, *Nature and Consequences of Intimate Partner Violence* 11 (2000)). This Court's decisions clarify that the use of 'physical force' must involve more than conduct capable of causing minor pain or injury. *See United States v. Walton*,

881 F.3d 768, 773 (9th Cir. 2018) ("mere potential for some trivial pain or slight injury will not suffice" as 'physical force'). The conduct must earn the "violent" designation.

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

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

Stokeling argued that the Eleventh Circuit incorrectly found Florida robbery has as an element the use of enough force to constitute 'physical force' under *Johnson I* simply because Florida robbery requires enough force to overcome resistance. Petition for Writ of Certiorari at 11-12, 23; Reply to the

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

In his opening brief, Stokeling suggested 'physical force' is force "reasonably expected to cause pain or injury." Petitioner's Brief at 23-24, 43. He stressed that the violent nature of *Johnson I*'s definition does not include minor uses of force, like those Sanchez detailed in Section B above. *Id.* at 3-5, 11-15, 18-21, 25-26. Stokeling criticized the government's interpretation of physical force because it unduly relied on the phrase "capable of causing physical pain." Accepting the government's view, he argued, would mean that virtually any force constitutes "physical force." *Id.* at 12, 22-25. Stokeling concluded that, since the amount of force used to commit Florida robbery is immaterial, Florida robbery is not a 'violent felony' under the ACCA's elements clause. *Id.* at 26-44. Stokeling listed several examples of Florida robberies that he said did not involve sufficiently violent force, including robberies involving a purse tug-of-war, pushing and bumping. *Id.* at 29-31, 33-41.

Sanchez's case presents very similar issues to those raised in *Stokeling*. As in Florida, in New Mexico appellate courts have held that, as long as a

defendant takes property by using force to overcome resistance, the defendant is guilty of robbery, regardless of the amount of force used. *State v. Martinez*, 513 P.2d 402, 403 (N.M. Ct. App. 1973) ("The amount or degree of force is not the determinative factor."); *State v. Segura*, 472 P.2d 387, 387 (N.M. Ct. App. 1970) (same); *State v. Sanchez*, 430 P.2d 781, 782 (N.M. Ct. App. 1967) ("the issue is not how much force was used"). The committee commentary to the relevant state uniform jury instruction says the same. NMRA UJI 14-1620, committee commentary ("the amount of force is immaterial").

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

Just as Stokeling has argued before this Court, Sanchez has persistently argued his state robbery does not have as an element the use of sufficient force to fall within the ACCA's elements clause. Just as the Eleventh Circuit dealt with Stokeling's argument, the Tenth Circuit rejected Sanchez's argument by adopting *Garcia*'s expansive view of what amount of force is 'physical force.' In *Garcia*, the Tenth Circuit relied on the "capable" part of the *Johnson I* definition and Justice Scalia's *Castleman* concurrence with which the majority disagreed and disregarded the violent part of the *Johnson I* definition. 877 F.3d at 949-50, 951-53, 953 n. 11, 955-56. As a consequence, it is the law in the Tenth Circuit that pushing to any extent, a momentary

tug-of-war over a purse and touching that caused someone to tumble qualifies as 'physical force.' *Garcia*, 877 F.3d at 949-50, 951-53, 955-56.

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

D. This Court should hold Sanchez's petition pending its resolution of *Stokeling*.

"Where intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is . . . potentially appropriate." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996); *see also Tyler v. Cain*, 533 U.S. 656, 666 n. 6 (2001) (noting the *Lawrence* standard). This Court's decision in the petitioner's favor in *Stokeling* would satisfy that GVR standard. For the reasons discussed in Section C above, there would be a reasonable probability that favorable decision would call into doubt the Tenth Circuit's broad view of what constitutes physical force which rationalized its holding that New Mexico robbery is a violent felony. Subverting that view would leave the Tenth Circuit with no choice but to grant Sanchez's § 2255 motion, vacate his ACCA

sentence and remand for resentencing without application of the ACCA. No procedural issues would stand in the way of that outcome.

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

II. This case presents an important question of federal law which has not been, but should be, settled by this Court, and concerning which the circuit courts of appeal are in conflict, specifically, what amount of force satisfies this Court's definition of "physical force" from *Johnson I*.

A. Introduction

If the *Stokeling* decision does not justify a GVR, this Court should grant certiorari in this case to resolve the question what amount of force satisfies this Court's "physical force" definition in *Johnson I*. The Tenth Circuit held New Mexico robbery falls within the ACCA's elements clause based on an expansive idea of what constitutes *Johnson I* force. For that holding it relied exclusively on *Garcia* which stressed the "capable" part of the *Johnson I* definition and Justice Scalia's opining in his *Castleman* concurrence, with which the majority disagreed, that "hitting, slapping, shoving, grabbing, pinching, biting, and hair pulling" amount to "physical force." *Garcia*, 877 F.3d at 949-50, 951-52 & n. 7, 953-55 & n.11, 955-56 (citing *Castleman*, 572 U.S. at 182, and *Johnson I*, 559 U.S. at 140). Because of that approach, the Tenth Circuit found touching someone and causing the person to stumble, pushing to any degree, and a momentary struggle for a purse all fit the *Johnson I* "physical force" definition. *Garcia*, 877 F.3d at 951-52, 953-55, 955-

56. The Tenth Circuit ignored the violent nature of "physical force" that this Court emphasized in *Johnson I* and *Castleman*.

While other circuit courts address the physical force issue in a way similar to the Tenth Circuit, others appreciate the robust amount of force required to constitute physical force. The Tenth Circuit explicitly recognized in *Garcia* that its position on pushing differs with the Fourth Circuit's. 877 F.3d at 953 n. 11. Other circuits disagree with the Tenth Circuit regarding pushing, touching that causes a stumble and momentarily struggling for a purse. If this Court's *Stokeling* decision does not resolve this split in the circuit courts, then this Court should grant certiorari in this case to provide guidance on how much force is the violent force this Court invoked in *Johnson I*.

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

A number of circuit courts disagree with the Tenth Circuit's holding that touching someone and causing the person to stumble, pushing to any degree, and a momentary struggle for a purse involve enough force to satisfy *Johnson I*s definition of "physical force." The Tenth Circuit explicitly acknowledged its conflict with the Fourth Circuit regarding pushing. The Tenth Circuit stated its position clashed with "cases such as" *United States v. Gardner*, 823 F.3d 793, 803-04 (4th Cir. 2016), in which the Fourth Circuit concluded a defendant who pushed a store clerk's shoulder, causing her to fall onto shelves, to commit a robbery did not use "physical force." 877 F.3d at 953 n. 11. The Tenth Circuit's position on pushing and touching in a way that causes the victim to stumble also conflicts with the Ninth Circuit's determination in *Walton* that "physical force" was not involved when a defendant pushed the robbery victim just enough to knock the victim off

balance to get the victim out of the way. 881 F.3d at 773; *see also United States v. Flores-Cordero*, 723 F.3d 1085, 1087-88 (9th Cir. 2013) (struggling to keep from being handcuffed and kicking an officer do not equal *Johnson I* "physical force").

The Tenth Circuit's holding that momentarily struggling over a purse meets the *Johnson I* standard also contrasts with other circuits' decisions. In *Walton*, the Ninth Circuit opined that the defendant did not use "physical force" when he rushed toward the victim, tugged her purse a couple of times, yanked her purse off of her arm, and ran away. 881 F.3d at 773. Similarly, in *United States v. Winston*, 850 F.3d 677 (4th Cir. 2017), the Fourth Circuit found the accused did not use physical force when he tapped the victim on the shoulder, jerked her around by pulling her shoulder, but not enough to cause her to fall, took her purse and ran. *Id.* at 684-86; *accord United States v. Molinar*, 881 F.3d 1064, 1070 (9th Cir. 2017) (a struggle over a wallet, involving yanking and pulling, causing the victim's arm to fly back did not involve the use of "physical force"); *United States v. Yates*, 866 F.3d 723, 729-30 (6th Cir. 2017) (same conclusion where a robber ran up to the victim, grabbed her purse, jerked her arm and ran off).

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

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

On the other hand, other circuit courts agree with the Tenth Circuit's approach in this case. The Eighth Circuit en banc held bumping a victim from behind, momentarily struggling with her and yanking a purse out of her hands involved the use of "physical force." *United States v. Swopes*, 886 F.3d 668, 671-72 (8th Cir. 2018) (en banc); *see also United States v. Pettis*, 888 F.3d 962, 965-66 (8th Cir. 2018) (jostling and a forceful pull on a boy's coat involves "physical force"). Similarly, in *United States v. Jennings*, 860 F.3d 450 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 701 (2018) – a case the Tenth Circuit cited with approval in *Garcia*, 877 F.3d at 955 – the Seventh Circuit acknowledged Minnesota cases "sustain robbery convictions based on the use . . . of relatively limited force or infliction of minor injuries," but still found Minnesota robbery falls within the elements clause. 860 F.3d at 456-57. The

Seventh Circuit found "physical force" was involved in pushing a victim against a wall and, in another case, yanking the victim's arm and pulling on it when she resisted the taking of her purse. *Id.* at 456; *see also Perez v. United States*, 885 F.3d 984, 989 (6th Cir. 2018) (forming a human wall blocking the victim's path as the victim attempted to pursue a pickpocket threatened physical force).

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

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

C. The Tenth Circuit was wrong to hold that New Mexico robbery is a violent felony.

The Tenth Circuit affirmed the district court's denial of Sanchez's § 2255 motion by disregarding this Court's notable emphasis in *Johnson I* on the

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

Touching that causes someone to stumble, momentarily struggling to take a purse or every pushing does not by any stretch of the imagination equal the "*violent* force" this Court portrayed in *Johnson I*. *Id.* at 140-41 (emphasis in original). Yet in *Garcia*, the decision upon which Sanchez's panel relied exclusively, the Tenth Circuit found each of those actions to be "physical force," 877 F.3d at 951-52, 954-55. It could reach that conclusion only by ignoring the gravamen of this Court's *Johnson I* holding: the involvement of violence.

In doing so, the Tenth Circuit also contravened the ACCA's purpose. This Court said in *Begay v. United States*, 553 U.S. 137 (2008), "[a]s suggested by its title, the Armed Career Criminal Act focuses upon the special danger created when a particular type of offender—a violent criminal or drug trafficker—possesses a gun." *Id.* at 146. "[A] prior crime's relevance to the possibility of future danger with a gun" exists when it "show[s] an increased likelihood that the offender is the kind of person who might deliberately point

the gun and pull the trigger." *Id.* Where such a crime does not reflect that increased likelihood, there is "no reason to believe that Congress intended a 15-year mandatory prison term." *Id.* The uses of minimal force the Tenth Circuit held were the uses of physical force do not by a long shot evidence the offenders are the kinds of people who might deliberately point a gun at someone and pull the trigger. Congress reserved the severe ACCA punishment for more dangerous offenders.

The Tenth Circuit's reliance on the "capable" part of *Johnson I*'s "physical force" definition, *Garcia*, 877 F.3d at 947, 949-50, 954-55; App. at 2-4, brings to mind the resort to speculation this Court condemned in *Johnson II*, 135 S. Ct. at 2556-63. The Tenth Circuit's dependence on Justice Scalia's *Castleman* concurrence, *Garcia*, 877 F.3d at 954-55, is way off base. In that concurrence, Justice Scalia argued the term 'physical force' in the definition of a "misdemeanor crime of domestic violence," 18 U.S.C. § 921(a)(33)(A)(ii), had the same meaning as 'physical force' in the ACCA's elements clause, 18 U.S.C. § 924(e)(2)(B)(i). 572 U.S. at 173-183. The *Castleman* majority disagreed. It held a "misdemeanor crime of domestic violence" included conduct that was less violent than the conduct covered by the ACCA's elements clause. *Id.* at 162-67. It makes no sense for the Tenth Circuit to base its ruling regarding the meaning of the elements clause on Justice Scalia's concurrence.

Justice Scalia believed "hitting, slapping, shoving [and] grabbing" constituted *Johnson I* "physical force." *Id.* at 182. But the *Castleman* majority expressed the opposite point of view. It referred to "pushing, grabbing, shoving, slapping and hitting," as "[m]inor uses of force that may not constitute violence in the generic sense." *Id.* at 165 (first quote from

Tjaden, *supra*, at 11). The *Castleman* majority goes on to give as an example of such a minor, nonviolent use of force, the squeezing of an arm that causes a bruise. *Id.* at 1412.

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

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

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

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

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

III. 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 elements 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. Sanchez*, 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 elements 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 elements 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 elements 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 elements 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' elements 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 elements 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 elements clause. When the panel decided Sanchez'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, Sanchez'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 elements 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 elements 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 Sanchez'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 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 elements clause's requirements.

In other words, as five other circuits have found, to fall within the elements 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 elements clause – a clause with language identical to the ACCA's elements 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 elements 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 elements 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 elements 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 elements 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 elements clause and Sanchez 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 elements 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.[5] *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*

[5] The government never argued the statute is divisible.

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.*

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 III (A) above, that means that offense is not a violent felony as defined in the ACCA's elements clause.

D. This Court should grant Sanchez'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 unnecessary conflict with the decisions of other circuits.

IV. Because New Mexico courts have explicitly held that only an unlawful touch is required to be guilty of aggravated battery with a deadly weapon, the offense does not have the use of *Johnson I* force as an element.

In New Mexico, aggravated battery is defined as, "the unlawful touching or application of force to the person of another with intent to injure that person or another." N.M. Stat. Ann. § 30-3-5(A). Aggravated battery simply demands evidence that a person touched another without permission. *See State v. Kraul*, 90 N.M. 314, 316-317 (Ct. App. 1977) (simple battery is necessary element of aggravated battery). Battery is the "least touching" of another person in a rude, insolent or angry manner. *State v. Seal*, 415 P.2d 845, 846 (N.M. 1966). That is not the violent force capable of causing pain or injury that constitutes physical force under the elements clause. *Johnson I*, 559 U.S. at 138-45; *United States v. Barraza-Ramos*,550 F.3d 1246, 1249-51 (10th Cir. 2008); *United States v. Hays*, 526 F.3d 674, 678-79 (10th Cir. 2008).

There is a material difference between a touch that may or may not lead to violence, and the actual or threatened use of violent physical force. The latter comes within the ACCA's elements clause; the former does not. Offenses of unwanted touch with only a possibility for violence fell within the ACCA's residual clause, which is now obsolete.

In New Mexico, battery is not measured by the physical harm done; it is the unlawfulness of even the slightest touch that matters. An offensive touch can be a battery and it will not necessarily involve force capable of causing pain or injury. In other words, the force of the touch and its consequences are secondary because without the touch one cannot commit a battery. Injury is

not a necessary element, nor is contact with the person's body. *State v. Ortega*, 113 N.M. 437, 440-41 (Ct. App. 1992). Because aggravated battery subsumes battery, in New Mexico unlawful touching, however slight, can never meet the ACCA's level of force.

For example, if you grab a driver through an open truck window to keep him from leaving, you commit battery. *Cf. State v. Hill*, 131 N.M. 195, 198, 200 (Ct. App. 2001) (analyzing if driver instigated battery or was a victim when officer struck driver's arm while truck in gear and drew weapon to keep him from driving off). Perhaps your grab seems to be done with an intent to injure. If so, it becomes an aggravated battery.[6] The same grab may result in the driver losing control and crashing the truck or hitting someone - now there are felony aggravated battery charges. Arguably, the same is true if you grab an officer's baton, "flashlight or weapon" instead of an arm, and spin him around, "causing the officer to fall . . . out a window, into a mine shaft, off a ship, or out of an airplane . . . ." *Ortega*, 113 N.M. at 441. Yet, the actus reus is still the unlawful touch, not the possibilities it creates.

A. By expanding *Castleman* beyond its express parameters, the Tenth Circuit is in conflict with other circuits that have found violent, physical force is active force that does not include mere touching.

A crime committed by mere touching, but that may set events in motion to cause great bodily harm, like New Mexico aggravated battery, does not categorically require a *Johnson I* level of force. *United States v. Torres-Miguel*, 701 F.3d 165, 168 (4th Cir. 2012). In *Johnson I* the Court ensured that its definition of force required a "substantial degree of force," or "strong

[6] New Mexico recognizes the privilege of parental control so that an intent to injure may be a disciplinary tactic and not necessarily a desire to inflict serious physical injury. *State v. Lefevre*, 138 N.M. 174, 177-78 (Ct. App. 2005).

physical force." 559 U.S. at 140. Although this force may be "capable" of causing pain, the result is not the determining factor. *See id.* The strength of the force is the important point.

The Tenth Circuit's decisions in *United States v. Perez-Vargas*, 414 F.3d 1282 (10th Cir. 2005) and *United States v. Rodriguez-Enriquez*, 518 F.3d 1191 (10th Cir. 2008), comport with this Court's ruling. In these cases the Tenth Circuit held pain or injury alone does not render a crime forceful. *Perez-Vargas*, 414 F.3d at 1285-87; *Rodriguez-Enriquez*, 518 F.3d at 1194; *see also Torres-Miguel*, 701 F.3d at 168 ("of course, a crime may result in death or serious injury without involving the use of physical force."); *Middleton*, 883 F.3d at 490 (noting this portion of *Torres-Miguel* survives *Castleman* because there remains an acute distinction between de minimus force discussed in *Castleman* and violent force discussed in *Johnson I*); and *id.* (rejecting government's argument that causing injury categorically means violent force was used). De minimus force, such as mere offensive touching, regardless of whether it may lead to injury, will not come within the elements clause because it is not violent. An offense falls within that clause only when it requires proof of an underlying forceful, violent physical act imparted to another's body. *Perez-Vargas*, 414 F.3d at 1285; *Rodriguez-Enriquez*, 518 F.3d at 1194.

In *United States v. Ontiveros*, 875 F.3d 533, 536 (10th Cir. 2017), the panel overruled *Perez-Vargas*, and *Rodriguez-Enriquez*. It believed that the court's earlier cases did not survive *Castleman*. It said that according to *Castleman* the "use of physical force" in the ACCA's elements clause includes force applied directly or indirectly, such as through poison. 875 F.3d at 536-38 (citing *Castleman*, 572 U. S. at 169-171). The *Sanchez* panel used *Ontiveros*

to find Sanchez's aggravated battery conviction satisfied the elements clause. App. 3a. It ruled that whether harm occurs indirectly, rather than directly is irrelevant. *Id.* *Ontiveros* is not the reliable authority the *Sanchez* panel wants it to be. In *Ontiveros*, the court interpreted *Castleman* in a way that puts it in conflict with other circuits. *Castleman* has nothing to do with the characterization of violent felonies. Not only have other circuit courts concluded just that, so too did *Castleman*.

There this Court expressly disavowed any intent to upset the circuits' understanding of the ACCA and its definition of violent felony. 572 U.S. at 164 n.4. "Courts of Appeals have generally held that mere offensive touching cannot constitute the 'physical force' necessary to a 'crime of violence.'" *Id.* "Nothing in today's opinion casts doubt on these holdings, because ... 'domestic violence' encompasses a range of force broader than that which constitutes 'violence' simpliciter." *Id.* *Castleman* was clear that it was not addressing "force" under *Johnson I*'s definition, but rather was interpreting a wholly different statutory phrase. *Id.*

"By its express terms, *Castleman*'s analysis is not applicable to the physical force requirement for a crime of violence, which suggests a category of violent, active crimes that have as an element a heightened form of physical force that is narrower in scope than that applicable in the domestic violence context," said *United States v. Rico-Mejia*, 859 F.3d 318, 322 (5th Cir. 2017) (internal quotations omitted). The First Circuit, like the Fourth and Fifth, also recognized that *Castleman* did not alter the definition of force that applies in the ACCA context. The court commented that "[p]hysical force can mean different things depending on the context in which it appears." *Whyte v. Lynch*, 807 F.3d 463, 470 (1st Cir. 2015). It then held that the context

addressed in *Castleman*, the Domestic Violence Gun Ban, can "be satisfied by a 'mere offensive touching' – a standard that casts a far wider net in the sea of state crime predicates than does *Johnson*'s requirement of 'violent force.'" *Id.* at 471. Therefore, irrespective of *Castleman*, the court found that a Connecticut assault statute that, like New Mexico, can involve causing physical injury, did not require violent physical force. *Id.* at 471. Given the sound reasoning in these opinions, it is difficult to accept that *Castleman* has expressly invalidated the Tenth Circuit's earlier analysis in *Perez-Vargas* and *Rodriguez-Enriquez*.

Perez-Vargas and *Rodriguez-Enriquez* should remain binding precedent. If so, then the result here is apparent: New Mexico aggravated battery is focused on the resulting harm to the person not the force behind the unlawful touching, and so does not include an element of violent physical force as described by this Court in *Johnson I*. *See State v. Chavez*, 82 N.M. 569, 571 (Ct. App. 1971) (whether an aggravated battery rises to a felony "depends largely . . . on the nature of the injury inflicted."). Indeed, no element calls for proof that the accused used violent, physical force to cause or potentially cause harm to another. *See e.g. Ortega*, 113 N.M. at 440 (commenting that contact with another's cane, or paper or any other object held in that person's hand may constitute a battery)[7]; *Chavez*, 82 N.M. at 572 ("defendant's act need not be a direct (that is, immediate) cause" of harm or the likely harm to

[7] A variety of unwanted touchings would come within the aggravated battery statute. For example, a person may bump another into the path of an oncoming bus or train. Another may kick a cane out from under someone who needs it to walk or stand and the fall causes serious injury. As these examples illustrate, harm need not result from a violent physical contact between the accused and another – it can come from any number of acts which do not use violent physical force.

another). Thus, New Mexico aggravated battery does not match the force clause's definition of violent felony.

Sanchez asks this Court to review the Tenth Circuit's decision to bring it in line with *Johnson I*.

Conclusion

Under Point I, Sanchez requests that this Court hold this petition pending *Stokeling*'s resolution, and upon that resolution, grant *certiorari* in this case, vacate the Tenth Circuit's decision, and remand for reconsideration in light of the decision in *Stokeling*. Under Points II-IV, if a GVR is not appropriate after the decision in *Stokeling*, this Court should grant this Petition and review and reverse the Tenth Circuit's decision in Sanchez's case.

Respectfully submitted,

STEPHEN P. MCCUE
Federal Public Defender

DATED: December 31, 2018

By: *s/ John F. Robbenhaar*
John F. Robbenhaar*
Assistant Federal Public Defender

Attorney for the Petitioner
* Counsel of Record

Appendix

2018 WL 4214236
Only the Westlaw citation is currently available.
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 10th Cir. Rule 32.1.
United States Court of Appeals, Tenth Circuit.

UNITED STATES of America,
Plaintiff-Appellee,
v.
Arthur SANCHEZ, Defendant-Appellant.
No. 17-2200

|
Filed September 5, 2018

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(D.C. Nos. 1:16-CV-00659-JAP-GBW & 1:13-CR-00961-JAP-1) (D. New Mexico)

Before MATHESON, EID, and CARSON, Circuit Judges.

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Allison H. Eid, Circuit Judge

*1 Arthur Sanchez seeks a certificate of appealability (COA) to challenge the denial of his 28 U.S.C. § 2255 motion. *See id.* § 2253(c)(1)(B) (providing that no appeal may be taken from a final order denying relief under § 2255 unless the movant obtains a COA). We deny a COA and dismiss this matter.

I

Mr. Sanchez pleaded guilty to possessing heroin with intent to distribute, 21 U.S.C. § 841(a)(1), and possessing a firearm and ammunition after a prior felony conviction, 18 U.S.C. § 922(g)(1). His presentence investigation report determined he was subject to the enhanced penalty provisions of the Armed Career Criminal Act of 1984 (ACCA), which imposes a mandatory minimum sentence of 15 years in prison for violations of § 922(g) when the defendant has "three previous convictions ... for a violent felony." 18 U.S.C. § 924(e)(1). The ACCA defines a "violent felony" as "any crime punishable by imprisonment for a term exceeding one year" that (1) "has as an element the use, attempted use, or threatened use of physical force against the person of another" (the "elements clause"); (2) "is burglary, arson, ... extortion, [or] involves use of explosives" (the "enumerated offenses clause"); or (3) "otherwise involves conduct that presents a serious potential risk of physical injury to another" (the "residual clause"). *Id.* § 924(e)(2)(B). Mr. Sanchez had been convicted in New Mexico of robbery, aggravated assault with a deadly weapon, and aggravated battery with a deadly weapon. Thus, he agreed to a 15-year sentence under the ACCA and did not appeal.

Following the Supreme Court's decision in *Johnson v. United States*, —— U.S. ——, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015) ("*Johnson II*"), which invalidated the ACCA's residual clause, Mr. Sanchez moved to correct his sentence pursuant to 28 U.S.C. § 2255. He argued that his three prior convictions no longer qualified as violent felonies under the ACCA because the residual clause was unconstitutional, the enumerated offenses clause was inapplicable, and the elements clause was not satisfied. A magistrate judge agreed with the first two points but not the last, concluding that Mr. Sanchez's prior convictions qualified as violent felonies under the elements clause.

The magistrate judge therefore recommended that the § 2255 motion be denied. Over Mr. Sanchez's objections, the district court adopted the recommendation, denied the § 2255 motion, and declined to issue a COA. Mr. Sanchez now seeks a COA from this court.

II

A COA is a jurisdictional prerequisite to our review. *Miller-El v. Cockrell*, 537 U.S. 322, 335-36, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). To obtain a COA, a prisoner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). We engage in "an overview of the claims in the [§ 2255 motion] and a general assessment of their merits." *Miller-El*, 537 U.S. at 336, 123 S.Ct. 1029. "At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.' " *Buck v. Davis*, ___ U.S. ___, 137 S.Ct. 759, 773, 197 L.Ed.2d 1 (2017) (quoting *Miller-El*, 537 U.S. at 327, 123 S.Ct. 1029).

*2 To qualify as a violent felony under the elements clause, a prior conviction must have "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). "In this context, 'physical force' means '*violent* force—that is, force capable of causing physical pain or injury to another person.' " *United States v. Maldonado-Palma*, 839 F.3d 1244, 1248 (10th Cir. 2016) (quoting *Johnson v. United States*, 559 U.S. 133, 140, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010) ("*Johnson I*")), *cert. denied*, ___ U.S. ___, 137 S.Ct. 1214, 197 L.Ed.2d 255 (2017).

1. Aggravated Assault with a Deadly Weapon, N.M. Stat. Ann. § 30-3-2(A)

We have consistently held that New Mexico's crime of aggravated assault with a deadly weapon satisfies *Johnson I*'s standard of violent force. *See Maldonado-Palma*, 839 F.3d at 1250 (holding that N.M. Stat. Ann. § 30-3-2(A) is categorically a crime of violence under the elements clause of U.S.S.G. § 2L1.2); *United States v. Ramon Silva*, 608 F.3d 663, 670-71 (10th Cir. 2010) (holding that New Mexico aggravated assault with a deadly weapon is categorically a violent felony under the ACCA elements clause); *United States v. Pacheco*, 730 Fed.Appx. 604, 606 (10th Cir. 2018) (unpublished) (same).[1] As we explained in *Maldonado-Palma*, aggravated assault with a deadly weapon requires the "actual use[ ]" of a deadly weapon "capable of producing death or great bodily harm or inflicting dangerous wounds in an assault." 839 F.3d at 1250 (internal quotation marks omitted). The use of such a weapon in an assault, we reasoned, "necessarily threatens the use of physical force, i.e., 'force capable of causing physical pain or injury to another person.' " *Id.* (quoting *Johnson I*, 559 U.S. at 140, 130 S.Ct. 1265). Although *Maldonado-Palma* analyzed a provision of the sentencing guidelines, its analysis is instructive, "[g]iven the similarity in language between the ACCA and [the sentencing guidelines]." *Ramon Silva*, 608 F.3d at 671 (internal quotation marks omitted).

Mr. Sanchez acknowledges these authorities but asserts our cases were wrongly decided. He contends that *State v. Branch*, 417 P.3d 1141, 1148 (N.M. Ct. App. 2018), undermined our cases because it held that aggravated assault with a deadly weapon is a general intent crime that does not require a specific intent to use a deadly weapon "against the person of another." COA App. at 13 (internal quotation marks omitted). But *Branch* did not alter the state of the law. As *Ramon Silva* recognized, "[t]hat aggravated assault does not require proof of a specific intent to assault the victim, or of a specific intent to injure or even frighten the victim, only confirms that aggravated assault is not a specific intent crime, but rather is a general intent crime." 608 F.3d at 673 (brackets, citation, and internal quotation marks omitted). The offense is a violent felony because it requires "unlawfully assaulting or striking at another," N.M. Stat. Ann. § 30-3-2(A), employing a deadly weapon, *Maldonado–Palma*, 839 F.3d at 1250, with general criminal intent, *see Ramon Silva*, 608 F.3d at 673, all of which we have held at least threatens the use of physical force against the person of another. The denial of relief was not debatable.

2. *Robbery, N.M. Stat. Ann. § 30-16-2*

*3 Mr. Sanchez also contends his robbery conviction does not satisfy the elements clause because the amount of force used to overcome a victim's resistance is immaterial.[2] He says robbery can be committed using only slight force, which is insufficient to satisfy the physical force requirement of *Johnson I*. As Mr. Sanchez acknowledges, however, this argument is foreclosed by *United States v. Garcia*, 877 F.3d 944, 956 (10th Cir. 2017), *petition for cert. filed* (U.S. June 18, 2018) (No. 17-9469). In *Garcia*, we held that robbery in New Mexico is a violent felony under the ACCA's elements clause. *Id.* We analyzed the relevant case law and acknowledged that some New Mexico cases suggested that "any quantum of force which overcomes resistance would be sufficient to support a robbery conviction." *Id.* But focusing on "realistic probabilities, not theoretical possibilities," we observed that "cases affirming convictions which clearly discuss the quantum of force describe force sufficient to satisfy the *Johnson I* definition." *Id.* Hence, we concluded that the New Mexico crime of robbery "categorically matches the definition of 'physical force' the Supreme Court assigned in *Johnson I*" and "has as an element the use or threatened use of physical force against another person." *Id.* In light of *Garcia*, reasonable jurists would not debate the district court's decision. Mr. Sanchez offers various arguments as to why *Garcia* was wrongly decided, but he recognizes that we are bound by our precedent absent *en banc* reconsideration or a contrary Supreme Court decision. *See United States v. Springer*, 875 F.3d 968, 974-75 (10th Cir. 2017), *cert. denied*, —— U.S. ——, 138 S.Ct. 2002, —— L.Ed.2d —— (2018).[3]

3. Aggravated Battery with a Deadly Weapon, N.M. Stat. Ann. § 30-3-5(C)

Finally, Mr. Sanchez contends that his conviction for aggravated battery with a deadly weapon does not satisfy the elements clause because the crime can be committed without using violent force as required by *Johnson I*; he says it can be committed with only an unlawful touching.[4] Mr. Sanchez fails to explain, however, how an unlawful touching *with the use of a deadly weapon* can be committed without the threatened use of physical, violent force.

We have held "that physical force is involved when a person intentionally causes physical contact with another person with a deadly weapon." *United States v. Treto-Martinez*, 421 F.3d 1156, 1159 (10th Cir. 2005) (holding that a Kansas conviction for aggravated battery against a law enforcement officer qualified as a "crime of violence" under U.S.S.G § 2L1.2(b)(1)(A)). Although *Treto-Martinez* pre-dated *Johnson I*, we applied *Treto-Martinez* in *Ramon Silva* and held that "apprehension-causing aggravated assault under N.M. Stat. Ann. § 30-3-2(A) creates a commensurate threat of physical force such that the crime qualifies as a violent felony under the ACCA," 608 F.3d at 672 (internal quotation marks omitted). We reasoned that "[t]he conduct could always lead to substantial and violent contact, and thus it would always include as an element the threatened use of violent force."*Id.* (ellipsis and internal quotation marks omitted). It follows that if "[e]mploying a weapon that is capable of producing death or great bodily harm or inflicting dangerous wounds in an assault necessarily threatens the use of physical force, i.e., force capable of causing physical pain or injury to another person," *Maldonado-Palma*, 839 F.3d at 1250 (internal quotation marks omitted), so too must employing such a weapon when committing an actual battery, *see, e.g.*, *United States v. McMahan*, 732 F. App'x 665, 669 (10th Cir. 2018) (unpublished) (adhering to *Treto-Martinez* and holding that aggravated battery in Kansas is a violent felony under the ACCA's elements clause), *petition for cert. filed*, (U.S. July 23, 2018) (No. 18-5393).[5]

*4 Mr. Sanchez posits that an aggravated battery might be committed with a deadly weapon in a way that does not involve direct physical force, such as poisoning the victim. But once again, he recognizes that this argument is foreclosed by our precedent: " 'Use of force is not the act of sprinkling the poison; it is the act of employing poison knowingly as a device to cause physical harm. That the harm occurs indirectly, rather than directly (as with a kick or punch), does not matter.' " *United States v. Ontiveros*, 875 F.3d 533, 537 (10th Cir. 2017) (brackets and ellipsis omitted) (quoting *United States v. Castleman*, 572 U.S. 157, 134 S.Ct. 1405, 1415, 188 L.Ed.2d 426 (2014), *cert. denied*, —— U.S. ——, 138 S.Ct. 2005, —— L.Ed.2d —— (2018)). Given this authority, no reasonable jurist would debate the district court's decision.

III

Accordingly, we deny a COA and dismiss this matter.

All Citations

--- Fed.Appx. ----, 2018 WL 4214236

Footnotes

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

1 N.M. Stat. Ann. § 30-3-2 provides:
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.

2 N.M. Stat. Ann. § 30-16-2 provides:
Robbery consists of the theft of anything of value from the person of another or from the immediate control of another, by use or threatened use of force or violence.
Whoever commits robbery is guilty of a third degree felony.

Whoever commits robbery while armed with a deadly weapon is, for the first offense, guilty of a second degree felony and, for second and subsequent offenses, is guilty of a first degree felony.

3 As Mr. Sanchez indicates in his letter filed under Fed. R. App. P. 28(j), the Supreme Court has granted certiorari in *Stokeling v. United States*, —— U.S. ——, 138 S.Ct. 1438, 200 L.Ed.2d 716 (2018) (Mem.), to consider the following question:
Is a state robbery offense that includes "as an element" the common law requirement of overcoming "victim resistance" categorically a "violent felony" under the [ACCA's elements clause] if the offense has been specifically interpreted by state appellate courts to require only slight force to overcome resistance?
Notwithstanding the grant of certiorari in *Stokeling*, *Garcia* definitively answered the question presently before us, and we are bound by that decision unless and until it is overruled by an *en banc* panel of this court or a contrary decision of the Supreme Court.

4 N.M. Stat. Ann. § 30-3-5 provides:
A. Aggravated battery consists of the unlawful touching or application of force to the person of another with intent to injure that person or another.
B. Whoever commits aggravated battery, inflicting an injury to the person which is not likely to cause death or great bodily harm, but does cause painful temporary disfigurement or temporary loss or impairment of the functions of any member or organ of the body, is guilty of a misdemeanor.

C. Whoever commits aggravated battery inflicting great bodily harm or does so with a deadly weapon or does so in a manner whereby great bodily harm or death can be inflicted is guilty of a third degree felony.

5 We may consider non-precedential, unpublished decisions for their persuasive value. *See* Fed. R. App. P. 32.1; 10th Cir. R. 32.1(A).

FILED
United States Court of Appeals
Tenth Circuit

October 3, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ARTHUR SANCHEZ,

Defendant - Appellant.

No. 17-2200

ORDER

Before **MATHESON**, **EID**, and **CARSON**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

v.

No. CIV 16-659 JAP/GBW
No. CR 13-961 JAP

ARTHUR SANCHEZ,

Defendant.

MEMORANDUM OPINION AND ORDER

On June 23, 2016, Arthur Sanchez filed a MOTION TO CORRECT SENTENCE PURSUANT TO 28 U.S.C. § 2255 (§ 2255 Motion) (Doc. No. 1). Mr. Sanchez's § 2255 Motion asks the Court to set aside his conviction and sentence in accordance with *Samuel Johnson v. United States,* 135 S. Ct. 2551 (2015), in which the United States Supreme Court struck down the residual clause of the Armed Career Criminal Act (ACCA) as unconstitutionally vague.

On July 5, 2017, after considering initial and supplemental briefing, United States Magistrate Judge Gregory B. Wormuth recommended denying Mr. Sanchez's § 2255 Motion. PROPOSED FINDINGS AND RECOMMENDED DISPOSITION (PFRD) (Doc. No. 20). On August 2, 2017, Mr. Sanchez filed objections to the PFRD, arguing, in part, that the government has not established that his prior convictions qualified as violent felonies for purposes of enhancing Mr. Sanchez's sentence under the ACCA. Mr. Sanchez asks the Court to vacate his ACCA sentence and to re-sentence him to a prison term of no greater than ten years. MR. SANCHEZ'S OBJECTIONS TO THE MAGISTRATE JUDGE'S PROPOSED FINDINGS AND RECOMMENDED DISPOSITION (Objections) (Doc. No. 23).

In its Response to the Objections, the government counters that none of the cases cited by Mr. Sanchez, most of which concern robbery statutes in other states, support Mr. Sanchez's request. UNITED STATES' RESPONSE TO OBJECTIONS TO MAGISTRATE'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW (Response) (Doc. No. 24). Mr. Sanchez maintains that the government's position is inaccurate and untenable. MR. SANCHEZ'S REPLY TO THE GOVERNMENT'S RESPONSE TO HIS OBJECTIONS TO THE MAGISTRATE JUDGE'S PROPOSED FINDINGS AND RECOMMENDED DISPOSITION (Reply 1) (Doc. No. 25).

The Court has conducted a *de novo* review of those portions of the PFRD to which Mr. Sanchez objects, and it has reviewed the pertinent law as well as all of the briefing and attachments. For the reasons explained below, the Court will overrule Mr. Sanchez's objections and will adopt the Magistrate Judge's PFRD, with the result that Mr. Sanchez's § 2255 Motion will be denied.

Procedural Background[1]

On December 17, 2013, Mr. Sanchez pleaded guilty to the offenses of possession of heroin with the intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C) and being a felon in possession of a firearm and ammunition in violation of 18 U.S.C. § 922(g)(1) and § 924(a)(2). Cr. Doc. Nos. 30, 31, 32. Mr. Sanchez entered into a Rule 11(c)(1)(C) plea agreement that included a binding stipulation to a term of imprisonment of 180 months (15 years) and three years of supervised release. Cr. Doc. No. 32 at 1, 4.

Although an offense under § 922(g)(1) is generally subject to a statutory maximum sentence of ten years, the ACCA will increase that penalty to a statutory minimum sentence of

[1] The Court generally adopts the Magistrate Judge's summary of the background facts to which Mr. Sanchez does not appear to have objected.

15 years if the offender has three prior convictions for a violent felony. 18 U.S.C. § 924(e)(1). In its presentence report (PSR), the United States Probation Office found that Mr. Sanchez had at least three prior violent felony convictions, PSR ¶ 57 – third degree robbery, aggravated assault with a deadly weapon, and aggravated battery with a deadly weapon. As a result, Mr. Sanchez qualified as an armed career criminal under the ACCA, PSR ¶¶ 57, 71, and faced a minimum term of 15 years' imprisonment. *See Logan v. United States*, 552 U.S. 23, 27 (2007). At the time of his sentencing, Mr. Sanchez did not dispute any of the PSR findings.[2]

In his § 2255 Motion, Mr. Sanchez argued that after the *Samuel Johnson* decision, his prior New Mexico convictions for robbery, aggravated assault, and aggravated battery no longer qualified as predicate violent felonies for purposes of enhancing his sentence under the ACCA. Magistrate Judge Wormuth recommended finding that all three of the New Mexico convictions were violent felonies under the elements clause of the ACCA, and that, therefore, Mr. Sanchez was properly sentenced. In his Objections to the PFRD, Mr. Sanchez challenges the Magistrate Judge's application and interpretation of "the elements clause," also referred to as "the physical force clause" of the ACCA, i.e., 18 U.S.C. § 924(e)(2)(B)(i), as to each of the three prior convictions.

Legal Standard

When Mr. Sanchez was sentenced, the ACCA defined a "violent felony" as any crime punishable by imprisonment for a term exceeding one year that:

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

[2] Due to Mr. Sanchez's classification as an armed career criminal and his use of a firearm in connection with a controlled substance offense, the PSR assigned a base offense level of 34. PSR ¶ 57. With a three-level reduction for acceptance of responsibility, Mr. Sanchez's base offense level was 31. His criminal history category was VI; accordingly, his guideline imprisonment range was 188 to 235 months. PSR ¶ 115. However, the Court imposed a sentence of 180 months followed by three years of supervised release in accordance with the parties' stipulation. *See* PFRD at 3–4.

> (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 italicized portion of subparagraph ii above is known as "the residual clause" of the ACCA, which the Supreme Court struck down as unconstitutionally vague in its 2015 *Samuel Johnson* decision. *See Samuel Johnson*, 135 S. Ct. at 2556–61. The *Samuel Johnson* decision left intact subparagraph i – "the elements clause" or "the physical force clause" of the ACCA. *Id.* at 2557, 2563. As stated above, Mr. Sanchez's challenges relate to the elements clause.

In *United States v. Harris*, 844 F.3d 1260 (10th Cir. 2017), *pet. for cert. filed*, *Harris v. United States* (U.S. Apr. 4, 2017) (No. 16–8616), the Tenth Circuit Court of Appeals noted that a court should apply a "categorical approach" in determining if a prior conviction qualifies as an ACCA violent felony, i.e., "focusing on the elements of the crime of conviction, not the underlying facts." *Id.* at 1263 (citation omitted). A categorical approach does not require that "every conceivable factual offense covered by a statute fall within the ACCA. Rather, the proper inquiry is whether the conduct encompassed by the elements of the offense, in the ordinary case, qualifies under the ACCA as a violent felony…" *United States v. Smith*, 652 F.3d 1244, 1246 (10th Cir. 2011) (citation omitted). *See Begay v. United States*, 553 U.S. 137, 141 (2008) (observing that a court should consider an offense "generically, … in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion").

The *Harris* Court evaluated whether Colorado's robbery statute "has as an element the use, attempted use, or threatened use of physical force against the person of another." *Id.* at 1263–64 (citation omitted). The Tenth Circuit Court advised that involves two steps, the application of federal law and then of state law because federal law defines the meaning of the

phrase "use, attempted use, or threatened use of physical force" and "state law defines the substantive elements of the crime of conviction." *Id.* at 1264 (citations omitted). *See United States v. Nicholas,* 686 F. App'x 570, 574 (10th Cir. 2017) (in analyzing whether the defendant's prior felony conviction for Kansas robbery was a violent felony, the court employed a two-step inquiry: "first, 'we must identify the minimum force required by [Kansas] law for the crime of robbery'; second, we must 'determine if that force categorically fits the definition of physical force' required under the ACCA.").

In a 2010 decision, the United States Supreme Court held that "physical force" meant "*violent* force – that is, force capable of causing physical pain or injury to another person." *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010) (emphasis in original). The word "'violent' … connotes a substantial degree of force." *Id.* "[T]he term 'physical force' itself normally connotes force strong enough to constitute 'power'…." *Id.* at 142. "[Physical force] might consist, for example, of only that degree of force necessary to inflict pain – a slap in the face, for example." *Id.* at 143.

Objections

I. <u>New Mexico Robbery</u>

Mr. Sanchez contends that the government has failed to satisfy its burden in proving that any of the prior felony convictions, including robbery '" necessarily' satisfy[ies] the 'physical force' clause's prerequisites." Objections at 2. Mr. Sanchez also asserts that the Magistrate Judge appears to have "lost sight of critical principles," has misread New Mexico and federal law, and has misunderstood Mr. Sanchez's arguments. *See* Objections at 2, 3, 7, 15. Mr. Sanchez's overarching argument appears to be that the New Mexico robbery statute requires nothing more than minimal or minuscule physical contact (or the threat of that type of physical contact), which

does not amount to *Curtis Johnson* force, and, accordingly, cannot qualify as an ACCA violent felony.

This Court disagrees with Mr. Sanchez and overrules the objections. Magistrate Judge Wormuth thoroughly and carefully interpreted the pertinent case law in relation to Mr. Sanchez's arguments. In addition, Judge Wormuth's interpretations of the case law and his conclusions are consistent with almost all of the decisions in this District concerning the question of whether New Mexico robbery qualifies as an ACCA violent felony.

Keeping in mind the federal law definition of "physical force" (discussed above), the Court examines the elements of New Mexico robbery, NMSA § 30-16-2, and the New Mexico state courts' interpretation of that language. The robbery statute states:

> Robbery consists of the theft of anything of value from the person of another or from the immediate control of another, by use or threatened use of force or violence.
>
> Whoever commits robbery is guilty of a third degree felony.
>
> Whoever commits robbery while armed with a deadly weapon is, for the first offense, guilty of a second degree felony and, for second and subsequent offenses, is guilty of a first degree felony.

NMSA § 30-16-2. Thus, an element of New Mexico robbery is the "use or threatened use of force or violence" against "the person of another." *See State v. Lewis*, 1993-NMCA-165, ¶ 8, 116 N.M. 849, 851 ("The use of force, violence, or intimidation is an essential element of robbery.") (citation omitted).

In *Lewis*, the New Mexico Court of Appeals emphasized that "in order to convict for [robbery], the use or threatened use of force must be the factor by which the property is removed from the victim's possession." *Id.* ¶ 9. In contrast, a defendant who picks the pocket of a victim is not guilty of New Mexico robbery because the use or threatened use of force is lacking. "[F]orce or fear must be the moving cause inducing the victim to part unwillingly with his

property." *Id.* (citations omitted). Mr. Sanchez's reliance on or his interpretation of "a parenthetical" in *Lewis* does not persuade the Court that Judge Wormuth misinterpreted *Lewis*. *See* Objection at 3.

In *State v. Bernal*, the New Mexico Supreme Court observed that "robbery is a crime designed to punish the use of violence." *Bernal*, 2006-NMSC-050, ¶ 27, 140 N.M. 644, 651. The New Mexico Supreme Court rejected arguments that robbery was a property crime and nothing more than aggravated larceny. *Id.* The *Bernal* Court reasoned that the crime of robbery was distinct from larceny because robbery requires and is designed to punish the element of force. *Id.* ¶ 28 (citation omitted). "Since robbery generally carries a heavier punishment than larceny, the robbery statute clearly is designed to protect citizens from violence." *Id. See also State v. Sanchez*, 1967-NMCA-009, ¶ 8, 78 N.M. 284, 825 ("The force or intimidation is the gist of the offense [of robbery].").

Thus, this Court finds that New Mexico state courts have interpreted New Mexico robbery to require the kind of force or violence that qualifies the crime as an ACCA violent felony. Mr. Sanchez's reliance on *State v. Sanchez*, 1967-NMCA-009, ¶ 4 does not persuade the Court otherwise. The *Sanchez* Court may not have specifically held "that a fist in the back [of the victim] is never sufficient force to satisfy the robbery force element[,]"s*ee* Objections at 3, but the New Mexico Court of Appeals also did not hold that a fist to the back alone was enough force to sustain a robbery conviction. In *Sanchez,* Court of Appeals emphasized that there simply was no evidence to show that a "fist against the back, without more, constitute[d] the force or fear sufficient to sustain a robbery conviction[.]" *Sanchez*, ¶ 10. Moreover, as appropriately noted by Judge Wormuth, the *Sanchez* Court reiterated the general principle from New Mexico case law that "force or intimidation is the gist of [New Mexico robbery.]" *Id.* ¶ 8.

Similarly, Mr. Sanchez's reliance on *State v. Martinez*, 1973-NMCA-120, 85 N.M. 468 is unavailing. Mr. Sanchez argues that *Martinez* stands for the principle that jostling alone can be sufficient force to commit New Mexico robbery. Objections at 3. But, in *Martinez*, there was evidence of more than just jostling to support the robbery conviction. "[T]he ripping of the jacket pocket in grabbing the money, *and knocking the victim against the railing*, was a showing of sufficient use of force to sustain the conviction. *Id.* ¶ 5, 85 N.M. at 469 (emphasis added).

In addition, Mr. Sanchez interprets *State v. Curley,* 1997-NMCA-038, 123 N.M. 295 to support his position that the "use of any minuscule amount of force while [purse] snatching to overcome the resistance of attachment is enough" force to constitute New Mexico robbery. Objections at 4. In *Curley*, the New Mexico Court of Appeals was asked to answer "what force suffices to turn a larceny into a robbery." *Id.* ¶ 1, 123 N.M. at 296. In a purse snatching case, where the evidence did not show that the victim's purse strap was broken, that the victim struggled with the defendant, or that the victim offered any resistance against the snatching, the *Curley* Court concluded that the force used to take the purse was not sufficient to constitute robbery and that the defendant may have been entitled to a lesser-included-offense instruction for larceny. *Id.* ¶¶ 3, 18. However, the distinguishable facts in *Curley* and its holding, along with other purse-snatching cases cited by Mr. Sanchez, do not persuade the Court that the Magistrate Judge's reasoning and recommendation were mistaken.

Moreover, the majority of the Judges in the District of New Mexico who have addressed this same or similar issue have found that New Mexico robbery qualifies as an ACCA violent felony. *United States v. Serrano*, No. CIV 16-670 RB/WPL, 2017 WL 3208527, at *4 (D.N.M. Feb. 16, 2017), report and recommendation adopted, No. CIV 16-670, 2017 WL 3208467 (D.N.M. May 9, 2017) (adopting findings and recommendation by magistrate judge who

observed that "case after case [has] held that robbery requires that the force 'must overcome the victim's resistance. It must compel one to part with his property. It must be such that the power of the owner to retain his property is overcome.'"), *appeal filed* (D.N.M. May 11, 2017); *United States v. Dean*, No. CIV 16-289 WJ/LAM (Doc. No. 17) (D.N.M. May 3, 2017) (adopting Magistrate Judge's finding that New Mexico attempted armed robbery conviction constituted an ACCA violent felony), *appeal filed* (D.N.M. June 30, 2017); *Rhoads v. United States*, No. CIV 16-325 JCH/GBW, Order Adopting PFRD at 7 (Doc. No. 20) (D.N.M. Apr. 5, 2017) (noting that there was "significant consensus within the District that New Mexico simple robbery qualifies as a crime of violence[,]" notwithstanding one decision to the contrary), *appeal filed* (D.N.M. May 30, 2017); *Baker v. United States*, No. CIV 16-715 PJK/GBW, Order Adopting PFRD (Doc. No. 14) (D.N.M. Mar. 17, 2017) ("Suffice it to say that based on Tenth Circuit and New Mexico law, it is clear that both offenses challenged here (Armed Robbery and Aggravated Battery (Deadly Weapon)) are 'violent felonies' under the ACCA as amplified by [*Curtis Johnson*] …."); *Contreras v. United States*, No. CIV 16-671 RB/SMV, Order Adopting PFRD (Doc. No. 14) (D.N.M. Feb. 24, 2017) (finding New Mexico robbery is a crime of violence under sentencing guideline's elements clause); *Garcia v. United States*, No. CIV 16-240 JB/LAM, Memorandum Opinion and Order adopting in part Magistrate Judge's recommendations (Doc. No. 37) (D.N.M. Jan. 31, 2017) (finding New Mexico robbery is a violent felony under ACCA's elements clause), *appeal filed* (D.N.M. Feb. 9, 2017); and *Hurtado v. United States,* No. CIV 16-646 JAP/GJF, PFRD (Doc. No. 17) (D.N.M. Jan. 11, 2017) (recommending that the undersigned District Judge find that New Mexico robbery is a crime of

violence under sentencing guideline's elements clause).[3] *See also See, e.g.,United States v. Manzanares*, No. CIV 16-599 WJ/SMV, 2017 WL 3913235, at *14 (D.N.M. Sept. 6, 2017) (recommending that Manzanares's prior convictions for New Mexico aggravated assault with a deadly weapon, aggravated battery, and armed robbery all be found to have satisfied the force clause of the ACCA).[4]

As far as the Court has determined, the only decision to the contrary in this District is *United States v. King*, __ F. Supp. 3d __, 2017 WL 1506766, at *5 (D.N.M. Mar. 31, 2017).[5] In *King*, United States District Judge Martha Vazquez concluded that the force element of New Mexico robbery did not amount to *Curtis Johnson* force, and that the New Mexico robbery statute did not satisfy the ACCA's elements clause. In so holding, Judge Vazquez distinguished *United States v. Lujan,* 9 F.3d at 890, 891 (10th Cir. 1993), in which the Tenth Circuit Court held that New Mexico robbery is "clearly [a] violent felon[y] under the [ACCA]," because "it contains the required element of force." Judge Vazquez reasoned that *Lujan* did not bind the Court because *Curtis Johnson* was a "superseding contrary decision by the Supreme Court." *King,* at *10. This Court acknowledges the different conclusion reached by Judge Vazquez as well as opinions by judges from other Districts and Circuit Courts who have analyzed other

[3] Before the District Court had an opportunity to decide the objections to the PFRD, Defendant Hurtado filed a motion to dismiss based on the Supreme Court decision in *Beckles v. United States,* 2017 WL 855781 (Mar. 16, 2017), wherein the Court held that *Samuel Johnson* did not apply to the career offender guideline. Motion to Dismiss (Doc. No. 21).

[4] The deadline to object to the Magistrate Judge's findings and recommendation in *Manzanares* has not yet run.

[5] The Court recognizes that the Tenth Circuit Court in analyzing the Kansas state robbery statute, as well as other district and circuit courts that have addressed various state robbery statutes, have reached differing conclusions on the question of whether a state robbery conviction qualifies as an ACCA violent felony. *See, e.g.,United States v. Nicholas,* 686 F. App'x 570 (10th Cir. 2017) (analyzing Kansas robbery and Kansas case law). *See also* Mr. Sanchez's Reply in which he discusses various federal court decisions addressing different states' robbery statutes. Indeed, in *Harris*, 844 F.2d at 1262 (petition for cert. filed in April 2017), the Tenth Circuit Court acknowledged that the question is not easily or consistently answered with respect to a particular state robbery statute. "[I]n the last twelve months, eleven circuit-level decisions have reached varying results on this very narrow question–in examining various state statutes, five courts have found no violent felony and six have found a violent felony." But, to the extent there is a split on this question in this Circuit, the Tenth Circuit Court will be asked to resolve the split.

states' robbery statutes. *See* Objections at 8–16. However, none of these decisions persuades the Court that Judge Wormuth's reasoning and recommendations are flawed.

In sum, having found that New Mexico robbery qualifies as an ACCA violent felony and that the government has satisfied its burden in this regard, the Court overrules Mr. Sanchez's Objections and will adopt the findings and recommendations of the Magistrate Judge.

II. New Mexico Aggravated Assault with a Deadly Weapon

Mr. Sanchez argues that the government has not established that New Mexico aggravated assault with a deadly weapon under NMSA § 30-3-2(A) necessarily has as an element the threatened use of physical force against the person of another. Objections at 16. Thus, according to Mr. Sanchez the Court should not treat New Mexico aggravated assault with a deadly weapon as an ACCA violent felony.

New Mexico's aggravated assault statute provides that an aggravated assault can consist of:

> 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.

NMSA § 30–3–2.

Judge Wormuth determined that Mr. Sanchez's argument regarding New Mexico aggravated assault with a deadly weapon was foreclosed by *United States v. Maldonado-Palma*, 839 F.3d 1244, 1248–50 (10th Cir. 2016), *cert. denied*, 137 S. Ct. 1214 (2017), in which the Tenth Circuit Court held that "aggravated assault with a deadly weapon under [N.M.S.A.] § 30-

3-2(A) is categorically a crime of violence" under the sentencing guidelines.[6] *See* PFRD at 21–22. Magistrate Judge Wormuth found that *Maldonado-Palma* "compels the conclusion that Defendant's aggravated assault with a deadly weapon offense is a violent felony under the ACCA." *Id.* at 22.

In *Maldonado-Palma,* the Tenth Circuit Court examined the "elements clause" of the pertinent sentencing guideline "to determine if the New Mexico offense of aggravated assault with a deadly weapon had as an element the use, attempted use, or threatened use of physical force against the person of another." 839 F.3d at 1248. The defendant, *in Maldonado-Palma*, argued that not all types of simple assault, under NMSA § 30-3-1 e.g., "the use of insulting language toward another impugning his honor, delicacy or reputation[,]" required proof of the requisite amount of physical force that would serve to enhance his sentence. Thus, according to the defendant, it followed that assaulting another by using insulting words, while possessing a deadly weapon, would qualify as an aggravated assault under NMSA § 30-3-2(A), even without any proof of the use of force. *Id.* at 1249. The defendant in *Maldonado-Palma* concluded that consequentially, NMSA § 30-3-2(A) could not be a crime of violence since it did not require the use of force.

The Tenth Circuit, in *Maldonado-Palma,* rejected the defendant's argument, noting that the defendant ignored the other key element of aggravated assault under NMSA § 30-3-2(A), "namely that the assault is committed 'with a deadly weapon.'" *Id.* The *Maldonado-Palma* Court then looked to New Mexico's uniform jury instructions for guidance in interpreting the statutory elements of the offense. All three of the pertinent jury instructions included as a required element

[6] The Tenth Circuit Court has instructed that the definition of a "crime of violence" under the sentencing guidelines is "almost identical" to the definition of a "violent crime" under the ACCA. Thus, an analysis under the ACCA "applies equally to the sentencing guidelines." *United States v. Charles*, 576 F.3d 1060, 1068 n.2 (10th Cir. 2009) (citation omitted).

that the defendant use a deadly weapon. "It is the use of a deadly weapon that raises an assault to an aggravated assault not an intent to injure." *Id.* at 1249–50 (citation omitted).

In addition, the *Maldonado-Palma* Court briefly referenced its earlier decision in *United States v. Ramon* Silva, 608 F.3d 663 (10th Cir. 2010) ("noting similarity of language in elements clause of ACCA" and pertinent sentencing guideline), *cert. denied,* 562 U.S. 1224 (2011), as well as the defendant's argument that *Roman Silva* should not be dispositive. *Id.* at 1248–49. However, ultimately, the Tenth Circuit Court rejected all of the defendant's arguments and concluded that the district court had not erred in increasing Mr. Maldonado's sentence to account for his prior conviction for a crime of violence. *Id.* at 1250–51.

As he did before the Magistrate Judge, Mr. Sanchez again argues "that the Tenth Circuit's view of state law in *Ramon Silva* and *Maldonado-Palma* … was clearly wrong." Objections at 22. Mr. Sanchez believes that the holdings of *State v. Branch*, 2016-NMCA-071, 387 P.3d 250, *cert. granted* (July 28, 2016) and of *State v. Manus*, 1979-NMSC-035, 93 N.M. 95, *overruled on other grounds by Sells v. State*, 1982-NMSC-125, 98 N.M. 786 "have a determinative effect on whether New Mexico aggravated assault with a deadly weapon is a 'violent felony' under the 'physical force' clause." Objections at 19. In support, Mr. Sanchez contends that "Tenth Circuit precedent 'can be overruled by a later declaration[] to the contrary by that state's courts.'" *Id.* at 21.

Be that as it may, Mr. Sanchez has virtually conceded that *Maldonado-Palma* is Tenth Circuit law and is precedent. Moreover, this Court cannot overrule the Tenth Circuit Court based on a possible interpretation of state court decisions. Additionally, Mr. Sanchez's wishful thinking about how the Tenth Circuit Court might interpret certain New Mexico state court decisions that

it either did not discuss or have an opportunity to discuss in *Ramon Silva* and in *Maldonado-Palma*, is not the law.

Like the Magistrate Judge, this Court believes 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 a crime of violence under the ACCA. The government has met its burden in this regard and the Court will adopt the findings and recommendations of the Magistrate Judge, and will overrule Mr. Sanchez's Objections.

III. New Mexico Aggravated Battery with a Deadly Weapon

Mr. Sanchez argues that the government has not established that New Mexico aggravated battery with a deadly weapon necessarily has as an element the threatened use of physical force against the person of another. Objections at 22. He maintains that his conviction of aggravated battery with a deadly weapon does not constitute a violent felony because "[i]n New Mexico, an offensive touch can be a battery that does not involve force capable of causing pain or injury." Objections at 22. Mr. Sanchez also contends that the Magistrate Judge misconstrued the pertinent case law. *See id.* at 22–23. Thus, according to Mr. Sanchez the Court should not treat New Mexico aggravated battery with a deadly weapon as an ACCA violent felony because that offense does not require use of "ACCA's physical force." *Id.* at 23.

New Mexico's aggravated battery statute provides:

> A. Aggravated battery consists of the unlawful touching or application of force to the person of another with intent to injure that person or another.
>
> B. Whoever commits aggravated battery, inflicting an injury to the person which is not likely to cause death or great bodily harm, but does cause painful temporary disfigurement or temporary loss or impairment of the functions of any member or organ of the body, is guilty of a misdemeanor.

> C. Whoever commits aggravated battery inflicting great bodily harm or does so with a deadly weapon or does so in any manner whereby great bodily harm or death can be inflicted is guilty of a third degree felony.

NMSA § 30-3-5. Mr. Sanchez was convicted of Aggravated Battery with a Deadly Weapon in violation of NMSA § 30-3-5(C). *See* PFRD at 25.

Magistrate Judge Wormuth found that the "logic in *Maldonado-Palma* compels the conclusion that a New Mexico conviction for aggravated battery with a deadly weapon categorically qualifies as a violent felony under the ACCA." PFRD at 27. Mr. Sanchez counters that the *Maldonado-Palma* Court did not address an "offensive touching" battery, which Mr. Sanchez believes would fall below the *Curtis Johnson* level of physical force. Objections at 22–23.

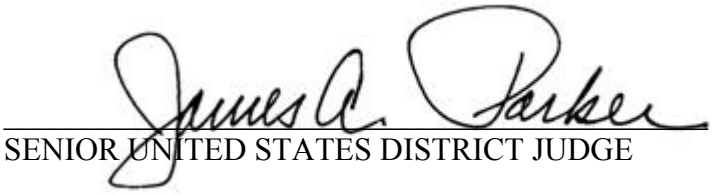
In *Vasquez v. United States*, No. CIV 16-678 JAP (D.N.M. Jan. 10, 2017), this Court addressed and rejected a similar argument. In *Vasquez*, the petitioner argued that a New Mexico aggravated battery did not require the use of violent physical force because the crime encompassed any touch. Memorandum Opinion and Order at 8 (Doc. No. 11). This Court acknowledged that a simple battery in New Mexico requires only the slightest touch. *Id.* (citations omitted). "But the requirement of a specific intent to injure and the use of a deadly weapon differentiate New Mexico's aggravated battery statute from the common-law crime." *Id.* (citing, e.g., *United States v. Mitchell*, 653 F. App'x 639, 645 (10th Cir. 2016) ("the additional element of a deadly or danger weapon makes apprehension-causing assault [or an attempted-battery assault] a crime of violence, even if the simple assault would not be."). This Court concluded, in *Vasquez*, that "even if only the slightest touch is required, Petitioner's conviction for aggravated battery with a deadly weapon contains as an element the threatened use of violent physical force, and remains a crime of violence after [*Samuel*] *Johnson*." *Id.* at 8. *See also Dean*,

No. CIV 16-289 (Doc. No. 17) (finding New Mexico aggravated battery conviction, under NMSA § § 30-3-5(C) constituted ACCA violent crime).

Like the Magistrate Judge, this Court finds the New Mexico offense of aggravated battery with a deadly weapon under NMSA § 30-3-5(C) qualifies as a crime of violence under the ACCA. The government has met its burden in this regard and the Court will adopt the findings and recommendations of the Magistrate Judge, and will overrule Mr. Sanchez's Objections.

IT IS THEREFORE ORDERED that:

1) MR. SANCHEZ'S OBJECTIONS TO THE MAGISTRATE JUDGE'S PROPOSED FINDINGS AND RECOMMENDED DISPOSITION (Doc. No. 23) are OVERRULED;
2) the Magistrate Judge's PROPOSED FINDINGS AND RECOMMENDED DISPOSITION (Doc. No. 20) are ADOPTED;
3) Defendant's MOTION TO CORRECT SENTENCE PURSUANT TO 28 U.S.C. § 2255 (Doc. No. 1) is DENIED; and
4) 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

ARTHUR SANCHEZ, 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, John F. Robbenhaar, hereby certify that on December 31, 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,

STEPHEN P. MCCUE
Federal Public Defender

DATED: December 31, 2018

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