No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

SERGIO SALDIVAR GUTIERREZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED ON REVIEW

California state courts have authoritatively construed the state statute punishing assault with a deadly weapon, California Penal Code § 245(a)(1) and (2), as a "general intent" crime that lacks any requirement of a specific intent to harm, nor even the defendant's knowledge that his or her conduct is likely to cause harm. The question presented here is whether an offense that does not require, at a minimum, a conscious disregard of a risk of harm, lacks an element of the "use of physical force *against* the person of another" as required to categorically qualify as a "violent felony" under the Armed Career Criminal Act's force clause, 18 U.S.C. § 924(e)(2)(B)(i).

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Petition for Certiorari

Petitioner Sergio Saldivar Gutierrez respectfully petitions for a writ of certiorari to review the final order of the United States Court of Appeals for the Ninth Circuit in Case No. 18-35036, affirming the district court's denial of relief under 28 U.S.C. § 2255.

Order Below

The Ninth Circuit's unpublished memorandum opinion in *United States v. Gutierrez*, 771 F. App'x 363 (9th Cir. 2019), affirming the district court's denial of Mr. Gutierrez's 28 U.S.C. § 2255 motions is attached at Appendix 1. The district court's unpublished opinion in *United States v. Gutierrez*, No. 1:11-CR-30009-AA-3, 2018 WL 283737 (D. Or. Jan. 2, 2018), is attached at Appendix 3.

Jurisdictional Statement

The Ninth Circuit Court of Appeals entered its final order in this case on May 29, 2019. Mr. Gutierrez did not seek rehearing. This petition is timely under Supreme Court Rule 13.3. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Relevant Constitutional and Statutory Provisions

The statute providing for collateral review of federal sentences is 28 U.S.C. § 2255, which is attached at Appendix 15.

In the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), attached at Appendix 17, Congress prescribed a greater minimum and maximum sentence for certain firearms offenders with prior convictions for a "violent felony" or a "serious drug offense":

> (e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

18 U.S.C. § 924(e)(1). The ACCA defines "violent felony" as follows:

> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--
>
> (i) *has as an element the use, attempted use, or threatened use of physical force against the person of another*; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another[.]

18 U.S.C. § 924(e)(2)(B) (emphasis added). This petition refers to clause (i) of the violent felony definition as the "force clause," because it requires each qualifying crime to have an element of physical force. The first part of clause (ii) listing particular types of offenses, is commonly referred to as the "enumerated offenses clause." The final part of clause (ii), beginning with "or otherwise involves," is referred to as the "residual clause."

A variety of other federal statutes and sentencing provisions use the same "use, attempted use, or threated use of physical force against" formulation as the ACCA's force clause. *See, e.g.*, 18 U.S.C. § 924(c)(3)(A); 18 U.S.C. § 16(a); U.S.S.G. § 4B1.2(a)(1); U.S.S.G. § 2L1.2, comment. n.2. The courts generally interpret the force language in these provisions uniformly. *See United States v. Perez*, No. 17-10216, 2019 WL 3332599, at *2

(9th Cir. July 11, 2019) ("We are guided by our prior interpretations of this statutory language, regardless of the context in which it appears.").

California Penal Code § 245(a) defines the crime of assault with a deadly weapon or force likely to produce great bodily harm. In pertinent part, it provides:

> (a)(1) Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars ($10,000), or by both the fine and imprisonment.
>
> (2) Any person who commits an assault upon the person of another with a firearm shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not less than six months and not exceeding one year, or by both a fine not exceeding ten thousand dollars ($10,000) and imprisonment.

Cal. Penal Code § 245(a) (2000). The text of the statute did not change in relevant part between the years of Mr. Gutierrez's prior convictions at issue here—1987, 1990, and 2000.

Statement Of The Case

On October 3, 2011, Mr. Gutierrez entered a guilty plea to Count 11 of a federal indictment alleging the unlawful possession of a firearm by a felon in violation of 18 U.S.C. § 922(g). A violation of § 922(g) generally carries a maximum term of ten years in prison. 18 U.S.C. § 924(a)(2). The ACCA, however, mandates a 15-year minimum sentence and a maximum of life in prison for a felon who has "three previous convictions . . . for a violent felony or for a serious drug offense." 18 U.S.C. § 924(e)(1). The indictment against Mr. Gutierrez specifically alleged a violation of § 924(e) and identified as predicates three

prior California convictions for assault with a deadly weapon under California Penal Code § 245(a), including one committed as a juvenile. Based on the law at the time, Mr. Gutierrez agreed in his plea agreement that his prior convictions subjected him to the ACCA mandatory minimum sentence. The plea agreement did not specify which clause of the ACCA's violent felony definition applied.

On November 17, 2011, the district court sentenced Mr. Gutierrez to the mandatory minimum 180-month sentence under the ACCA, consistently with the agreement of the parties. Mr. Gutierrez did not appeal his conviction or sentence.

On June 26, 2015, this Court held that the residual clause of the ACCA's violent felony definition is unconstitutionally vague and that imposing an enhanced sentence under the residual clause violates the Constitution's guarantee of due process. *Johnson v. United States*, 135 S. Ct. 2551, 2560 (2015). The Court subsequently held that *Johnson* announced a new substantive rule that applies retroactively to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257, 1263 (2016).

Within one year after the *Johnson* ruling, Mr. Gutierrez filed a 28 U.S.C. § 2255 motion to vacate, set aside, or correct the ACCA sentence. Mr. Gutierrez argued that, in light of *Johnson*, his prior California assault convictions under California Penal Code § 245(a) no longer qualify as violent felonies, rendering his 15-year sentence unlawful. The district court denied relief, concluding that assault with a deadly weapon under California Penal Code § 245(a) requires the "intentional use of violent force," qualifying the offense as a violent felony under the ACCA's force clause. Appendix 9-14. However, the court

found that "reasonable jurists could debate" the matter and granted a certificate of appealability "on the issue of whether a conviction for violation of California Penal Code § 245(a)(1) or (2) qualifies as a violent felony for purposes of the ACCA." Appendix 14.

Mr. Gutierrez timely appealed to the Ninth Circuit from the denial of § 2255 relief. On May 29, 2019, the Ninth Circuit issued a memorandum opinion denying relief based on recent published circuit precedent holding that § 245(a)(1) qualifies as a crime of violence under the analogous force clause in 18 U.S.C. § 16(a). Appendix 1-2 (citing *United States v. Vasquez-Gonzalez*, 901 F.3d 1060, 1065-68 (9th Cir. 2018)). In *Vasquez-Gonzalez*, the Ninth Circuit had held that assault with a deadly weapon under California Penal Code § 245(a) "requires an intentional use of force." 901 F.3d at 1068.

Mr. Gutierrez is currently serving his 180-month sentence at FCI Sheridan with a projected release date of October 28, 2024.

Summary of Argument

In *Leocal v. Ashcroft*, this Court held that the "use" of physical force against the person of another requires, at a minimum, "active employment" of force, which is something more "than negligent or merely accidental conduct." 543 U.S. 1, 9 (2004). The concept of negligence measures the risk of harm from the perspective of a hypothetical "reasonable person," *Elonis v. United States*, 135 S. Ct. 2001, 2011 (2015), whereas the higher mens rea of recklessness requires that a defendant act with a subjective awareness of the risk of harm. *Voisine v. United States*, 136 S. Ct. 2272, 2282 (2016). While some

circuits have held that reckless crimes can satisfy the force clause, *Leocal*'s holding that negligent crimes do not qualify has remained undisputed in every circuit.

The difficulty in this case however, arises because the lower courts have struggled to translate the modern mens rea concepts of recklessness and negligence to state assault laws that incorporate diverse, common-law derived mens rea standards. The result is wildly inconsistent application of federal enhancement provisions to state laws with similar elements. This Court's intervention is necessary to clarify that, at a minimum, awareness of a risk of harm is necessary to qualify a state assault law as a violent felony, ensuring consistency in federal law.

Certiorari is also necessary because the Ninth Circuit's qualification of assault with a deadly weapon under California Penal Code § 245(a) as a violent felony under the force clause contravenes this Court's precedent on an important federal question. The California courts have construed the statute to be a "general intent" crime for which the risk of harm is judged from the perspective of a hypothetical reasonable person, not the defendant. The Ninth Circuit has held that the force clause language requires the knowing or intentional use of physical force. Moreover, the Ninth Circuit has recognized that other crimes incorporating California's "general intent" mental state fail to meet the knowing or intentional standard. Even with respect to § 245(a), the Ninth Circuit en banc has explained that the unique, state-defined mens rea is less culpable than recklessness because it does not require an awareness of the risk of harm, *Ceron v. Holder*, 747 F.3d 773, 784 (9th Cir. 2014) (en banc).

Yet, the Ninth Circuit in Mr. Gutierrez's case and other published precedent has insisted in the criminal context that § 245(a) requires the "intentional use of force," satisfying the force clause. Appendix 1-2 (citing *Vasquez-Gonzalez*, 901 F.3d at 1065-68). This conclusion confuses an intentional act with an intentional use of violent force, creating internal inconsistency in Ninth Circuit precedent, and running directly contrary to this Court's precedent in *Leocal*. This Court should grant certiorari to bring the Ninth Circuit's aberrant treatment of § 245(a) into conformity with this Court's clear precedent.

Reasons for Granting the Writ

A. The Circuit Courts Are In Disarray Regarding The Mental State Necessary For An Assault Offense To Have The "Use Of Physical Force Against Another" As An Element.

At common law, crimes generally were classified as requiring either "general intent" or "specific intent." *See* BLACK'S LAW DICTIONARY (11th ed. 2019). But this "venerable distinction . . . has been the source of a good deal of confusion" in light of various interpretations of these terms. *United States v. Bailey*, 444 U.S. 394, 403 (1980); *see also* FED. CRIM. JURY INSTR. 7TH CIR. 4.12 (2013 ed.) ("Distinctions between 'specific intent' and 'general intent' more than likely confuse rather than enlighten juries."); Joshua Dressler, UNDERSTANDING CRIMINAL LAW § 10.06 (3d ed. 2001) ("The terms 'specific intent' and 'general intent' are the bane of criminal law students and lawyers . . . .") (internal quotation marks omitted). Accordingly, in recent decades the Model Penal Code, federal courts, and many states have gravitated "away from the traditional dichotomy of intent" and towards a more modern "hierarchy of culpable states of mind," which

commonly include "purpose, knowledge, recklessness, and negligence." *Bailey*, 444 U.S. at 403-04.

It is these modern mens rea terms that this Court has employed in its crime of violence opinions. In *Leocal*, the Court interpreted the "use of physical force against the person or property of another" in the 18 U.S.C. § 16(a) "crime of violence" definition to require a mens rea greater than negligence. 543 U.S. at 9. The petitioner in *Leocal* had been convicted in Florida of driving under the influence of alcohol and causing serious bodily injury, a crime that required no "proof of any particular mental state." *Id.* at 7-10. The Court held that the offense did not fall within the scope of § 16(a)'s definition of a "crime of violence." The Court noted that the word "use" is an "elastic" term that must be construed "in its context and in light of the terms surrounding it." *Id.* at 9. "The critical aspect of § 16(a) is that a crime of violence is one involving the 'use . . . of physical force *against the person or property of another*.'" *Id.* (emphasis in original).

Referring specifically to the "against" phrase, the Court concluded that one would not naturally employ that wording to connote accidental harm:

> Thus, a person would "use . . . physical force against" another when pushing him; however, we would not ordinarily say a person "use[s] . . . physical force against" another by stumbling and falling into him. When interpreting a statute, we must give words their "ordinary or natural" meaning. . . . The key phrase in § 16(a)—the "use . . . of physical force against the person or property of another"—most naturally suggests a higher degree of intent than negligent or merely accidental conduct.

Id. at 9 (citation omitted). The Court also reasoned that requiring a higher degree of culpability was consistent with the nature of the phrase being defined, "crime of violence,"

which suggests "a category of violent, active crimes that cannot be said naturally to include DUI offenses." *Id.* at 11; *see also Begay v. United States*, 553 U.S. 137, 145 (2008) (holding that the ACCA's residual clause requires purposeful conduct), *overruled on other grounds by Johnson*, 135 S. Ct. at 2560.

Following *Leocal*, the Court in *United States v. Castleman* reaffirmed that "use" of physical force requires something more than "negligent or merely accidental conduct," even within the less serious definition of "misdemeanor crime of domestic violence" in 18 U.S.C. § 921(a)(33)(A). 572 U.S. 157, 169 n.8 (2014).[1]

Two years later, in *Voisine*, the Court held that "acts of force undertaken recklessly" can qualify as the "use" of force. 136 S. Ct. at 2282. As in *Castleman*, *Voisine* involved the firearms ban for individuals convicted of "garden-variety assault or battery misdemeanors" in a domestic context, not the ACCA. *Id.* at 2280. Critical to the Court's reasoning was the requirement under the modern concept of recklessness that a defendant must *consciously disregard* a substantial risk of causing harm. *Id.* at 2278-29. The Court observed that the word "use" "does not demand that the person applying force have the purpose or practical certainty that it will cause harm," but it does anticipate the "understanding that it is substantially likely to do so." *Id.* at 2279. The Court held that "acts undertaken with

[1] A "misdemeanor crime of domestic violence" means an offense that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon," when committed within a domestic relationship. 18 U.S.C. § 921(a)(33)(A). The definition omits the narrowing "against the person or property of another" phrase discussed in *Leocal* with respect to 18 U.S.C. § 16(a)'s felony crime of violence definition.

awareness of their substantial risk of causing injury" involve the active employment of force because the harm caused is "the result of a deliberate decision to endanger another[.]" *Id.* at 2279 (emphasis added).[2]

The present case does not concern the question of whether *Voisine*'s incorporation of reckless conduct applies to the ACCA. Rather, this case turns on the "more than negligence" standard clearly set forth in *Leocal* that has remained unambiguous and undisputed. The issue in this case arises from the fact that many state assault laws do not use the modern mental state terms of negligence and recklessness. The circuit courts have struggled to translate these modern concepts to the variety of state-specific mental state requirements that conform to no generic definition, producing divergent results for crimes with similar elements.

In *United States v. Rose*, for example, the First Circuit held that Rhode Island assault and battery with a deadly weapon, a "general intent" crime, was not a violent felony under the ACCA because the minimum mental state necessary to commit the offense equates to mere recklessness. 896 F.3d 104, 114 (1st Cir. 2018). The court reasoned that, under state law, the general intent mental state required only "the intention to make the bodily

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[2] Before *Voisine*, the Courts of Appeal had "almost uniformly" held that recklessness is not a sufficient mens rea for a violent felony under the ACCA and similar crime of violence provisions. *Castleman*, 572 U.S. at 169 n.8. In *Voisine*, the Court was careful to explain that its decision concerned only § 921(a)(33)(A) and did "not resolve" whether the force clause in § 16(a) includes reckless conduct. *Voisine*, 136 S. Ct. at 2280 n.4.

movement which constitutes the act which the crime requires." *Id.* at 114 (quoting *State v. Sivo*, 925 A.2d 901, 914 (R.I. 2007)); *see also United States v. Parnell*, 818 F.3d 974, 981-82 n.5 (9th Cir. 2016) (agreeing with undisputed position that the defendant's conviction for Massachusetts [assault and battery by deadly weapon] does not qualify as a violent felony because "[u]nder Massachusetts law, an [assault and battery by deadly weapon] conviction may be predicated on a reckless act causing physical or bodily injury to another").

By contrast, in *United States v. Vail-Bailon*, the Eleventh Circuit held that Florida felony battery, another general intent crime, "requires an intentional use of force" for purposes of the Sentencing Guidelines. 868 F.3d 1293, 1302 (11th Cir. 2017) (en banc). The felony battery statute at issue in *Vail-Bailon* required touching that causes "great bodily harm, permanent disability, or permanent disfigurement." *Id.* However, the offender need not intend harm or know that the conduct creates a risk of harm. In a strong dissent, Judge Rosenbaum argued that, "when a person has no reason to believe that harm is substantially likely to result from his mere touch of another . . . he cannot be said to have 'use[d]' physical force in the sense that the federal definition of 'crime of violence' requires." *Vail-Bailon*, 868 F.3d at 1318 (Rosenbaum, J., dissenting) (citing *Voisine*, 136 S. Ct. at 2279).

In the Eighth Circuit, the court has drawn a distinction between various types of reckless conduct, carving out assault statutes that encompass reckless driving from other types of recklessness. *United States v. Fields*, 863 F.3d 1012, 1015 (8th Cir. 2017). In an

earlier case, *United States v. Fogg*, the Eighth Circuit had held that recklessly discharging a firearm at or toward a person, occupied building or motor vehicle would qualify as a violent felony because the act undertaken recklessly is an act of force (discharging a firearm). 836 F.3d 951, 955-56 (8th Cir. 2016). But later, in *Fields*, the court held that Missouri second-degree assault, which encompasses reckless driving resulting in injury, is not a violent felony. 836 F.3d at 1015.

The circuit courts' difficulty in adapting the modern mens rea standards under the force clause to diverse state assault statutes involves a question of exceptional importance that requires this Court's guidance. Having a clear and consistent definition of what degree of intent defines the "use of physical force against another" is crucial to the many categorically-defined federal sentencing enhancements for crimes involving violence, including the harsh mandatory minimum sentence required by the ACCA, the consecutive sentencing provisions of 18 U.S.C. § 924(c), and the many negative consequences linked to 18 U.S.C. § 16(a)'s "crime of violence" definition. Viewed from either the individual perspective or at a systematic level, these provisions should not brook arbitrariness or inconsistency. Thus, this Court should grant certiorari to clarify its crime of violence jurisprudence in the context of state assault laws.

B. The Ninth Circuit's Qualification Of § 245(a) As A Violent Felony Contravenes This Court's Precedent On An Important Question Of Federal Law.

By holding that a conviction under California Penal Code § 245(a) qualifies as a violent felony, even though the offense does not require awareness of the risk of harm, the

Ninth Circuit's precedent contravenes this Court's unambiguous and repeated direction that something more than negligence is required.

1. The Mental State Necessary For A Violation Of California Penal Code § 245(a) Equates With Negligence, Not Recklessness Or Intent.

Under federal law, a statute encompasses a negligence standard when it measures harm based on the defendant's knowledge of relevant facts as viewed from the perspective of a hypothetical "reasonable person," without requiring subjective awareness of the potential for harm. *Elonis*, 135 S. Ct. at 2011 (criminal negligence standards incorporate "circumstances known" to the defendant, then ask whether a "reasonable person equipped with that knowledge, not the actual defendant, would have recognized the harmfulness"); *J.D.B. v. N. Carolina*, 564 U.S. 261, 274 (2011) (noting that negligence "turns on what an objectively reasonable person would do in the circumstances"). A reckless mens rea, by contrast, requires the defendant's actual awareness and disregard of the risk of harm. *Voisine*, 136 S. Ct. at 2278. As interpreted by the state courts, § 245(a)'s mens rea aligns more closely with the federal standard of negligence than recklessness because it measures harm from the objective perspective of a reasonable person and does require a subjective awareness of the risk of harm.

The California Supreme Court has held that § 245(a) is a "general intent crime," for which a defendant may be held liable even without intending to use force. *People v. Williams*, 26 Cal. 4th 779, 788 (2001); CALCRIM 875 ("The People are not required to prove that the defendant actually intended to use force against someone when he/she

acted"). The criminal intent required to commit assault is merely "the general intent to willfully commit an act the direct, natural and probable consequences of which if successfully completed would be the injury to another." *People v. Rocha*, 3 Cal. 3d 893, 899 (1971). Therefore, a defendant who "honestly believes" that he is not committing a battery is still culpable if "a reasonable person" would find that his act was likely to result in a battery. *Williams*, 26 Cal. 4th at 788 n.3.

Because the question of whether an act "by its nature will probably and directly result in the application of physical force against another" is left to consideration under a reasonable person standard, California's state courts have understood *Williams* as defining a mental state standard that is equivalent to federal negligence. *See, e.g.*, *People v. Wright*, 100 Cal. App. 4th 703, 706 (Ct. App. 2002) ("[W]e are bound by *Williams*. We shall conclude the defendant was properly convicted of a negligent assault on the facts of the case."); *see also People v. Smith*, 57 Cal. App. 4th 1470, 1474-75, 1477 (Ct. App. 1997) ("*Williams* is at odds with *Smith* because it adopts a negligence standard"), *abrogation recognized by Wright*, 100 Cal. App. 4th at 705; *People v. Aznavoleh*, 210 Cal. App. 4th 1181, 1189 (Ct. App. 2012) (stating that *Williams* has been viewed as "'adopt[ing] a negligence standard' of criminal liability for assault") (quoting *Wright*, 100 Cal. App. 4th at 706).

Under that standard, a defendant can be convicted for violating § 245(a) based on conduct like driving dangerously or play-wrestling that is not intentionally violent. *See Aznavoleh*, 210 Cal. App. 4th at 1189; *People v. Wyatt*, 48 Cal. 4th 776, 781 (2010). In

Aznavoleh, the defendant was convicted of assault after speeding through an intersection in an apparent drag race and crashing into another car. 210 Cal. App. 4th at 1189. He admitted that he saw the other car enter the intersection, and his passengers testified that they told him to slow down and that the light was red. *Id.* The appellate court affirmed Mr. Aznavoleh's conviction, finding his "assertion that he is merely guilty of reckless behavior . . . unavailing." *Id.* at 1188. The court explained that the only "difference between assault and mere recklessness" for state law purposes "is that the former 'requires actual knowledge of the facts sufficient to establish that the defendant's act by its nature will probably and directly result in injury to another.'" *Id.* at 1189 (quoting *Williams*, 26 Cal. 4th at 782). However, under state law, assault does not require that the defendant "be subjectively aware of the risk that a battery might occur." *Id.* Based on this standard, the court rejected the defendant's insufficiency argument:

> As we have explained, a defendant need not intend to commit a battery, *or even be subjectively aware of the risk that a battery might occur*. . . . He need only be aware of what he is doing. The foreseeability of the consequences is judged by the objective "reasonable person" standard.

Id. at 1190 (emphasis added).

Similarly, in *Wyatt*, the defendant argued that he should not have been convicted of child abuse homicide because the child's injuries were incurred while "play-wrestling" with defendant and were not the result of intentional force. 48 Cal. 4th at 779. The California Court of Appeal had agreed and reversed the defendant's conviction for insufficient evidence that the defendant had "actual knowledge" that he was "wrestling far

too hard with his young son." *Id.* at 779. But on review, the California Supreme Court disagreed that the defendant's knowledge was relevant. The court explained that under *Williams*, the defendant "need not know or be subjectively aware that his act is capable of causing great bodily injury. . . . This means the requisite mens rea may be found even when the defendant *honestly believes his act is not likely to result in such injury*." *Id.* at 781 (emphasis added).

Judged by federal standards, the § 245(a) mens rea is akin to negligence because it does not require that the defendant be aware of any risk of harm. *See Voisine*, 136 S. Ct. at 2279 (stating that recklessness requires "acts undertaken with *awareness of their substantial risk of causing injury*"). Although § 245(a) requires an intentional act undertaken with knowledge of the facts that make the conduct risky, the defendant need not subjectively perceive the risk. In *Elonis*, this Court explained that engaging in a knowing act is not equal to knowing the character of that act. 135 S. Ct. at 2011. In *Elonis*, the Court considered as a matter of statutory interpretation whether a culpable mental state is required for a threatening communication to be punishable under 18 U.S.C. § 875(c). Relying on the "basic principle" that "wrongdoing must be conscious to be criminal," the Court concluded that a culpable mental state must "apply to the fact that the communication contains a threat." *Elonis*, 135 S. Ct. at 2009, 2011.

The government in *Elonis* had argued that a defendant's statements should be punished as threats as long as "he himself knew the contents and context" of the statements and "a reasonable person would have recognized that [they] would be read as genuine

threats." 135 S. Ct. at 2011. This Court rejected that argument, stating that the government's proposed mental state could not be characterized "as something other than a negligence standard" because it ultimately relied on whether a "reasonable person," not the defendant, would view the conduct as harmful:

> [T]he fact that the Government would require a defendant to actually know the words of and circumstances surrounding a communication does not amount to a rejection of negligence. Criminal negligence standards often incorporate "the circumstances known" to a defendant. . . . Courts then ask, however, whether a reasonable person equipped with that knowledge, not the actual defendant, would have recognized the harmfulness of his conduct. . . . That is a negligence standard.

Id. (citation omitted).

Under *Elonis*, a statute that allows the consequences of a defendant's intentional act to be judged from the perspective of a reasonable person—not the defendant—encompasses a negligence standard. That is exactly the standard required by § 245(a), which imposes liability where a reasonable person—not the defendant—would foresee the risk of harm created by the defendant's conduct.

2. Ninth Circuit Case Law Is Internally Inconsistent Regarding The Necessary Mental State For A Violent Felony.

The Ninth Circuit's qualification of § 245(a) as a violent felony creates intra-circuit inconsistency on the critical question of what mens rea is necessary for an assault offense to be deemed categorically violent for purposes of the ACCA and similar enhancement provisions.

The longstanding rule in the Ninth Circuit is that an offense must be committed intentionally or knowingly to qualify as having the use of force against another as an element; mere recklessness does not suffice. *See United States v. Orona*, 923 F.3d 1197 (9th Cir. 2019); *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, (9th Cir. 2006) (en banc). The court has even concluded that depraved heart murder does not qualify as a "crime of violence" under 18 U.S.C. § 924(c)(3)(A) because the offense can be committed with reckless indifference. *United States v. Begay*, No. 14-10080, 2019 WL 3884261 (9th Cir. Aug. 19, 2019). The court stated: "[O]ur precedent seems squarely to place crimes motivated by intent on a pedestal, while pushing off other very dangerous and violent conduct that, because not intentional, does not qualify as a 'crime of violence.' Reckless conduct, no matter how extreme, is not intentional." *Begay*, 2019 WL 3884261, at *5 (quoting *Covarrubias Teposte v. Holder*, 632 F.3d 1049, 1053 (9th Cir. 2011) (internal quotation marks omitted)).

Applying the circuit's intentional or knowing standard to other state crimes, the Ninth Circuit has recognized that California's "general intent" mental state does not amount to more than recklessness. For example, in *United States v. Narvaez-Gomez*, the Ninth Circuit held that the California "general intent" offense of "maliciously and willfully discharg[ing] a firearm at an inhabited dwelling house, occupied building, occupied motor vehicle, occupied aircraft, inhabited housecar, . . . or inhabited camper" did not entail the necessary mental state regarding the use of force to qualify as a crime of violence. 489 F.3d

970, 976 (9th Cir. 2007) (addressing Cal. Penal Code § 246). The court held that the statute's "general intent" mental state criminalized mere recklessness:

> California courts characterize section 246 as a general intent crime. . . . A violation includes discharging a firearm "in such close proximity to the target that [a defendant] shows a conscious indifference to the probable consequence that one or more [projectiles] will strike the target." . . . These state precedents demonstrate that a violation of section 246 *may result from purely reckless conduct and does not categorically constitute a crime of violence*."

Id. at 976-77 (emphasis added); *see also Gonzalez-Ramirez v. Sessions*, 727 F. App'x 404, 405 (9th Cir. 2018) (holding that discharging a firearm at an unoccupied motor vehicle in violation of Cal. Penal Code § 247(b) is not a crime of violence that precludes cancellation of removal because, like § 246, it "is a *general intent crime* that includes no further mental state beyond willing commission of the act proscribed by law" (emphasis added)).

Moreover, even with respect to § 245(a), the en banc Ninth Circuit has held in the immigration context that the statute's state-law defined mental state is *less culpable* than mere recklessness. *Ceron*, 747 F.3d at 784. The issue in *Ceron* was whether § 245(a) qualifies as a "crime of moral turpitude" for purposes of immigration law. *Id.* at 781-82. Assault is not generally a crime of moral turpitude unless it involves either intentional infliction of serious harm or infliction of harm on a protected class of victim. *Nunez v. Holder*, 594 F.3d 1124, 1132 (9th Cir. 2010) (citing *Morales-Garcia v. Holder*, 567 F.3d 1058, 1065-66 (9th Cir. 2009)). After reviewing *Williams* and other California authorities, the en banc Ninth Circuit found that § 245(a) "does not require a specific intent to injure" and does not "require that the offender actually perceive the risk created by his or her

actions." *Ceron*, 747 F.3d at 784. The court contrasted § 245(a) with an Illinois statute criminalizing assault with a deadly weapon that required "conscious disregard" of risk and "actual awareness of the risk created by the criminal violator's action." *Id.* The Court noted that the Illinois statute contained a "recklessness" mental state, whereas § 245(a) "requires knowledge of the relevant facts but *does not require subjective appreciation of the ordinary consequences of those facts*." *Id.* (emphasis added). The Court in *Ceron* remanded the case to the Board of Immigration Appeals to decide in the first instance whether § 245(a) is a crime involving moral turpitude, emphasizing the less culpable mental state as a crucial but not determinative factor for consideration. *Id.* at 784.

Despite this background, the Ninth Circuit has insisted in the criminal "crime of violence" context that § 245(a)'s mens rea is *greater* than recklessness. *United States v. Vasquez-Gonzalez*, 901 F.3d 1060, 1068 (9th Cir. 2018); *United States v. Jimenez-Arzate*, 781 F.3d 1062 (9th Cir. 2015). In *Jimenez-Arzate*, the Ninth Circuit issued a per curiam decision affirming § 245(a) as a categorical crime of violence under § 2L1.2. 781 F.3d at 1064. In its analysis, the court agreed with the defendant's assertions that state case law did not require a defendant to intend, or even personally recognize, the likelihood that his actions would cause an injury to be convicted under § 245(a), so long as the defendant was aware of facts that would lead a reasonable person to realize the danger, such as in the dangerous driving scenario in *Aznavoleh* or the play-wrestling context in *Wyatt*. *Id.* However, the panel rejected the defendant's argument that this undisputed mens rea standard amounted, at worst, to mere recklessness:

> Contrary to Jimenez-Arzate's argument, *Aznavoleh* did not hold that an automobile accident stemming from merely reckless driving may result in a conviction under § 245(a)(1). The defendant in *Aznavoleh* engaged in street racing, heedlessly disregarding a perceived likelihood of death or grave injury to others. Likewise, in *Wyatt*, a reasonable person would have recognized the dangers of striking a child with the deadly force used, even if the defendant was not subjectively aware of the risks of his "play wrestling" with the child in that manner.

Id.

The Ninth Circuit's insistence that § 245(a) requires intentional violence cannot be reconciled with the earlier en banc holding in *Ceron* because the Court in *Ceron* held that § 245(a)'s mental state is less than recklessness. *Compare Ceron*, 747 F.3d at 784 (stating that, in contrast to the Illinois statute that required recklessness, § 245(a) "does not require subjective appreciation of the ordinary consequences of [the relevant] facts") *with Jimenez-Arzate*, 781 F.3d at 1064 (stating that a conviction under § 245(a) requires more than mere recklessness, even while acknowledging that it does not require the defendant to be subjectively aware of any risk of harm). The tension is impossible to reconcile because, although *Ceron* involved a "crime involving moral turpitude" determination rather than a "crime of violence" determination, the same federal definitions of "recklessness" and "negligence" apply to both. *See Ceron*, 747 F.3d at 784 (providing definitions); *Voisine*, 136 S. Ct. at 2278 (recklessness requires a defendant to "'consciously disregard' a substantial risk that the conduct will cause harm to another").

3. *The Ninth Circuit's Treatment of § 245(a) As A Violent Felony Contravenes This Court's Precedent On An Important Question Of Federal Law.*

This Court should grant certiorari because the Ninth Circuit's qualification of § 245(a) as a violent felony under the force clause contravenes this Court with respect to an important question of federal law. Although *Leocal* spoke in terms of negligence, rather than general intent, its holding all but resolves the question of whether § 245(a) may be a violent felony.

The key principle in *Leocal* is that to have committed a crime of violence, a defendant must both intend to commit an act and intend, or at least be aware, that the act risks harm to another. The defendant in *Leocal* had been convicted of driving under the influence of alcohol and causing serious bodily injury. 543 U.S. at 3. The Court held that even an intent to drive while drunk—undoubtedly dangerous conduct by any objective standard—did not imply an intent to cause harm or injury, and thus the Court held that the offense "is not a crime of violence under § 16(a)." *Id.*

The California Court of Appeal's decision in *Aznavoleh* shows that a person may be convicted for California assault on the basis of nearly identical conduct. The defendant in that case was deemed guilty of assault with a deadly weapon under § 245(a) because of a decision to "deliberately race[] through a red light at a busy intersection," resulting in a collision with another vehicle. 210 Cal. App. 4th at 1183. In affirming the conviction, the state court made clear that a defendant need not "be subjectively aware of the risk that a battery might occur" to be guilty of violating § 245(a). *Id.* at 1190.

In other words, even though the defendants in *Leocal* and *Aznavoleh* both acted intentionally (by getting behind the wheel while drunk or by racing through an intersection), neither statute required the defendant to be aware of the risk of causing such injury. The law distinguishes between an intent to commit an act and an intent or conscious disregard of bringing about consequences from that act. *See United States v. Woods*, 576 F.3d 400, 411 (7th Cir. 2009) (stating that "[e]very crime of recklessness necessarily requires a purposeful, volitional act that sets in motion the later outcome"). The Ninth Circuit's focus on the intentional act rather than the subjective appreciation of the risk of harm runs directly contrary to *Elonis*'s holding that a criminal negligence standard "often incorporate[s] 'the circumstances known' to a defendant" and then asks "whether a reasonable person equipped with that knowledge, not the actual defendant, would have recognized the harmfulness of his conduct." 135 S. Ct. at 2011. The Court should grant certiorari in order to correct the Ninth Circuit's aberrant treatment of California's assault law. By failing to require even reckless force, California Penal Code § 245(a)'s "general intent" standard cannot categorically meet the definition of a crime of violence.

Conclusion

For the foregoing reasons, the Court should issue a writ of certiorari.

Dated this 26th day of August, 2019.

Stephen R. Sady

Elizabeth G. Daily
Attorneys for Petitioner

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

SERGIO SALDIVAR GUTIERREZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

CERTIFICATE OF SERVICE AND MAILING

I, Stephen R. Sady, counsel appointed to represent petitioner under the Criminal Justice Act of 1964, 18 U. S. C. § 3006A(d)(6), certify that pursuant to Rule 29.3, service has been made of the within PETITION FOR WRIT OF CERTIORARI on the counsel for the respondent by hand-delivery on August 26, 2019, an exact and full copy thereof addressed to:

Frank Papagni
Assistant U.S. Attorney
Suite 2400
405 E. Eighth Avenue
Eugene, Oregon 97401

Amy Potter
Assistant U.S. Attorney
Suite 2400
405 E. Eighth Avenue
Eugene, Oregon 97401

and by depositing in the United States Post Office, in Portland, Oregon on August 26, 2019, first class postage prepaid, an exact and full copy thereof addressed to:

Kelly A. Zusman
Assistant U.S. Attorney
1000 SW Third, Suite 600
Portland, Oregon 97204

Noel Francisco
Solicitor General of the United States
Room 5616
Department of Justice
950 Pennsylvania Ave., N. W.
Washington, DC 20530-0001

Further, the original and ten copies were mailed to the Honorable Scott S. Harris, Clerk of the United States Supreme Court, by depositing them in a United States Post Office Box, addressed to 1 First Street, N.E., Washington, D.C., 20543, for filing on this 26th day of August, 2019, with first-class postage prepaid.

Additionally, I electronically filed the foregoing MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR WRIT OF CERTIORARI by the using the Supreme Court's Electronic filing system on August 26, 2019.

Dated this 26th day of August, 2019.

Stephen R. Sady
Attorney for Petitioner

Subscribed and sworn to before me this 26th day of August, 2019.

OFFICIAL STAMP
MITZI JOANNE MILLER
NOTARY PUBLIC-OREGON
COMMISSION NO. 981876
MY COMMISSION EXPIRES DECEMBER 04 2022

Notary Public of Oregon

NOT FOR PUBLICATION

FILED

MAY 29 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SERGIO SALDIVAR GUTIERREZ, Defendant-Appellant.	No. 18-35036 D.C. Nos. 1:16-cv-01127-AA 1:11-cr-30009-AA-3 MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Ann L. Aiken, District Judge, Presiding

Submitted May 21, 2019**

Before: THOMAS, Chief Judge, FRIEDLAND and BENNETT, Circuit Judges.

Sergio Saldivar Gutierrez appeals from the district court's order denying his 28 U.S.C. § 2255 motion to vacate the 180-month mandatory minimum sentence imposed pursuant to the Armed Career Criminal Act (ACCA). We have

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

jurisdiction under 28 U.S.C. § 2253. Reviewing de novo, *see United States v. Hill*, 915 F.3d 669, 673 (9th Cir. 2019), we affirm.

Gutierrez contends that he is entitled to relief because his four prior convictions for assault with a deadly weapon under California Penal Code § 245(a) are not violent felonies under the ACCA, 18 U.S.C. § 924(e)(2)(B)(i). Gutierrez's argument is foreclosed by *United States v. Vasquez-Gonzalez*, 901 F.3d 1060, 1065-68 (9th Cir. 2018), which was decided while this appeal was pending. In *Vasquez-Gonzalez*, this court held that section 245(a)(1) is a categorical crime of violence under 18 U.S.C. § 16(a), which is materially identical to 18 U.S.C. § 924(e)(2)(B)(i). *See id.* at 1068; *see also United States v. Studhorse*, 883 F.3d 1198, 1203 (9th Cir.), *cert. denied*, 139 S. Ct. 127 (2018) (18 U.S.C. § 16(a) and 18 U.S.C. § 924(e)(2)(B)(i) have "near-identical language"). Accordingly, *Vasquez-Gonzalez* controls here and the district court did not err in denying Gutierrez's motion.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

MEDFORD DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

No. 1:11-cr-30009-AA-3
No. 1:16-cv-01127-AA

v.

OPINION & ORDER

SERGIO SALDIVAR GUTIERREZ,

Defendant.

AIKEN, District Judge.

The matter comes before the Court on Defendant Sergio Saldivar Gutierrez's Motion to Vacate or Correct Sentence under 28 U.S.C. § 2255. ECF No. 142. The Court finds that this matter appropriate for resolution without a hearing and the motion is DENIED.

BACKGROUND

In October 2011, Gutierrez entered a guilty plea to a charge of Felon in Possession of a Firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1). ECF No. 69. As part of the plea deal, Gutierrez agreed that he had at least three predicate convictions for violent felonies under the Armed Career Criminal Act ("ACCA"). In November 2011, Senior District Judge Owen M. Panner sentenced Gutierrez to the ACCA mandatory minimum sentence of 180 months.[1] ECF Nos. 92, 93.

At the time of his plea and sentencing, Gutierrez had the following relevant predicate convictions for purposes of the ACCA:

[1] This case was transferred to this Court several years after Gutierrez was sentenced.

1. A California conviction for Assault with a Deadly Weapon in violation of Cal. Penal Code § 245(a)(2) in the Los Angeles County Superior Court. Judgment was entered August 30, 1990. Def. Mot. Ex. A, at 11; Plea Pet. 2, ECF No. 73.

2. A California conviction for Attempted Murder in violation of Cal. Penal Code § 664/187(a) and Assault with a Deadly Weapon in violation of Cal. Penal Code § 245(a)(2) in the Los Angeles County Superior Court. Judgment was entered April 15, 1992. Def. Mot. Ex. A, at 12; Plea Pet. 2.

3. A California conviction for Assault with a Deadly Weapon in violation of Cal. Penal Code § 245(a)(1) in the Los Angeles County Superior Court. Judgment was entered May 30, 2000. Def. Mot. Ex. A, at 13; Plea Pet. 2.

4. A California conviction for Assault with a Deadly Weapon in violation of Cal. Penal Code § 245(a)(2) in the Los Angeles County Juvenile Court. Judgment was entered February 27, 1987. Def. Mot. Ex. A, at 10; Plea Pet. 2.

Gutierrez did not file a direct appeal of his sentence. In 2015, the United State Supreme Court issued its decision in *Johnson v. United States*, ___U.S.___, 135 S.Ct. 2551 (2015) (*Johnson II*), which held that the residual clause of the Armed Career Criminal Act was void for vagueness. In 2016, the Supreme Court held that the *Johnson II* decision was retroactively applicable to cases on collateral review. *Welch v. United States*, ___U.S.___, 136 S.Ct. 1257, 1268 (2016). This motion followed.

LEGAL STANDARDS

Under 28 U.S.C. § 2255, a federal prisoner in custody under sentence may move the court that imposed the sentence to vacate, set aside, or correct the sentence on the ground that:

> [T]he sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack. . . .

28 U.S.C. § 2255(a).

To warrant relief, a petitioner must demonstrate that the error of constitutional magnitude had a substantial and injurious effect or influence on the guilty plea or the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993); *see also United States v. Montalvo*, 331 F.3d 1052,

1058 (9th Cir. 2003) ("We hold now that *Brecht*'s harmless error standard applies to habeas cases under section 2255, just as it does to those under section 2254.").

A petitioner seeking relief under § 2255 must file his motion within the one-year statute of limitations set forth in § 2255(f). The limitations period runs one year from the latest of four dates: (1) when the judgment of conviction became final; (2) when the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action; (3) when the right asserted is initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; and (4) when the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence. 28 U.S.C. § 2255(f).

Under § 2255, "a district court must grant a hearing to determine the validity of a petition brought under that section, '[u]nless the motions and the files and records of the case *conclusively show* that the prisoner is entitled to no relief.'" *United States v. Blaylock*, 20 F.3d 1458, 1465 (9th Cir. 1994) (alteration and emphasis in original) (quoting 28 U.S.C. § 2255). In determining whether a § 2255 motion requires a hearing, "[t]he standard essentially is whether the movant has made specific factual allegations that, if true, state a claim on which relief could be granted." *United States v. Withers*, 638 F.3d 1055, 1062 (9th Cir. 2011) (alteration in original, internal quotation marks and citation omitted). A district court may dismiss a § 2255 motion based on a facial review of the record "only if the allegations in the motion, when viewed against the record, do not give rise to a claim for relief or are 'palpably incredible or patently frivolous.'" *Id.* at 1062-63 (quoting *United States v. Schaflander*, 743 F.2d 714, 717 (9th Cir.

1984)); *see United States v. Hearst*, 638 F.2d 1190, 1194 (9th Cir. 1980). Conclusory statements in a § 2255 motion are insufficient to require a hearing. *Hearst*, 638 F.2d at 1194.

If a court denies a habeas petition, the court may issue a certificate of appealability if "jurists of reason could disagree with the district court's resolution of [the petitioner's] constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *see* 28 U.S.C. § 2253(c)(1). Although the petitioner is not required to prove the merits of his case, he must demonstrate "something more than the absence of frivolity or the existence of mere good faith on his or her part." *Miller-El*, 537 U.S. at 338 (internal quotation marks and citation omitted).

DISCUSSION

Federal law generally prohibits felons from possessing firearm. 18 U.S.C. § 922(g). Under ordinary circumstances, ten years is the maximum term of imprisonment for a violation of § 922(g). However, if a felon with three previous convictions for a "violent felony or a serious drug offense" violates § 922(g), the ACCA mandates a sentence of at least 15 years. 18 U.S.C. § 924(e)(1). Gutierrez contends that his convictions for Assault with a Deadly Weapon under Cal. Penal Code § 245(a)(1) and (2) are no longer "violent felonies" within the meaning of the ACCA because (1) conviction under § 245(a) requires only reckless or negligent conduct and (2) because assault requires only the "least touching" under California law and does not, therefore, rise to the level of violent force.

I. The Categorical Analysis and the Elements Clause

The ACCA defines 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 (ii) is burglary, arson, or extortion, involves the 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 final clause, highlighted above, is known as the "residual clause."

In June 2015, the Supreme Court struck down the residual clause as unconstitutionally vague in violation of the Due Process Clause of the Fifth Amendment. *Johnson II*, 135 S.Ct. at 2555-57. As a consequence, the scope of offenses constituting violent felonies narrowed considerably. In the wake of the *Johnson II* decision, a prior conviction only qualifies as a violent felony if it either (1) "has as an element the use, attempted use, or threatened use of physical force against the person of another," (the "elements clause,"); or (2) "is burglary, arson, or extortion, [or] involves the use of explosives," (the "enumerated offenses.").

Courts use the "categorical approach" to determine whether a prior conviction is a predicate offense under the ACCA. *United States v. Parnell*, 818 F.3d 974, 978 (9th Cir. 2016). Using the categorical approach, courts "compare the elements of the statute forming the basis of the defendant's conviction with the elements of the 'generic' crime—*i.e.*, the offense as commonly understood." *Descamps v. United States*, 570 U.S. 254, 133 S.Ct. 2276, 2281 (2013). "The prior conviction qualifies as an ACCA predicate only if the statute's elements are the same as, or narrower than, those of the generic offense." *Id.* Under the categorical approach, courts do not look beyond the elements of the statute of conviction and must presume that the conviction rests upon the least of the acts criminalized. *Ramirez v. Lynch*, 810 F.3d 1127, 1131 (9th Cir. 2016). If, after conducting this analysis, the court concludes that the state statute of conviction criminalizes more conduct than the generic offense, then it is overbroad and the conviction will not qualify as a predicate offense. *Id.*

The Supreme Court has, however, recognized that some statutes set out one or more elements of the offense in the alternative, essentially forming "several different crimes." *Descamps*, 133 S.Ct. at 2281, 2284. "If at least one, but not all of those crimes matches the generic version, a court needs a way to find out which the defendant was convicted of." *Id.* at 2285. In cases involving such "divisible" statutes, courts are permitted to apply the "modified categorical approach." *Id.* at 2281. Under the modified categorical approach, courts may look beyond the elements of the statute to documents like charging instruments, jury instructions, plea agreements, transcripts of plea hearings, and judgments to determine whether the defendant was convicted of a set of elements that fall within the generic definition. *Mathis v. United States*, ___U.S.___, 136 S.Ct. 2243, 2249 (2016); *Ramirez*, 810 F.3d at 1131.

In this case, neither party asserts that Assault with a Deadly Weapon falls within the ACCA's list of enumerated offenses, and so the analysis will focus on the elements clause. To qualify as a predicate offense under the elements clause, the state statute 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). The simple fact that the statute includes an element involving the use of physical force against another person is not sufficient to place a conviction within the bounds of the elements clause. The Supreme Court has held that "physical force" in the ACCA means "*violent* force—that is, force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010) (*Johnson I*).

To determine whether a conviction involves violent force, courts must look to both the text of the statute and to the state courts' interpretations of its terms. *United States v. Strickland*, 860 F.3d 1224, 1226 (9th Cir. 2017). "State cases that examine the outer contours of the conduct criminalized by the state statute are particularly important because 'we must presume that the

conviction rested upon [nothing] more than the least of th[e] acts criminalized.'" *Id.* at 1226-27 (quoting *Moncrieffe v. Holder*, 569 U.S. 184 (2013)).

II. Assault with a Deadly Weapon

In this case, Gutierrez has several predicate convictions for Assault with a Deadly Weapon in violation of California Penal Code § 245(a), which provides:

> (a)(1) Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars ($10,000), or by both the fine and imprisonment
>
> (2)Any person who commits an assault upon the person of another with a firearm shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not less than six months and not exceeding one year, or by both a fine not exceeding ten thousand dollars ($10,000) and imprisonment.

Cal. Pen. Code § 245(a)(1), (2) (2000).[2]

In California, assault "requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another." *People v. Williams*, 26 Cal. 4th 779, 29 P.3d 197, 204 (2001). Assault is a general intent crime and "does not require a specific intent to injure the victim," or "the subjective awareness of the risk that an injury might occur." *Id.* at 203-04. However, "mere recklessness or criminal negligence is still not enough [to sustain a conviction] because a jury cannot find a defendant guilty of assault based on facts he should have known but did not know." *Id.* at 203 (internal citations omitted). "California Penal Code section 245(a)(1) and 245(a)(2) proscribe the same conduct, the only difference being the type of weapon involved." *United States v. Heron-Salinas*, 566 F.3d 898, 899 (9th Cir. 2009).

[2] The 1990 and 1987 versions of Cal. Penal Code § 245(a)(1) and (2) are substantially similar to the 2000 version.

Gutierrez argues, in essence, that recent California state court decisions permit conviction under § 245(a) for a negligent use of force. A negligent application of force is insufficient to constitute a "use of force" and therefore cannot serve as the basis for a crime of violence. *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004). But knowledge, or general intent, remains a sufficient *mens rea* to serve as the basis for a crime of violence. *See United States v. Melchor-Meceno*, 620 F.3d 1180, 1186 (9th Cir. 2010) ("[T]o knowingly place another person in fear of imminent serious bodily harm . . . includes the requisite *mens rea* of intent for a crime of violence.").

In 2008, the Ninth Circuit issued a brief opinion in which it held that a conviction under § 245(a)(2), for assault with a firearm, was categorically a crime of violence under 18 U.S.C. § 16(a) and (b).[3] *Heron-Salinas*, 566 F.3d at 899. Although Gutierrez argues that *Heron-Salinas* considered only the § 16(b) residual clause, Def. Mem. 14-16, the Court notes that the holding of *Heron-Salinas* encompassed both the elements clause of § 16(a) and the residual clause of § 16(b). *Heron-Salinas*, 566 F.3d at 899; *see also Ramirez v. Lynch*, 628 F. App'x 506, 506-07 (9th Cir. 2016) ("We have expressly held that assault with a deadly weapon in violation of California Penal Code § 245(a)(1) is categorically a crime of violence as defined in 18 U.S.C. § 16(a)."); *United States v. Gonzalez*, 692 F. App'x 483, 483 (9th Cir. 2017) (reaffirming that conviction of Cal. Penal Code § 245(a)(1) was categorically a crime of violence under 18 U.S.C. § 16(a)).

Following *Heron-Salinas*, the Ninth Circuit determined that a conviction for violation of § 245(a)(1) categorically qualifies as a "crime of violence" under elements clause of the 2006 version of U.S.S.G. § 2L1.2(b)(1)(A)(ii). *United States v. Grajeda*, 581 F.3d 1186, 1189-90 (9th Cir. 2009). Like the ACCA, the "elements clause" of § 2L1.2 (2006) required that the offense

[3] 18 U.S.C. § 16(a) provides that a "crime of violence" is "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another[.]"

"has as an element the use, attempted use, or threatened use of physical force against the person of another." *Id.* at 1190 (internal quotation marks omitted).

In *Grajeda*, the Ninth Circuit rejected the defendant's argument that § 245(a)(1) is overbroad because assault may be accomplished under California law by "the least touching," noting that "even the 'least touching' with a deadly weapon or instrument . . . is violent in nature and demonstrates at a minimum the threatened use of actual force." *Id.* at 1192. The court also rejected the defendant's argument that § 245(a)(1) does not require proof of sufficiently intentional conduct to qualify as a crime of violence. *Id.* at 1192-96. In particular, the court noted that § 245(a)(1) requires an intentional violent act with a deadly weapon or instrument or with force likely to cause serious bodily injury that by its nature will directly and immediately cause the application of physical force to another, although the outcome—the specific injury—need not have been intended. *Id.* at 1195.

In 2015, the Ninth Circuit revisited *Grajeda* in light of two intervening California state court decisions. *United States v. Jimenez-Arzate*, 781 F.3d 1062 (9th Cir. 2015). The first, *People v. Aznavoleh*, 210 Cal. App. 4th 1181, 148 Cal. Rptr.3d 901 (2012), involved a defendant who intentionally ran a red light while street racing, even though he had seen another car entering the intersection. *Jimenez-Arzate*, 781 F.3d at 1064. The state court found that the defendant's conduct had been sufficiently intentional to satisfy the *mens rea* requirement of § 245(a)(1). *Jimenez-Arzate*, 781 F.3d at 1064.

The second state court case, *People v. Wyatt*, 48 Cal. 4th 776, 229 P.3d 156, 157 (2010), involved a father who, while play wrestling with his infant son, struck the boy with such force that the child died. *Jimenez-Arzate*, 781 F.3d at 1064. The California Supreme Court upheld the father's conviction for involuntary manslaughter and assault because substantial evidence

established that the father knew he was striking his son with his fist, forearm, knee, and elbow, and "that he used an amount of force a reasonable person would realize was likely to result in great bodily injury." *Wyatt*, 229 P.3d at 157; *Jimenez-Arzate*, 781 F.3d at 1064.

In *Jimenez-Arzate*, the Ninth Circuit rejected the defendant's argument that *Wyatt* and *Aznavoleh* stood for the proposition that a defendant may be convicted under § 245(a) based on mere recklessness, reaffirming the holding of *Grajeda*. *Jimenez-Arzate*, 781 F.3d at 1064-65.

The Ninth Circuit recently addressed a similar argument in *United States v. Werle*, ___F.3d___, No. 16-30181, 2017 WL 6346659 (9th Cir. Dec. 13, 2017). In *Werle*, the defendant had been convicted of harassment under Wash. Rev. Code § 9A.46.020(2)(b)(ii). *Id.* at *2. Under the relevant formulation, the statute of conviction required proof of two elements: (1) a knowing threat to kill someone immediately or in the future; and (2) that the words or conduct of the defendant placed that person in reasonable fear that the threat to kill would be carried out. *Id.*

Like Gutierrez, Werle argued that § 9A.46.020(2)(b)(ii) was overbroad because it allowed conviction based on mere negligence. *Id.* at *2. The Ninth Circuit rejected that argument:

> Turning to § 9A.46.020(2)(b)(ii), the first element of conviction under that section requires the defendant to have "knowingly threated to kill" someone. The Washington Supreme Court has interpreted this element to require the defendant subjectively to know that he or she is communicating a threat of intent to cause bodily injury to the person threatened or to another person. A knowing threat of intent to cause bodily injury plainly requires a sufficient *mens rea* to constitute the threated use of physical force.
>
> Recognizing the difficulty in attacking the first element of the crime, Werle argues that a different element of the crime requires only negligence: placing the victim "in reasonable fear that the threat to kill would be carried out." Werle is correct that the Washington Supreme Court has interpreted this element to require only negligence. Nevertheless, Werle's argument is unavailing because § 4B1.2(a)(1) only requires that the state crime has as "*an element* . . . the threatened use of physical force." It is clear that the first element of a conviction under § 9A.46.020(2)(b)(ii)—a knowing threat of intent to kill someone—

> requires a sufficient *mens rea*, and so that element by itself may render the conviction a crime of violence. That other elements of the statute may be satisfied with a lower *mens rea* adds nothing to our inquiry under § 4B1.2(a)(1), because requiring the state to prove additional elements only narrows the reach of the crime.

Id. at *3 (internal quotation marks, alterations, and citations omitted, emphasis in original).

The same reasoning applies with equal force to a conviction under § 245(a) for purposes of the ACCA elements clause. In *Grajeda*, the Ninth Circuit held that conviction under § 245(a)(1) requires an intentional use of violent force. *Grajeda*, 581 F.3d at 1195. The statute therefore has as "*an element*" the knowing or intentional use, attempted use, or threatened use, of violent physical force. As in *Werle*, the fact that additional elements of the offense may require a lesser *mens rea* is irrelevant.

Gutierrez also argues that because § 245(a) may be satisfied by the "least touching," it does not require violent force within the meaning of the ACCA. As a previously noted, however, the Ninth Circuit rejected this very argument in *Grajeda*, noting that even the least touching with a deadly weapon or instrument is violent in nature. *Grajeda*, 581 F.3d at 1192.

Finally, Court notes that a series of recent unpublished Ninth Circuit cases have cited the holding of *Grajeda* with approval. *See United States v. Oregon-Mendoza*, 697 F. App'x 893 (9th Cir. 2017) (reaffirming that violation of § 245(a)(1) is categorically a crime of violence and finding that *Grajeda* is not "clearly irreconcilable" with *Descamps*.); *United States v. Orozco-Madrigal*, 698 F. App'x 483 (9th Cir. 2017) (holding same); *United States v. Solomon*, 700 F. App'x 682 (9th Cir. 2017) (holding same); *see also Gonzalez*, 692 F. App'x at 483 (reaffirming the holding of *Jimenez-Arzate* that conviction of Cal. Penal Code § 245(a)(1) was categorically a crime of violence under 18 U.S.C. § 16(a)).

The Court therefore concludes that, following *Heron-Salinas*, *Grajeda*, *Jimenez-Arzate*, and *Werle*, Guiterrez's convictions for Assault with a Deadly Weapon under Cal. Penal Code § 245(a) are categorically violent felonies under the ACCA elements clause. As Gutierrez has more than three predicate convictions for violent felonies, the sentencing court correctly imposed the ACCA mandatory minimum sentence in this case.

CONCLUSION

For the reasons set forth above, Defendant's Motion is DENIED. The Court finds, however, that reasonable jurists could debate whether "the petition should have been resolved in a different manner." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The Court therefore grants a certificate of appealability on the issue of whether a conviction for violation of California Penal Code § 245(a)(1) or (2) qualifies as a violent felony for purposes of the ACCA.

It is so ORDERED and DATED this 2nd day of January, 2018.

ANN AIKEN
United States District Judge

28 U.S.C.A. § 2255 (2016)

§ 2255. Federal custody; remedies on motion attacking sentence

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of--

> **(1)** the date on which the judgment of conviction becomes final;
>
> **(2)** the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> **(3)** the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain--

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the

18 U.S.C. § 924(e) (2011)

§ 924. Penalties

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection--

(A) the term "serious drug offense" means--

> **(i)** an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or
>
> **(ii)** an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, 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; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.