No. _____

In the

Supreme Court of the United States

JOHN ANZURES, 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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An Introduction to the Question Presented for Review

According to this Court's decisions in *Taylor* and *Stitt*, Anzures's New Mexico commercial burglary conviction categorically is not generic burglary. Thus, it does not qualify as a violent felony as defined by the Armed Career Criminal Act's (ACCA) enumerated offense clause. The ACCA enhanced sentence Anzures is serving is illegal because that conviction was one of three used by the district court to support that sentence.

This Court has held a burglary statute, like New Mexico's, that prefaces the location where the burglary may take place with the word "any" does not comport with generic burglary. Although the Tenth Circuit acknowledged in *Ramon Silva* and *King* that commercial burglary in New Mexico is categorically not generic burglary, it still denied Anzures's 28 U.S.C. § 2255 *Johnson* motion to set aside his sentence.

To do so, the court claimed when Anzures was sentenced, *Ramon Silva* and *King* held that under the modified categorical approach a commercial burglary conviction was generic burglary. It concluded that the sentencing court did not need the now defunct residual clause to make that finding, i.e. "the snapshot of what the controlling law was at the time of sentencing," left "little dispute" that Anzures's offense fell within the generic definition. The problem is that *Ramon Silva* and *King* were wrongly decided. This Court repeatedly has held that the modified categorical approach is never utilized when the elements of a state offense "are broader than those of a listed generic offense." *Mathis v. United States*, 136 S.Ct. 2243, 2251 (2016). Once there is a categorical mismatch, the modified categorical approach cannot be used to reach generic burglary. To allow the Tenth Circuit's decisions to

stand, allows it to produce, and then perpetuate, a legal mistake that causes someone a legal harm each time it is used.

The court's decision here willfully ignores *Taylor* was controlling law when Anzures was sentenced. *Stitt* did not clarify or correct the law on generic burglary. It reaffirmed what *Taylor* had always meant. By the circuit's own definition, *Ramon Silva* cannot be the "relevant legal background" for an analysis now because a wrong decision has no "pertinence to the issue at hand." Black's Law Dictionary (7th Ed.). Relevant law is material and proper. An opinion that applies the wrong analysis to produce an incorrect conclusion is neither. This Court said as much in *Mathis*. *Taylor* was the relevant authority when Anzures was sentenced. Accordingly, the circuit's modified categorical approach was inapplicable to its analysis and New Mexico commercial burglary categorically was not generic burglary.

Question Presented for Review

Anzures presents the following issue to this Court:

I. When a *Johnson* petitioner would not be an armed career criminal if sentenced today, is it right to endorse the Tenth Circuit's "relevant legal background" analysis which blatantly ignores controlling law or should a court focus instead on a showing that the sentence was possibly predicated on a residual clause that is now unconstitutional as is done in the Fourth and Ninth Circuits?

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In the

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JOHN ANZURES, Petitioner

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Petition for Writ of Certiorari

John Anzures 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. John Anzures*, Case No. 18-2115, affirming the district court's denial of Anzures's 28 U.S.C. § 2255 motion challenging his Armed Career Criminal Act (ACCA) sentence, was not published.[1] The district court's memorandum opinion denying the motion was not published.[2]

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[1] App. 1a-6a. 'App.' refers to the attached appendix. 'Vol.' refers to the record on appeal which is contained in three volumes. Anzures refers to the documents and pleadings in those volumes as Vol. I-III followed by the page number found on the bottom right of the page (e.g. Vol. III at 89). 'Doc.' refers to the number of the document on the district court criminal docket sheet in No. 10-CR-3461-JCH. 'PSR' refers to the presentence report.

[2] App. 7a-31a.

Jurisdiction

On June 19, 2019, the Tenth Circuit affirmed the district court's decision to deny Anzures's § 2255 motion challenging his ACCA sentence.[3] This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). According to this Court's Rule 13.1, this petition is timely if filed on or before September 17, 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(e)

The federal statutory provision involved in this case is 18 U.S.C. § 924(e), which provides in part:

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

(2) As used in this subsection—...

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

[3] App. 1a-6a.

(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 Statute

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

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

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

Statement of the Case

In July, 2012, the district court sentenced Anzures as an armed career criminal to a prison term of 15 years. App. 2a.

Anzures negotiated a plea agreement with the government. He agreed to plead guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). App. 2a. The parties stipulated that if Anzures was an armed career criminal the court would sentence him to 15 years in prison. *Id.*

After Anzures pleaded guilty, the probation office prepared a presentence report (PSR). In the PSR, the probation office maintained that Anzures's prior convictions made him an armed career criminal. PSR ¶ 39. It identified three New Mexico convictions it believed were "crimes of violence": a 1997

conviction for aggravated assault; a 1997 conviction for commercial burglary; and a 2005 conviction for aggravated assault. PSR ¶ 39.[4] Consequently, it said that Anzures was "subject to an enhanced sentence" required by 18 U.S.C. § 924(e). PSR ¶ 92.

Under the ACCA, when an accused is convicted of violating § 922(g)(1), the statutory imprisonment range rises from zero to ten years (§ 924(a)(2)), to a mandatory minimum of fifteen years to life, if he has three prior convictions for a 'violent felony' committed on occasions different from one another. § 924(e)(1). A felony offense is a 'violent felony' if it fits within § 924(e)(2)(B)'s force clause, enumerated clause or residual clause. Neither the parties nor the probation office explained why Anzures's conviction fit within these clauses.

At the sentencing hearing, the Court accepted the binding plea agreement and the probation office's designation of Anzures as an armed career criminal. Vol. III at 4, 7.[5] The parties did not object to that designation or to any findings in the presentence report. *Id.* at 3. The court followed the plea agreement and ordered that Anzures be imprisoned for 180 months. *Id.* at 10. And, as was often the case in ACCA sentencings, the court did not state on the record whether Anzures's prior convictions came within the residual clause, the enumerated offenses clause or the force clause of the violent felony definition.

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[4] The probation office did not use the phrase "violent felony" to describe these convictions.

[5] Record on appeal Vol. III contains the sentencing hearing transcript from July 10, 2012.

In June 2015, this Court struck down the residual clause of the ACCA as being unconstitutionally vague. *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015). Soon afterwards Anzures filed a motion to correct his sentence. App. 2a; Vol. I at 17. He argued that the residual clause in § 924(e)(2)(B) was no longer valid after *Johnson* and that New Mexico commercial burglary and aggravated assault were not violent felonies as defined by the force clause. *Id.*

For various reasons, the district court denied Anzures's motion. App. 7a; Vol. I at 181. First it said, when it sentenced Anzures, according to the Tenth Circuit's decision in *United States v. Ramon Silva*, 608 F.3d 663 (10th Cir. 2010), New Mexico commercial burglary was generic burglary and therefore a violent felony under the ACCA's enumerated clause. App. 11a. Irrespective of *Ramon Silva*'s continuing validity, the court was bound by *United States v. Snyder*, 871 F.3d 1122 (10th Cir. 2017) to find that the residual clause was not part of its decision that Anzures's commercial burglary conviction was a violent felony. App. 12a-13a. Accordingly, it dismissed Anzures's § 2255 motion with prejudice. App. 31a. It did not issue a certificate of appealability.

On appeal, the Tenth Circuit affirmed. The panel said it was directed by . *Snyder*, to examine the "relevant legal background" when Anzures was sentenced. App. 3a. It believed that *Ramon Silva* and *United States v. King*, 422 F.3d 1055 (10th Cir. 2005) were "controlling law" then. *Id.* After applying the modified categorical approach, both cases held that New Mexico commercial burglary was generic burglary. App. 3a-4a. To Anzures's panel, it was irrelevant whether those cases were correctly decided or if they since had been abrogated by Supreme Court precedent. *Id.* The panel concluded

there was "little dispute" that the "background legal environment" when Anzures was sentenced showed that New Mexico commercial burglary "fell within the scope of the ACCA's enumerated crimes clause." App. 4a. Thus, Anzures had not established by a preponderance of the evidence that the district court relied on the residual clause to find that conviction qualified as an ACCA predicate offense. *Id.* The panel did not discuss the impact of *Taylor v. United States*, 495 U.S. 575, 598, 599-602 (1990), *Stitt v. United States*, 139 S.Ct. 399, 407 (2018), or *Mathis v. United States*, 136 S.Ct. 2243, 2248-49, 2254-55 (2016), on its precedent. It merely acknowledged that *Ramon Silva* was abrogated by *Mathis*. App. 4a.

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

Reasons for Granting the Writ

The courts of appeals are divided over how to adjudicate the merits of a *Johnson* petition. The Fourth and Ninth Circuits, look at the law interpreting the crime's elements as it currently stands. *See United States v. Winston*, 850 F.3d 677, 684 (4th Cir. 2017) ("Accordingly, we now must consider under the current legal landscape whether Virginia common law robbery qualifies as a violent felony under the ACCA's force clause."); *United States v. Geozos*, 870 F.3d 890, 897 (9th Cir. 2017) (stating that, to decide the merits, "we look to the substantive law concerning the force clause as it currently stands, not the law as it was at the time of sentencing"). The Tenth Circuit adjudicates the merits by looking to both the factual record and the law at the time of sentencing. *Snyder*, 871 F.3d at 1126, 1128-30. These conflicting methodologies lead to disparate and unjust results and must be resolved by this Court.

This Court's prompt review is necessary because of the important liberty interests at stake. In many instances, like here, *Johnson* petitioners are serving sentences far higher than the statutory maximum for which they are eligible because subsequent clarifying case law from this Court makes clear that their prior convictions do not qualify under any clause of the ACCA.

Anzures's case is an ideal vehicle for resolving the issue of how a petitioner can show *Johnson* error because the decision below cannot be affirmed on alternate grounds. Anzures would not be an armed career criminal if sentenced today, and the decision below makes clear that Anzures claim was timely and was not procedurally defaulted.

A. The Tenth Circuit's "relevant legal background" approach is in direct conflict with that of the Fourth Circuit and leaves *Johnson* petitioners whose prior convictions are actually not violent felonies without a remedy.

After *Taylor v. United States*, 495 U.S. 575, 599 (1990), Anzures's New Mexico commercial burglary was not generic burglary and therefore could not be used as an ACCA predicate conviction. *See also King*, 422 F.3d at 1057 (New Mexico's commercial burglary statute was not categorically generic burglary because it proscribes conduct broader than generic burglary); *Ramon Silva*, 608 F.3d at 665 (same). The Tenth Circuit disagreed. It said, when the record is inconclusive, for Anzure's to establish *Johnson* error after the panel's decision in *Snyder*, 871 F.3d at 1130, he had to show that neither of the remaining violent felony clauses – the enumerated offenses clause or the force clause – would have captured this conviction under the "relevant background legal environment" at the time of sentencing. Although neither clause would capture Anzures's commercial burglary conviction under the legal environment then or now, the court held that when Anzures was sentenced, according to *Ramon Silva*, that conviction fell within the enumerated offense clause. App. 3a-4a.

But *Ramon Silva* did not frame the legal "snapshot"[6] when Anzures was sentenced, *Taylor* did. In *Stitt*, 139 S.Ct. at 407, this Court said *Taylor* made clear that a burglary statute which prefaces the location means with "any," will not satisfy the generic burglary definition. New Mexico's commercial burglary statute prefaces its location means with the word "any." It prohibits "the unauthorized entry" into "any vehicle, watercraft, aircraft or other structure, movable or immovable, with intent to commit any felony or theft

[6] *Snyder*, 871 F.3d at 1130.

therein." N.M.S.A. § 30-16-3(B). Using the word "any" means that the state legislature did not intend to limit the statute's coverage to "structures customarily used or adapted for overnight accommodation." *Stitt*, 139 S.Ct. at 407. A statute which includes, buildings or structures, even nonpermanent ones, that are not designed or adapted for overnight use, falls "outside the generic burglary definition." *Id.* Thus, contrary to the Tenth Circuit's ruling here, *Ramon Silva*'s holding that New Mexico commercial burglary is generic burglary under the modified categorical approach is inconsistent with this Court's precedent. *See Ramon Silva*, 608 F.3d at 668-69 (ruling that generic burglary includes any burglary committed in "a building or enclosed space" and using modified categorical approach to find New Mexico commercial burglary satisfies its definition). Then, as now, New Mexico commercial burglary is not generic burglary and Anzures's conviction for that offense should not have been used to justify an ACCA sentence.

Furthermore, other circuits would not have resolved Anzures's motion in the manner prescribed by *Snyder*. As noted, the *Snyder* panel held that if, based on the record and the "relevant background legal environment," a petitioner's sentence could have rested on a clause other than the residual clause at sentencing, he has not demonstrated *Johnson* error. *Snyder*, 871 F.3d at 1130. The Fourth and Ninth Circuits have not adopted this approach.

The Fourth Circuit's test flips the inquiry. It held that in order to demonstrate constitutional error, a *Johnson* petitioner need only show that his sentence "may have been predicated on application of the now void residual clause, and therefore may be an unlawful sentence." *Winston*, 850 F.3d at 682. In other words, in the Fourth Circuit, an inconclusive record is sufficient to show error.

Acknowledging the common problem of ambiguous ACCA sentencing records, *Winston* remarked that that "'[n]othing in the law requires a [court] to specify which clause it relied upon in imposing a[n ACCA] sentence.'" *Id.* (quoting *In re Chance*, 831 F.3d 1335, 1340 (11th Cir. 2016)) (brackets in original). The court thus declined to "penalize a movant for a court's discretionary choice not to specify under which clause of Section 924(e)(2)(B) an offense qualified as a violent felony." *Id.*

It also cautioned that requiring a petitioner to show affirmative reliance on the residual clause in order to demonstrate *Johnson* error would result in "'selective application' of the new rule of constitutional law announced in *Johnson*," in violation of "'the principle of treating similarly situated defendants the same.'" *Id.* (quoting *Teague v. Lane*, 489 U.S. 288, 304 (1989)). According to *Winston*, the possibility that the sentencing court relied on the residual clause is enough to establish *Johnson* error.

In *Winston*, the court found that the error was not harmless because Winston's prior conviction for Virginia robbery was no longer a crime of violence under the remaining clauses of the ACCA. 850 F.3d at 682 n.4. The *Snyder* panel's approach to this issue is directly at odds with *Winston*. Using the Fourth Circuit's rule, Anzures would prevail because the district court may have relied on the residual clause at sentencing. And the *Johnson* error was not harmless in this case because Anzures's commercial burglary conviction does not qualify as a violent felony under the remaining ACCA clauses.

The Ninth Circuit's approach is similar. Borrowing its rule from *Stromberg v. California*, 283 U.S. 359 (1931), the court held that "when it is unclear from the record whether the sentencing court relied on the residual

clause, it necessarily is unclear whether the court relied on a constitutionally valid or a constitutionally invalid legal theory." *United States v. Geozos*, 870 F.3d 890, 895 (9th Cir. 2017). Put simply, an unclear record is sufficient for a movant to show *Johnson* error. *Geozos* ultimately decided that the *Johnson* error in that case was not harmless because the petitioner's prior conviction for Florida robbery was no longer a violent felony under the current legal framework in that circuit.

Whereas the approach of the Fourth and Ninth Circuits approach allow for the possibility of unconstitutional reliance on the residual clause where, like here, there is ambiguity in the record, the panel here, relying on *Snyder*, placed a far higher burden on a petitioner like Anzures. Unless the words "residual clause" appear in the record, a petitioner must use old law to show that his crimes could not have fallen under one of the narrower ACCA clauses at the time of sentencing in order to prevail. This approach does not have a basis in law or reason.

1. Without the residual clause, Anzures's commercial burglary conviction does not qualify as an ACCA predicate after *Johnson*.

The Tenth Circuit affirmed the denial of Anzures's *Johnson* petition because he could not prove "by a preponderance of the evidence that the sentencing court relied on the residual clause to categorize his commercial burglary as an ACCA predicate offense." App. 4a. The court's analysis is incorrect and manifestly unjust.

First, Anzures's imprisonment violates *Johnson* because he is serving a sentence for which he is statutorily ineligible. This claim ripened only after *Johnson*. Certain prior convictions are no longer ACCA predicates and Anzures is not an Armed Career Criminal. Actually, the pertinent inquiry is

whether any constitutional basis exists upon which his ACCA sentence can rest today. The answer is no. Continued incarceration violates due process.

Second, Anzures must show only that the district court cannot legally impose an enhanced ACCA sentence after *Johnson*. He has no burden to prove what the sentencing court said or thought years ago. The residual clause was operational when Anzures was sentenced. This overarching clause played a role in enhancing countless sentences when other ACCA clauses were too circumscribed to apply. Indeed, objecting to other clauses was academic when the residual clause loomed. *See United States v. Taylor*, 873 F.3d 476, 481-82 (5th Cir. 2017) (before *Johnson*, accused had "no legal right" to "determination" as to which clause court used to find prior conviction a violent felony).

Finally, it is inequitable to deny relief to Anzures but grant it to others like him. Treating similarly situated petitioners differently based on variations in sentencing records results in the "selective application" of *Johnson*. *Winston*, 850 F.3d at 682.

a. New Mexico commercial burglary's elements include infinite location means and therefore the offense categorically is not generic burglary as defined by this Court in *Taylor* and *Stitt*.

In *Stitt*, this Court held that generic burglary as used in the ACCA's enumerated clause, includes "vehicles designed or adopted for overnight use." A building or other structure, including nonpermanent or mobile structures, that are adapted or used for overnight accommodation, are location means that come within the generic burglary definition. 139 S.Ct. at 406-08. The Court also said that in *Taylor*, 495 U.S. at 599, its generic definition excluded those statutes that prefaced with "any" the location at which the burglary took place. *Stitt*, 139 S.Ct. at 407. When the state legislature inserted "any"

it did not intend to restrict that statute's coverage to vehicles or structures used or adapted for overnight accommodation. *Id.* New Mexico's commercial burglary statute is one that prefaces the location means with "any." Thus, according to *Stitt* and *Taylor*, it does not come within the definition of generic burglary.

The generic federal definition of burglary is "an unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Taylor*, 495 U.S. at 599. In comparison, commercial burglary in New Mexico is committed by unlawfully entering "any vehicle, watercraft, aircraft, or other structure . . . ." N.M.S.A. § 30-16-3(B). Like the Missouri statute analyzed in *Taylor*, New Mexico's definition of burglary is broader than the generic one because it refers to "any" building or structure, including ones that are filled with objects other than people. *See Stitt*, 139 S.Ct. at 407 ("serious risk of violence" less likely in structures that, for example, contain cargo).

The phrase in New Mexico's statute, "or any other structure" indisputably offers an infinite amount of possibilities. In other words, the list of location means in New Mexico's commercial burglary statue is not finite. In *Mathis*, the Court held listed locations are not alternative elements that create separate crimes. Instead, New Mexico's statute, like that of Iowa in *Mathis*, has alternative ways of satisfying the location element. *See Mathis*, 136 S.Ct. at 2250 (holding Iowa's burglary statute "defines one crime, with one set of elements, broader than generic burglary – while specifying multiple means of fulfilling its locational element, some but not all of which . . . satisfy the generic definition.").

New Mexico uniform jury instructions also demonstrate that the alternative locations are means not elements. The relevant instruction lists all the alternative locations together - "vehicle, watercraft, aircraft, or other structure" - which illustrates they are means of commission and not elements to be proven to a jury. N.M.R.A., UJI 14-1630; *see also Mathis*, 136 S.Ct. at 2257 (when jury instruction includes statute's alternative terms, "[t]hat is as clear an indication as any that each alternative is only a possible means of commission, not an element."). In other words, one location must be established. It does not matter which one. And it does not have to be a location that is customarily used or adapted for overnight accommodation. Whether a particular location is included or omitted from the jury instruction is "extraneous to the crime's legal requirements." *Mathis*, 136 S.Ct. at 2248. Because any "other structure" would satisfy the locational element of the crime of fourth degree non-residential burglary, the prosecution need not have the jury agree as to the particular means that satisfies that element. The fact that all of the jurors agree that the locational element was satisfied, regardless of whether they disagreed as to whether the location was a "vehicle" or any "other structure" is sufficient to meet the locational element of the offense.

Simply put, the alternative locations are means to commit the offense not elements. The statute is indivisible and the categorical approach applies. This approach "involves only comparing elements." *Mathis*, 136 S.Ct. at 2257. Here, as in *Mathis*, the statute's elements cannot match the generic burglary definition because they "reach a broader range of places." 136 S.Ct. at 2250. As Anzures explains in Section (c)(2), *infra*, *Ramon Silva* and *King* were wrong to use the modified categorical approach to press New Mexico

commercial burglary into the generic definition. The modified categorical approach is never used when the elements of a state offense "are broader than those of a listed generic offense." 136 S.Ct. at 2251. *Mathis* stressed that "even if his conduct fits within the generic offense, the mismatch of elements saves the defendant from an ACCA sentence . . . regardless of whether a statute omits or instead specifies alternative means of commission." *Id.* Following the Court's rulings in *Taylor*, *Mathis* and *Stitt*, Anzure's New Mexico commercial burglary conviction falls outside the generic burglary definition and is not a violent felony.

b. *Snyder* cannot defeat Anzures's § 2255 petition to correct the sentence.

Anzures's case is an example of how ambiguity in the record can be used unfairly against him. Central to the Tenth Circuit's decision to affirm the denial of Anzures's *Johnson* petition was its conclusion that Anzures was unable to point to affirmative record evidence that the residual clause played a part at his sentencing. App. 4a. Although the magistrate judge acknowledged in her recommendation that today Anzures's prior commercial burglary conviction would not be a violent felony,[7] the appellate court still dismissed his petition because it believed the residual clause had no effect on its sentence.

The circuit court's belief is based exclusively on *Snyder*. There, a panel noted in the district court, there was "no mention whatsoever of the residual

[7] Specifically, the magistrate wrote, "There is no doubt that the Supreme Court's decision in *Mathis* abrogated the modified categorical approach employed by the Tenth Circuit in *Ramon Silva*, and that Anzures's commercial burglary conviction may not constitute generic burglary post-*Mathis*." Vol. I at 124.

clause in the PSR or any of the other district court pleadings or transcripts." 871 F.3d at 1130. Therefore, the panel consulted "the record in Snyder's case in light of [the] relevant background legal environment," and concluded that his state burglary convictions would have qualified under the enumerated offenses clause when he was sentenced. *Id.* at 1130. On this basis, the panel found that Snyder had not shown *Johnson* error. It acknowledged that Tenth Circuit law on Wyoming burglary had since been abrogated by *Mathis*. *Id.* at 1129 n.4. But the panel opined that "the relevant background legal environment is, so to speak, a 'snapshot' of what the controlling law was at the time of sentencing and does not take into account post-sentencing decisions that may have clarified or corrected pre-sentencing decisions." *Id.* at 1130.

According to the Tenth Circuit, in order to establish *Johnson* error after *Snyder*, when, like here, the record is inconclusive, a petitioner must show that neither of the remaining violent felony clauses – the enumerated offenses clause or the force clause – would have captured his prior convictions under the "relevant background legal environment" at the time of sentencing. App. 3a-4a; *Snyder*, 871 F.3d at 1130. Although neither clause would capture Anzures's commercial burglary conviction under the legal environment today, the panel here argued that after *Snyder* current case law is irrelevant to the question of whether a *Johnson* error occurred. App. 3a-4a. Because *Snyder* is inapplicable to cases that do not share its facts and should have no effect on Anzures petition for numerous other reasons, Anzures requests this Court expressly overrule it.

c. *Snyder* is irrelevant here because it is limited to its facts and it perpetuates a misapplication of the law.

In *Snyder*, the district court ruled Snyder's burglary convictions were ACCA predicates without relying on the residual clause. 871 F.3d at 1125, 1128. It explained it used the enumerated offense clause instead. *Id.* at 1128. A panel held Snyder's *Johnson* claim was baseless given the court's analysis - the residual clause had not been used to enhance Snyder's sentence. It also found the "controlling law at the time of sentencing" supported the district court's finding. *Id.* at 1129-30. Although Wyoming burglary included other means beyond those of generic burglary, the panel said the district court could use the modified categorical approach "to examine the underlying charging documents and/or jury instructions to determine if Snyder was charged only with burglary of buildings." *Id.* at 1130. Because the probation office "actually did just that," the district court concluded Snyder was convicted of burglarizing only occupied structures which fell within the enumerated offense clause. *Id.* at 1129-30.

Here, the Tenth Circuit inaptly relied on the enumerated offense clause to argue Anzures's commercial burglary conviction was a violent felony. There is no factual record to prove the district court or probation office used the clause to declare commercial/automobile burglary a violent felony. Only by willfully applying the ***modified*** categorical approach is the Tenth Circuit able to make the clause fit Anzures. Addtionally, *Snyder*'s argument that post-sentencing opinions by this Court or the Tenth Circuit cannot correct a lower court's earlier mistake is unsupportable. Anzures will next examine each of these points more fully.

1. *There are no facts in the record that prove the probation office or district court used the modified categorical approach to find commercial burglary a violent felony under the enumerated offense clause.*

At sentencing, the district court made no mention of the modified categorical approach, or the enumerated offense or force clause, to find Anzures's prior convictions were violent felonies. *See* Vol. III; Doc. 45 (sentencing transcript). The probation office never mentioned the clauses in its presentence report or at sentencing. It did not suggest using the modified categorical approach or present the limited documents allowed by that approach. Nor did the court reference such documents. Except for a PSR note that Anzures was convicted of New Mexico "Burglary (Commercial/Automobile)," the record is bare. PSR ¶ 44. The scant analysis factually distinguishes Anzures from *Snyder*. There simply is no evidence here that the court relied on the enumerated offense or force clause to impose an ACCA enhanced prison term.

2. *New Mexico commercial burglary is not categorically a violent felony under the enumerated offense clause.*

When Anzures was sentenced, some Tenth Circuit panels were using the modified categorical approach in a manner not established by this Court. Accordingly, in *King*, 422 F.3d at 1057, the court held New Mexico's commercial burglary statute was not categorically generic burglary. Since the statute prohibits trespassing in structures beyond buildings, such as vehicles, watercraft, or aircraft, it proscribes conduct broader than generic burglary. *Id.* (citing *Taylor*). Only by going "beyond the mere fact of conviction" and considering the "charging papers and jury instructions" could the court conclude the offense was a violent felony. *Id.*; *see also United States v. Scoville*, 561 F.3d 1174, 1179-80 (10th Cir. 2009) (using the residual clause

of the ACCA to find Ohio third degree burglary a violent felony after categorical and modified categorical approach failed to do so). The panel's analysis was improper and incorrect. New Mexico burglary is an indivisible offense and the modified categorical approach is not used to determine its elements. *United States v. Barela*, 2017 WL 4280584, *4 (D.N.M. 2017). Each structure listed is not an alternative element that creates separate crimes. *Id.* Instead, the statute, like Iowa's in *Mathis*, 136 S.Ct. at 2250, has alternative ways of satisfying the location element. The panel's misuse of the modified categorical approach produced a holding that was wrong then as well as now.

New Mexico commercial burglary, then, is not a violent felony within the enumerated offense clause. The Anzures panel suggested another panel's use of the modified categorical approach with no roots in Supreme Court precedent could be used to cudgel Anzures. App. 3a-4a. The panels in *King*, *Trent*, and *Ramon Silva* impermissibly used the modified categorical approach.[8] Although published, the opinions are vulnerable. They may have represented established circuit practice at the time but they were not controlling law. *Compare Trent*, 767 F.3d at 1060 (recognizing distinction between means and elements but ignoring it to use modified categorical approach) *with United States v. Zuniga-Soto*, 527 F.3d 1110, 1122 (10th Cir. 2008) (limiting analysis to categorical approach when statute listed means not elements); *see also id.* at 1121 (noting intra-circuit conflict on use of modified categorical approach); *United States v. King*, 979 F.2d 801, 802 (10th

[8] *United States v. Trent*, 767 F.3d 1046 (10th Cir. 2014)

Cir. 1992) (citing *Taylor* and finding "formal categorical approach" requires court to look "only to the elements" of potential ACCA predicate offenses).

*3. **Taylor** not **Ramon Silva** was the relevant precedent when Anzures was sentenced.*

In *Descamps v. United States*, this Court stressed it meant for the modified categorical approach to only be used to analyze statutes' alternative elements, not means. 570 U.S. 254, 260-65 (2013). It emphasized that *Taylor* permitted courts to use the modified categorical approach "as a tool for implementing the categorical approach . . . to determine which of the statute's *alternative elements* formed the basis of the defendant's prior conviction . . . . That is the job, as we have always understood it, of the modified categorical approach[.]" *Id.* at 262, 264 (emphasis added). In other words, the Court never intended the modified categorical approach be used as it was in the Tenth Circuit. Even so, there is no proof the district court here embraced the Tenth Circuit's approach over that of the Supreme Court.

The relevant "legal snapshot" when Anzures was sentenced was framed by *Taylor*, not *Ramon Silva*. *Stitt* proves that *Ramon Silva* misunderstood the Court's rulings in *Taylor*. Ramon Silva argued New Mexico commercial burglary was not generic burglary as defined by *Taylor* because that definition included "only those spaces that [] 'are designed for human habitation . . .'" 608 F.3d at 666. *Stitt* shows he was correct. There the Court emphasized that *Taylor* found Missouri burglary was not generic burglary because the location means were prefaced by "any." 139 S.Ct. at 407. By using "any" the statute referred to ordinary buildings or structures and was not meant to restrict burglary prosecutions to only those structures that were

customarily used or adapted as overnight quarters. *Id.* Thus, the statute was overbroad and fell outside the generic burglary definition.

New Mexico's commercial burglary statute also prefaces the location means with "any." After *Taylor* then, it would be inappropriate for a sentencing court to find it fit the generic burglary definition. Even *Ramon Silva* acknowledged, under the categorical approach, New Mexico commercial burglary was not generic burglary. 608 F.3d 665-66. That the panel misapprehended *Taylor* and decided to stray from that holding by incorrectly applying the modified categorical approach and finding the offense was generic burglary should not inure to Anzure's detriment.

After all, it is well established that "when [the Supreme Court] construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313 n. 12 (1994). Neither the *Anzures* panel nor the *Snyder* panel cite any authority for ignoring this rule. In a footnote, *Synder* admits *Mathis* invalidates the court's method for employing the modified categorical approach. 871 F.3d at 1129 n. 4. Beyond that meager admission, neither *Snyder* - or the *Anzures* panel - explain why *Taylor*, *Descamps* and *Mathis* are not binding precedent on the ACCA. *See Rivers*, 511 U.S. at 313 n. 12 (inaccurate for a circuit court to characterize a Supreme Court decision as "changing" the law that previously prevailed when the decision actually explains what the statute always meant and describes how the circuit court misinterpreted it).

An earlier, albeit misguided, "legal snapshot" cannot preserve a district court's unconstitutional sentencing error. *See United States v. Titties*, 852 F.3d 1257, 1264 (10th Cir. 2017) (an illegal sentence - one where the

incarceration term exceeds the statutory maximum - is, per se, reversible plain error); *see also id.* at 1275 (no overbroad statute can count as an ACCA predicate). If one accepts the *Anzures* panel's suggestion that the district court found the prior burglary conviction a violent felony under the enumerated offense clause, that court did so by incorrectly following *Ramon Silva* instead of *Taylor* and by improperly employing either the modified categorical approach or the residual clause as in *Scoville*. If the district court had followed *Ramon Silva*, it would have mentioned the modified categorical approach, or the enumerated offense or force clauses. According to the record, the court did not look at any documents consistent with the modified categorical approach. Nor did the court mention these clauses at sentencing. The probation office also did not mention them at sentencing or in the PSR. Nor did the office suggest using the modified categorical approach or present the limited documents allowed by that approach. The district court also did not reference such documents.

The relevant, correct law, then as now, expects a court to use the categorical approach to evaluate the elements of New Mexico commercial burglary. Under that analysis, as *King* and *Ramon Silva* concede, New Mexico commercial burglary is not generic burglary. *See King*, 422 F.3d at 1057 (New Mexico's commercial burglary statute was not categorically generic burglary); *Ramon Silva*, 608 F.3d at 665 (same). In turn, it is not an ACCA predicate under the enumerated or force clauses. If it was a predicate when Anzures was sentenced, it could only have been so under the now defunct residual clause. *Scoville*, 561 F.3d at 1179-80; *see also Chance*, 831 F.3d at 1340-41 (it makes "no sense" for court to ignore binding intervening precedent like *Descamps* and *Mathis* that instruct on the proper application

of the categorical approach when applied correctly means conviction could only have been a violent felony under residual clause).

d. *Snyder* must be limited to its facts because *Geozos* does not support its finding that the "relevant legal environment at the time of sentencing" decides whether convictions are violent felonies under the ACCA clauses that survive *Johnson*.

Snyder quoted extensively from *United States v. Geozos*, 870 F.3d 890 (9th Cir. 2017) before concluding Snyder's § 2255 motion was without foundation. However, that case is inapposite. Unlike Snyder, Geozos was before the court on his second § 2255 motion. Generally, a second motion is barred unless the "claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h)(2). Before addressing the merits, the court had to decide if the second motion relied on the new rule in *Johnson*. 870 F.3d at 896. It held when it is unclear, but possible, the sentencing court relied on the residual clause to impose an ACCA enhancement, the second motion relied on *Johnson*. *Id.* The court made this precursor finding in the context of the legal environment at the time of sentencing. But to next decide the merits of the motion, the past legal environment was irrelevant as the basis of the motion was that the environment had changed. By no stretch does *Geozos* support *Snyder*'s finding that the lower court had no need to rely on the residual clause "given the relevant background legal environment that existed at the time of Snyder's sentencing." 871 F.3d at 1130.

Indeed, to emphasize its ruling was separate from the merits of a second § 2255 motion, the *Geozos* court specified whether convictions "qualify him as an armed career criminal, we look to the substantive law concerning the force clause as it currently stands, not the law as it was at the time of sentencing."

870 F.3d at 897 (emphasis in original). Its reasons were made clear. It noted "judicial interpretations of substantive statutes receive retroactive effect." *Id.* at 898 (citing *Harper v. Va. Dept. of Taxation*, 509 U.S. 86, 97 (1993)). Further, "non-constitutional, substantive judicial decision[s] concerning the reach of the ACCA that post-date[] the time when the movant's conviction became final appl[y] in an initial § 2255 proceeding." *Id.* (quotations, citation omitted).

Now comes *Synder,* tasked to review the merits of a first § 2255 motion. It claims this must be done using "the controlling law at the time of sentencing and does not take into account post-sentencing decisions that may have clarified or corrected pre-sentencing decisions." 871 F.3d at 1129. It cites no authority for its claim. In *Geozos*, the government made the same argument. It was explicitly rejected. 870 F.3d at 898; *see also Lockhart v. Fretwell*, 506 U.S. 364, 371–72 (1993) (prejudice prong of a *Strickland*-based § 2255 claim may be made with the benefit of the law at the time the claim is litigated); *Mosby v. Senkowski*, 470 F.3d 515, 524 (2d Cir. 2006) ("[T]he Supreme Court has held that current law should be applied retroactively for purposes of determining whether a party has demonstrated prejudice under *Strickland*"s second prong."). *Snyder* lacks a legal foundation which necessarily limits its application to cases that share its facts.

As a practical matter, applying *Snyder* to different facts bars any *Johnson* relief if another ACCA clause was identified at sentencing. This holds even if the court's analysis improperly applies the categorical approach to the elements of the offense or relies on overruled precedent to examine other ACCA provisions. As *Geozos* stressed, such an outcome cannot be supported by the law. *See also In re Chance*, 831 F.3d at 1340 (any rule requiring proof

of sentencing under residual clause is "quite wrong" because no rule requires court to specify which clause used); *United States v. Ladwig*, 192 F. Supp. 3d 1153, 1160 (E.D. Wash. 2016) (inquiry requiring judges to ignore intervening decisions that "clear the mire of decisional law seems to beg courts to reach inconsistent results."); *cf. Winston*, 850 F.3d at 682 n. 4 (claim that "relies on interplay" between *Johnson* and other subsequent cases is still based on *Johnson*).

Worse yet, when *Snyder* is applied beyond its facts, Anzures is denied the relief to which he is entitled based on assumptions. After *Johnson*, a court deciding an initial § 2255 motion must determine categorically, by reference to the offense's elements, whether it is a violent felony under the remaining ACCA clauses. A conviction based on an indivisible statute that is overbroad cannot be an ACCA predicate. *Mathis*, 136 S.Ct. at 2257. *Snyder* holds that a court can ignore post-sentencing Supreme Court decisions like *Descamps* and *Mathis* in favor of its own opinion. Thus, when the record is silent, a reviewing court may assume the sentencing court used the modified categorical approach, albeit improperly; looked at underlying documents accordingly; followed unsound case law as opposed to this Court's precedent and still reached a legitimate conclusion. *See Mathis*, 136 S.Ct. at 2257 ("For more than 25 years, we have repeatedly made clear that the application of the ACCA involves, and involves only, comparing elements."). Furthermore, if later decisions reveal an offense like New Mexico commercial burglary is a categorical mismatch, then it was a predicate offense exclusively under the residual clause at sentencing. Yet, relief is not warranted unless the sentencing court said it relied on the clause. This Court demands "certainty"

that the offense qualifies as an ACCA conviction. *Mathis*, 136 S.Ct. at 2257. The uncurbed ability to assume a record under *Snyder* defies that certainty.

Conclusion

Concerns over arbitrary application of *Johnson* braced the Fourth Circuit's rule that a *Johnson* movant need only show that his sentence "*may have* been predicated on application of the now-void residual clause" in order to show *Johnson* error. *Winston*, 850 F.3d at 682 (emphasis added). Prior to *Johnson*, courts were not required to make specific findings, and counsel had no incentive to object, where serious crimes clearly fell within the residual clause. Accordingly, the Fourth Circuit declined to "penalize a movant for a court's discretionary choice not to specify" which clause it relied on. *Id.* And it declined to base its decision on "non-essential conclusions a court may or may not have articulated on the record in determining the defendant's sentence." *Id.*

The arbitrariness identified by *Winston* is compounded when "decisions from the Supreme Court that were rendered since [sentencing]" can be ignored "in favor of a foray into a stale record." *Chance*, 831 F.3d at 1340. For example, this Court in *Mathis* emphasized that "[f]or more than 25 years, we have repeatedly made clear that application of ACCA involves, and involves only, comparing elements." 136 S.Ct. at 2257. Applying a correct interpretation of this Court's precedent, even at the time of Anzures's sentencing, his prior commercial burglary conviction was not generic burglary and would have qualified only under the residual clause. Where *Winston* held that it was required to consider the interplay between *Johnson* and subsequent cases of this Court clarifying the scope of the violent felony definition, the *Snyder* panel applied stale and now-abrogated interpretations

of this Court's precedent to the question of whether a *Johnson* error occurred. *Cf. Taylor*, 873 F.3d at 482 (refusing to hold accused responsible for what may or may not have crossed judge's mind during sentencing). The opinion of the Tenth Circuit here, which relied expressly on *Snyder*, should be reversed in favor of the more straightforward and equitable rule that an inconclusive record demonstrates *Johnson* error, and current law applies to the question of whether the *Johnson* error was harmless.

The Tenth Circuit panel's decision here is fundamentally flawed. Anzures asks this Court to grant this Petition and review and reverse the Tenth Circuit's decision.

Respectfully submitted,

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DATED: September 17, 2019

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Appendix

2019 WL 2524145
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.
John **ANZURES**, Defendant - Appellant.

No. 18-2115
|
Filed June 19, 2019

Synopsis

Background: Defendant filed motion to vacate his sentence to 15 years in prison, pursuant to the Armed Career Criminal Act (ACCA), upon his plea of guilty to being a felon in possession of a firearm. The United States District Court for the District of New Mexico, Judith C. Herrera, J., 2018 WL 2684107, denied the motion. Defendant requested a certificate of appealability (COA).

Holdings: The Court of Appeals, Briscoe, Circuit Judge, held that:

[1] defendant failed to establish by preponderance of evidence that sentencing court relied on ACCA's unconstitutionally vague residual clause to categorize his commercial burglary conviction as predicate offense, and

[2] defendant's prior convictions for aggravated assault with a deadly weapon under New Mexico law qualified as predicate felonies under ACCA's elements clause.

Request denied and matter dismissed.

West Headnotes (2)

[1] Criminal Law

110 Criminal Law

Defendant failed to establish by preponderance of evidence that sentencing court relied on unconstitutionally vague residual clause of the Armed Career Criminal Act (ACCA) to categorize his commercial burglary conviction as predicate offense, and, thus, he failed to make substantial showing of denial of constitutional right, as required to obtain certificate of appealability (COA) from denial of his motion to vacate his sentence to 15 years in prison for being a felon in possession of a firearm. 18 U.S.C.A. § 924(e)(2)(B)(ii); 28 U.S.C.A. § 2253(c)(2).

Cases that cite this headnote

[2] Criminal Law

110 Criminal Law

Defendant's prior convictions for aggravated assault with a deadly weapon under New Mexico law qualified as predicate felonies under Armed Career Criminal Act's (ACCA) elements clause, and, thus, defendant failed to make substantial showing of denial of constitutional right, as required to obtain certificate of appealability (COA) from denial of his motion to vacate his sentence as career criminal to 15 years in prison for being a felon in possession of a firearm, since aggravated assault required threatening use of physical force against person of another. 18 U.S.C.A. § 924(e)(2)(B)(i); 28 U.S.C.A. § 2253(c)(2); N.M. Stat. Ann. § 30-3-2(A).

Cases that cite this headnote

West Codenotes

Recognized as Unconstitutional
18 U.S.C.A. § 924(e)(2)(B)(ii).

(D.C. Nos. 1:16-CV-00697-JCH-LF & 1:10-CR-03461-JCH-1) (D. New Mexico)

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Before BRISCOE, BALDOCK, and BACHARACH, Circuit Judges.

ORDER DENYING CERTIFICATE OF APPEALABILITY *

Mary Beck Briscoe, Circuit Judge

***1** John Anzures seeks a certificate of appealability (COA) to challenge the district court's denial of his motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. *See* 28 U.S.C. § 2253(c)(1)(B) (requiring COA to appeal denial of relief under § 2255). Because Anzures has failed to satisfy the standard for issuance of a COA, we deny his request and dismiss this matter.

To obtain a COA, Anzures must make "a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2). A substantial showing means that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000) (internal quotation marks omitted).

I. BACKGROUND

In 2012, Anzures entered a guilty plea to being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). The parties stipulated in the plea agreement that if Anzures was determined to be an armed career criminal, the court would sentence him to 15 years in prison, the mandatory minimum sentence, *see id.* § 924(e)(1). Based on Anzures' criminal record, as stipulated in the plea agreement, the district court determined that Anzures was a career criminal and sentenced him to 15 years in prison, pursuant to the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). He did not appeal his sentence.

The ACCA defines a violent felony as one that:

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

Id. § 924(e)(2)(B).

In *Johnson v. United States*, —— U.S. ——, 135 S. Ct. 2551, 192 L.Ed.2d 569 (2015), the Supreme Court held that the residual clause is unconstitutionally vague. *Id.* at 2256-57, 2563. The Supreme Court later held that *Johnson* is retroactive in cases on collateral review, allowing defendants previously sentenced under the ACCA's residual clause to challenge their sentences. *Welch v. United States*, —— U.S. ——, 136 S. Ct. 1257, 1268, 194 L.Ed.2d 387 (2016). [1] Anzures' § 2255 motion asserts that after *Johnson*, his prior New Mexico conviction for commercial burglary cannot support an ACCA enhanced sentence. He also asserts that three other prior felony convictions—two for aggravated assault and one for aggravated battery—do not satisfy the ACCA's requirement of "the use, attempted use, or threatened use of physical force against the person of another," so cannot support his enhanced sentence. Adopting the recommendation of a magistrate judge, the district court denied the motion and denied a COA.

II. COMMERCIAL BURGLARY

***2** **[1]** Anzures argues that his conviction for commercial burglary fell within the unconstitutionally vague residual clause and cannot support his ACCA sentence in light of *Johnson*. We engage in a two-part analysis of a *Johnson* claim. First, we consider, "*as a matter of historical fact*, whether the sentencing court relied on the residual clause in imposing the ACCA sentence." *United States v. Lewis*, 904 F.3d 867, 872 (10th Cir. 2018) (internal quotation marks omitted). In doing so, we "determine what the sentencing court did—even if that decision would be erroneous under current law." *Id.* (internal quotation marks omitted). Second, we determine "whether an identified error is harmless *as a matter of law*. That is, we must decide whether the sentencing court's reliance on the now-invalidated residual clause prejudiced the movant." *Id.* (internal quotation marks omitted).

"The § 2255 movant bears the burden of proving by a preponderance of the evidence that it was use of the residual clause that led to the sentencing court's enhancement of his sentence." *United States v. Copeland*, 921 F.3d 1233, 1242 (10th Cir. 2019) (internal quotation marks omitted). The district court did not hold an evidentiary hearing on the § 2255 motion to make factual findings, so we review the order denying relief de novo. *Id.* at 1241. In reviewing the district court's "ultimate determination of whether [the] sentencing court relied on the residual clause[,] [w]e review the district court's factual determinations about the sentencing record for clear error and the legal conclusions about the relevant background legal environment de novo." *Id.* at 1242 (internal quotation marks omitted).

> To determine whether the sentencing court relied on the residual clause, we examine (1) the sentencing record to confirm that there is no mention whatsoever of the residual clause in the [pre-sentence report] or any of the other sentencing court pleadings or transcripts, and (2) the relevant background legal environment at the time of sentencing to determine whether the district court would have needed to rely on the residual clause.

Id. (internal quotation marks omitted). Here, the sentencing record does not indicate the court's reasons for imposing an ACCA sentence, so we evaluate the "relevant background legal environment," which is "a 'snapshot' of what the controlling law was at the time of sentencing and does not take into account post-sentencing decisions that may have clarified or corrected pre-sentencing decisions," *United States v. Snyder*, 871 F.3d 1122, 1129 (10th Cir. 2017), *cert. denied*, —— U.S. ——, 138 S. Ct. 1696, 200 L.Ed.2d 956 (2018). [2]

The sentencing court counted as an ACCA predicate felony Anzures' conviction for commercial burglary. The relevant background legal environment in 2012 when Anzures was sentenced provided that for a conviction to qualify as a "burglary" under the ACCA's enumerated-offenses clause, it must contain the following elements: "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Taylor v. United States*, 495 U.S. 575, 598, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990). Also relevant to the background is this court's holding prior to Anzures' 2012 sentencing that a conviction under New Mexico's burglary statute qualified as a violent felony. *United States v. Ramon Silva*, 608 F.3d 663, 669 (10th Cir. 2010), *abrogated by Mathis v. United States*, —— U.S. ——, 136 S. Ct. 2243, 195 L.Ed.2d 604 (2016).

***3** The defendant in *Ramon Silva* had been convicted under N.M. Stat. Ann. § 30-16-3(B) for "*enter[ing] a structure, a shed*, located at 2024 Nancy SW, without authorization or permission, with intent to commit any felony or a theft therein." *Id.* at 666. Anzures pled guilty to violating the same statute, having been charged with "*enter[ing] a structure, New Mexico Storage and Lock*, located at 220 Isletta SW, without authorization or permission, with intent to commit any felony or a theft therein." R. Vol. 1, at 58 (emphasis added).

In *Ramon Silva*, this court rejected the defendant's argument that a shed did "not satisfy the 'building or other structure' element in generic burglary," 608

F.3d at 666, holding that "the 'building or other structure' element of generic burglary encompasses those burglaries that have been committed in a building or enclosed space, not in a boat or motor vehicle," *id.* at 668 (ellipsis and internal quotation marks omitted). *See also United States v. King*, 422 F.3d 1055, 1058-59 (10th Cir. 2005) (holding that New Mexico commercial burglary conviction for "enter[ing] a *structure*, American Self-Storage Unit #136, without authorization or permission, with intent to commit a theft therein" "established the generic elements of burglary" (ellipsis and internal quotation marks omitted)).

In view of this background legal environment, "there would have been little dispute at the time of [Anzure's] sentencing that his [New Mexico commercial burglary conviction] fell within the scope of the ACCA's enumerated crimes clause." *Snyder*, 871 F.3d at 1129. Therefore, Anzures has not established by a preponderance of the evidence that the sentencing court relied on the residual clause to categorize his commercial burglary conviction as an ACCA predicate offense.

Anzures makes several arguments based on *Mathis* and other opinions announced after he was sentenced in 2012. But at this stage, the inquiry is whether a reasonable jurist could conclude that Anzures has established a *Johnson* error—that the sentencing court more likely than not relied on the ACCA's residual clause. *Lewis*, 904 F.3d at 870-71. Our conclusion that Anzures has not made the requisite showing ends the inquiry. "*Mathis* and other current, post-sentence cases are only applicable at the harmless error stage of review, once the movant has established the existence of a *Johnson* error." *Id.* at 873. Accordingly, Anzures has failed to make the showing necessary for issuance of a COA.

III. REMAINING NEW MEXICO PRIOR FELONIES

Anzures asserts that his prior convictions for aggravated assault and aggravated battery were not violent felonies so they cannot support his ACCA sentence. Because these convictions are not for offenses enumerated in § 924(e)(2)(B)(ii), we examine them under the elements clause in § 924(e)(2)(B)(i). *See United States v. Harris*, 844 F.3d 1260, 1263 (10th Cir. 2017).

We review de novo the legal question of "[w]hether a prior conviction satisfies the ACCA's violent felony definition." *United States v. Titties*, 852 F. 3d 1257, 1263 (10th Cir. 2017). Again, Anzures must first establish *Johnson* error, meaning that the sentencing court more likely than not relied on the residual clause when it sentenced him under the ACCA.

A. New Mexico Aggravated Assault

[2] Anzures has two prior convictions for aggravated assault that the district court counted as ACCA predicate felonies. He contends these convictions do not have as an element the use, attempted use, or threatened use of physical force against the person of another, and therefore, they cannot be used to enhance his sentence.

***4** The relevant New Mexico statute states:

> 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. § 30-3-2.

To determine whether the prior convictions for aggravated assault under New Mexico law satisfy the elements clause of the ACCA, we "apply the categorical approach and examine only the elements of the offense, without regard to [Anzures'] specific conduct." *United States v. Maldonado-Palma*, 839 F.3d 1244, 1248 (10th Cir. 2016). Accordingly, "we consider only whether the statute of conviction required proof of the use, threatened use or attempted use of physical force[, which] means '*violent* force

—that is, force capable of causing physical pain or injury to another person.' " *Id.* (quoting *Johnson v. United States*, 559 U.S. 133, 140, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010) (*Curtis Johnson*) (further citation and internal quotation marks omitted)). "[G]uilty pleas may establish predicate offenses" for ACCA purposes, so long as the criminal statute that forms the basis for the predicate offense is divisible. *See* Shepard v. United States, 544 U.S. 13, 19-21, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005) (plurality); *see also* Taylor, 495 U.S. at 602, 110 S.Ct. 2143; United States v. Ventura-Perez, 666 F.3d 670, 674-76 (10th Cir. 2012). In the plea agreement in the underlying criminal case, Anzures acknowledged that both of his relevant aggravated-assault convictions were for the deadly-weapon version of aggravated assault, Suppl. R. at 18, so we consider § 30-3-2(A).

In *Maldonado-Palma*, we held "that aggravated assault with a deadly weapon under N.M. Stat. Ann. 30-3-2(A) is categorically a crime of violence." *Id.* at 1250. Although the court in *Maldonado-Palma* applied the elements clause of § 2L1.2 of the United States Sentencing Guidelines, the relevant language of the Guideline is similar to that of the ACCA. *See* U.S.S.G. § 2L1.2 cmt. n.2 (including in definition of "crime of violence" an offense "that has as an element the use, attempted use, or threatened use of physical force against the person of another"). This similarity is instructive "in determining whether a conviction qualifies as a violent felony." *Ramon Silva*, 608 F.3d at 671 (internal quotation marks omitted). Further, even though Anzures was sentenced before we decided *Maldonado-Palma*, the decision's reasoning is sound. Therefore, Anzures has not shown that it is more likely than not that, at the time of his sentencing, the district court would have conducted a different analysis and sentenced him under the residual clause of the ACCA.

Anzures maintains that our cases interpreting N.M. Stat. Ann. 30-3-2(A) are no longer good law because *State v. Branch*, 2018-NMCA-031, ¶ 21, 417 P.3d 1141, 1149, *cert. denied* (Mar. 16, 2018), demonstrates that aggravated assault does not require a specific intent to use a deadly weapon "against the person of another." Thus, he asserts, his convictions cannot support an ACCA sentence. But *Branch*'s holding that aggravated assault is a general-intent crime does not alter the applicable law. As *Ramon Silva* recognized, "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[; thus confirming] that aggravated assault is not a specific intent crime, but rather is a general intent crime." 608 F.3d at 673 (brackets, citations, and internal quotation marks omitted). The offense is a violent felony because it requires "unlawfully assaulting or striking at another," § 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 at least threatens the use of physical force against the person of another. Therefore, Anzures' two convictions for aggravated assault qualified as predicate felonies under the ACCA's elements clause, and he has not made the showing required for issuance of a COA.

B. New Mexico Aggravated Battery

***5** Anzures objects to the use of his prior conviction for aggravated battery to enhance his sentence. We need not consider whether this conviction qualifies under the ACCA, however. Even without this conviction, Anzures has three previous convictions for violent felonies—one for commercial burglary and two for aggravated assault—so his mandatory minimum sentence was 15 years in prison. *See* 18 U.S.C. § 924(e)(1) (providing that "a person who violates [18 U.S.C.] section 922(g) ... and has three previous convictions ... for a violent felony ... shall be ... imprisoned not less than fifteen years").

IV. CONCLUSION

Anzure's request for a COA is denied and this matter is dismissed.

All Citations

--- Fed.Appx. ----, 2019 WL 2524145

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 Anzures filed his § 2255 motion to vacate his sentence within a year of *Johnson*, so his motion is timely. *See United States v. Lewis*, 904 F.3d 867, 870 (10th Cir. 2018).

2 Anzures argues that *Snyder* is irrelevant to this case and its application perpetuates the error that post-sentencing opinions cannot correct an earlier mistake. We disagree for two reasons. First, we have repeatedly used the *Snyder* paradigm in post-conviction cases alleging *Johnson* errors. *See, e.g.*, *Copeland*, 921 F.3d at 1242; *United States v. Driscoll*, 892 F.3d 1127, 1133 (10th Cir. 2018); *Lewis*, 904 F.3d at 873. Second, one panel of this court cannot ignore binding precedent from a prior panel. *See United States v. Badger*, 818 F.3d 563, 569 (10th Cir. 2016).

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

vs. Nos. CR 10-3461 JCH
CIV 16-0697 JCH/LF

JOHN ANZURES,

Defendant/Movant.

MEMORANDUM OPINION AND ORDER ADOPTING MAGISTRATE JUDGE'S PROPOSED FINDINGS AND RECOMMENDED DISPOSITION

THIS MATTER comes before the Court on Magistrate Judge Laura Fashing's Proposed Findings of Fact and Recommended Disposition, Doc. 70[1] (Report), and defendant/movant John Anzures's Objections to the Magistrate Judge's Proposed Findings and Recommended Disposition, Doc. 73. Having carefully reviewed the record in this case and the relevant law, the Court overrules Anzures's objections and adopts the magistrate judge's recommendation to deny Anzures's motion.

I. Standard of Review

When a party files timely written objections to the magistrate judge's recommendation, the district court generally will conduct a de novo review and "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(C); *see also* FED. R. CIV. P. 72(b)(3). To preserve an issue for de novo review, "a party's objections to the magistrate judge's report and recommendation must be both timely and specific." *United States v. One Parcel of Real Prop., With Buildings, Appurtenances,*

[1] Citations to "Doc." are to the document number in the criminal case, case number CR 10-3461 JCH, unless otherwise noted.

Improvements, & Contents, Known as: 2121 E. 30th St., Tulsa, Oklahoma, 73 F.3d 1057, 1060 (10th Cir. 1996).

II. Discussion

The magistrate judge recommended that the Court deny Anzures's challenge to his sentence under the Supreme Court's decision in *Samuel Johnson v. United States*,[2] 135 S. Ct. 2551 (2015)—which held that that residual clause in the Armed Career Criminal Act (ACCA) was unconstitutionally vague—because Anzures was sentenced without reference to the residual clause. The magistrate judge concluded that at the time of Anzures's sentencing, there is no question that his commercial burglary conviction fell within the enumerated crimes clause of the ACCA. Doc. 70 at 8–13. In addition, his two prior convictions for aggravated assault with a deadly weapon fall within the ACCA's elements clause. *Id.* at 14–17. And, although the Court did not rely upon Anzures's prior aggravated battery conviction at his original sentencing in July 2012, it also qualifies as a violent felony under the ACCA's elements clause. Thus, if the Court erred in relying on the commercial burglary conviction, any error was harmless because the aggravated battery conviction could be substituted for the commercial burglary conviction. *Id.* at 17–28.

Anzures objects to the magistrate judge's Report on numerous grounds. First, he argues that the magistrate judge erred in applying the Tenth Circuit's decision in *United States v. Snyder*, 871 F.3d 1122 (10th Cir. 2017), arguing that *Snyder* should be limited to its facts, that

[2] Courts have started to differentiate between the two relevant *Johnson* opinions by referring to this opinion as the *Samuel Johnson* opinion, and the earlier *Johnson* case, *Curtis Johnson v. United States*, 559 U.S. 133 (2010)—which held that the term "physical force" as used in the elements clause of the ACCA means violent force, or force capable of causing physical pain or injury to another—as the *Curtis Johnson* opinion. I will adopt that convention, and will refer to the 2015 *Johnson* decision as the *Samuel Johnson* decision, and the 2010 *Johnson* decision as the *Curtis Johnson* decision.

following *Snyder* will lead to arbitrary and inconsistent results, that *Snyder* was wrongly decided, and that application of *Snyder* will result in an independent due process violation. Doc. 73 at 5–15. Second, he argues that the magistrate judge incorrectly concluded that aggravated assault with a deadly weapon in New Mexico necessarily has as an element the use, attempted use, or threatened use of physical force against another person. *Id.* at 15–27. Third, he argues that the magistrate judge erred in concluding that the government had not waived its right to rely on his prior aggravated battery conviction under New Mexico law as a predicate for the ACCA. *Id.* at 27–30. He further argues that if the Court considers this conviction, it does not qualify as a violent felony under the elements clause of the ACCA. *Id.* at 30–38. For the following reasons, the Court overrules Anzures's objections to the magistrate judge's Report.

A. This Court is Bound by the Tenth Circuit's Decision in *Snyder*, and the Magistrate Judge Correctly Applied its Analysis.

Anzures vehemently argues that this Court should not apply the Tenth Circuit's decision in *Snyder*, 871 F.3d 1122, on a variety of grounds. *See* Doc. 73 at 5–15. The Court, however, is not free to disregard binding Tenth Circuit precedent. "A district court must follow the precedent of this circuit, regardless of its views concerning the advantages of the precedent of our sister circuits." *United States v. Spedalieri*, 910 F.2d 707, 709 n.2 (10th Cir. 1990). Indeed, the Tenth Circuit recently characterized *Snyder* "as the leading authority in this circuit on determining if a sentencing court used the ACCA's residual clause in sentencing." *United States v. Washington*, — F.3d —, 2018 WL 2208475, *3 n.4 (10th Cir. May 15, 2018). Thus, to the extent that Anzures objects to the magistrate judge's report on the ground that *Snyder* was wrongly decided, or that the Court should decline to follow *Snyder*, or that the application of *Snyder* will lead to arbitrary results or a due process violation, those objections are overruled.

This Court is bound to follow *Snyder*. Consequently, the only issue before the Court is whether the magistrate judge erred in her application of *Snyder* to this case.

As a threshold matter, Anzures argues that the Court should not apply *Snyder* because there was no evidence in this case that the Court did not rely on the residual clause in determining that Anzures's prior commercial burglary offense was a violent felony under the ACCA. *See* Doc. 34 at 5; *see also id.* at 10–11 (arguing that before the Supreme Court's decision in *Samuel Johnson*, sentencing courts routinely relied on the residual clause to determine that a prior offense qualified as a violent felony under the ACCA). He asserts that if the record is unclear or silent as to whether the Court applied the residual clause at sentencing, the defendant is entitled to relief under *Samuel Johnson*. *See id.* at 12–13. The Tenth Circuit, however, has just rejected this approach. In *Washington*, the court held that on collateral review, the defendant bears the burden of showing "by a preponderance of the evidence—*i.e.*, that it is more likely than not—"that a sentencing court relied on the residual clause in determining that the defendant was ACCA eligible to be entitled to relief under *Samuel Johnson*. *Washington*, 2018 WL 2208475, at *3. In reaching this conclusion, the court specifically rejected the analysis of both the Ninth and Fourth Circuits, which have held that a defendant need only show that the sentencing court "may have" relied on the residual clause to establish a claim under *Samuel Johnson*. *See id.* (rejecting analysis in *United States v. Geozos*, 870 F.3d 890, 896 (9th Cir. 2017) and *United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017)). In short, it's Anzures's burden to show by a preponderance of the evidence that the Court relied on the residual clause in sentencing him. If he fails to make this showing, he is not entitled to relief.

In this case, as was true in *Washington*, the Court did not state which clause it was relying upon when it decided that Anzures was subject to the ACCA. *See generally* Doc. 45

(sentencing transcript); *see also* PSR ¶ 39 (noting that Anzures was subject to ACCA without specifying which clause of the ACCA applied). Consequently, Anzures bears the burden of showing, based on the relevant legal environment when he was sentenced in July 2012 and on the record, that it was more likely than not that the Court relied on the residual clause in sentencing him. *See Washington*, 2018 WL 2208475, at *4. This he cannot do.

In July 2012, when Anzures was sentenced, the most recent published Tenth Circuit opinion on whether a New Mexico commercial burglary conviction qualified as a violent felony under the ACCA was *United States v. Ramon Silva*, 608 F.3d 663 (10th Cir. 2010). As the magistrate judge correctly pointed out, Anzures was convicted under the exact same statute that was at issue in *Ramon Silva*. *See Ramon Silva*, 608 F.3d at 665. That statute provides:

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

N.M. STAT. ANN. § 30-16-3. In *Ramon Silva*, the court noted that "New Mexico courts have interpreted the phrase 'other structure' in subsection B 'to require an enclosure similar to a vehicle, watercraft, aircraft, or dwelling.'" 608 F.3d at 665 (quoting *State v. Foulenfont*, 1995-NMCA-028, ¶ 11, 119 N.M. 788, 791, 895 P.2d 1329, 1332). And because § 30-16-3(B) included the unlawful entry of locations that went beyond the generic definition of burglary, the court employed the modified categorical approach (as understood in 2010) and examined the "charging document, plea agreement, and plea colloquy to determine the character of [the defendant's] admitted burglary." *Id.* at 665–66 (internal quotation marks omitted).

The indictment to which Ramon Silva pled guilty charged him with "enter[ing] a structure, a shed." *Id.* at 666. Ramon Silva argued that a shed did not "satisfy the 'building or other structure' element in generic burglary" because it was not designed for human habitation or business and was not permanent. *Id.* The court rejected this argument. It reasoned that Supreme Court precedent and its own cases made clear that the "building or structure" element of generic burglary was broad, and included "both buildings and less complete structures." *Id.* at 668 (emphasis and internal quotation marks omitted). It included "a building or other place designed to provide protection for persons or property against weather or intrusion, but does not include vehicles or other conveyances whose primary purpose is transportation." *Id.* (quoting *United States v. Cummings*, 531 F.3d 1232, 1235 (10th Cir. 2008)). The court held "that the 'building or other structure' element in generic burglary encompasses those burglaries that have been 'committed in a building or enclosed space . . ., not in a boat or motor vehicle.'" *Id.* at 668–69 (quoting *Shepard v. United States*, 544 U.S. 13, 16 (2005)).

Applying the analysis of *Ramon Silva* to this case, there can be little doubt that when the Court sentenced Anzures, his commercial burglary conviction fell within the scope of the ACCA's enumerated crimes clause. Anzures pled guilty to an indictment that charged him with "enter[ing] a structure, New Mexico Storage and Lock, located at 220 Isleta SW, without authorization or permission, with intent to commit any felony or a theft therein," in violation of N.M. STAT. ANN. § 30-16-3(B). Doc. 40-1 at 1. That indictment makes clear that the place Anzures entered was a structure designed to protect property from intrusion, and was not a boat, vehicle, airplane, or other conveyance whose primary purpose was transportation. *See id.* Thus, the Court's application of the modified categorical approach as it existed in 2012 would have resulted in a determination that Anzures's commercial burglary conviction constituted generic

burglary. Anzures has failed to establish by a preponderance of the evidence that the Court relied on the residual clause in finding that Anzures's commercial burglary conviction was a violent felony under the ACCA. The magistrate judge correctly applied the *Snyder* analysis to this case.

Anzures argues that *Ramon Silva* and other cases that applied the modified categorical approach in a similar fashion "may have represented a trend in the circuit at the time[,] but they were not controlling law." Doc. 73 at 6. He says that the Tenth Circuit's earlier decision in *United States v. Zuniga-Soto*, 527 F.3d 1110 (10th Cir. 2008) highlighted the intra-circuit split on the correct application of the modified categorical approach, and that *Zuniga-Soto* made clear that "when faced with an intra-circuit conflict, [courts] should follow earlier, settled precedent over a subsequent deviation therefrom." *Id.* at 1121 (quoting *Haynes v. Williams*, 88 F.3d 898, 900 n.4 (10th Cir. 1996)). *Zuniga-Soto*, however, dealt with the application of the modified categorical approach to the determination of whether the Texas crime of assault on a public servant had as an element the use, attempted use, or threatened use of physical force. *Id.* at 1113. The court noted that some prior Tenth Circuit panels had used the modified categorical approach to determine whether the facts underlying a defendant's prior conviction actually involved the use of force, which was impermissible. *See id.* at 1121. Instead, courts only were permitted to examine specified judicial records to determine which part of a statute had been charged against a defendant, which in turn determined which part of the statute a court should examine on its face. *Id.*

Nothing about the holding in *Ramon Silva* is obviously in conflict with *Zuniga-Soto*, and there is no reason to think that the Court would have relied on *Zuniga-Soto*—which had nothing to do with either burglary or the enumerated crimes clause of the ACCA—to determine that

Anzures's prior commercial burglary conviction did not fall within the enumerated crimes clause of the ACCA. In 2013, after Anzures was sentenced, the Supreme Court explained the modified categorical approach as follows:

> We have previously approved a variant of this method—labeled (not very inventively) the "modified categorical approach"—when a prior conviction is for violating a so-called "divisible statute." That kind of statute sets out one or more elements of the offense in the alternative—for example, stating that burglary involves entry into a building *or* an automobile. If one alternative (say, a building) matches an element in the generic offense, but the other (say, an automobile) does not, the modified categorical approach permits sentencing courts to consult a limited class of documents, such as indictments and jury instructions, to determine which alternative formed the basis of the defendant's prior conviction. The court can then do what the categorical approach demands: compare the elements of the crime of conviction (including the alternative element used in the case) with the elements of the generic crime.

Descamps v. United States, 570 U.S. 254, 257 (2013). This is the analysis that the court in *Ramon Silva* applied. The New Mexico burglary statute set forth the elements of commercial burglary in the alternative, stating that burglary involves the unlawful entry into "any vehicle, watercraft, aircraft **or** other structure." N.M. STAT. ANN. § 30-16-3(B). The court examined the charging document only to determine whether the defendant was convicted of the part of the statute prohibiting entry into a "structure," which the court held constituted generic burglary, verses some other alternative, i.e., a vehicle, watercraft, or aircraft. *See Ramon Silva*, 608 F.3d at 665–69. It was not until the Supreme Court's 2016 decision in *Mathis v. United States*, 136 S. Ct. 2243 (2016), which distinguished between the *elements* of a crime from the *means* of committing that crime, *see id.* at 2249–50, that the Tenth Circuit had any reason to question its approach in *Ramon Silva*. *See Washington*, 2018 WL 2208475, at *4 n.5 (noting that *Ramon Silva* was abrogated by *Mathis*).

Indeed, Anzures cites another case that makes it even more obvious that in 2012, as the modified categorical approach was understood then, the Court found that his commercial

burglary conviction fell within the enumerated crimes clause of the ACCA, not the residual clause. *See* Doc. 73 at 6 (citing *United States v. King*, 422 F.3d 1055, 1057 (10th Cir. 2005) to support the proposition that New Mexico's commercial burglary statute is not categorically generic burglary). *King* presents facts remarkably similar to this case. In *King*, the sentencing court enhanced the defendant's sentence under the ACCA based in part on the defendant's prior conviction for commercial burglary under the same statute at issue here and in *Ramon Silva*. *King*, 422 F.3d at 1056, 1058. The court held that because New Mexico's commercial burglary statute is broader than generic burglary, the sentencing court properly could employ the modified categorical approach and examine specified court documents to determine whether the defendant was convicted of generic burglary. *Id.* at 1057. The defendant in *King* pled guilty to an indictment that charged him with entering "a *structure*, American Self-Storage Unit # 136 . . ., without authorization or permission, with intent to commit a theft therein." *Id.* at 1058 (emphasis in original). The court held that "because the indictment and plea agreement sufficiently establish that Mr. King entered a structure," his crime constituted generic burglary, and the sentencing court properly enhanced his sentence under the ACCA. *Id.*

The indictment in *King* is nearly identical to the one at issue here. *See* Doc. 40-1 at 1. In 2012, when the Court sentenced Anzures, it was bound by *King* and *Ramon Silva*. Anzures does not explain why the Court would have resorted to the analysis set forth in *Zuniga-Soto*—which held that assault of a public servant under Texas law was not a crime of violence under the Guidelines because it only required only a *mens rea* of recklessness and therefore did not have as an element the use of physical force, 527 F.3d at 1121–25—when there were two binding, published Tenth Circuit opinions directly on point. *See Washington*, 2018 WL 2208475, at *4 n.7 (noting that it was "highly unlikely" that the sentencing court considered the inapposite cases

cited by the defendant when there were two published decisions that "squarely addressed the issue before the district court"). Thus, to the extent that Anzures objects to the magistrate judge's Report because *King* and *Ramon Silva* (and the later case of *United States v. Trent*, 767 F.3d 1046 (10th Cir. 2014)) merely represented a "trend" and are "irrelevant," *see* Doc. 73 at 6, those objections are overruled. Having conducted a careful de novo review of the magistrate judge's Report and Anzures's objections, I find that the magistrate judge correctly applied the analysis in *Snyder*. Given the relevant legal background in 2012, the Court had no reason to resort to the residual clause in finding that Anzures's commercial burglary conviction was a violent felony under the ACCA.

B. The Magistrate Judge Correctly Determined That Anzures's Prior Convictions for Aggravated Assault With a Deadly Weapon Fall Within the Elements Clause of the ACCA.

Anzures argues that the magistrate judge incorrectly concluded that the Court was bound by the Tenth Circuit's decision in *United States v. Maldonado-Palma*, 839 F.3d 1244 (2016). Doc. 76 at 15–27. The court in *Maldonado-Palma*, 839 F.3d at 1250, held that New Mexico aggravated assault with a deadly weapon is categorically a crime of violence under USSG § 2L1.2's elements clause, which is identical to the ACCA's elements clause. *Compare* USSG § 2L1.2, comment. (n.2) ("'Crime of Violence' means . . . any other offense . . . that has as an element the use, attempted use, or threatened use of physical force against the person of another") *with* 18 U.S.C. § 924(e)(2)(B)(i) ("the term 'violent felony' means any crime . . . that[] has as an element the use, attempted use, or threatened use of physical force against the person of another"). Another panel of the Tenth Circuit recently held that *Maldonado-Palma* compelled the conclusion that New Mexico aggravated assault with a deadly weapon also "satisfy[ies] the ACCA's elements clause, and therefore, the Supreme Court's invalidation of the ACCA's residual clause" does not afford relief to a defendant whose sentence was enhanced based on this

offense. *United States v. Pacheco*, 2018 WL 1673153, *3 (10th Cir. Apr. 6, 2018) (unpublished). Based on *Maldonado-Palma*, which now has been reinforced by *Pacheco*, the magistrate judge correctly concluded that Anzures's two prior convictions for aggravated assault with a deadly weapon constitute violent felonies under the ACCA's elements clause.

Anzures argues at length why he believes *Maldonado-Palma* was wrongly decided, *see* Doc. 73 at 15–27, but, as explained above, the Court "must follow the precedent of this circuit, regardless of its views concerning the advantages of the precedent of our sister circuits." *Spedalieri*, 910 F.2d at 709 n.2. The only possible avenue for the Court to not follow *Maldonado-Palma* is if the New Mexico Supreme Court has issued an intervening contrary decision. *See Wankier v. Crown Equipment Corp.*, 353 F.3d 862, 866 (10th Cir. 2003) ("when a panel of this Court has rendered a decision interpreting state law, that interpretation is binding on district courts in this circuit, and on subsequent panels of this Court, unless an intervening decision of the state's highest court has resolved the issue"). Anzures seems to argue that this applies because the New Mexico Court of Appeals—notably *not* the New Mexico Supreme Court—issued an opinion in January 2018 reviewing the sufficiency of evidence necessary to support an aggravated assault with a deadly weapon conviction, *see State v. Branch*, 2018-NMCA- —, — P.3d —, 2018 WL 525423 (Jan. 23, 2018), and thus is an intervening state court decision.

Anzures's argument is without merit. First, the portion of the 2018 New Mexico Court of Appeals decision in *Branch* that relates to the elements of an aggravated assault conviction is identical to the 2016 version of this opinion, which was issued before *Maldonado-Palma*. *Compare Branch*, 2018-NMCA- —, — P.3d —, 2018 WL 525423, at *2–*4 *with State v. Branch*, 2016-NMCA-071, ¶¶ 10–19, 387 P.3d 250, 255–57. Second, and more importantly, the

2018 *Branch* decision is not a decision by New Mexico's *highest* court, and therefore does not permit this Court to refuse to follow binding Tenth Circuit precedent. *See Wankier*, 353 F.3d at 866; *see also Kokins v. Teleflex, Inc.*, 621 F.3d 1290, 1297 (10th Cir. 2010) (court refused to consider intervening decision by the Colorado Court of Appeals as reason to disregard binding Tenth Circuit precedent because decision was not by Colorado's highest court). The two cases on which Anzures relies involve intervening decisions by the relevant state's highest court. *See* Doc. 73 at 26 (citing *United States v. Badger*, 818 F.3d 563, 570 (10th Cir. 2016) and *Kinnison v. Houghton*, 432 F.2d 1274, 1277 (10th Cir. 1970)). These cases do not permit this Court to decline to follow binding Tenth Circuit precedent based on a decision by a state's intermediate appellate court. *See Badger*, 818 F.3d at 570–71 (court departed from earlier Tenth Circuit precedent based on statements by Utah Supreme Court); *Kinnison*, 432 F.2d at 1277 (court retreated from earlier Tenth Circuit decision based on intervening decision by the Wyoming Supreme Court).

In short, there is no intervening decision by the New Mexico Supreme Court that would permit this Court to decline to follow *Maldonado-Palma*, and the Tenth Circuit's recent decision in *Pacheco* just reinforces the correctness of the magistrate judge's analysis. Anzures's prior New Mexico convictions for aggravated assault with a deadly weapon are categorically violent felonies under the elements clause of the ACCA. Anzures is not entitled to relief under *Samuel Johnson.*

C. The Magistrate Judge Correctly Concluded That Anzures's Prior Conviction for Aggravated Battery Also Qualifies as a Violent Felony Under the Elements Clause of the ACCA, and That the Government Did Not Waive Its Ability to Rely on This Conviction as an ACCA Predicate Offense.

Although the Court may not need to reach this issue, Anzures argues that the magistrate judge incorrectly concluded that the government had not waived its right to rely on Anzures's

prior conviction for aggravated battery as an ACCA-qualifying felony if the Court erred in relying on his commercial burglary conviction. Doc. 73 at 28–30. He further argues that even if the Court considers this conviction, it does not qualify as a violent felony under the elements clause of the ACCA. *Id.* at 30–38. Neither argument is persuasive.

1. *The Government Did not Waive its Ability to Rely on Anzures's Aggravated Battery Conviction as an ACCA Qualifying Offense.*

The magistrate judge recommended that the Court hold that if it incorrectly relied on Anzures's prior commercial burglary conviction in finding that he qualified for the ACCA enhancement, any error was harmless because he had another qualifying conviction: aggravated battery. Doc. 70 at 17–19. Anzures does not specifically address the magistrate judge's harmless error analysis. Doc. 73 at 28–30. Instead, he insists that because the government did not object to the PSR prior to sentencing and require the Court to determine whether Anzures had four qualifying ACCA predicate offenses instead of just three, the government has "waived" its ability to rely on this conviction. *See id.* In making this argument, Anzures relies exclusively on a string of Eleventh Circuit cases, and does not address the district court cases from Colorado and New Mexico on which the magistrate judge relied. *See id.* For the following reasons, the Court is not persuaded by Anzures's argument.

As the Supreme Court and the Tenth Circuit repeatedly have explained, there is a difference between waiver and forfeiture. "Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" *United States v. Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). The Tenth Circuit has further explained that "waiver is accomplished by intent, but forfeiture comes about through neglect." *United States v. Zubia-Torres*, 550 F.3d 1201, 1205 (10th Cir. 2008) (internal quotation marks and brackets omitted). At issue in *Zubia-Torres* was

"whether defense counsel's acquiescence in the PSR guideline calculation constituted a waiver of the right to raise . . . on appeal [whether his prior drug trafficking conviction constituted a "drug trafficking offense" within the meaning of the relevant Guideline provision], as opposed to a mere forfeiture." *Id.* at 1204. The court held that because the defendant never had made the argument that his prior drug-related conviction was not a "drug trafficking offense" within the meaning of the Guidelines, he did not affirmatively abandon that argument. *Id.* at 1207. Nor did he do anything to invite the alleged error. *Id.* Thus, defense counsel's "rote statement" that she did not object to the PSR did not constitute a waiver. *Id.*

The same is true in this case. There is no indication in the record that the government argued that Anzures's prior aggravated battery conviction was a violent felony under the ACCA, then affirmatively abandoned that argument. Nor is there any indication that the government ever affirmatively conceded that the aggravated battery conviction was not an ACCA-predicate offense. The indictment in this case alleged that Anzures had eight prior felony convictions, including aggravated battery with a deadly weapon, commercial burglary, and two separate offenses of aggravated assault with a deadly weapon, among others. *See* Doc. 4. The government and Anzures agreed—without specifying which of the eight convictions listed in the indictment made it so—that Anzures qualified for the ACCA enhancement, and that he should serve the minimum mandatory sentence of 15 years in prison. *See* Doc. 36 ¶ 5 (plea agreement under Rule 11(c)(1)(C) to 15 years in prison). The government and Anzures further agreed that Anzures previously had been convicted of the four offenses at issue here (among many others), and that each of these convictions was valid. *See id.* ¶¶ 9(b)(1), (3), (5), (8); 17(a), (c), (e), (h). The presentence report stated that Anzures qualified for the ACCA enhancement, and listed two aggravated assault convictions and the commercial burglary conviction under the heading

"Armed Career Criminal Provision," which refers both to the ACCA and the Guidelines. PSR ¶ 39. The presentence report did not state that these were all Anzures's ACCA-qualifying convictions. *See id.* Neither party filed written objections to the presentence report, and when the Court asked at sentencing whether there were any objections, only defense counsel answered, "No, ma'am." Doc. 45 at 3. At sentencing, the Court found that Anzures was an armed career criminal without specifying the convictions on which it was relying. *Id.* at 9. Under these circumstances, the government did not intentionally relinquish or abandon its right to rely on any of Anzures's prior convictions as potential ACCA-predicate offenses should the Court determine that it erred in relying on any of the three listed in the presentence report under paragraph 39.

Anzures urges the Court to follow the Eleventh Circuit's waiver rule, which prohibits the government from arguing that a "previously unmentioned felony can now take the place of a conviction that was relied upon by the sentencing court, but which no longer supports the sentence." *McCarthan v. Director of Goodwill Industries-Suncoast, Inc.*, 851 F.3d 1076, 1121 (11th Cir. 2017) (en banc) (Martin, C.J., dissenting). Anzures has not pointed to another circuit that has adopted this waiver rule, nor could the Court find one. Moreover, unlike the situation in *McCarthan*, Anzures's prior aggravated battery with a deadly weapon was not "previously unmentioned." This conviction was "mentioned" in the indictment, twice in the plea agreement, and in the presentence report.

Given that harmless error analysis unquestionably applies to § 2255 proceedings, *United States v. Dago*, 441 F.3d 1238, 1246 (10th Cir. 2006), and that there was no reason for the government to object to a presentence report that was entirely consistent with its understanding that Anzures qualified for the ACCA enhancement, the Court finds that the magistrate judge's analysis makes sense and is consistent with Tenth Circuit precedent. Notably, after the

magistrate judge issued her Report, the Tenth Circuit affirmed Judge Browning's opinion in *United States v. Garcia*, 07-CR-788 JB, — F.3d —, 2017 WL 2271421, *19–*21 (D.N.M. Jan. 31, 2017), which held that the government had not waived its right to rely on the defendant's robbery conviction as an ACCA-qualifying conviction by not objecting to the presentence report, which did not include it as a predicate offense. In affirming Judge Browning, the Tenth Circuit held that it was the government's burden to prove that the district court's reliance on the ACCA's residual clause was harmless, and that it could do so by showing that another conviction—one not relied on by the district court at sentencing—qualified as a violent felony under the elements clause (or presumably the enumerated crimes clause) of the ACCA. *See United States v. Garcia*, 877 F.3d 944, 948–56 (10th Cir. 2017). The Court therefore overrules Anzures's argument that the government has waived its ability to rely on his prior aggravated battery conviction as an ACCA-predicate offense.

2. *Anzures's Prior Felony Aggravated Battery Conviction is Categorically a Violent Felony Under the ACCA; Therefore, Any Reliance on the Residual Clause in Determining that Anzures's Prior Commercial Burglary Conviction was a Violent Felony was Harmless Error.*

In his objections, Anzures argues that the magistrate judge erred in finding that the felony aggravated battery statute under which he was convicted qualifies as a violent felony under the elements clause of the ACCA. Doc. 73 at 30–38. He argues that the magistrate judge erred in concluding that the Tenth Circuit's decisions in *United States v. Barraza-Ramos*, 550 F.3d 1246 (10th Cir. 2008) and *United States v. Hays*, 526 F.3d 674 (10th Cir. 2008) do not control this case, and that she erred in concluding that the felony aggravated battery statute's requirement that an unlawful touching that inflicts great bodily harm (or could inflict such harm) necessarily requires physical force. *See id.* at 30–36. He further argues that the magistrate judge erred in

applying the modified categorical approach. *See id.* at 36–38. The Court will address each of Anzures's arguments, albeit in a slightly different order.

a. *The Magistrate Judge Correctly Determined that Felony Aggravated Battery in New Mexico Requires More than a Mere Touch.*

Anzures argues that "[c]ommon law battery is an element of aggravated battery and the mere touch needed to complete the offense is not the violent physical force described in [*Curtis Johnson v United States*, 559 U.S. 133 (2010)] as necessary to meet the force clause definition." Doc. 73 at 33. Common law battery, however, is a misdemeanor crime distinct from the aggravated battery statute at issue here, which is a felony. *Compare* N.M. STAT. ANN. § 30-3-4 (codifying common law battery and stating "[w]hoever commits battery is guilty of a petty misdemeanor") *with* N.M. STAT. ANN. §§ 30-3-5(A), (C) (describing felony aggravated battery). One "key distinction between the two battery statutes is the mens rea requirement." *State v. Skippings*, 2011-NMSC-021, ¶ 14, 150 N.M. 216, 258 P.3d 1008, 1012. "Under the aggravated battery statute, it must be established that the perpetrator possessed the specific intent to injure that person or another." *Id.* Felony aggravated battery also requires proof either that the perpetrator touched the victim with a deadly weapon, or that the perpetrator touched the victim in a way that caused great bodily harm or in a way that likely would result in death or great bodily harm. N.M. STAT. ANN. § 30-3-5(C). Anzures's argument ignores these additional elements of felony aggravated battery. When viewed all together, the elements of felony aggravated battery require "violent force," not merely a touch.

The elements of felony aggravated battery involving great bodily harm are as follows:

1. The defendant touched or applied force to the victim.
2. The defendant intended to injure the victim or another.
3. The defendant either caused great bodily harm to the victim or acted in a way that would likely result in death or great bodily harm to the victim.

N.M. R. ANN., Crim. UJI 14-323. "Great bodily harm means an injury to a person which creates a high probability of death or results in serious disfigurement or results in loss of any member or organ of the body or results in permanent or prolonged impairment of the use of any member or organ of the body." N.M. R. ANN., Crim. UJI 14-131 (brackets and footnote omitted).

The elements of felony aggravated battery with a deadly weapon are as follows:

1. The defendant touched or applied force to the victim with a deadly weapon.
2. The defendant intended to injure the victim or another.

N.M. R. ANN., Crim. UJI 14-323. An object is a deadly weapon if, when used as a weapon, it could cause death or great bodily harm. *Id.*

Thus, the question with respect to the three means of committing aggravated battery is whether the additional elements—that the defendant acted with the intent to injure and either caused great bodily harm, acted in a way that likely would cause death or great bodily harm, or used a deadly weapon—necessarily involves the use of violent force. *See United States v. Taylor*, 843 F.3d 1215, 1223 (10th Cir. 2016) (although *simple* battery does not satisfy the elements clause because it could be accomplished by only the slightest touch, the question is whether battery that includes the aggravating element of a deadly weapon is sufficient to satisfy the violent force requirement). Tenth Circuit precedent evaluating similar statutes compels the conclusion that these additional elements satisfy the violent force requirement of the ACCA.

For example, in *United States v. Treto-Martinez*, 421 F.3d 1156, 1160 (10th Cir. 2005), the Tenth Circuit held that Kansas aggravated battery satisfied the force clause of the Guidelines.[3] Conviction under one prong of the statute required "physical contact . . . whereby

[3] Although *Treto-Martinez* pre-dates *Curtis Johnson*, the court in *Treto-Martinez* did not apply a lesser standard of "physical force" in interpreting the force clause. *Compare Treto-Martinez*, 421 F.3d at 1159 (holding that "[a]lthough not all physical contact performed in a rude, insulting[,] or angry manner would rise to the level of physical force," (i.e., more than mere touching is required), such contact would satisfy the force clause if carried out with a deadly

great bodily harm, disfigurement or death can be inflicted." *Id.* "It is clear," the court held, "that a violation of this provision" suffices to satisfy the force clause. *Id.* "No matter what the instrumentality of the contact, if the statute is violated by contact that can inflict great bodily harm, disfigurement or death, it seems clear that, at the very least, the statute contains as an element the "threatened use of physical force." *Id.* This prong of the Kansas aggravated battery statute is similar to the requirement under the New Mexico felony aggravated battery statute that the defendant "caused great bodily harm" or "acted in a way that would likely result in death or great bodily harm." *See* N.M. R. ANN., Crim. UJI 14-323.

With respect to aggravated battery involving the use of a deadly weapon, several cases are instructive. As the magistrate judge noted, in *United States v. Maldonado-Palma*, 839 F.3d 1244, 1250 (10th Cir. 2016), the court held that New Mexico aggravated assault with a deadly weapon is categorically a crime of violence under the Sentencing Guidelines' force clause, which is identical to the ACCA's force clause. The use of a weapon "capable of producing death or great bodily harm . . . necessarily threatens the use of physical force." *Id.* Similarly, in *United States v. Ramon Silva*, 608 F.3d 663, 670–71 (10th Cir. 2010), the court held that New Mexico's "apprehension causing" aggravated assault statute qualified under the force clause of the ACCA. Even though the assault statute could be violated without any actual physical contact or violence

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weapon), *with Curtis Johnson*, 559 U.S. at 140 (requiring more than mere touching to satisfy the force clause). Therefore, *Curtis Johnson* did not diminish the precedential value of *Treto-Martinez*. Instead, *Curtis Johnson* resolved a split among the circuits as to whether mere touching could satisfy the force clause—essentially affirming the Tenth Circuit's approach. *See generally United States v. Hays*, 526 F.3d 674, 677–81 (10th Cir. 2008) (discussing the circuit split); *id.* at 684 n.4 (Ebel, J., dissenting) (also discussing the circuit split). The Supreme Court held that mere touching was not enough, which is consistent with earlier Tenth Circuit decisions. *See, e.g.*, *United States v. Venegas-Ornelas*, 348 F.3d 1273, 1275 (10th Cir. 2003) ("Force, as used in the definition of a crime of violence, is synonymous with destructive violent force."); *Hays*, 526 F.3d at 681 ("[P]hysical force in a crime of violence[] must, from a legal perspective, entail more than mere contact. Otherwise, *de minimis* touchings could [suffice]." (internal quotation marks omitted)).

perpetrated against the victim, the conduct it criminalized "'could always lead to . . . substantial and violent contact, and thus . . . would always include as an element' the threatened use of violent force." *Id.* at 672 (quoting *Treto-Martinez*, 421 F.3d at 1160); *see also Taylor*, 843 F.3d at 1224 (noting that "regardless of the type of dangerous weapon that is employed by a particular defendant, the use of a dangerous weapon during an assault or battery always constitutes a sufficient threat of force to satisfy the [force] clause" (internal quotation marks omitted)).

The Tenth Circuit already has rejected many of the same arguments Anzures makes here with respect to the New Mexico statute that prohibits aggravated battery against a household member. *See Pacheco*, 2018 WL 1673153, at *3–*5. In *Pacheco*, the court held that the defendant's prior felony conviction for aggravated battery against a household member satisfied the ACCA's elements clause. *Id.* at *5. The only difference between the aggravated-battery-against-a-household-member statute and the regular aggravated-battery statute is the relationship of the victim to the perpetrator. *Compare* N.M. STAT. ANN. § 30-3-16 (aggravated battery against a household member) *with* N.M. STAT. ANN. § 30-3-5 (aggravated battery). Thus, the *Pacheco* decision again reinforces the correctness of the magistrate judge's analysis.

Based on these cases, the Court finds that New Mexico felony aggravated battery requires the use of physical force required by *Curtis Johnson*. Conviction under New Mexico's felony aggravated battery statute requires more than a mere touching. It requires the intent to injure and commission in a manner whereby great bodily harm is inflicted, or death or great bodily harm could be inflicted, or where a deadly weapon is used. *See* N.M. STAT. ANN. § 30-3-5(C). A battery committed in a manner that could inflict great bodily harm necessarily requires "force capable of causing physical pain or injury." *Curtis Johnson*, 559 U.S. at 140; *Treto-Martinez*, 421 F.3d at 1160. Likewise, a battery committed with the use of a deadly weapon "always

constitutes a sufficient threat of force to satisfy the [force] clause." *Taylor*, 843 F.3d at 1224 (internal quotation marks omitted). The additional requirements of felony aggravated battery—essentially, that serious bodily injury did or could have occurred, or that a deadly weapon was used—put the statute squarely in the range of conduct that the Tenth Circuit has found to satisfy the physical force requirement of the elements clause. Notably, several other judges in this District have reached the same conclusion.[4]

Anzures's arguments to the contrary are unpersuasive. He argues that conviction under the felony aggravated battery statute can result from any "unlawful touching, however slight." Doc. 73 at 34–35. Because "aggravated battery subsumes battery," he contends, any unlawful touch will satisfy the battery element, and no more force is required for conviction of the greater offense of aggravated battery. *Id.* But Anzures cites no case that supports his argument. His citations to cases analyzing simple battery, rather than felony aggravated battery, are inapposite. *See State v. Ortega*, 1992-NMCA-003, 113 N.M. 437, 827 P.2d 152; *State v. Hill*, 2001-NMCA-094, 131 N.M. 195, 34 P.3d 139. And the cases he cites that do evaluate the aggravated battery statute indisputably involve the use of physical force. *See State v. Traeger*, 2001-NMSC-022, 130 N.M. 618, 29 P.3d 518 (defendant used baseball bat to beat victim).[5] Anzures ignores the

[4] *E.g.*, *Dallas v. United States*, 16-cv-0676 MV/LF, Doc. 21 at 2–12 (D.N.M. Dec. 4, 2017); *Manzanares v United States*, 16-cv-0599 WJ/SMV, Doc. 21 at 18–24 (D.N.M. Sept. 6, 2017); *Sanchez v. United States*, 16-cv-0659 JAP/GBW, Doc. 20 at 24–27 (D.N.M. July 5, 2017); *Sedillo v. United States*, 16-cv-0426 MCA/LAM, Doc. 18 at 13–16 (D.N.M. Mar. 6, 2017); *Vasquez v. United States*, 16-cv-0678 JAP/WPL, Doc. 11 at 8 (D.N.M. Jan. 10, 2017); *see also United States v. Folse*, 15-cr-2485 JB, 2017 WL 4481158, *20–*25 (D.N.M. Oct. 5, 2017) (New Mexico felony aggravated battery is a crime of violence under the § 4B1.2 of the Guidelines).

[5] Anzures further relies on *State v. Kraul*, 1977-NMCA-032, 90 N.M. 314, 563 P.2d 108, which also is inapposite. *Kraul* held that simple battery and battery upon a peace officer are lesser included offenses of aggravated battery upon a peace officer. But the fact that simple battery is a lesser included offense of felony aggravated battery does not mean that the Court can ignore the additional elements required to establish felony aggravated battery in determining whether that offense is a violent felony under the ACCA.

plain language of the statute, which explicitly requires more than mere touching. He cites no authority suggesting otherwise.

b. *The Tenth Circuit's Decisions in Barraza-Ramos and Hays do not Determine the Outcome Here.*

Anzures argues that the Tenth Circuit's decision in *Barraza-Ramos*, 550 F.3d 1246 (10th Cir. 2008), is particularly pertinent and should control the outcome of this case. Doc. 73 at 31–32. I disagree. The magistrate judge correctly held that the statute at issue in *Barraza-Ramos* was not analogous to New Mexico's felony aggravated battery statute, and that the *Barraza-Ramos* decision was not determinative.

In *Barraza-Ramos*, 550 F.3d at 1250–51, the Tenth Circuit held that a Florida aggravated battery statute, which criminalized battery against pregnant women, did not satisfy the force clause. The statute could be violated by merely "touching" a pregnant woman against her will. *Id*. at 1249. *Barraza-Ramos* did not involve a battery statute with the additional requirements that the defendant intend to injure the victim and that the defendant commit the battery (1) in a manner that causes great bodily harm, (2) with the use of a deadly weapon, or (3) in a manner whereby death or great bodily harm likely would be inflicted. These additional requirements distinguish New Mexico aggravated battery from the statute at issue in *Barraza-Ramos*. And, as explained in footnote 5 above, the fact that simple battery is a lesser included offense of felony aggravated battery does not permit the Court to ignore the additional elements of felony aggravated battery in determining whether it satisfies the elements clause of the ACCA. New Mexico's felony aggravated battery, N.M. STAT. ANN. §§ 30-3-5(A), (C), qualifies as a violent felony under the elements clause of the ACCA

Anzures also relies heavily on the Tenth Circuit's decision in *Hays*. *See* Doc. 73 at 31–32. In *Hays*, 526 F.3d at 681, the court held that a Wyoming battery statute did not satisfy the

"use of physical force" element required to satisfy the definition of a "misdemeanor crime of domestic violence." However, the underlying statute in *Hays* could be violated by unlawfully touching someone in a rude, insolent or angry manner. *Id.* at 678. Because that provision could be violated by "any contact, however slight," the court held that it did not satisfy the force clause. *Id.* at 678–79. As discussed above, aggravated felony battery in New Mexico requires more than "any contact, however slight." *Hays* therefore does not control the outcome of this case.

c. *The Magistrate Judge Correctly Applied the Modified Categorical Approach.*

Anzures's final argument is that the magistrate judge erred in applying the modified categorical approach to the statute at issue here. He argues, for the first time, that the magistrate judge should not have reviewed the court documents attached as exhibits to the government's response, and he asks the Court to strike those exhibits. *See* Doc. 73 at 38. Issues raised for the first time in objections to the magistrate judge's recommendation are deemed waived. *United States v. Garfinkle*, 261 F.3d 1030, 1031 (10th Cir. 2001). Nonetheless, even without considering the court documents attached to the government's response, the magistrate judge did not misapply the modified categorical approach.

Anzures suggests that the magistrate judge found that subsection C of N.M. STAT. ANN. § 30-3-5 was divisible. Doc. 73 at 37. This is simply incorrect. The magistrate judge held only that subsection C was divisible from subsection B, not that the three methods of committing felony aggravated battery under subsection C were divisible from each other. Doc. 70 at 19. The magistrate judge specifically declined to decide whether subsection C was divisible, and instead found that however felony aggravated battery was committed, it qualified as a violent felony under the ACCA. *See id.* at 20 ("The Court need not decide that question [whether

subsection C is divisible] . . . ."), 27 ("[A]ll three of the *means* by which one can violate N.M. STAT. ANN. § 30-3-5(C) satisfy the force requirement set out in [*Curtis*] *Johnson*." (emphasis added)).

Anzures's argument that the magistrate judge should not have used the modified categorical approach to determine whether he violated subsection B or C is baffling. He argues that "whether aggravated battery is divisible in this way is irrelevant because both versions require proof of an unlawful touch." Doc. 73 at 37. Although it is true that both the misdemeanor offense and the felony offense require proof of an unlawful touch, the magistrate judge needed to determine whether Anzures's prior offense was a *felony*, and therefore potentially a *violent felony* under the ACCA, or merely a misdemeanor. The only way to make this determination was to apply the modified categorical approach.[6] That determination only informed the Court as to what additional elements form the basis of a felony aggravated battery under New Mexico law and was a proper application of the modified categorical approach. *See Mathis v. United States*, 136 S. Ct. 2243, 2253 (2016) ("the modified approach serves—and serves solely—as a tool to identify the elements of the crime of conviction"). And although Anzures repeatedly argues that the Court should not consider all of the elements of felony aggravated battery to determine whether it qualifies as a violent felony under the ACCA, the Tenth Circuit has held otherwise. *See Taylor*, 843 F.3d at 1223–24 (sentencing court properly considered whether the additional element of the use of a dangerous weapon during an assault or battery was sufficient to satisfy the elements clause of the career offender provision of the

[6] The magistrate judge did not need to view the exhibits attached to the government's response to make this determination. Anzures admitted in his plea agreement that he had been convicted of felony aggravated battery in the state of New Mexico in the early 1990s. *See* Doc. 36 at 4, 8.

Guidelines). The magistrate judge did not err in applying the modified categorical approach to determine the elements of felony aggravated battery under New Mexico law.

III. Conclusion

For the foregoing reasons, the Court overrules Anzures's objections (Doc. 73).

IT IS THEREFORE ORDERED that the Proposed Findings and Recommended Disposition (Doc. 70) is ADOPTED by the Court.

IT IS FURTHER ORDERED that this case is DISMISSED with prejudice, and that a final judgment be entered concurrently with this order.

UNITED STATES DISTRICT JUDGE

No. _____

In the

Supreme Court of the United States

JOHN ANZURES, 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, Alonzo J. Padilla, hereby certify that on September 17, 2019, 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: September 17, 2019

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