No. _____

In the
Supreme Court of the United States

JORGE HIRAM BÁEZ–MARTÍNEZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

APPENDIX

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UNITED STATES of America, Appellee,

v.

Jorge Hiram BÁEZ-MARTÍNEZ, Defendant, Appellant.

No. 18-1289

United States Court of Appeals, First Circuit.

February 11, 2020

Background: Defendant was convicted in the United States District Court for the District of Puerto Rico, Jay A. García–Gregory, J., of possessing a firearm as a convicted felon, and defendant received 15-year mandatory minimum sentence under Armed Career Criminal Act (ACCA), based on prior violent felonies. Defendant appealed. The Court of Appeals, 786 F.3d 121, affirmed. The Supreme Court granted certiorari, vacated the judgment, and remanded. The District Court, Jay A. Garcia-Gregory, Senior District Judge, 258 F.Supp.3d 228, determined that defendant's prior convictions under Puerto Rico law, i.e., a prior conviction for second-degree murder and two prior convictions for attempted murder, qualified as predicate violent felonies under the ACCA. Defendant appealed.

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

(1) as a matter of first impression, a prior conviction for second-degree murder qualifies as a violent felony under the ACCA's force clause, because malice aforethought is more than ordinary recklessness;

(2) defendant's conviction in 1996, under prior version of Puerto Rico's second-degree murder statute, required malice aforethought rather than ordinary recklessness; and

(3) defendant's prior convictions for attempted murder categorically involved violent force, in contrast to mere omissions.

Affirmed.

1. Criminal Law ⚿1139

The Court of Appeals would review de novo defendant's preserved appellate claim that his prior convictions did not constitute violent felonies, as predicates for 15-year mandatory minimum sentence under Armed Career Criminal Act (ACCA), at sentencing for possessing a firearm as a convicted felon. 18 U.S.C.A. §§ 922(g), 924(e)(1), (e)(2)(B).

2. Sentencing and Punishment ⚿1284

Under the categorical approach to determining whether, for sentence enhancement, a defendant's prior conviction under state law qualifies as a violent felony under the force clause of the definition of violent felony in the Armed Career Criminal Act (ACCA), the court must presume that the defendant's prior offense was for the least culpable conduct for which there is a realistic probability of a conviction under the state statute. 18 U.S.C.A. § 924(e)(2)(B)(i).

3. Sentencing and Punishment ⚿1284

In ascertaining the requirements of state law, when applying the categorical approach to determining whether a defendant's prior conviction under state law qualifies, for sentence enhancement purposes, as a violent felony under the force clause of the definition of violent felony in the Armed Career Criminal Act (ACCA), the court is bound by the interpretation of state law by the state's highest court, including its determination of the elements of the state criminal statute. 18 U.S.C.A. § 924(e)(2)(B)(i).

4. Sentencing and Punishment ⚿1262

For sentence enhancement under the Armed Career Criminal Act (ACCA), one who acts only with ordinary recklessness does not use physical force against the person of another, for purposes of the force clause of the definition of violent felony in the ACCA, which definition encompasses offenses having as an element the use, attempted use, or threatened use of physical force against the person of another. 18 U.S.C.A. § 924(e)(2)(B)(i).

5. Homicide ⚿530

The mens rea required for murder at common law was and remains malice aforethought.

6. Homicide ⚿530

Malice aforethought, as element of murder under common law, comes in four flavors: (1) intent to kill; (2) intent to cause serious bodily injury; (3) depraved heart, also referred to as reckless indifference or extreme recklessness; and (4) intent to commit a felony, i.e., the felony-murder rule.

7. Homicide ⚿533

The depraved-heart type of mental state, which satisfies the malice aforethought element for murder under common law, requires more than ordinary recklessness.

8. Homicide ⚿657, 709

A criminal homicide for which the mental state satisfies the ordinary standard of recklessness, but not the heightened standard of acting recklessly under circumstances manifesting extreme indifference to the value of human life, is classified as manslaughter rather than murder under the common law.

9. Homicide ⚿533, 709

If a defendant shoots a gun into a room that he knows to be occupied and one of the occupants is killed, the defendant could be found guilty of murder under the common law, because he acted not only recklessly, but with reckless indifference to human life, but if a defendant recklessly shoots a gun in the woods while hunting and kills another person, the defendant has merely committed manslaughter under the common law, because the probability that death would result is much lower.

10. Sentencing and Punishment ⚿1263

For sentence enhancement purposes, a prior conviction for second-degree murder qualifies as a violent felony under the force clause of the definition of violent felony in the Armed Career Criminal Act (ACCA), as an offense having as an element the use, attempted use, or threatened use of physical force against the person of another, even though second-degree murder requires no showing of mens rea beyond malice-aforethought-variety recklessness. 18 U.S.C.A. § 924(e)(2)(B)(i).

11. Statutes ⚿1067

In interpreting any federal statute, the court must not lose sight of the common sense that likely informed Congress's understanding of the statute's terms.

12. Homicide ⚿530, 540, 545

Under Puerto Rico law, murder is defined as the killing of a human being with malice aforethought, and second-degree murder is any murder that is not first-degree murder, with first-degree murder including any willful, deliberate, and premeditated killing, plus a few other methods.

13. Homicide ⚿530

The concept of malice aforethought, as element of murder under Puerto Rico law, implies the absence of just cause or excuse in causing death and implies, also, the existence of the intent to kill a fellow human being.

14. Homicide ⚿546

For second-degree murder under Puerto Rico law, malice aforethought is enough, without the specific intent to kill.

15. Homicide ⚿530

Malice aforethought, as element of murder under Puerto Rico law, denotes a state or condition in the actor formed by an inherent deficiency in his or her sense of morality and righteousness as a result of having stopped caring about the respect and safety of human life.

16. Sentencing and Punishment ⚿1285

For sentence enhancement under the Armed Career Criminal Act (ACCA), defendant's prior conviction in 1996, under later-repealed version of Puerto Rico's second-degree murder statute, required malice aforethought rather than ordinary recklessness, and thus, the prior conviction qualified as a violent felony under the force clause of the definition of violent felony in the ACCA, as an offense having as an element the use, attempted use, or threatened use of physical force against the person of another; while Puerto Rico law, in 1996, defined two general mental states, i.e., intent and negligence, and it defined "intent" in a way that sounded like ordinary recklessness and defined "malice" to include the commission of an intentional act, "malice" could not be equated with "malice aforethought," which was term of art specific to the crime of murder. 18 U.S.C.A. § 924(e)(2)(B)(i); 33 L.P.R.A. §§ 3061, 3062, 3063 (repealed).

17. Criminal Law ⚿12.7(2)

The court invokes the rule of lenity only if there is some grievous ambiguity or uncertainty about how a criminal statute should be applied.

18. Sentencing and Punishment ⚿1262

For sentence enhancement under the Armed Career Criminal Act (ACCA), "physical force," within the meaning of the force clause of the ACCA's definition of violent felony as an offense having as an element the use, attempted use, or threatened use of physical force against the person of another, is violent force or a substantial degree of force that is capable of causing physical pain or injury to another person. 18 U.S.C.A. § 924(e)(2)(B)(i).

See publication Words and Phrases for other judicial constructions and definitions.

19. Sentencing and Punishment ⚿1262

For sentence enhancement under the Armed Career Criminal Act (ACCA), mere touching, as an element of a crime, is insufficient to constitute "physical force," within the meaning of the force clause of the ACCA's definition of violent felony as an offense having as an element the use, attempted use, or threatened use of physical force against the person of another. 18 U.S.C.A. § 924(e)(2)(B)(i).

See publication Words and Phrases for other judicial constructions and definitions.

20. Sentencing and Punishment ⚿1262

To constitute "physical force," within the meaning of the force clause of the definition of violent felony for purposes of sentence enhancement under the Armed Career Criminal Act (ACCA), which definition encompasses offenses having as an element the use, attempted use, or threatened use of physical force against the person of another, the force must be exerted by and through concrete bodies, and intellectual force or emotional force does not count. 18 U.S.C.A. § 924(e)(2)(B)(i).

See publication Words and Phrases for other judicial constructions and definitions.

21. Homicide ⚿558

Attempted murder under Puerto Rico law requires a specific intent to kill.

22. Homicide ⚿557

Attempted murder occurs under Puerto Rico law when a person commits acts or incurs omissions unequivocally directed to cause the death of a human being with malice aforethought.

23. Sentencing and Punishment ⚿1285

For sentence enhancement under the Armed Career Criminal Act (ACCA), defendant's two prior convictions under Puerto Rico law, for attempted murder, categorically involved violent force exerted by and through concrete bodies and therefore they required physical force, as required under the force clause of the definition of violent felony in the ACCA as an offense having as an element the use, attempted use, or threatened use of physical force against the person of another, though attempted murder could occur when a person committed omissions unequivocally directed to cause the death of a human being with malice aforethought; the knowing or intentional causation of bodily injury necessarily involved the use of violent physical force because murder always resulted in death, and while an attempted murder would not result in death, the force clause covered the attempted use of physical force. 18 U.S.C.A. § 924(e)(2)(B)(i).

24. Sentencing and Punishment ⚿1262

For sentencing enhancement under the Armed Career Criminal Act (ACCA), the knowing or intentional causation of bodily injury necessarily involves the use of physical force, under the force clause of the definition of violent felony in the ACCA, which definition encompasses offenses having as an element the use, attempted use, or threatened use of physical force against the person of another. 18 U.S.C.A. § 924(e)(2)(B)(i).

25. Courts ⚿92, 96(3)

When the Supreme Court is plain on a point, even in dicta, the Court of Appeals is generally expected to follow its lead.

26. Criminal Law ⚿1130(5)

As a general matter, appellees are not held to the same waiver standards as appellants, with respect to the failure to present arguments on appeal.

West Codenotes

Recognized as Unconstitutional

18 U.S.C.A. § 924(e)(2)(B)(ii)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO [Hon. Jay A. García-Gregory, U.S. District Judge]

Franco L. Pérez-Redondo, Research & Writing Specialist, with whom Eric A. Vos, Federal Public Defender, and Vivianne M. Marrero-Torres, Assistant Federal Public Defender, Supervisor, Appeals Section, were on brief, for appellant.

Francisco A. Besosa-Martínez, Assistant United States Attorney, with whom Rosa Emilia Rodríguez-Vélez, United States Attorney, and Mariana E. Bauzá-Almonte, Assistant United States Attorney, Chief, Appellate Division, were on brief, for appellee.

Before HOWARD, Chief Judge, TORRUELLA and KAYATTA, Circuit Judges.

KAYATTA, Circuit Judge.

Jorge Hiram Báez-Martínez challenges his Armed Career Criminal Act ("ACCA") sentence on the ground that he lacked the three required predicate felonies. The district court determined that Báez-Martínez's prior conviction for second-degree murder and two prior convictions for attempted murder were violent felonies, thus triggering the ACCA's fifteen-year mandatory minimum. We affirm.

I.

In 2012, Báez-Martínez was convicted at a jury trial for being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). The unobjected-to Presentence Investigation Report ("PSR") included the following prior offenses, all in violation of Puerto Rico law: (1) one conviction for second-degree murder; (2) two convictions for attempted murder; and (3) two convictions for carjacking,[1] each committed on the same occasion as the two attempted murders.[2] The PSR stated that the ACCA, 18 U.S.C. § 924(e)(1), applied, meaning that Báez-Martínez was subject to a statutory minimum of fifteen years' imprisonment. The district court agreed and sentenced Báez-Martínez to fifteen years. We affirmed his conviction. See United States v. Báez-Martínez, 786 F.3d 121, 130 (1st Cir. 2015).

In 2015, the Supreme Court declared the residual clause of the ACCA's definition of "violent felony" unconstitutional. See Johnson v. United States ("Johnson II"), —— U.S. ——, 135 S. Ct. 2551, 2563, 192 L.Ed.2d 569 (2015). In light of this holding, the Supreme Court vacated Báez-Martínez's sentence and remanded to determine whether the ACCA still applied. See Báez-Martínez v. United States, —— U.S. ——, 136 S. Ct. 545, 193 L.Ed.2d 421 (2015) (mem.). On remand, the district court held that attempted murder and second-degree murder are violent felonies under the force clause, thus satisfying the ACCA's three-predicate-felony requirement. See United States v. Báez-Martínez, 258 F. Supp. 3d 228, 239–40 (D.P.R. 2017). The court did not address carjacking. The court again sentenced Báez-Martínez to fifteen years, remarking, "[I w]ish that I wouldn't have to sentence you to 180 months, but that is the minimum."[3]

[1] Báez-Martínez timely appealed. We review de novo his preserved claim that his prior convictions do not constitute violent felonies under the ACCA. See United States v. Kennedy, 881 F.3d 14, 19 (1st Cir. 2018).

II.

The ACCA mandates a minimum sentence of fifteen years for qualifying defendants who violate § 922(g). 18 U.S.C. § 924(e)(1). A qualifying defendant is anyone who "has three previous convictions ... for a violent felony or a serious drug offense, or both, committed on occasions different from one another." Id. Báez-Martínez has no prior drug-related convictions, so we consider only potential violent felonies. "[V]iolent felony" is defined under the ACCA as:

> any crime punishable by imprisonment for a term exceeding one year ... that ... has as an element the use, attempted use, or threatened use of physical force against the person of another; or ... is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious

1. The carjacking convictions were under the since-repealed Article 173B. See P.R. Laws Ann. tit. 33, § 4279b (originally enacted Aug. 5, 1993, amended Apr. 4, 1998, repealed June 18, 2004); see also United States v. Carrera González, Cr. No. 05-366, 2006 WL 2092569, at *3 n.1 (D.P.R. July 26, 2006).

2. The PSR included several other prior convictions, including for robbery and kidnapping, but the government is not contending here that any of these offenses should be considered violent felonies under the ACCA.

3. The apparent basis for the district court's statement seems to be the testimony about Báez-Martínez's concerted efforts at rehabilitation during the period of his incarceration as well as his impressive achievement of having successfully pursued his Johnson II case, pro se, up to the Supreme Court.

> potential risk of physical injury to another . . . .

Id. § 924(e)(2)(B).

Báez-Martínez does not dispute that second-degree murder, attempted murder, and carjacking are "punishable by imprisonment for a term exceeding one year." So we train our attention on the rest of the definition, which divides into three parts: the "force clause" (sometimes called the "elements clause"), the "enumerated clause," and the "residual clause." Stokeling v. United States, —— U.S. ——, 139 S. Ct. 544, 556, 202 L.Ed.2d 512 (2019). The residual clause is defunct after Johnson II, 135 S. Ct. at 2563. And since none of Báez-Martínez's prior convictions fall within the list of enumerated offenses, that leaves only the force clause. So, we ask if the crimes at issue "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another."

[2, 3] In answering this question, we apply the "categorical approach," which we have explained in detail many times before. See, e.g., United States v. Faust, 853 F.3d 39, 50 (1st Cir. 2017). In brief, we must presume that the defendant's prior offense was for the least culpable conduct for which there is a "realistic probability" of a conviction under the statute. United States v. Starks, 861 F.3d 306, 315 (1st Cir. 2017) (citing Moncrieffe v. Holder, 569 U.S. 184, 191, 133 S.Ct. 1678, 185 L.Ed.2d 727 (2013)); see Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193, 127 S.Ct. 815, 166 L.Ed.2d 683 (2007). And in ascertaining the requirements of state law, we are "bound by [the state] Supreme Court's interpretation of state law, including its determination of the elements of" the criminal statute. Johnson v. United States ("Johnson I"), 559 U.S. 133, 138, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010).[4]

With this approach in mind, we turn to considering the Puerto Rico offenses of second-degree murder and attempted murder. For the reasons that follow, we find that each offense "has as an element the use, attempted use, or threatened use of physical force against the person of another." Báez-Martínez's conviction for second-degree murder and his two convictions for attempted murder under Puerto Rico law therefore satisfy the ACCA's three-predicate-felony rule. We save for another day whether carjacking also categorically counts as a violent felony.

A. Second-Degree Murder

Báez-Martínez argues on appeal that second-degree murder under Puerto Rico law does not categorically satisfy the mens rea requirement of the force clause because, he contends, second-degree murder can be committed with a mens rea of "recklessness." As we will explain, our case law supports the contention that one who acts only recklessly does not "use . . . physical force against the person of another" within the meaning of the ACCA's force clause. But, as we will also explain, Puerto Rico law -- like the law of most jurisdictions -- requires proof of a heightened degree of recklessness to convict a person of second-degree murder. And as we will finally explain, that heightened form of recklessness is sufficient for purposes of the force clause even though ordinary recklessness is not. We offer these explanations in reverse order.

1.

The incorporation of a mens rea component into the "violent felony" definition

4. For these purposes, we treat Puerto Rico law as state law. See González Figueroa v. J.C. Penney P.R., Inc., 568 F.3d 313, 318 (1st Cir. 2009) ("In regard to law-determination, Puerto Rico is the functional equivalent of a state.").

traces back to the Supreme Court's decision in Leocal v. Ashcroft, 543 U.S. 1, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004). There, the Court interpreted the word "use" in the force clause of 18 U.S.C. § 16(a), defining "crime of violence" in nearly identical terms as the ACCA defines "violent felony," to require "a higher degree of intent than negligent or merely accidental conduct." Id. at 9, 125 S.Ct. 377. The Court reserved the question whether "reckless" conduct could suffice. Id. at 13, 125 S.Ct. 377.

[4] The mens rea analysis made the jump to the ACCA in Begay v. United States, 553 U.S. 137, 128 S.Ct. 1581, 170 L.Ed.2d 490 (2008). There, the Supreme Court held that drunk-driving statutes, which generally punish reckless conduct or possibly have no mens rea requirement at all, fall outside the scope of the ACCA's residual clause. Id. at 144–45, 128 S.Ct. 1581; see also Sykes v. United States, 564 U.S. 1, 13, 131 S.Ct. 2267, 180 L.Ed.2d 60 (2011). In a series of cases thereafter, we -- like many circuit courts -- drew an increasingly hard line against treating statutes encompassing reckless conduct as violent felonies. See United States v. Holloway, 630 F.3d 252, 261 (1st Cir. 2011); see also United States v. Fish, 758 F.3d 1, 9–10 (1st Cir. 2014) (interpreting 18 U.S.C. § 16(b)). Despite this approach having been marked as not yet finally resolved by the Supreme Court, see Voisine v. United States, —— U.S. ——, 136 S. Ct. 2272, 2279, 195 L.Ed.2d 736 (2016) ("[N]othing in Leocal ... suggests ... that 'use' marks a dividing line between reckless and knowing conduct."), we have since reaffirmed this bright-line rule in evaluating crimes under the force clause, see United States v. Rose, 896 F.3d 104, 109–10 (1st Cir. 2018) (citing Bennett v. United States, 868 F.3d 1 (1st Cir.), opinion withdrawn as moot, 870 F.3d 34, 36 (1st Cir. 2017) (per curiam), reasoning adopted by United States v. Windley, 864 F.3d 36, 37 n.2 (1st Cir. 2017) (per curiam)); Kennedy, 881 F.3d at 19–20.[5]

[5, 6] But murder (including second-degree murder) requires more than ordinary recklessness. The mens rea required for murder at common law was and remains "malice aforethought." 2 Wayne R. LaFave, Substantive Criminal Law § 14.1 (3d ed. 2017). Malice aforethought comes in four flavors: (1) intent to kill, (2) intent to cause serious bodily injury, (3) depraved heart (also referred to as "reckless indifference" or "extreme recklessness"), and (4) intent to commit a felony (the felony-murder rule). Id.; see United States v. Pineda-Doval, 614 F.3d 1019, 1038–40 (9th Cir. 2010); see also Samuel H. Pillsbury, Crimes of Indifference, 49 Rutgers L. Rev. 105, 116–21, 118 n.28 (1996). It is the third category that concerns us in this case.

5. The Supreme Court recently granted, then dismissed, certiorari to settle the question of whether a crime encompassing ordinary recklessness can satisfy the ACCA's force clause. See Walker v. United States, 769 F. App'x 195 (6th Cir. 2019), cert. granted, —— U.S. ——, 140 S.Ct. 519, 205 L.Ed.2d 333, 2019 WL 6042320 (U.S. Nov. 15, 2019) (No. 19-373), and cert. dismissed, —— U.S. ——, 140 S.Ct. 953, 206 L.Ed.2d 118, 2020 WL 411668 (U.S. Jan. 27, 2020) (dismissing due to petitioner's death). But see Solicitor General's Response to Suggestion of Death, id. (Jan. 23, 2020) (recommending that the Court take up the issue in another case). Whatever the ultimate resolution of that issue in the Supreme Court, our decision here will not necessarily be changed. Assuming the Court upholds our holding in Bennett and Windley concerning ordinary recklessness, our analysis here would likely remain unchanged unless the Supreme Court should opine in a manner broad enough to eliminate all forms of recklessness as sufficient. If the Court instead holds that reckless crimes can be violent felonies, then a fortiori crimes requiring heightened recklessness can, too.

[7, 8] Whatever the label, this "depraved heart" type of mental state is consistently distinguished from ordinary recklessness. See generally John C. Duffy, Note, Reality Check: How Practical Circumstances Affect the Interpretation of Depraved Indifference Murder, 57 Duke L.J. 425 (2007); Alan C. Michaels, Note, Defining Unintended Murder, 85 Colum. L. Rev. 786 (1985). For example, the Model Penal Code defines the term "recklessly" in its ordinary sense as follows:

> A person acts recklessly ... when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that ... its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

Model Penal Code § 2.02(2)(c). But for homicide to constitute murder, the defendant must act "recklessly under circumstances manifesting extreme indifference to the value of human life." Id. § 210.2(1)(b). A criminal homicide that satisfies the former, ordinary standard of recklessness but not the latter, heightened standard is classified as "manslaughter." Id. § 210.3(1)(a).

[9] Thus, if a defendant "shoot[s] a gun into a room that [he] knows to be occupied" and one of the occupants is killed, the defendant could be found guilty of murder because he acted not only recklessly, but with reckless indifference to human life. United States v. Begay, 934 F.3d 1033, 1041 (9th Cir. 2019) (quoting Pineda-Doval, 614 F.3d at 1039). If, on the other hand, a defendant recklessly shoots a gun in the woods while hunting and kills another person, the defendant has merely committed manslaughter because the probability that death would result was much lower. See State v. Perfetto, 424 A.2d 1095, 1098 (Me. 1981). Similarly, "the vast majority of vehicular homicides," including "the average drunk driving homicide," are treated only as manslaughter, United States v. Fleming, 739 F.2d 945, 948 (4th Cir. 1984), but when a defendant with a blood alcohol content of .315% drives nearly 100 miles per hour in the oncoming lane of a busy thoroughfare and kills another driver in a collision, a murder conviction can result, see id. at 947–48.

Of course, this distinction between ordinary recklessness and "extreme" recklessness only matters to the extent it undercuts the rationale for reckless conduct not qualifying under the force clause of the ACCA. That rationale trains on the statutory phrase "use ... of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). In Voisine, the Supreme Court held that reckless conduct could entail a "use" of force under 18 U.S.C. § 921(33)(A)(ii) (defining "misdemeanor crime of domestic violence"). 136 S. Ct. at 2278–79. But § 921(33)(A)(ii) requires only the "use ... of physical force," not the "use ... of physical force against the person of another." In holding that reckless conduct did not qualify under the ACCA, we relied on those additional five words, reasoning that the phrase "against the person of another" in the ACCA force clause materially distinguishes Voisine. See Bennett, 868 F.3d at 19. "The injury caused to another by the volitional action in a reckless assault," we reasoned, was not "a result known to the perpetrator to be practically certain to occur." Id. at 18. So "reckless conduct bereft of an intent to employ force against another falls short of the mens rea required under" the ACCA. Id. at 12 (emphasis in original) (quoting Fish, 758 F.3d at 16). Thus, for purposes of the ACCA, the dividing line is somewhere between recklessness and the more culpable mental state of "knowledge," at least

under our precedent. Id. at 2–3; cf. Voisine, 136 S. Ct. at 2279 (remarking on the "dividing line between reckless and knowing conduct"). But we recognized it was a close call, and we ultimately resorted to the rule of lenity to determine that recklessness was not enough. See Bennett, 868 F.3d at 3.

Malice-aforethought-style recklessness falls somewhere between ordinary recklessness and knowledge on the mens rea spectrum. See Duffy, supra, at 429. Per the Model Penal Code commentary, "recklessness that can fairly be assimilated to purpose or knowledge should be treated as murder, [whereas] less extreme recklessness should be punished as manslaughter." Model Penal Code § 210.2(1)(b) cmt. 4 (Am. Law Inst. 1980). So this heightened recklessness is at least as close to knowledge as it is to ordinary recklessness. See United States v. Marrero, 743 F.3d 389, 401 (3d Cir. 2014) (observing that depraved-heart recklessness "is tantamount to an actual desire to injure or kill" (quoting Commonwealth v. Kling, 731 A.2d 145, 148 (Pa. Super. Ct. 1999))); cf. Tison v. Arizona, 481 U.S. 137, 157, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987) ("[R]eckless disregard for human life ... represents a highly culpable mental state ...."). And since we found it a close call that ordinary recklessness did not satisfy the Leocal standard after Voisine, we find less difficulty in saying that heightened recklessness approaching knowledge does satisfy that standard.

This makes sense when we consider the rationale behind these cases, too. In Bennett, the fact that reckless conduct was not "practically certain" to result in injury, and that an identifiable victim might not be ascertained during the conduct, meant that there was no active employment of force "'against' another" in the ordinary sense. 868 F.3d at 18; see Leocal, 543 U.S. at 9, 125 S.Ct. 377 ("'[U]se' requires active employment."). But what separates malice aforethought is the "extreme indifference to the value of human life." Model Penal Code § 210.2(1)(b). So the defendant who shoots a gun into a crowded room has acted with malice aforethought precisely because there is a much higher probability -- a practical certainty -- that injury to another will result. And the defendant certainly must be aware that there are potential victims before he can act with indifference toward them. See United States v. Dixon, 419 F.2d 288, 292–93 (D.C. Cir. 1969) (Leventhal, J., concurring) ("The difference between that recklessness which displays depravity and such extreme and wanton disregard for human life as to constitute 'malice' and that recklessness that amounts only to manslaughter lies in the quality of awareness of the risk."). So the defendant who acts in this manner can more fairly be said to have actively employed force (i.e., "use[d]" force) "against the person of another."

[10, 11] In holding that second-degree murder qualifies as a violent felony under the ACCA even though the offense requires no showing of mens rea beyond malice-aforethought-variety recklessness, we make two additional points. First, in interpreting any statute, we must not lose sight of the common sense that likely informed Congress's understanding of the ACCA's terms. See United States v. Turkette, 452 U.S. 576, 580, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981) ("[A]bsurd results are to be avoided ...."); United States v. D'Amario, 412 F.3d 253, 255 (1st Cir. 2005) (recognizing that we apply "common sense" in interpreting criminal statutes).[6]

6. Indeed, Congress seems to have assumed (sensibly) that courts would treat murder as a "crime of violence," at least before Johnson II was decided. See, e.g., 18 U.S.C. § 3559(f)(1)

Second, "in terms of moral depravity," murder is often said to stand alone among all other crimes. Kennedy v. Louisiana, 554 U.S. 407, 438, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008) (quoting Coker v. Georgia, 433 U.S. 584, 598, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) (plurality opinion)). We therefore decline to follow the majority in the Ninth Circuit's decision in Begay, 934 F.3d at 1038–41 (holding that federal second-degree murder is not a crime of violence for purposes of § 924(c)), and align instead with the Fourth Circuit's decision in In re Irby, 858 F.3d 231, 237 (4th Cir. 2017) (holding that federal second-degree murder is a crime of violence, although not considering the precise argument made here).

2.

Báez-Martínez was convicted of second-degree murder under Puerto Rico law, not under some generic common-law murder formula. So our preceding analysis only matters if Puerto Rico murder -- and Puerto Rico second-degree murder in particular -- fits the general model we have laid out.

[12–15] Murder in Puerto Rico, like in most states, is defined as the "killing of a human being with malice aforethought." Pueblo v. Lucret Quiñones, 11 P.R. Offic. Trans. 904, 927, 929 (1981). Second-degree murder is any murder that is not first-degree murder, where first-degree murder includes any "willful, deliberate, and premeditated killing," plus a few other methods. Id. The Supreme Court of Puerto Rico has stated that "[t]he concept of malice aforethought implies the absence of just cause or excuse in causing death and implies, also, the existence of the intent to kill a fellow human being." Pueblo v. Rivera Alicea, 125 P.R. Dec. 37, 1989 WL 608548 (1989) (English translation) (emphasis in original). For second-degree murder, though, "malice aforethought is enough, without the specific intent to kill." Pueblo v. Rosario, 160 P.R. Dec. 592, 609–10 (2003) (certified translation). Malice aforethought "denotes a state or condition in the actor formed by an inherent deficiency in his or her sense of morality and righteousness as a result of having stopped caring about the respect and safety of human life." Id. at 609. In other words, Puerto Rico recognizes "depraved heart" murder and, like many states, classifies this as second-degree murder in most cases.

[16] That would be the end of the matter, but for one wrinkle that remains to be ironed out. Báez-Martínez was convicted of second-degree murder in 1996.[7] At that time, the Puerto Rico Penal Code defined two general mental states: "intent" and "negligence."[8] P.R. Laws Ann. tit. 33, §§ 3061–3063 (repealed June 18, 2004); see Pueblo v. Castañón Pérez, 14 P.R. Offic. Trans. 688, 693, 114 D.P.R. 532 (1983) (plurality opinion). "Intent" included crimes in which "the result, though unwanted, has been foreseen or could have been foreseen by the person as a natural or probable consequence of his act or omission," P.R. Laws Ann. tit. 33, § 3062, which sounds a lot like the Model Penal Code

(increasing the mandatory minimum for federal crimes of violence against children "if the crime of violence is murder").

7. The murder itself was committed in 1995.

8. In 2014, Puerto Rico updated its penal code to reflect the four Model Penal Code mental states of "purposely," "knowingly," "recklessly," and "negligently." See United States v. Voisine, 778 F.3d 176, 203 n.13 (1st Cir.) (Torruella, J., dissenting), cert. granted in part, —— U.S. ——, 136 S. Ct. 386, 193 L.Ed.2d 309 (2015), and aff'd, —— U.S. ——, 136 S. Ct. 2272, 195 L.Ed.2d 736 (2016).

definition of ordinary "recklessness." And because Puerto Rico law in 1996 defined "malice" to include the commission of an "intentional act," id. § 3022(19), "malice" at least arguably incorporated the definition of "intent," recklessness included. Thus, Báez-Martínez argues, "malice aforethought" in Puerto Rico included ordinary recklessness at the time of his conviction.

There are a few problems with Báez-Martínez's reasoning. For starters, it equates "malice" with "malice aforethought," even though the latter is a term of art specific to the crime of murder. See Wilbur v. Mullaney, 496 F.2d 1303, 1306 (1st Cir. 1974); 2 LaFave, supra, § 14.1; Dannye Holley, Culpability Evaluations in the State Supreme Courts from 1977 to 1999: A "Model" Assessment, 34 Akron L. Rev. 401, 410 n.93 (2001). The only case Báez-Martínez cites discussing the definition of "malice" is Castañón Pérez, which involved the use of that term in the crime of mayhem, not murder. 14 P.R. Offic. Trans. at 692. Also, the plurality in Castañón Pérez stated that mere reckless conduct would fall under the statutory definition of "negligence," not "intent." See id. at 693 ("The new provision introduces the classification of the offense as either intentional or willful; and negligent or culpable, equivalent to reckless negligence."); see also Pueblo v. Rivera Rivera, 23 P.R. Offic. Trans. 641, 123 D.P.R. 739 (1989) ("Puerto Rican [criminal] negligence, with its modalities of recklessness, carelessness, want of skill, inattention, nonobservance of the law or regulations, is equivalent to civil-law [g]uilt." (emphasis added)). Finally, many states have been inconsistent with mens rea terminology, including "recklessness," see Voisine, 136 S. Ct. at 2281, so Puerto Rico is not unique in this regard. This inconsistency does not change the fact that "malice aforethought" is a peculiar kind of recklessness. And since Puerto Rico law in 1996 required proof of malice aforethought for all Puerto Rico murder convictions, see Lucret Quiñones, 11 P.R. Offic. Trans. at 927, 929, we must reject Báez-Martínez's argument that his 1996 conviction for second-degree murder under Puerto Rico law does not count as a violent felony.

[17] As a final salvo, Báez-Martínez asks that we apply the rule of lenity to determine that Puerto Rico murder could have encompassed ordinary recklessness in 1996. We invoke the rule of lenity only if there is some "grievous ambiguity or uncertainty" about how the law should be applied, Muscarello v. United States, 524 U.S. 125, 139, 118 S.Ct. 1911, 141 L.Ed.2d 111 (1998) (quoting Staples v. United States, 511 U.S. 600, 619 n.17, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994)), and we find no such ambiguity in Puerto Rico law requiring malice aforethought.

Moreover, we question whether the rule of lenity could help Báez-Martínez in trying to broaden the reach of the offense of conviction. Our task at this stage of the categorical approach is to discern the elements of state criminal law. See, e.g., Stokeling, 139 S. Ct. at 554–55 (deciphering Florida's robbery statute). If that law were so ambiguous as to warrant application of lenity, lenity might favor the narrower rather than the broader reading of the state law. See United States v. Santos, 553 U.S. 507, 514, 128 S.Ct. 2020, 170 L.Ed.2d 912 (2008) (plurality opinion) ("The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them."). Here, for example, if it were entirely uncertain whether a person could be convicted of second-degree murder in Puerto Rico only on a showing of ordinary recklessness, lenity would ordinarily favor a negative answer. The rule of lenity is a tool of statutory interpretation, see Rule of Lenity, Black's Law Dictionary (11th ed. 2019) ("The judicial doctrine

holding that a court, in construing an ambiguous criminal statute that sets out multiple or inconsistent punishments, should resolve the ambiguity in favor of the more lenient punishment."), so lenity would arguably favor an ACCA defendant only when the uncertainty resides in the ACCA itself, see, e.g., Bennett, 868 F.3d at 3; see also Leocal, 543 U.S. at 11 n.8, 125 S.Ct. 377 (uncertainty in § 16). In any event, since we find no grievous ambiguity in the Puerto Rico law at issue, lenity can play no role here, no matter what its role might otherwise be.

B. Attempted Murder

Báez-Martínez has two prior convictions for attempted murder. The question whether Congress intended attempted murder to be a violent felony has an easy answer: of course it did. And the ACCA as enacted contained a residual clause that easily encompassed attempted murder. See James v. United States, 550 U.S. 192, 208, 127 S.Ct. 1586, 167 L.Ed.2d 532 (2007) (using attempted murder as an obvious example of a crime that fell within the residual clause), overruled by Johnson II, 135 S. Ct. at 2563. The residual clause, however, suffered from being too vague at its margins, and in Johnson II, the Supreme Court struck the clause as void for vagueness. 135 S. Ct. at 2563. Now courts try to see if crimes that were likely well encompassed by that clause might find refuge in the force clause. So the precise issue before us is not that easy-to-answer question (Did Congress intend to include attempted murder as a violent felony under the ACCA?), but the more difficult, workaround question (Does attempted murder qualify under the force clause?).

[18–20] The Supreme Court first spelled out the standard for "physical force" in Johnson I, 559 U.S. 133, 130 S.Ct. 1265. "[P]hysical force," the Court tells us, means "violent force" or "a substantial degree of force" that is "capable of causing physical pain or injury to another person." Id. at 140, 130 S.Ct. 1265 (emphasis in original). "[M]ere[ ]touching" as an element of a crime is insufficient. See id. at 141, 130 S.Ct. 1265. The force must be "exerted by and through concrete bodies." Id. at 138, 130 S.Ct. 1265. "Intellectual force or emotional force" does not count. Id.

[21, 22] We apply this standard to attempted murder under Puerto Rico law. As noted, murder is "the killing of a human being with malice aforethought." Lucret Quiñones, 11 P.R. Offic. Trans. at 929. Attempted murder requires a specific intent to kill. Pueblo v. Bonilla Ortiz, 23 P.R. Offic. Trans. 393, 123 D.P.R. 434 (1989). "[A]ttempted murder occurs when a person commits acts or incurs omissions unequivocally directed to cause the death of a human being with malice aforethought." Id.[9] This is true of attempted murder (and murder) in most states, so Puerto Rico attempted murder fits the general common-law model in this regard. See 2 LaFave, supra, § 14.3 ("[M]urder may be committed by an omission to act, in violation of a duty to act, when accompanied by an intent to kill . . . ."). See generally Model Penal Code § 2.01 (describing circumstances under which an omission can form a basis for criminal liability).

[23] Báez-Martínez's argument builds on the fact that murder, and thus attempted murder, can be committed "when a person . . . incurs omissions unequivocally directed to cause the death of a human

9. The government has not argued that attempted murder is "divisible" along these grounds (i.e., omission versus act), so we stick with the basic "categorical approach" and not the familiar "modified categorical approach." See Rose, 896 F.3d at 107.

being with malice aforethought." He argues that an omission (i.e., doing nothing) cannot be considered "violent force" "exerted by and through concrete bodies" under Johnson I. Therefore there is no "physical force" and thus the force clause does not apply. On a blank slate, we might well agree. When a child dies from not being fed, the death is not -- in nonlegal terms -- a result of "force." Nor is it the result of "forceful physical properties as a matter of organic chemistry" as where a defendant "sprinkles poison in a victim's drink." United States v. Castleman, 572 U.S. 157, 171, 134 S.Ct. 1405, 188 L.Ed.2d 426 (2014) (internal quotation marks omitted). The human body is a highly organized organic system that requires input (energy in the form of food) to sustain itself. Without that input, the body naturally tends toward a state of disorder and eventually death as a result of entropy. See generally Enrico Fermi, Thermodynamics (1936). "Force" has nothing to do with it.

For this reason, several courts -- including our own -- have at least suggested that crimes that can be completed by omission fall outside the scope of the force clause. See United States v. Teague, 469 F.3d 205, 208 (1st Cir. 2006) (Texas child endangerment); see also United States v. Mayo, 901 F.3d 218, 230 (3d Cir. 2018) (Pennsylvania aggravated assault); United States v. Resendiz-Moreno, 705 F.3d 203, 205 (5th Cir. 2013) (Georgia first-degree child neglect), overruled by United States v. Reyes-Contreras, 910 F.3d 169, 187 (5th Cir. 2018); cf. Chambers v. United States, 555 U.S. 122, 127–28, 129 S.Ct. 687, 172 L.Ed.2d 484 (2009) (holding that a "failure to report" crime is not a violent felony because "the crime amounts to a form of inaction"); United States v. Middleton, 883 F.3d 485, 489–90 (4th Cir. 2018) (holding that South Carolina involuntary manslaughter is not a violent felony because it can be committed by providing alcohol to minors). But see United States v. Jennings, 860 F.3d 450, 459–60 (7th Cir. 2017) ("[W]hy should it matter that the mechanism of harm is negative (. . . withholding an EpiPen® in the midst of a severe allergic reaction) or positive (swinging a fist or administering a poison)?"). In short, common sense and the laws of physics support Báez-Martínez's position.

[24] But while nature follows the laws of physics, circuit courts must follow the law as announced by the Supreme Court. See, e.g., Parker v. Matthews, 567 U.S. 37, 48–49, 132 S.Ct. 2148, 183 L.Ed.2d 32 (2012) (per curiam). And in Castleman, the Supreme Court declared: "[T]he knowing or intentional causation of bodily injury necessarily involves the use of physical force. . . . [A] 'bodily injury' must result from 'physical force.' " 572 U.S. at 169–70, 134 S.Ct. 1405; see also id. at 175, 134 S.Ct. 1405 (Scalia, J., concurring in part and concurring in the judgment) (" '[I]ntentionally or knowingly caus[ing] bodily injury,' categorically involves the use of 'force capable of causing pain or injury to another person' . . . ." (second alteration in original) (citation omitted) (quoting id. and Johnson I, 559 U.S. at 140, 130 S.Ct. 1265)).

Castleman involved the "misdemeanor crime of domestic violence" standard under § 921(a)(33)(A). The Court decided for those purposes that "offensive touching" would be sufficient for "physical force" even though it would not satisfy Johnson I's "violent force" standard for the ACCA. Id. at 162–63, 134 S.Ct. 1405 (majority opinion). But see id. at 175, 134 S.Ct. 1405 (Scalia, J., concurring in part and concurring in the judgment) (believing the standards should be the same). The Court thus reserved whether bodily injury, such as a cut, would necessarily entail that higher

level of "violent" force. Id. at 167, 134 S.Ct. 1405 (majority opinion) ("Whether or not the causation of bodily injury necessarily entails violent force [is] a question we do not reach."). We, too, have since avoided answering that question. See Lassend v. United States, 898 F.3d 115, 126–27 (1st Cir. 2018); Whyte v. Lynch, 815 F.3d 92, 92–93 (1st Cir. 2016) (per curiam). And we need not answer it in full today, because this case does not involve a minor injury such as a cut or a bruise.

But if all bodily injuries necessarily entail some force, as Castleman declares, then it seems to us that a serious bodily injury must necessarily entail violent force under Castleman's reasoning of "injury, ergo force." "Violent" force, after all, is simply physical force distinguished by the degree of harm sought to be caused. See Violence, Black's Law Dictionary, supra ("The use of physical force . . . esp., physical force unlawfully exercised with the intent to harm."); Violence, Merriam–Webster's Collegiate Dictionary (11th ed. 2012) ("[E]xertion of physical force so as to injure or abuse . . . ."); see also Offense, Black's Law Dictionary, supra (defining "violent offense" as a "crime characterized by extreme physical force, such as murder"); cf. Johnson I, 559 U.S. at 140–41, 130 S.Ct. 1265 (citing various dictionary definitions of the word "violent"). And since murder always results in death (and death is the ultimate injury), the violent-force requirement is satisfied.

Attempted murder, of course, is separated from murder in that the victim does not die. We do not think this makes a difference. The force clause covers both the "use" and "attempted use" of force. So, if murder requires violent force because death results, then attempted murder does, too, because the defendant attempted to reach that result. Cf. United States v. García-Ortiz, 904 F.3d 102, 107–08 (1st Cir. 2018) ("[P]lacing someone in fear of bodily injury . . . involve[s] the use of physical force, if 'force' encapsulates the concept of causing or threatening to cause bodily injury.").

[25] We have considered whether we might nevertheless stay within our circuit lane and still accept Báez-Martínez's argument by distinguishing Castleman. The Supreme Court did not expressly consider the problem of omissions -- like starving a child -- when it decided Castleman. It instead considered harm that "occurs indirectly" like in the poison example. Castleman, 572 U.S. at 171, 134 S.Ct. 1405; see also United States v. Edwards, 857 F.3d 420, 427 (1st Cir. 2017). But its categorical pronouncement that "[i]t is impossible to cause bodily injury without applying force in the common-law sense" plainly encompasses any bodily injury, deeming the injury to be the fingerprint of force. 572 U.S. at 170, 134 S.Ct. 1405. And when the Supreme Court is plain on a point, even in dicta, we are generally expected to follow its lead. See LaPierre v. City of Lawrence, 819 F.3d 558, 563–64 (1st Cir. 2016) ("[W]e 'are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings.' " (quoting Cuevas v. United States, 778 F.3d 267, 272–73 (1st Cir. 2015))).

We also note that two other circuits have recently marched to the Castleman drum on this issue, holding that attempted murder is a crime of violence under analogous definitions. See United States v. Peeples, 879 F.3d 282, 286–87 (8th Cir.) (holding that attempted murder is a crime of violence under the force clause of U.S.S.G. § 4B1.2(a)), cert. denied, —— U.S. ——, 138 S. Ct. 2640, 201 L.Ed.2d 1042 (2018); see also United States v. Studhorse, 883 F.3d 1198, 1204–06 (9th Cir.) (holding that attempted murder is a crime of violence under the force clause of § 16(a), although

not considering the murder-by-omission argument), cert. denied, —— U.S. ——, 139 S. Ct. 127, 202 L.Ed.2d 78 (2018). We are bound to agree. Therefore, Báez-Martínez's two convictions for attempted murder must also be counted as violent felonies.

III.

One final issue remains. Báez-Martínez argued in the district court, by way of a pro se filing, that the government waived ACCA sentencing by failing to designate which of his prior convictions constituted predicate felonies under the ACCA at his initial sentencing. On appeal, Báez-Martínez renews this argument, again in a pro se supplemental brief filed after his opening brief, claiming that due process prohibits the government from redesignating predicate convictions after his successful appeal to the Supreme Court.

In support of his argument, Báez-Martínez observes that other courts have held that defendants have a due process right to be notified that a prior conviction is being used as an ACCA predicate. See United States v. Moore, 208 F.3d 411, 414 (2d Cir. 2000); United States v. O'Neal, 180 F.3d 115, 125–26 (4th Cir. 1999). Those same cases, however, hold that this notice requirement is satisfied so long as the PSR lists the conviction. See Moore, 208 F.3d at 414; O'Neal, 180 F.3d at 125–26; see also United States v. Tracy, 36 F.3d 187, 198 (1st Cir. 1994) (holding that predicate felonies need not be listed in an indictment). Here, Báez-Martínez's PSR listed all the relied-upon convictions, so these cases do not help him much.

Báez-Martínez next observes that other courts have held that, in instances where a PSR specifically designates some prior convictions as ACCA predicates but not others, the government is precluded from substituting those other offenses on remand after a defendant's successful appeal. See United States v. Hodge, 902 F.3d 420, 430 (4th Cir. 2018); cf. Bryant v. Warden, FCC Coleman–Medium, 738 F.3d 1253, 1259 (11th Cir. 2013), overruled on other grounds by McCarthan v. Dir. of Goodwill Indus.–Suncoast, Inc., 851 F.3d 1076 (11th Cir. 2017). Again, these cases are inapposite. The rule in these cases is based on the doctrine of expressio unius est exclusio alterius; the defendant's "notice" as to the unlisted convictions drops out from the listing of other convictions. See Hodge, 902 F.3d at 427–28 (citing NLRB v. Sw. Gen., Inc., —— U.S. ——, 137 S. Ct. 929, 940, 197 L.Ed.2d 263 (2017)); cf. United States v. Wallace, 573 F.3d 82, 88 (1st Cir. 2009) (discussing the "mandate rule"). Here, the PSR did not designate any particular prior conviction as an ACCA predicate; all convictions listed in the PSR were treated the same. As such, expressio unius does not apply because Báez-Martínez was on equal notice as to each of his convictions that they might be considered a predicate felony.

[26] Báez-Martínez asks us to do what no other court has done: hold that the government must specifically and exhaustively designate all ACCA predicates from the outset, or else forfeit ACCA sentencing. We decline the invitation. Báez-Martínez was on notice that the prior convictions listed in his PSR might be considered for ACCA sentencing, and the government has maintained at all stages of this litigation that, at a minimum, his convictions for second-degree murder, attempted murder, and carjacking were for violent felonies.[10]

10. Báez-Martínez also argues that, by not addressing his argument at all in its responsive brief on appeal, the government has waived this point and that vacatur of his sentence is therefore required. We disagree. As a general matter, appellees are not held to the same

IV.

For the foregoing reasons, we affirm Baéz-Martínez's ACCA sentence.

UNITED STATES, EX REL. James BANIGAN and Richard Templin; State of Florida, State of Illinois, State of Indiana, State of Louisiana, Commonwealth of Massachusetts, State of Michigan, State of New Mexico, State of New York, State of Tennessee, State of Texas, Commonwealth of Virginia, State of North Carolina, ex rel. James Banigan and Richard Templin, Plaintiffs, Appellants,

State of California, State of Colorado, State of Connecticut, State of Delaware, District of Columbia, State of Georgia, State of Hawaii, State of Maryland, State of Minnesota, State of Montana, State of Nevada, State of New Hampshire, State of New Jersey, State of Oklahoma, State of Rhode Island, State of Wisconsin, City of Chicago, ex rel. James Banigan and Richard Templin, Plaintiffs,

v.

PHARMERICA, INC., Defendant, Appellee,

Omnicare, Inc.; Organon Pharmaceuticals USA, Inc.; Organon USA, Inc.; Schering Plough Corp.; Akzo Nobel NV.; Merck & Co., Inc.; Organon Biosciences N.V.; Organon International, Inc., Defendants.

No. 18-1487

United States Court of Appeals, First Circuit.

February 19, 2020

Background: Relators, two drug company employees, filed qui tam action under the False Claims Act (FCA) and various state laws against pharmacy company and its subsidiaries, alleging that pharmacy company had defrauded the government by participating in Medicaid scheme that involved its receipt of kickbacks for switching patients' prescriptions to drug company's antidepressant medication and then filing for Medicaid reimbursement for the kickback-tainted medications. The United States District Court for the District of Massachusetts, Rya W. Zobel, Senior District Judge, 883 F.Supp.2d 277, dismissed the action for lack of subject matter jurisdiction due to FCA's public disclosure bar. Relators sought reconsideration. The district court, 2012 WL 3929822 and 2018 WL 2012684, denied relators' motion for reconsideration and granted pharmacy company's motion to dismiss remaining state law claims. Relators appealed.

Holdings: The Court of Appeals, Lipez, Senior Circuit Judge, held that:

(1) FCA's public disclosure bar applied, but

waiver standards as appellants. See Ms. S. v. Reg'l School Unit 72, 916 F.3d 41, 48–49 (1st Cir. 2019). Given the unusual briefing posture of this issue and the relative weakness of Báez-Martínez's argument, we are unwilling to reverse the district court in this instance merely because the government failed to proffer the obvious point to be made in defense of the judgment.

UNITED STATES of America, Plaintiff,

v.

Jorge BAEZ–MARTINEZ, Defendant.

CRIMINAL NO. 12–281 (JAG)

United States District Court,
D. Puerto Rico.

Signed 06/29/2017

Background: Defendant was convicted in the United States District Court for the District of Puerto Rico, Jay A. Garcia-Gregory, J., of possessing a firearm as a convicted felon and was sentenced to a 15-year mandatory minimum sentence pursuant to the Armed Career Criminal Act (ACCA). The First Circuit Court of Appeals, Selya, Circuit Judge, 786 F.3d 121, affirmed the conviction. The United States Supreme Court, 136 S.Ct. 545, then granted defendant's petition for writ of certiorari and vacated the First Circuit's judgment. After the case was remanded for resentencing, defendant objected to pre-sentence report, arguing that he should be resentenced without any ACCA enhancement.

Holdings: The District Court, Garcia-Gregory, J., held that:

(1) Puerto Rico's second degree murder statute required the "use of physical force" within meaning of ACCA;

(2) "malice aforethought" requirement of second degree murder statute satisfied mens rea requirement of ACCA's force clause;

(3) fact that second degree murder conviction could rest on accomplice liability theory was irrelevant for ACCA purposes; and

(4) defendant's attempted murder conviction under Puerto Rico law qualified as a "violent felony" under the ACCA.

Ordered accordingly.

1. Sentencing and Punishment ⚿1250

To determine whether a prior crime is a predicate offense under the Armed Career Criminal Act (ACCA), courts use the "categorical approach," in which courts look only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions. 18 U.S.C.A. § 924(e)(2)(B).

2. Sentencing and Punishment ⚿1262

If all the conduct covered by a statute categorically requires violent force capable of causing physical injury, then that statute is a predicate offense under the Armed Career Criminal Act (ACCA). 18 U.S.C.A. § 924(e)(2)(B).

3. Sentencing and Punishment ⚿1250

In determining the minimum conduct covered by a statute, courts reviewing whether a conviction constitutes a predicate offense under the Armed Career Criminal Act (ACCA) should not rely solely on their legal imagination; there must be a realistic probability, not a theoretical possibility, that the State would apply its statute in the manner posited by the reviewing court. 18 U.S.C.A. § 924(e)(2)(B).

4. Sentencing and Punishment ⚿1262

If a statute does not qualify as a violent felony under the Armed Career Criminal Act (ACCA) pursuant to the categorical approach, the court must then determine if the statute is divisible. 18 U.S.C.A. § 924(e)(2)(B).

5. Sentencing and Punishment ⚿1285

Puerto Rico's second degree murder statute, which defined second degree murder as any unlawful killing with malice

aforethought that was not first degree murder, categorically required the 'use of physical force' within meaning of the Armed Career Criminal Act's (ACCA) force clause; statute's unlawful killing element necessarily required physical force even though such force could be employed indirectly, as it was impossible to cause bodily injury without using force capable of producing that result. 18 U.S.C.A. § 924(e)(2)(B); 33 L.P.R.A. §§ 4001-4002 (2004).

6. Sentencing and Punishment ⚿1262

In the Armed Career Criminal Act (ACCA) context, "physical force" means violent force, that is, force capable of causing physical pain or injury to another person. 18 U.S.C.A. § 924(e)(2)(B).

See publication Words and Phrases for other judicial constructions and definitions.

7. Sentencing and Punishment ⚿1285

The "malice aforethought" requirement of Puerto Rico's second degree murder statute was sufficient to satisfy the mens rea requirement of the Armed Career Criminal Act's (ACCA) force clause; even if a reckless mens rea was insufficient to satisfy the force clause, criminal recklessness under Puerto Rico law was characterized by an absence of malice, and "malice aforethought" required an element of moral deficiency that recklessness did not require. 18 U.S.C.A. § 924(e)(2)(B); 33 L.P.R.A. §§ 4001-4002 (2004).

8. Sentencing and Punishment ⚿1285

Defendant's conviction for second degree murder under Puerto Rico law qualified as a "violent felony" under the Armed Career Criminal Act's (ACCA) force clause, even though a second degree murder conviction could rest on a theory of accomplice liability; given that aiding and abetting the commission of a crime of violence was a crime of violence itself, whether one could commit an offense by aiding and abetting or any other theory of accomplice liability was irrelevant to determining whether an offense qualified as a "violent felony." 18 U.S.C.A. § 924(e)(2)(B); 33 L.P.R.A. §§ 4001-4002 (2004).

9. Sentencing and Punishment ⚿1285

Defendant's conviction for attempted murder under Puerto Rico law qualified as a "violent felony" under the Armed Career Criminal Act's (ACCA) force clause; although attempted murder did not require the actual use of physical force, it necessarily required the attempted use of physical force, as any act or omission unequivocally directed to cause the death of a human being done with the specific intent to kill categorically involved the attempted use of force capable of causing physical pain or injury to another person. 18 U.S.C.A. § 924(e)(2)(B); 33 L.P.R.A. § 4001 (2004).

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Max J. Perez–Bouret, United States Attorney's Office, District of Puerto Rico, Torre Chardon, Suite 1201, 350 Chardon Ave., San Juan, PR 00918, Susan Zetta Jorgensen, United States Attorney's Office, District of Puerto Rico, Torre Chardon, Suite 1201, 350 Chardon Ave., San Juan, PR 00918, for Defendant.

OPINION AND ORDER

GARCIA–GREGORY, United States District Judge

This case asks a seemingly easy question: are murder and attempted murder

violent felonies that require the "use, attempted use, or threatened use of physical force." However, the legal analysis of this question turns out to be more complicated and convoluted than common sense would dictate. Nonetheless, this tortuous analysis leads to the same conclusion that general principles of logic and common sense would reach: murder and attempted murder are violent felonies. Thus, Defendant must be re-sentenced to at the very least a fifteen-year mandatory minimum.

BACKGROUND

Defendant Jorge Baez–Martinez ("Defendant") was convicted of possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). Docket No. 58. The pre-sentence report investigation stated that Defendant was subject to the enhanced penalty of the Armed Career Criminal Act (the "ACCA"), 18 U.S.C. § 924(e)(1), based on his criminal history. Docket No. 78. Accordingly, Defendant was sentenced to the fifteen-year mandatory minimum. Docket No. 80.

Defendant appealed his conviction without raising any issues as to his sentencing, and the First Circuit affirmed his conviction on May 13, 2015. Docket No. 92. However, shortly thereafter, the Supreme Court declared the residual clause of the ACCA unconstitutionally vague. *See Johnson v. United States*, —— U.S. ——, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015) ("*Johnson II*"). Thus, Defendant petitioned for a Writ of Certiorari, and the Supreme Court vacated the First Circuit's judgment and remanded the case to the First Circuit for further consideration in light of *Johnson II*. Docket No. 94. The First Circuit, in turn, remanded the case to this Court for re-sentencing. *Id.*

Defendant has a lengthy criminal history, which includes convictions for second degree murder, attempted murder, robbery, and kidnapping, all under Puerto Rico law. Docket No. 68. Defendant filed a memorandum in support of his objections to the pre-sentence report, arguing that he should be re-sentenced without the ACCA enhancement, because these crimes do not constitute ACCA predicate offenses under the statute's force clause. Docket No. 104–1.[1] The Government responded, arguing that these crimes are ACCA predicates. Docket No. 123. Defendant replied. Docket No. 128.

ANALYSIS

The issue here is whether Defendant is subject to a fifteen-year mandatory minimum sentence under the ACCA. This question turns on whether Defendant has been convicted of three "violent felonies" under the ACCA's force clause. The Court holds that he has.

The Court begins by providing the relevant framework to determine if a crime constitutes a "violent felony" under the ACCA's force clause. In applying this framework, the Court then concludes that, under Puerto Rico law, second degree murder and attempted murder do constitute "violent felonies." Since Defendant has two convictions for attempted murder and one for second degree murder, Docket No. 68, the Court finds that he has three convictions for ACCA predicate offenses.

1. Defendant filed a new set of objections to the pre-sentence report, with an adjoining memorandum, on March 9, 2017, Docket Nos. 134, 135, to "replace and/or eliminate citations to cases that have not been officially translated by the Puerto Rico Supreme Court," Docket No. 135. However, as Defendant states, the more recent memorandum "contains no new substantive arguments or objections." *Id.* Thus, the Court uses Defendant's first memorandum to characterize his arguments, since the Government responded to this one.

Accordingly, Defendant must be re-sentenced to the mandatory minimum and the Court need not consider if Defendant's other convictions constitute ACCA predicates.

I. The ACCA Violent Felony Framework

The ACCA provides a fifteen-year mandatory minimum sentence for criminal defendants who have three previous convictions "for a violent felony or a serious drug offense." 18 U.S.C. § 924(e)(1). The ACCA defines a "violent felony" as any crime punishable by imprisonment of over one year, that (1) "has as an element the use, attempted use, or threatened use of physical force against the person of another"—the force clause—(2) is "burglary, arson, or extortion, involves use of explosives"—the enumerated offenses clause—or (3) "otherwise involves conduct that presents a serious potential risk of physical injury to another"—the residual clause. *Id.* at § 924(e)(2)(B). The residual clause was declared unconstitutionally vague by the Supreme Court in *Johnson II*, 135 S.Ct. at 2563, and this case does not involve any enumerated offense. Thus, this case only deals with the force clause.

[1–3] To determine whether a prior crime is an ACCA predicate offense, courts use the "categorical approach," in which courts "look[ ] only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." *Taylor v. United States*, 495 U.S. 575, 600, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990). In applying the force clause, the Supreme Court has defined physical force as "violent force—that is, force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010) ("*Johnson I*").[2] Thus, if all the conduct covered by a statute categorically requires violent force capable of causing physical injury, then that statute is an ACCA predicate offense. *See United States v. Faust*, 853 F.3d 39, 51 (1st Cir. 2017). In determining the minimum conduct covered by a statute, courts should not rely solely on "their 'legal imagination.' " *Whyte v. Lynch*, 807 F.3d 463, 467 (1st Cir. 2015), *reh'g denied*, 815 F.3d 92 (1st Cir. 2016) (quoting *Gonzales v. Duenas–Alvarez*, 549 U.S. 183, 193, 127 S.Ct. 815, 166 L.Ed.2d 683 (2007)). "There must be 'a realistic probability, not a theoretical possibility, that the State would apply its statute' in the manner posited by the reviewing court.' " *Id.* (quoting *Gonzales*, 549 U.S. at 193, 127 S.Ct. 815).

[4] If a statute does not qualify as a violent felony under the categorical approach, then a court must determine if it is divisible. *Descamps v. United States*, 570 U.S. 254, 133 S.Ct. 2276, 2281, 186 L.Ed.2d 438 (2013). However, since the Court concludes that the relevant crimes here are categorically ACCA predicate offenses, the Court need not engage in this analysis.

II. Puerto Rico Second Degree Murder

Defendant has a prior conviction for second degree murder under Puerto Rico law.

2. The force clause at issue here, 18 U.S.C. § 924(e)(2)(B)(i), is identical or substantially similar to the force clauses found in 18 U.S.C. § 16, 18 U.S.C. § 924(c)(3), and the career offender guidelines; and the First Circuit has interpreted all of these statutes to have the same definition of "physical force." *See Whyte v. Lynch*, 807 F.3d 463, 468 (1st Cir. 2015), *reh'g denied*, 815 F.3d 92 (1st Cir. 2016) (analyzing 18 U.S.C. § 16); *United States v. Taylor*, 848 F.3d 476, 491 (1st Cir. 2017) (analyzing 18 U.S.C. § 924(c)(3)); *United States v. Fields*, 823 F.3d 20, 35 (1st Cir. 2016) (analyzing the career offender guidelines). Thus, the Court will treat any decision interpreting the force clause in any of these statutes the same as if it directly interpreted the ACCA's force clause.

Docket No. 68. He argues that this conviction does not constitute a "violent felony" under the ACCA's force clause because second degree murder: (1) can be committed in "non-violent" ways, such as by poison, guile, deception, or omission, *id.* at 7–9; (2) can be committed with a reckless *mens rea*, *id.* at 5–7; and (3) can rest on a theory of accomplice liability, *id.* at 7–8. The Court disagrees.

The Court begins by outlining why recent caselaw, particularly the case of *United States v. Castleman*, —— U.S. ——, 134 S.Ct. 1405, 188 L.Ed.2d 426 (2014), dictates that second degree murder categorically requires the "use of physical force." Then the Court explains why none of Defendant's arguments warrant a contrary conclusion.

A. The "Use of Physical Force"

[5] The Puerto Rico second degree murder statute categorically requires the "use of physical force" under the ACCA. At the time Defendant was convicted, the Puerto Rico Penal Code defined murder as "the killing of a human being with malice aforethought."[3] P.R. Laws Ann. tit. 33, § 4001 (repealed June 18, 2004); *see Pueblo v. Rivera Alicea*, 125 D.P.R. 37, 44, 1989 WL 608548, slip official translation at 4 (P.R. Dec. 19, 1989)[4]. The Penal Code then specifically enumerated what constituted first degree murder before stating "[a]ll other murders shall be deemed as second degree murders." P.R. Laws Ann. tit. 33, § 4002 (repealed June 18, 2004).[5] As such, second degree murder is any unlawful killing with malice aforethought that is not first degree murder.

[6] The conduct element of second degree murder—the unlawful killing of a human being—necessarily requires physical force. In the ACCA context, " 'physical force' means violent force—that is, force capable of causing physical pain or injury to another person." *Johnson I*, 559 U.S. at 140, 130 S.Ct. 1265. To kill someone means "[t]o end life; to cause physical death." Black's Law Dictionary 1002 (10th ed. 2014). It can hardly be denied that an unnatural death is a type of physical injury—in fact it is the ultimate physical injury. *Cf. Umana v. United States*, No. 08 CR 134, 229 F.Supp.3d 388, 393, 2017 WL 373458, at *4 (W.D.N.C. Jan. 25, 2017) (" 'an unlawful killing'—necessarily requires physical injury to the body of another person, even if the injury is no more

3. Before 1974, the statute described murder as an "unlawful killing." *Pueblo v. Ortiz Gonzalez*, 11 P.R. Offic. Trans. 503, 506–07, 111 D.P.R. 408 (P.R. 1981). However, the Puerto Rico Supreme Court made clear that the removal of the term "unlawful" had no juridical consequence, as any killing in murder is unlawful. *Id.* Thus, for purposes of clarity, this Court will interpret the statute as covering only *unlawful* killings.

4. The electronic version of this case's official translation has no pincites. Therefore, the Court will cite to the slip official translation when citing a specific page.

5. The statute specifically stated:

> Murder in the first degree shall be:
> (a) Any murder perpetrated by means of poison, lying in wait or torture, or any willful, deliberate and premeditated killing, or which is committed while perpetrating or attempting to perpetrate aggravated arson, rape, sodomy, robbery, carjacking, burglary, kidnapping, mayhem, mutilation or escape.
> (b) Causing the death of a member of the Police, a member of the Municipal Guard, a Penal Guard, or a member of the National Guard while substituting or supporting the Police, when any of these persons is acting in the performance of their duties and their death is the result of the commission or attempted commission of a felony or the concealment thereof.
>
> All other murders shall be deemed as second degree murders.

P.R. Laws Ann. tit. 33, § 4002 (repealed June 18, 2004).

than cessation of that person's heart."). Thus, if a person causes the unlawful death of another person, they have caused physical injury, and causing physical injury "categorically involves the use of force capable of causing physical pain or injury to another person." *See United States v. Castleman*, —— U.S. ——, 134 S.Ct. 1405, 1417, 188 L.Ed.2d 426 (2014) (Scalia, J., concurring) (internal citations and quotation marks omitted). Therefore, second degree murder categorically requires the use of physical force. *See also United States v. Checora*, 155 F.Supp.3d 1192, 1197 (D. Utah 2015) ("It is hard to imagine conduct that can cause another to die that does not involve physical force against the body of the person killed.").

Defendant argues otherwise, primarily positioning that second degree murder can be committed in "nonviolent" ways, such as by poison, guile, deception, or deliberate omission; thus, Defendant contends that second degree murder does not categorically require the use of physical force. Docket No. 104–1 at 7. But this argument is contradicted by the Supreme Court's recent interpretation of what constitutes the "use" of physical force. *Castleman*, 134 S.Ct. at 1405.[6]

In *Castleman*, the Court held that a defendant convicted of intentionally or knowingly causing bodily injury to the mother of his child had been convicted of a "misdemeanor crime of domestic violence" under 18 U.S.C. § 922(g)(9). *Id.* at 1408. Similar to the force clause of an ACCA "violent felony," a "misdemeanor crime of domestic violence" is defined as "an offense that . . . has, as an element, *the use or attempted use of physical force*." *Id.* § 921(a)(33)(A)(ii) (emphasis added). In arriving at its holding, the *Castleman* Court examined the meaning of the "*use* of physical force," as well as the relationship between "injury" and "physical force." *Castleman*, 134 S.Ct. at 1414–15 (emphasis added).

The Court began by stating that "the knowing or intentional causation of bodily injury necessarily involves the use of physical force." *Id.* at 1414. The Court specifically rejected the argument, adopted by the district court, that one could cause bodily injury without the "use of physical force," by, for example, "deceiving [the victim] into drinking a poisoned beverage, without making contact of any kind." *Id.* at 1414–15 (brackets in original) (internal quotation marks omitted). The Court clarified that " 'physical force' is simply 'force exerted by and through concrete bodies,' as opposed to 'intellectual force or emotional force.' " *Id.* at 1414 (quoting *Johnson I*, 559 U.S. at 138, 130 S.Ct. 1265). Then, the Court made clear that the "use of physical force" can occur indirectly, as well as directly:

> [T]he knowing or intentional application of force is a 'use' of force . . . . The 'use of force' in Castleman's example is not the act of sprinkling the poison; *it is the act of employing poison knowingly as a device to cause physical harm. That the*

6. In addition, Defendant puts forth no concrete example or realistic possibility of a second degree murder conviction based on guile, deception, or omission. This Court should not rely solely on its " 'legal imagination' in positing what minimum conduct could hypothetically support a conviction under [a statute.]" *See Whyte*, 807 F.3d at 467 (quoting *Gonzales*, 549 U.S. at 193, 127 S.Ct. 815). A defendant must "at least point to his own case or other cases in which the state courts in fact did apply the statute in the [ ] manner for which he argues." *Gonzales*, 549 U.S. at 193, 127 S.Ct. 815. Defendant makes no such showing here. Thus, in the alternative to the analysis below, the Court finds that Defendant has not sufficiently shown that a second degree murder conviction may rest on guile, deception, or omission.

> *harm occurs indirectly, rather than directly (as with a kick or punch), does not matter.* Under Castleman's logic, after all, one could say that pulling the trigger on a gun is not a 'use of force' because it is the bullet, not the trigger, that actually strikes the victim.

Id. at 1415 (internal citations omitted) (emphasis added).

Castleman's reasoning makes clear that second degree murder requires the "use of physical force." Similar to how the *Castleman* Court found that one cannot cause bodily injury without the "use of physical force," *id.* at 1414, one cannot cause an involuntary death—a severe type of bodily injury—without the "use of physical force." *See Checora*, 155 F.Supp.3d at 1198 ("Similarly, this court concludes that it is impossible to cause death without applying physical force as explained in *Castleman*."). Regardless of the means used, someone who murders has caused the ultimate physical harm. As *Castleman* elucidates, it is irrelevant whether that harm occurs directly or indirectly, as the "use of force" occurs anytime someone knowingly employs a device to cause physical harm. 134 S.Ct. at 1415. Even if a defendant commits murder without the direct use of force, such as by poison, guile, deception, or deliberate omission, a defendant would still necessarily use "a device to cause physical harm," i.e. death, just as Castleman "employ[ed] poison knowingly as a device to cause physical harm." *Id.*; *see United States v. Waters*, 823 F.3d 1062, 1066 (7th Cir.) ("Likewise, withholding medicine causes physical harm, albeit indirectly, and thus qualifies as the use of force under *Castleman*."), *cert. denied*, —— U.S. ——, 137 S.Ct. 569, 196 L.Ed.2d 448 (2016). Thus, second degree murder categorically requires the "use, attempted use, or threatened use of physical force."

Defendant argues that *Castleman* is not determinative here because the Supreme Court explicitly limited its holding to the context of a "misdemeanor crime of domestic violence" under 18 U.S.C. § 922(g). Docket No. 128 at 11. Defendant points out that *Castleman* defined physical force more broadly in the context of § 922(g) than how it is defined in the ACCA context. *Id.* at 11–12. Specifically, he argues that the physical force in § 922(g) includes the common-law definition of force, which can be satisfied by a mere offensive touching, unlike the ACCA definition. *Id.* Therefore, Defendant argues that unlike in *Castleman*, "the indirect application of force, including the causation of death by tricking a victim into ingesting poison, does not require the use, attempted use or threatened use of physical force." *Id.* at 11. The Court disagrees.

The majority of post-*Castleman* courts that have considered this argument have rejected it; instead extending the relevant *Castleman* analysis to statutes that have the same definition of "physical force" as the ACCA. *See, e.g., In re Irby,* 858 F.3d 231, 234–39 (4th Cir. 2017) (holding that *Castleman* makes clear that second-degree retaliatory murder is a "crime of violence" under § 924(c)'s force clause); *United States v. Rice*, 813 F.3d 704, 705–06 (8th Cir.), *cert. denied*, —— U.S. ——, 137 S.Ct. 59, 196 L.Ed.2d 59 (2016) (holding, in the context of the sentencing guideline's force clause, that *Castleman* resolves that a person "uses physical force in causing an injury through indirect means."); *United States v. Waters*, 823 F.3d 1062, 1065 (7th Cir.), *cert. denied*, —— U.S. ——, 137 S.Ct. 569, 196 L.Ed.2d 448 (2016) (citing *Castleman* to reject the argument, in the context of the sentencing guideline's force clause, that one can cause injury to another person without using physical force); *United States v. Moreno–Aguilar*, 198 F.Supp.3d 548, 553 (D. Md. 2016) (stating that the

Castleman decision "foreclosed any argument that the term 'physical force' [in the ACCA context] does not include murder by poisoning"); *Checora*, 155 F.Supp.3d at 1198 (applying *Castleman* to hold that second degree murder constitutes a "crime of violence" under § 924(c)'s force clause); *United States v. Bell*, 158 F.Supp.3d 906, 918 (N.D. Cal. 2016) (holding that *Castleman*'s analysis regarding the indirect use of physical force applies equally to the § 924(c) context).

These courts have extended *Castleman* for good reason. Although *Castleman* did provide that the *degree* of physical force required under the ACCA is higher than that required for a "crime of domestic violence" under § 922(g), *see* 134 S.Ct. at 1410–13, the relevant portion of *Castleman* was not focused on the requisite degree of physical force, but rather on what it means to "use physical force," s*ee id.* at 1414–15. Since there is no material distinction between § 922(g) and the ACCA in this regard, *see Bell*, 158 F.Supp.3d at 918, *Castleman*'s holding that one can "use physical force" indirectly, such as by employing poison, applies equally in the ACCA context.[7] Using *Castleman*'s definition of the "use of physical force," it becomes evident that the causation of bodily injury necessarily involves the "use of physical force" "since it is impossible to cause bodily injury without using force capable of producing that result." *See, e.g., Rice*, 813 F.3d at 706 (quoting *Castleman*, 134 S.Ct. at 1416–17 (Scalia, J., concurring) (internal quotation marks omitted)); *In re Irby,* 858 F.3d at 236 ("*Johnson* [I] and *Castleman* make it pellucid that second-degree retaliatory murder is a crime of violence because unlawfully killing another human being requires the use of force 'capable of causing physical pain or injury to another person.' ") (internal citation omitted).

The Fifth Circuit, on the other hand, recently held that *Castleman* did not warrant reconsidering previous decisions holding that a person could cause physical injury without using physical force. *See United States v. Rico–Mejia*, 859 F.3d 318, 321 (5th Cir. 2017).[8] However, the Fifth Circuit's only reasoning for this decision was one paragraph noting that *Castleman*'s holding only applied to "misdemeanor crimes of domestic violence," which carried a broader definition of "physical force" than the crime of violence context.

7. The distinction between what constitutes the ''use of physical force'' and the degree of physical force required by the two definitions is best illustrated with an example. Consider two scenarios where someone tricks a victim into drinking a noxious liquid. The liquid in the first scenario simply causes its drinker to fall asleep, whereas the second liquid is a potent poison capable of causing death. Under *Castleman*, both scenarios constitute the ''use of'' some degree of physical force, since in both there was ''force exerted by and through concrete bodies,'' 134 S.Ct. at 1414 (quoting *Johnson I*, 559 U.S. at 138, 130 S.Ct. 1265), and both liquids are knowingly being used as a device to cause physical harm, *see id.* at 1415. However, the degree of physical force used is clearly different. The second scenario constitutes a ''use of physical force'' under the ACCA since the degree of physical force is ''capable of causing physical pain or injury to another person.'' *Johnson I*, 559 U.S. at 140, 130 S.Ct. 1265. However, it is doubtful that the first scenario would satisfy the ACCA definition of ''physical force,'' even though it might constitute ''physical force'' under § 922(g), because giving someone a liquid that causes bad breath may be an ''offensive touching.''

8. One such decision states that ''a defendant could violate [the statute], for example, by threatening either to poison another or to guide someone intentionally into dangerous traffic, neither of which involve 'force', as that term is defined by our court.'' *United States v. De La Rosa–Hernandez,* 264 Fed.Appx. 446, 449 (5th Cir. 2008). This stands in direct contradiction to this Court's holding today.

Id. The court made no mention of the distinction between what constitutes a "use of physical force" versus the degree of physical force. Accordingly, this Court is not persuaded by the Fifth Circuit,[9] and instead finds the view of the Eighth, Fourth, and Seventh Circuits, as well as most district courts that have considered this issue, to be more persuasive.

The First Circuit's opinion in *Whyte v. Lynch*, 807 F.3d 463 (1st Cir. 2015), *reh'g denied*, 815 F.3d 92 (1st Cir. 2016) does not warrant a contrary conclusion. In *Whyte*, the First Circuit held that the petitioner's conviction for third-degree assault in Connecticut was a "crime of violence" under 18 U.S.C. § 16. *Id.* at 465. The relevant statute prohibited a person from intentionally causing "physical injury to another person." *See id.* at 467. The court stated that the statute's plain language gave no indication that the offense required "the use, threatened use, or attempted use of 'violent force.' " *Id.* at 468. The court added that "[c]ommon sense, moreover, suggests there exists a 'realistic probability' that, under this statute, Connecticut can punish conduct that results in 'physical injury' but does not require the 'use of physical force.' " *Id.* at 469 (internal citations omitted). As an example, the court stated that "a person could intentionally cause physical injury by 'telling the victim he can safely back his car out while knowing an approaching car driven by an independently acting third party will hit the victim.' " *Id.* (quoting *United States v. Villegas–Hernandez,* 468 F.3d 874, 879 (5th Cir.2006)).

Although at first glance, the *Whyte* court seems to agree with the Fifth Circuit's approach, *Whyte* has no precedential value here because the court deemed waived the very argument this Court rests its holding on. *See United States v. DiPina*, 178 F.3d 68, 73 (1st Cir. 1999) (stating that the court is not bound by a prior decision where the court did not consider an issue directly). In *Whyte*, the government never argued that *Castleman* dictated that causing injury necessarily involves the "use of physical force." In fact, because the government raised this argument for the first time in its petition for rehearing, "the [c]ourt never considered it," and held that it was waived "[f]or purposes of this case only." *Whyte v. Lynch*, 815 F.3d 92 (1st Cir. 2016) (denying petition for rehearing). Furthermore, the First Circuit recently clarified that *Whyte* did not limit *Castleman*'s indirect causes analysis to the misdemeanor crime of domestic violence context. *United States v. Edwards*, 857 F.3d 420, 426–27 (1st Cir. 2017). Thus, the application of *Castleman* to the ACCA context is still an open question in the First Circuit.

When the First Circuit considers the issue properly, this Court believes it will agree with the approach taken by the majority of post-*Castleman* courts, and conclude that one cannot cause physical injury without the "use of physical force." As already discussed, this is the more persuasive view. Using the example the First Circuit borrowed from the Fifth Circuit, a person who intentionally causes someone to back into moving traffic "uses physical force" because he has "knowingly [used] a device to cause physical harm." *See Castleman*, 134 S.Ct. at 1415; *see also In re Irby,* 858 F.3d 231, 237 (4th Cir. 2017) ("It is absurd to believe that Congress would

9. The Court notes that Defendant also cites other cases that have similarly held that one can cause physical injury without the "use of physical force." Docket No. 128 at 9. However, these cases were all decided before *Castleman*. Since this Court holds that *Castleman* resolves this issue, these cases are irrelevant until they are reconsidered in light of *Castleman*.

have intended poisoners and people who use their wits to place someone in the path of an inevitable force to avoid the force clause ...."). That "use of physical force" rises to the ACCA level because it is "force capable of causing physical pain or injury to another person." *See Johnson I*, 559 U.S. at 140, 130 S.Ct. 1265. Accordingly, second degree murder, as defined by Puerto Rico law, categorically requires the "use of physical force" under the ACCA.

B. Mens Rea

[7] Defendant next argues that second degree murder does not have the requisite *mens rea* to qualify as a "violent felony" under the ACCA's force clause. The Court disagrees because the *mens rea* of "malice aforethought," as defined and interpreted by Puerto Rico law, is sufficient.

The Supreme Court has made clear that the "use of physical force" has a *mens rea* component. *Leocal v. Ashcroft*, 543 U.S. 1, 8–9, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004). In *Leocal*, the Court held that the "use of physical force" in the ACCA requires "a higher degree of intent than negligent or merely accidental conduct." *Id.* at 9, 125 S.Ct. 377. However, the Court did not state whether a *mens rea* of recklessness was sufficient. *Id.* at 13, 125 S.Ct. 377. In *United States v. Fish*, 758 F.3d 1, 9–10 (1st Cir. 2014), the First Circuit held, based on *Leocal*'s logic, that a crime requiring only a reckless *mens rea* could not qualify as a "crime of violence" pursuant to the residual clause of 18 U.S.C. § 16.

Defendant argues that a reckless *mens rea* is similarly insufficient for the force clause of the ACCA. Docket No. 104–1 at 6.[10] He further argues that second degree murder can be committed with a *mens rea* equivalent to criminal recklessness, and thus second degree murder cannot be a "violent felony" pursuant to the force clause. *Id.* at 5–6. The Government counters that second degree murder requires more than criminal recklessness since it requires a specific intent to kill. Docket No. 123 at 6–11. Neither party is correct. Although second degree murder does not require a specific intent to kill, the "malice aforethought" it requires is higher than mere recklessness.

The *mens rea* required for second degree murder, at the relevant time, was "malice aforethought." P.R. Laws Ann. tit. 33, § 4001 (repealed June 18, 2004); *Pueblo v. Rivera Alicea*, 125 D.P.R. 37, 45, 1989 WL 608548, slip official translation at 4 (P.R. 1989) [11]. The Puerto Rico Penal Code provided that "malice ... denote[s] the commission of a damaging, intentional act, without justification or excuse and the conscious nature thereof." P.R. Laws Ann. tit. 33, § 3022(19) (repealed June 18, 2004). Article 15 of the Code further provided that:

> Crime is intentional:
>
> (a) When the result has been foreseen and wanted by the person as a consequence of his act or omission; or

10. The Court assumes *arguendo* that this is true. However, this issue is far from decided in the First Circuit, especially in light of the recent Supreme Court decision in *Voisine v. United States*, —— U.S. ——, 136 S.Ct. 2272, 195 L.Ed.2d 736 (2016). The *Voisine* Court held that a reckless use of force can constitute the "use of physical force" in the context of a "misdemeanor crime of domestic violence" under § 922(g). Multiple courts have extended this holding to the ACCA context. *See, e.g., United States v. Webb*, 217 F.Supp.3d 381, 397 (D. Mass. 2016). The First Circuit is currently considering the issue in *United States v. Bennett*, CA No. 16–2039 (1st Cir. filed Aug. 16, 2016). This Court takes no position on this issue.

11. The electronic version of the case's official translation has no pincites. Therefore, the Court will cite the slip official translation when citing to a specific page.

(b) When the result, though unwanted, has been foreseen or could have been foreseen by the person as a natural or probable consequence of his act or omission.

P.R. Laws Ann. tit. 33, § 3062 (repealed June 18, 2004). Defendant argues that the definition of intent in Article 15(b) allowed for a second degree murder conviction with a *mens rea* of only recklessness. Docket No. 128 at 4. The Court disagrees for two reasons.

First, relevant Puerto Rico Supreme Court precedent provides that criminal recklessness was, at the time, characterized by the *absence of malice*. *See Pueblo v. Castañon Perez*, 114 D.P.R. 532, 536–37, 14 P.R. Offic. Trans. 688, 693, 1983 WL 204175 (P.R. 1983). When Defendant was convicted of his prior crimes, the Puerto Rico Penal Code only criminalized conduct that was either intentional under Article 15, as defined above, or criminally negligent under Article 16.[12] P.R. Laws Ann. tit. 33, § 3061 (repealed June 18, 2004). In *Castañon Perez*, the supreme court explained which conduct fell in which category, stating that the Code classified offenses as "either intentional or willful; and *negligent or culpable, equivalent to reckless negligence*." *See* 14 P.R. Offic. Trans. at 693 (emphasis added). Thus, the supreme court made clear that acts that are committed recklessly fall within the Code's definition of "negligence," not "intent." *Id.* The court further stated that "[a]bsence of malice constitutes the main key to characterize negligence." *Id.* Since reckless conduct falls within the Code's definition of "negligence," and "negligence" is characterized by the absence of malice, then reckless conduct must also be characterized by the absence of malice. The logical corollary to this is that acts that *are committed with malice*, such as murder, do not fall into the Code's definition of negligence, which includes recklessness. Thus, second degree murder, which requires "malice aforethought," cannot be committed recklessly.

Second, the Puerto Rico Supreme Court has also interpreted "malice aforethought" to require a more perverse mental state than criminal recklessness. *See Rivera Alicea*, 125 D.P.R. at 45, slip official translation at 4; *Pueblo v. Rosario*, 160 D.P.R. 592, 2003 WL 22848956 (P.R. 2003)[13]. In *Rivera Alicea*, the supreme court stated that "[t]he concept of malice aforethought implies . . . the existence of the intent to kill a fellow human being. The intent to kill may take place when an act is committed or serious bodily injury is inflicted, the probable consequence of which is the death of the person." 125 D.P.R. at 45, slip official translation at 4. The supreme court later clarified, in *Pueblo v. Rosario*, that unlike first degree murder, second degree murder only requires "malice aforethought . . . without a specific intent to kill." 160 D.P.R. at 609–10 (certified translation at 11) (internal citations omitted). But the court added that this "refers to the intention to carry out an act or produce grievous bodily harm that will in all probability result in the death of a person." *Id.* at 610 (certified translation at 11–12) (internal citations omitted). The court also provided that any degree of murder "by its defini-

12. Article 16 stated the following concerning negligence: "[t]he person who brings about an unwanted criminal result through negligence or carelessness, or lack of circumspection or skill or through nonobservance of the law, is responsible for negligence." P.R. Laws Ann. tit. 33, § 3063 (repealed June 18, 2004).

13. The Court relied on the certified translation of this decision, which was filed at Docket No. 141.

tion and nature, entails an act that is *perverse, ill-intentioned, and contrary to the ethical and moral values of our society*." *Id.* at 609 (certified translation at 11) (emphasis added). It denotes a mental state that is characterized by "*an inherent deficiency in [the actor's] sense of morality and righteousness* as a result of *having stopped caring about the respect and safety of human life*." *Id.* (certified translation at 11) (emphasis added) (internal citations omitted).

These cases use strong language to describe the mental state required for murder as a truly depraved and corrupt one. In turn, criminal recklessness lacks this element of moral deficiency; instead, only requiring a defendant to take an action while " 'consciously disregard[ing]' a substantial risk that the conduct will cause harm to another." *Voisine v. United States*, —— U.S. ——, 136 S.Ct. 2272, 2278, 195 L.Ed.2d 736 (2016) (quoting Model Penal Code § 2.02(2)(c)).[14] Thus, "malice aforethought" constitutes a more perverse *mens rea* than criminal recklessness. *See also Umana v. United States*, No. 08 CR 134, 229 F.Supp.3d 388, 395, 2017 WL 373458, at *5 (W.D.N.C. Jan. 25, 2017) (holding that " 'malice aforethought' requires a higher degree of intent than 'reckless' conduct"). Accordingly, "malice aforethought" is sufficient to satisfy the *mens rea* requirement of the ACCA's force clause.

C. Accessorial Liability

[8] Lastly, Defendant argues that second degree murder cannot constitute a "violent felony" under the ACCA's force clause because a second degree murder conviction can rest on a theory of accomplice liability, such as "aiding and abetting murder, instigating murder, and accessory before the fact to murder." Docket No. 104–1 at 7–8. The Court disagrees.

The First Circuit rejected a similar argument in *United States v. Mitchell*, 23 F.3d 1, 2–3 (1st Cir. 1994). The *Mitchell* court stated that "aiding and abetting 'is not a separate offense' from the underlying substantive crime." *Id.* at 2 (quoting *United States v. Sanchez*, 917 F.2d 607, 611 (1st Cir. 1990), *cert. denied*, 499 U.S. 977, 111 S.Ct. 1625, 113 L.Ed.2d 722 (1991)). Thus, "[o]ne who aids and abets an offense is punishable as a principal, and the acts of the principal become those of the aider and abetter as a matter of law." *Id.* at 3 (1st Cir. 1994) (internal citations and quotation marks omitted). As a result, the court held that "aiding and abetting the commission of a crime of violence is a crime of violence itself." *Id.* Thus, whether one can commit an offense by aiding and abetting or any other theory of accomplice liability plays no role in determining whether that offense constitutes a "violent felony" under the ACCA.

Accordingly, this Court holds that second degree murder under Puerto Rico law constitutes a "violent felony" under the ACCA's force clause.

III. Puerto Rico Attempted Murder

[9] Attempted murder also constitutes a "violent felony" under the ACCA's force clause for essentially the same reasons as second degree murder. "[A]ttempted murder occurs when a person 'commits acts or [incurs] omissions unequivocally directed

14. Interestingly, the Model Penal Code also recognizes that murder requires a more perverse mental state than mere recklessness. *Compare* Model Penal Code § 210.2 ("criminal homicide constitutes murder when . . . (b) it is committed recklessly under circumstances manifesting *extreme indifference to the value of human life.*") (emphasis added), *with* Model Penal Code § 210.3 ("Criminal homicide constitutes manslaughter when (a) it is committed recklessly; or . . . .").

to' cause the death of a human being with malice aforethought." *Pueblo v. Bonilla Ortiz*, 23 P.R. Offic. Trans. 393, 397, 123 D.P.R. 434, 1989 WL 607314 (P.R. 1989) (citing P.R. Laws Ann. tit. 33, §§ 3121, 4001 (repealed June 18, 2004)). Attempted murder requires a specific intent to kill. *Id.* Thus, all of the Court's conclusions as to second degree murder apply with equal or greater force to attempted murder.

The ACCA's force clause defines a "violent felony" as any crime that "has as an element the use, *attempted use*, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i) (emphasis added). Although attempted murder does not require the actual "use of physical force," it necessarily requires the "attempted use of physical force," as any act or omission "unequivocally directed to cause the death of a human being" done with the specific intent to kill "categorically involves the [attempted] use of force capable of causing physical pain or injury to another person." *See Castleman*, 134 S.Ct. at 1417 (Scalia, J., concurring). Accordingly, attempted murder also constitutes a "violent felony" under the ACCA's force clause.

As a final point, the Court cannot leave its common sense entirely at the door. *See Abramski v. United States*, —— U.S. ——, 134 S.Ct. 2259, 2267, 189 L.Ed.2d 262 (2014) (stating that common sense is a "fortunate side-benefit of construing statutory terms fairly"). It is hard to think of a more "violent felony" than murder or attempted murder. Thus, common sense further supports the Court's holding that these two crimes are ACCA predicate offenses. *See In re Irby,* 858 F.3d 231, 237 (4th Cir. 2017).

Given this holding, the Court must sentence Defendant to the fifteen-year mandatory minimum under 18 U.S.C. § 924(e). Defendant has two convictions for attempted murder and one for second degree murder. Docket No. 68. As this makes three convictions for ACCA predicate offenses, the Court need not consider any of Defendant's other prior convictions.

CONCLUSION

In view of the foregoing, Defendant will be re-sentenced to at least a fifteen-year imprisonment term pursuant to the ACCA. A re-sentencing hearing will be set shortly.

IT IS SO ORDERED.

Luis ARROYO–RUIZ, Plaintiff,

v.

TRIPLE–S MANAGEMENT GROUP, et al., Defendants.

Civil No. 15–1741 (FAB)

United States District Court,
D. Puerto Rico.

Signed July 10, 2017

Background: Former employee, who suffered from renal condition, diabetes, high blood pressure, and asthma, brought action against employer, alleging violations of Americans with Disabilities Act (ADA) and Title VII. The District Court, 206 F.Supp.3d 701, dismissed in part. Employer moved for summary judgment.

Holdings: The District Court, Besosa, J., held that:

(1) employer was not liable for disability discrimination under ADA;

(2) employer was not liable for hostile work environment under ADA; and

UNITED STATES DISTRICT COURT

District of Puerto Rico

UNITED STATES OF AMERICA
v.
JORGE BAEZ-MARTINEZ

Date of Original Judgment: 11/15/2013
(Or Date of Last Amended Judgment)

Reason for Amendment:

- ☑ Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))
- ☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))
- ☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))
- ☐ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)

AMENDED JUDGMENT IN A CRIMINAL CASE

Case Number: 3:12-CR-00281-001(JAG)
USM Number: 39309-069
AFPD John Connors and AFPD Franco Perez-Redondo
Defendant's Attorney

- ☐ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))
- ☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
- ☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
- ☐ Direct Motion to District Court Pursuant ☐ 28 U.S.C. § 2255 or ☐ 18 U.S.C. § 3559(c)(7)
- ☐ Modification of Restitution Order (18 U.S.C. § 3664)

THE DEFENDANT:

- ☐ pleaded guilty to count(s) _____
- ☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.
- ☑ was found guilty on count(s) one (1) on December 19, 2012 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18:922(g)(1) & 924(e)	Prohibited person in possession of firearm: convicted felon	3/29/2012	one (1)

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s) _____
- ☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

3/21/2018
Date of Imposition of Judgment

s/ Jay A. Garcia-Gregory
Signature of Judge
Jay A. García Gregory, U.S. District Judge
Name and Title of Judge

3/21/2018
Date

DEFENDANT: JORGE BAEZ-MARTINEZ
CASE NUMBER: 3:12-CR-00281-001(JAG)

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of :

ONE HUNDRED AND EGHTY (180) MONTHS. (Time served will be credited)

☑ The court makes the following recommendations to the Bureau of Prisons:

1. That defendant be designated to Coleman, FL.
2. That defendant be enrolled in an educational/vocational rehabilitation training program.

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: JORGE BAEZ-MARTINEZ
CASE NUMBER: 3:12-CR-00281-001(JAG)

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :

FIVE (5) YEARS.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: JORGE BAEZ-MARTINEZ
CASE NUMBER: 3:12-CR-00281-001(JAG)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: JORGE BAEZ-MARTINEZ
CASE NUMBER: 3:12-CR-00281-001(JAG)

SPECIAL CONDITIONS OF SUPERVISION

The same Additional Supervised Release Term imposed on November 15, 2013.

DEFENDANT: JORGE BAEZ-MARTINEZ
CASE NUMBER: 3:12-CR-00281-001(JAG)

CRIMINAL MONETARY PENALTIES

The defendant must pay the following total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 100.00	$ 0.00	$ 0.00	$ 0.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage

TOTALS $ 0.00 $ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: JORGE BAEZ-MARTINEZ
CASE NUMBER: 3:12-CR-00281-001(JAG)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ☑ Lump sum payment of $ 100.00 due immediately, balance due

☐ not later than _____ , or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☑ The defendant shall forfeit the defendant's interest in the following property to the United States:

As stated in paragraph 15 of the Plea Agreement.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.