No. _____

In the

Supreme Court of the United States

ARCHIE MANZANARES, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the

United States Court of Appeals

for the Tenth Circuit

Petition for Writ of Certiorari

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Questions Presented For Review

1. The "categorical approach" determines whether a prior conviction qualifies as a violent felony under the Armed Career Criminal Act (ACCA). The relevant question is whether the offense of conviction has as an element the use, attempted use, or threatened use of violent physical force. The facts of the offense are irrelevant. New Mexico juries are instructed the level of force used in robbery is immaterial. Juries must decide only if the force directly related to separating the property from the person. The Tenth Circuit admits this is the law in New Mexico. However, in analyzing whether robbery is a violent felony, it set state law and the categorical approach aside and scrutinized facts in a select few of its own published cases. From the facts, it derived a minimal level of force that it declared categorically has been, and will be, found in every New Mexico robbery. Although no jury has ever considered a minimum level of force, the circuit court decided the minimum it had devised equals "physical force" as defined by this Court.

Does the Tenth Circuit's analysis, which relies on facts rather than elements, abrogate this Court's holdings that the categorical approach focus on the elements, as defined by state law, to determine what a prior conviction actually established?

2. New Mexico courts have held the state's aggravated assault statute does not have a mens rea element with respect to the victim. Does a criminal offense that can be committed without any mens rea qualify as a violent felony under the ACCA?

3. Does New Mexico aggravated battery qualify as a violent felony under the ACCA when it requires only an unlawful touch and may result in an injury that was unintended?

Related Proceedings

United States Court of Appeals for the Tenth Circuit

United States v. Archie Manzanares, Case No. 18-2010

Opinion Entered: April 17, 2020

Mandate Entered: June 9, 2020

United States District Court for the District of New Mexico

United States v. Archie Manzanares, Case No. 12-CR-2563-WJ & No. 16-CV-599-WJ/SMV

Judgment Entered: December 1, 2017

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In the

Supreme Court of the United States

ARCHIE MANZANARES, Petitioner

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Petition for Writ of Certiorari

Archie Manzanares petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit in his case.

Opinions Below

The Tenth Circuit's decision in *United States v. Manzanares*, Case No. 18-2010, affirming the district court's denial of Manzanares' 28 U.S.C. § 2255 motion challenging his Armed Career Criminal Act (ACCA) sentence, was published and is reported at 956 F.3d 1220 (10th Cir. 2020).[1] The district court's memorandum opinion denying the motion was not published.[2]

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[1] App. 1a-10a. "App." refers to the attached appendix. 'PSR' refers to the probation office's presentence report. The record on appeal contained four volumes. Manzanares refers to the documents and pleadings in those volumes as Vol. __ followed by the bates number on the bottom right of the page (e.g. Vol. I at 89).

[2] App. 11a - 44a.

Jurisdiction

On April 17, 2020, the Tenth Circuit affirmed the district court's decision to deny Manzanares' § 2255 motion challenging his ACCA sentence.[3] This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). According to this Court's Order from March 19, 2020, this petition is timely if filed on or before September 14, 2020.

Pertinent Constitutional and Statutory Provisions

U.S. Constitution, Amendment V

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

18 U.S.C. § 924(e)

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

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

(2) As used in this subsection—. . .

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

[3] App. 1a-10a.

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

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

New Mexico Statutes

The first New Mexico statutory provision involved in this case is N.M. Stat. Ann. § 30-16-2, which provides as follows:

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

Whoever commits robbery is guilty of a third degree felony.

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

The New Mexico Uniform Jury Instruction on robbery, NMRA Crim. UJI 14-1620, provides as follows:

For you to find the defendant guilty of robbery, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant took and carried away _____ (identify property), from _____ (name of victim), or from his immediate control intending to permanently deprive _____ (name of victim) of the property; [the _____ (property) had some value;]

2. The defendant took the _____ (property) by [force or violence] [or] [threatened force or violence];

3. This happened in New Mexico on or about the ___ day of _____, _____.

USE NOTES: The gist of the offense of robbery is the use of force or intimidation. Although the amount of force is immaterial, the force or threatened use of force must be directly related to the separation of the property from the person of another.

The second New Mexico statutory provision involved in this case is N.M. Stat. Ann. § 30-3-2, which provides as follows:

Aggravated assault consists of either:

A. unlawfully assaulting or striking at another with a deadly weapon;

B. committing assault by threatening or menacing another while wearing a mask, hood, robe or other covering upon the face, head or body, or while disguised in any manner, so as to conceal identity; or

C. willfully and intentionally assaulting another with intent to commit any felony. Whoever commits aggravated assault is guilty of a fourth degree felony.

The final New Mexico statutory provision addressed in this petition is N.M. Stat. Ann. 30-3-5, which describes the offense of aggravated battery:

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

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

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

Statement of the Case

A. District Court Proceedings

In July, 2013, the district court sentenced Manzanares as an armed career criminal to a prison term of 15 years. Vol. 2 at 19-21.

Manzanares negotiated a plea agreement with the government. He agreed to plead guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2) and to possession of a controlled substance in violation of 21 U.S.C. § 844. Vol. 2 at 10-17; PSR ¶ 1. The parties stipulated that if Manzanares was an armed career criminal the Court would sentence him to 15 years in prison. Vol 2 at 12. If he was not, then he would not be bound by the agreement. *Id.*

After Manzanares pleaded guilty to the two charges, the probation office prepared a presentence report. In the PSR, the probation office maintained that Manzanares' prior convictions made him an armed career criminal. PSR ¶ 39. Without listing the convictions it believed were 'violent felonies,' the office concluded that Manzanares had "at least three." PSR ¶ 39. Consequently, it said that Manzanares was "subject to an enhanced sentence" required by 18 U.S.C. § 924(e). *Id.*

Under the ACCA, when an accused is convicted of violating § 922(g)(1), the statutory imprisonment range rises from zero to ten years (§ 924(a)(2)), to a mandatory minimum of fifteen years to life, if he has three prior convictions for a 'violent felony' committed on occasions different from one another. § 924(e)(1). A felony offense is a 'violent felony' if it fits within § 924(e)(2)(B)'s force clause, enumerated clause or residual clause. It was evident that Manzanares' convictions did not come within the enumerated clause. Yet,

neither the parties nor the probation office explained how Manzanares' convictions fit within the two remaining clauses.

At the sentencing hearing, the Court accepted the binding plea agreement and the probation office's designation of Manzanares as an armed career criminal. Vol. 4 at 5. The parties did not object to that designation or to any findings in the presentence report. *Id.* at 3. The court followed the plea agreement and ordered that Manzanares be imprisoned for 180 months. *Id.* at 5.

In June 2015, this Court struck down the residual clause of the ACCA as being unconstitutionally vague. *Johnson v. United States*, 576 U.S. 591, 606 (2015) ("*Johnson II*"). Soon afterwards Manzanares filed a motion to correct his sentence. Vol. 2 at 25. He argued that the residual clause in § 924(e)(2)(B) was no longer valid after *Johnson II* and that New Mexico armed robbery, aggravated assault and aggravated battery were not violent felonies as defined by the force clause. Vol. 2 at 30-48. The district court denied Manzanares' motion. *Id.* at 156. It claimed all three offenses had an element that conformed to the force clause definition. Accordingly, it dismissed Manzanares' § 2255 motion with prejudice. Vol. 2 at 189. However, it granted a certificate of appealability on the issue of whether Manzanares' prior armed robbery conviction qualified as a violent felony under the ACCA.[4] Manzanares then filed a timely notice of appeal. *Id.* at 193.

[4] App. 45a - 46a.

B. Tenth Circuit Proceedings

Although the certificate of appealability was for the robbery issue only, the Tenth Circuit addressed Manzanares' challenge to the aggravated assault and aggravated battery convictions as well. 956 F.3d at 1226-28; App. 8a-9a. First, regarding robbery, the court said it was bound by its earlier decision in *United States v. Garcia*, 877 F.3d 944 (10th Cir. 2017). There, it held New Mexico robbery categorically is a violent felony. By examining the facts from select published decisions of the New Mexico appellate courts, *Garcia* delineated a minimum level of force it believed had been and would be used by every accused convicted of robbery. *Manzanares*, 956 F.3d at 1225-27 (citing *Garcia*, 877 F.3d at 954-56).

Irrespective of *Garcia*'s analytical approach, the court said *Stokeling v. United States*, 139 S.Ct. 544 (2019) endorsed its result. It insisted, like *Garcia*, *Stokeling* held that robbery committed by snatching or grabbing which "'overcome[s] the resistance of attachment'" is perpetrated with *Johnson I* level force. 956 F.3d at 1225 (quoting *State v. Curley*, 123 N.M. 295, 297 (Ct. App. 1997)). However, the court overlooked that unlike New Mexico, Florida's robbery statute, addressed in *Stokeling*, "'requires resistance by the victim that is overcome by the physical force of the offender.'" *Stokeling*, 139 S.Ct. at 553-55 (quoting *Robinson v. State*, 692 So.2d 883, 886 (1997)).

Stokeling equated the force needed to complete Florida's robbery with violent force because the "physical resistance" element necessarily involved "a physical confrontation and struggle." *Id.* at 553. In *Manzanares*, the court did not explain how *Stokeling* reinforced *Garcia* when that element and its

accompanying "physical contest" are not necessary components, nor the inevitable result of New Mexico robbery.

Moving to New Mexico aggravated assault, the court found it also is a violent felony. Relying on earlier decisions in *United States v. Maldonado-Palma*, 839 F.3d 1244 (10th Cir. 2016) and *United States v. Ramon Silva*, 608 F.3d 663 (10th Cir. 2010), the court said intervening New Mexico case law disapproving of *Ramon Silva*'s interpretation of the state's aggravated assault statute was irrelevant. 956 F.3d at 1227. In *State v. Branch*, 417 P.3d 1141 (N.M. Ct. App. 2018), the court held the prosecution did not have to prove the threat or conduct was directed toward the victim. Manzanares argued this holding is proof the offense does not have the "against the person of another" element of the ACCA's force clause. The Tenth Circuit disagreed. It said, New Mexico aggravated assault was a "general intent" crime in which an accused, "threaten[s] the use of physical force against the person of another." 956 F.3d at 1227.

Third, again relying on its precedent, the court rejected Manzanares' argument that New Mexico aggravated battery fell outside the force clause. The court conceded the offense can be committed merely by an unlawful touch. *Id.* at 1228. However, in *United States v. Ontiveros*, 875 F.3d 533, 536 (10th Cir. 2017), it held that one cannot cause bodily injury without the use of physical force. Since harm or potential harm is an element of the New Mexico offense, according to *Ontiveros*, it could not be perpetrated without using physical force. *Id.*

Reasons for Granting the Writ

A. New Mexico appellate courts have repeatedly held in state robbery cases that the amount of force required to overcome resistance is immaterial. This accords with commentary to New Mexico's uniform jury instructions. A jury must decide only if the force used was directly related to the separation of property from the person. It does not decide the level of force used or if it reached a certain threshold or if the victim actively resisted.

In *Garcia*, the Tenth Circuit conceded that to prove robbery in New Mexico does not seem to require the "physical force" defined in *Johnson v. United States*, 559 U.S. 133, 140 (2010) ("*Johnson I*"). 877 F.3d at 950-53, 956. But rather than apply the categorical approach to the robbery statute, it held that what New Mexico courts have "said is less important than what is done" by a particular subset of defendants. 877 F.3d at 956. The court itself then created the benchmark by examining facts in published opinions it chose and aggregating them to establish a level of force it deemed necessary for every New Mexico robbery conviction. *Id.* at 953, 956. The court cited no authority for its unprecedented approach. Equally noteworthy is its compilation of selected facts led it to conclude robberies in New Mexico will always involve the necessary "physical force" defined by this Court in *Johnson I*. *Id.* at 956.

The Tenth Circuit's analysis conflicts with *Descamps*, *Moncrieffe*, and *Mathis,*[5] which mandate only the elements matter under the categorical approach. The only facts a reviewing court can be certain were found by a

[5] *Descamps v. United States*, 570 U.S. 254, 268-274 (2013); *Moncrieffe v. Holder*, 569 U.S. 184, 197-98, 200-01 (2013); *Mathis v. United States*, 136 S.Ct. 2243, 2256 (2016).

jury are those that constitute elements of the offense. Those are not the facts used to develop the Tenth Circuit's anomalous standard. New Mexico juries deliberating whether the elements of robbery were established do not decide the level of force used to separate the property from the person. Nor do they decide whether the force reached the Tenth Circuit's averred threshold. The court did what this Court forbids; it relied on its own interpretation of facts, unrelated to statutory elements, to secure ACCA enhancements.

This Court should overrule *Garcia*. The approach the Tenth Circuit uses to ensure New Mexico robbery is a violent felony is without authority and contrary to this Court's categorical approach rules. Leaving the decision intact sanctions courts culling desirable facts from hand-picked cases to wedge prior convictions into the force clause even if the elements, as defined by state courts and legislatures, do not fit.[6] The Court also should find New Mexico robbery does not require the force necessary to implicate the force clause and the ACCA cannot apply to Manzanares.

B. Because New Mexico courts expressly have held that the prosecution is not required to prove any threat, or any conduct at all, directed toward the victim of an aggravated assault, the Tenth Circuit's decision, that the offense nonetheless has as an element the use, attempted use or threatened use of violent force, is in conflict with five other circuits that have held a state offense must have as an element a mens rea relating to the victim to come within the force clause.

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[6] Earlier in the same year, the court used its unauthorized analysis in *United States v. Harris*, 844 F.3d 1260, 1266-68 (10th Cir. 2017) to conclude Colorado robbery categorically matched the "physical force" definition of *Johnson I*.

Citing with approval Tenth Circuit Judge Hartz's dissent in *United States v. Ramon Silva*, 608 F.3d 663, 674-78 (10th Cir. 2010), *abrogated on other grounds, as recognized by United States v. Marquez*, 728 F. App'x 884 (2018), the New Mexico Court of Appeals has definitively ruled that to prove New Mexico aggravated assault with a deadly weapon ("AADW") the state is "not required to prove any threat – or any conduct at all – directed toward the [victim]." *Branch*, 417 P.3d at 1147-49. Had the Fourth, Fifth, Seventh, Ninth and Eleventh Circuits reviewed whether this offense comes within § 924(e)(2)(B)(i)'s force clause definition, settled precedent would have dictated a decision that New Mexico AADW is not a violent felony. The courts would have contradicted the Tenth Circuit because the offense is missing the "against the person of another" component essential to the force clause. *See*, *e.g.*, *United States v. Parral-Dominguez*, 794 F.3d 440, 445-46 (4th Cir. 2015) (discharging a firearm offense did not satisfy force clause because it could be committed without targeting or threatening to target occupant); *United States v. Alfaro*, 408 F.3d 204, 209 (5th Cir. 2005) (shooting into occupied dwelling under Virginia law does satisfy sentencing guidelines force clause definition in § 2L1.2, because accused could commit offense "merely by shooting a gun at a building that happens to be occupied" without deliberately shooting, attempting to shoot, or threatening to shoot another person); *United States v. Jaimes-Jaimes*, 406 F.3d 845, 849-50 (7th Cir. 2005) (offense did not fall within "against the person of another" element of guidelines' force clause because shooting at building or vehicle required only that shooter should have realized there might be a human being present); *United States v. Narvaez–Gomez*, 489 F.3d 970, 976-77 (9th Cir. 2007) (discharging firearm at occupied dwelling under California law is categorically not a crime of violence

because it may be committed with "purely reckless conduct" toward another person); *United States v. Estrella*, 758 F.3d 1239, 1248-54 (11th Cir. 2014) (government did not prove defendant's conviction for shooting at a vehicle satisfied against a person requirement in guideline's force clause because not apparent which of offense's mens rea elements formed basis of conviction – with knowledge that damage would likely be done to property *or* to a person).

Branch demonstrates that the Tenth Circuit has relied on an incorrect, or at least incomplete, understanding of New Mexico aggravated assault's elements. According to *Branch*, the prosecution is not required to prove that the accused intended to assault a bystander, for instance, "'but only that he did an unlawful act which caused [the bystander] to reasonably believe that she was in danger of receiving an immediate battery, that the act was done with a deadly weapon, and that it was done with general criminal intent.'" *Branch*, 417 P.3d at 1148 (quoting *State v. Manus*, 93 N.M. 95, 99 (1979)) (brackets added in *Branch*). The Court of Appeals explained this meant "[t]here is no nexus required between" the accused and the victim. *Id.* That holding contradicts the *Ramon Silva* majority's that the state must prove "a defendant purposefully threatened or engaged in menacing conduct *toward* a victim." 608 F.3d at 674 (emphasis added).

In pointing to Judge Hartz's dissent in *Ramon Silva*, *Branch* clarified that an individual can be guilty of aggravated assault if he commits an unlawful act, with conscious wrongdoing, by handling a weapon in a manner that induces fear of battery without any mens rea of any sort directed at the person whose fear has been induced. 417 P.3d at 1148 (citing *Ramon Silva*, 608 F.3d at 675 (Hartz, J., dissenting); *cf.* N.M. Stat. Ann. § 30-7-4(A)(3) (prohibiting negligent use of deadly weapon by handling firearm in negligent

manner). That *Branch* cited with approval Judge Hartz's interpretation and not the *Ramon Silva* majority's, confirms its interpretation was incorrect under New Mexico law.[7] Correctly interpreted, New Mexico AADW, does not require the prosecution to establish any threat – or any conduct at all – directed toward an innocent bystander.

Under the ACCA, the ultimate inquiry is whether a particular predicate offense constitutes a "violent felony." It is evident from the plain language of that clause that offenses that can be committed recklessly do not qualify as ACCA predicates. The phrase "the use of physical force against the person of another" clarifies that only a singular kind of physical force suffices: one that is directed or aimed at another person. As *Branch* illustrates, in New Mexico, a person can commit aggravated assault without explicitly targeting another person. Recklessly or negligently engaging in conduct that unknowingly creates a reasonable fear of harm in another is enough. Because New Mexico aggravated assault does not have as an element, "against the person of another," it is not a violent felony as described in the ACCA's force clause. The Tenth Circuit incorrectly characterized it as a violent felony under the force clause.

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[7] *Branch* also approved of *United States v. Rede-Mendez*, 680 F.3d 552, 557 (6th Cir. 2012). It said the court accurately depicted the mens rea of New Mexico aggravated assault when it held that the offense "differs from the generic version most significantly in the mens re it attaches to the element of bodily injury or fear of injury." 417 P.3d at 1148. In spite of the Court of Appeals imprimatur, *Rede-Mendez*'s interpretation was rejected by the Tenth Circuit in *Maldonado-Palma.* 839 F.3d 1250 n.9

At a minimum, the Court should hold this petition pending disposition of *Borden v. United States*, No. 19-5410, and then grant this petition, vacate the judgment and remand for reconsideration.

C. In New Mexico aggravated battery simply demands evidence that a person touched another without permission. *State v. Kraul*, 90 N.M. 314, 316-17 (Ct. App. 1977) (simply battery is necessary element of aggravated battery). Relying on *United States v. Ontiveros*, 875 F.3d 533 (10th Cir. 2017), the Tenth Circuit here rejected a distinction between an element requiring violent physical force and conduct resulting in injury. *Manzanares*, 956 F.3d at 1228. *Ontiveros* held that *United States v. Castleman*, 572 U.S. 157 (2014) cast aside any distinction between direct and indirect application of force. *Ontiveros*, 875 F.3d at 538. Despite this Court's express disclaimer in *Castleman* that it was not deciding whether bodily injury necessarily requires "physical force" as used in the force clause, the Tenth Circuit held that *Castleman* decided just that. According to the Tenth Circuit then, any injury, irrespective if it was intended, necessarily is caused by violent physical force. *Manzanares*, 956 F.3d at 1228.

The Tenth Circuit is mistaken. *Johnson I* controls, not *Ontiveros*. The force required to bring an offense within the force clause is strong, physical force. *Johnson I,* 559 U.S. at 140. An offense committed by mere touching, like New Mexico aggravated battery, may set events in motion that cause great bodily harm, but it does not categorically require *Johnson I* level force. *United States v. Torres-Miguel*, 701 F.3d 165, 168 (4th Cir. 2012).

To interpret the force clause in *Johnson I*, the Court referred to the definition of 'physical force' in Black's Law Dictionary and to Webster's New International Dictionary's description of 'violent.' 559 U.S. at 140-41. Black's

defined 'physical force' as "force consisting in a physical act." *Id.* According to Webster, 'violent' means "moving, acting or characterized by strong physical force." *Id.* Consequently, violent physical force in the force clause means the physical application of strong force. Basic physics, then, is first to define the act being analyzed.

New Mexico cases do not require proof of a willingness to use violent force. All that is asked is evidence that person touched another without permission. The events set in motion by an unwanted touch which may unintentionally cause injury do not create force; it is present in the underlying unlawful touch. Thus, there is a material difference between a touch that may or may not lead to a violent outcome, and the actual or threatened use of violent physical force. The latter comes within the ACCA's force clause; the former does not.

In New Mexico, an unlawful touch is the only force necessary to complete an aggravated battery. Clearly, the use of physical force, as described in *Johnson I*, is not an element of this offense. This Court should grant certiorari to resolve the impact, if any, of *Castleman* on the felony force clause and determine whether an offense with an element of bodily injury necessarily also has as an element the use of violent physical force.

A. To determine whether a past conviction is a violent felony, the Tenth Circuit forgoes elements and the categorical approach and creates one that examines facts from select state cases and sets a *Johnson I* threshold level of force that it says every robbery prosecution will meet.

In *Garcia*, 877 F.3d at 953, the panel agreed that in New Mexico, a jury is not asked to decide as an element of robbery, the degree of force and whether that force was capable of causing bodily injury. The panel then conceded that when, as in New Mexico, "no specific quantum of force is required to commit a robbery . . . it precludes the use of convictions under the Element Clause of the ACCA." *Id.* at 953 n. 9; & *id.* at 956 (admitting New Mexico cases have held "any quantum of force which overcomes resistance could be sufficient to support a robbery conviction"). It also acknowledged that New Mexico's Uniform Jury Instruction for robbery was one in which the amount of force used to commit robbery was described as "immaterial." *Id.*

Still, *Garcia* dismissed the instructions sanctioned by the New Mexico Supreme Court and the state appellate courts' rulings because "what is said is less important than what is done." *Id.* at 956. In other words, it was convinced by its truncated survey of published appellate decisions that *every* robbery conviction in New Mexico will categorically involve more force than the "minimal level of physical force to take a victim's property." *Id.*

Garcia cited no authority for this novel approach. The *Manzanares* panel incorrectly used it to decide the robbery issue here. 956 F.3d 1225-27. Because it is antithetical to this Court's mandated categorical approach, *Garcia* has no precedential value. Dismissing as less important what is said by a state's appellate courts or legislature and focusing instead on what is done by an accused in a particular case is expressly contrary to how a court applies the categorical approach.

To determine if a prior conviction comes within a federal enhancement definition, courts generally employ the "categorical approach." *Mathis*, 136 S. Ct. at 2248. With the categorical approach, the court looks at the elements of the crime rather than the details of the accused's conduct. *Descamps*, 570 U.S. at 257. Specifically, courts "compare the elements of the statute forming the basis of the defendant's conviction with the elements of the 'generic' crime – i.e., the offense as commonly understood." *Id*. Courts do not assess the offense "in terms of how an individual offender might have committed it on a particular occasion," but rather "in terms of how the law defines the offense." *Johnson II*, 576 U.S. at 596 (quotation marks omitted). The categorical approach is meant to ensure that a particular crime does not at times count as a predicate offense and other times not, "depending on the facts of the case." *Descamps*, 570 U.S. at 268 (citation, quotation marks omitted). Consequently, a state court's interpretation of its statutes is important because it establishes and defines the elements which apply in every prosecution. *See Larios-Reyes v. Lynch*, 843 F.3d 146, 152 (9th Cir. 2016) (circuit courts' analysis of state offense's elements is "constrained" by state appellate courts' definition and interpretation of state law); *Mathis*, 136 S. Ct at 2254 ("[A] good rule of thumb for reading . . . decisions is that what they say and what they mean are one and the same.").

Reviewing non-elemental facts of past cases, as the *Garcia* panel did, undermines this Court's directive to decide rules of law on categorical grounds. *See Mathis*, 136 S.Ct. at 2253 (stressing that modified categorical approach is used only to identify the elements of the crime of conviction "when a statute's disjunctive phrasing renders one (or more) of them opaque."). Instead of looking only at robbery's elements as defined and

interpreted by New Mexico courts, *Garcia* examined the facts of a select cluster of cases to craft a measure of force it insists will have been proven in every New Mexico robbery conviction. This premise is ill-conceived. As *Garcia* acknowledges, in those cases the factfinder did not find the accused used a specific level of force, because that is not an element of the offense. *See Garcia*, 877 F.3d at 953 (acknowledging New Mexico's appellate courts decide sufficiency issues on the force element by evaluating whether force compelled the person to part with property, not how much force was used).

At times, an accused may use a level of force that satisfies the federal physical force definition. But as the degree of force and whether that force was capable of causing bodily injury are not elements, the force used will not necessarily rise to that level in every case. To suggest otherwise, as *Garcia* does, is conjecture. "[T]he only facts the court can be sure the jury so found are those constituting the elements of the offense – as distinct from amplifying but legally extraneous circumstances." *Descamps*, 570 U.S. at 269-70. Put simply, the degree of force that may have been used in a New Mexico robbery was "irrelevant to crime charged." *Id.* at 270. *Garcia*'s analysis leads to an outcome that cannot naturally be categorical.

Descamps addressed the difficulty with *Garcia*'s hypothetical construct. To paraphrase the Court, as long as New Mexico requires only some force as the lever by which the item is taken then, that is all the indictment "must allege," it is all the jury instructions "must mention" and it is all "the jury must find to convict the defendant." *Descamps*, 570 U.S. at 273. Before factfinders convict an accused for robbery in New Mexico, they are not asked to agree on a level of force used by the accused. And they certainly are not required to find it reached a certain threshold, nor whether the victim

actively resisted the taking. *Compare Stokeling*, 139 S.Ct. at 554-55 (emphasizing that Florida robbery requires resistance by victim that is overcome by accused's force). "Whatever the underlying facts or evidence presented, the defendant still will not have been convicted, in the deliberate and considered way the Constitution guarantees, of an offense with the same elements as the supposed generic crime." *Descamps*, 570 U.S. at 273.

When no specific amount of force is required to complete a robbery, the offense at times will be committed with more than minimal force, and other times it will not. *United States v. Bong*, 913 F.3d 1252, 1263-64 (10th Cir. 2019). If some means used to commit the offense are non-violent under the force clause, then the offense is not a violent felony predicate for an ACCA enhancement. *Garcia* used *Curley* and other cases to establish an unconditional minimum level of physical force that was never intended or sanctioned by New Mexico's legislature or appellate courts to be an element of the offense. The panel insisted every state opinion it reviewed examined "what level of force was actually deemed sufficient in practice." 877 F.3d at 953. That is incorrect.

For example, *Garcia* suggested that *Curley* held an "intentional shove" was enough to satisfy robbery's force element. 877 F.3d at 954. But sufficiency of proof was not at issue. Instead, *Curley* considered whether the trial court erred by not giving a lesser-included larceny instruction in a robbery case. 123 N.M. at 296, 299. It reviewed whether a reasonable "jury's view of the facts and which inferences it chooses to draw" justified a larceny instruction. *Id.* at 299. It concluded "the facts are rich with conflicting inferences" and the instruction was warranted. *Id.*

Deciding if a "shove" was "intentional" and the degree of force used were not part of the court's holding. What conduct constituted robbery or larceny was determined by the jury. *Id.* at 299. Accordingly, the court examined reasonable but divergent inferences, not absolutes. For example, a "shove" and "*other force* in grabbing the purse" could be "incidental" depending on the jury's view of the evidence. *Id.* (emphasis added). Rather than support *Garcia*'s adoption of a minimum level of force for robbery in New Mexico, *Curley* makes Manzanares' point: the degree of force is immaterial to decide whether force was used. New Mexico robbery may be accomplished in a variety of ways with varying degrees of force. Indeed, it can be perpetrated with minimal force and without any purposeful resistance by, or injury to, the victim.

Irrefutably, no one with a New Mexico robbery conviction will have been found by the factfinder to have used a specific degree of physical force, or more pointedly, to have used "active . . . violent force - force capable of causing physical pain or injury - against another person." *See State v. Clokey*, 89 N.M. 453, 453-54 (1976) (evidence of "snatching of the purse from the victim" was sufficient to establish robbery); *Curley*, 123 N.M. at 296 ("even a slight amount" of force enough to make taking a robbery); *State v. Lewis*, 116 N.M. 849, 851 (Ct. App. 1993) (amount or degree does not determine whether item taken by force, rather jury decides whether force caused person to part with possession). The Tenth Circuit cannot replace the "facts . . . constituting elements of the offense" by "amplifying [] legally extraneous circumstances" and then imply they were the means of commission underlying the prosecution's theory of the crime. *Descamps*, 570 U.S. at 270.

Garcia invites the lower courts to examine the non-elemental facts in state appellate decisions and ask whether they move a prior conviction into the relevant enhancement definition. *Descamps* warned against such an approach; "we have expressly and repeatedly forbidden" a court from "asking whether a particular set of facts leading to a conviction conforms to a generic [] offense." *Descamps*, 570 U.S. at 274. By not hewing to the state court's interpretation of the offense's elements, and not "focusing on the legal question of what a conviction *necessarily* established," the fairness and predictability in the administration of federal criminal law is upended. *Mellouli v. Lynch*, 575 U.S. 798, 135 S.Ct. 1980, 1987 (2015) (emphasis in original). Indeed, *Garcia* encourages repeated litigation on the same issue. Parties will scour state court transcripts – "'where the rubber meets the road'" – to prove "in practice," there are facts that either do or do not satisfy a federal enhancement definition. *Garcia*, 877 F.3d at 950, 953 (quoting *Harris*, 844 F.3d at 1266). This detour from the categorical approach, in favor of an unfettered, fact-based one, removes the requirement that a sentencing court be "certain" that a violent-felony designation necessarily applies to a particular offense before it can be treated as an ACCA predicate. *Mathis*, 136 S. Ct. at 2257 (discussing the ACCA's demand for certainty); *Shepard v. United States*, 544 U.S. 13, 21-22 (2005) (same).

Garcia is in direct conflict with longstanding decisions by this Court. It stands as an exception to the uniform reasoning of those cases. The Court should overrule *Garica*. It also should find New Mexico robbery does not require the force necessary to implicate the force clause and that the ACCA cannot apply to Manzanares.

B. A criminal offense that can be committed with a mens rea of recklessness does not qualify as a violent felony under the ACCA.

The Tenth Circuit's precedent incorrectly holds that a criminal offense committed recklessly is a 'violent felony.' In *Manzanares*, 956 F.3d at 1227, the court reaffirmed earlier decisions that New Mexico aggravated assault *so defined* falls within the ACCA force clause. The court's decisions inaccurately describe New Mexico law and are inconsistent with this Court's precedent.

A "violent felony" is a crime that has as an element the "use of physical force against the person of another." In *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004), the Court said the crucial phrase is "against the person of another." Including reckless offenses does not give effect to the element's plain meaning. When a person uses force recklessly, he is indifferent to whether it falls on another person or not. Reckless conduct falls outside the force clause.

This explains why New Mexico aggravated assault with a deadly weapon is not a violent felony: the state is "not required to prove any threat – or any conduct at all – directed toward the [victim]." *State v. Branch*, 417 P.3d 1141, 1149 (N.M. Ct. App. 2018). "Liability under the statute is only limited by the requisite mental state of conscious wrongdoing and by the requirement that the victim's fear must be reasonable." *Id.* at 1148.

Conscious wrongdoing relates to the act itself, irrespective of its relationship to the victim. The *Branch* court acknowledged reckless action established guilt, citing a dissenting Tenth Circuit judge's conclusion that in New Mexico "'a person who intentionally handles a weapon in a manner that induces fear of battery can be guilty of assault even if he merely wants to show off his dexterity in handling the weapon, without any interest in inducing fear.'" 417 P.3d at 1148 (quoting *Ramon Silva*, 608 F.3d at 675)

(Hartz, J., dissenting). Consequently, New Mexico aggravated assault with a deadly weapon does not have the critical "against the person of another" element and is not a violent felony under the ACCA.

1. At a minimum, the Court should hold this petition pending disposition of *Borden v. United States*, No. 19-5410, which will decide whether a criminal offense that can be committed with a mens rea of recklessness can qualify as a "violent felony" under the ACCA, and then grant this petition, vacate the judgment, and remand for reconsideration in light of that decision (GVR).

After Manzanares filed his reply brief but before the Tenth Circuit issued its published decision, this Court granted Charles Borden Jr.'s petition for writ of certiorari. *Borden v. United States*, No. 19-5410 (Mar. 2, 2020). For the reasons given above, the Court should grant Manzanares' certiorari petition as well, particularly because this would be a valuable companion case to *Borden* given the similarity of the issues.

At a minimum, however, the Court should hold this petition pending disposition of *Borden* and then grant the petition, vacate the judgment, and remand for reconsideration in light of that decision. "A GVR is appropriate when intervening developments" – like a new opinion from this Court – "reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the matter." *Wellons v. Hall*, 558 U.S. 220, 225 (2010) (per curiam) (citing *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam)) (quotation marks omitted). "This practice has some virtues. In an appropriate case, a GVR order conserves the scarce resources of this Court that might otherwise be expended on plenary consideration, assists the court below by flagging a particular issue that it does not appear

to have fully considered, assists this Court by procuring the benefit of the lower court's insight before [it] rules on the merits, and alleviates the potential for unequal treatment that is inherent in [its] inability to grant plenary review of all pending cases raising similar issues[.]" *Lawrence*, 516 U.S. at 167 (quotation marks omitted). This flexible approach "can improve the fairness and accuracy of judicial outcomes while at the same time serving as a cautious and deferential alternative to summary reversal in cases whose precedential significance does not merit [the Court's] plenary review." *Id.* at 168.

Here, "the equities of the case" support a GVR order if the Court does not grant plenary review. *Lawrence*, 516 U.S. at 167-68. Regardless of the outcome in *Borden*, the Court's decision will necessarily delve into the mens rea requirements of the ACCA's force clause in general and in particular, the minimum degree of intent expected for an offense to come within the force clause. A GVR will therefore "assist[]" the Tenth Circuit "by flagging a particular issue that it does not appear to have fully considered[.]" *Id.* at 167. If the Court holds that the force clause does not cover crimes that are committed with a mens rea of mere recklessness, then Manzanares' New Mexico aggravated assault conviction, which requires only conscious wrongdoing, a lesser mental state than recklessness, cannot be a violent felony. But even if the Court reaches the opposite conclusion, there is still a "reasonable probability" that its decision would cause the Tenth Circuit to change its ruling in the criminal-case context "if given the opportunity for further consideration[.]" *Wellons*, 558 U.S. at 225 (quotation marks omitted). The court would have to examine whether inattention to the consequences of one's acts, a component of New Mexico aggravated assault, meets the force

clause's mens rea threshold as described by this Court in *Borden*. *See* NMRA Crim. UJI 14-306 (state must prove defendant's unlawful conduct caused victim to reasonably believe defendant was about to intrude on his personal safety). Accordingly, the Court should GVR, at a minimum.

C. New Mexico aggravated battery, which can be completed by the slightest offensive touch, is focused on the resulting harm to the person not the force behind the unlawful touching, and so does not categorically include an element of violent physical force as described by this Court in *Johnson I*.

Under N.M. Stat. Ann. § 30-3-5(A), "[a]ggravated battery consists of the unlawful touching or application of force to the person of another with intent to injure that person or another." In New Mexico, that element can be satisfied with proof of mere touching, however slight. *State v. Seal*, 76 N.M. 461, 461 (1966). That type of touching falls outside of *Johnson I*'s definition of "physical force" because as that phrase is used in the ACCA it means a "substantial degree of force." 559 U.S. at 140.

The battery element is not measured by the physical harm done; it is the unlawfulness of even the slightest touch that matters. In other words, the force of the touch and its consequences are secondary because without the touch one cannot commit a battery. Injury is not a necessary element, nor is contact with the person's body. *State v. Ortega*, 113 N.M. 437, 440-41 (Ct. App. 1992). Because aggravated battery subsumes battery, in New Mexico unlawful touching, however slight, can never meet the ACCA's level of force.

To illustrate, if you grab a driver through an open truck window to keep him from leaving, you commit battery. *Cf. State v. Hill*, 131 N.M. 195, 198, 200 (Ct. App. 2001) (analyzing if driver instigated battery or was a victim when officer struck driver's arm while truck in gear and drew weapon to keep him from driving off). Perhaps your grab seems to be done with an intent to

injure. If so, it becomes an aggravated battery. The same grab may result in the driver losing control and crashing the truck or hitting someone - now there are felony aggravated battery charges. Arguably, the same is true if you grab an officer's baton, "flashlight or weapon" instead of an arm, and spin him around, "causing the officer to fall . . . out a window, into a mine shaft, off a ship, or out of an airplane . . . ." *Ortega*, 113 N.M. at 441.[8] Yet, the actus reus is still the unlawful touch, not the possibilities it creates.

According to the Tenth Circuit, so long as physical pain or injury is caused, the movement or action that set in motion the events which caused the harm categorically qualifies as *Johnson I* defined physical force. *Ontiveros*, 875 F.3d at 536; *accord Manzanares*, 956 F.3d at 1228. This ruling is inconsistent with *Johnson I*. This Court did not find that the word "physical" in the phrase "physical force" relates to the effect of the force used. It explained that "physical" refers to the mechanism by which the force is imparted to the "person of another." 550 U.S. 140-41. To relate physical force to its effect adds nothing to the force clause definition.

By definition then, it is fundamentally incorrect to assume, as the Tenth Circuit does, that any causation of physical harm, even when done by omission, is accomplished only by the use of violent physical force. *Ontiveros*, 875 F.3d 538. De minimus force, like mere touching, however slight, does not match the description of "physical force" because it is not violent. While a variety of unwanted touching would come within New Mexico's aggravated

[8] Another may kick a cane out from under someone who needs it to walk or stand and the fall causes serious injury. *Ortega*, 113 N.M. at 440 (commenting that contact with another's cane, or paper or any other object held in that person's hand may constitute a battery).

battery statute, none require the use of *Johnson I* level physical force to cause harm. Moreover, such harm will not categorically be caused by violent physical force, if the statute's elements do not require it. In New Mexico, no element of aggravated battery calls for proof that the accused used violent, physical force to cause or potentially cause harm to another. An unlawful touch can be the means by which the injury occurs. For an offense to come within the force clause, the result is not the determinative factor, the strength of the force is the important point.

The Tenth Circuit insists an offense like New Mexico aggravated battery comes within the force clause because in *Castleman* this Court "specifically rejected the contention that 'one can cause bodily injury without the use of physical force.'" *Ontiveros*, 875 F.3d at 536 (quoting *Castleman*, 572 U.S. at 170); *accord Manzanares*, 956 F.3d at 1228. *Ontiveros* cannot rely on *Castleman* for a holding it did not make. *Castleman* has nothing to do with the characterization of violent felonies. Not only have other circuit courts concluded just that, so too did *Castleman*.

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

"By its express terms, *Castleman*'s analysis is not applicable to the physical force requirement for a crime of violence, which suggests a category of violent, active crimes that have as an element a heightened form of physical force that is narrower in scope than that applicable in the domestic violence context," said *United States v. Rico-Mejia*, 859 F.3d 318, 322 (5th Cir. 2017) (internal quotations omitted). The First Circuit, like the Fourth and Fifth, also recognized that *Castleman* did not alter the definition of force that applies in the ACCA context. The court commented that "[p]hysical force can mean different things depending on the context in which it appears." *Whyte v. Lynch*, 807 F.3d 463, 470 (1st Cir. 2015). It then held that the context addressed in *Castleman*, the Domestic Violence Gun Ban, can "be satisfied by a 'mere offensive touching' – a standard that casts a far wider net in the sea of state crime predicates than does *Johnson*'s requirement of 'violent force.'" *Id.* at 471. Therefore, irrespective of *Castleman*, the court found that a Connecticut assault statute that, like New Mexico, can involve causing physical injury, did not require violent physical force. *Id.* at 471. Given the sound reasoning in these opinions, it is difficult to accept that *Castleman* expressly begot *Ontiveros*.

In *Johnson I*, this Court explicitly held that the slightest offensive touching is insufficient to make an offense a violent felony under the felony force clause. 559 U.S. at 139-40. In contrast to the misdemeanor force clause *Castleman* addressed, the felony force clause addressed in *Johnson I* requires violent force – that is, a level of force more active and severe than the force required to commit common-law battery. *Id.* *Ontiveros* failed to honor this distinction and therefore, stands in direct conflict with this Court's authority. It must be overruled.

In the Tenth Circuit before *Ontiveros*, pain or injury alone did not categorically mean violent physical force was used to commit the offense. *United States v. Perez-Vargas*, 414 F.3d 1282, 1285-86 (10th Cir. 2005) (Colorado third degree assault requiring proof accused "knowingly or recklessly cause[d] bodily injury to another" did not "necessarily require[] the application of force."); *United States v. Rodriguez-Enriquez*, 518 F.3d 1191, 1195 (10th Cir. (assault statute which forbids nonconsensual administration of a drug, substance or preparation does not involve use of physical force). *Perez-Vargas* and *Rodriguez-Enriquez* are consistent with the Court's precedent, *Ontiveros* is not. They, not *Ontiveros*, should be binding precedent. If that were so, then the result here is apparent: New Mexico aggravated battery is not a violent felony. An unwanted touch is the only force required to complete the offense. And the accused will not necessarily have used violent physical force in the touch, even though it is unlawful. *See e.g. Ortega*, 113 N.M. at 440 (commenting that contact with another's cane, or paper or any other object held in that person's hand may constitute a battery); *State v. Chavez*, 82 N.M. 569, 571 (Ct. App. 1971)("defendant's act need not be a direct (that is, immediate) cause" of harm or the likely harm to another). The great bodily harm that results or that could have been inflicted is enough for a jury to find the accused guilty of aggravated battery. *See Chavez*, 82 N.M. at 572 (whether an aggravated battery rises to a felony "depends largely . . . on the nature of the injury inflicted."). Consequently, New Mexico aggravated battery does not match the force clause's definition and Manzanares' conviction is not a violent felony.

Conclusion

For the reasons given in his petition, Manzanares respectfully requests this Court grant his petition for writ of certiorari.

Respectfully submitted,
Stephen P. McCue
Federal Public Defender

DATED: September 14, 2020

By: *s/Margaret A. Katze*
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Appendix

956 F.3d 1220
United States Court of Appeals, Tenth Circuit.

UNITED STATES of America, Plaintiff - Appellee,
v.
Archie MANZANARES, Defendant - Appellant.

No. 18-2010
|
FILED April 17, 2020

Synopsis

Background: Defendant filed motion to vacate sentence, challenging enhancement of his sentence under the Armed Career Criminal Act (ACCA). The United States District Court for the District of New Mexico, William P. Johnson, Chief Judge, 2017 WL 5956886, adopted the report and recommendation of Stephan M. Vidmar, United States Magistrate Judge, 2017 WL 3913235, and denied the motion. Defendant appealed.

[Holding:] The Court of Appeals, Briscoe, Circuit Judge, held that minimum culpable conduct required for New Mexico conviction for armed robbery categorically fit the definition of physical force for purposes of the elements clause of the ACCA's definition of violent felony.

Affirmed.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

West Headnotes (15)

[1] **Criminal Law** Habitual and Second Offenders

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1177.5 Habitual and Second Offenders
110k1177.5(1) In general

Even if the residual clause of the definition of violent felony in the Armed Career Criminal Act (ACCA) had played a role in defendant's sentencing after the definition had been found unconstitutionally vague under due process principles in *Johnson v. United States*, any error was harmless, with respect to sentence enhancement, where defendant's three prior convictions under state law qualified as violent felonies under the elements clause of the ACCA's definition of violent felony. U.S. Const. Amend. 5; 18 U.S.C.A. § 924(e)(2)(B)(i).

[2] **Criminal Law** Review De Novo
Criminal Law Post-conviction relief

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)13 Review De Novo
110k1139 In general
110 Criminal Law
110XXIV Review
110XXIV(O) Questions of Fact and Findings
110k1158.36 Post-conviction relief

The Court of Appeals reviews a district court's legal rulings on a motion to vacate sentence de novo and reviews its findings of fact for clear error. 28 U.S.C.A. § 2255.

[3] **Criminal Law** Review De Novo

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)13 Review De Novo
110k1139 In general

Whether a prior conviction satisfies the definition of violent felony in the

Armed Career Criminal Act (ACCA), for purposes of sentence enhancement, is a legal question that is reviewed de novo. 18 U.S.C.A. § 924(e)(2)(B).

[4] Sentencing and Punishment Burden of proof

350H Sentencing and Punishment
350HVI Habitual and Career Offenders
350HVI(K) Proceedings
350Hk1375 Evidence
350Hk1378 Burden of proof

The government bears the burden of proving that a prior conviction qualifies as a violent felony under the Armed Career Criminal Act (ACCA), for purposes of sentence enhancement. 18 U.S.C.A. § 924(e)(2)(B).

[5] Sentencing and Punishment Violent or Nonviolent Character of Offense

350H Sentencing and Punishment
350HVI Habitual and Career Offenders
350HVI(C) Offenses Usable for Enhancement
350HVI(C)1 In General
350Hk1261 Violent or Nonviolent Character of Offense
350Hk1262 In general

Under the categorical approach to determining whether a prior felony qualifies as a violent felony under the Armed Career Criminal Act (ACCA), for purposes of sentence enhancement, the court focuses on the elements of the crime for the prior conviction, not the underlying facts. 18 U.S.C.A. § 924(e)(2)(B).

[6] Sentencing and Punishment Violent or Nonviolent Character of Offense

350H Sentencing and Punishment
350HVI Habitual and Career Offenders
350HVI(C) Offenses Usable for Enhancement
350HVI(C)1 In General
350Hk1261 Violent or Nonviolent Character of Offense
350Hk1262 In general

"Physical force," within the meaning of the elements clause of the Armed Career Criminal Act (ACCA), which defines a violent felony, for purposes of sentence enhancement based on a prior violent felony, as an offense having as an element the use, attempted use, or threatened use of physical force against the person of another, 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)(i).

1 Cases that cite this headnote

[7] Sentencing and Punishment Violent or Nonviolent Character of Offense

350H Sentencing and Punishment
350HVI Habitual and Career Offenders
350HVI(C) Offenses Usable for Enhancement
350HVI(C)2 Offenses in Other Jurisdictions
350Hk1283 Violent or Nonviolent Character of Offense
350Hk1284 In general

When construing the minimum culpable conduct required for a state conviction, when determining whether the state offense categorically fits the definition of physical force, so that a defendant's prior conviction for the offense qualifies as a violent felony under the elements clause of the definition of violent felony in the Armed Career Criminal Act (ACCA), the minimum culpable conduct includes only conduct for which there is a realistic probability, not a theoretical possibility, that the state statute would apply. 18 U.S.C.A. § 924(e)(2)(B)(i).

[8] **Sentencing and Punishment** Particular offenses

350H Sentencing and Punishment
350HVI Habitual and Career Offenders
350HVI(C) Offenses Usable for Enhancement
350HVI(C)2 Offenses in Other Jurisdictions
350Hk1283 Violent or Nonviolent Character of Offense
350Hk1285 Particular offenses

The minimum culpable conduct required for a New Mexico conviction for armed robbery categorically fit the definition of physical force, so that the defendant's prior conviction for the offense qualified as a violent felony under the elements clause of the definition of violent felony in the Armed Career Criminal Act (ACCA); force that overcame the victim's resistance would be required for a conviction for simple robbery under the New Mexico statute, and because simple robbery satisfied the elements clause, armed robbery necessarily satisfied it. 18 U.S.C.A. § 924(e)(2)(B)(i); N.M. Stat. Ann. § 30-16-2.

3 Cases that cite this headnote

[9] **Courts** Number of judges concurring in opinion, and opinion by divided court

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k88 Previous Decisions as Controlling or as Precedents
106k90 Decisions of Same Court or Co-Ordinate Court
106k90(2) Number of judges concurring in opinion, and opinion by divided court

A panel of the Court of Appeals cannot overrule the judgment of another panel, and it is bound by the precedent of prior panels absent en banc reconsideration by the Court of Appeals or a superseding contrary decision by the Supreme Court.

1 Cases that cite this headnote

[10] **Courts** Number of judges concurring in opinion, and opinion by divided court

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k88 Previous Decisions as Controlling or as Precedents
106k90 Decisions of Same Court or Co-Ordinate Court
106k90(2) Number of judges concurring in opinion, and opinion by divided court

When a panel of the Court of Appeals has rendered a decision interpreting state law, that interpretation is binding on subsequent panels of the Court of Appeals, unless an intervening decision of the state's highest court has resolved the issue.

[11] **Robbery** Force

342 Robbery
342k6 Force

Under New Mexico law, robbery is committed when attached property is snatched or grabbed by sufficient force so as to overcome the resistance of attachment, but it is not committed by a mere snatching without any resistance from the victim. N.M. Stat. Ann. § 30-16-2.

1 Cases that cite this headnote

[12] **Criminal Law** Certificate of probable cause or reasonable doubt

110 Criminal Law
110XXIV Review
110XXIV(F) Proceedings, Generally
110k1073 Certificate of probable cause or reasonable doubt

To make a substantial showing of the denial of a constitutional right, as required for a certificate of appealability

(COA) from the denial of a motion to vacate sentence, a defendant must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. 28 U.S.C.A. §§ 2253(c)(2), 2255.

[13] **Criminal Law** Certificate of probable cause or reasonable doubt

110 Criminal Law
110XXIV Review
110XXIV(F) Proceedings, Generally
110k1073 Certificate of probable cause or reasonable doubt

In light of binding circuit precedent, no reasonable jurist could debate, as would be required for certificate of appealability (COA) from denial of motion to vacate sentence, the district court's conclusion that defendant's prior New Mexico conviction for aggravated assault with a deadly weapon satisfied the elements clause of the definition of violent felony in the Armed Career Criminal Act (ACCA), for sentence enhancement purposes; while the New Mexico offense was a general intent crime, it required unlawfully assaulting or striking at another by employing a deadly weapon, and such conduct at least threatened the use of physical force against the person of another. 18 U.S.C.A. § 924(e)(2)(B)(i); 28 U.S.C.A. §§ 2253(c)(2), 2255; N.M. Stat. Ann. § 30-3-2(A).

[14] **Courts** Previous Decisions as Controlling or as Precedents

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k88 Previous Decisions as Controlling or as Precedents
106k89 In general

Given the similarity in language between the elements clauses of the Armed Career Criminal Act (ACCA) and the Sentencing Guidelines defining "violent felony" and "crime of violence," respectively, courts may look to precedent under one provision for guidance under another in determining whether a conviction qualifies as a violent felony or a crime of violence. 18 U.S.C.A. § 924(e)(2)(B)(i); U.S.S.G. § 4B1.2(a)(1).

[15] **Criminal Law** Allowance or leave from appellate court

110 Criminal Law
110XXIV Review
110XXIV(F) Proceedings, Generally
110k1072 Allowance or leave from appellate court

In light of binding circuit precedent, no reasonable jurist could debate, as would be required for certificate of appealability (COA) from denial of motion to vacate sentence, the district court's conclusion that defendant's prior New Mexico conviction for aggravated battery satisfied the elements clause of the definition of violent felony in the Armed Career Criminal Act (ACCA), for sentence enhancement purposes; while the New Mexico statute focused on the resulting harm to the person, an offender could not cause bodily injury without the use of physical force. 18 U.S.C.A. § 924(e)(2)(B)(i); 28 U.S.C.A. §§ 2253(c)(2), 2255; N.M. Stat. Ann. § 30-3-5(C).

1 Cases that cite this headnote

***1222 Appeal from the United States District Court for the District of New Mexico (D.C. Nos. 1:16-CV-00599-WJ-SMV & 1:12-CR-01563-WJ-1)**

Attorneys and Law Firms

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C. Paige Messec, Assistant United States Attorney (John C. Anderson, United States Attorney, with her on the briefs), Office of the United States Attorney for the District of New Mexico, Albuquerque, New Mexico, appearing for Appellee.

Before BRISCOE, KELLY, and CARSON, Circuit Judges.

Opinion

BRISCOE, Circuit Judge.

***1223** Defendant-Appellant Archie Manzanares appeals from the district court's denial of his 28 U.S.C. § 2255 motion challenging his sentence under the Armed Career Criminal Act (ACCA). Because the district court granted a certificate of appealability (COA) as to one issue, we exercise jurisdiction under 28 U.S.C. § 2253. We affirm the denial of relief and deny Mr. Manzanares's motion to expand the COA.

I

On April 1, 2013, Mr. Manzanares pleaded guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2), and to possession of a controlled substance, in violation of 21 U.S.C. § 844. ROA, Vol. II at 11. His plea agreement provided for a 15-year sentence if the district court determined he was an armed career criminal. *Id.* at 12. On July 2, 2013, after concluding that Mr. Manzanares had at least three prior violent felonies and thus qualified as an armed career criminal, the district court imposed the 15-year sentence contemplated by the plea agreement. *Id.*, Vol. IV at 5.

Under the ACCA, an offense qualified as a violent felony by satisfying at least one of three definitions, which have come to be known as the Elements Clause, the Enumerated Clause, and the Residual Clause. *See* 18 U.S.C. § 924(e)(2)(B); *United States v. Garcia*, 877 F.3d 944, 946 (10th Cir. 2017), *cert. denied*, —— U.S. ——, 139 S. Ct. 1257, 203 L.Ed.2d 294 (2019). After Mr. Manzanares's conviction was final, the Supreme Court invalidated the Residual Clause as being unconstitutionally vague, *see* *Johnson v. United States*, —— U.S. ——, 135 S. Ct. 2551, 2557, 2563, 192 L.Ed.2d 569 (2015) (*Johnson II*), and then made *Johnson II* applicable to cases on collateral review, *see* *Welch v. United States*, —— U.S. ——, 136 S. Ct. 1257, 1268, 194 L.Ed.2d 387 (2016).

[1] In his timely *Johnson II*-based § 2255 motion, Mr. Manzanares asserted that without the Residual Clause, his underlying New Mexico convictions (armed robbery, aggravated assault with a deadly weapon, and aggravated battery) no longer qualified as violent felonies. The district court denied the motion, concluding that all three underlying convictions satisfy the Elements Clause. ROA, Vol. I at 184. It then granted a COA regarding the armed robbery conviction but denied a COA as to the other two convictions.[1] *Id.* at 186–87. Mr. Manzanares appeals the classification of the armed robbery conviction as a violent felony, and he seeks to expand the COA to allow him to appeal the decision regarding the aggravated assault with a deadly weapon and aggravated battery convictions.

***1224** II

[2] **[3]** **[4]** The district court granted a COA on the issue of whether armed robbery in violation of N.M. Stat. Ann. § 30-16-2 satisfies the Elements Clause. We review the district court's legal rulings on a § 2255 motion de novo and its findings of fact for clear error. *Garcia*, 877 F.3d at 947–48. Whether a prior conviction satisfies the ACCA's violent felony definition is a legal question we review de novo. *Id.* at 948. The government bears the burden of proving a prior conviction qualifies under the ACCA. *Id.*

[5] **[6]** To determine this issue, we apply the "categorical approach," focusing on the elements of the crime of conviction, not the underlying facts. *Id.* The Elements Clause provides that a conviction is a "violent felony" if it "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). "[T]he phrase 'physical force' means *violent* force—that is, force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010) (*Johnson I*) (emphasis in original).

[7] We must first identify the minimum "force" required by state law for the crime of conviction, and second determine if that force categorically fits the definition of physical force. *United States v. Ontiveros*, 875 F.3d 533, 535–36 (10th Cir. 2017). "When construing the minimum culpable conduct required for a conviction, such conduct only includes that in which there is a realistic probability, not a theoretical possibility, the state statute would apply." *Id.* at 536 (internal quotation marks omitted).

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

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

After the district court issued its decision in this case, this court decided *Garcia*, where we considered whether a conviction for third degree robbery under the same New Mexico robbery statute qualified as a violent felony under the Elements Clause. We held that third degree robbery "categorically matches the definition of 'physical force' the Supreme Court assigned in *Johnson I*" as it "has an element the use or threatened use of physical force against another person." *Garcia*, 877 F.3d at 956. In concluding that robbery under § 30-16-2 "is a violent felony under the ACCA's Elements Clause," *id.*, we emphasized that the "mere[ ] snatching [of property] without any resistance from the victim would not" satisfy "the element of force for robbery" under the New Mexico statute, *id.* at 954 (citing *State v. Curley*, 123 N.M. 295, 939 P.2d 1103, 1105 (N.M. Ct. App. 1997)) (concluding that "when no more force is used than would be necessary to remove property from a person who does not resist, then the offense is larceny, and not robbery").

[8] After *Garcia* was decided, the Supreme Court decided *Stokeling v. United States*, —— U.S. ——, 139 S. Ct. 544, 550, 202 L.Ed.2d 512 (2019), which held that the ACCA's Elements Clause "encompasses ***1225** robbery offenses that require the criminal to overcome the victim's resistance." After issuing *Stokeling*, the Supreme Court denied certiorari in *Garcia*. *See Garcia v. United States*, —— U.S. ——, 139 S. Ct. 1257, 203 L.Ed.2d 294 (2019).

The government contends *Stokeling* and *Garcia* control the outcome in this case. Mr. Manzanares responds that *Garcia* was wrongly decided and that New Mexico robbery does not have as an element the use of physical force as described by *Stokeling*. We agree with the government that *Stokeling* and *Garcia* are controlling.

[9] **[10]** We acknowledge "[w]e cannot overrule the judgment of another panel of this court. We are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court." *In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993) (per curiam). Further, "when a panel of this Court has rendered a decision interpreting state law, that interpretation is binding on ... subsequent panels of this Court, unless an intervening decision of the state's highest court has resolved the issue."

Wankier v. Crown Equip. Corp., 353 F.3d 862, 866 (10th Cir. 2003).

Garcia held that a conviction for simple robbery under § 30-16-2 satisfies the Elements Clause, and, as Mr. Manzanares concedes, interpreted the statute to require force that overcomes the victim's resistance. *See* Aplt. Br. at 21 ("As the *Garcia* panel acknowledged, numerous New Mexico cases expressly state that 'any quantum of force which overcomes resistance would be sufficient to support a robbery conviction.' ") (citing *Garcia*, 877 F.3d at 956). If simple robbery satisfies the Elements Clause, then necessarily armed robbery under the same statute would satisfy the Elements Clause. We are bound by *Garcia*'s interpretation of the New Mexico robbery statute, and we are unpersuaded by Mr. Manzanares's arguments urging us to reconsider its holdings.

[11] First, *Stokeling* is not a superseding contrary Supreme Court decision. Rather than undermining *Garcia*'s result, *Stokeling* compels it. *Stokeling* holds that the amount of force sufficient to overcome a victim's resistance satisfies *Johnson I*'s force standard. 139 S. Ct. at 555; *see also* *United States v. Ash*, 917 F.3d 1238, 1242 (10th Cir. 2019), *cert. filed*, No. 18-9639 (June 12, 2019) (noting, after *Stokeling*, that "[t]he line is drawn, therefore, between robbery that can be accomplished by the mere snatching of property and robbery that requires overcoming even slight victim resistance"). And, as interpreted in *Garcia*, New Mexico's robbery statute distinguishes "robbery" from "larceny" using a nearly identical standard as *Stokeling*: "[R]obbery is committed when attached property is snatched or grabbed by sufficient force so as to overcome the resistance of attachment," *Curley*, 939 P.2d at 1105, but it is not committed by a "mere[ ] snatching ... without any resistance from the victim," *Garcia*, 877 F.3d at 954. *See also* *State v. Martinez*, 85 N.M. 468, 513 P.2d 402, 402 (N.M. Ct. App. 1973) (affirming robbery conviction where "there was more than a 'mere snatching' "); *State v. Sanchez*, 78 N.M. 284, 430 P.2d 781, 782 (N.M. Ct. App. 1967) (stating that the force used "must overcome the victim's resistance" and reversing a robbery conviction because facts were "comparable to those pickpocket or purse snatching cases").

To be sure, in *Ash*, we noted that the standard applied in *Garcia* was "arguably ... different" than the standard applied ***1226** by the Supreme Court in *Stokeling*. 917 F.3d at 1242 n.5. That is, rather than determining only whether New Mexico robbery requires force to overcome a victim's resistance, *Garcia* drew a different line: whether the New Mexico statute requires "the use of *any* physical force" to overcome the victim's resistance *or* something "more than minimal actual force." 877 F.3d at 950 (emphasis in original). But *Stokeling* held that either of these readings of New Mexico law would satisfy *Johnson I*, concluding that *any* "force necessary to overcome a victim's physical resistance is inherently 'violent' in the sense contemplated by *Johnson*." 139 S. Ct. at 553. Thus, *Stokeling* does not undermine *Garcia*'s result. [2]

Moreover, because there has been no intervening change in state law, we are bound by *Garcia*'s interpretation of New Mexico's robbery statute. *See* *Wankier*, 353 F.3d at 866. Mr. Manzanares argues that a post-*Garcia* state law decision, *State v. Barela*, No. A-1-CA-34945, 2018 WL 4959122, at *2 (N.M. Ct. App. Sept. 4, 2018), illustrates that New Mexico robbery can be perpetrated without any use, attempted use, or explicit threats of force. Aplt. Rep. Br. at 5. In *Barela*, the New Mexico Court of Appeals upheld the defendant's robbery conviction because the evidence showed the defendant had uttered threats of violence, which satisfied the state's obligation to show that the defendant took the purse by threatened force or violence. *See id.* Because *Barela* required a threatened use of violence to uphold a robbery conviction, it likewise does not undermine *Garcia*. [3]

Given *Stokeling*'s holding that force which overcomes a victim's resistance is violent force, and *Garcia*'s holding that New Mexico's robbery statute requires that level of force, we affirm the district court's conclusion that Mr. Manzanares's New Mexico armed robbery conviction satisfies the Elements Clause.

III

[12] Mr. Manzanares has also moved to expand the COA to address his other two underlying prior convictions. A COA ***1227** requires "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), meaning that Mr. Manzanares "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000).

A

[13] **[14]** One of Mr. Manzanares's prior convictions is for aggravated assault with a deadly weapon, in violation of N.M. Stat. Ann. § 30-3-2(A). Under N.M. Stat. Ann. § 30-3-2(A), "[a]ggravated assault consists of ... unlawfully assaulting or striking at another with a deadly weapon." This court has twice held that § 30-3-2(A) satisfies the Elements Clause. *See* *United States v. Maldonado-Palma*, 839 F.3d 1244, 1250 (10th Cir. 2016) (holding § 30-3-2(A) is categorically a crime of violence under the Elements Clause of United States Sentencing Guidelines Manual § 2L1.2);[4] *United States v. Ramon Silva*, 608 F.3d 663, 674 (10th Cir. 2010) (holding § 30-3-2(A) is categorically a violent felony under the Elements Clause), *abrogated on other grounds by* *Mathis v. United States*, —— U.S. ——, 136 S. Ct. 2243, 195 L.Ed.2d 604 (2016).

Mr. Manzanares argues that *Maldonado-Palma* and *Ramon Silva* were wrongly decided and that they are undermined by a subsequent New Mexico Court of Appeals decision, *State v. Branch*, 417 P.3d 1141 (N.M. Ct. App. 2018) (*Branch II*), because *Branch II* holds that aggravated assault does not require a specific intent to use a deadly weapon "against the person of another." But *Branch II*'s holding that aggravated assault is a general-intent crime did not alter the state of the law. Rather, as *Ramon Silva* recognized, "aggravated assault does not require proof of a specific intent to assault the victim, or of a specific intent to injure or even frighten the victim[; thus confirming] that aggravated assault is not a specific intent crime, but rather is a general intent crime." 608 F.3d at 673 (brackets, citations, and internal quotation marks omitted). The offense is a violent felony because it requires "unlawfully assaulting or striking at another," § 30-3-2(A), employing a deadly weapon, *Maldonado-Palma*, 839 F.3d at 1250, with general criminal intent, *see* *Ramon Silva*, 608 F.3d at 673, all of which we have held at least threaten the use of physical force against the person of another. Given this court's binding precedent, no reasonable jurist could debate the district court's conclusion that Mr. Manzanares's New Mexico conviction for aggravated assault with a deadly weapon satisfies the Elements Clause.

B

[15] Mr. Manzanares's other prior conviction is for aggravated battery, in violation of N.M. Stat. Ann. § 30-3-5(C). N.M. Stat. Ann. § 30-3-5 states:

> A. Aggravated battery consists of the unlawful touching or application of force to the person of another with intent to injure that person or another.
>
> B. Whoever commits aggravated battery, inflicting an injury to the person ***1228** which is not likely to cause death or great bodily harm, but does cause painful temporary disfigurement or temporary loss or impairment of the functions of any member or organ of the body, is guilty of a misdemeanor.

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

Mr. Manzanares argues that a conviction under § 30-3-5(C) does not categorically require *Johnson I*-level force because "New Mexico aggravated battery is focused on the resulting harm to the person[,] not the force behind the unlawful touching." Aplt. Br. at 57. For this proposition, Mr. Manzanares relies on *United States v. Perez-Vargas*, 414 F.3d 1282 (10th Cir. 2005), and *United States v. Rodriguez-Enriquez*, 518 F.3d 1191 (10th Cir. 2008). Aplt. Br. at 54.

However, we expressly overruled *Rodriguez-Enriquez* and *Perez-Vargas* in *United States v. Ontiveros*, 875 F.3d 533, 536 (10th Cir. 2017), citing and relying on the Supreme Court's decision in *United States v. Castleman*, 572 U.S. 157, 134 S.Ct. 1405, 188 L.Ed.2d 426 (2014). The Supreme Court in *Castleman* "specifically rejected the contention that 'one can cause bodily injury without the use of physical force.' " *Ontiveros*, 875 F.3d at 536 (quoting *Castleman*, 572 U.S. at 170, 134 S.Ct. 1405). Thus, in *Ontiveros*, we concluded that Colorado second-degree assault is a crime of violence, even though the crime's elements "focus on the result of the conduct (serious bodily injury), not the conduct itself." *Id.* (holding that "*Perez-Vargas* and *Rodriguez-Enriquez* relied on reasoning that is no longer viable in light of *Castleman*"). Mr. Manzanares contends that *Rodriguez-Enriquez* and *Perez-Vargas* "should remain binding precedent," Aplt. Br. at 57, but we are bound by *Ontiveros* and the Supreme Court's ruling in *Castleman*. The district court's conclusion that Mr. Manzanares's conviction under § 30-3-5(C) satisfies the Elements Clause is not reasonably debatable.

IV

We affirm the district court's denial of Mr. Manzanares's § 2255 motion, deny his motion to expand the COA, and deny as moot the government's motion for summary affirmance.

All Citations

956 F.3d 1220

Footnotes

1 The district court did not require Mr. Manzanares to show that the Residual Clause played a role in his sentencing. *See United States v. Snyder*, 871 F.3d 1122, 1130 (10th Cir. 2017) (affirming denial of relief where the defendant was sentenced under the Enumerated Clause, rather than the Residual Clause). We need not determine what effect the Residual Clause had at sentencing, however, because any error in applying the Residual Clause would be harmless, as the government has shown that Mr. Manzanares has three convictions that qualify as violent felonies under the Elements Clause. *See United States v. Driscoll*, 892 F.3d 1127, 1135–36 (10th Cir. 2018) (stating a *Johnson II* error would be harmless if the defendant has three valid predicate convictions to support an ACCA sentence).

2 Mr. Manzanares also relies on our post-*Stokeling* decision in *United States v. Bong*, 913 F.3d 1252 (10th Cir. 2019), but *Bong* involved a different state statute than the one at issue

here. In *Bong*, we concluded that a conviction under Kansas's robbery statute did not qualify as a violent felony because Kansas law, in contrast with that of New Mexico, permits a defendant to be convicted of violating the statute without any resistance by or injury to the victim. 913 F.3d at 1262, 1264. In other words, Kansas robbery falls on the other side of the "snatching" line.

3 Even if we were not bound by *Garcia*'s interpretation of New Mexico's robbery statute, we would conclude that the statute, as applied by New Mexico courts, requires force that overcomes the victim's resistance rather than the mere snatching of property. *See* *Curley*, 939 P.2d at 1105; *Martinez*, 513 P.2d at 402; *Sanchez*, 430 P.2d at 782; *see also* *State v. Bernal*, 140 N.M. 644, 146 P.3d 289, 296 (2006) (noting that robbery is "distinct from larceny because it requires, and is designed to punish, the element of force"). Mr. Manzanares, however, points to *State v. Clokey*, 89 N.M. 453, 553 P.2d 1260, 1260 (1976), where the New Mexico Supreme Court held that "the evidence supported the verdict of the jury that the snatching of the purse was accompanied by force sufficient to convert the crime from larceny to robbery." But the New Mexico Court of Appeals, in its post-*Clokey* decisions, has not interpreted *Clokey* as requiring an amount of force less than necessary to overcome a victim's resistance. *See, e.g.*, *Curley*, 939 P.2d at 1105 (noting that "the issue in [*Clokey*] was not whether there was evidence justifying a lesser-included-offense instruction [of larceny]").

4 Given the "similarity in language between the ACCA and [the Sentencing Guidelines]" defining "violent felony" and "crime of violence," respectively, we may "look[ ] to precedent under one provision for guidance under another in determining whether a conviction qualifies as a violent felony." *Ramon Silva*, 608 F.3d at 671 (quotations omitted).

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

v. **No. 12-cr-1563 WJ**
16-cv-0599 WJ/SMV

ARCHIE MANZANARES,

Defendant.

ORDER ADOPTING MAGISTRATE JUDGE'S PROPOSED FINDINGS AND RECOMMENDED DISPOSITION

THIS MATTER is before the Court on the Magistrate Judge's Proposed Findings and Recommended Disposition [CR Doc. 53; CV Doc. 21] ("PF&RD") issued September 6, 2017. On reference by the undersigned, [CV Doc. 2], the Honorable Stephan M. Vidmar, United States Magistrate Judge,[1] recommended denying Defendant Archie Manzanares's Motion to Correct Sentence Pursuant to 28 U.S.C. § 2255 [CR Doc. 35; CV Doc. 1]. Manzanares objected to the PF&RD on November 6, 2017. [CR Doc. 57; CV Doc. 25]. On de novo review of the portions of the PF&RD to which Manzanares objects, the Court will overrule the objections, adopt the PF&RD, deny Manzanares's motion, and dismiss case number 16-cv-0599 WJ/SMV with prejudice.

I. Background

On June 27, 2012, Manzanares was charged via indictment with being a felon in possession of a firearm/ammunition, in violation of 18 U.S.C. §§ 922(g)(1), 924(e)(1).

[1] Throughout his objections, Manzanares refers to Judge Vidmar as a "magistrate." *E.g.*, [CV Doc. 25] at 1, 2, 15, 16, 21, 23, 26, 28, 31. The appropriate title is "magistrate judge." *See* 28 U.S.C. § 636.

Presentence Report ("PSR") at 4. On April 1, 2013, he was charged via information with possession of heroin, in violation of 21 U.S.C. § 844(a). *Id.* He pleaded guilty to both charges on April 1, 2013. *Id.* The plea bargain Manzanares negotiated with the government hinged on whether he qualified as an armed career criminal under the Armed Career Criminal Act ("ACCA"). If he was found to be an armed career criminal, Manzanares would stipulate to a sentence of 180 months. *Id.* If he was found not to be an armed career criminal, Manzanares would be permitted to withdraw from the plea. *Id.*

United States Probation and Pretrial Services prepared his PSR. The PSR provided that Manzanares qualified as an armed career criminal under the ACCA because he had at least three prior convictions for violent felonies or serious drug offenses. *Id.* at 7. In applying the ACCA enhancement, the PSR did not list which prior felony convictions constituted the "violent felonies" or "serious drug offenses." *Id.* Elsewhere in the PSR, however, Manzanares's prior felony convictions are listed. *Id.* at 5. Among them are aggravated assault with a deadly weapon, aggravated battery, and armed robbery, all in New Mexico. *Id.* Likewise, the PSR lists his entire criminal history in a separate section, though it does not indicate which of the offenses were felonies (as opposed to misdemeanors), or which were relied on as predicate offenses in applying the ACCA enhancement. *See id.* at 8–12.

With the armed career criminal enhancement, Manzanares's offense level was 34. *Id.* at 7. Based on a downward adjustment for acceptance of responsibility, his total offense level was 31, with a criminal history category of VI and a guideline imprisonment range of 188–235 months. *Id.* at 8, 19. On July 2, 2013, the Court held a sentencing hearing. *See* [CR Doc. 33]. Neither party objected to the PSR. *See id.* at 3. The Court accepted the plea agreement and

found that Manzanares qualified as an armed career criminal under the ACCA. *Id.* at 5. The Court sentenced him to 180 months' imprisonment pursuant to the plea agreement. *Id.* Manzanares did not appeal his sentence. The instant case is his first motion under § 2255.

II. Motions under § 2255 and *Johnson II*

Pursuant to 28 U.S.C. § 2255(a), a "prisoner in custody" pursuant to a federal conviction may "move the court . . . to vacate, set aside or correct the sentence" if it "was imposed in violation of the Constitution or laws of the United States."

In *Johnson v. United States* ("*Johnson II*"), 135 S. Ct. 2551, 2557 (2015), the Supreme Court held that the so-called "residual clause" of the definition of "violent felony" in the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B), was unconstitutionally vague. The ACCA defined "violent felony" as follows:

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

Id. (emphasis added). The closing words of this definition, italicized above, have come to be known as the "residual clause." Subsection (i) is referred to as the "force clause."

The Court explained that the residual clause left "grave uncertainty" about "deciding what kind of conduct the 'ordinary case' of a crime involves." *Johnson II*, 135 S. Ct. at 2557. That is, the residual clause "denie[d] fair notice to defendants and invite[d] arbitrary enforcement by judges" because it "tie[d] the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements." *Id.* Second, the ACCA's residual

clause left "uncertainty about how much risk it takes for a crime to qualify as a violent felony." *Id.* at 2558. By combining these two indeterminate inquiries, the Court held, "the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id.* On that ground it held the residual clause void for vagueness. *Id.*

Soon thereafter, the Court determined that the ruling in *Johnson II* was substantive (as opposed to procedural) and, therefore, had "retroactive effect in cases on collateral review." *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016). Accordingly, *Welch* opened the door for individuals sentenced under the residual clause of the ACCA's violent-felony definition to move to vacate their sentences as unconstitutional under § 2255.

III. Judge Vidmar found that Manzanares's prior convictions qualified as violent felonies irrespective of the now-invalidated residual clause and recommended that his motion be denied.

Manzanares had at least three prior felony convictions that were determined to qualify as violent felonies under § 924(e)(2)(B) of the ACCA, triggering that provision's sentencing enhancement.[2] *See* PSR at 5, 7; [CR Doc. 2] at 1. Manzanares challenged the application of the ACCA sentencing enhancement. He argued that the government had waived the right to argue that certain of his prior convictions qualified as violent felonies under those portions of § 924(e)(2)(B) that remained intact in the wake of *Johnson II*. [Doc. 1][3] at 6–9. In the alternative, Manzanares contended that his prior New Mexico convictions for aggravated assault

[2] The record showed a discrepancy as to the precise number of Manzanares's prior felony convictions: his PSR listed six, but his charging document listed five. *Compare* PSR at 5, *with* [CR Doc. 2] at 1. Judge Vidmar noted that this discrepancy was immaterial because the conviction not listed in the indictment was not one of the three on which the government relied for the ACCA sentencing enhancement. [CV Doc. 21] at 4 n.2.

[3] Unless specifically noted otherwise, citations to document numbers refer to the docket in the civil case, case number 16-cv-0599 WJ/SMV.

with a deadly weapon, aggravated battery, and armed robbery[4] could have qualified as violent felonies (and thus, counted toward his armed career criminal designation) only under the now-invalidated residual clause. [Doc. 1] at 9–24. He argued he was therefore entitled to be resentenced without application of the ACCA enhancement.

The government responded that it had not waived the right to argue that Manzanares's prior felony convictions qualified under the still-extant clauses of § 924(e)(2)(B). [Doc. 10] at 14–15. It contended that because Manzanares did not object to the PSR or imposition of the ACCA enhancement at sentencing, "the Court must assume that it relied upon *all*" of his qualifying prior convictions. *Id.* at 15 (emphasis added). The government further argued that each of the three prior felony convictions qualified under the force clause of the ACCA. *Id.* at 3–14.

Judge Vidmar found that (1) the government had not waived the right to argue that Manzanares's prior convictions qualified under those portions of § 924(e)(2)(B) that survived *Johnson II*, and (2) Manzanares's prior convictions for New Mexico aggravated assault with a deadly weapon, aggravated battery, and armed robbery qualified as violent felonies, irrespective of the unconstitutional residual clause. [Doc. 21]. Therefore, he recommended that Manzanares not be resentenced and that his § 2255 motion be denied.

[4] Though the PSR never indicated which three of his prior convictions were the qualifying felonies, the parties apparently agreed that these were the three at issue. Additionally, in a memorandum filed after Manzanares filed the instant motion, the United States Probation Office identified these three prior convictions as those that "meet the definition of violent felony, without the use of the residual clause." [Doc. 7].

A. Judge Vidmar found that the United States had not waived the right to argue that Manzanares's prior convictions qualified as violent felonies under the force clause of the ACCA.

Judge Vidmar first addressed the threshold issue raised by Manzanares—whether the government had waived the right to argue that certain of his prior convictions still qualified as violent felonies under § 924(e)(2)(B) in the wake of *Johnson II*. [Doc. 21] at 6–10. Neither the PSR nor the Court at sentencing expressly stated which of Manzanares's prior felony convictions qualified as violent felonies, or which clause of § 924(e)(2)(B) the convictions fell under (i.e., the so-called "force clause," the "enumerated clause," or the "residual clause"). *Id.* at 6. Manzanares contended that, by failing to object at the time of his sentencing, the government waived the right to later identify which prior convictions were qualifying ACCA predicate offenses. *Id.* Manzanares argued it would be "fundamentally unfair" to allow the government to "swap out unidentified ACCA predicate offenses" on collateral review of his ACCA enhancement. *Id.*

Judge Vidmar found that Manzanares had cited no case law in support of his argument that the government could not rely on prior convictions not specifically referenced as ACCA predicates in the PSR or at sentencing. The case from the Eleventh Circuit on which Manzanares relied actually contravened his position. *Id.* at 6–7 (citing *McCarthan v. Warden*, 811 F.3d 1237 (11th Cir. 2016), *rev'd en banc on other grounds sub nom. McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076 (2017)). The court in *McCarthan* had noted that, in general, defendants are "entitled to know the specific convictions on which an ACCA enhancement is recommended and imposed." *Id.* at 7–8 (quoting *McCarthan*, 811 F.3d at 1253). But where the defendant had failed to object to the PSR or at sentencing, the court reviewing his

§ 2254 petition "must . . . assume that the district court relied on all of [the defendant's] ACCA-qualifying convictions in imposing" his ACCA enhancement. *Id.* at 8 (quoting *McCarthan*, 811 F.3d at 1254). *McCarthan* put the onus on the *defendant*, not the government, to object to the PSR or at sentencing where the ACCA enhancement was applied and the qualifying prior convictions not explicitly identified. Absent any such objection, the reviewing court must presume that the sentencing court relied on *all* ACCA-qualifying convictions.[5] Judge Vidmar found that a recent decision from this District further compelled the finding that the government had not waived the right to rely on Manzanares's prior convictions. *Id.* at 9–10 (citing *United States v. Garcia*, No. 16-cv-0240 JB/LAM, 2017 WL 2271421, at *19–21 (D.N.M. Jan. 31, 2017) ("There is no dispute that [the defendant] has a robbery conviction, and the conviction's existence cannot be waived. The Court can consider it. It does not disappear. What [the sentencing judge] did with it, or did not do with it, ten years ago is irrelevant.")). The government was not foreclosed, Judge Vidmar found, from arguing that any of the qualifying prior felony convictions listed in Manzanares's PSR still qualified as ACCA predicate offenses even absent the unconstitutional residual clause.

B. Judge Vidmar found that Manzanares's predicate offenses qualified as violent felonies under the force clause of the ACCA.

1. The Force Clause of § 924(e)(2)(B)

The "force clause" of § 924(e)(2)(B) provides that an underlying conviction is a violent felony where it "has as an element the use, attempted use, or threatened use of physical force against the person of another." § 924(e)(2)(B)(i). To determine whether a prior conviction

[5] Judge Vidmar noted that *McCarthan* did discuss the circumstances under which the government's failure to object to the PSR or at sentencing would constitute waiver. [Doc. 21] at 8 n.5 (citing *McCarthan*, 811 F.3d at 1250 n.8). He found, however, that such circumstances were inapplicable to the facts of this case. *Id.*

qualifies as a violent felony under the force clause, courts compare § 924(e)(2)(B)(i) with the elements of the underlying statute of conviction.

Specifically, courts must compare the force required for a conviction of the predicate offense against the physical force requirement of § 924(e)(2)(B)(i). Courts must determine whether the least culpable conduct criminalized by the underlying offense—e.g., the least amount of force required to sustain a conviction for New Mexico aggravated assault with a deadly weapon—meets the physical force requirement of the force clause. *See Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013) ("Because we examine what the state conviction necessarily involved, not the facts underlying the case, we must presume that the conviction rested upon [nothing] more than the least of th[e] acts criminalized, and then determine whether even those acts are encompassed by [the force clause]." (last set of brackets added) (internal quotation marks omitted)). This inquiry requires application of both federal and state law. Federal law defines the meaning of the phrase "use, attempted use, or threatened use of physical force" in § 924(e)(2)(B)(i). *United States v. Harris*, 844 F.3d 1260, 1264 (10th Cir. 2017). And state law defines the substantive elements of the crime of conviction. *Id.*; *United States v. Rivera-Oros*, 590 F.3d 1123, 1126 (10th Cir. 2009). In discerning the level of force that gives rise to conviction under the predicate offense, there must be a "*realistic probability*, not a theoretical possibility," that the statute would apply to the conduct contemplated. *Rivera-Oros*, 590 F.3d at 1133 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)).

In undertaking this comparison, courts generally apply the "categorical approach." *Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013). That is, courts look only to the statutory definition of the predicate offense, while ignoring the particular facts of the case. *Id.* If

the statute of conviction "sweeps more broadly" than the force clause (i.e., if conviction could result without the use of "physical force," as federal law defines that term), the prior conviction cannot qualify as an ACCA predicate, irrespective of whether the defendant's actual conduct in committing the crime involved the use of physical force. *See id.*

Some statutes, however, have a more complicated structure and require a slightly different approach. A single statute may be "divisible"—it may list elements in the alternative—and thereby define multiple crimes. *Id.* at 2281. When a statute defines multiple crimes by listing alternative elements, courts undertake the "modified categorical approach" to determine *which* of the multiple alternative elements listed in the statute applied to convict the defendant. *Id.* Under the modified categorical approach, a sentencing court looks to the record of conviction (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of. The court may then compare the physical force required for conviction under that crime, as the categorical approach commands, with the physical force requirement of the force clause. *See id.*

The Supreme Court has provided guidance for determining whether a statute is indivisible or divisible and, thus, whether to implement the modified categorical approach first or proceed directly to the categorical approach. *Mathis v. United States*, 136 S. Ct. 2243, 2256–57 (2016). The central question is whether the statute lists multiple *elements* disjunctively, thereby creating multiple different crimes (i.e., a divisible statute, triggering the modified categorical approach), or whether it enumerates various factual *means* of committing a single element (i.e., an indivisible statute, requiring the categorical approach). *Id.* at 2249–50. If a state court decision "definitively answers the question," then a sentencing judge "need only follow what it

says." *Id.* at 2256. Or, "the statute on its face may resolve the issue." *Id.* If statutory alternatives carry different punishments, then they must be elements (and, thus, the statute divisible, triggering the modified categorical approach). *Id.* (citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000)). "Conversely, if a statutory list is drafted to offer 'illustrative examples,' then it includes only a crime's means of commission." *Id.*

2. Manzanares's Prior Convictions

In *Johnson v. United States* ("*Johnson I*"), 559 U.S. 133, 138–40 (2010), the Supreme Court interpreted "physical force" under the force clause of § 924(e)(2)(B) to mean "*violent* force—that is, force capable of causing physical pain or injury to another person." *Id.* at 140. The Court offered this interpretation in the course of holding that the force required for conviction under a state battery statute—"*any* intentional physical contact, no matter how slight"—was less than the ACCA's physical force requirement. *Id.* at 138 (internal quotation marks omitted). In other words, "physical force" under the force clause means more than de minimis touching. *See Harris*, 844 F.3d at 1264–65 ("It is important to keep in mind why it was necessary for the Court [in *Johnson I*] to use the language" of "*violent* force" and "strong physical force"—namely, because the Court "was rejecting the government's argument that physical force means . . . . even the slightest offensive touching." (internal quotation marks omitted)).

Judge Vidmar considered whether each of Manzanares's prior qualifying convictions required the degree of force necessary to satisfy the "physical force" requirement of § 924(e)(2)(B)(i).[6] He found that they did.

Aggravated Assault with a Deadly Weapon

Manzanares was convicted of aggravated assault, NMSA 1978, § 30-3-2. That statute provides:

> Aggravated assault consists of either:
>
> A. unlawfully assaulting or striking at another with a deadly weapon;
>
> B. committing assault by threatening or menacing another while wearing a mask, hood, robe or other covering upon the face, head or body, or while disguised in any manner, so as to conceal identity; or
>
> C. willfully and intentionally assaulting another with intent to commit any felony.

§ 30-3-2. There was no dispute that Manzanares was convicted of aggravated assault with a deadly weapon, § 30-3-2(A). [Doc. 21] at 15.

Judge Vidmar found that Tenth Circuit precedent compelled the finding that § 30-3-2(A) satisfied the "physical force" requirement of the force clause. *Id.* at 15–17. In *United States v. Ramon Silva*, 608 F.3d 663, 670–71 (10th Cir. 2010), the Tenth Circuit held that "apprehension causing" aggravated assault with a deadly weapon was a violent felony under the ACCA's force clause. Subsequently, in *United States v. Maldonado-Palma*, 839 F.3d 1244 (10th Cir. 2016), the Tenth Circuit held that § 30-3-2(A), aggravated assault with a deadly weapon, was

[6] The government did not contend that any of Manzanares's prior convictions qualified under the enumerated clause of § 924(e)(2)(B). The only issue, then, was whether each qualified under the force clause.

categorically a "crime of violence" under the force clause, no matter which theory of the underlying simple assault applied. *Id.* at 1250. After determining that the New Mexico aggravated assault statute was divisible, the court found that commission of aggravated assault with a deadly weapon required the *use* (and not just the mere possession) of a deadly weapon in carrying out the assault. *Id.* Employing a deadly weapon in an assault "necessarily threatens the use of physical force, i.e., 'force capable of causing physical pain or injury to another person.'" *Id.* (quoting *Johnson I*, 559 U.S. at 140). Therefore, the court concluded, New Mexico aggravated assault with a deadly weapon was categorically a crime of violence.[7]

Manzanares argued that a recent decision of the New Mexico Court of Appeals, *State v. Branch*, 2016-NMCA-071, 387 P.3d 250, undercut the reasoning of *Ramon Silva* and *Maldonado-Palma* and compelled a different outcome. [Doc. 21] at 17. Manzanares argued that, per the reasoning of *Branch*, assault in New Mexico did not require proof of the defendant's intent to assault the victim—only that the victim reasonably believed he or she was in danger. *Id.* (citing [Doc. 19] at 2). He argued that the Tenth Circuit's recent decisions were wrongly decided because they rested on the principle that the use of physical force must be "intentional against the person of another." *Id.* (citing [Doc. 19] at 4). Judge Vidmar rejected this argument. He found he was bound by the Tenth Circuit's decisions in *Ramon Silva* and *Maldonado-Palma*. *Id.* *Branch* was decided before *Maldonado-Palma* and therefore did not undermine the precedential value of that decision. *Id.*; *see also United States v. Miera*, 2013 WL 6504297, at *18 (D.N.M. Nov. 22, 2013) (questioning the Tenth Circuit's opinion in *Ramon Silva* but

[7] Although the court in *Maldonado-Palma* was evaluating the force clause of United States Sentencing Guidelines § 2L1.2, Judge Vidmar found that its holding applied equally to the identically worded force clause of the ACCA's definition of violent felony. [Doc. 21] at 16 (citing *Maldonado-Palma*, 839 F.3d at 1248; *Ramon Silva*, 608 F.3d at 671; *United States v. Mitchell*, 653 F. App'x 639, 642 (10th Cir. 2016)).

concluding that the court "is not, however, free to disregard the majority's conclusion that aggravated assault with a deadly weapon in New Mexico is a violent felony" under the force clause of the ACCA). Judge Vidmar concluded that New Mexico aggravated assault with a deadline weapon, § 30-3-2(A), qualified as a violent felony under the force clause of the ACCA, 18 U.S.C. § 924(e)(2)(B).

Aggravated Battery

Manzanares was also convicted of aggravated battery, NMSA 1978, § 30-3-5. That statute provides:

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

§ 30-3-5. Judge Vidmar first found that § 30-3-5 was divisible into its respective misdemeanor and felony subsections because statutory alternatives carrying different penalties "must be elements."[8] [Doc. 21] at 18 (quoting *Mathis*, 136 S. Ct. at 2256). Applying the modified

[8] Manzanares challenged the government's position that the divisibility question should be decided and the modified categorical approach applied. He argued, "If the offense is not categorically a [violent felony], then the court does not use the modified categorical approach to evaluate it. In other words, because the statue is overly broad and indivisible as to the unlawful touch element, the modified categorical approach is not applied." [Doc. 19] at 8. Judge Vidmar rejected this apparent suggestion that because simple battery is a component of aggravated battery, the divisibility question is irrelevant, because simple battery does not require *Johnson I*-level physical force. [Doc. 21] at 18 n.11. He found that Manzanares's analysis was mistaken and the divisibility question necessarily

categorical approach, he found that Manzanares was convicted under subsection C, the felony version of the statute.[9] *Id.* at 19.

Having concluded that Manzanares was convicted of felony aggravated battery, Judge Vidmar compared the elements of § 30-3-5(C) against the force clause of § 924(e)(2)(B). Conviction under § 30-3-5(C) required proof that the defendant committed a battery (1) that inflicted great bodily harm, (2) with a deadly weapon, or (3) in a manner whereby great bodily harm could be inflicted. *Id.* at 19–20 (citing § 30-3-5(C); UJI 14-322 NMRA; UJI 14-323 NMRA). "Great bodily harm," under New Mexico law, was "an injury to the person which creates a high probability of death; or which causes serious disfigurement; or which results in permanent or protracted loss or impairment of the function of any member or organ of the body." *Id.* at 20 (citing NMSA 1978, § 30-1-12(A)). And a "deadly weapon" was defined as "any firearm," "any weapon which is capable of producing death or great bodily harm," or "any other weapons with which dangerous wounds can be inflicted." *Id.* (citing § 30-1-12(B)). Moreover, aggravated battery with a deadly weapon in New Mexico required the *use* of the deadly weapon. *Id.* (citing UJI 14-322 (instructing that aggravated battery with a deadly weapon requires proof that the defendant "touched or applied force to" the victim with a deadly weapon and that "[t]he defendant *used*" a deadly weapon (emphasis added))).

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preceded a comparison of the elements of the crime of conviction against the force clause. *Id.* (citing *Mathis*, 136 S. Ct. at 2256 (characterizing the divisibility question ("elements or means?") as the "threshold inquiry")).

[9] It was not clear to Judge Vidmar whether Manzanares genuinely contested that he was convicted of the felony, rather than the misdemeanor, version of aggravated battery. [Doc. 21] at 19. Neither party had submitted documentation of his prior conviction beyond the PSR, and Manzanares cited case law providing that "a court may not use [a PSR] to resolve a conviction's ambiguities." *Id.* (quoting *United States v. Hays*, 526 F.3d 674, 678 (10th Cir. 2008)). To the extent Manzanares was contesting that he was convicted of felony aggravated battery, Judge Vidmar took judicial notice of the public record of his conviction, which showed that he was convicted of felony aggravated battery, § 30-3-5(C). *Id.* at 19 & n.14.

Judge Vidmar found that the least culpable conduct under § 30-3-5(C) necessarily involved the use or threatened use of physical force—"force capable of causing physical pain or injury to another person." *Id.* (quoting *Johnson I*, 559 U.S. at 140). Although the Tenth Circuit has not decided this specific question, it has evaluated similar statutes. *Id.* In *United States v. Treto-Martinez*, the Tenth Circuit held that Kansas aggravated battery satisfied the force clause of the Guidelines.[10] 421 F.3d 1156, 1160 (10th Cir. 2005). Conviction under one prong of the statute required "physical contact . . . whereby great bodily harm, disfigurement or death can be inflicted." *Id.* "It is clear," the court held, "that a violation of this provision is . . . sufficient to satisfy" the force clause. *Id.* "No matter what the instrumentality of the contact, if the statute is violated by contact that can inflict great bodily harm, disfigurement or death, it seems clear that, at the very least, the statute contains as an element the 'threatened use of physical force.'" *Id.* Judge Vidmar also looked to recent Tenth Circuit decisions interpreting assault statutes. *Id.* at 21 (citing *Maldonado-Palma*, 839 F.3d at 1249–50 (the use of a weapon "capable of producing death or great bodily harm" "necessarily threatens the use of physical force"); *Ramon Silva*, 608 F.3d at 670–71 (even though conviction could result without any actual physical contact against the victim, the conduct criminalized "could always lead to . . . substantial and violent contact, and thus . . . would always include as an element the threatened use of violent force" (internal quotation marks omitted)); *United States v. Taylor*, 843 F.3d 1215, 1224 (10th Cir. 2016) (noting that "regardless of the type of dangerous weapon that is employed by a particular defendant, the

[10] Judge Vidmar acknowledged that *Treto-Martinez* pre-dated *Johnson I* but noted that the court in *Treto-Martinez* did not apply a lesser standard of "physical force" in interpreting the force clause. [Doc. 21] at 20 n.15. Therefore, it did not appear to Judge Vidmar that the precedential value of *Treto-Martinez* was diminished by *Johnson I*. *Id.*

use of a dangerous weapon during an assault or battery always constitutes a sufficient threat of force to satisfy the [force] clause" (internal quotation marks omitted))).

Conviction under § 30-3-5(C), Judge Vidmar found, required more than de minimis force—it required the intent to injure and commission in a manner whereby great bodily harm was inflicted, where death or great bodily harm could have been inflicted, or where a deadly weapon was used. *Id.* at 22. A battery committed in a manner that could inflict great bodily harm necessarily required "force capable of causing physical pain or injury." *Id.* (citing *Johnson I*, 559 U.S. at 140; *Treto-Martinez*, 421 F.3d at 1160). Likewise, given the holding of *Maldonado-Palma* and its predecessors, a battery committed with the use of a deadly weapon "always constitutes a sufficient threat of force to satisfy the [force] clause." *Id.* (quoting *Taylor*, 843 F.3d at 1224 (internal quotation marks omitted)). Judge Vidmar found that the additional requirements of felony aggravated battery—essentially, that serious bodily injury did or could have occurred—put the statute squarely in the range of conduct that the Tenth Circuit has found to satisfy the physical force requirement of the force clause.

Manzanares's arguments to the contrary were unpersuasive. *Id.* at 22–23. He argued that conviction under the aggravated battery statute could result from mere "unlawful touching, however slight." [Doc. 19] at 6; *see also* [Doc. 1] at 22–23. Because "[s]imple battery is a necessary element of aggravated battery," he contended, any unlawful touch would satisfy the battery element, and no more force was required for conviction of the greater offense of aggravated battery. [Doc. 19] at 5. But Judge Vidmar noted that Manzanares cited no case that supported his argument. [Doc. 21] at 22–23. His citations to cases analyzing "simple" battery, rather than felony aggravated battery, were inapposite. *Id.* And the cases he cited that did

actually analyze the *aggravated* battery statute indisputably involved the use of physical force. *Id.* at 23. Manzanares ignored the plain language of the statute, which explicitly required more than mere touching, and cited no authority suggesting otherwise. *Id.*

Judge Vidmar likewise rejected Manzanares's reliance on two Tenth Circuit cases, finding that both cases were readily distinguishable. *Id.* (citing *United States v. Hays*, 526 F.3d at 678 (Wyoming battery statute did not satisfy the force clause where conviction could result from "unlawfully touching someone in a rude, insolent or angry manner"—i.e., "any contact, however slight"); *United States v. Barraza-Ramos,* 550 F.3d 1246, 1249–51 (10th Cir. 2008) (Florida aggravated battery statute, which criminalized battery against pregnant women, did not satisfy the force clause because it could be violated by merely "touching" a pregnant woman against her will)). Neither case contemplated a battery statute with the additional requirements of the intent to injure *and* commission (1) in a manner that causes great bodily harm, (2) with the use of a deadly weapon, or (3) in a manner whereby great bodily harm could be inflicted. These additional requirements distinguished New Mexico aggravated battery from the statutes in those cases. New Mexico felony aggravated battery, § 30-3-5(C), qualified as a violent felony under the force clause of the ACCA.

Armed Robbery

Finally, Judge Vidmar considered Manzanares's prior conviction for armed robbery. The New Mexico robbery statute provides:

> Robbery consists of the theft of anything of value from the person of another or from the immediate control of another, by use or threatened use of force or violence.
>
> Whoever commits robbery is guilty of a third degree felony.

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

§ 30-16-2. Judge Vidmar found that the statute was divisible into simple robbery, a third degree felony, and armed robbery, a first degree felony. [Doc. 21] at 24. Manzanares was convicted of armed robbery. *Id.*

Judge Vidmar then evaluated whether New Mexico armed robbery required the degree of physical force necessary to satisfy the force clause of the ACCA. *Id.* at 24–32. Without resolving whether the additional requirement of being armed with a deadly weapon during the commission of a robbery necessitates the use of force, he found that New Mexico robbery necessarily required the use of *Johnson I*-level physical force, irrespective of whether the defendant was armed.

Judge Vidmar found that the New Mexico robbery statute contained a force element: the theft must be committed "by use or threatened use of force or violence." *Id.* at 25 (quoting § 30-16-2). "The use of force, violence, or intimidation is an essential element of robbery." *Id.* (quoting *State v. Lewis*, 1993-NMCA-165, ¶ 8, 116 N.M. 849). The force must be exercised against the person of another. *State v. Bernal*, 2006-NMSC-050, ¶ 28, 140 N.M. 644 ("Robbery is not merely a property crime, but a crime against a person."). Further, he found, courts must consider the *degree* of force employed in the commission of the theft in evaluating conviction under the statute. *Id.* (citing *State v. Clokey*, 1976-NMSC-035, ¶ 3, 89 N.M. 453 ("The question of whether or not the snatching of the purse from the victim was accompanied by sufficient force to constitute robbery is a factual determination, within the province of the jury's discretion.")).

Judge Vidmar concluded that New Mexico robbery required more than mere de minimis force. *Id.* at 25–26. He was guided by the reasoning of two New Mexico state court decisions distinguishing robbery from the less serious crime of larceny. In *State v. Curley*, the New Mexico Court of Appeals noted that theft constitutes robbery only where it is accomplished using "force necessary to overcome any resistance." *Id.* at 25 (quoting *Curley*, 1997 NMCA-038, ¶ 18, 123 N.M. 295). The court noted that courts should construe the "resistance of attachment" requirement "in light of the idea that robbery is an offense against the person, and something about that offense should reflect the increased danger to the person that robbery involves over the offense of larceny." *Id.* at 25–26 (quoting *Curley*, 1997-NMCA-038, ¶ 11). The "reason for the distinction" between robbery and larceny—and the increased punishment—"is the increased danger to the person." *Id.* (quoting *Curley*, 1997-NMCA-038, ¶ 13). Therefore, "an increase in force that makes the victim aware that her body is resisting could lead to the dangers that the crime of robbery was designed to alleviate." *Id.* (quoting *Curley*, 1997-NMCA-038, ¶ 13).

The Supreme Court of New Mexico clarified this rationale in *State v. Bernal*, 2006-NMSC-050. As the Court found, "robbery is a crime designed to punish the use of violence" and "to protect citizens from violence." [Doc. 21] at 26 (quoting *Bernal*, 2006-NMSC-050, ¶¶ 27–28). In other words, Judge Vidmar found, the force used to commit a robbery is that which puts the victim on notice of the theft and creates the possibility of a dangerous and violent confrontation. *Id.* The rationale behind the force element of New Mexico robbery, he found, tracks that identified by the Tenth Circuit in defining a violent felony in

Ramon Silva—the prohibited conduct constitutes a violent felony because it "could always lead to . . . substantial and violent contact." *Id.* (quoting *Ramon Silva*, 608 F.3d at 672).

Judge Vidmar found that the Tenth Circuit's decision in *United States v. Harris*, 844 F.3d 1260, further compelled his findings. [Doc. 21] at 26–28. In evaluating the force element of Colorado robbery, the *Harris* court weighed heavily the language of a recent decision of the Colorado Supreme Court that discussed the distinction between larceny and robbery. *Id.* at 27 (citing *Harris*, 844 F.3d at 1266–67). The additional requirement of violence—of "circumstances involving a danger to the person as well as a danger to property"—distinguished Colorado robbery from the "property crime of larceny." *Id.* (quoting *Harris*, 844 F.3d at 1266–67). To the extent that earlier decisions of the Colorado appellate courts upheld robbery convictions on less-than-violent force, such case law was not controlling. *Id.* Judge Vidmar found that the rationale of the Colorado Supreme Court distinguishing robbery from larceny, on which the *Harris* court relied, mirrored that of the New Mexico courts in *Curley* and *Bernal*. *Id.* at 27–28. The crime of robbery in New Mexico, as in Colorado, was designed to "punish the use of violence" and "protect citizens from violence." *Id.* at 28 (quoting *Bernal*, 2006-NMSC-050, ¶¶ 27–28). New Mexico robbery, Judge Vidmar found, qualified as a violent felony under the force clause of the ACCA.

Judge Vidmar analyzed Manzanares's authorities and arguments to the contrary and found them to be inapposite or otherwise unpersuasive. *Id.* at 28–32. Manzanares relied, for example, on language in New Mexico case law that referred not to the *degree* of force used, but rather to the *time* at which the force or violence was deployed. *Id.* at 28–29 (citing *State v. Martinez*, 1973-NMCA-120, ¶¶ 4–5, 513 P.2d 402; *Lewis*, 1993-NMCA-165, ¶ 12). Such

language was not pertinent to the consideration of the degree of force required to commit robbery in New Mexico.

Judge Vidmar likewise found that the authorities Manzanares cited for the proposition that New Mexico robbery can be accomplished with de minimis force were unavailing. *Id.* at 29–30 (citing *Curley*, 1997-NMCA-038; *Martinez*, 1973-NMCA-120; *State v. Segura*, 1970-NMCA-066, 81 N.M. 673; *State v. Verdugo*, 2007-NMCA-095, ¶ 26, 142 N.M. 267; *State v. Pitts*, 1985-NMCA-045, ¶ 16, 102 N.M. 747). He found that none of the cases Manzanares cited actually upheld a robbery conviction on de minimis force, and that any dicta in the cases suggesting as much ran counter to the principles set out in *Curley* and *Bernal*. *Id.* Finally, Judge Vidmar was not persuaded by the case law Manzanares cited from outside the Tenth Circuit. *Id.* at 30–31; *see also Harris*, 844 F.3d at 1262 (recognizing that the circuits "have reached varying results" on the question of whether robbery statutes satisfy the force clause).

Judge Vidmar found that Manzanares's prior convictions for New Mexico aggravated assault with a deadly weapon, aggravated battery, and armed robbery all qualified as violent felonies irrespective of the unconstitutional residual clause. He therefore recommended that Manzanares's motion be denied.

IV. Standard of Review for Objections to Magistrate Judge's PF&RD

A district judge must "make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C). "[O]bjections to the magistrate judge's report must be both timely and specific to preserve an issue for de novo review by the district court[.]" *United States v. 2121 E. 30th St.*,

73 F.3d 1057, 1060 (10th Cir. 1996). To preserve an issue, a party's objections to a PF&RD must be "sufficiently specific to focus the district court's attention on the factual and legal issues that are truly in dispute." *Id.* Moreover, "theories raised for the first time in objections to the magistrate judge's report are deemed waived." *United States v. Garfinkle*, 261 F.3d 1030, 1030–31 (10th Cir. 2001).

V. Analysis

Manzanares objects to Judge Vidmar's proposed findings and recommended disposition. [Doc. 25]. He objects to the findings that each of his three prior New Mexico convictions for aggravated assault with a deadly weapon, aggravated battery, and armed robbery requires the use of *Johnson I*-level force, such that they qualify as violent felonies under the force clause of § 924(e)(2)(B).[11] On de novo review, the Court agrees with Judge Vidmar that all three prior convictions qualify as violent felonies under the force clause of § 924(e)(2)(B). Manzanares's objections will be overruled and his motion will be denied.

Aggravated Assault with a Deadly Weapon

Manzanares objects to Judge Vidmar's finding that New Mexico aggravated assault with a deadly weapon, § 30-3-2(A), qualifies as a violent felony under the force clause of § 924(e)(2)(B). As discussed *supra*, Judge Vidmar found that the Tenth Circuit's recent decision in *Maldonado-Palma* controlled the outcome here. [Doc. 21] at 15–17.

Manzanares urges in his objections, as he did in his briefing on the motion, that *Maldonado-Palma* is not controlling. He suggests that *Maldonado-Palma* and the Tenth Circuit's earlier decision in *Ramon Silva* misinterpreted § 30-3-2(A) in two material ways

[11] Manzanares did not object to Judge Vidmar's finding that the government had not waived the right to argue that these prior convictions qualified as violent felonies under the force clause of § 924(e)(2)(B).

that bear on whether the statute satisfies the force clause of § 924(e)(2)(B). First, he contends that conviction under § 30-3-2(A) can result from no more than a person insulting another (i.e., committing an assault) while possessing a weapon, and that the provision does not require that the weapon actually be used in the commission of the assault. [Doc. 25] at 2, 6–8 (discussing New Mexico case law). Because the court in *Maldonado-Palma* interpreted § 30-3-2(A) to require that the deadly weapon be "actively employed in committing the assault"—and it was this *use* of the deadly weapon that satisfied the physical force requirement of the force clause—that case was wrongly decided, Manzanares argues. *Id.* at 3–6 (quoting *Maldonado-Palma*, 839 F.3d at 1250). He suggests that the Tenth Circuit failed to follow the categorical approach set out in *Mathis* by improperly reading "beyond the statute's plain language" to find that § 30-3-2(A) required "use" of the weapon. *Id.* at 4. Second, Manzanares maintains that § 30-3-2(A) does not require "*any* intent with respect to the victim," and thus does not require the use of force "*against* the person of another." *Id.* at 8; *see also id.* at 8–11 (citing *Branch*, 2016-NMCA-071; *State v. Manus*, 1979-NMSC-035, 93 N.M. 95, *overruled on other grounds by Sells v. State*, 1982-NMSC-125, 98 N.M. 786). He argues that *Ramon Silva* and *Maldonado-Palma* rest on "an incorrect idea of the elements" of § 30-3-2(A). *Id.* at 13.

Manzanares's objections are without merit and will be overruled. As an initial matter, the court in *Maldonado-Palma* did not, as Manzanares suggests, sidestep the categorical approach mandated by the Supreme Court. The categorical approach directs courts to "focus solely on . . . the elements of the crime of conviction" to determine whether the crime of conviction qualifies as a violent felony—in the context of the force clause, whether the crime of conviction necessarily requires the use of *Johnson I*-level "physical force." *See Mathis*, 136 S. Ct. at 2248.

Courts are directed to look at the statutory elements only and not to consider the underlying facts of the crime. This direction away from examining the record of a particular conviction is the raison d'être of the categorical approach. In employing the categorical approach, courts must look to state law to interpret the statutory elements. *Harris*, 844 F.3d at 1264. Interpreting the meaning of a statutory element is different than looking behind the elements to the facts surrounding conviction. Manzanares seems to conflate these analyses, only the latter of which is at odds with the categorical approach. *See* [Doc. 25] at 4–5. In evaluating "what proof is necessary" for conviction under § 30-3-2(A), the Tenth Circuit in *Maldonado-Palma* was merely interpreting the meaning of the statutory requirement that the assault be committed "with a deadly weapon." 839 F.3d at 1249. This process is not inconsistent with the categorical approach; the categorical approach demands it.

Moreover, Manzanares's arguments that *Maldonado-Palma* misinterpreted New Mexico law are beside the point. Whatever Manzanares thinks of *Maldonado-Palma*, it is binding Tenth Circuit law which this Court must follow. Manzanares urges that Tenth Circuit precedent interpreting state law "can be overruled by a later declaration[] to the contrary by that state's courts." [Doc. 25] at 13 (internal quotation marks omitted) (quoting *United States v. Badger*, 818 F.3d 563 (10th Cir. 2016)). Manzanares argues that *Branch* is the contrary authority that renders the holding of *Maldonado-Palma* non-binding. But, as Judge Vidmar pointed out, *Branch* was decided *before Maldonado-Palma*. It is not contrary intervening authority. Moreover, as Manzanares himself notes, the *Branch* court relied on the reasoning of a New Mexico Supreme Court case decided in 1979. *See* [Doc. 25] at 13. The Court is bound by the Tenth Circuit's recent decision in *Maldonado-Palma*. New Mexico aggravated assault with a

deadly weapon, § 30-3-2(A), qualifies as a violent felony under the force clause of § 924(e)(2)(B).

Aggravated Battery

Manzanares also objects to Judge Vidmar's finding that New Mexico aggravated battery, § 30-3-5(C), qualifies as a violent felony under the force clause of § 924(e)(2)(B). His objections expound on the argument he made in his briefing on the motion. The force element of aggravated battery, he argues, is the "unlawful touching or application of force" to the person of another. Aggravated battery thus requires for conviction no more force than that required to commit simple battery—unlawful touching, no matter how slight—and such de minimis force does not satisfy the force requirement of § 924(e)(2)(B). Although felony aggravated battery additionally requires that the battery either inflict great bodily harm, be done in a manner whereby great bodily harm or death could be inflicted, or be committed with a deadly weapon, this additional requirement concerns the risk of injury and does not bear on the degree of force required to accomplish the battery. Manzanares contends that Judge Vidmar erred by rejecting the proposition that New Mexico aggravated battery includes as an element common law battery and thus can be accomplished with de minimis force. [Doc. 25] at 15. He further suggests that Judge Vidmar's consideration of the divisibility question and application of the modified categorical approach were unnecessary. *Id.* at 26–27.

Manzanares's objections are without merit and will be overruled. First, Judge Vidmar correctly applied the modified categorical approach at the outset of his analysis, finding that § 30-3-5 was divisible into its misdemeanor and felony versions. [Doc. 21] at 18–19. Manzanares argues that application of the modified categorical approach is unnecessary.

[Doc. 25] at 26–27. He contends that the divisibility question "is irrelevant because both [misdemeanor and felony aggravated battery] require proof of an unlawful touch," and thus neither can satisfy the force clause. *Id.* at 26. For the reasons set out in the PF&RD and discussed further *infra*, Manzanares's analysis is flawed. The additional requirements of felony aggravated battery bear on the question of whether that crime qualifies as a violent felony under the force clause. It is not sufficient to point out that both versions include the "unlawful touching" requirement of simple battery. The divisibility analysis and application of the modified categorical approach necessarily precede a comparison of the elements against the force clause, because a statute's divisibility vel non will determine what the elements of the statute are.[12] *See Mathis*, 136 S. Ct. at 2256 (characterizing the divisibility question as the "threshold inquiry"). I adopt Judge Vidmar's finding that Manzanares was convicted of felony aggravated battery, § 30-3-5(C).

As to the substantive analysis of § 30-3-5(C), Manzanares misapprehends Judge Vidmar's findings in the PF&RD. He suggests that Judge Vidmar "refuses to acknowledge" that unlawful touching is an element of aggravated battery. [Doc. 25] at 15. Judge Vidmar did not refuse to acknowledge the "unlawful touching" requirement. He found, instead, that the "unlawful touching" element could not be considered in isolation, as Manzanares urges, in comparing that statute to the force clause. Judge Vidmar found that the additional alternative requirements that elevate simple battery to felony aggravated battery—the infliction of great bodily harm, commission in a manner whereby great bodily harm could be

[12] As Judge Vidmar pointed out in the PF&RD, resolution of the divisibility of § 30-3-5 is an essential first step in this case for a more fundamental reason. *See* [Doc. 21] at 19 & n.12. Section 30-3-5 is divisible into a misdemeanor, § 30-3-5(B), and a felony, § 30-3-5(C). If Manzanares had been convicted of the misdemeanor version, that would be the end of the analysis. A misdemeanor conviction would not qualify as a violent felony under § 924(e)(2)(B) irrespective of whether the statute of conviction satisfied the force clause.

inflicted, or commission with a deadly weapon—put the statute within the range of conduct that satisfies the force clause. *See* [Doc. 21] at 20–22. In other words, a battery committed in a manner that could inflict great bodily harm necessarily requires the use or threat of *Johnson I*-level physical force. *Id.* at 22 (citing *Johnson I*, 559 U.S. at 140; *Treto-Martinez*, 421 F.3d at 1160).

The Court adopts the reasoning set out in the PF&RD. Contrary to Manzanares's urging, the additional alternative requirements of bodily injury (or use of a deadly weapon) render § 30-3-5(C) a qualifying predicate felony under the force clause. As the Tenth Circuit set out in *Treto-Martinez*, "[n]o matter what the instrumentality of the contact, if the statute is violated by contact that can inflict great bodily harm, disfigurement or death, it seems clear that, at the very least, the statute contains as an element the 'threatened use of physical force.'" 421 F.3d at 1160. The "unlawful touching" requirement cannot be evaluated independently of the bodily injury requirement in determining whether the crime requires *Johnson I*-level force. As Judge Vidmar found, Manzanares's reliance on case law analyzing simple battery is unavailing. *See* [Doc. 21] at 22–23; *see also, e.g.*, *United States v. Barraza-Ramos*, 550 F.3d at 1250–51 (Florida aggravated battery statute did not satisfy force clause because it could be violated by merely "touching" a pregnant woman against her will; the statute elevated simple battery to aggravated battery based only on the status of the victim, rather than any additional force or injury requirement).

Manzanares does cite to two Tenth Circuit cases holding that certain state statutes, despite having a bodily injury element, failed to satisfy the force clause of the Guidelines. [Doc. 25] at 19–21 (citing *United States v. Perez-Vargas*, 414 F.3d 1282, 1285 (10th Cir. 2005)

(assault statute requiring that the defendant "knowingly or recklessly causes bodily injury to another person or with criminal negligence he causes injury to another person by means of a deadly weapon"); *United States v. Rodriguez-Enriquez*, 518 F.3d 1191, 1195 (10th Cir. 2008) (statute criminalizing the "nonconsensual administration of a drug, substance, or preparation" that causes harm to the victim (internal quotation marks omitted)). In those cases, the Tenth Circuit rejected the view that the word "physical" in the context of "physical force" could "relate[] to the effect of the force"; instead, it "must refer to the mechanism by which the force is imparted to the 'person of another.'" *Rodriguez-Enriquez*, 518 F.3d at 1194. Thus, "intentionally exposing someone to hazardous chemicals," for example, would not constitute "physical force," though it could cause significant bodily harm. *Id.* at 1195. Relying on those cases, Manzanares argues that a person could be convicted of felony aggravated battery by, for example, intentionally exposing someone to an allergen that results in serious bodily injury. [Doc. 25] at 20. He argues that under the logic of *Perez-Vargas* and *Rodriguez-Enriquez*, such conduct would not satisfy the physical force requirement.

After *Perez-Vargas* and *Rodriguez-Enriquez* were decided, however, the Supreme Court decided *United States v. Castleman*, 134 S. Ct. 1405 (2014). In that case, the Court evaluated whether conviction for an offense involving knowingly or intentionally causing bodily injury to another satisfied the force clause of the definition of a "misdemeanor crime of domestic violence" under 18 U.S.C. § 922(g)(9). The Court held that "the knowing or intentional causation of bodily injury necessarily involves the use of physical force." 134 S. Ct. at 1414. "A 'bodily injury,'" the Court held, "must result from 'physical force.'" *Id.* This is true whether or not the force is applied directly:

> [A]s we explained in [*Johnson I*], "physical force" is simply "force exerted by and through concrete bodies," as opposed to "intellectual force or emotional force." And the common-law concept of "force" encompasses even its indirect application. . . . It is impossible to cause bodily injury without applying force in the common-law sense. Second, the knowing or intentional application of force is a "use" of force. [The defendant] is correct that under *Leocal v. Ashcroft*, the word "use" "conveys the idea that the thing used (here, 'physical force') has been made the user's instrument." But he errs in arguing that although "[p]oison may have 'forceful physical properties' as a matter of organic chemistry, . . . no one would say that a poisoner 'employs' force or 'carries out a purpose by means of force' when he or she sprinkles poison in a victim's drink[.]" The "use of force" in [the defendant's] example is not the act of "sprinkl[ing]" the poison; it is the act of employing poison knowingly as a device to cause physical harm. That the harm occurs indirectly, rather than directly (as with a kick or punch), does not matter. Under [the defendant'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. *Leocal* held that the "use" of force must entail "a higher degree of intent than negligent or merely accidental conduct"; it did not hold that the word "use" somehow alters the meaning of "force."

Id. at 1414–15 (internal citations omitted).

It is true that the Court in *Castleman* was evaluating the physical force requirement of a *misdemeanor* crime of domestic violence, rather than the physical force requirement of a violent *felony*. And the majority opinion in *Castleman* acknowledged that it was not deciding whether "causation of bodily injury necessarily entails *violent* force." 134 S. Ct. at 1413 (emphasis added). *But see id.* at 1417 (Scalia, J., concurring) ("[I]ntentionally or knowingly caus[ing] bodily injury categorically involves the use of force capable of causing physical pain or injury to another person." (second alteration in original) (internal citation and quotation marks omitted)). Nevertheless, the Court's reasoning with respect to the meaning of "use of force"—namely, its determination that such use of force may be effectuated through direct *or* indirect means—

extends to an interpretation of an identically-worded phrase appearing in a similar context.[13] The Court's logic—i.e., that the use of physical force lies in the act of causing physical harm and not necessarily in the physical exertion required to create the harm—applies equally to the force clause of § 924(e)(2)(B). *Castleman* thus undercuts the logic of *Perez-Vargas* and *Rodriguez-Enriquez* and forecloses Manzanares's argument on this point.

Battery that inflicts or could have inflicted great bodily harm necessarily entails the violent force required by *Johnson I*—the use or threat of force "capable of causing physical pain or injury to another person." 559 U.S. at 140. New Mexico felony aggravated battery, § 30-3-5(C), qualifies as a violent felony under the force clause of § 924(e)(2)(B).[14]

Armed Robbery

Finally, Manzanares objects to Judge Vidmar's finding that New Mexico armed robbery, § 30-16-2, qualifies as a violent felony under the force clause of § 924(e)(2)(B). Though he found that § 30-16-2 was divisible into simple robbery and armed robbery, Judge Vidmar found that New Mexico robbery requires *Johnson I*-level physical force irrespective of whether the defendant was armed with a deadly weapon. [Doc. 21] at 24–32. In his objections, Manzanares re-asserts the arguments and authorities he cited in his original briefing. [Doc. 25] at 28–32. Citing the same body of New Mexico case law, he maintains that New Mexico robbery can be

[13] Other courts in the Tenth Circuit have reached the same conclusion. *See Miller v. United States*, 2016 WL 7256875, at *5–7 (D. Wyo. Dec. 15, 2016) (unpublished) (Wyoming robbery statute requiring that the defendant inflict bodily injury upon another person in the commission of the crime satisfied the Guidelines' force clause); *Pikyavit v. United States*, 2017 WL 1288559, at *4–7 (D. Utah Apr. 6, 2017) (applying the reasoning of *Castleman* to hold that Utah's assault by prisoner statute qualified under the ACCA's force clause).

[14] Several other judges in this District have reached the same conclusion. *E.g.*, *United States v. Pacheco*, 16-cv-0341 WJ/CG, [Doc. 15] at 8–9 (D.N.M. June 1, 2017); *United States v. Sanchez*, 16-cv-0659 JAP/GBW, [Doc. 26] at 14–16 (D.N.M. Sept. 27, 2017); *United States v. Dallas*, 16-cv-0676 MV/LF, [Doc. 15] at 6–10 (D.N.M. May 3, 2017); *United States v. Sedillo*, 16-cv-0426 MCA/LAM, [Doc. 18] at 13–16 (D.N.M. Mar. 6, 2017); *United States v. Vasquez*, 16-cv-0678 JAP/WPL, [Doc. 11] at 8 (D.N.M. Jan. 10, 2017).

accomplished through the application of de minimis force to the victim. *Id.* at 28–29. He cites a large volume of case law from other federal courts in support of his position. *Id.* at 31–32.

On de novo review, the Court adopts the reasoning set out by Judge Vidmar in the PF&RD and finds that New Mexico robbery requires *Johnson I*-level physical force. As discussed at length *supra*, there is no question that the force clause of the ACCA requires more than de minimis force. *See Harris*, 844 F.3d at 1264–65 (the Court in *Johnson I* used the language of "*violent* force" and "strong physical force" in the course of "rejecting the government's argument that physical force means . . . . even the slightest offensive touching" (internal quotation marks omitted)). New Mexico robbery requires more than such minimal force. *See, e.g.*, *Clokey*, 1976-NMSC-035, ¶ 3 ("The question of whether or not the snatching of the purse from the victim was accompanied by sufficient force to constitute robbery is a factual determination, within the province of the jury's discretion."); *Lewis*, 1993-NMCA-165, ¶ 15 (declining to interpret the New Mexico robbery statute "to encompass situations where force is used to retain property immediately after its *nonviolent* taking," and reiterating that "force must be the lever by which property is separated from the victim" (emphasis added)).

As Judge Vidmar noted in the PF&RD, the language of the Supreme Court of New Mexico in *State v. Bernal* provides the strongest indication that New Mexico robbery requires *Johnson I*-level violent physical force. New Mexico robbery, as opposed to larceny, "requires, and is designed to punish, the element of force." 2006-NMSC-050, ¶ 28. "Since robbery generally carries a heavier punishment than larceny, the robbery statute clearly is designed to protect citizens from violence." *Id.* Robbery "is not merely a property crime, but a

crime against a person."[15] *Id.; see also Harris*, 844 F.3d at 1264 (looking to language from the Colorado Supreme Court distinguishing between robbery and larceny in deciding that Colorado robbery satisfied the force clause); *United States v. Garcia*, 2017 WL 2271421, at *24 (D.N.M. Jan. 31, 2017) (relying on *Bernal* to find that New Mexico robbery satisfies the force clause). Manzanares fails to address Judge Vidmar's analysis of *Bernal* in his objections. His other arguments regarding case law purporting to provide that New Mexico robbery can be committed with no more than de minimis force were soundly rejected by Judge Vidmar in the PF&RD. *See* [Doc. 21] at 28–30; *see also Garcia*, 2017 WL 2271421, at *23 n.12 ("[A]s applied, the Court is convinced that Court of Appeals of New Mexico's standard results in robbery convictions only where a defendant utilizes *Johnson I* violent force."). His citations to Tenth Circuit case law in support of his position are unavailing because the cases he cites address statutes whose force elements are satisfied by de minimis force. *E.g.*, *United States v. Ama*, 684 F. App'x 736, 741 (10th Cir. 2017) (federal statute criminalizing "forcibl[e]" assault of a federal employee did not satisfy force clause, where "[e]ven minor contact, such as lay[ing] one's finger on another person without lawful justification" was "forcible" (last alteration in original) (internal quotation marks omitted)); *United States v. Lee*, 2017 WL 2829372, at *4 (10th Cir. June 30, 2017) (unpublished) (holding that Florida statute that could be violated by "wiggling and struggling" to avoid arrest or "clipping an officer's hand while fleeing" did not

[15] In the PF&RD, Judge Vidmar noted, based on the above-quoted language in *Bernal*, that the force required to commit robbery is that which puts the victim on notice and creates the possibility of a dangerous and violent confrontation. [Doc. 21] at 26. He noted that this looming potential for a violent altercation—on which the force requirement of New Mexico robbery is based—was similar to the threat of violence created by the force element of the assault statute analyzed by the Tenth Circuit in *Ramon Silva*. *Id.* The Tenth Circuit found that the assault statute satisfied the force clause because it "could always lead to . . .substantial and violent contact." *Id.* (quoting *Ramon Silva*, 608 F.3d at 672). In his objections, Manzanares suggests that this reference to the possibility of violent contact is somehow a reference to the invalid residual clause. [Doc. 25] at 29–30. In fact, the language on which Judge Vidmar was relying came from the Tenth Circuit's analysis of the force clause.

satisfy the force clause, though it was a "close call"); *United States v. Nicholas*, 686 F. App'x 570, 574 (10th Cir. 2017) (Kansas robbery "requires nothing more than de minimis physical contact"). Likewise, his citations to other federal court decisions analyzing similar statutes are unavailing. Again, most of the cases he cites address statutes whose force requirement can be satisfied through de minimis force. *See id.* at 31–32.

New Mexico robbery qualifies as a violent felony under the force clause of § 924(e)(2)(B). Several judges, including the undersigned, have reached the same conclusion in other cases.[16]

Conclusion

Manzanares's prior convictions for New Mexico aggravated assault with a deadly weapon, § 30-3-2(A), aggravated battery, § 30-3-5(C), and armed robbery, § 30-16-2, qualify as violent felonies under the force clause of the ACCA's definition of "violent felony," § 924(e)(2)(B). His prior convictions qualify as violent felonies irrespective of the now-invalidated residual clause. His motion under § 2255 will be denied.

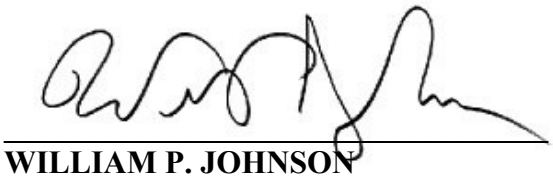
IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Manzanares's Objections to the Magistrate Judge's Proposed Findings and Recommended Disposition [CR Doc. 57; CV Doc. 25] are **OVERRULED**.

IT IS FURTHER ORDERED that the Magistrate Judge's Proposed Findings and Recommended Disposition [CR Doc. 53; CV Doc. 21] are **ADOPTED**.

[16] *See United States v. Barela*, 2017 WL 3142516 (D.N.M. July 25, 2017); *see also, e.g., Garcia*, 2017 WL 2271421, at *53–57; *United States v. Serrano*, 16-cv-0670 RB/WPL, [Doc. 16] at 4 (D.N.M. May 9, 2017); *United States v. Dean*, 16-cv-0289 WJ/LAM, [Doc. 17] at 6 (D.N.M. May 3, 2017); *Rhoads v. United States*, 16-cv-0325 JCH/GBW, [Doc. 20] at 11 (D.N.M. Apr. 5, 2017); *Hurtado v. United States*, 16-cv-0646 JAP/GJF, [Doc. 17] (D.N.M. Jan. 11, 2017). *But see United States v. King*, 16-cv-0501 MV/KK, [Doc. 18] at 29 (D.N.M. Mar. 31, 2017) (finding that New Mexico armed robbery does not qualify as a violent felony under the ACCA's force clause).

IT IS FURTHER ORDERED that Defendant Archie Manzanares's Motion to Correct Sentence Pursuant to 28 U.S.C. § 2255 [CR Doc. 35; CV Doc. 1] is **DENIED**. Case number 16-cv-0599 WJ/SMV is **DISMISSED with prejudice.**

IT IS SO ORDERED.



WILLIAM P. JOHNSON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

v. **No. 12-cr-1563 WJ**
16-cv-0599 WJ/SMV

ARCHIE MANZANARES,

Defendant.

ORDER ISSUING CERTIFICATE OF APPEALABILITY

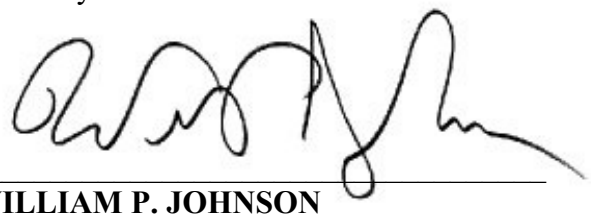
THIS MATTER is before the Court sua sponte under Rule 11(a) of the Rules Governing Section 2255 Proceedings. By final judgment entered concurrently herewith, the Court denied Defendant Archie Manzanares's Motion to Correct Sentence Pursuant to 28 U.S.C. § 2255 [CR Doc. 35; CV Doc. 1][1] and dismissed with prejudice case number 16-cv-0599 WJ/SMV. "At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)). The Court determines that Defendant has satisfied this standard and will issue a certificate of appealability solely on the issue of whether Defendant's prior conviction for New Mexico armed robbery, NMSA 1978, § 30-16-2, qualifies as a violent felony under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B). *See United States v. Garcia*, No. 17-2019 (10th Cir. June 7, 2017) (order issuing a certificate of appealability on whether New Mexico robbery,

[1] References that begin with "CV" are to Case No. 16-cv-0599 WJ/SMV. References that begin with "CR" are to the underlying criminal case, Case No. 12-cr-1563 WJ.

§ 30-16-2, qualifies as a violent felony under the ACCA). No certificate of appealability issues as to any other issue raised by Defendant.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that a certificate of appealability issue only on the issue of whether Defendant's prior conviction for New Mexico armed robbery, § 30-16-2, qualifies as a violent felony under the ACCA.

IT IS SO ORDERED.



WILLIAM P. JOHNSON
UNITED STATES DISTRICT JUDGE

No. _____

In the

Supreme Court of the United States

ARCHIE MANZANARES, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

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

Certificate of Service

I, Margaret A. Katze, hereby certify that on September 14, 2020, a copy of the petitioner's Motion for Leave to Proceed in Forma Pauperis and Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit were mailed postage prepaid, to the Solicitor General of the United States, Department of Justice, Room 5614,

950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001, counsel for the Respondent.

Respectfully submitted,

Stephen P. McCue
Federal Public Defender

DATED: September 14, 2020

By: *s/ Margaret A. Katze*

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