No. 20-5774

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

## Petitioner's Reply Brief

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## A. New Mexico aggravated assault does not come within the ACCA's force clause because it can be committed recklessly or negligently.

In New Mexico there are three means by which aggravated assault with a deadly weapon can be perpetrated: by any unlawful act, by threatening conduct, or by menacing conduct. N.M. Stat. Ann. §§ 30-3-1(B), 30-3-2(A). The New Mexico Court of Appeals has held that when committed by an unlawful act, the mens rea element is satisfied by proof of recklessness or negligence. *State v. Branch*, 417 P.3d 1141, 1147-49, 1156 (N.M. Ct. App. 2018).

The government states Manzanares is not entitled to relief on his aggravated assault claim. It says the Tenth Circuit, in *United States v. Ramon Silva*, 608 F.3d 663 (10th Cir. 2010), found that New Mexico aggravated assault cannot be committed recklessly but requires a more intentional mens rea. BIO 8, 14. It argues, then, if this Court finds in *Borden v. United States*, No. 19-5410 that offenses committed with a reckless mens rea are not violent felonies, the decision will not impact Manzanares. BIO 18. Manzanares disagrees. He argues the *Ramon Silva* decision that the government cites is demonstrably incorrect. Rather, in New Mexico, case law holds that aggravated assault can be committed with a reckless or negligent

mens rea. And an intent higher than recklessness or negligence must be proven for an offense to satisfy the force clause element,"against the person of another." *Leocal v. Ashcroft*, 543 U.S. 1, 9, 11 (2004).

The government does not cite any New Mexico case that holds aggravated assault requires more than a reckless or negligent mens rea. It refers only to *Ramon Silva* for its argument. BIO 8, 14. Yet, in *State v. Branch*, the New Mexico Court of Appeals said the Tenth Circuit's interpretation of the mens rea requirement in *Ramon Silva* was wrong. 417 P.3d at 1148. It explicitly held that not even a mens rea of recklessness is required to complete New Mexico aggravated assault. *Id.* at 1148-49, 1156. Thus, the Tenth Circuit opinion on which the government relies is in conflict with the state's case law.

1. Under *Branch*, proof of recklessness is not all that can satisfy the mens rea element of aggravated assault. A mental state of conscious wrongdoing and a victim's reasonable fear of receiving an immediate battery is enough. 417 P.3d at 1148. In fact, *Branch* clarified that a more intentional mens rea like purposefully threatening or engaging in menacing conduct *toward* the victim is *not* necessary. *Id*. at 1147-49, 1156 (emphasis added). In New Mexico, "conscious wrongdoing" is equivalent to a reckless or negligent mens rea. *State v. Yarborough*, 120 N.M. 669, 676 (1995). Accordingly, *Branch* concluded that a negligent state of mind is all the prosecution must

prove.

In *Branch*, the court was asked point-blank to decide if "at the very least," aggravated assault required proof one "did so recklessly." 417 P.3d at 1147. The court noted, in common law, criminal assault required proof of an "actual intention" to cause another's apprehension. But in New Mexico, "the only mens reas involved is that of conscious wrongdoing . . . ." *Id.* at 1147-48. As noted above, "conscious wrongdoing" includes acts done with a reckless or negligent mens rea. *Yarborough*, 120 N.M. at 676.

In *Yarborough*, the New Mexico Supreme Court examined the mens rea requirements of the state's vehicular homicide and involuntary manslaughter statutes. *Id.* at 675-76. If they were the same, Yarborough could not be retried for the latter once the jury had acquitted him of the former. *Id.* The mens rea necessary for vehicular homicide, the court said, is "conscious wrongdoing." *Id.* at 676. It defined that term as the "purposeful doing of an act that the law declares to be a crime." *Id.* (citation, quotation marks, omitted). The mens rea for involuntary manslaughter is criminal negligence. *Id.* Its mental state "includes reckless, wanton, or willful disregard of the consequences." *Id.* The court held that "the mental states for both crimes are the same." *Id.*

With this precedent of equivalence in mind, the *Branch* court reasoned aggravated assault can occur "without directing any conduct toward

[another], without acting recklessly, and without harboring any specific intent to cause apprehension or fear." 417 P.3d at 1156. In other words, a negligent mens rea was enough. Contrary to the Tenth Circuit's finding in *Ramon Silva*, "conscious wrongdoing" does not require a more intentional mens rea than recklessness.

Ironically, the *Branch* holding was prompted by Branch's use of the same argument found in *Ramon Silva*. Like the Tenth Circuit, Branch claimed N.M. Stat. Ann. § 30-3-1(B) required a higher mens rea than recklessness. Specifically, the prosecution had to prove he threatened or engaged in menacing conduct toward the victim. 417 P.3d at 1149. The court said, no, it did not. Such a belief "misreads" the statute. *Id.* New Mexico assault can be perpetrated by simply performing "'an unlawful act.'" *Id.* (quoting § 30-3-1(B)); *see Yarborough*, 120 N.M. at 676 (definition of "conscious wrongdoing"). "The commission of an unlawful act is an alternative method of committing the offense that does not rely on threatening or menacing conduct." *Id.*

2. To demonstrate the minimal mens rea necessary to complete an aggravated assault in New Mexico, the court pointed to the dissent in *Ramon Silva*. 417 P.3d at 1148. There, the dissenting judge described conduct that the *Branch* court embraced as an example of the statute's "expansive application." *Id.* "'[A] person who intentionally handles a weapon in a

manner that induces a fear of battery can be guilty of assault even if he merely wants to show off his dexterity in handling the weapon . . . .'" *Id.* at 1147 (quoting *Ramon Silva*, 608 F.3d at 675) (Hartz, J., dissenting).[1] Judge Hartz aptly described a reckless or negligent act: the body movements constituting the act were intended – dexterously handling a weapon – but without regard for, or failing to see, the act's consequences. *See* Model Penal Code, § 2.02(2)(c, d) (defining recklessness and negligence, respectively, as consciously disregarding or failing to perceive risks resulting from conduct). The negligent mens rea of the act is enough, *Branch* said, for a jury to find aggravated assault with a deadly weapon. 417 P.3d at 1148-49; *see also* M.P.C., § 2.02(5) (when law provides negligence or recklessness suffices to establish an element, element is established if person acts "purposely, knowingly or recklessly").

Ultimately, *Ramon Silva*'s majority came to a different, albeit incorrect, conclusion. It did so by failing to consider the "alternative method" proposed in *Branch*, "the commission of an unlawful act." *Branch*, 417 P.3d at 1149. Even before *Branch*, the New Mexico Supreme Court had recognized an "unlawful act" as another means to perpetrate an aggravated assault. *State v. Manus*, 93 N.M. 95, 98 (1979), *overruled on other grounds* by *Sells v. State*,

[1] Before being appointed to the Tenth Circuit, Judge Hartz served on the New Mexico Court of Appeals for over ten years.

98 N.M. 786 (1982). A discussion of *Manus* is absent from the majority's opinion. *See* 608 F.3d at 673 (citing *Manus* solely for proposition that specific intent is not required). Ignoring the alternative "commission of an unlawful act," the Tenth Circuit focused only on the means of threatening or menacing conduct. It opined aggravated assault required "more than the display of dexterity in handling a weapon." 608 F.3d at 674. Its tunneled vision led to the flawed conclusion that "the crime requires proof that a defendant purposefully threatened or engaged in menacing conduct *toward* a victim . . . ." *Id.* (emphasis in original). If the majority's interpretation had been accurate, *Branch* would not have later endorsed Judge Hartz's dissent as an example of how a negligent mens rea applied.

State courts define state law. The Tenth Circuit's interpretation of the elements of New Mexico aggravated assault does not control. *See James v. United States*, 550 U.S. 192, 214 (2007) (whether prior state conviction qualifies as a violent felony under ACCA, court looks solely to elements of offense as defined by state law). No New Mexico court has elevated the mens rea requirement beyond recklessness for an "unlawful act." No New Mexico jury has deliberated whether the commission of an "unlawful act" required "purposefully threatening or engaging in menacing conduct toward a victim." *Ramon Silva* did not consider the offense by means of an "unlawful act," nor the corresponding mens rea of such an act. In New Mexico, all that

aggravated assault requires is proof of "conscious wrongdoing," or evidence of a reckless or negligent mens rea.

3. The government notably avoids reconciling *Branch* with the mens rea finding in *Ramon Silva* on which its argument rests. It can only parrot the Tenth Circuit's quip that *Branch* "'did not alter the state of the law.'" BIO 15-16 (quoting *United States v. Manzanares*, 956 F.3d 1220, 1227 (10th Cir. 2020)). Its response is inadequate. *Branch*'s repudiation of *Ramon Silva* was resounding and represents current New Mexico law. *Branch* must be addressed.

*Branch* held that for New Mexico aggravated assault committed by an "unlawful act," proof of a negligent mens rea was enough. Neither the government nor the Tenth Circuit explain why a more intentional mens rea than recklessness is necessary in every aggravated assault case. Or how it is to be proven. "Conscious wrongdoing" encompasses reckless and negligent conduct. *Yarborough*, 120 N.M. at 676; *Branch*, 417 P.3d at 1148. Neither explain how "conscious wrongdoing" is a mens rea measurably higher than recklessness when *Yarborough* and *Branch* expressly say it is not. Given these intractable yet consequential inconsistencies, there is a "reasonable probability" the Court's decision in *Borden* will move the Tenth Circuit to "reject" its earlier decisions when "given the opportunity for further consideration." *Wellons v. Hall*, 558 U.S. 220, 225 (2010) (per curiam)

(citation, quotation marks omitted). Therefore, at a minimum, Manzanares asks the Court to hold his petition until *Borden* is decided.

4. Finally, the government suggests that Manzanares has not preserved the issue for this Court's review. BIO 11. It is incorrect. In prosecuting his 28 U.S.C. § 2255 petition, Manzanares consistently argued that *Branch*'s holding on the minimal mens rea necessary to commit New Mexico aggravated assault conflicted with the Tenth Circuit's holding that a higher degree than reckless was required. Concomitantly, he maintained that committing the offense by an "unlawful act" did not meet the "against the person of another" element of the ACCA's force clause.

To fall within the force clause, an offense must have as an element the use, attempted use, or threatened use of *physical force against another person*. In *Leocal*, 543 U.S. at 9, this Court explained the phrase does not simply define the object of the force, it also reflects the "degree of intent" the use of force requires. "The use of physical force" is "against the person of another." The phrase restricts the force used to one that is "against . . . another," or intentionally or knowingly aimed at another person. It necessarily follows that offenses committed recklessly or negligently do not fit this definition. Reckless or negligent acts do not require force directed at another person.

When a person knows his conduct will cause a particular result, the law

imputes to him the intent to cause the result. 1 Wayne R. Lafave, Substantive Criminal Law § 5.2(a), at 457 (3d ed. 2018). Accordingly, when a person aims physical force against another, the intent imputed is greater than when a person dexterously handles a weapon to show off, causing alarm. One act is required by the force clause, the other is enough to prove New Mexico aggravated assault. Manzanares again argues the force clause plainly contemplates directing or aiming physical force at another, which *Branch* established is not an element of New Mexico aggravated assault.

### B. The Tenth Circuit used a method contrary to this Court's categorical approach to find violent, physical force against another is an element of New Mexico robbery, which is at odds with the holdings of actual state law.

The government argues Manzanares' robbery claim is not eligible for review because *United States v. Garcia*, 877 F.3d 944 (10th Cir. 2017) corresponds with this Court's precedent. BIO 10-12. It also contends *Garcia*'s holding that New Mexico robbery is always committed with *Johnson I* level force is correct. *Id.*[2] But the argument is flawed when *Garcia* was decided without using the categorical approach set by this Court. As *Descamps*, *Moncrieffe,* and *Mathis* illustrate, when a lower court strays from the focused categorical approach, the result is legally unreliable, and the Court will respond. Manzanares challenged *Garcia* when it was published.

[2] *Johnson v. United States*, 559 U.S. 133 (2010) (*Johnson I*).

He argued it contravened both this Court's precedent and New Mexico state law. AOB 8-28; Response in Opposition to Motion for Summary Disposition, filed 2/11/19. The Court must intervene because as Manzanares' case shows, if not corrected, the Tenth Circuit will continue to use a methodology to find substantive offense elements not found in state law.

1. In *Garcia*, the court did not use this Court's categorical approach. It said, for its analysis, "what is said [by state appellate courts] is less important than what is done [by the accused]." 877 F.3d at 956. It said, "facts," from cases it would pick, were "relevant to a determination of how those elements are actually applied in the state's courts . . . ." *Id.* at 953. The court then wrapped its ad hoc method in the language of the Court to signal deference. It claimed its culling of facts would produce a "realistic probability [] the state statute would apply." *Id.* at 948. The government is silent on the court's blatant deviation from the prescribed categorical approach.

When offense elements and their definitions are clearly described in the statute and jury instructions, that information is what the court has to decide if a prior conviction fits within the ACCA's force clause. *See Descamps v. United States*, 570 U.S. 254, 261 (2013) (formal categorical approach lets courts look only to statutory definitions and not particular facts underlying convictions). When the minimum conduct needed to commit an offense is included, it becomes the conduct proven beyond a reasonable doubt. *Mathis*

*v. United States*, 138 S.Ct. 2243, 2248 (2016); *see also Descamps*, 570 U.S. at 272 (jury instructions "make clear" the element jury must find beyond reasonable doubt). Hewing to the offense elements was an elegant way for this Court to enshrine the Sixth Amendment right to a jury as factfinder even when a jury was absent. Scouring other cases for facts to further define an element goes well beyond what the categorical approach allows. *See Mathis*, 138 S.Ct. at 2248; (facts "extraneous" to offense's "legal requirements"), & *id.* at 2252 (court cannot go beyond identifying elements of offense to "explore the manner" offense committed).

In *Descamps*, the Court criticized the circuit court for "reworking" its categorical approach "to discern" facts about "the defendant's underlying conduct" from a trial or plea. 570 U.S. at 269. Here, the Tenth Circuit selected other New Mexico cases, scrutinized their facts, and determined the force required for every New Mexico robbery conviction. Remarkably, it was also *Johnson I* level force. The Court has detailed what a sentencing court needs to complete its categorical analysis. *See Mathis*, 136 S.Ct. at 2256 (no need to look beyond elements and definitions when both "provide clear answers" to their meaning). Only statutes and jury instructions define the minimum conduct necessary to satisfy an element. And once found by a jury, it is a "realistic probability" this exact conduct is what the state will apply to the offense.

The Court in *Descamps* reserved the question, "whether, in determining a crime's elements, a sentencing court should take account not only of the relevant statute's text, but of judicial rulings interpreting it." 570 U.S. at 275. A lower court might take the reservation as license to examine judicial rulings. But the Court made clear one tenet of the categorical approach: "the key [] is elements . . . and *not* [] the particular facts underlying those convictions.'" *Id.* at 261 (citation, quotation marks omitted) (emphasis in original). Arguably, there may be an "opaque" offense whose substantive elements are less easy to ascertain. *Descamps*, 570 U.S. at 260. But, more often, when the elements are indivisible and clearly defined in the statute and jury instructions, searching for particular facts in judicial rulings is both unnecessary and highly inappropriate.

There is no material difference between looking at the facts underlying Manzanares' robbery conviction and looking at the underlying facts of someone else's case. What the court is looking for is whether the offense was committed in a way that meets the force clause. Rather than an objective comparison of offense and ACCA elements, the court has an end in mind and is looking to support it. To do so, this Court warned, is "merely asking whether a particular set of facts leading to a conviction conforms to [an] [] ACCA [predicate] offense." *Descamps*, 570 U.S. at 274. "And that is what" has been "expressly and repeatedly forbidden." *Id.*

2. An additional problem with the Tenth Circuit's approach is that its result is unreliable. For example, New Mexico robbery "does not require the factfinder (whether judge or jury) to make [a] determination" on the level of force used in the taking. *Descamps*, 570 U.S. at 277. The jury is informed the amount of force is immaterial. NMRA Crim. UJI 14-1620 & Committee Commentary. Instead, the state statute and jury instruction direct the jury to decide only whether any force used directly related to the taking of property. *Id.* It is not asked to decide the amount of force used, if it reached a certain level, or if the victim actively resisted.

When the jury is told the amount of force used is immaterial, like in New Mexico, then the level remains undetermined. It may reach *Johnson I* level force or it may not. But under the formal categorical approach, such an undefined force will never uniformly encompass "force capable of causing physical pain or injury to another person." *Johnson I*, 559 U.S. at 140. The sole question presented is if force was the factor by which the property was taken. *State v. Lewis*, 116 N.M. 849, 851 (Ct. App. 1993). It is a question only the jury can decide. *See State v. Clokey*, 89 N.M. 453, 453 (1976) (whether "snatching of the purse" was accompanied by force sufficient to constitute robbery is a factual issue for the jury). Conversely, no New Mexico court would incorporate *Garcia* to instruct the jury, "the force used has the capacity to inflict physical pain, if not concrete physical injury, upon the victim."

*Garcia*, 877 F.3d at 955 (citation, quotation marks omitted). Whether the force used was capable of inflicting pain does not accurately describe the conduct found by a jury for the force element of New Mexico robbery.

The government criticizes Manzanares for citing "no New Mexico case that . . . permits a conviction for armed robbery based on something less than force necessary to overcome a victim's resistance." BIO 12. In New Mexico, overcoming resistance is not a force element found in statutes or jury instructions. *Compare* O.R.S. § 164.395 ("overcoming resistance" an element); ME St. 17-A § 651(1)(B)(1) (same). And the government does not cite any New Mexico case where it is. In fact, in *State v. Curley*, the court held "the amount of force required for robbery when property is attached to the person is that force, regardless of the amount, that is necessary to remove the attached property when either the person or the strength of the attachment does not cause resistance." 123 N.M. 295, 296 (Ct. App. 1997). *Curley* aligns with what Manzanares has argued: the jury decides whether force directly related to the taking and the force necessary may be minimal, without struggle or injury or violence against another.

3. The Tenth Circuit failed to follow the categorical approach in *Garcia*. It removed offense elements from its analysis and backed in facts from other cases to support its own precedent that every New Mexico robbery will be committed with *Johnson I* level force. This Court's precedent does not

"authorize a sentencing court to substitute such a facts-based inquiry for an elements-based one." *Descamps*, 570 U.S. at 277-78. Before applying a stiff ACCA enhancement, this Court expects the sentencing court be certain the predicate offense includes an element in which *Johnson I* level force was used against another. *Mathis*, 136 S. Ct. at 2257 (discussing the ACCA's demand for certainty). Certainty is not assured with the method used by the Tenth Circuit.

## Conclusion

Manzanares has preserved his issues for this Court's review. Given that the Tenth Circuit and the state courts are in clear conflict, the Court should intervene to reinforce that it is the latter whose interpretation of New Mexico state law controls. Manzanares' petition for a writ of certiorari should be granted.

Respectfully submitted,
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