No._____

In the
SUPREME COURT OF THE UNITED STATES

ALBERT MARTINEZ, 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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I. Questions Presented

1. Whether the definition of force adopted in *Stokeling* for robbery eschews a requirement that any fear produced by a threat of force be reasonable?

2. Whether a court may cherry-pick facts to establish a threshold level of force sufficient for Armed Career Criminal Act (ACCA) purposes and evade examining the elements of the statute?

3. Whether a conviction for residential burglary under New Mexico law which allows for a conviction where as long as someone uses a non-residential structure (including cars) as a dwelling, falls within the generic crime of burglary in the Armed Career Criminal Act (ACCA)?

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Petition for Writ of Certiorari

Albert Martinez 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. Martinez*, Case No. 19-2046 was not published.[1] The district court did not enter an order denying Mr. Martinez contention his previous convictions under New Mexico law for Robbery and Burglary were not violent felonies; instead, the court sentenced him to 180 months, tacitly denying his contentions.

[1] App. 001A. "App." refers to the attached appendix.

Statement of Jurisdiction

On April 22, 2020, the Tenth Circuit held that Mr. Martinez's previous convictions under New Mexico law for burglary and robbery qualified as predicate violent offenses under ACCA. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Pertinent law

18 U.S.C. §§ 924. Penalties

(e)(2) As used in this subsection—...

(B) the term "violent felony" means 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 [.]

N.M. Stat. Ann. § 30-16-2. Robbery

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.

N.M. Stat. Ann. § 30-16-3. Burglary

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

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> A "dwelling house" is any structure, any part of which is customarily used as living quarters.

III. Factual Background

Mr. Martinez's driveway was blocked. (It is unclear from the record who called the police about the vehicle blocking the driveway) When police responded they noticed a Cadillac Escalade in the backyard and asked Mr. Martinez about it; as he was renting the house, he did not know anything about the vehicle blocking his driveway. Police followed him into the house as he retrieved contact information for his landlord. The police did not see anything suspicious in their trek through the house. But the police decided to "run" Mr. Martinez information anyway. They discovered he had an outstanding warrant for a violation of supervised release because he consumed alcohol. Police arrested Mr. Martinez. They discovered an unloaded gun in his right leg cargo pocket. The Government charged him with being a felon in possession. Because Mr. Martinez had prior convictions in New Mexico State court for robbery and burglary, the court sentenced him to fifteen years under the Armed Career Criminal Act[2] (ACCA).

Mr. Martinez disagreed his convictions under New Mexico law for Robbery and Burglary counted as predicate violent felonies under

[2] 18 U.S.C. 924(e)

ACCA. The district court did not enter any order specifically denying Mr. Martinez's objections but sentenced him to 180 months, an ACCA sentence. Mr. Martinez appealed; the Tenth Circuit entered a perfunctory order denying his claims.

IV. Reasons for Granting the Writ

This Court should grant certiorari for three reasons. First, the Tenth Circuit ignored the limits this Court placed on the force required to commit robbery by failing to differentiate between actual and constructive force. Second, the Tenth Circuits circumvents this Court's requirement that the categorical approach examine the elements of the underlying crime and not the facts. Lastly, this case squarely presents the question left unanswered in *United States v. Stitt*, 139 S. Ct. 399 (2018): whether use alone transforms any structure into the type of location protected by the generic crime of burglary.

A. The Tenth Circuit ignored this Court's definition of force necessary for robbery.

The Tenth Circuit declared, "Although *Stokeling*[3] held that ACCA force encompasses the common law, it did not *limit* ACCA force to the common law." *United States v. Velasquez*, 810 F. App'x 655, 659 (10th Cir. 2020). But this is exactly what *Stokeling* did – define the limits of force used in Robbery for ACCA. The Tenth Circuit's disdain for the limits set forth in Stokeling creates a misunderstanding of what amount of force needs to be threatened to qualify as an ACCA violent felony under the force clause.

To determine if a prior conviction qualifies as a violent felony under ACCA courts use the categorical approach. *Taylor v. United States,* 495 U.S. 575, 600 (1990). The court first determines the generic definition of the offense at issue. *Taylor*, 495 U.S. at 598. For convictions implicating the force clause, the "meaning of 'physical force' in § 924(e)(2)(B)(i) is a question of federal law." *Johnson v. United States*, 559 U.S. 133, 138 (2010) (*Johnson I*).

Johnson I determined whether a Florida conviction for battery, which followed the common law as "*any* intentional physical contact, 'no matter how slight,'" qualified as a violent felony. 559 U.S. at 138, 130

[3] *Stokeling v. United States*, 139 S. Ct. 544 (2019)

S.Ct. 1265, *quoting State v. Hearns*, 961 So.2d 211, 218 (Fla. 2007) (emphasis in original). *Johnson I* eschewed the common law definition of force for ACCA and held "the phrase 'physical force' means *violent* force—that is, force capable of causing physical pain or injury to another person." *Id.* at 140 (emphasis in original).

The categorical approach requires the reviewing court to identify the minimal criminal conduct necessary for a conviction. When "the [state] statute sweeps more broadly than the generic crime, a conviction under that law cannot count as an ACCA predicate." *Descamps v. United States*, 570 U.S. 254, 261 (2013). So too with a state law that defines force more broadly than the federal definition of force. *Johnson I*, 559 U.S. 133.

Thus far, the majority of cases examining whether a prior robbery conviction counts as a violent felony under ACCA only looked at actual physical force necessary. *See e.g. United States v. Starks*, 861 F.3d 306 (1st Cir. 2017) (holding Massachusetts's robbery is not a violent felony for ACCA under physical force clause); *United States v. Ojeda*, 951 F.3d 66 (2d Cir. 2020) (holding prior New York first-degree robbery conviction was predicate violent felony under physical force clause of

ACCA); *United States v. Dinkins*, 928 F3d 349(4th Cir. 2019) (holding North Carolina Robbery qualifies as a predicated violent felony under physical force clause of ACCA); *United States v. Burris*, 920 F.3d 942 (5th Cir 2019) (holding Texas Robbery under physical force clause of ACCA); *Fullum v. United States*, 756 Fed. Appx. 568 (6th Cir. 2018) (conviction in Ohio for aggravated robbery constituted a violent felony under ACCA as aggravated robbery could not realistically be committed without violent force); *Klikno v. United States*, 928 F.3d 539, 547 (7th Cir. 2019), *cert. denied sub nom. Van Sach v. United States*, 140 S. Ct. 878 (2020), and *cert. denied sub nom. Lipscomb v. United States*, 140 S. Ct. 878 (2020), and *cert. denied,* 140 S. Ct. 879, (2020), and *cert. denied sub nom. Browning v. United States*, 140 S. Ct. 879 (2020) (noting the requirement to show "force sufficient to overcome a victim's resistance," is not a demanding one). *Stokeling* held that the minimum force required to elevate larceny to robbery was the force required to overcome the victim's resistance, explicitly adopting the common law definition of robbery. 139 S. Ct. at 555 ("the term 'physical force' in ACCA encompasses the degree of force necessary to commit common-law robbery"). *Stokeling* presupposes the use of actual force in robbery,

noting that "robbery that must overpower a victim's will—even a feeble or weak-willed victim—necessarily involves a physical confrontation and struggle." 139 S. Ct. at 553. Thus, even tearing the strap of a purse to obtain possession of it comprises robbery. Significantly, the *Stokeling* Court emphasized that the "[m]ere 'snatching of property from another' will not suffice" to constitute robbery.139 S. Ct. at 555.

Under common law, robbery may be committed in two ways: actual force and constructive or implied force, i.e. threat. Similarly, most states allow conviction for robbery upon a showing of constructive or actual force. The ACCA definition of violent felony also includes constructive force, penalizing prior felonies that "threatened use of physical force …."

Unintentionally *Stokeling* sowed confusion – for purposes of Robbery does the threat of a broken purse strap constitute a "threat of physical force"? Or must "threat of physical force" mean threat of "force capable of causing physical pain or injury to another person"? *Johnson I*, 559 U.S. at 140. The common law provides the answer – "It is not every threat or menace that will be sufficient to make a case of robbery …. It must be of such a nature as to excite *reasonable* apprehension of

danger, and to *reasonably* …cause a man to surrender his property." W. Clark & W. Marshall, Law of Crimes 555 (H. Lazell ed., 2d ed. 1905). In other words, the threat must be of *Johnson I* level force. But the Tenth Circuit passed over the requirement that the fear elicited by the threat be reasonable.

Instead, the Tenth Circuit, in *Velasquez*, determined that the only "pertinent inquiry is whether the threat of force caused the victim to part with his or her property." 810 F. App'x at 659. Under this interpretation, it does not matter if the thief makes a ridiculous threat, or makes no explicit or implicit threat, as long as the victim perceives a threat, the thief becomes a robber. The scofflaw who threatens to throw a butterfly at a victim unless she gives up her umbrella becomes a robber when the lepidopterophobe gives up her umbrella. The high-school student who obtains another's lunch money by demanding "give it to me or else" has also committed robbery. The Tenth Circuit's reasoning, that only the fact of the threat causes the victim to part with her property, regardless of reasonableness of the threat does not rise to the level of force necessary to allow an ACCA conviction.

But the Tenth Circuit's decision does follow most State's interpretation of their robbery statutes; although exact phrasing may vary most allow conviction for a threat or "putting in fear." *See e.g.* Ga. Code Ann. § 16-8-40 (A person commits the offense of robbery when, with intent to commit theft, he takes property of another from the person or the immediate presence of another: (1) By use of force; (2) By intimidation, by the use of threat or coercion, or by placing such person in fear of immediate serious bodily injury to himself or to another…"); Idaho Code Ann. § 18-6501 ("Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear."); Ind. Code Ann. § 35-42-5-1 (Robbery accomplished by "(1) by using or threatening the use of force on any person; or(2) by putting any person in fear"); Neb. Rev. Stat. Ann. § 28-324 ("A person commits robbery if, with the intent to steal, he forcibly and by violence, or by putting in fear, takes from the person of another any money or personal property of any value whatever.") And although it would seem clear that a statute requiring the thief to "threaten[] the immediate use of physical force upon another person" in order to be convicted of robbery would

require a threat of *Johnson I* level force, a quick survey of cases reveals that to be far from the case. *See* Ky. Rev. Stat. Ann. § 515.030.

The Tenth Circuit held that Colorado's robbery statute would constitute a violent felony for ACCA purposes. *United States v. Harris*, 844 F.3d 1260, 1268 (10th Cir. 2017). Colorado upheld a robbery conviction where late at night the defendant requested change but then "altered his expression and demanded all the money in the cash drawer." *People v. Thomas*, 509 P.2d 592, 593 (Co. 1973). The clerk testified he was afraid because of "the man's impatience, the threatening expression on his face," and the fact he could not see both of the defendant's hands. *Id.* Thus, in the Tenth Circuit's view, impatience, a "threatening expression," and the inability to see the whole person equals a threat "force capable of causing physical pain or injury to another person." *Johnson I,* 559 U.S. at 140.

In *State v. Barela*, 2018 WL 4959122 (N.M. Ct. App. 2018) (unpub.), the New Mexico Court of Appeals affirmed a robbery conviction although the accused never touched the victim and did not frighten her. While the victim sat in her parked car in her driveway, Barela reached through the open door and took her purse. As he was

withdrawing his arm from the car, he told her "just give me your purse and you won't get hurt." She testified that she had no time to be afraid. *Id.* at *2. Barela argued this evidence was insufficient to prove Robbery. The court disagreed. It said Barela's comment "was enough for the jury to find that he took the purse by threatened force or violence." *Id.* New Mexico robbery then can be perpetrated with *any* amount of threatened force, including by a threat that fails to frighten the victim.

The Seventh Circuit held, "A conviction for robbery under the Indiana statute qualifies under the still-valid elements clause of the ACCA definition of violent felony." *United States v. Duncan*, 833 F.3d 751, 752 (7th Cir. 2016). But Indiana held that a purse snatching counted as robbery because "[t]he unexpected use of force directed against the victim would be sufficient evidence from which the trier of fact could infer that the victim did experience fear." *Maul v. State*, 467 N.E.2d 1197, 1200 (Ind. 1984). In other words, the inherent force in a snatching – a de minims amount of force not sufficient to be ACCA under actual force – equaled a "threat of bodily harm." This runs directly contrary to *Stokeling's* explanation that a snatching cannot constitute robbery. 139 S. Ct. at 555. Robbery, as espoused by *Stokeling*,

supported by the prior version of ACCA and the common law, supports the idea that the force inherent in such a sudden snatching is, in fact, an actual threat of force.

This case provides this Court with an ideal vehicle to address *Stokeling's* accidental creation of confusion surrounding the amount of force that must be threatened in order to comprise robbery.

B. The Tenth Circuit cherry-picks facts to establish New Mexico Robbery requires a threshold level of force sufficient for ACCA purposes and evades examining the elements of New Mexico's Robbery statute as required by the categorical approach.

The heart of the categorical approach is its refusal to consider facts of a case. The reason for this is well-founded: focusing on elements rather than facts promotes consistency and even-handedness. The categorical approach ensures that a particular crime does not at times count as a predicate offense and other times does not, "depending on the facts of the case." *Descamps*, 570 U.S. at 268. In *United States v. Garcia*, 877 F.3d 944, 953 (10th Cir. 2017), the Tenth Circuit reviewed a sampling of New Mexico state robbery convictions and concluded from that non-exhaustive survey 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.* This approach vitiates the categorical approach.

The *Garcia* Court, 877 F.3d at 953, agreed that in New Mexico, a jury considering a charge of robbery does not decide whether the degree of force used was capable of causing bodily injury; instead, the jury only decides whether the force was the lever that separated the victim from her property. The panel conceded 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 described the amount of force necessary to commit robbery as "immaterial." *Id.* Nonetheless, *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.

Dismissing what is said by a state's appellate courts or legislature as less important and instead concentrate only on what is done by an

accused in a particular case expressly contravenes the categorical approach. Under the categorical approach, the court looks at the elements of the crime rather than the facts 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 v. United States,* 576 U.S. 591, 596 (2015) *(Johnson II)* (internal quotation marks omitted). The categorical approach ensures even handedness - a particular crime will at all times count as predicate offense (or not) regardless of the underlying facts. *See Descamps*, 570 U.S. at 268.

Substituting facts of past cases for elements, as the *Garcia* panel did, flaunts this Court's directive to decide rules of law on categorical grounds. *See Mathis v. United States*, 136 S.Ct.2243, 2253 (2016) (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.").

C. Whether a conviction for residential burglary under N.M. Stat. Ann. § 30-16-3(A), which allows for a conviction where as long as someone uses a non-residential structure (including cars) as a dwelling, falls within the generic crime of burglary in the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B)(ii)?

Taylor defined "burglary" as an offense that "contains at least the following elements: an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime" and explained ACCA burglary did not include "a boat or motor vehicle." Most recently, in *United States v. Stitt,* 139 S. Ct. 399, 403-04 (2018), this Court clarified burglary to include "burglary of a structure or vehicle that has been adapted or is customarily used for overnight accommodation." The Court did not decide whether use alone as a dwelling puts a car or boat into the generic definition of burglary. New Mexico's residential burglary statute allows use alone to transform a car into a dwelling. In New Mexico, a defendant can be guilty of residential burglary for entering a motor vehicle, in which someone sleeps.

In New Mexico:

> Burglary consists of the unauthorized entry of any vehicle, watercraft, aircraft, dwelling or other

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

N.M. Stat. Ann. § 30-16-3. Subsections A and B provide different penalties, making it a divisible statute. *Mathis*, 136 S. Ct. at 2256. This statute, New Mexico's only burglary statute, punishes all unauthorized entries with felonious intent in New Mexico. *United States v. Turrieta*, 875 F.3d 1340 (10th Cir. 2017), held a previous conviction for residential burglary in New Mexico could be counted as an ACCA predicate convictions. *Turrieta* focused on the divisibility to decide that a dwelling house could not be a "vehicle, watercraft, aircraft or structure." 875 F.3d at 1347. But New Mexico's definition of dwelling, New Mexico law interpreting its burglary statute, and the plain language of the statute reveal the difference between Subsections A and

B is not the *type* of structure – any enclosed space – but the *use* of that space that merits different punishments.

The New Mexico Supreme Court identified the "outer limits of New Mexico's burglary statute" in *State v. Office of Pub. Def. ex rel. Muqqddin*, 285 P.3d 622, 624 (N.M. 2012). In tracing the evolution of New Mexico burglary, the *Muqqddin* court explained that the statute purposefully expanded the common law crime. Critically, the Legislature "stripped away the previous distinctions between … a dwelling house compared with other structures." *Muqqddin*, 285 P.3d at 627-28. This assertion by the New Mexico Supreme Court interpreting its law scuttles *Turrieta's* contrary reading that a dwelling house is a unique structure unrelated to the other structures enumerated within the burglary statute. 875 F.3d at 1343.

New Mexico defines a dwelling house as "any structure, any part of which is customarily used as living quarters." N.M. Rule Ann. Crim. UJI 14-1631. The New Mexico Supreme Court promulgates New Mexico's jury instructions "establish[ing] a presumption that the instructions are correct statements of law." *State v. Wilson*, 867 P.2d 1175, 1178 (N.M. 1994). "Any" modifies "structure" and "part." N.M.

Rule Ann. Crim. UJI 14-1631. The word "any" "naturally carries 'an expansive meaning.'" *SAS Institute, Inc. Iancu*, 138 S. Ct. 1348, 1354 (2018) (*quoting United States v. Gonzales*, 520 U.S. 1, 5 (1997)). As an example of the expansive power of "any," the court upheld a conviction for residential, not commercial, burglary when the owner had the "habit of sleeping at his drugstore." *State v. Hudson*, 430 P.2d 386, 387 (N.M. 1967). This allowed a part of the drugstore to assume the character of a dwelling. Thus, "dwelling house" in Section 30-16-3(A) includes any structure as long as some part of it is used as living quarters. If placing a cot in a drugstore transforms it into a dwelling, spending the night in a Jeep transforms it into a dwelling as well. Requiring only use as living quarters to transform a structure to a dwelling expands New Mexico residential burglary beyond generic burglary, even as clarified by *Stitt*, 139 S.Ct. 404. This presents the question left unanswered in *Stitt*, 139 S. Ct. 399: whether use alone transforms any structure into the type of location protected by the generic crime of burglary.

V. Conclusion

Because the Tenth Circuit has misinterpreted the common-law standard adopted in *Stokeling* that guides the categorical analysis of the elements clause for robbery, this Court should grant this writ. Further, because *Stitt* left open the question if occasional use transforms a vehicle into a dwelling for purposes of ACCA burglary, this Court should grant this writ.

Respectfully submitted,

DATED: September 18, 2020

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