Appendix

FILED
United States Court of Appeals
Tenth Circuit

May 4, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KEVIN FOLSE, a/k/a "Criminal,"

Defendant - Appellant.

No. 19-2065
(D.C. No. 1:15-CR-02485-JB-1)
(D. N.M.)

ORDER AND JUDGMENT*

Before **HOLMES**, **SEYMOUR**, and **PHILLIPS**, Circuit Judges.

Following a three-day trial, a federal jury convicted Kevin Folse of carjacking and being a felon in possession of a firearm, among other offenses. The district court thereafter sentenced him to 360 months' imprisonment. He now appeals, contesting his convictions and his designation for sentencing purposes as

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Federal Rule of Appellate Procedure 32.1 and 10th Circuit Rule 32.1. After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* FED. R. APP. P. 34(a)(2); 10TH CIR. R. 34.1(G). The case is therefore ordered submitted without oral argument.

a career offender. We reject all of Mr. Folse's challenges. Accordingly, exercising jurisdiction under 28 U.S.C. § 1291, we **affirm** the district court's judgment.

I

This appeal stems from a series of events that occurred throughout the early morning hours of July 2, 2015. The catalyst of the events began at around 2:00 a.m. While investigating a motor-vehicle incident, officers and detectives of the Albuquerque Police Department (the "APD" or the "Department") sought to find Mr. Folse. Receiving information that Mr. Folse was possibly at a residence located at 1825 Pitt Street, the officers set up a perimeter around the location; they lacked a warrant to enter.

While observing the residence, Detective Deloris Sanchez witnessed an individual through a window in one of the outer-facing rooms. The individual was Valente Estrada, a tenant of 1825 Pitt Street. Detective Sanchez spoke to Mr. Estrada through the window, informing him that the officers had reason to believe Mr. Folse was inside the residence. After some back-and-forth communication, Detective Sanchez instructed Mr. Estrada to leave the residence through the front door to speak with the officers.

Mr. Estrada agreed to do so, but after leaving his room to exit the residence, he never came outside of the front door. According to Mr. Estrada's

testimony, the front door had been barricaded with couches and chairs. After Mr. Estrada reported this to Detective Sanchez, she instructed Mr. Estrada to remove the furniture and exit through the front door. However, upon returning to the main entrance, Mr. Estrada was intercepted by Mr. Folse in the hallway, who called out to Mr. Estrada. Mr. Folse grabbed Mr. Estrada, and took him into a different bedroom, which belonged to Mr. Estrada's roommate.

Mr. Estrada testified that Mr. Folse had a knife in his hand. Fearing that Mr. Folse might stab him, Mr. Estrada did not resist Mr. Folse's directions. In addition to the knife, Mr. Estrada noted that Mr. Folse was armed with a silver and black gun, and when he entered into his roommate's bedroom, Mr. Estrada witnessed a group of people gathered there. Mr. Folse was in essence holding virtually all of the individuals in the room hostage. Mr. Folse's girlfriend, however, was also one of the individuals in the bedroom. Mr. Folse and his girlfriend confiscated the cellphones of the individuals in the room, in addition to the keys to Mr. Estrada's car, a silver Saturn. Concerned about being attacked, Mr. Estrada made no attempt to escape the room, nor did the other individuals present.

Throughout the time in the room—approximately two hours—Mr. Folse exhibited aggressive and violent behavior. Mr. Folse told at least one individual to sit down or he would "stab him," and on another occasion he broke a glass

table top over a woman's head. Supp. R., Vol II, at 247, 249 (Trial Tr., dated Oct. 6, 2015). Several photographs introduced at trial depicted the aftermath of the latter incident—specifically, a couch stained with blood and covered in glass, where the victim had been sitting. *Id*. 249–50, 254. During this time, the officers enforcing the perimeter outside of the residence attempted to reestablish contact with Mr. Estrada but to no avail. With no obvious signs of "duress" coming from the home, such as "screaming or yelling," and concerned that their surveillance had been "compromised," the officers remained in the area but pulled back to a point where they "could no longer monitor the activity around Pitt Street." *Id.* at 65, 68–69.

After the officers pulled back, a little before 11:00 a.m., Mr. Folse decided to leave the premises. Picking up Mr. Estrada's confiscated keys, and still armed with a gun and knife, Mr. Folse told Mr. Estrada, in a "very demanding" manner, "okay, you're going with me." *Id*. at 261. Mr. Folse and Mr. Estrada exited the residence with their respective girlfriends, and Mr. Folse got into the driver's seat of the car, with his girlfriend in the passenger seat, and Mr. Estrada seated directly behind Mr. Folse in the backseat with his girlfriend. At trial, Mr. Estrada testified that he felt scared, that he did not want anyone else to get hurt, and that he felt he had no choice but to obey Mr. Folse.

Meanwhile, detectives—who had been observing the house through binoculars—saw a silver car (which was Mr. Estrada's Saturn) pull out of the driveway at a high rate of speed. Driving in unmarked vehicles, the officers left their surveillance positions, and a chase ensued. During this pursuit, Mr. Folse ran through a stop sign and a red light, swerved around cars, and accelerated at various points to evade the officers. In the midst of this chase, Mr. Folse turned onto a street named Woodland Avenue, and according to Mr. Estrada, Mr. Folse threw a gun out of the car window. According to the testimony of Detective Sanchez, Woodland Avenue has two bends in the road, and when the officers who were pursuing Mr. Folse came around the second bend, they discovered the Saturn. It appears to have lost control and crashed. The Saturn was upside, with its wheels spinning. The four occupants exited the vehicle, apparently unharmed. Mr. Folse and his girlfriend took off running from the car, while Mr. Estrada and his girlfriend remained by the car.

A detective pursued Mr. Folse on foot, following him through an apartment complex and eventually arriving at a fence. Looking over the fence, the detective witnessed Mr. Folse backing out of a residential driveway in a dark Kia SUV. As Mr. Folse backed the SUV out of the driveway, a woman came out of the house running and screaming. A thirteen-year-old boy, identified as

Michael B., was sitting in the passenger seat of the Kia while waiting for his great-grandmother to give him a ride to the store.

According to Michael's testimony, while he was waiting for his great-grandmother the car was idling in the driveway and a man got into the SUV's driver's seat, put his hand on the gearshift, and told Michael he "had three seconds to get out." *Id*. at 421. At trial Michael identified the man as Mr. Folse, *id*. at 419, and testified that Mr. Folse was acting "aggressively" and breathing "heavily," as if "he [had] just r[u]n a couple of miles." *Id*. at 419–20. Michael said Mr. Folse made him feel "[s]hocked" and "scared," *id*. at 420, and that it did not seem "like a safe or good idea" to resist Mr. Folse, *id*. at 432. Michael attempted to quickly exit the Kia, but before he could jump out, Mr. Folse put the vehicle in reverse, affording Michael little time to get out. Michael ended up "[j]umping, diving out" of the vehicle, and the passenger's door hit him in the shoulder, spinning him around and causing him significant injury. *Id*. at 422.

Michael immediately ran inside the residence and dialed 911. The dispatcher asked whether the man in the car had a weapon, to which Michael responded in the negative. However, when testifying at Mr. Folse's trial, Michael stated that Mr. Folse actually had a pistol with him and identified the piece as a "[n]ine millimeter, .45 millimeter" caliber gun. *Id*. at 421.

After the Kia left the driveway, the detective who had been pursuing Mr. Folse on foot remained near the scene, while other law enforcement continued the pursuit of Mr. Folse. That detective was "flagged [] down" by a maintenance employee with the Bernalillo County Water Authority who "said that he had located a firearm." *Id.* at 480. Specifically, around 11:00 a.m. that day (July 2), the maintenance employee had been driving on Woodland Avenue and observed a firearm on the ground. The employee picked up the gun with a rag and turned it over to the officer.

Despite their efforts to capture Mr. Folse, law enforcement came up short on July 2. Mr. Folse successfully managed to elude police. But he was arrested the next day. A federal grand jury subsequently indicted him, and returned a superceding indictment on five counts: one count of felon-in-possession-of-a-firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2) (Count 1); two counts of carjacking in violation of 18 U.S.C. § 2119 (Count 2 and Count 4); and two counts of using, carrying, possessing, and brandishing a firearm during and in relation to and in furtherance of the carjackings charged in Count 2 and Count 4, respectively, in violation of 18 U.S.C. § 924(c) (Count 3 and Count 5). After a

three-day trial, in October 2015, a jury found Mr. Folse guilty of Counts 1–4[1]. *Id.* at 31–34. The district court sentenced Mr. Folse to 360 months' imprisonment.

II

On appeal, Mr. Folse contends that the district court erred when it: (1) held there was sufficient evidence to support his felon-in-possession conviction; (2) instructed the jury on the elements of his felon-in-possession offense; (3) omitted the intent element from its jury instruction on constructive possession; (4) held there was sufficient evidence for his convictions on two counts of carjacking; (5) relied on Mr. Folse's two prior felony convictions of aggravated battery with a deadly weapon and possession of marijuana with intent to distribute to enhance his sentence under the career-offender sentencing guideline. We address Mr. Folse's five claims in turn, rejecting them all.

A. Felon-in-Possession Conviction, 18 U.S.C. § 922(g)

Mr. Folse contends that the evidence was insufficient to support his felon-in-possession conviction, and the district court erred in two distinct ways in instructing the jury. Specifically, as to the latter, Mr. Folse contends that the district court erred when it did not (1) include the knowledge-of-status element in

[1] Prior to trial, the district court dismissed the second brandishing-of-a-firearm count (i.e., Count 5) on motion of the government.

its felon-in-possession instruction and (2) include the proper intent element in the constructive-possession instruction.

1. Sufficiency of the Evidence

We review sufficiency-of-the-evidence challenges de novo. *See, e.g.*, *United States v. Castorena-Jaime*, 285 F.3d 916, 933 (10th Cir. 2002). In so doing, "we ask only whether taking the evidence—both direct and circumstantial, together with the reasonable inferences to be drawn therefrom—in the light most favorable to the government, a reasonable jury could find the defendant guilty beyond a reasonable doubt." *United States v. Radcliff*, 331 F.3d 1153, 1157 (10th Cir. 2003) (quoting *United States v. McKissick*, 204 F.3d 1282, 1289 (10th Cir. 2000)); *see United States v. Nelson*, 383 F.3d 1227, 1229 (10th Cir. 2004) ("Rather than examining the evidence in 'bits and pieces,' we evaluate the sufficiency of the evidence by 'considering the collective inferences to be drawn from the evidence as a whole.'" (quoting *United States v. Wilson*, 107 F.3d 774, 778 (10th Cir. 1997))).

We do not assess the credibility of witnesses or weigh conflicting evidence, because those tasks are exclusively within the jury's domain. *See, e.g.*, *United States v. Summers*, 414 F.3d 1287, 1293 (10th Cir. 2005). Indeed, we may reverse "only if no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Haslip*, 160 F.3d 649, 652

(10th Cir. 1998) (quoting *United States v. Wacker*, 72 F.3d 1453, 1462–63 (10th Cir. 1995)). This "standard requires this court to review the trial record to determine if there is evidence to support the verdict." *United States v. Austin*, 231 F.3d 1278, 1283 (10th Cir. 2000).

To convict Mr. Folse under 18 U.S.C. § 922(g), at the time of Mr. Folse's trial the government had to prove the following elements beyond a reasonable doubt: "(1) [the defendant] was previously convicted of a felony; (2) he thereafter knowingly possessed a firearm; and (3) the possession was in or affecting interstate commerce." *United States v. Benford*, 875 F.3d 1007, 1015 (10th Cir. 2017). However, approximately two months *after* Mr. Folse filed his notice of appeal, the Supreme Court clarified that there is an additional *mens rea* element that the government must prove to establish the offense. *See Rehaif v. United States*, --- U.S. ----, 139 S. Ct. 2191, 2200 (2019); *see also United States v. Herriman*, 739 F.3d 1250, 1258 (10th Cir. 2014) ("*Mens rea* is 'the mental element of the crime charged.'" (quoting *Clark v. Arizona*, 548 U.S. 735, 742 (2006))). In the post-*Rehaif* world, the government also must prove that the defendant *knew* that he belonged to the relevant category of individuals barred from possessing a firearm at the time of the firearm possession. *See Rehaif*, 139 S. Ct. at 2200; *see also United States v. Benton*, 988 F.3d 1231, 1236–37 (10th Cir. 2021) (sketching the contours of *Rehaif*'s holding).

Invoking *Rehaif*, Mr. Folse claims that the government failed to meet this additional knowledge-of-status burden, as it has "introduced no evidence to establish that Mr. Folse knew he had been convicted of a crime punishable by more than one year in prison at the time of the firearm possession." Aplt.'s Opening Br. at 16. Mr. Folse attributes the government's failure to offer such evidence to its "erroneous interpretation of § 922(g)." *Id*. at 18. In light of *Rehaif*, Mr. Folse concludes that this court should reverse his conviction and direct the district court to enter a judgment of acquittal concerning his felon-in-possession charge. We reject this argument.

In assessing a sufficiency-of-the-evidence challenge in circumstances such as these, we "analyze the sufficiency of the evidence under the law *in effect at the time of trial*." *Benford*, 875 F.3d at 1014 (emphasis added); *Wacker*, 72 F.3d at 1465 ("[T]he government here cannot be held responsible for 'failing to muster' evidence sufficient to satisfy a standard which did not exist at the time of trial."); *see also United States v. Arciniega-Zetin*, 755 F. App'x 835, 842 (10th Cir. 2019) (unpublished) ("We must order the dismissal of any charge that the government failed to prove by sufficient evidence *under the law in force during his trial*. But if the government's proof suffices under that now-outdated law, then showing that this proof would *not* suffice under the supervening law won't win the defendant a dismissal." (first emphasis added)).

Here, we must analyze the sufficiency of the evidence under the law governing felon-in-possession offenses at the time of Mr. Folse's trial—that is, under the pre-*Rehaif* standard. And, under that standard, the government was not required to prove that Mr. Folse knew that he was a felon when he possessed the firearm. This state of the law is fatal to Mr. Folse's cause. He does not even attempt to argue that the evidence was insufficient to support his conviction under the pre-*Rehaif* standard. Accordingly, we reject this sufficiency-of-the-evidence claim.

2. Jury Instructions

Mr. Folse also contends that, even if we do not vacate his § 922(g) conviction based on the lack of sufficient evidence, a new trial is still warranted because the district court erred in omitting two required elements of its jury instructions concerning Mr. Folse's felon-in-possession offense. First, again invoking *Rehaif*, Mr. Folse contends that the district court's instructions to the jury on the elements of his felon-in-possession offense were required to include the knowledge-of-status element, and the absence of that element rendered the instructions plainly erroneous. Second, Mr. Folse contends that the instructions regarding his felon-in-possession offense were also plainly erroneous because they did not properly define the correct *mens rea* to support a constructive-possession theory of liability.

Usually, "[w]e review de novo the jury instructions as a whole and view them in the context of the entire trial to determine if they accurately state the governing law and provide the jury with an accurate understanding of the relevant legal standards and factual issues in the case. " *United States v. Vernon*, 814 F.3d 1091, 1103 (10th Cir. 2016) (quoting *United States v. Richter*, 796 F.3d 1173, 1185 (10th Cir. 2015)). However, where a party fails to object at trial on a ground upon which it later seeks reversal on appeal, that party must "run the gauntlet created by our rigorous plain-error standard of review." *United States v. McGehee*, 672 F.3d 860, 876 (10th Cir. 2012); *see* Fed. R. Crim. P. 52(b); *United States v. Visinaiz*, 428 F.3d 1300, 1308 (10th Cir. 2005) ("When no objection to a jury instruction was made at trial, the adequacy of the instruction is reviewed . . . for plain error."). Mr. Folse does not dispute that he failed to object before the district court to the two alleged jury-instruction deficiencies that he raises on appeal. Therefore, we review his instructional challenges only for plain error.

A party seeking relief under the plain-error rubric bears the burden of showing "(1) an error, (2) that is plain, which means clear or obvious under current law, and (3) that affects substantial rights." *McGehee*, 672 F.3d at 876 (quoting *United States v. Cooper*, 654 F.3d 1104, 1117 (10th Cir. 2011)); *see also United States v. Gonzalez-Huerta*, 403 F.3d 727, 736 (10th Cir. 2005) (en banc). "If these factors are met, [this court] may exercise discretion to correct the error

if (4) it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Cordery*, 656 F.3d 1103, 1105 (10th Cir. 2011); *United States v. Winder*, 557 F.3d 1129, 1136 (10th Cir. 2009) ("Under the plain error standard, 'even if a defendant demonstrates an error that is plain, we may only take corrective action if that error not only prejudices the defendant's substantial rights, but also seriously affects the fairness, integrity, or public reputation of judicial proceedings.'" (quoting *United States v. Rivas–Macias*, 537 F.3d 1271, 1281 (10th Cir. 2008))).

We apply plain error "less rigidly when reviewing a potential constitutional error," *United States v. James*, 257 F.3d 1173, 1182 (10th Cir. 2001), as is the case here because "an improper instruction on an element of the offense violates the Sixth Amendment's jury trial guarantee," *Neder v. United States*, 527 U.S. 1, 12 (1999); *accord Benford*, 875 F.3d at 1016–17.

a. Possession of a Firearm by a Felon

In its felon-in-possession instructions, among other things, the district court charged the jury that "Mr. Folse was convicted of a felony, that is, a crime punishable by imprisonment for a term exceeding one year, before he possessed the firearm . . . ." Supp. R., Vol. I, at 37 (Final Jury Instrs. - No. 11, filed Oct. 7, 2015). At trial, the parties stipulated to this element—specifically, the fact that he was a convicted felon at the time he possessed the firearm. But the parties did

not stipulate, nor did the instructions require the jury to find, that Mr. Folse knew of his felon status at the time of his firearm possession. Thus, Mr. Folse contends that the felon-in-possession instructions were plainly erroneous under the current law of *Rehaif*.

And the government freely acknowledges as much—that is, it acknowledges that, as to the knowledge-of-status element, the felon-in-possession instructions were erroneous and clearly or obviously so, when judged by the *Rehaif* standard. In other words, the government acknowledges that Mr. Folse satisfies his burden as to the first two prongs of the plain-error test. *See, e.g.*, *United States v. Benamor*, 937 F.3d 1182, 1188–89 (9th Cir. 2019) (holding that "the absence of an instruction requiring the jury to find that [the defendant] knew he was a felon was clear error under *Rehaif*" and thus the first two prongs of plain error were satisfied). However, that is as far as the government's concession goes.

Turning to the remainder of the plain-error test, we conclude that Mr. Folse's claim cannot surmount the hurdle of the third prong of that test. More specifically, Mr. Folse fails to demonstrate—as the third prong requires—that the *Rehaif* instructional error affected his substantial rights (i.e., prejudiced him). Consequently, we may end our analysis there. *See, e.g.*, *United States v. Rosales-Miranda*, 755 F.3d 1253, 1258 (10th Cir. 2014) ("We will not reverse a

conviction for plain error unless all four prongs of the plain-error test are satisfied." (quoting *United States v. Caraway*, 534 F.3d 1290, 1299 (10th Cir. 2008))).

"An error only affects substantial rights when it is prejudicial, meaning that there is 'a reasonable probability that, but for the error claimed, the result of the proceeding would have been different.'" *United States v. Algarate-Valencia*, 550 F.3d 1238, 1242 (10th Cir. 2008) (quoting *Gonzalez-Huerta*, 403 F.3d at 733); *accord United States v. Weiss*, 630 F.3d 1263, 1274 (10th Cir. 2010). Mr. Folse cannot satisfy this standard because—as the government correctly asserts—"the record leaves no doubt that [Mr. Folse] knew he was a felon," Aplee.'s Resp. Br. at 19. The government rests this assertion in substantial part on Mr. Folse's lengthy criminal history, stating:

> The record here establishes that Folse had six prior felony convictions, one of which was for possessing a firearm as a felon. For his first set of two convictions, he was given a deferred sentence of two-and-a-half years; when his probation was revoked, he was sentenced to 640 days' custody [i.e., more than 1 ½ years]. For a later set of three convictions, he was sentenced to seven years, two of which were suspended.

Id. at 20–21 (citing R., Vol. II, at 70–71).[2]

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[2] The government contends that, in conducting the third-prong, plain-error analysis, "it is appropriate for the court to look to the entire record." Aplee.'s Resp. Br. at 19. Generally speaking, that approach is settled and—at least in the guilty-plea context—free from any controversy. *See, e.g.*, *United*

(continued...)

The government reasons that, had the jury been properly instructed under *Rehaif*, the government would have been permitted to carry its burden of proof by introducing evidence concerning Mr. Folse's criminal history and, if it had done

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[2](...continued)
States v. Dominguez Benitez, 542 U.S. 74, 83 (2004); *United States v. Edgar*, 348 F.3d 867, 872 (10th 2003). But, in this trial context, the government relies heavily on the portion of the record that contains the Presentence Report ("PSR"), which details Mr. Folse's significant criminal history. Importantly, in his reply brief, Mr. Folse does not object to such reliance on the PSR. Indeed, Mr. Folse does not meaningfully engage at all in his reply brief with the government's plain-error arguments concerning the missing knowledge-of-status element. We are aware, however, that construing the scope of entire-record review, in the context of a plain-error assessment of *Rehaif trial* error, as extending beyond the trial record (i.e., the evidence before the jury) to include the PSR, is not a universal practice—at least when considering both the third *and* fourth prongs. *See, e.g.*, *United States v. Maez*, 960 F.3d 949, 960 (7th Cir. 2020) ("The circuits have taken different approaches to the record for plain-error review of *jury verdicts* in light of *Rehaif*."); *see also United States v. Nasir*, 982 F.3d 144, 164–65 (3d Cir. 2020) (en banc) ("[C]ourts of appeals that have considered whether the government's failure to prove the knowledge-of-status element in a 922(g) prosecution is plain error . . . . have reached that result based on their preliminary conclusion that they are permitted to look outside the trial record to find evidence to plug the gap left by the prosecution at trial. The justifications offered for that view are not all of a piece."). And the Tenth Circuit does not appear to have ruled on the matter in controlling precedent. Yet, under these circumstances—especially where the opposing party, Mr. Folse, has not objected—we are willing to follow the government's approach. *Cf. United States v. A.S.*, 939 F.3d 1063, 1076 (10th Cir. 2019) (noting that "we are free to conclude that [the defendant] waived, at the very least, non-obvious arguments" challenging the government's material contention in support of the district court's judgment, by failing to address that argument "even in reply"). Accordingly, we inquire beyond the trial record to consider the PSR. "[A] future panel may need to resolve whether courts in similar circumstances can look beyond the trial record." *United States v. Arthurs*, 823 F. App'x 692, 696 n.7 (10th Cir. 2020) (unpublished).

so, "there is no chance that the jury would have doubted that on July 2, 2015, Folse knew he was a felon." *Id*. at 21. We agree. More to the point, Mr. Folse cannot show that there is a reasonable probability that the result of the proceeding, as it relates to his felon-in-possession charge, would have been different, if the jury had been properly instructed under the *Rehaif* standard.

In particular, the fact that Mr. Folse had actually served in two separate time frames significantly more than one year in prison—based on multiple felony convictions—leads us to conclude that Mr. Folse "lack[s] a plausible argument that he hadn't known" at the time of the instant felon-in-possession offense that he was a convicted felon. *United States v. Tignor*, 981 F.3d 826, 831 (10th Cir. 2020); *see id.* at 830 (noting that the defendant "presumably wouldn't forget that he'd spent well over a year in prison after obtaining the conviction"); *United States v. Trujillo*, 960 F.3d 1196, 1208 (10th Cir. 2020) (rejecting the defendant's third-prong, reasonable-probability argument where the defendant "was convicted of six felonies . . . . [and] served a total of four years in prison for six felony offenses." (citation omitted)); *see also United States v. Hollingshed*, 940 F.3d 410, 415–16 (8th 2019) (holding that the defendant failed to satisfy the third prong of the plain error test, where he "pleaded guilty to possession with intent to distribute cocaine in 2001, was sentenced to 78 months' imprisonment, and was imprisoned for about four years before he began his supervised release"), *cert.*

denied, --- U.S. ----, 140 S. Ct. 2545 (2020); *Benamor*, 937 F.3d at 1189 (concluding that the third prong of the plain-error test was not met and underscoring that "[w]hen Defendant possessed the shotgun, he had been convicted of seven felonies in California state court, including three felonies for which sentences of more than one year in prison were actually imposed on him. . . . Defendant spent more than nine years in prison on his various felony convictions before his arrest for possessing the shotgun"), *cert. denied*, --- U.S. ----, 140 S. Ct. 818 (2020).

Accordingly, Mr. Folse's claim stumbles irretrievably on the third prong of the plain-error test. *See, e.g.*, *United States v. Burghardt*, 939 F.3d 397, 404 (1st Cir. 2019) (holding that the defendant's substantial rights were not affected where there was "overwhelming proof" defendant had previously been sentenced to more than one year in prison), *cert. denied*, --- U.S. ----, 140 S. Ct. 2550 (2020).

b. Constructive Possession of a Firearm

Mr. Folse mounts a second instructional challenge pertaining to his felon-in-possession offense, which also must stand or fall under the rigorous plain-error rubric. This one relates to the *mens rea* component of the court's instruction concerning constructive possession. Mr. Folse contends that the district court plainly erred in not instructing the jury that, in order for the government to prove

that Mr. Folse constructively possessed the firearm, it must establish that he intended to exercise control over the firearm.

As a general matter, to establish a felon-in-possession offense the government must prove beyond a reasonable doubt that the defendant possessed a firearm. *See, e.g.*, *Trujillo*, 960 F.3d at 1201; *United States v. Silva*, 889 F.3d 704, 711 (10th Cir. 2018). Mr. Folse's claim centers on the theories of liability that the government may employ to establish this possession element. The government may show that, at the time of the offense, the defendant was either in actual or constructive possession of the firearm. *See Benford*, 875 F.3d at 1015 (noting that possession "may be either actual or constructive").

"Actual possession occurs where 'a person has direct physical control over a firearm at a given time.'" *United States v. Samora*, 954 F.3d 1286, 1290 (10th Cir. 2020) (quoting *United States v. Jameson*, 478 F.3d 1204, 1209 (10th Cir. 2007)). As for constructive possession, at the time of Mr. Folse's trial, our precedent had long held that "[c]onstructive possession of a firearm exists when an individual 'knowingly hold[s] the power and ability to exercise dominion and control over it.'" *United States v. King*, 632 F.3d 646, 651 (10th Cir. 2011) (second alteration in original) (quoting *United States v. Lopez*, 372 F.3d 1207, 1211 (10th Cir. 2004)). And the district court's instruction here tracked this precedent, providing that constructive possession exists when a person "who,

although not in actual possession, knowingly has the power at a given time to exercise dominion or control over an object, either directly or through another person or persons." Supp. R., Vol. I, at 39.

However, in 2016, after the jury rendered its verdict in Mr. Folse's trial, we recognized that the Supreme Court had altered the law of constructive possession, such that "constructive possession requires both power to control an object and *intent to exercise that control*." *United States v. Little*, 829 F.3d 1177, 1182 (10th Cir. 2016) (emphasis added). Mr. Folse did not lodge an objection at his trial that effectively anticipated this change—that is, he did not object to the court's constructive-possession instruction on the ground that it elided the intent-to-exercise-control element. Nevertheless, Mr. Folse raises such an objection now.

In doing so, Mr. Folse acknowledges that he must seek relief under our rigorous plain-error standard. Yet he believes that he can satisfy this standard. The government disagrees. As with the knowledge-of-status claim, the government is willing to concede that the district court's constructive-possession instruction constitutes error under current law and that this error is clear or obvious—that is, it is willing to concede that the first two prongs of the plain-error test are satisfied. However, the government argues strongly that Mr. Folse cannot satisfy the remainder of the plain-error test. And we agree. In particular,

like the government, we conclude that Mr. Folse cannot clear the hurdle of the third prong of the plain-error test.

In advancing his cause, Mr. Folse argues that the government's primary evidence establishing his possession of a firearm came from one witness—Mr. Estrada—and that, in analogous circumstances, we have held that where an instruction omits an intent element, a defendant's substantial rights are affected. *See* Aplt.'s Opening Br. at 31 ("This Court has held that omitting the intent element affected a defendant's substantial rights where a government's witness provided the main proof linking the defendant with a gun."). However, we find the government's contrary argument persuasive.

Specifically, the government contends that it sought throughout the trial to establish the element of possession under an actual-possession theory—not a constructive-possession theory. In other words, the government's proof sought to establish that Mr. Folse actually possessed the firearm—i.e., that the gun was in his hand. And, according to the government, "[i]t is certain that the jury accepted this theory because it, in fact, convicted Folse of actual possession when it found, beyond a reasonable doubt, that Folse brandished the firearm as charged in Count 3." Aplee.'s Resp. Br. at 22–23. In sum, as the government reasons, "[i]t is not possible that the jury's verdict relied on a defective theory of constructive possession." *Id.* at 23.

In substance, the government's reasoning is sound, and we find it to be consonant with our independent consideration of the record. Virtually all of the evidence that the government adduced at trial as to Mr. Folse's firearm possession focused on his actual physical possession of the firearm—more specifically, on his actual handling of the firearm over an extended period of time on July 2. For example, the government elicited substantial testimony from Mr. Estrada that Mr. Folse had the gun in hand while he kept Mr. Estrada and others at 1825 Pitt Street hostage, as well as while driving Mr. Estrada's Saturn. Thus, the evidence before the jury indicated that Mr. Folse had actual possession over the firearm over the course of several hours. Under our caselaw, that was more than sufficient to satisfy the possession element of the felon-in-possession offense. *See Samora*, 954 F.3d at 1290 (noting that "to convict on actual possession, the defendant must have held the firearm 'for a mere second or two' during the time specified in the indictment" (quoting *United States v. Adkins*, 196 F.3d 1112, 1115 (10th Cir. 1999))). And the government highlighted this aspect of its evidence before the jury. *See, e.g.*, Supp. R., Vol. II, 591 (government arguing at trial that it had established "Mr. Folse[] knowingly possessed a firearm" based on "testimony from Valente Estrada which indicated that he saw a firearm in Mr. Folse's hands *for several hours*" (emphasis added)).

In short, there was virtually no evidence before the jury that pointed in the direction of Mr. Folse's constructive possession of the firearm. Therefore, it is very unlikely that the jury relied on a defective theory of constructive possession here in pronouncing Mr. Folse guilty. This means that Mr. Folse necessarily cannot carry his third-prong burden of showing that—had the jury been properly instructed concerning constructive possession—the outcome of his trial as to his felon-of-possession charge would have been different. Accordingly, we conclude that Mr. Folse's second instructional challenge also fails: it does not satisfy the third prong of the plain-error test, and our analysis stops there.

B. Carjacking Convictions, 18 U.S.C. §2119

Mr. Folse also challenges his conviction on two counts of carjacking, claiming that the government presented insufficient evidence to support both convictions. As we have mentioned, we review sufficiency-of-the-evidence challenges de novo.

To convict Mr. Folse under the federal carjacking statute, the government had to prove the following elements beyond a reasonable doubt: "(1) that [Mr. Folse] took a motor vehicle from the person or presence of another; (2) that he did so by force, violence or intimidation; (3) that [Mr. Folse] intended to cause death or serious bodily harm; and (4) that the motor vehicle had been transported, shipped, or received in interstate or foreign commerce." *United States v. Gurule*, 461 F.3d 1238, 1243 (10th Cir. 2006). Mr. Folse argues that the evidence was insufficient as to both counts to show the "intent" element—that is, "the intent to cause death or serious bodily harm." 18 U.S.C. § 2119.

More specifically, Mr. Folse claims that the government failed to meet this burden as to the carjacking of Mr. Estrada's Saturn (Count 2) ("First Carjacking"), and the carjacking of the Kia SUV, in which the minor, Michael B., occupied the passenger seat (Count 4) ("Second Carjacking"). Regarding the First Carjacking, Mr. Folse endeavors to bolster his argument with citations to cases from our sister circuits, which purportedly contend that carjacking requires

"evidence that shows that a defendant directly threatened victims with actual weapons, made affirmative threatening statements, and/or physically assaulted the victims"—features that, according to Mr. Folse, neither of the two carjackings here had. Aplt.'s Opening Br. at 23–24 (collecting cases).

Mr. Folse contends in particular that the government failed to present evidence indicating that, in the First Carjacking, a gun was ever pointed at anyone to ensure compliance with the taking of Mr. Estrada's car, nor did Mr. Estrada allege that he was even so much as "threatened with or exposed to any harm at any point when Mr. Folse was taking his car." *Id*. at 25; *see also id*. at 24–25 (contending that Mr. Estrada asserted only a "general fear" which stemmed from the day's earlier events at 1825 Pitt Street). Mr. Folse presses the point that, not only was there insufficient evidence that he would have employed the firearm to inflict serious bodily harm to effectuate the taking of the Saturn, but there was no evidence that the firearm was even loaded. He argues that although Mr. Estrada may have felt "generally intimidated" by Mr. Folse's previous conduct and possession of a firearm, "there was not evidence beyond a reasonable doubt that he had a loaded firearm at the time of the taking." *Id.* at 26.

In addressing the Second Carjacking, Mr. Folse maintains that this conviction is also grounded in insufficient evidence. He argues that, absent

evidence that a firearm was used to effectuate this taking,[3] all that remained for the jury's consideration was a statement by Mr. Folse to Michael that he had "three seconds to get out of the Kia." *Id.* at 26. And, while such conduct may have satisfied the intimidation element of the offense, Mr. Folse reasons that it does not satisfy the intent element. In particular, Mr. Folse argues that the element requires proof that the defendant possessed at least the intent to seriously harm the carjacking victim, if necessary to steal the car. Instead, Mr. Folse characterizes this statement to Michael as being simply an "empty threat" or "intimidating bluff," which fails to satisfy the requisite element of intent. *Id.* (quoting *Holloway v. United States*, 526 U.S. 1, 11 (1999)).

However, having carefully considered Mr. Folse's arguments in the light of the record, we ultimately are not persuaded by them. As to both carjackings, admittedly, the incriminating evidence concerning the intent element is not overwhelming. Yet it need not be.

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[3] Apparently due to the equivocal nature of Michael's statements concerning whether Mr. Folse had a firearm, the government did not ask the jury to factor Mr. Folse's alleged possession of a firearm into its assessment of his guilt of the Second Carjacking. *See* Aplee.'s Resp. Br. at 29 n.8 ("The government at trial did not emphasize Michael's testimony that he saw a gun in Folse's hand and does not ask this court to rely on it now."); *see also* Aplt.'s Opening Br. at 26 (noting that, as to the Second Carjacking, "the government agreed to omit [reference to Mr. Folse's alleged possession of a firearm] from the carjacking instruction due to Michael's wavering accounts").

The question is not whether *every* reasonable factfinder—when presented with the same evidence—would have rendered a verdict of guilty; rather, it is whether *any* reasonable factfinder would have done so. *See United States v. Irvin*, 682 F.3d 1254, 1266 (10th Cir. 2012) ("In reviewing the sufficiency of the evidence and denial of a motion for judgment of acquittal, this court reviews the record de novo to determine whether, viewing the evidence in the light most favorable to the government, *any* rational trier of fact could have found the defendant guilty of the crime beyond a reasonable doubt") (emphasis added); *United States v. Ramos-Arenas*, 596 F.3d 783, 787 (10th Cir. 2010) ("Admittedly, some facts may have swayed a rational factfinder in another direction. But this is not our role when reviewing the sufficiency of the evidence: we will reverse only if the jury's decision was outside the range of a rational factfinder's reasonable choices."); *United States v. Hill*, 786 F.3d 1254, 1263 (10th Cir. 2015) (noting that "the government's evidence need not remove all doubt, but merely those doubts that are reasonable").

Considering the totality of the circumstances, we conclude that a reasonable factfinder could have found beyond a reasonable doubt that the evidence was sufficient to establish the intent element. Therefore, Mr. Folse's sufficiency-of-the-evidence challenges to his two carjacking convictions must fail.

In *Holloway v. United States*, the Supreme Court focused on and interpreted the intent requirement of the carjacking statute, 18 U.S.C. § 2119. *See Holloway*, 526 U.S. at 6 (noting that "the question is whether a person who points a gun at a driver, having decided to pull the trigger if the driver does not comply with a demand for the car keys, possesses the intent, at that moment, to seriously harm the driver"). The Court held that the intent element can be satisfied when the government proves that the defendant possessed a "conditional intent" at the time he demands or takes control of the car—that is, the government need not prove that the defendant possessed "a specific and unconditional intent to kill or harm in order to complete the proscribed offense." *Id*. at 7.

While *Holloway* and its progeny no doubt require that the defendant possess the requisite intent "at the precise moment he demanded or took control of the car," Aplt.'s Reply Br. at 1, that intent must be discerned from a consideration of the "totality of the circumstances." *United States v. Vallejos*, 421 F.3d 1119, 1123 (10th Cir. 2005) (quoting *United States v. Malone*, 222 F.3d 1286, 1291 (10th Cir. 2000)); *accord United States v. Pena*, 550 F. App'x 563, 565 (10th Cir. 2013) (unpublished); *cf. Bushco v. Shurtleff*, 729 F.3d 1294, 1308–09 (10th Cir. 2013) ("[A]s a specific example in the context of criminal intent, this court has indicated that the required criminal intent in carjacking cases is determined from the totality of the circumstances."). And, in considering those

circumstances, the factfinder may determine that an "entire episode" is "sufficiently contemporaneous" with the moment the defendant took control of the vehicle "to be probative" regarding the nature of the defendant's intent. *Pena*, 550 F. App'x at 565–65.

Therefore, in our consideration of whether there was sufficient evidence that Mr. Folse possessed the requisite intent, we are not limited to a narrow point in time—that is, to the exact moment that Mr. Folse took control of the vehicles at issue—but, instead, must consider the totality of the circumstances, insofar as those circumstances are probative of his intent at those moments. Stated otherwise, in considering the totality of the circumstances, we must examine the defendant's conduct in any relevant episode that is sufficiently contemporaneous to the exact moment that the defendant took possession of the vehicle to shed light on his intent in that moment.

In this vein, we believe that a reasonable factfinder could readily conclude that all of Mr. Folse's violent and aggressive acts on the morning of July 2—i.e., the hostage-taking events and the high-speed chase—comprise one relevant episode probative of his intent. From that episode a reasonable factfinder could infer that Mr. Folse had few (if any) qualms about resorting to serious, violent acts—especially with the end of avoiding capture by the police—when he took possession of the vehicles at issue. And, more specifically, a reasonable

factfinder could infer that Mr. Folse possessed the conditional intent to kill or inflict serious bodily harm—that is, the intent to take such actions if he had to do so in order to obtain the vehicular means of escaping the police.

Beginning with the hostage-taking events, recall that Mr. Folse confined numerous individuals in a single room, confiscated their cellphones, and presided over them for several hours wielding in his hand both a knife and gun. When one of those individuals attempted to move, Mr. Folse threatened that person in explicit terms—saying, "sit down or he was going to stab him, kill him." Supp. R., Vol. II, at 247. Then, for reasons that are unclear, Mr. Folse broke "a glass table top" over a woman's head, *id*. at 247, 254, instructing her "not to stand up, because if she did, he was going to stab and kill her." *Id*. at 254–55. Indeed, the jury had an opportunity to see photographs depicting the aftermath of this brutal act of violence—a blood-stained couch, covered in glass, where the woman was sitting. *Id*. at 254. And it was directly on the heels of these events that Mr. Folse—still with a gun in hand—told Mr. Estrada, in a "very demanding" manner, "okay, you're going with me," *id*. at 261—fleeing with both Mr. Estrada and Mr. Estrada's girlfriend in Mr. Estrada's Saturn. Moreover, in his reckless vehicular flight, Mr. Folse demonstrated his strong intention of avoiding capture by law enforcement and his willingness to act aggressively and to risk danger to do so. To that point, he led the officers on a dangerous car chase in which Mr. Folse

endangered a number of other drivers on the road, as he ran a stop sign and a red light and swerved around vehicles in his flight path. Furthermore, Mr. Folse put the passengers in the Saturn itself at risk when he crashed the car, causing it to flip over.

Mr. Folse's acts of violence and aggression relating to the First Carjacking segued into the Second Carjacking, during which Mr. Folse took possession of the Kia belonging to Michael's great-grandmother, with Michael in the car. In particular, Mr. Folse jumped in the vehicle and warned Michael that he had three seconds to get out. As Michael was attempting to do so, Mr. Folse sped off, causing Michael to fall out and suffer significant injuries.

Viewed in the totality, the events in this episode—during which Mr. Folse not only expressly threatened two people's lives, but also endangered the lives of many others and, in fact, inflicted significant physical harm on two individuals—indicate that Mr. Folse was willing and able to use *whatever force* that he considered necessary to avoid capture by the police. And, more to the point, they show that Mr. Folse possessed the conditional intent to kill or inflict serious bodily harm, if he had to do so to secure the vehicular means of escape from law enforcement.

Furthermore, even if we were to assume—as Mr. Folse urges—that, in the First Carjacking, the gun in his hand was unloaded,[4] under the circumstance of this case, that fact would not avail him. Whether a gun is loaded certainly is a relevant fact in the consideration of the totality of the circumstances bearing on a defendant's intent. *See Malone*, 222 F.3d at 1291. But the unloaded status of a defendant's firearm by no means would preclude a reasonable factfinder from determining that the defendant possessed the requisite conditional intent to kill or inflict serious bodily harm. *See, e.g.*, *United States v. Fekete*, 535 F.3d 471, 478 (6th Cir. 2008) ("A look at the caselaw from this and other circuits, however, reveals that the issue of whether a carjacker's firearm was loaded has generally not been treated by the courts as outcome-dispositive. Rather, the courts have looked at the totality of the relevant circumstances, including whether there was physical violence or touching and/or direct or implied verbal threats to kill or harm." (citing our decision in *Malone*, 222 F.3d at 1291–92, in support of this proposition)); *see also United States v. Small*, 944 F.3d 490, 500 (4th Cir. 2019) (noting that "even if [the victim's] assailants carried an unloaded gun" they may

[4] We note that the government says that it is not definitively established by the record that the gun used in the First Carjacking was unloaded. Construing the record in the light most favorable to the government—as we must, *see Radcliff*, 331 F.3d at 1157—it is questionable whether we should give Mr. Folse the benefit of such an assumption. However, as we discuss below, this assumption ultimately does not avail Mr. Folse in any event.

possess the requisite conditional intent to cause death or serious bodily harm), *cert. denied*, --- U.S. ----, 140 S. Ct. 2644 (2020).

Indeed, a gun can readily be used to inflict serious bodily harm, and even death, even if it is not loaded. *See Fekete*, 535 F.3d at 480 ("The requisite *mens rea* can be shown by evidence of an intent to use a knife, a baseball bat, brute force, or any other means that indicates an ability and willingness to cause serious bodily harm or death if not obeyed. A lack of proof beyond a reasonable doubt that a gun was loaded, therefore, does not foreclose the possibility that . . . the defendant nonetheless had the requisite conditional intent to cause death or serious bodily harm by other means (e.g., pistol-whipping or brute force) . . . ."); *see also Small*, 944 F.3d at 500 ("[A]s too many crime victims know, even an unloaded firearm is capable of causing harm.").

Moreover, the fact that Mr. Folse did not *directly* threaten Mr. Estrada is of little significance, despite Mr. Folse's insistence otherwise. Though Mr. Folse never *explicitly* threatened Mr. Estrada—including when he took control of Mr. Estrada's Saturn—his threat to kill Mr. Estrada or to inflict seriously bodily harm on him was certainly implicit in Mr. Folse's statement—expressed as an order or directive—"you're coming with me." This statement followed immediately on the heels of Mr. Folse violence-laden treatment of his hostages, during which Mr.

Folse threatened the lives of two occupants of the home, and caused serious injury to one of the individuals in the room.

Mr. Folse fails to supply any caselaw providing that the threat must be explicit and directly aimed at the carjacking victim. Indeed, the factual circumstances in one of the cases that Mr. Folse relies on, *Pena*, suggests to the contrary. *See Pena*, 550 F. App'x at 556 (underscoring the fact that the defendant had displayed "aggressive behavior" and evinced an unspoken "threat to shoot" an individual by placing a gun to his head, in supporting the conclusion that the requisite evidence of carjacking intent was present, even though the individual confronted by the gun had left the scene and was not the person from whose presence the vehicle was seized); *see also Fekete*, 535 F.3d at 478 (noting that in analyzing the totality of the circumstances relative to the carjacking intent question, courts look, *inter alia*, at whether there are "*implied* verbal threats to kill or harm" (emphasis added)).

In sum, considering the totality of the circumstances, we conclude that a reasonable factfinder could have found beyond a reasonable doubt that the evidence was sufficient to establish the intent element as to both of Mr. Folse's carjacking charges. That is, a reasonable factfinder could determine that Mr. Folse had the conditional intent to cause death or serious bodily harm in order to

take the two vehicles at issue. Therefore, Mr. Folse's sufficiency-of-the-evidence challenges to his carjacking convictions must fail.

C. Career-Offender Sentencing Guidelines

Mr. Folse contends that neither of his two prior felony convictions of aggravated battery with a deadly weapon and possession of marijuana with intent to distribute were qualifying predicates under the Sentencing Guidelines, and therefore the district court erred in its imposition of the career-offender sentencing enhancement. *See* U.S.S.G. §§ 4B1.1, 4B1.2. Because Mr. Folse preserved this issue by filing a formal objection to the Presentence Report ("PSR"), in which he contested the application of the career-offender enhancement, we analyze this claim under de novo review. *See United States v. Mitchell*, 113 F.3d 1528, 1532 (10th Cir. 1997) ("Whether a defendant was erroneously classified as a career offender is a question of law subject to de novo review.").

1. New Mexico Aggravated Battery

Mr. Folse argues that his conviction for aggravated battery under New Mexico law, N.M. Stat. § 30-3-5, does not fall within the definition of "crime of violence" under U.S.S.G. § 4B1.2(a), which requires a crime to have "as an element the use, attempted use, or threatened use of physical force against the person of another." *See* Aplt.'s Opening Br. at 40. Therefore, he reasons that this conviction cannot be the predicate for a career-offender enhancement under § 4B1.1(a).

The relevant New Mexico statute provides in full:

> 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.

N.M. Stat. § 30-3-5. Penalized as a misdemeanor under N.M. Stat. § 30-3-4, simple "[b]attery is included within the offense of aggravated battery." *State v. Duran*, 456 P.2d 880, 881 (N.M. Ct. App. 1969); *see* N.M. Stat. Ann. § 30-3-4 ("Battery is the unlawful, intentional touching or application of force to the

person of another, when done in a rude, insolent or angry manner."). As specified in subsection A, aggravated battery is distinguished from this simple battery offense, in significant part, by the nature of the proscribed *mens rea*: aggravated battery requires that the touching or application of force to a person be committed "with intent to injure that person or another." N.M. Stat. § 30-3-5(A). And then, depending on the scope and nature of the defendant's conduct, aggravated battery is punished as a misdemeanor under subsection (B) or as a felony under subsection (C).

With this statutory background in mind, we turn to Mr. Folse's arguments. As noted, Mr. Folse argues that his conviction for aggravated battery with a deadly weapon under New Mexico law, N.M. Stat. § 30-3-5, does not fall within the definition of "crime of violence" under U.S.S.G. § 4B1.2(a). The language of that provision upon which Mr. Folse focuses—which requires that a "crime of violence" have as "an element the use, attempted use, or threatened use of physical force against the person of another"—has been frequently referred to by our court as "the elements clause." *United States v. Taylor*, 843 F.3d 1215, 1220 (10th Cir. 2016).

"Our inquiry under the elements clause demands application of 'the categorical approach, examining the elements of the [state] statute to see whether they meet the requirements of U.S.S.G. § 4B1.2(a)(1)'s crime of violence

definition.'" *United States v. Ash*, 917 F.3d 1238, 1240 (10th Cir. 2019) (quoting *United States v. Bettcher*, 911 F.3d 1040, 1043 (10th Cir. 2018)), *petition for cert filed*, No. 18-9639 (June 10, 2019); *see also United States v. Titties*, 852 F.3d 1257, 1265–66 (10th Cir. 2017) (discussing the categorical approach). And, in laying the ground work for his specific contentions, Mr. Folse highlights that, under the categorical approach, "[c]ourts must presume that a prior conviction 'rested upon nothing more than the least of the acts criminalized' by the state statute." Aplt.'s Opening Br. at 40. (alterations omitted) (quoting *Moncrieffe v. Holder*, 569 U.S. 184, 190–91 (2013)).

Mr. Folse's argument centers on the "physical force" component of the elements clause. This component carries a settled meaning: it "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 (2010); *accord Ash*, 917 F.3d at 1242. In a nutshell, Mr. Folse argues that one need not use "physical force" (i.e., violent force) to violate New Mexico's aggravated battery statute and, therefore, his conviction under that statute does not qualify as a "crime of violence" under U.S.S.G. § 4B1.2(a)(1).

More specifically, Mr. Folse contends that, "[w]hile § 30-3-5 defines other types of aggravated battery[,] meeting the requirements of subsection A is common to any version of the crime and identifies the least culpable conduct

criminalized by the statute." Aplt.'s Opening Br. at 40. He highlights that the aggravated battery—which subsection A delineates—proscribes "unlawful touching," just like the simple battery offense, and such touching "can be satisfied with proof of mere touching, however slight." *Id.* at 42. And he elaborates:

> The slightest offensive touching can complete aggravated battery in New Mexico. The aggravation of the battery offense rests on the harm caused. Battery that inflicts or could inflict bodily harm or that is done with a deadly weapon are how a simple battery rises to aggravated battery. But these additional factors do not create force; it is present in the underlying unlawful touch. Since the prosecution does not have to prove aggravated battery was committed with violent physical force, it is not a violent felony as described in 4B1.2's force clause.

Id. at 42 (omitting citation to *State v. Traeger*, 29 P.3d 518 (2001)).

Thus, stated within the framework of the categorical approach, Mr. Folse's argument may be understood as follows: the focus of the categorical analysis should be the conduct that subsection A proscribes because that is the least culpable conduct criminalized by the statute; like simple battery, subsection A outlaws unlawful touching, and that may be established by proof of even mere touching; unlawful touching is the source of the force criminalized by the statute and the factors in subsections (B) and (C) merely relate to the harm caused by the statute; and because unlawful touching may be established by evidence of mere touching, it is not a categorical match for the "physical force," required under the elements clause, that is, "*violent* force—that is, force capable of causing physical

pain or injury to another person." *Johnson*, 559 U.S. at 140. But we are not convinced.

It is undisputed that Mr. Folse was convicted of the felony version of the statute—that is, of an offense specified subsection (C).[5] Therefore, contrary to Mr. Folse's contention, it logically follows that our assessment of the least acts criminalized for purposes of a categorical comparison should center on the acts delineated in subsection (C).[6] A panel of our court reached just such a conclusion

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[5] Mr. Folse does not dispute that his conviction under § 30-3-5 is for a felony, and only subsection (C) penalizes conduct at the felony level. Furthermore, he expressly acknowledges that he was convicted of New Mexico "[a]ggravated battery with a deadly weapon," and that offense is only found in subsection (C). Aplt.'s Opening Br. at 38.

[6] Mr. Folse does not dispute and the government assumes, for comparative purposes under the categorical approach, that § 30-3-5 is divisible—at least to the level of the three separate enumerated paragraphs. *See* Aplee.'s Resp. Br. at 35 n.9. In other words, the working assumption appears to be that, to the extent that those paragraphs set forth crimes—at the very least—the separate paragraphs provide the units for discerning the least criminalized acts to compare with the elements clause. *See Descamps v. United States*, 570 U.S. 254, 257 (2013) (noting that a divisible statute "sets out one or more elements of the offense in the alternative"); *see also Titties*, 852 F.3d at 1267 (elaborating on the concept of a divisible statute). We are content to make the same assumption as the government. *See United States v. Pacheco*, 730 F. App'x 604, 607 (10th Cir. 2018) (unpublished) (deeming a virtually identical statute to be divisible at this level). But, despite Mr. Folse's seeming admission that he was convicted of a discrete crime under a portion of § 30-3-5(C) relating to deadly weapons, the government asserts that "[t]he record does not reveal which of these theories supported Folse's conviction. Aplee.'s Resp. Br. at 35 n.9. And the government does not contend that § 30-3-5(C) is itself divisible into discrete crimes. Therefore, the government asserts that Mr. Folse's offense "required proof that he touched or applied force to another person in a rude, angry, or insolent way, with

(continued...)

in a persuasive unpublished decision that addressed a virtually identical New Mexico statute, outlawing aggravated battery against a household member. *See United States v. Pacheco*, 730 F. App'x 604, 609 (10th Cir. 2018) (unpublished).

And, in doing so, the *Pacheco* panel had occasion to address and reject an argument like Mr. Folse's that asserted that the force component of the statute may be proved by no more than mere touching.[7] Specifically, the panel reasoned:

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[6](...continued)
the intent to injure, plus that he either (1) inflicted great bodily harm; (2) committed the battery with a deadly weapon; or (3) committed the battery in a manner whereby great bodily harm or death could be inflicted." *Id.* at 34–35. We have no need to opine on whether subsection (C) itself is divisible; it has no bearing on our resolution of this appeal.

[7] As quoted in *Pacheco*, the statute provided that:

> A. Aggravated battery against a household member consists of the unlawful touching or application of force to the person of a household member with intent to injure that person or another.
>
> B. Whoever commits aggravated battery against a household member by inflicting an injury to that person that is not likely to cause death or great bodily harm, but that 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 against a household member by inflicting great bodily harm or doing so with a deadly weapon or doing so in any manner whereby great bodily harm or death can be inflicted is guilty of a third degree felony.

Pacheco, 730 F. App'x at 607 (quoting N.M. Stat. § 30-3-16).

> Pacheco argues that committing aggravated battery against a household member "in any manner whereby great bodily harm or death can be inflicted," N.M. Stat. Ann. § 30-3-16(C), does not require violent force because it can be "satisfied with proof of mere touching, however slight," Aplt. Opening Br. at 4. We disagree with Pacheco's characterization of the statute. Aggravated battery against a household member requires that the touching be done with an "intent to injure," N.M. Stat. Ann. § 30-3-16(A), and in "any manner whereby great bodily harm or death can be inflicted," *id.* § 30-3-16(C)).

Id. In effect, under the *Pacheco* panel's construction of the statute, though subsection (A)'s definition of aggravated battery is effectively incorporated into subsection (C)—most notably insofar as it requires that an unlawful touching be "with intent to injure"—in prescribing a felony offense, subsection (C) specifies acts that require proof of a stepped-up level of unlawful force. *See id.* at 607 (introducing the statute, by noting that it "consists of a definitional subsection followed by alternative subsections establishing the crime as either a misdemeanor or felony based on the resulting harm"). Like the government, we believe that *Pacheco*'s construction of the statute is applicable to the terms of the statute at issue here, § 30-3-5. *See* Aplee.'s Resp. Br. at 35 (noting that "each of the aggravating factors [in subsections (B) and (C) elevates the type of qualifying force above the mere offensive touching that can form a simple battery").

Morever, we recognize that Mr. Folse's reluctance to accept such a construction is predicated in substantial part on the belief that the extent of force—under *Johnson*'s physical-force standard—cannot be measured by the

extent of potential harm. *See* Aplt.'s Opening Br. at 42 ("The aggravation of the battery offense rests on the harm caused. . . . But these additional factors do not create force . . . ."); *see also* Aplt.'s Reply Br. at 10 ("The elements of physical injury and physical force simply cannot be used interchangeably."); *id.* at 11 ("An offense falls within that [elements] clause only when it requires proof of an underlying forceful, violent physical act imparted to another's body."). But such a belief flies in the teeth of *Johnson*'s conception of physical force: it is "force capable of causing physical pain or injury to another person." *Johnson*, 559 U.S. at 140. Furthermore, in *United States v. Ontiveros*, we read the Court's cases as rejecting the notion that there is no necessary nexus between the effect of the force and the physical-force standard of *Johnson*. 875 F.3d 533, 536–537 (10th Cir. 2017) (harmonizing *Johnson* with the Court's subsequent decision in *United States v. Castleman*, 572 U.S. 157 (2014)). The *Pacheco* panel had previously rebuffed in persuasive fashion a defendant's similar beliefs under a like rationale. 730 F. App'x at 609 (rejecting the idea that "the degree of force required by [] *Johnson* cannot be measured in terms of the resulting harm"). Accordingly, we conclude that there is no merit in Mr. Folse's belief concerning the nexus of force and harm.

The foregoing analysis fatally undercuts Mr. Folse's argument that, under the categorical approach, the elements of his aggravated battery conviction do not

require the requisite physical (i.e., violent) force to satisfy the elements clause. Given that his focus in discerning the least acts criminalized was on subsection (A), Mr. Folse spills virtually no ink on affirmatively arguing about which of the acts proscribed in subsection (C) constitutes the least act criminalized and whether those acts meet the *Johnson* test for physical force. The closest he comes to doing so is in objecting to *Pacheco*'s conclusion that one of the discrete set of acts proscribed by the statute at issue there—which resembles a set of acts in subsection (C)—does not satisfy *Johnson*'s test for physical force. *See* Aplt.'s Reply Br. at 10. But he only does so under his belief—now shown to be misguided—that there is no necessary nexus between the harm effected and the force used. *Id.* ("That the New Mexico statute proscribes the infliction of great bodily harm does not create a requirement of physical, violent force. The *Pacheco* Court conflated the use of violent force with the causation of injury."). Accordingly, that argument gets Mr. Folse nowhere.

Absent a meaningful argument from Mr. Folse concerning which of the acts proscribed in subsection (C) constitutes the least act criminalized and whether those acts meet the *Johnson* test for physical force, we deem the matter waived. *See, e.g.*, *United States v. Pursley*, 577 F.3d 1204, 1231 n.17 (10th Cir. 2009) (noting that "skeletal reference [to an argument in briefing] does not present a cognizable issue for appellate review" and consequently the issue is waived).

And, therefore, Mr. Folse's "crime of violence" challenge, which is centered on the physical-force issue, fails.

In sum, we conclude that the district court did not err in concluding that Mr. Folse's conviction under New Mexico's aggravated-battery statute, § 30-3-5, constituted a "crime of violence" within the meaning of U.S.S.G. § 4B1.2(a).

2. Possession of Marijuana with Intent to Distribute

Mr. Folse also challenges the district court's classification of possession of marijuana with intent to distribute as a "controlled substance" offense under § 4B1.2(b) based on "compelling policy reasons as to why this offense should not be used to trigger an enhancement as severe as the Career Offender guideline." Aplt.'s Opening Br. at 43. Although conceding that possession of marijuana with intent to distribute falls within the definition of a "controlled substance offense," *id*., Mr. Folse claims that, in New Mexico, a first offense of possession with intent to distribute marijuana is treated as a low-level felony, such that it is treated in the same fashion as simple possession of marijuana.

Next, Mr. Folse points out that marijuana is now legal for recreational purposes and medical purposes in various states; in particular, it is legally available for medical purposes in New Mexico. *Id*. at 43–44. And, seeing as "evidence was presented that Mr. Folse suffers from a medical condition which would qualify him for lawful medical marijuana" (though what the condition is, he does not say), Mr. Folse reasons that it would be "fundamentally unfair to use this relatively minor offense"—which punishes conduct that "could have been legal as to him"—to significantly enhance his sentence under § 4B1.2(b). *Id*. at 44.

However, the government counters that policy reasons of the kind that Mr. Folse articulates are only proper considerations for a sentencing court *after* it has arrived at a proper Guidelines calculation—more specifically, *after* the court has determined whether the career-offender enhancement is applicable. Then, the court may properly consider such policy concerns in determining an appropriate and just sentence under the factors of 18 U.S.C. § 3553(a). And, accordingly, the government contends that the district court did not err in "refusing to let those [policy] arguments sway the correct calculation under the Guidelines." Aplee.'s Resp. Br. at 38.

We agree with the government. Mr. Folse's policy arguments do not provide the proper foundation for attacking the district court's computation of his Guidelines sentence and, more specifically, the court's determination that Mr. Folse's conviction for possession of marijuana with intent to distribute constitutes a "controlled substance" offense under § 4B1.2(b). Accordingly, we reject Mr. Folse's sentencing argument concerning this marijuana offense.

III

For the foregoing reasons, each of Mr. Folse's claims of error fails. We accordingly **AFFIRM** his conviction and sentence.

ENTERED FOR THE COURT

Jerome A. Holmes
Circuit Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA

Plaintiff,

vs. No. CR 15-2485 JB

KEVIN FOLSE

Defendant.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on Defendant Kevin Folse's Formal Objections to Presentence Report, filed May 15, 2017 (Doc. 223)("Objections"). The primary issues are: (i) whether Defendant Kevin Folse qualifies for a "career offender" sentencing enhancement under U.S.S.G. § 4B1.1 based on his prior felony convictions for aggravated battery with a deadly weapon and possession of marijuana with intent to distribute, as well as the two carjacking convictions rendered in this case; (ii) whether the Court should apply a 2-level obstruction-of-justice enhancement for witness intimidation under U.S.S.G. § 3C1.1; and (iii) whether the Court should apply a 2-level obstruction-of-justice enhancement for reckless endangerment during flight under U.S.S.G. § 3C1.2. The Court concludes that all three enhancements apply. First, Folse qualifies as a career offender, because his carjacking conviction in this case is a "crime of violence" under U.S.S.G. § 4B1.2(a), his prior aggravated battery with a deadly weapon conviction was a "crime of violence" under U.S.S.G. 4B1.2(a), and his prior possession of marijuana with intent to distribute conviction is a controlled substance offense under § 4B1.2(b). Second, Folse qualifies for the obstruction-of-justice enhancement, because he asked "Creeper" to tell a potential witness to go "M.I.A." prior to trial. Third, he qualifies for the obstruction-of-justice reckless-endangerment-

during-flight enhancement, because Folse put pedestrians and other drivers at substantial risk of serious injury or death while fleeing police when he threw a gun out of a moving vehicle, drove at high speeds, and ran both a red light and a stop sign.

FACTUAL BACKGROUND

The Court takes its factual account from the Presentence Investigation Report, filed May 10, 2017 (Doc. 220)("PSR"). Later, the Court will note Folse's factual objections and, where necessary to determine whether the disputed sentencing enhancements apply, the Court will resolve them.

Between June 30 and July 2, 2015, Albuquerque Police Department ("APD") detectives searched for Folse, a.k.a. "Criminal," who was fleeing from law enforcement and had "committed various violent crimes" during flight. PSR ¶ 5, at 4. On July 2, 2015, APD officers stopped a stolen black Cadillac, which Folse "had been driving a few hours earlier."[1] PSR ¶ 6, at 4. Although the officers determined that Folse was not the driver, the driver stated that he had just purchased the vehicle from Folse and that Folse was located at 1825 Pitt Street NE in Albuquerque, New Mexico. See PSR ¶ 6, at 4. APD dispatched officers to the residence, where they observed an individual matching Folse's description close the front door. See PSR ¶ 7, at 4. The officers failed, however, to positively identify the man. See PSR ¶ 7, at 4. An APD detective then proceeded to the back of the residence and observed an individual -- later identified as Valente Estrada -- looking out the back

[1]The PSR, in its discussion of "Offense Behavior Not Part of Relevant Conduct," states that Folse stole the Cadillac on June 30, 2015, during a staged meet-up with the vehicle's owner, who had listed the vehicle for sale in an online advertisement, to take it for a test-drive. PSR ¶ 50, at 10. A few hours later, an APD officer located the stolen Cadillac and initiated a traffic stop. See PSR ¶ 51, at 10. As the officer approached the driver's side of the vehicle, he drew his service weapon and "gave verbal commands for the driver to exit the vehicle." PSR ¶ 51, at 10. When the driver -- later identified as Folse -- saw the officer, he "accelerated through the intersection[,] running a red light [and] almost striking the officer." PSR ¶ 51, at 10. A vehicle pursuit ensued, but "was discontinued for safety reasons." PSR ¶ 51, at 10.

window. See PSR ¶ 7, at 4. Estrada said the front door was "barricaded" and that he was alone in the residence. PSR ¶ 8, at 5.

Shortly thereafter, the man first observed at the front door -- later identified as Folse -- "had [Estrada] join four other individuals in the bedroom with Angela Murray," Folse's girlfriend,[2] where Folse "proceeded to take all of their cellular telephones and remove[] their batteries . . . ." PSR ¶ 8, at 5. Estrada "observed that Folse had both a knife and a handgun in his possession." PSR ¶ 8, at 5. To help "ease the tension," Estrada offered Folse and the others marijuana and methamphetamine. PSR ¶ 9, at 5. After consuming the methamphetamine, Folse threatened to stab one of the individuals and to hold "everyone in the room at gunpoint for seven hours."[3] PSR ¶ 9, at 5. Tensions were high, because Murray had challenged Folse to prove that he had not "been with any of the women in the house[.]" PSR ¶ 10, at 5. In response to this challenge, Folse "pulled out his gun and started pistol-whipping one of the females in the home." PSR ¶ 10, at 5.

Folse eventually decided to leave the residence, but, before leaving, Folse ordered Estrada to hand over the keys to his 2002 silver Saturn passenger vehicle. See PSR ¶ 11, at 5. Estrada complied with Folse's order, fearing that he "had no choice . . . based on the continuous threats and acts of violence against him." PSR ¶ 11, at 5. Folse and Murray then exited the house, and ordered Estrada and one of Murray's female friends into the Saturn. See PSR ¶ 11, at 5. Estrada and the friend "did not feel they had a choice but to go with Folse . . . ." PSR ¶ 11, at 5.

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[2]Murray was initially a co-Defendant in this matter. See Superseding Indictment ¶ 2, at 2, filed September 10, 2015 (Doc. 31)("Superseding Indictment"). The Court severed the two matters on September 29, 2015. See Order Granting Defendant Kevin Folse's Motion to Sever Defendants, filed September 29, 2015 (Doc. 72).

[3]The PSR acknowledges that "[t]estimony at trial did not explain what happened inside the residence at Pitt prior to [Estrada] coming home[,] or why Folse was holding three persons at gunpoint inside the home." PSR ¶ 9, at 6.

APD received information that Folse had departed the house in a silver Saturn. See PSR ¶ 12, at 5. Officers soon caught up to the Saturn and attempted to conduct a traffic stop; Folse refused to yield, however, and, during the ensuing flight, threw a semiautomatic pistol from the vehicle. See PSR ¶ 12, at 5. Folse eventually lost control of the vehicle and "crashed violently, rolling the car onto its roof." PSR ¶ 13, at 6. As APD arrived on the scene, "the vehicle was still spinning and four individuals emerged from the broken windows." PSR ¶ 13, at 6.

Folse and Murray fled on foot. See PSR ¶ 13, at 6. As they entered a residential street, they came upon a 2008 Kia Sorrento sitting in a driveway with the engine running. See PSR ¶ 14, at 6. Folse opened the driver-side door and told Michael B., a juvenile sitting in the passenger seat, that he had "three seconds to get out." PSR ¶ 14, at 6. Michael B. complied with Folse's order, but as Michael B. was exiting the car, Folse backed the car out of the driveway and clipped Michael B.'s left shoulder with the open car door. See PSR ¶ 14, at 6; id. ¶ 16, at 6. In an interview and later at trial, Michael B. testified that Folse had a firearm; immediately after the incident, however, he told a 911 operator that Folse did not have a firearm. See PSR ¶ 14, at 6; id. ¶ 16, at 6.

APD officers later located the Kia Sorrento and recognized Folse as the driver. See PSR ¶ 15, at 6. When the officers attempted another vehicle stop, Folse again failed to yield. See PSR ¶ 15, at 6. "A vehicle pursuit ensued, but was discontinued due to the reckless driving by Folse." PSR ¶ 15, at 6. Folse eventually abandoned the Kia Sorrento on Interstate 40, hopped the freeway retaining wall, and "ran towards a business complex where he was able to get a ride out of the area." PSR ¶ 15, at 6.

The next day, on July 3, 2015, APD located Folse at a Seven-Eleven store in Albuquerque. See PSR ¶ 17, at 6. When officers attempted to arrest Folse, he fled the scene in a stolen 1999 Ford

F-150 truck.[4] See PSR ¶ 17, at 6. A vehicle pursuit again ensued, but "officers disengaged from the chase because Folse was putting the public at risk of being harmed." PSR ¶ 17, at 6. Later that day, Isleta Pueblo Police Department officers observed the Ford F-150 truck parked at the Isleta Casino outside Albuquerque. See PSR ¶ 17, at 6. After reviewing security tapes, officers confirmed that Folse was in the Casino. See PSR ¶ 17, at 6. When Folse exited Isleta Casino, officers arrested him without incident. See PSR ¶ 17, at 6. The keys to the stolen F-150 were in his pocket. See PSR ¶ 17, at 6.

In September 2015, Folse wrote a letter to a friend known as "Creeper," asking him "to do what he could in assuring that [Estrada] would not show up to testify." PSR ¶ 18, at 6. "The letter was given to [Estrada] who then gave it to law enforcement." PSR ¶ 18, at 6-7.

PROCEDURAL BACKGROUND

On July 14, 2015, a grand jury indicted Folse for: (i) being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2) (Count I); (ii) carjacking a silver Saturn, in violation of 18 U.S.C. § 2119 (Count II); and (iii) using, carrying, and brandishing a firearm in relation to and in furtherance of a crime of violence, i.e., carjacking the Saturn, in violation of 18 U.S.C. § 924(c) (Count III). See Indictment at 1-2, filed July 14, 2015 (Doc. 10)("Indictment"). On September 9, 2015, a grand jury returned a Superseding Indictment. See Superseding Indictment at 1. The Superseding Indictment preserves the original Indictment's three counts and adds two new counts. Count IV charges Folse with carjacking a 2008 Kia Sorrento, in violation of 18 U.S.C. § 2119, see Superseding Indictment ¶ 4, at 3, and Count V charges Folse with using, carrying, and

[4]The PSR, in its discussion of "Offense Behavior Not Part of Relevant Conduct," states that Folse stole the F-150 on July 1, 2015, while the vehicle's owner was inside a convenience store. PSR ¶ 52, at 10. The owner had left the keys in the ignition and the engine running. See PSR ¶ 52, at 10. The next day, on July 2, 2015, Folse was observed driving the F-150. See PSR ¶ 52, at 10.

brandishing a firearm in relation to and in furtherance of a crime of violence, i.e., carjacking the Kia Sorrento, in violation of 18 U.S.C. § 924(c), see Superseding Indictment ¶ 5, at 3. Plaintiff United States of America later dismissed Count V, because it obtained evidence that Folse did not use a firearm in the second alleged carjacking. See United States' Unopposed Motion to Dismiss Count Five of the Superseding Indictment ¶¶ 5-9, at 3, filed October 1, 2015 (Doc. 83). On October 8, 2015, following a three-day trial, a jury convicted Folse on all four remaining counts. See Verdict at 1, filed October 8, 2015 (Doc. 105).

The United States Probation Office ("USPO") filed a Presentence Investigation Report on May 10, 2017. PSR at 1. In the PSR, the USPO notes that, with respect to the violation of 18 U.S.C. § 924(c) in Count III, U.S.S.G. § 2K2.4 provides that the guideline sentence is a minimum seven-year term of imprisonment. See PSR ¶¶ 25-26, at 7-8. The PSR then groups Counts I and II for guideline calculation purposes pursuant to U.S.S.G. § 3D1.2(c). See PSR ¶ 27, at 8. For these two counts, the PSR calculates an adjusted offense level of 30, including a base offense level of 20, a 4-level enhancement under § 2B3.1(4)(A) for abduction of Estrada, a 2-level enhancement under § 2B3.1(b)(5) for carjacking the Saturn, a 2-level obstruction-of-justice enhancement under § 3C1.1 for witness intimidation, and a 2-level enhancement under § 3C1.2 for reckless endangerment during flight. See PSR ¶¶ 28-35, at 8. Regarding Count IV, the PSR calculates an adjusted offense level of 24, including a base offense level of 20, a 2-level enhancement under § 2B3.1(b)(5) for carjacking the Kia Sorrento, and a 2-level obstruction-of-justice enhancement under § 3C1.2 for reckless endangerment during flight. See PSR ¶¶ 36-41, at 9. Given the multiple counts of conviction, the PSR calculates a combined adjusted offense level of 31. See PSR ¶¶ 42-45, at 9.

Finally, the PSR notes that Folse is a career offender under § 4B1.1(a), because (i) he was at least eighteen years old when he committed the two federal carjackings; (ii) those carjackings are

crimes of violence; and (iii) he has at least two prior felony convictions for a crime of violence or a controlled substance offense. See PSR ¶ 46, at 9. See also PSR ¶ 115, at 26 (noting that Folse has prior felony convictions for possession of marijuana with intent to distribute and aggravated battery with a deadly weapon). The PSR accordingly calculates a criminal history category of VI under § 4B1.1(b). See PSR ¶ 62, at 14. The PSR provides, however, that the total offense level remains 31, because, under § 4B1.1(b), "if the offense level that is otherwise applicable is greater than the offense level listed in the table," the Court should "use the otherwise applicable offense level." PSR ¶ 47, at 9. The PSR notes that, here, the otherwise applicable offense level -- 31 -- is greater than the offense level listed in the table. See PSR ¶ 47, at 9. The PSR adds that, pursuant to § 4B1.1(c), the applicable guideline range for a career-offender defendant convicted under 18 U.S.C. § 924(c) is determined as follows:

> In the case of multiple counts of conviction, the guideline range shall be the greater of (A) the guideline range that results by adding the mandatory minimum consecutive penalty required by the 18 U.S.C. § 924(c) to the minimum and maximum of the otherwise applicable guideline range, which results in a range of 272 months to 319 months; and (B) the guideline range determined using the table in U.S.S.G. § 4B1.1(c)(3), which is 360 months to life.

PSR ¶ 47, at 9-10. The PSR concludes that, "[s]ince it is the greater of the two options, the guideline range shall be determined under 4B1.1(c)(3)." PSR ¶ 47, at 9. Thus, the PSR calculates a guideline imprisonment range of 360 months to life. See PSR ¶ 97, at 23. The PSR notes, however, that, if he were not a career offender, Folse's total offense level of 31 and criminal history category of VI would yield a guideline imprisonment range of 188 to 235 months, plus a consecutive 84-month term for the 18 U.S.C. § 924(c) violation in Count III, resulting in an effective guideline range of 272 to 319 months. See PSR ¶ 97, at 23.

1. Folse's Objections to the PSR.

Folse filed his formal objections to the PSR on May 15, 2017. See Objections at 1. Folse

makes three primary objections. See Objections at 2-22. First, Folse argues that the career offender enhancement under § 4B1.1(a) does not apply, because (i) his prior felony conviction for aggravated battery with a deadly weapon is not a "crime of violence" under § 4B1.2(a); (ii) his prior conviction for possession of marijuana with intent to distribute should not be considered a "controlled substance offense" under § 4B1.2(b); and (iii) the carjackings for which he was convicted in this case do not constitute crimes of violence under § 4B1.2(a). See Objections at 2-17. Second, Folse contends that the 2-level obstruction-of-justice enhancement under § 3C1.2 for reckless endangerment during flight is not warranted, because his driving, while admittedly unsafe, was not "reckless" as § 3C1.2 requires. Objections at 18-19. Third, Folse avers that the 2-level obstruction-of-justice enhancement under § 3C1.1 for witness intimidation is not warranted, because he did not "threaten, intimidate, or unlawfully influence" a witness, nor did he enlist "Creeper" to do so. Objections at 19-22. In light of these objections, Folse disputes the PSR's guideline imprisonment calculation, and proffers an alternative calculation. See Objections at 23-24. Finally, Folse objects to several factual statements in the PSR. See Objections at 24-27. The Court discusses all these objections in turn.

a. Objections to the "Career Offender" Enhancement.

For context, Folse begins by noting that a "defendant who qualifies for the Career Offender enhancement faces a significantly longer sentence of imprisonment than one who does not." Objections at 3. He notes that, "[r]egardless of a career offender's actual criminal history category, the Guidelines assign him the highest possible Criminal History Category: Category VI." Objections at 3 (citing U.S.S.G. § 4B1.1(b)). Moreover, he notes, the "Career Offender guideline is particularly onerous for a defendant convicted under 18 U.S.C. § 924(c)," because it imposes a guideline range of 360 months to life for such offenders. Objections at 3. Here, he asserts, neither his conviction for

aggravated battery with a deadly weapon, nor his conviction for possession of marijuana with intent to distribute, justify the career offender enhancement. See Objections at 3-4.

First, Folse argues that his felony conviction for aggravated battery with a deadly weapon is not a "crime of violence" under § 4B1.2(a). Objections at 4. Section 4B1.2(a), he notes, defines "crime of violence" as an offense punishable by a term of imprisonment 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 one of several enumerated offenses. Objections at 2.[5] He argues that, because his conviction is not an enumerated offense under § 4B1.2(a)(2), it can "only trigger application of the Career Offender guideline . . . [if it] 'has as an element the use, attempted use, or threatened use of physical force against the person of another.'" Objections at 4 (quoting U.S.S.G. § 4B1.2(a)(1)). Although he admits that courts in the United States District of New Mexico have concluded that "New Mexico aggravated battery constitutes a 'crime of violence,'" he contends that "there is no controlling law on this point from the Tenth Circuit." Objections at 4. Moreover, he contends, "there are compelling reasons" to conclude that his aggravated battery conviction "should not qualify as a crime of violence because it does not satisfy the 'force clause.'" Objections at 4. He supports this argument by discussing his aggravated battery charge, New Mexico aggravated battery law, and § 4B1.2's "force clause." Objections at 4-13.

Folse initially notes that, in 2008, he pled no contest to a charge that he

> did touch or apply force to Bronson Sanchez, with a handgun, an instrument or object which, when used as a weapon, could cause death or great bodily harm, intending to injure Bronson Sanchez, or another, and used a firearm, contrary to Section 30-3-5(A) & (C) and Section 31-18-16 NMSA 1978.

[5]Folse notes that § 4B1.2(a) was recently amended to eliminate language resembling the "residual clause" in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii), which the Supreme Court of the United States of America invalidated as unconstitutionally vague in Johnson v. United States, 135 S. Ct. 2551 (2015). Objections at 2.

Objections at 4 (citation omitted). He then notes that aggravated battery in New Mexico "consists of the unlawful touching or application of force to the person of another with intent to injure," and that such battery is a third-degree felony if it "inflict[s] great bodily harm" or is committed "with a deadly weapon" or "in any manner whereby great bodily harm or death can be inflicted . . . ." Objections at 5 (emphases omitted)(citing N.M. Stat. Ann. § 30-3-5(A), (C)). Folse notes that a "deadly weapon," in turn, is defined as "any firearm, whether loaded or unloaded; or any weapon which is capable of producing death or great bodily harm," Objections at 5 (emphasis omitted)(citing N.M. Stat. Ann. § 30-1-12(B)), and argues that this definition applies to "'offenses involving both use and possession of deadly weapons,'" Objections at 5 (quoting United States v. Silva, 608 F.3d 663, 670 (10th Cir. 2010)(emphasis omitted)). Thus, Folse contends, "an *unloaded* firearm[] automatically count[s] as a deadly weapon," but, "because 'firearm' is listed under Section 30-1-12(B), the charge of aggravated battery with a firearm as a deadly weapon does not require any showing that the firearm (loaded or unloaded) 'could cause death or bodily harm.'" Objections at 5-6 (emphases in original)(quoting State v. Murillo, 2015-NMCA-046, ¶ 21, 347 P.3d 284, 291). Essentially, he explains, firearms "are separated by a semicolon in Section 30-1-12(B) from the listed weapons 'include[d]' in the definition of instruments 'capable of producing death or great bodily harm,' and therefore firearms . . . are not defined by Section 30-1-12(B) as *per se* 'capable of producing death or great bodily harm.'" Objections at 6. In support of this argument, he notes that the Court of Appeals of New Mexico has concluded that "'Section 30-1-12(B) expressly designates unloaded firearms to be deadly weapons as a matter of law, regardless of their manner of use in any particular crime.'" Objections at 6 (quoting State v. Fernandez, 2007-NMCA-091, ¶ 12, 164 P.3d 112, 115)(emphasis omitted).

Extrapolating from this analysis, Folse argues that aggravated battery with great bodily harm "is a distinct crime from" aggravated battery with a deadly weapon. Objections at 7. He argues that, "[u]nlike aggravated battery with great bodily harm, aggravated battery with a deadly weapon does not have as an element the intent to injure (and in fact actually injuring) in a way likely to result in death or great bodily harm." Objections at 7 (emphases, footnote, and citations omitted). Here, he argues, he "was not convicted of a crime containing as an element the intent to injure 'in a way that would likely result in death or great bodily harm.'" Objections at 7. His conviction's elements, he notes, include: (i) unlawful touching or application of force to another; (ii) with intent to injure; and (iii) with a firearm. See Objections at 7.

Turning to his objection to the § 4B1.1 enhancement, Folse argues that his prior aggravated battery conviction is not a "crime of violence," because the crime's elements "do not necessarily involve the 'use, attempted use, or threatened use of physical force against the person of another.'" Objections at 8 (quoting U.S.S.G. § 4B1.2(a)(1)). He contends that "physical force" in this context means "'*violent* force -- that is, force capable of causing physical pain or injury to another person.'" Objections at 10 (emphasis in original)(quoting Johnson v. United States, 559 U.S. 133, 140 (2010)("Johnson I")). He concludes that, given this analysis, "a careful examination of recent decisions finding that New Mexico's crime of aggravated battery with a deadly weapon does qualify as a 'crime of violence' actually demonstrates why this offense should *not* constitute a crime of violence." Objections at 8 (emphasis in original). He notes, for example, that the Honorable James A. Parker, Senior United States District Judge, recently concluded that aggravated battery with a deadly weapon is a crime of violence. See Objections at 8 (citing Vasquez v. United States, 2017 U.S. Dist. LEXIS 4135, at *12 (D.N.M. 2017)(Parker, J.)). He argues that Judge Parker based this conclusion on two recent United States Court of Appeals for the Tenth Circuit cases holding that

aggravated assault with a deadly weapon constitutes a crime of violence. See Objections at 8 (relying on United States v. Mitchell, 653 F. App'x 639 (10th Cir. 2016); United States v. Ramon Silva, 608 F.3d 663 (10th Cir. 2010)). Those cases, he avers, "focus on the 'threat' of physical force in determining that the statutes at issue necessitated '*violent* force[.]'" Objections at 8 (emphasis in original). He notes that New Mexico state courts, by contrast, "have held that it is possible to commit battery without threatening a person." Objections at 10 (citing State v. Branch, 2016-NMCA-071, ¶ 27, 387 P.3d 250, 258). Thus, he argues, "the logic employed in *Mitchell* and *Silva* -- which focuses on a threat of force -- does not translate to New Mexico aggravated battery with a deadly weapon." Objections at 10. Similarly, he avers, the Tenth Circuit's decision in United States v. Maldonado-Palma, 839 F.3d 1244 (2016), holding that aggravated assault with a deadly weapon is a crime of violence, is inapposite, because: (i) unlike that crime, aggravated battery with a deadly weapon "does not require 'use' of a deadly weapon," but rather that a defendant "touch[] a person 'with' a firearm or deadly weapon," Objections at 12; and (ii) a defendant can "commit aggravated battery without also committing aggravated assault," Objections at 13 (citation omitted).

Second, Folse argues that his prior felony conviction for possession of marijuana with intent to distribute "should not qualify as a 'controlled substance offense'" under § 4B1.2(b). Objections at 13. He notes that, in 2007, he pled guilty to possession of marijuana with intent to distribute, a fourth-degree felony under N.M. Stat. Ann. § 30-31-22(A)(1), and that he received a suspended eighteen-month sentence, with eighteen months unsupervised probation. See Objections at 13-14. He concedes that "technically this offense of conviction meets the definition of 'controlled substance offense' under § 4B1.2(b)," but contends that "there are compelling policy reasons as to why this offense should not be used to trigger an enhancement as severe as the Career Offender guideline." Objections at 14. He argues, first, that, "in New Mexico, a first offense of possession with intent to

distribute marijuana is treated as the lowest degree of felony, so low that it is treated the same as simple possession (eight ounces or more) of marijuana." Objections at 14 (citing N.M. Stat. Ann. § 30-31-22(A)(1); N.M. Stat. Ann. § 30-31-23(B)(3)). Second, he contends that "marijuana is now legal under state law for recreational purposes" in several states and that it is legal "for medical purposes in multiple other states, including New Mexico." Objections at 14 (citing N.M. Stat. Ann. § 23-2B-1). He contends that he "suffers from a medical condition . . . which would qualify him for lawful medical marijuana use under this law," although he concedes that there is no evidence that he "applied for or obtained a New Mexico medical marijuana card[.]" Objections at 14-15. Nevertheless, he asserts, it would be "unfair to use this relatively minor offense -- which punishes conduct that could have been legal as to him -- to significantly enhance his sentence." Objections at 15. Third, he says that the Court has distinguished "between controlled substance offenses involving possession of marijuana" and "other substances such as narcotic drugs." Objections at 15. He notes, for example, that, in United States v. Rodriguez, 147 F. Supp. 1278 (D.N.M. 2015)(Browning, J.), the Court criticized a "trend in the United States of inconsistent enforcement of federal marijuana laws," and concluded that the defendant, charged with possession of fifty kilograms or more of marijuana with intent to distribute, did not pose a "danger to the community." Objections at 15 (quoting United States v. Rodriguez, 147 F. Supp. at 1281)(internal quotation marks omitted).

Finally, Folse argues that his "instant convictions for carjacking do not constitute a crime of violence for purposes of the Career Offender enhancement." Objections at 17. He notes that, for the § 4B1.1 enhancement to apply, the "instant offense of conviction must meet the definition of 'crime of violence' or 'controlled substance offense' under the guideline." Objections at 16. The Tenth Circuit, he contends, has not yet decided whether "federal carjacking is determined to be a crime of violence under the 'force clause' of § 4B1.2." Objections at 16. He admits that the Tenth Circuit

has held that "federal carjacking constitutes a crime of violence under 18 U.S.C. § 924(c)(3) because it 'carries with it a substantial risk of the use of physical force.'" Objections at 16 (quoting United States v. Brown, 200 F.3d 700, 706 (10th Cir. 1999)). He contends, however, that "this language is akin to the 'residual clause' language that was deleted from the Career Offender guideline in the August 1, 2016 amendment to the Guidelines, and therefore, cannot be used as a basis for application of the guideline to Mr. Folse." Objections at 16. Moreover, he argues, although the Career Offender guideline's "enumerated offenses" provision includes "robbery," the Tenth Circuit has concluded that "robbery and carjacking are not identical offenses." Objections at 16 (citing United States v. Rushing, 210 F. App'x 767, 770 (10th Cir. 2006)). Last, he contends that carjacking is not a crime of violence, because it "may be committed by 'intimidation,' rather than by force and violence." Objections at 17 (quoting United States v. Malone, 222 F.3d 1286, 1291 (10th Cir. 2000)). Thus, he concludes, carjacking "may be accomplished without the 'use, attempted use, or threatened use of physical force against the person of another.'" Objections at 17 (quoting U.S.S.G. § 4B1.2(a)).

b. Objections to the Obstruction-of-Justice Enhancement for Reckless Endangerment.

Turning to the PSR's obstruction-of-justice enhancement for reckless endangerment, Folse notes that § 3C1.2 "provides for a two-point enhancement 'if the defendant recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer.'" Objections at 18 (quoting United States v. Buckley, 2000 U.S. App. LEXIS 11799, at *11 (10th Cir. 2000)). Folse contends that the "risk" which the defendant creates must be such that to "'disregard that risk [would] constitute[] a gross deviation from the standard of care that a reasonable person would exercise in such a situation.'" Objections at 18 (quoting United States v. Buckley, 2000 U.S. App. LEXIS 11799, at *11). Folse further contends that "'[t]he standard of care envisioned by the Guidelines is that of the reasonable person, not the reasonable fleeing criminal

suspect.'" Objections at 18 (quoting United States v. Buckley, 2000 U.S. App. LEXIS 11799, at *11-12).

Folse argues that, here, his conduct during the vehicle pursuits involving the Saturn and the Kia Sorrento was not "reckless" as § 3C1.2 defines that term. Objections at 19. Folse contends that there is no evidence that he "aimed either of the vehicles at anyone, or even came close to colliding with anyone . . . ." Objections at 19. Folse contends that the evidence indicates, "[a]t most, . . . [that he] drove in excess of the speed limit and ran one stop sign and one red light." Objections at 19. As to the Saturn, Folse concedes that his "excess speed resulted in the [] vehicle . . . flipping over on a sharp curve," but emphasizes that "no injuries were reported." Objections at 19. With respect to the Kia Sorrento, Folse concedes that he "accelerated very rapidly" and "drove in excess of the speed limit (possibly about 60 mph) and weaved in and out of traffic." Objections at 19. Folse argues that, although "these facts certainly do not paint a picture of particularly safe driving practices, and may rise to the level of negligence, it does not reflect a 'gross deviation from the standard of care that a reasonable person would exercise in such a situation.'" Objections at 19.

c. Objections to the Obstruction-of-Justice Enhancement for Witness Intimidation.

Turning next to the obstruction-of-justice enhancement for witness intimidation, Folse notes that § 3C1.1 provides a 2-level enhancement if (i) "the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction"; and (ii) "the obstructive conduct related to (A) the defendant's offense of conviction and any relevant conduct[,] or (B) a closely related offense[.]" Objections at 19-20 (quoting U.S.S.G. § 3C1.1)(internal quotation mark omitted). Folse emphasizes that the § 3C1.1 enhancement requires that the "defendant must have deliberately -- not accidentally, incidentally, or mistakenly -- done some act with the specific purpose of thwarting

the investigation and prosecution." Objections at 20 (quoting United States v. Welbig, 2015 U.S. Dist. LEXIS 66185, at *59-60 (D.N.M. 2015)(Browning, J.)(citation omitted)). Folse concludes that § 3C1.1 requires "extreme conduct." Objections at 20.

Here, Folse contends, the letter to Creeper did "not threaten, intimidate, or unlawfully influence" Estrada, nor did it "enlist 'Creeper' to do so." Objections at 22. Rather, Folse asserts, the letter "asks 'Creeper' to talk ('rap') to [Estrada] and tell him to 'go MIA' and 'chill for a while.'" Objections at 22. Folse contends that, "[a]t most, this language can be interpreted as asking an intermediary to suggest to a witness that the witness not appear in court." Objections at 22. Folse reasons that "[s]uch a suggestion could be motivated by a number of things, including a concern that the witness may not be truthful in his testimony and may intend to inculpate the defendant in order to exculpate himself." Objections at 22. In Folse's view, "[t]his conduct should not be deemed to rise to the level of obstruction so as to trigger this enhancement." Objections at 22.

d. Folse's Alternative Guideline Imprisonment Calculation.

In light of his objections to the career-offender enhancement and to the two obstruction-of-justice enhancements, Folse contends that the PSR improperly calculates his guideline imprisonment range at 272 to 319 months without the career-offender enhancement, and at 360 months to life with the career-offender enhancement. See Objections at 23. Folse argues that, without the objectionable enhancements, his offense level is 28. See Objections at 23. Folse further contends that his "actual criminal history score is seven (7), which yields a Criminal History Category of IV." Objections at 23 (citing PSR ¶¶ 60-61, at 14). Thus, Folse asserts, "[w]ith a criminal history category of IV, and an offense level of 28, Mr. Folse's guideline range would be 110-137 months." Objections at 24. Folse adds that, given the mandatory seven-year sentence for his conviction pursuant to 18 U.S.C. § 924(c), his effective guideline range is 194 to 221 months. See Objections at 24.

e. Folse's Factual Objections.

Folse closes by noting his objections to several factual statements in the PSR which, he argues, lack support in evidence adduced either at trial or in investigative reports. See Objections at 24-26. First, he contends that there is no evidence that he "was observed driving a stolen black Cadillac on July 2, 2015 or at any time." Objections at 24 (citing PSR ¶ 6, at 4). Second, he objects to the PSR's assertion that someone "who matched the description of Folse" closed the front door at 1825 Pitt Street NE in Albuquerque, New Mexico, PSR ¶ 7, at 4, because "that person was never positively identified as Mr. Folse," Objections at 24. Third, he asserts that there is no evidence that he held people "at gunpoint" inside the home. Objections at 25 (citing PSR ¶ 9, at 5). Fourth, he avers that the PSR's statements regarding his "pistol-whipping one of the females in the home," PSR ¶ 10, at 5, are irrelevant to determining his sentence, and says that, regardless, the statements should be excluded from the PSR pursuant to rule 32(d)(3)(C) of the Federal Rules of Criminal Procedure,[6] because the statements, if disclosed, "might result in physical or other harm to the defendant or others," Objections at 25. Fifth, he objects to the statements that APD "confirmed that Folse was the driver" of the Saturn and that officers saw him throw a gun from the Saturn, PSR ¶ 12, at 5, because "no witnesses from APD testified that they observed and identified Mr. Folse as the driver of the Saturn," or that "they had seen Mr. Folse throw a gun from the Saturn," Objections at 25. Sixth, he objects to the statement that people at the home were "kidnapped," PSR ¶ 13, at 6, because he "was never charged with or convicted of kidnapping, and the testimony adduced at trial does not establish the crime of kidnapping," Objections at 25. Seventh, he objects to the statement that he pointed a gun at Michael B., because the United States "dismissed Count VI, the § 924(c) brandishing charge

[6]Rule 32(d)(3)(C) states: "The presentence report must exclude . . . (C) any other information that, if disclosed, might result in physical or other harm to the defendant or others." Fed. R. Crim. P. 32(d)(3)(C).

in connection with the second carjacking, based on the 911 audio recording in which M[ichael]" said that Folse did not have a gun. Objections at 25-26 (citing PSR ¶ 16, at 6). Eighth, he objects to the statement that he stole the Cadillac, because "he was never positively identified as the perpetrator of that crime." Objections at 26 (citing PSR ¶ 50, at 10). Last, he objects to the statements that he was identified as the driver of the Cadillac on June 30, 2015, and that he ran a red light and almost struck the APD officer, because "[t]he police reports corresponding to that incident do not contain a positive identification of Mr. Folse as the driver of that vehicle during that incident." Objections at 26 (citing PSR ¶ 51, at 10).

2. The USPO's Third Addendum.

The USPO responds to Folse's Objections by way of an addendum to the PSR. See Third Addendum to the Presentence Report at 1, filed May 10, 2017 (Doc. 222)("Third Addendum").[7] The USPO responds first to Folse's objection to the 2-level obstruction-of-justice enhancement for witness intimidation. See Third Addendum at 4-5. The USPO argues that the § 3C1.1 enhancement should apply, because Folse asked "Creeper" to "do what he could to assure that [Estrada] would not

[7]The USPO filed its first PSR on February 11, 2016, see Presentence Investigation Report, filed February 11, 2016 (Doc. 135), and, in response to informal objections by the United States, a revised PSR on February 29, 2016, see Presentence Investigation Report, filed February 29, 2016 (Doc. 139). On May 12, 2016, the USPO filed an addendum to the PSR, discussing terms of probation under 18 U.S.C. § 3563 and supervised release under 18 U.S.C. § 3583. See Addendum to the Presentence Report at 1, filed May 12, 2016 (Doc. 170). The USPO filed a second addendum on June 1, 2016, discussing interviews that the USPO conducted with Michael B., Michael B.'s father, and Michael B.'s grandmother. See Second Addendum to the Presentence Report at 1-2, filed June 1, 2016 (Doc. 178). On May 1, 2017, Folse informally objected to the PSR, and, in response to Folse's objections, on May 10, 2017, the USPO filed a second revised PSR -- the operative PSR from which the Court draws its facts in this Memorandum Opinion and Order -- as well as a Third Addendum to the PSR. See PSR at 1; Third Addendum at 1. Folse filed his formal Objections on May 15, 2017. See Objections at 1. In a fourth addendum to the PSR, the USPO explains that its Third Addendum is responsive to Folse's Objections. See Forth [sic] Addendum to the Presentence Report at 1, filed May 17, 2017 (Doc. 224). The Court discusses the USPO's Third Addendum in this section.

show up to testify." Third Addendum at 4. The USPO contends that Application Note (K) to § 3C1.1 provides that "threatening the victim of the offense in an attempt to prevent the victim from reporting the conduct constituting the offense of conviction is obstruction." Third Addendum at 4. Next, the USPO responds to Folse's objection to the 2-level obstruction-of-justice enhancement for reckless endangerment under § 3C1.2. See Third Addendum at 4-5. The USPO asserts that the § 3C1.2 enhancement should apply, because Folse "recklessly created a substantial risk of death or serious bodily injury . . . in the course of fleeing from" APD officers. Third Addendum at 4.

Finally, the USPO responds to Folse's objection to the career-offender enhancement under § 4B1.1. See Third Addendum at 5-6. First, the USPO contends that Folse's prior conviction for possession of marijuana with intent to distribute qualifies as a "controlled substance offense," because it is a fourth-degree felony punishable by 18 months imprisonment. Third Addendum at 5-6. Second, the USPO asserts that Folse's prior conviction for aggravated battery with a deadly weapon qualifies as a "crime of violence." Third Addendum at 6. The USPO notes that, under § 4B1.2, an offense is a crime of violence if its "statutory definition contains any of the elements within the elements clause, which states, has the use, attempted use, or threatened use of physical force against the person of another." Third Addendum at 6. The USPO contends that New Mexico aggravated battery meets this definition, because, under N.M. Stat. Ann. § 30-3-5(C), "a person commits aggravated battery when inflicting great bodily harm or does so with a deadly weapon or in the manner whereby great bodily harm or death can be inflicted." Third Addendum at 6.

RELEVANT LAW REGARDING THE GUIDELINES

In United States v. Booker, 543 U.S. 220 (2005), the Supreme Court of the United States of America severed the mandatory provisions from the Sentencing Reform Act, Pub. L. No. 98-473, 98 Stat. 1976, thus making Guidelines sentencing ranges effectively advisory. In excising the two

sections, the Supreme Court left the remainder of the Act intact, including 18 U.S.C. § 3553: "Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable." United States v. Booker, 543 U.S. at 261.

Congress has directed sentencing courts to impose a sentence "sufficient, but not greater than necessary" to comply with four statutorily defined purposes enumerated in 18 U.S.C. § 3553(a)(2):

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner . . . .

18 U.S.C. § 3553(a)(2)(A)-(D).

> [A] defendant who has been found guilty of an offense described in any Federal statute . . . shall be sentenced in accordance with the provisions of this chapter so as to achieve the purposes set forth in subparagraphs (A) through (D) of section 3553(a)(2) to the extent that they are applicable in light of all the circumstances of the case.

18 U.S.C. § 3551. To achieve these purposes, § 3553(a) directs sentencing courts to consider: (i) the Guidelines; (ii) the nature of the offense and the defendant's character; (iii) the available sentences; (iv) a policy favoring uniformity in sentences for defendants who commit similar crimes; and (v) the need to provide restitution to victims. See 18 U.S.C. § 3553(a)(1), (3)-(7).

Although the Guidelines are no longer mandatory, both the Supreme Court and the Tenth Circuit have clarified that, while the Guidelines are only one of several factors enumerated in § 3553(a), they are entitled to substantial deference. See Rita v. United States, 551 U.S. 338, 349 (2007)("The Guidelines as written reflect the fact that the Sentencing Commission examined tens of

thousands of sentences and worked with the help of many others in the law enforcement community over a long period of time in an effort to fulfill [its] statutory mandate."); United States v. Cage, 451 F.3d 585, 593 (10th Cir. 2006)(describing the Guidelines as more than "just one factor among many"). They are significant, because "the Guidelines are an expression of popular political will about sentencing that is entitled to due consideration . . . [and] represent at this point eighteen years' worth of careful consideration of the proper sentence for federal offenses." United States v. Cage, 451 F.3d at 593 (internal quotation marks omitted). A reasonable sentence is also one that "avoid[s] unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a). See United States v. Booker, 543 U.S. at 261-62.

The Tenth Circuit has "joined a number of other circuits in holding that a sentence within the applicable Guidelines range is presumptively reasonable." United States v. Terrell, 445 F.3d 1261, 1264 (10th Cir. 2006), overruled on other grounds by Rita v. United States, 551 U.S. 338, 349 (2007), as recognized in United States v. Zamora-Solorzano, 528 F.3d 1247, 1251 n.3 (10th Cir. 2008). This presumption, however, is an appellate presumption and not one that the trial court can or should apply. See Rita v. United States, 551 U.S. at 351; Gall v. United States, 552 U.S. 38, 46-47 (2007); Kimbrough v. United States, 552 U.S. 85, 90-91 (2007). Instead, the trial court must undertake the § 3553(a) balancing of factors without any presumption in favor of the advisory[8]

[8]Attorneys and courts often say that the "Guidelines" are advisory, but it appears more appropriate to say that the Guideline ranges are advisory. Gall v. United States, 522 U.S. at 46 ("As a result of our decision [in United States v. Booker], the Guidelines are now advisory[.]"); United States v. Leroy, 298 F. App'x 711, 712 (10th Cir. 2008)(unpublished)("[T]he Guidelines are advisory, not mandatory."); United States v. Sells, 541 F.3d 1227, 1237 (10th Cir. 2008)("[T]he sentence ultimately imposed by the district court was based on a correctly calculated Guidelines range, a stated consideration of the § 3553(a) factors, and an understanding that the Guidelines are advisory."). The Court must consider the Guidelines, see Gall v. United States, 522 U.S. at 46 ("It is . . . clear that a district judge must give serious consideration to the extent of any departure from the Guidelines . . . ."), and must accurately calculate the Guidelines range, see Gall v. United States, 522 U.S. at 49 ("[A] district court should begin all sentencing proceedings by correctly calculating the

Guidelines sentence. See Rita v. United States, 551 U.S. at 351; Gall v. United States, 552 U.S. at 46-47; Kimbrough v. United States, 552 U.S. at 90-91.

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applicable Guidelines range."). The Court is not mandated, however, to apply a sentence within the calculated Guidelines range. See United States v. Sierra-Castillo, 405 F.3d 932, 936 n.2 (10th Cir. 2005)("[D]istrict courts post-Booker have discretion to assign sentences outside of the Guidelines-authorized range . . . . "). Accord United States v. Chavez-Rodarte, 2010 WL 3075285, at *2-3 (D.N.M. 2010)(Browning, J.).

> The Court must adhere to the following three-step sequence when sentencing a criminal defendant: first, determining the appropriate sentencing range on the basis of Guidelines' chapters 2 through 4; next, applying Guidelines-contemplated departures based on parts 5H and 5K; and, only then, varying from the Guidelines framework on the basis of the § 3553(a) factors taken as a whole. The Court must follow this sequence, because: (i) the Guidelines expressly provide for it, and courts must still consult the Guidelines, even if they will subsequently vary from them in the third step of the sequence; and (ii) adherence to this sequence is the only way to give effect to 18 U.S.C. § 3553(e).
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> . . . .
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> The Supreme Court held in United States v. Booker that "district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing," 543 U.S. at 264, but further expounded in Kimbrough v. United States that "courts may vary [from the Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines," 552 U.S. 85, 101 (2007)(alteration in original)(internal quotation marks omitted). In theory, this freedom could mean that a district court may excise individual portions of the Guidelines along the way as it performs an otherwise by-the-book Guidelines analysis, end up with a sentence with built-in variances, and never even know what sentence a true, rigid Guidelines application would yield. In practice, however, appellate courts expect district courts to first obtain the true Guidelines' sentence range and circumscribe their United States v. Booker-granted authority to post-Guidelines analysis "variances." Irizarry v. United States, 553 U.S. 708, 710-16 (2008). A district court that attempts to vary from U.S.S.G. § 1B1.1's basic sequence most likely acts procedurally unreasonably. See Gall v. United States, 552 U.S. 38, 51 (2007)(holding that a sentence is procedurally reasonable if "the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence" (emphasis added)).

United States v. Nolf, 2014 WL 3377695, at *20-21 (D.N.M. 2014)(Browning, J.)(emphasis in original).

> While the Supreme Court's decision in United States v. Booker has given the sentencing court discretion that it did not have earlier, the sentencing court's first task remains to accurately and correctly determine the advisory-guideline sentence. Thus, before the sentencing court takes up a defendant's Booker arguments, the sentencing court must first determine whether the defendant is entitled to downward departures. The sentencing court may, however, also use these same departure factors in the Booker calculus, even if the court does not grant a downward departure.

United States v. Apodaca-Leyva, 2008 WL 2229550, at *6 (D.N.M. 2008)(Browning, J.). The Supreme Court has noted, however, that the sentencing judge is "in a superior position to find facts and judge their import under § 3553(a) in each particular case." Kimbrough v. United States, 552 U.S. at 89. Applying § 3553(a)'s factors, the Court has concluded that the case of an illegal immigrant who re-entered the United States to provide for his two children and two siblings was not materially different from other re-entry cases, and, thus, no variance from the Guidelines sentence was warranted. See United States v. Alemendares-Soto, 2010 WL 5476767, at *12 (D.N.M. 2010)(Browning, J.). Still, in United States v. Jager, 2011 WL 831279 (D.N.M. 2011)(Browning, J.), although the defendant's military service was not present to an unusual degree and, thus, did not warrant a departure, the Court found that a variance was appropriate, because the defendant's military service was "superior and uniformly outstanding," as the defendant appeared to have been "trustworthy[] and dedicated, and he served with distinction." 2011 WL 831279, at *14.

LAW REGARDING THE BURDEN OF PROOF REQUIRED FOR ENHANCEMENTS UNDER THE GUIDELINES

In Apprendi v. New Jersey, 530 U.S. 466 (2000), the Supreme Court reaffirmed the principle that it is permissible for sentencing judges "to exercise discretion -- taking into consideration various factors relating both to offense and offender -- in imposing judgment within the range prescribed by statute." 530 U.S. at 481. The Supreme Court cautioned, however, that the Constitution of the United States of America limits this discretion and its Sixth Amendment requires that, "[o]ther than

the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. at 490. In Blakely v. Washington, 542 U.S. 296 (2004), the Supreme Court elaborated on its holding in Apprendi v. New Jersey, stating that the "'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Blakely v. Washington, 542 U.S. at 303 (emphasis and citations omitted). In United States v. Booker, however, the Supreme Court held that, because the sentencing guidelines are no longer mandatory, "*Apprendi* does not apply to the present advisory-Guidelines regime." United States v. Ray, 704 F.3d 1307, 1314 (10th Cir. 2013). See United States v. Booker, 543 U.S. at 259 ("[W]ithout this provision [of the Guidelines statute] -- namely, the provision that makes the relevant sentencing rules mandatory and imposes binding requirements on all sentencing judges -- the statute falls outside the scope of *Apprendi's* requirement.")(alterations and internal quotations marks omitted). More recently, the Supreme Court held that the requirements in Apprendi v. New Jersey apply to facts that increase a defendant's mandatory minimum sentence. See Alleyne v. United States, 133 S. Ct. 2151, 2155 (2013).

In United States v. Magallanez, 408 F.3d 672 (10th Cir. 2005), the Tenth Circuit held that Blakely v. Washington and United States v. Booker did not change the district court's enhancement findings analysis. See United States v. Magallanez, 408 F.3d at 684-85. United States v. Magallanez involved plain-error review of a drug sentence in which a jury found the defendant guilty of conspiracy to possess with intent to distribute, and to distribute, methamphetamine. See 408 F.3d at 676. As part of its verdict, the jury, through a special interrogatory, attributed to the defendant 50-500 grams of methamphetamine; at sentencing, however, the judge -- based on testimony of the various amounts that government witnesses indicated they had sold to the defendant

-- attributed 1200 grams of methamphetamine to the defendant and used that amount to increase his sentence under the Guidelines. See 408 F.3d at 682. The district court's findings increased the defendant's Guidelines sentencing range from 63 to 78 months to 121 to 151 months. See 408 F.3d at 682-83. On appeal, the Tenth Circuit stated that, both before and after Congress' passage of the Sentencing Reform Act, "sentencing courts maintained the power to consider the broad context of a defendant's conduct, even when a court's view of the conduct conflicted with the jury's verdict." 408 F.3d at 684. Although United States v. Booker made the Guidelines ranges "effectively advisory," the Tenth Circuit reaffirmed that "district courts are still required to consider Guideline ranges, which are determined through application of the preponderance standard, just as they were before." United States v. Magallanez, 408 F.3d at 685 (citation omitted).

The Tenth Circuit, while "recognizing 'strong arguments that relevant conduct causing a dramatic increase in sentence ought to be subject to a higher standard of proof,'" has "long held that sentencing facts in the 'ordinary case' need only be proven by a preponderance." United States v. Olsen, 519 F.3d 1096, 1105 (10th Cir. 2008)(quoting United States v. Washington, 11 F.3d 1510, 1516 (10th Cir. 1993)).[9] "[T]he application of an enhancement . . . does not implicate the Supreme

[9]Although the Tenth Circuit stated in United States v. Washington that "the issue of a higher than a preponderance standard is foreclosed in this circuit," 11 F.3d at 1516, the Tenth Circuit has since classified its holding as leaving "open the possibility that due process may require proof by clear and convincing evidence before imposition of a Guidelines enhancement that increases a sentence by an 'extraordinary or dramatic' amount," United States v. Ray, 704 F.3d at 1314 (quoting United States v. Olsen, 519 F.3d at 1105). See United States v. Olsen, 519 F.3d at 1105 (affirming the use of the preponderance-of-the-evidence standard for sentencing facts that increase a sentence in the "'ordinary case'" (quoting United States v. Washington, 11 F.3d at 1516)). The Tenth Circuit has not yet found that an "extraordinary or dramatic" instance warrants a higher standard of proof for certain facts that enhance a defendant's sentence. United States v. Olsen, 519 F.3d at 1105 (explaining that it need not determine whether a higher standard of proof is required to sentence a defendant for committing perjury in relation to a grand jury investigation, because the enhancement did not require the district court to determine that the defendant committed murder, but only that he obstructed a homicide investigation). See United States v. Constantine, 263 F.3d 1122, 1125 n.2 (10th Cir. 2001)(affirming a preponderance-of-the-evidence standard for facts that enhance a

Court's holding in Apprendi v. New Jersey." United States v. Reyes-Vencomo, 2012 WL 2574810, at *3 (D.N.M. 2012)(Browning, J.). The Tenth Circuit applies Apprendi v. New Jersey's requirement that a fact be submitted to a jury only where the fact would increase a defendant's sentence "above the statutory maximum permitted by the statute of conviction." United States v. Price, 400 F.3d 844, 847 (10th Cir. 2005). Accord United States v. Ray, 704 F.3d at 1314. A defendant may assert an error under Apprendi v. New Jersey only where the fact at issue increased his sentence beyond the statutory maximum. See United States v. O'Flanagan, 339 F.3d 1229, 1232 (10th Cir. 2003)(holding that a defendant could not assert an error under Apprendi v. New Jersey, because "his sentence does not exceed the statutory maximum"); United States v. Hendrickson, 2014 WL 6679446, at *6 (10th Cir. 2014)(unpublished)(holding that, after Alleyne v. United States, "[i]t is well-established that sentencing factors need not be charged in an indictment and need only be proved to the sentencing judge by a preponderance of the evidence").[10] The Court has noted:

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defendant's offense level 4 levels); United States v. Valdez, 225 F.3d 1137, 1143 n.2 (10th Cir. 2000)(rejecting the defendant's argument that a dramatic increase in a sentence because of a sentencing judge's finding of additional amounts of methamphetamine associated with acquitted charges entitled the defendant to a clear-and-convincing evidence standard at sentencing, and noting that the Tenth Circuit "foreclosed by binding precedent" this argument); United States v. Washington, 11 F.3d at 1516 (finding that a district court need not find by any more than a preponderance of the evidence the amount of cocaine a defendant distributed, even though its findings increased the defendant's sentence from twenty years to consecutive forty-year terms).

[10] United States v. Hendrickson, is an unpublished Tenth Circuit opinion, but the Court can rely on an unpublished Tenth Circuit opinion to the extent its reasoned analysis is persuasive in the case before it. See 10th Cir. R. 32.1(A), 28 U.S.C. ("Unpublished opinions are not precedential, but may be cited for their persuasive value."). The Tenth Circuit has stated: "In this circuit, unpublished orders are not binding precedent, . . . and . . . citation to unpublished opinions is not favored . . . . However, if an unpublished opinion . . . has persuasive value with respect to a material issue in a case and would assist the court in its disposition, we allow a citation to that decision." United States v. Austin, 426 F.3d 1266, 1274 (10th Cir. 2005). The Court concludes that United States v. Hendrickson, United States v. Schmidt, United States v. Banda, United States v. Rushing, United States v. Sim, and United States v. Porter have persuasive value with respect to a material issue, and will assist the Court in its preparation of this Memorandum Opinion and Order.

> [A]lthough the decision of the Supreme Court of the United States in Alleyne v. United States, . . . 133 S. Ct. 2151 . . . (2013), expands the rule from Apprendi v. New Jersey, 530 U.S. 466 . . . (2000)(holding that facts that increase the maximum sentence a defendant faces must be proven to a jury beyond a reasonable doubt), to cover facts that increase the mandatory minimum sentence, as well as the maximum sentence, it does not prohibit district judges from continuing to find advisory sentencing factors by a preponderance of the evidence. See [United States v. Sangiovanni,] 2014 WL 4347131, at *22-26 [(D.N.M. 2014)(Browning, J.)].

United States v. Cervantes-Chavez, 2014 WL 6065657, at *14 (D.N.M. 2014)(Browning, J.).

LAW REGARDING RELEVANT CONDUCT FOR SENTENCING

In calculating an appropriate sentence, the Guidelines consider a defendant's "offense of conviction and all relevant conduct under § 1B1.3 (Relevant Conduct) unless a different meaning is specified or is otherwise clear from the context." U.S.S.G. § 1B1.1, cmt. 1(H). In United States v. Booker, the Supreme Court noted:

> Congress' basic statutory goal -- a system that diminishes sentencing disparity -- depends for its success upon judicial efforts to determine, and to base punishment upon, the *real conduct* that underlies the crime of conviction. That determination is particularly important in the federal system where crimes defined as, for example, "obstruct[ing], delay[ing], or affect[ing] commerce or the movement of any article or commodity in commerce, by . . . extortion," . . . can encompass a vast range of very different kinds of underlying conduct.

543 U.S. at 250-51 (emphasis in original)(quoting 18 U.S.C. § 1951(a)). The Supreme Court's reasoning in United States v. Booker suggests that the consideration of real conduct is necessary to effectuate Congress' purpose in enacting the Guidelines.

Section 1B1.3(a) provides that the base offense level under the Guidelines "shall be determined" based on the following:

> (1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
>
> (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged

> as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;
>
> (2) solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;
>
> (3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and
>
> (4) any other information specified in the applicable guideline.

U.S.S.G. § 1B1.3(a)(1)-(4). The court may consider, as relevant conduct, actions that have not resulted in a conviction. Pursuant to the commentary to U.S.S.G. § 6A1.3, evidentiary standards lower than beyond a reasonable doubt are permitted to show relevant conduct. The court may rely upon reliable hearsay, so long as the evidence meets the preponderance-of-the-evidence standard. See United States v. Vigil, 476 F. Supp. 2d 1231, 1245 (D.N.M. 2007)(Browning J.). Accord United States v. Schmidt, 353 F. App'x 132, 135 (10th Cir. 2009)(unpublished)("The district court's determination of 'relevant conduct' is a factual finding subject to a preponderance of the evidence standard, and clear error review."). The evidence and information upon which the court relies, however, must have sufficient indicia of reliability. See U.S.S.G. § 6A1.3 ("In resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.").

Supreme Court precedent on relevant conduct comes primarily from two cases: Witte v. United States, 515 U.S. 389 (1995), and United States v. Watts, 519 U.S. 148 (1997). In Witte v.

United States, the Supreme Court upheld the use of uncharged conduct at sentencing against a double-jeopardy challenge. See 515 U.S. at 404-06. The defendant in Witte v. United States had been involved in an unsuccessful attempt to import marijuana and cocaine into the United States in 1990, and an attempt to import marijuana in 1991. See 515 U.S. at 392-93. In March 1991, a federal grand jury indicted the defendant for attempting to possess marijuana with intent to distribute in association with the defendant's latter attempt to import narcotics. See 515 U.S. at 392-93. At sentencing, the district court concluded that, because the 1990 attempt was part of the continuing conspiracy, it was relevant conduct under U.S.S.G. § 1B1.3, and thus calculated the defendant's base offense level based on the aggregate amount of drugs involved in both the 1990 and 1991 episodes. See 515 U.S. at 394.

In September 1992, a second federal grand jury indicted the defendant for conspiring and attempting to import cocaine in association with his activities in 1990. See 515 U.S. at 392-93. The defendant moved to dismiss the indictment, contending that he had already been punished for the cocaine offenses, because the court had considered those offenses relevant conduct at the sentencing for the 1991 marijuana offense. See 515 U.S. at 395. The district court agreed and dismissed the indictment, holding that punishment for the cocaine offenses would violate the prohibition against multiple punishments in the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States. See 515 U.S. at 395. The United States Court of Appeals for the Fifth Circuit reversed and held that "the use of relevant conduct to increase the punishment of a charged offense does not punish the offender for the relevant conduct." United States v. Witte, 25 F.3d 250, 258 (5th Cir. 1994). In reaching this holding, the Fifth Circuit acknowledged that its conclusion was contrary to other United States Courts of Appeals opinions, including the Tenth Circuit's, that had previously

considered this question. See 25 F.3d at 255 n.19 (citing United States v. Koonce, 945 F.2d 1145 (10th Cir. 1991)).

The Supreme Court granted certiorari to resolve the conflict between the Courts of Appeals and affirmed the Fifth Circuit's judgment. See 515 U.S. at 395. In holding that the district court's consideration of the defendant's relevant conduct did not punish the defendant for that conduct, the Supreme Court concluded that "consideration of information about the defendant's character and conduct at sentencing does not result in 'punishment' for any offense other than the one of which the defendant was convicted." 515 U.S. at 401. The Supreme Court reasoned that sentencing courts had always considered relevant conduct and "the fact that the sentencing process has become more transparent under the Guidelines . . . does not mean that the defendant is now being punished for uncharged relevant conduct as though it were a distinct criminal offense." 515 U.S. at 402. Sentencing enhancements do not punish a defendant for uncharged offenses; rather, they reflect Congress' policy judgment "that a particular offense should receive a more serious sentence within the authorized range if it was either accompanied by or preceded by additional criminal activity." 515 U.S. at 403.

In United States v. Watts, the Supreme Court, in a per curiam opinion, relied upon Witte v. United States and upheld, against a double-jeopardy challenge, a sentencing judge's use of conduct for which the defendant had been acquitted. See United States v. Watts, 519 U.S. at 149. The Supreme Court noted that its conclusion was in accord with every United States Court of Appeals -- other than the Ninth Circuit -- and that each had previously held that a sentencing court may consider conduct for which the defendant had been acquitted, if the government establishes that conduct by a preponderance of the evidence. See 519 U.S. at 149 (citing, e.g., United States v. Coleman, 947 F.2d 1424, 1428-29 (10th Cir. 1991)). The Supreme Court began its analysis with 18 U.S.C. § 3661: "No

limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." United States v. Watts, 519 U.S. at 151 (quoting 18 U.S.C. § 3661). According to the Supreme Court, 18 U.S.C. § 3661 embodies the codification of "the longstanding principle that sentencing courts have broad discretion to consider various kinds of information" and that "the Guidelines did not alter this aspect of the sentencing court's discretion." United States v. Watts, 519 U.S. at 151-52.

Tenth Circuit case law adheres closely to the Supreme Court's results in Witte v. United States and United States v. Watts. See United States v. Andrews, 447 F.3d 806, 810 (10th Cir. 2006)(applying Witte v. United States' holding to affirm that a career-offender enhancement does not violate the Fifth Amendment's Double Jeopardy Clause). In United States v. Banda, 168 F. App'x 284 (10th Cir. 2006)(unpublished), the Tenth Circuit rejected a defendant's argument that it was "structural error" for a district court to find sentencing factors "by a preponderance of the evidence rather than the jury applying a beyond-a-reasonable-doubt standard." 168 F. App'x at 290. The Tenth Circuit explained that "'[i]t is now universally accepted that judge-found facts by themselves do not violate the Sixth Amendment. Instead, the constitutional error was the court's reliance on judge-found facts to enhance the defendant's sentence mandatorily.'" 168 F. App'x at 290 (quoting United States v. Lauder, 409 F.3d 1254, 1269 (10th Cir. 2005)).

In United States v. Coleman, the defendant, Troy Coleman, appealed the district court's enhancement of his sentence for firearms possession after he was convicted of conspiracy to possess and possession of a controlled substance with intent to distribute, but was acquitted of using or carrying a firearm during and in relation to a drug trafficking crime. See 947 F.2d at 1428. The Tenth Circuit acknowledged that courts had taken various positions on whether a sentence may be

enhanced for firearms possession despite a defendant's acquittal on firearms charges. See United States v. Coleman, 947 F.2d at 1428-29 (citing United States v. Duncan, 918 F.2d 647, 652 (6th Cir. 1990)("[A]n acquittal on a firearms carrying charge leaves ample room for a district court to find by the preponderance of the evidence that the weapon was possessed during the drug offense."); United States v. Rodriguez, 741 F. Supp. 12, 13-14 (D.D.C. 1990)(refusing to apply 2-level enhancement for firearms possession, because "[t]o add at least 27 months to the sentence for a charge of which the defendant was found not guilty violates the constitutional principle of due process and the ban against double jeopardy")).

Without discussion related to the standard of proof a sentencing court should use to make factual findings, the Tenth Circuit held that the district court did not err in enhancing Coleman's sentence for possession of a firearm. See United States v. Coleman, 947 F.2d at 1429. The Tenth Circuit based its conclusion on evidence that: (i) individuals at the arrest scene handled the weapons at will; (ii) the weapons were handled at will by individuals who lived at the house; and (iii) the weapons were kept for the protection of conspiracy participants and the narcotics involved. See 947 F.2d at 1429. The Tenth Circuit summarized that, in reviewing relevant federal case law, it found "persuasive the decisions that have allowed a sentencing court to consider trial evidence that was applicable to a charge upon which the defendant was acquitted." 947 F.2d at 1429.

In United States v. Washington, 11 F.3d at 1510, the defendant, Patrick Washington, argued that the United States should prove drug quantities used as relevant conduct to establish a defendant's offense level by clear-and-convincing evidence, rather than by a preponderance of the evidence. See 11 F.3d at 1512. The defendant objected to his sentencing, because the drug quantity that the district court considered as relevant conduct, and which the court found by a preponderance of the evidence, increased his Guidelines sentencing range from 210-262 months to life in prison.

See 11 F.3d at 1515. The defendant argued "that because the additional drug quantities effectively resulted in a life sentence a higher standard of proof should be required." 11 F.3d at 1515. Although the Tenth Circuit in United States v. Washington "recognize[d] the strong arguments that relevant conduct causing a dramatic increase in sentence ought to be subject to a higher standard of proof," it held that "the Due Process Clause does not require sentencing facts in the ordinary case to be proved by more than a preponderance standard." 11 F.3d at 1516 (citing McMillan v. Pennsylvania, 477 U.S. 79, 84 (1986)). See United States v. Sangiovanni, 2014 WL 4347131, at *22-26 (D.N.M. 2014)(Browning, J.)(concluding that a sentencing court can cross reference from the Guidelines that correspond to the defendant's crime of conviction to the Guidelines for another, more harshly punished crime, if it can be established by a preponderance of the evidence that the defendant committed the more serious crime); United States v. Cervantes-Chavez, 2014 WL 6065657, at *14-15 (D.N.M. 2014)(Browning, J.)(cross referencing from the guideline for being an illegal alien in possession of a firearm to the drug-possession guideline after finding by a preponderance of the evidence that the defendant committed a drug-possession crime).

The Court has previously held that it may consider a defendant's refusal to answer questions for the PSR, while not drawing an adverse inference from the refusal. See United States v. Goree, 2012 WL 592869, at *11 (D.N.M. 2012)(Browning, J.). The Court has also held that, although it can consider a defendant's silence about information regarding herself or others engaging in criminal conduct, it will not rely on that silence to increase the defendant's sentence. See United States v. Chapman, 2012 WL 257814, at *13 n.5 (D.N.M. 2012)(Browning, J.). Finally, the Court has held that a defendant's "aggression towards other individuals, and the murder he may have attempted to orchestrate while incarcerated" is relevant information which the Court can consider in fashioning a proper sentence. United States v. Romero, 2012 WL 6632493, at *23 (D.N.M. 2012)(Browning, J.).

ANALYSIS

The Court overrules Folse's Objections. First, the Court concludes that Folse is a "career offender" under § 4B1.1, because: (i) the federal carjackings for which he was convicted in this case are crimes of violence under § 4B1.2(a); (ii) his prior conviction for aggravated battery with a deadly weapon is a crime of violence under § 4B1.2(a); and (iii) his prior conviction for possession of marijuana with intent to distribute is a controlled substance offense under § 4B1.2(b). The Court thus concludes that Folse's criminal history category is VI and that, given his conviction under 18 U.S.C. § 924(c), the PSR correctly calculates his guideline imprisonment range at 360 months to life. Second, the Court imposes a 2-level enhancement under § 3C1.1, because Folse willfully obstructed and impeded the administration of justice when he sent a letter to "Creeper" instructing him to "do what he could" to prevent Estrada from testifying. Finally, the Court imposes a 2-level enhancement under § 3C1.2, because Folse recklessly created a substantial risk of death or serious bodily injury when he fled from APD officers in the silver Saturn and in the Kia Sorrento.

I. FOLSE IS A "CAREER OFFENDER" UNDER U.S.S.G. § 4B1.1, BECAUSE HIS CARJACKING CONVICTIONS IN THIS CASE ARE CRIMES OF VIOLENCE, AND BECAUSE HE HAS AT LEAST TWO PRIOR FELONY CONVICTIONS FOR A CRIME OF VIOLENCE OR A CONTROLLED SUBSTANCE OFFENSE.

Section 4B1.1 provides an enhancement for defendants who qualify as "career offenders." U.S.S.G. § 4B1.1(c). A defendant is a career offender if: (i) he was at least eighteen years old at the time he committed the federal offense of conviction for which he is being sentenced; (ii) the federal offense of conviction is a felony that is either a "crime of violence" or a "controlled substance offense"; and (iii) "the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense." U.S.S.G. § 4B1.1(a). Here, Folse disputes that his federal convictions for carjacking under 18 U.S.C. § 2119 are "crimes of violence." Objections at 16-17. Folse also disputes that his prior conviction for aggravated battery with a deadly weapon is a

"crime of violence" and that his prior conviction for possession of marijuana with intent to distribute is a "controlled substance offense." Objections at 2-16. Folse therefore asserts that he is not a career offender under § 4B1.1. See Objections at 2. The Court disagrees with Folse, and will apply the career offender enhancement.

A. FOLSE'S CARJACKING CONVICTIONS ARE "CRIMES OF VIOLENCE" UNDER U.S.S.G. § 4B1.2.

Under § 4B1.2, an offense qualifies as a "crime of violence" if it (i) "has as an element the use, attempted use, or threatened use of physical force against the person of another" (the "elements clause"); or (ii) is one of the crimes that the guideline enumerates, including "murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, [or] extortion" (the "enumerated-offense clause"). U.S.S.G. § 4B1.2(a)(1)-(2). At the time of Folse's conviction in this case, § 4B1.2 also stated that a "crime of violence" includes offenses which "otherwise involve[] conduct that presents a serious potential risk of physical injury to another" (the "residual clause"). United States v. Thyberg, 2017 U.S. App. LEXIS 6189, at *1-2 (10th Cir. 2017)(discussing an earlier version of the Guidelines). In late 2016, however, in light of the Supreme Court's decision in Johnson v. United States, 135 S. Ct. 2551 (2015)("Johnson II"), which invalidated identical language in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii) ("ACCA"), as unconstitutionally vague, § 4B1.2 was amended to excise the residual clause from the definition of "crime of violence," U.S.S.G. § 4B1.2 (App'x C, amend. 798).[11] An offense thus qualifies as a crime of violence under § 4B1.2 only if: (i) it meets the elements clause; or (ii) it is listed in the enumerated-offense clause.

[11]Before the 2016 amendment to § 4B1.2, the Tenth Circuit held that the residual clause is void for vagueness in light of the Supreme Court's decision in Johnson II. See United States v. Madrid, 805 F.3d 1204, 1207 (10th Cir. 2015), overruled in part by Beckles v. United States, 137 S. Ct. 886 (2017). In 2017, however, the Supreme Court decided that, contrary to the Tenth Circuit's holding in United States v. Madrid, § 4B1.2's residual clause is "not void for vagueness," because the advisory Guidelines are not subject to a due process vagueness challenge. Beckles v. United

At the outset, the Court notes that "carjacking" is not listed by name in the enumerated-offense clause. U.S.S.G. § 4B1.2(a)(2). Nor is carjacking a "robbery," because the two offenses "'require[] proof of a different element.'" United States v. Rushing, 210 F. App'x, 767, 770 (10th Cir. Dec. 13, 2006)(alteration in original)(unpublished)(quoting Blockburger v. United States, 284 U.S. 299, 304 (1932)). As the Tenth Circuit explained in United States v. Rushing, carjacking under 18 U.S.C. § 2119 requires proof (i) that the defendant "took a motor vehicle from the person or presence of another"; (ii) that he did so "by force, violence or intimidation"; (iii) that he "intended to cause death or serious bodily harm"; and (iv) "that the motor vehicle had been transported, shipped or received in interstate or foreign commerce." 210 F. App'x at 770 (citation omitted). Robbery under 18 U.S.C. § 1951, by contrast, requires proof of (i) "the taking of property from another against the person's will"; (ii) "the use of actual or threatened force, violence or fear of injury"; and (iii) "that the conduct obstructed, delayed, interfered with or affected commerce." 210 F. App'x at 770 (citation omitted). Thus, because carjacking is not a "robbery" under § 4B1.2(b)'s enumerated-offense clause, Folse's carjacking convictions are crimes of violence only if they meet § 4B1.2's elements clause.

To determine whether an offense fits within the elements clause, the Court uses "one of two methods of analysis: the categorical or modified categorical approach." United States v. Taylor, 843 F.3d 1215, 1220 (10th Cir. 2016)(citation omitted). "The categorical approach focuses solely on 'the elements of the statute forming the basis of the defendant's conviction.'" United States v. Taylor, 843 F.3d at 1220 (quoting Descamps v. United States, 133 S. Ct. 2276, 2281 (2013)). "The modified categorical approach applies when the statute is 'divisible'; that is, when it 'lists multiple, alternative

States, 137 S. Ct. at 892. Nevertheless, § 4B1.2's residual clause has been eliminated, and the Court is obligated to "use the Guidelines Manual in effect on the date that the defendant is sentenced." U.S.S.G. § 1B1.11.

elements, and so effectively creates several different crimes.'" United States v. Taylor, 843 F.3d at 1220 (quoting United States v. Madrid, 805 F.3d at 1207 (Descamps v. United States, 133 S. Ct. at 2285)). When applying the modified categorical approach, the Court may "consult a limited class of documents, such as indictments and jury instructions, to determine which alternative [elements] formed the basis of the defendant's [] conviction." Descamps v. United States, 133 S. Ct. at 2281 (alterations added). The Court then "compare[s] those elements to the crime of violence categories, still focus[ing] only on the elements, rather than the facts, of a crime to determine whether it is categorically a crime of violence under all circumstances." United States v. Mitchell, 653 F. App'x at 643 (first alteration added)(citations and internal quotation marks omitted).

Here, the Court must determine whether carjacking under 18 U.S.C. § 2119 is categorically a crime of violence as defined by U.S.S.G. § 4B1.2(a)(1). The carjacking statute provides that:

> Whoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall --
>
> (1) be fined under this title or imprisoned not more than 15 years, or both,
>
> (2) if serious bodily injury (as defined in section 1365 of this title, including any conduct that, if the conduct occurred in the special maritime and territorial jurisdiction of the United States, would violate section 2241 or 2242 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and
>
> (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both, or sentenced to death.

18 U.S.C. § 2119. The Supreme Court has construed § 2119 as "establishing three separate offenses by the specification of distinct elements . . . ." Jones v. United States, 526 U.S. 227, 235-36 (1999). Section 2119 is thus a "divisible" statute, i.e., it "lists multiple, alternative elements," thus creating "different crimes." Descamps v. United States, 133 S. Ct. at 2285. That the statute is divisible,

however, is immaterial to the Court's analysis; here, Folse asserts that carjacking does not meet § 4B1.2's elements clause, because it may "be committed by 'intimidation,' rather than by force and violence." Objections at 17 (citation omitted). Because Folse's objection "focuses on the element of using 'force and violence' or 'intimidation,' which element is common to all three versions of the crime," the Court's analysis of this objection "appl[ies] equally to all three carjacking offenses." United States v. Evans, 848 F.3d 242, 246 n.3 (4th Cir. 2017).

Accordingly, the Court must determine whether carjacking "by force and violence or by intimidation," 18 U.S.C. § 2119, necessarily requires the "use, attempted use, or threatened use of violent physical force," U.S.S.G. § 4B1.2(a)(1). As used in § 4B1.2's elements clause, the statutory phrase "physical force" means "violent force," which necessarily "connotes a substantial degree of force." Johnson I, 559 U.S. at 140 (interpreting "violent felony" in the ACCA's elements clause). To qualify as "violent physical force," the degree of force employed must be "capable of causing physical pain or injury to another person." Johnson I, 559 U.S. at 140. See United States v. Harris, 844 F.3d 1260, 1266 (10th Cir. 2017)(concluding that "physical force means violent force, or force capable of causing physical pain or injury to another person" under Johnson I). Here, Folse posits that carjacking "by intimidation" does not involve "violent physical force." Objections at 17. Folse asserts that, although the Tenth Circuit held in United States v. Brown that "carjacking constitutes a crime of violence . . . because it 'carries with it a substantial risk of the use of physical force,'" that decision is inapposite, because it "is akin to the 'residual clause' language that was deleted from the Career Offender guideline in the August 1, 2016 amendment . . . ." Objections at 16 (quoting United States v. Brown, 200 F.3d at 706).

Folse reads United States v. Brown too narrowly. In that case, the Tenth Circuit stated that "[t]he substantive offense of carjacking is always a crime of violence because § 2119 requires taking

or attempting to take a vehicle by force and violence or by intimidation, and the crime of carjacking carries with it a substantial risk of the use of physical force." United States v. Brown, 200 F.3d at 706 (citations omitted). Folse selectively quotes the latter clause, while omitting the former. See Objections at 16. It may be that the latter clause "is akin to the 'residual clause' language," as Folse contends. Objections at 16. The former clause, however, plainly concludes that § 2119's elements meet the "crime of violence" criteria, albeit under 18 U.S.C. § 924(c)(3)'s elements clause. United States v. Brown, 200 F.3d at 706 (interpreting 18 U.S.C. § 924(c)(3), which provides that an offense is a crime of violence if it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," or if it falls under a residual definition). In other words, the Tenth Circuit stated in United States v. Brown that carjacking is a "crime of violence" under both § 924(c)(3)'s elements clause -- which is nearly identical to § 4B1.2's elements clause -- and § 924(c)(3)'s residual clause.

Regardless, the Court need not rely upon United States v. Brown to conclude that carjacking under 18 U.S.C. § 2119 is a "crime of violence" for purposes of the career-offender guideline. As the Court noted in Lloyd v. United States, 2016 U.S. Dist. LEXIS 118274 (D.N.M. 2016)(Browning, J.), "[t]he Courts of Appeals have uniformly ruled that federal crimes involving takings 'by force and violence, or by intimidation,' have as an element the use, attempted use, or threatened use of physical force." 2016 U.S. Dist. LEXIS 118274, at *13 (analyzing whether armed bank robbery is a crime of violence under 18 U.S.C. § 924(c)(3)). The Court reasoned that, while "[a] taking 'by force and violence' entails the use of physical force, . . . a taking by intimidation involves the threat to use such force." Lloyd v. United States, 2016 U.S. Dist. LEXIS 118274, at *14 (citing, e.g., United States v. Jones, 932 F.2d at 625)("Intimidation means the threat of force[.]"). Accordingly, the Court concluded that bank robbery "by force and violence" requires the

use of physical force, while bank robbery "by intimidation" requires the threatened use of physical force. Lloyd v. United States, 2016 U.S. Dist. LEXIS 118274, at *14.

The bank robbery statute at issue in Lloyd v. United States contains the identical "by force and violence, or by intimidation" phrase at issue here. Compare 18 U.S.C. § 2113(a), with id. § 2119. The Court thus concludes that the federal carjacking statute categorically qualifies as a "crime of violence" under § 4B1.2's elements clause, because it necessarily requires the "use, attempted use, or threatened use of violent physical force." U.S.S.G. § 4B1.2(a). While carjacking "by force and violence" requires the use of physical force, carjacking "by intimidation" requires the threatened use of physical force. Cf. United States v. Jones, 932 F.2d at 625 ("Intimidation means the threat of force[.]"); United States v. McGuire, 2017 U.S. App. LEXIS 1771, at *5 (10th Cir. 2017)(noting that federal crimes involving takings "by intimidation" involve "the threat of physical force")(citing, e.g., Lloyd v. United States, 2016 U.S. Dist. LEXIS 118274, at *5). Moreover, as several United States Courts of Appeals have held, the physical force used or threatened in a carjacking necessarily is "violent." United States v. Evans, 848 F.3d at 247 (holding that "'intimidation' [] in [the carjacking statute] means a threat of violent force"); In re Smith, 829 F.3d 1276, 1280 (11th Cir. 2016)(holding that "intimidation" in the carjacking statute necessarily means the threatened use of violent physical force). Accordingly, Folse is incorrect that carjacking "by intimidation" does not involve "violent physical force." Objections at 17. In light of the above analysis, the Court concludes that carjacking under § 2119 -- whether "by force and violence, or by intimidation" -- categorically is a "crime of violence" for purposes of the career-offender guideline.

B. FOLSE'S PRIOR AGGRAVATED-BATTERY-WITH-A-DEADLY-WEAPON CONVICTION IS A "CRIME OF VIOLENCE" UNDER U.S.S.G. § 4B1.2.

Folse contends that his prior conviction under New Mexico law for aggravated battery with a deadly weapon is not a "crime of violence" under § 4B1.2, because the offense does "not necessarily

involve the 'use, attempted use, or threatened use of physical force against the person of another.'" Objections at 8 (quoting U.S.S.G. § 4B1.2(a)(1)). According to Folse, New Mexico law proscribes two distinct aggravated-battery felony offenses: (i) aggravated battery with a deadly weapon; and (ii) aggravated battery with great bodily harm. See Objections at 7. Folse argues that the latter offense necessarily requires "physical force" sufficient to satisfy § 4B1.2(a)(1) and that the former offense does not require such force. Objections at 7-8. Folse therefore concludes that his conviction for aggravated battery with a deadly weapon does not qualify as a predicate offense for purposes of the career-offender enhancement.

Aggravated battery, like carjacking, is not listed in § 4B1.2's enumerated-offense clause. The offense thus qualifies as a "crime of violence" only if it meets § 4B1.2's elements clause, i.e., if it "has as an element the use, attempted use, or threatened use of physical force against the person of another." U.S.S.G. § 4B1.2(a)(1). As the Court noted supra, "physical force" in this context means "violent force, or force capable of causing physical pain or injury to another person." United States v. Harris, 844 F.3d at 1266. To determine whether New Mexico aggravated battery has the requisite force element, the Court applies the "categorical approach," i.e., the Court looks at "the elements of the statute forming the basis of the defendant's conviction." Descamps v. United States, 133 S. Ct. at 2281. If New Mexico's aggravated battery statute is "divisible," i.e., if it lists multiple, alternative elements, thereby effectively creating several different crimes, United States v. Taylor, 843 F.3d at 1220 (citation omitted), the Court applies the "modified categorical approach" to determine "which alternative formed the basis of the defendant's prior conviction," Descamps v. United States, 133 S. Ct. at 2281 (alterations added). Under either approach, the Court must focus "only on the elements, rather than the facts, of [the] crime to determine whether it is categorically a crime of violence under all circumstances." United States v. Mitchell, 653 F. App'x at 643 (alteration added)(citations and

internal quotation marks omitted). The Court thus turns to the text of New Mexico's aggravated battery statute.

> New Mexico's aggravated battery 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.

N.M. Stat. Ann. § 30-3-5. Subsection A articulates the "least culpable conduct criminalized" by the statute, United States v. Harris, 844 F.3d at 1268 n.9, i.e., the unlawful touching of another with the intent to injure that person, see N.M. Stat. Ann. § 30-3-5(A). Arguably, such touching-with-intent-to-injure involves a threat of "force capable of causing physical pain or injury to another person." United States v. Harris, 844 F.3d at 1266. See State v. Vallejos, 2000-NMCA-075, ¶ 18, 9 P.3d 668, 674-75 (noting that "[t]he aggravated battery statute is directed at preserving the integrity of a person's body against serious injury"). Under this line of reasoning, because the "least of the acts criminalized" by the statute has the requisite force element, Moncrieffe v. Holder, 133 S. Ct. 1678, 1684 (2013), New Mexico aggravated battery categorically fits within § 4B1.2's elements clause. Folse overlooks this reasoning; indeed, he implicitly assumes that subsection A does not necessarily require the threat of physical force sufficient to meet § 4B1.2(a)(1). See Objections at 4-13. Instead, Folse focuses on subsection C and contends that his conviction under that subsection does not qualify as a crime of violence. See Objections at 4-13. The Court finds this argument unpersuasive.

Because subsections B and C differentiate between misdemeanor offenses and third-degree felony offenses, the aggravated battery statute is divisible. See Mathis v. United States, 136 S. Ct. 2243, 2256 (2016)("If statutory alternatives carry different punishments, then under *Apprendi* they must be elements.")(citations omitted). Here, Folse was convicted of felony aggravated battery with a deadly weapon under subsection C. See PSR ¶ 59, at 13; Objections at 4. That subsection is itself divisible and can be violated by either: (i) committing aggravated battery and "inflicting great bodily harm"; (ii) committing aggravated battery "with a deadly weapon"; or (iii) committing aggravated battery "in any manner whereby great bodily harm or death can be inflicted." N.M. Stat. Ann. § 30-3-5(C). Subsection C's divisibility, however, is immaterial; as the Court has previously concluded, "any of the three ways to commit § 30-3-5C involves 'the use, attempted use, or threatened use of physical force against the person of another.'" United States v. Lopez-Valencia, Nos. CIV 10-0216 JB/KBM, CR 09-0111 JB (D.N.M. Aug. 26, 2010)(Browning, J.)(interpreting U.S.S.G. § 2L1.2's elements clause). In other words, § 30-3-5(C) does not contain "statutory phrases that cover several different generic crimes, some of which require violent force and some of which do not," Johnson I, 559 U.S. at 144; rather, all of § 30-3-5(C)'s proscriptions require violent force.

First, aggravated battery that either "inflict[s] great bodily harm" or risks such harm or death necessarily contains, as an element, the actual or threatened use of physical force. New Mexico law defines "great bodily harm" as "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." N.M. Stat. Ann. § 30-1-12(A). If anything, this definition necessarily implies a much higher quantum of physical force than the minimum force that § 4B1.1 requires. Compare N.M. Stat. Ann. § 30-1-12(A), with United States v. Harris, 844 F.3d at 1266 (stating that "physical force" under § 4B1.1 must be "capable of causing physical pain

or injury to another person"). "[S]erious disfigurement," for example, results from far more severe violence than does mere "physical pain" under § 4B1.1. As the Tenth Circuit has noted in a similar context, "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.'" United States v. Treto-Martinez, 421 F.3d 1156, 1159 (10th Cir. 2005)(interpreting U.S.S.G. § 2L1.2's elements clause).

Second, the unlawful touching or application of force "with a deadly weapon" includes as an element the actual or threatened use of physical force. In United States v. Treto-Martinez, the Tenth Circuit considered whether Kansas aggravated battery with a deadly weapon is a "crime of violence" under U.S.S.G. § 2L1.2's elements clause. 421 F.3d at 1159-60. Kansas' aggravated-battery statute proscribes, in relevant part, intentional physical contact with a deadly weapon in "a rude, insulting or angry manner . . . ." Kan. Stat. Ann. § 21-5413 (b)(1)(C).[12] The Tenth Circuit held -- in broad terms -- that "physical force is involved when a person intentionally causes physical contact with another person with a deadly weapon," because such contact "uses physical force by means of an instrument calculated or likely to produce bodily injury . . . ." United States v. Treto-Martinez, 421 F.3d at 1159. The Tenth Circuit also held that intentional physical contact "with a deadly weapon in 'a rude, insulting or angry manner,' has at the very least the 'threatened use of physical force,'" because such contact "could always lead to more substantial and violent contact, and thus it would always include as an element the 'threatened use of physical force.'" United States v. Treto-Martinez, 421 F.3d at 1160. In short, the Tenth Circuit concluded that Kansas aggravated battery with a deadly weapon

[12]The Tenth Circuit in United States v. Treto-Martinez analyzed an earlier version of Kansas' aggravated-battery statute, codified at Kan. Stat. Ann. § 21-3414(a). The updated statute, codified at Kan. Stat. Ann. § 21-5413 (b), contains the same relevant language as the earlier version, and, thus, the Court will cite to the updated statute in its analysis.

categorically is a crime of violence under § 2L1.2, because "[p]hysical contact with a deadly weapon . . . will always constitute either actual or threatened use of physical force." United States v. Treto-Martinez, 421 F.3d at 1159 (emphasis added).

The Tenth Circuit's analysis in United States v. Treto-Martinez counsels the same conclusion in this case. New Mexico's aggravated-battery law, like Kansas' statute, proscribes mere physical contact with a deadly weapon. Compare N.M. Stat. Ann. § 30-3-5 ("Aggravated battery consists of the unlawful touching . . . with a deadly weapon . . . ."), with Kan. Stat. Ann. § 21-5413 (b)(1)(C) ("Aggravated battery is . . . knowingly causing physical contact . . . with a deadly weapon . . . ."). As the Tenth Circuit concluded in United States v. Treto-Martinez, such physical contact "has at the very least the 'threatened use of physical force,'" because it "could always lead to more substantial and violent contact, and thus it would always include as an element the 'threatened use of physical force.'" 421 F.3d at 1160. If anything, this reasoning applies with even greater force here, because, unlike in Kansas, New Mexico's aggravated-battery law requires that the defendant unlawfully touch another person "with intent to injure that person or another." N.M. Stat. Ann. § 30-3-5(A). Thus, under New Mexico law, aggravated battery with a deadly weapon does not simply risk "lead[ing] to more substantial and violent contact," United States v. Treto-Martinez, 421 F.3d at 1160; rather, the defendant must intend such contact.

Folse notes -- correctly -- that "there is no controlling [Tenth Circuit] law" regarding whether aggravated battery with a deadly weapon in New Mexico categorically is a crime of violence under § 4B1.2. Objections at 4. Tenth Circuit decisions concerning New Mexico aggravated assault with a deadly weapon, however, are persuasive in this context. In United States v. Maldonado-Palma, for example, the Tenth Circuit concluded that, under New Mexico law, aggravated assault with a deadly weapon requires that the defendant actually use such a weapon, i.e., that "merely possessing a deadly

weapon" is insufficient. 839 F.3d at 1250 (footnote omitted). The Tenth Circuit, accordingly, held that New Mexico aggravated assault with a deadly weapon categorically is a crime of violence under § 2L1.2, because employing a deadly weapon "necessarily threatens the use of physical force, i.e., 'force capable of causing physical pain or injury to another person.'" United States v. Maldonado-Palma, 839 F.3d at 1250 (quoting Johnson I, 559 U.S. at 140). The same logic applies to aggravated battery with a deadly weapon, which, in New Mexico, requires proof of a deadly weapon's use in the offense and not its mere possession. See N.M. Stat. Ann. § 30-3-5 ("Aggravated battery consists of the unlawful touching . . . with a deadly weapon . . . ."); NMRA, Crim. 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 the defendant "used" a deadly weapon). Indeed, this logic is especially persuasive here, because, unlike an attempted-battery assault, Folse's conviction involves a completed battery.

Folse objects that United States v. Maldonado-Palma and other aggravated-assault cases are inapposite, because, he asserts, aggravated battery with a deadly weapon "does not require 'use' of a deadly weapon,'" but rather that the defendant "touch[] a person 'with' a firearm or deadly weapon." Objections at 12 (citing NMRA, Crim. UJI 14-322). In support of this argument, Folse adverts to New Mexico's uniform jury instruction for aggravated battery with a deadly weapon, which directs the jury to decide, in relevant part, whether:

> 1. The defendant touched or applied force to _____ (*name of victim*) by _____ with a [_____] [deadly weapon. The defendant used a _____ (*name of instrument or object*). A _____ (*name of instrument or object*) is a deadly weapon only if you find that a _____ (*name of object*), when used as a weapon, could cause death or great bodily harm] . . . .

NMRA, Crim. UJI 14-322 (bracketed material and emphases in original)(footnotes omitted). The instruction's use notes specify that, if the subject weapon is listed in N.M. Stat. Ann. § 30-1-12(B),

the weapon's name should be inserted into the first pair of brackets. See NMRA, Crim. UJI 14-322 cmt. n.3. Section 30-1-12(B), in turn, designates as "deadly weapons" items such as "any firearm" and various knives. The use notes state that if, however, § 30-1-12(B) does not list the subject weapon, the jury should receive the "alternative" instruction that the second pair of brackets delineates. NMRA, Crim. UJI 14-322 cmt. n.5. Thus, if the defendant is charged, for example, with aggravated battery with a firearm, the jury must decide whether the defendant "touched or applied force to [the victim] . . . with a [firearm]"; alternatively, if § 30-1-12(B) does not list the subject weapon, the jury must decide whether the defendant "used" the weapon. NMRA, Crim. UJI 14-322. Folse, therefore, is technically correct that aggravated battery with a firearm does not require a jury instruction on the defendant's "use" of the firearm.

This conclusion, however, is immaterial, because, in this context, touching or applying force to someone "with" a firearm is the same as "using" a firearm. As the Supreme Court recently noted in Voisine v. United States, 136 S. Ct. 2272 (2016), "[d]ictionaries consistently define the noun 'use' to mean the 'act of employing' something." 136 S. Ct. at 2278 (citing Webster's New International Dictionary 2806 (2d ed. 1954); Random House Dictionary of the English Language 2097 (2d ed. 1987); Black's Law Dictionary 1541 (6th ed. 1990)). The Tenth Circuit, relying on this interpretation, has construed "use" in New Mexico's uniform jury instruction on aggravated assault with a deadly weapon as requiring that the defendant "employ the deadly weapon in committing the assault" and not "merely possess[] a deadly weapon." United States v. Maldonado-Palma, 839 F.3d at 1250. Similarly, the only way to touch or apply force "with" a deadly weapon, as the aggravated-battery instruction requires, NMRA, Crim. UJI 14-322, is to employ a deadly weapon in committing the battery. Folse, however, contends -- without analysis -- that "'with' . . . [is] '[a] word denoting a relation of proximity, contiguity, or association.'" Objections at 12 (citing Black's Law Dictionary

(6th ed. 1990)). While this definition is accurate, it is meaningless in a vacuum, because it begs the question what is related and how. Here, the prepositional phrase "with a [deadly weapon]" modifies the verbs "touched" and "applied," with the preposition denoting a causal relationship between the deadly weapon on the one hand and the physical contact on the other. Folse's apparent suggestion that the term "with" denotes a deadly weapon's mere proximity to, rather than its use in, a battery, contravenes this plain reading.

Folse, in a further attempt to distinguish aggravated-assault cases, contends that those cases "focus on the 'threat' of physical force in determining that the statutes at issue necessitated '*violent* force . . . .'" Objections at 8 (emphasis in original). The focus on threats of force, however, is not a distinguishing factor, because any offense may qualify as a crime of violence under § 4B1.2 if it "has as an element the . . . threatened use of physical force . . . ." U.S.S.G. § 4B1.2(a)(1). Nevertheless, Folse avers that, because "it is possible to commit battery without threatening a person," i.e., without "'causing the person to believe the person is about to be battered,'" the aggravated-assault cases' "logic . . . does not translate to New Mexico aggravated battery with a deadly weapon." Objections at 10 (quoting State v. Branch, 2016-NMCA-071, ¶ 27, 387 P.3d at 258). This analysis is unavailing for two primary reasons.

First, the Tenth Circuit's threat analysis in its aggravated-assault cases is not limited to overt threats of violence that the victims subjectively apprehend. In United States v. Ramon Silva, for example, the Tenth Circuit held that aggravated assault with a deadly weapon carries two threats of violence: (i) "[t]he conduct 'could always lead to . . . substantial and violent contact,'" 608 F.3d at 672 (quoting United States v. Treto-Martinez, 421 F.3d at 1160); and (ii) "the conduct 'could at least put the victim on notice of the possibility that the weapon will be used more harshly in the future,'" United States v. Ramon Silva, 608 F.3d at 672 (quoting United States v. Dominguez, 479 F.3d 345,

349 (5th Cir. 2007)). Thus, the Tenth Circuit found threats in (i) the conduct's inherent propensity to lead to violence; and (ii) the victim's subjective apprehension of additional violence. See United States v. Ramon Silva, 608 F.3d at 672. Here, although Folse may be correct that aggravated battery does not necessarily have as an element the subjective-apprehension threat, because it is possible to commit a battery without the victim apprehending any violence, see Objections at 10, it does not follow that aggravated-assault cases are inapposite. To the contrary, those cases have persuasive force, because they hold that the use of a deadly weapon in the commission of an aggravated assault inherently risks leading to physical violence. See United States v. Maldonado-Palma, 839 F.3d at 1250 ("Employing a weapon that is capable of producing death or great bodily harm or inflicting dangerous wounds in an assault necessarily threatens the use of physical force[.]"); States v. Ramon Silva, 608 F.3d at 672 ("Purposefully threatening or engaging in menacing conduct toward a victim, with a weapon capable of causing death or great bodily harm, threatens the use of 'force capable of causing physical pain or injury . . . .'")(citation omitted).

Second, Folse's attempt at distinguishing aggravated-assault cases is belied by those cases' reliance on aggravated-battery jurisprudence as persuasive authority. In United States v. Ramon Silva, for example, the Tenth Circuit cited United States v. Treto-Martinez -- in which it concluded that Kansas' aggravated-battery-with-a-deadly-weapon offense qualifies as a "crime of violence" -- for the proposition that employing a deadly weapon in the commission of an assault inherently risks leading to more "'substantial and violent contact . . . .'" United States v. Ramon Silva, 608 F.3d at 672 (quoting United States v. Treto-Martinez, 421 F.3d at 1160). In addition, the Tenth Circuit cited United States v. Dominguez -- a Fifth Circuit aggravated-battery-with-a-deadly-weapon case which followed United States v. Treto-Martinez -- for the idea that using a deadly weapon in an assault could "'put the victim on notice of the possibility that the weapon will be used more harshly in the

future[.]'" United States v. Ramon Silva, 608 F.3d at 672 (quoting United States v. Dominguez, 479 F.3d at 349). Though the Tenth Circuit "recognize[d] that *Treto-Martinez* and *Dominguez* analyzed aggravated battery statutes that criminalized intentional physical contact with a deadly weapon," it nevertheless "consider[ed] these decisions persuasive," because they turn on threats of violence that stem from the use of a deadly weapon in the offense. United States v. Ramon Silva, 608 F.3d at 672. The same logic counsels the Court's reliance on aggravated-assault jurisprudence.

Folse's final argument is that aggravated battery with a deadly weapon is not a "crime of violence," because the offense does not necessarily entail "death or bodily harm." Objections at 5-6. Folse explains his argument as follows: under N.M. Stat. Ann. § 30-3-5(C), aggravated battery with a deadly weapon "is a distinct crime from" aggravated battery with great bodily harm, meaning that, by implication, it does not have as an element the threat of "death or great bodily harm." Objections at 7. Nor, according to Folse, does the use of a firearm inherently risk "death or great bodily harm." Objections at 7. Folse observes that a "deadly weapon" is defined as "'any firearm, whether loaded or unloaded; or any weapon which is capable of producing death or great bodily harm . . . .'" Objections at 5 (emphases omitted)(quoting N.M. Stat. Ann. § 30-1-12(B)). Folse interprets the semicolon separating "any firearm" from other weapons "capable of producing death or great bodily harm" as signifying that "firearms . . . are not defined by Section 30-1-12(B) as *per se* 'capable of producing death or great bodily harm.'" Objections at 6. Thus, Folse posits, neither the statutory offense nor the definition of "deadly weapon" requires the use, or threatened use, of violent physical force. Objections at 6.

This line of analysis misapprehends the quantum of physical force necessary to satisfy § 4B1.2's elements clause. Force capable of producing "death or great bodily harm," Objections at 5-6, is not the standard; rather, "physical force" under § 4B1.2 means "violent force, or force capable

of causing physical pain or injury to another person." United States v. Harris, 844 F.3d at 1266. An aggravated battery with a deadly weapon that satisfies § 4B1.2's "physical force" standard may fall short of inflicting "death or great bodily harm"; all it requires is "violent force, or force capable of causing physical pain or injury to another person." United States v. Harris, 844 F.3d at 1266. The "physical force" standard is met when analyzing the elements that Folse concedes applies to his conviction: "(1) the unlawful touching or application of force to the person of another; (2) with intent to injure a person; (3) with a firearm (whether loaded or unloaded)." Objections at 7. See N.M. Stat. Ann. § 30-3-5(C). The unlawful touching or application of force with a firearm -- whether loaded or unloaded -- is "violent force, or force capable of causing physical pain or injury to another person." See United States v. Treto-Martinez, 421 F.3d at 1159 ("Physical contact with a deadly weapon . . . will always constitute either actual or threatened use of physical force.").

Further, the term, "deadly weapon," itself suggests that a deadly weapon's use entails "death or great bodily harm." See Black's Law Dictionary, 1731 (9th Ed. 2009)(Defining a deadly weapon as: "[a]ny firearm or other device . . . from the manner in which it is used or is intended to be used, is calculated or likely to produce death."). In listing weapons that are capable of "producing death or great bodily harm," the New Mexico Legislature has also indicated that firearms would be weapons that necessarily entail "death or great bodily harm," because a firearm (whether loaded or unloaded) is as deadly, if not more deadly, as any of the items listed: "daggers, brass knuckles, switchblade knives . . . swordcanes, any kind of sharp pointed canes, also slingshots, slung shots, [and] bludgeons." N.M. Stat. Ann. § 30-1-12(B). Given this context and the foregoing analysis, the Court concludes that Folse's prior aggravated battery with a deadly weapon conviction is a "crime of violence" under U.S.S.G. § 4B1.2(a).

C. FOLSE'S PRIOR POSSESSION OF MARIJUANA WITH INTENT TO DISTRIBUTE CONVICTION IS A "CONTROLLED SUBSTANCE OFFENSE" UNDER U.S.S.G. § 4B1.2(b).

Folse contends that, for policy reasons, the Court should conclude that Folse's possession of marijuana with intent to distribute conviction is not a "controlled substance offense" under U.S.S.G. § 4B1.2(b). Objections at 13. Folse concedes that "technically this offense of conviction meets the definition of 'controlled substance offense." Objections at 14. Folse, nevertheless, argues that the Court should disregard this controlling definition, because; (i) his conviction is the "lowest degree of felony" in New Mexico and is treated the same as simple marijuana possession; (ii) marijuana is now recreationally legal in nine states and the District of Columbia; (iii) medical marijuana is now legal in New Mexico; and (iv) Folse suffers from a medical condition that would qualify him for lawful medical marijuana use. See Objections at 14-15.

Under U.S.S.G. § 4B1.2(b), a "controlled substance offense" is "an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits . . . the possession of a controlled substance (or a counterfeit substance) with intent to . . . distribute." U.S.S.G. § 4B1.2(b). Folse pled guilty to possession of marijuana with intent to distribute. See Objections at 13; N.M. Stat. Ann. § 30-31-22(A)(1). For a first offense under N.M. Stat. Ann. § 30-31-22(A)(1), Folse was subject to 18 months imprisonment. See N.M. Stat. Ann. § 30-31-22(A)(1); N.M. Stat. Ann. § 31-18-15(A)(13); Objections at 13-14. Marijuana is classified as a "controlled substance." U.S.C. §§ 802(6), 812(c)(10). Folse's conviction, thus, falls under the ambit of a "controlled substance offense." U.S.S.G. § 4B1.2(b).

The Court declines to ignore the Sentencing Guideline's clear command. Although state marijuana laws have undergone a sea change in the past twenty years, see Melanie Reed, The Quagmire that Nobody in the Federal Government Wants to Talk About: Marijuana, 44 N.M. L.

Rev. 169, 171-72 (2014)(Describing state marijuana laws that have changed in the past twenty years), federal law, including the Sentencing guidelines, remains unchanged. Folse argues that the Court's prior opinions in United States v. Rodriguez, 147 F. Supp. 3d 1278, 1281 (D.N.M. 2015)(Browning, J.), and United States v. Burciaga-Duarte, No. 14-0592, 2015 U.S. Dist. LEXIS 80950, at *1 (D.N.M. June 9, 2015)(Browning, J.), demonstrate that marijuana convictions should be treated differently than narcotic drug convictions, because marijuana offenders do not show the same "danger to the community." Objections at 15 (citing United States v. Rodriguez, 147 F. Supp. 3d at 1281). Those cases diverge from the present case, because neither implicated U.S.S.G. § 4B1.2(b)'s clear definition of "controlled substance offense." United States v. Rodriguez, 147 F. Supp. 3d at 1290; United States v. Burciaga-Duarte, No. 14-0592, U.S. Dist. LEXIS 80950, at *16, *24-*35. Although United States v. Rodriguez involved a defendant's possession of marijuana with intent to distribute, that opinion involved a detention hearing and not a sentencing. See United States v. Rodriguez, 147 F. Supp. 3d, at 1281. The Court's main focus there was to determine whether that defendant was a flight risk or a danger to the community in the pretrial detention context. See 147 F. Supp. 3d, at 1281. The Court noted that, with certain crimes, a presumption arises that the defendant is a flight risk and a danger to the community -- including possession of marijuana with intent to distribute. See 147 F. Supp. 3d at 1290. The Court also noted, however, that the United States inconsistently enforces the federal marijuana laws. See 147 F. Supp. 3d at 1288 ("While three people were convicted in the District of Colorado of such [marijuana] offenses in 2014, 352 individuals were convicted in the District of New Mexico for those crimes."). Based on several factors, including the "pure marijuana" nature of the crime and Rodriguez' significant community ties, the Court concluded that Rodriguez was not a danger to the community, but that he presented a flight risk -- the Court, however, determined it could mitigate that risk. See 147 F. Supp. 3d at 1295-

98. In coming to that conclusion, the Court considered the Sentencing Guidelines, specifically 18 U.S.C. § 3553(a)'s factors, and it determined that "[t]he Executive Branch's decision to not enforce federal marijuana laws in certain states affects a number of factors set forth in § 3553(a)." 147 F. Supp. 3d at 1292. Among other things, the Executive Branch's policy "puts downward pressure on the Court with regard to each of these factors in pure marijuana cases," and the Court "cannot soundly conclude that imposing a Guidelines sentence on a poor Hispanic individual caught distributing marijuana in New Mexico is 'just punishment' when wealthier Caucasians in states like Colorado and Washington receive no punishment whatsoever for the same offense." 147 F. Supp. 3d at 1292. In United States v. Burciaga-Duarte, the Court concluded, for similar reasons, that it would sentence a defendant in the guideline's lower range in a marijuana-only offense, because of the Executive Branch's selective enforcement of marijuana laws. See, No. 14-0592, U.S. Dist. Lexis 80950, at *24-*35.

The Court does not run afoul of its earlier decisions, because the issue before the Court now diverges from the issues in United States v. Burciaga-Duarte, U.S. Dist. Lexis 80950, at *24, and United States v. Rodriguez, 147 F. Supp. 3d at 1292. Neither decision grappled with U.S.S.G. § 4B1.2(b). In sentencing a defendant or determining his flight risk, the Court has a degree of discretion, but in calculating the guideline range, the Court does not. See United States v. Sim, 556 F. App'x 726, 730 (10th Cir. Feb. 28 2014)(unpublished)("[The district court] was correct insofar as it said that § 4A1.2(e) permits no discretion in *calculating* a Guidelines sentence.")(emphasis in original); United States v. Keiffer, 681 F.3d 1143, 1165 (10 Cir. 2012). Although 18 U.S.C. § 3553(a)'s factors may ultimately bear on the Defendant's overall sentence, that question is not the one before the Court today. The Court, accordingly, concludes that Folse's prior possession of marijuana with intent to distribute conviction was a controlled substance offense.

In sum, the Court has signaled that it is not likely to detain, pre-trial, a United States citizen who is charged only with a marijuana-only drug crime. If the Department of Justice is not going to go after wealthy Anglo-owned marijuana establishments in Colorado and other states, the Court is not likely to defer to the United States' requests in New Mexico that it should detain Hispanic defendants charged only with marijuana-only drug crimes. Similarly, if a defendants' criminal background includes marijuana-only possession, or marijuana-only drug convictions or arrests, the Court is not likely to give them much, if any, weight, in deciding whether to detain that defendant before trial. Similarly, at the sentencing of a marijuana-only crime, the Court is likely to vary downward as much as possible. Those are areas in which the Court has some discretion. In calculating the correct guideline range -- as opposed to deciding what to do with the guideline range -- the Court has to calculate the guideline range correctly. Folse's policy, Kimbrough v. United States, and § 3553(a) factors are not appropriately considered here, but are appropriate later at the sentencing phase when departures, variances, and § 3553 factors are typically argued and considered.

II. FOLSE'S LETTER TO "CREEPER" OBSTRUCTS OR IMPEDES THE ADMINISTRATION OF JUSTICE UNDER U.S.S.G. § 3C1.1.

Under U.S.S.G. § 3C1.1, a defendant's offense level must be enhanced by 2 levels if:

> (1) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and
>
> (2) the obstructive conduct related to (A) the defendant's offense of conviction and any relevant conduct; or (B) a closely related offense.

U.S.S.G. § 3C1.1. The Guidelines' commentary gives the following relevant examples of obstruction of justice:

> . . . .

> (A) threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so.
>
> . . . .
>
> (K) threatening the victim of the offense in an attempt to prevent the victim from reporting the conduct constituting the offense of conviction.

U.S.S.G. § 3C1.1 Commentary 4(A), (K). See United States v. Fleming, 667 F.3d 1098, 1109 (10th Cir. 2011)("Section 3C1.1 expressly applies to attempts by defendants to directly or *indirectly* threaten, intimidate, or influence a potential witness.")(emphasis in original). The enhancement applies even for attempted obstruction of justice if the United States demonstrates that the defendant intended to obstruct justice and that the defendant committed an act that constitutes a substantial step toward the obstruction of justice. See United States v. Fleming, 667 F.3d 1098, 1107 (10th Cir. 2011). In Folse's letter to Creeper, Folse writes:

> I will be released on all charges if some Fool name [sic] [Estrada] does not show up to testify against me[.] . . . [P]lease rap to him for me, tell him to go M.I.A. "Chill out for a while"[;] I get set free n[e]xt week or get life in prison based on [Estrada's] testimony.

Sentencing Memorandum at 1, filed April 15, 2016 (Doc. 159-11)("Creeper Letter"). Folse argues that this language does not "threaten, intimidate or unlawfully influence the witness [Estrada], nor does he enlist 'Creeper' to do so. . . . At most, this language can be interpreted as asking an intermediary to suggest to a witness that the witness not appear in court." Objections at 22. Folse also reasons that this writing could be "motivated by a number of things," including a concern for the testimony's truthfulness, and, thus, the writing would not trigger the enhancement. Objections at 22.

The Court disagrees with Folse's arguments. The Tenth Circuit's conclusion in United States v. Fleming, 667 F.3d at 1110-11, demonstrates why Folse's arguments are misplaced. In United States v. Fleming, the defendant, after learning that a woman named Ms. Scott had been subpoenaed

to testify against him, instructed a woman named Michelle: "[*T*]*ell her not to be talking to anybody about this shit*. . . . I'm afraid they might use her, try to use her against me, or threaten her with a, putting a case on her, to testify against me, cause these are some dirty people man." United States v. Fleming, 667 F.3d at 1110 (emphasis in original). Noting that, under U.S.S.G. § 3C1.1, a defendant's offense level can be enhanced 2 levels for attempted obstruction of justice if the Defendant commits an act that is a substantial step toward obstruction of justice, the Tenth Circuit concluded that the defendant's request that Michelle tell Ms. Scott "'not to be talking to anybody about this shit' was an attempt to threaten or influence Ms. Scott and satisfied the substantial step requirement." 667 F.3d at 1111. Given the entirety of the letter, Folse's request to Creeper that he tell Estrada. to "go M.I.A. 'Chill out for a while'" conveys the same message that the defendant's message communicated in United States v. Flemming. Creeper Letter at 1. See 667 F.3d at 1111. Folse's letter, accordingly, amounts to at least an attempt to threaten or influence Estrada.

Folse, nevertheless, argues that the obstruction of justice enhancement is applicable only in cases of "extreme conduct." Objections at 20. For this expansive proposition, Folse cites the Court's conclusions in three cases. First, he cites the Court's determination in United States v. Yeselew that the obstruction of justice enhancement applied where the defendant "beat the only witness . . . threatened to kill [the witness] . . . and tried to transfer blame for the murder to the witness." United States v. Yeselew, 2010 WL 3834418, at *11 (D.N.M. Aug. 5, 2010)(Browning, J.). See Objections at 20-21. Second he cites the Court's conclusion in United States v. Roybal that the enhancement applied, because the defendant "tracked down one of the government's confidential sources," told the source that the defendant was "watching the source's house, knew when their kids came home," and he would "make [his] family pay." United States v. Roybal, 188 F. Supp. 1163, 1212-13 (D.N.M. 2016)(Browning, J.). See Objections at 20-21. Folse

contrasts those cases with United States v. Tilga, where the Court concluded that U.S.S.G. § 3C1.1 did not apply. See United States v. Tilga, 824 F. Supp. 2d 1295, 1338 (D.N.M. 2011)(Browning, J.). In that case, the defendant told a witness that, if anyone asked about where he had obtained his property, to lie about it. See United States v. Tilga, 824 F. Supp. at 1337. Subsequently, the IRS began an investigation into the defendant's property, and the defendant told the witness "he was going to pay." Objections at 22. United States v. Tilga, 824 F. Supp. at 1337. The United States, however, conceded that the "[witness] was going to pay" statement was an "unpremeditated emotional response" that lacked the intent required for obstruction of justice and the Court agreed. United States v. Tilga, 824 F. Supp. at 1338.

The conduct in United States v. Yeselew and United States v. Roybal assuredly amounts to obstruction under U.S.S.G. § 3C1.1, but Tenth Circuit precedent indicates that far less extreme conduct can be sufficient to meet U.S.S.G. § 3C1.1's standard. See United States v. Fleming, 667 F.3d at 1111. Folse's "extreme conduct" argument is, accordingly, misplaced. Folse's circumstances also sufficiently diverge from the unpremeditated emotional response in United States v. Tilga, to make the Court's ruling that the defendant there lacked the requisite intent inapposite. Here, in contrast, Folse wrote out his threat, indicating a much higher level of premeditation. Further, in United States v. Tilga, the threatened witness's personal knowledge of wrongdoing was so slight that it was "unlikely that the false statements . . . would reasonably interfere with the investigation or thwart prosecution." 824 F. Supp. 2d at 1338. In contrast, here, Folse wanted Estrada. to be "M.I.A." at trial, because Folse believed that Estrada's testimony would be dispositive. Creeper Letter at 1. Folse's belief that Estrada was an essential witness further demonstrates that Folse designed his writing with the intent to obstruct justice. Given the letter's context and its contents, the Court concludes that a 2-level enhancement will apply.

III. FOLSE'S FLIGHT FROM LAW ENFORCEMENT CREATED A SUBSTANTIAL RISK OF DEATH OR SERIOUS INJURY UNDER U.S.S.G. § 3C1.2.

Folse's driving and corresponding conduct while fleeing law enforcement in both the silver Saturn and Kia Sorrento created a substantial risk of death or serious injury. Under U.S.S.G. § 3C1.2, if the defendant "recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer," the Court must enhance the Defendant's offense level by 2. U.S.S.G. § 3C1.2. "Reckless" is defined as "a situation in which the defendant was aware of the risk created by his conduct and the risk was of such a nature and degree that to disregard that risk constituted a gross deviation from the standard of care that a reasonable person would exercise in such a situation." United States v. Porter, 643 F. App'x 758, 759 (10th Cir. March 29, 2016)(unpublished). The standard of care under the guidelines "is that of the reasonable person, not the reasonable fleeing criminal suspect." United States v. Conley, 131 F.3d 1387, 1389 (10th Cir. 1997).

Folse's actions while driving both cars were reckless and put others at substantial risk. First, Folse drove a vehicle -- the silver Saturn -- that had a standard transmission, but told the passengers "he didn't know how to drive a standard." Transcript of Trial Proceedings at 241:14-15 ("Trial Tr."). In the Saturn, Folse drove over the speed limit, ran a stop sign and a red light, veered into oncoming traffic, and threw a gun out the window. See Trial Tr. at 242:17-18; id. at 242:23-24; id. at 243:7-9; id. at 243:15-16; id. at 243:21-25; id. at 345:19-20. He eventually lost control of the Saturn and rolled it. See Trial Tr. at 245:22-246:3. Folse then took off running and stole a Kia Sorrento. See Trial Tr. 246:20; id. at 353:20. The police pursued. See Trial Tr. at 350:1-2. In the Kia, he wove in and out of other cars, "going across three lanes at a time," during lunch hour traffic, and may have reached sixty miles per hour in a forty mile per hour zone. Trial Tr. at 440:5-8; id. at 440:12-14; id. at 441:10-23. These actions grossly deviated from the standard of care. Folse put

other drivers and pedestrians at substantial risk when he threw the gun out the window -- because of the possibility of accidental discharge -- and he put his passengers, other drivers, and pedestrians at substantial risk of injury when he wove in and out of traffic at high speed, and blew threw a stop sign and a red light. See United States v. Porter, 643 F. App'x at 759 (Concluding that a U.S.S.G. § 3C1.2 enhancement applied to a defendant who, among other things, led police officers on a short car pursuit, "commit[ed] several traffic violations . . . ultimately crash[ed] into a residential garage" and "dropped a pistol on the ground" as the police pursued); United States v. Chandler, 12 F.3d 1427, 1433-34 (7th Cir. 1994)(Ruling that a reckless endangerment enhancement applied where police chased a defendant at dusk through residential neighborhoods at speeds between thirty-five and fifty miles per hours, because of possible injury to residents).

Folse contends that the enhancement should not apply, because he did not "aim[] either of the vehicles at anyone, or even came close to colliding with anyone." Objections at 19. Those facts are immaterial, because intent to harm or completed harm are not required under the guidelines. See U.S.S.G. § 3C1.2. Rather, U.S.S.G. § 3C1.2 requires only a substantial risk of serious bodily injury or death and awareness of that substantial risk. See U.S.S.G. § 3C1.2; United States v. Porter, 643 F. App'x at 759. The Court concludes that the required substantial risk existed here, and Folse was aware of that risk. It will, accordingly, apply a 2-level enhancement.

IT IS ORDERED that Defendant Kevin Folse's Formal Objections to Presentence Report, filed May 15, 2017 (Doc. 223), are overruled.

UNITED STATES DISTRICT JUDGE

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