

IN THE SUPREME COURT OF THE UNITED STATES

CARLOS OREGON-MENDOZA,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether a general intent offense may qualify as a “crime of violence”—as the First, Ninth, Tenth, and Eleventh Circuits have held—or whether it lacks an element of the “use of force *against* another”—as the Second, Third, Fourth, Fifth, Sixth, Seventh, and Eighth Circuits have held.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
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Petitioner Carlos Oregon-Mendoza respectfully prays that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on September 29, 2017.

OPINION BELOW

The Ninth Circuit in a memorandum decision affirmed Mr. Oregon's conviction and sentence for illegal reentry in violation of 8 U.S.C. § 1326. *See United States v. Oregon-Mendoza*, 697 F. App'x 893 (9th Cir. 2017) (attached here as Appendix A). The Ninth Circuit denied Mr. Oregon's petition for rehearing en banc on February 1, 2018. *See United States v. Oregon-Mendoza*, 2018 U.S. App. LEXIS 2609 (9th Cir. 2018) (attached here as Appendix B).

JURISDICTION

On September 29, 2017, the Ninth Circuit affirmed Mr. Oregon's sentence and conviction. *See Appendix A*. On February 1, 2018, the court denied rehearing. *See Appendix B*. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE¹

Mr. Oregon-Mendoza is a citizen of Mexico who first came to the United States at the age of three. He attended grade school, graduated from high school, and learned to speak fluent English in the United States. And he remained here until his deportation in September 2010 after suffering a conviction for assault with a deadly weapon in 2009. Attempting to return to the United States in 2014, Mr. Oregon was arrested by Border Patrol agents near the border, and he was charged with illegal reentry under 8 U.S.C. § 1326.

Mr. Oregon challenged the validity of his underlying deportation as an aggravated felon under 8 U.S.C. § 1326(d), arguing that his prior conviction for assault with a deadly weapon under California Penal Code § 245(a)(1) was not a “crime of violence” within the meaning of the aggravated felony definition in 8 U.S.C. § 1101(a)(43)(F). That motion was denied, and he was convicted at a bench trial of illegal reentry guilty to illegal reentry. Mr. Oregon was sentenced to 64 months custody for this conviction.

On appeal to the Ninth Circuit, Mr. Oregon pressed his claim that California robbery was not categorically a crime of violence. Specifically, he maintained that the Ninth Circuit’s prior decision in *United States v. Grajeda*, 581 F.3d 1186 (9th Cir. 2009), which had found § 245 to be a categorical crime of violence, was no longer good law because its analysis was inconsistent with this Court’s subsequent decision in *Descamps v. United States*, 133 S. Ct. 2276 (2013), as well as California decisions upholding § 245 convictions for conduct which lacked an intent to use force *against* another.

¹ All the facts presented here appear in the record below.

Relying on *Grejada*, the Ninth Circuit affirmed in an unpublished memorandum on September 29, 2017, without further explanation. See Appendix A. Mr. Oregon filed a petition for rehearing en banc, which the Ninth Circuit denied. See Appendix B. This petition follows.

SUMMARY OF THE ARGUMENT

In *Leocal v. Ashcroft*, 543 U.S. 1 (2004), this Court explained that an offense with a mens rea of negligence did not have as an element the “use, attempted use, or threatened use of physical force against the person or property of another” and thus could not be a crime of violence under 18 U.S.C. § 16; in *United States v. Castleman*, 134 S. Ct. 1405 (2014), the Court suggested the same is also true for recklessness. But because one third of states define their assault and battery statutes—not in terms of “negligence” and “recklessness”—but in terms of whether they are “general intent” or “specific intent” crimes, circuit courts have sharply disagreed over how to apply *Leocal* to such offenses. This Court should follow the approach taken by the Second, Third, Fourth, Fifth, Sixth, Seventh, and Eighth Circuits, which holds that a crime of violence requires an *intent* to use physical force *against* another, and not simply negligence or recklessness as to the consequences of one’s actions. Adopting this approach is consistent with *Leocal* and will prevent circuit courts from taking conflicting positions that lead to erratic and inconsistent outcomes. Thus, Mr. Oregon respectfully requests that the Court grant his petition for certiorari.

REASONS FOR GRANTING THE PETITION

I.

CIRCUIT COURTS ARE CURRENTLY SPLIT ON THE QUESTION OF WHETHER A GENERAL INTENT CRIME CONTAINS THE NECESSARY MENS REA TO BE A CRIME OF VIOLENCE.

A. One Third of States Still Define Mens Rea in Terms of “Specific Intent” or “General Intent,” Which Leads to Inconsistent Results When Applying this Court’s Crime of Violence Precedent.

At common law, crimes generally were classified as requiring either “general intent” or “specific intent.” *See* Black’s Law Dictionary (10th ed. 2014).² But this “venerable distinction . . . has been the source of a good deal of confusion” in light of various interpretations of these terms. *United States v. Bailey*, 444 U.S. 394, 403 (1980). *See also* Fed. Crim. Jury Instr. 7th Cir. 4.12 (2013 ed.) (“Distinctions between ‘specific intent’ and ‘general intent’ more than likely confuse rather than enlighten juries.”); Joshua Dressler, *Understanding Criminal Law* § 10.06 (3d ed. 2001) (“The terms ‘specific intent’ and ‘general intent’ are the bane of criminal law students and lawyers”) (internal quotation marks omitted). Accordingly, in recent decades the Model Penal Code, federal courts, and many states have gravitated “away from the traditional dichotomy of intent” and towards a more modern “hierarchy of culpable states of mind,” which commonly include “purpose, knowledge, recklessness, and negligence.” *Id.* at 403-04.

It is these modern mens rea terms that the Court has employed in its crime of violence opinions. In *Leocal v. Ashcroft*, the Court held that a DUI statute with a mens rea of

² Black’s Law Dictionary defines “general intent” as “[t]he intent to perform an act even though the actor does not desire the consequences that result,” explaining that it usually “takes the form of recklessness (involving actual awareness of a risk and the culpable taking of that risk) or negligence (involving blameworthy inadvertence).” *Id.* By contrast, “specific intent” is “[t]intent to accomplish the precise criminal act that one is later charged with.” *Id.*

“negligence” could not satisfy the crime of violence definition appearing at 18 U.S.C. § 16 because that definition “requir[es] a higher mens rea than the merely accidental or negligent conduct involved in a DUI offense.” 543 U.S. at 11. Then in *United States v. Castleman*, the Court affirmed *Leocal*’s holding that the “use” of force “must entail ‘a higher degree of intent than negligent or merely accidental conduct’” and went on to note with approval that “the Courts of Appeals have almost uniformly held that recklessness is not sufficient” for a crime of violence. 134 S. Ct. at 1414 n.8 & 1415 (quoting *Leocal*, 543 U.S. at 9). Thus, when deciding whether an offense qualifies as a crime of violence, this Court has always employed modern terminology to find that crimes of negligence and recklessness do not fit this definition.

But problems arise when circuit courts apply this Court’s precedent using modern terminology to state offenses that are still defined in terms of “general intent” and “specific intent.” For instance, at least 17 states have assault or battery statutes where the mens rea is defined in terms of general or specific intent.³ Thus, *Leocal* and *Castleman*—which speak in

³ See *Mill v. State*, 585 P.2d 546, 550 (Ala. 1978) (referring to “the general intent crime of assault with a dangerous weapon”); *People v. Williams*, 29 P.3d 197, 203 (Cal. 2001) (stating that assault is “a general intent crime”); *State v. Bitting*, 291 A.2d 240, 243 (Conn. 1971) (stating that “only general intent need be proven” for the assault statute); *V.M. v. State*, 729 So. 2d 428, 429 (Fla. Dist. Ct. App. 1999) (stating that battery requires general intent, rather than specific intent); *Maynor v. State*, 570 S.E. 2d 428, 431 (Ga. 2002) (finding that aggravated assault with a deadly weapon “does not require a specific criminal intent; rather, it requires only a general criminal intent”); *People v. Rodgers*, 780 N.E.2d 352, 356 (Ill. Ct. App. 2002) (“Aggravated battery is a crime of general, not specific, intent.”) (internal quotations and citation omitted); *Henderson v. State*, 534 N.E.2d 1105, 1108 (Ind. 1989); *State v. Redmon*, 244 N.W.2d 792, 797 (Iowa 1976) (“[A]ssault and battery is properly classified as a ‘general intent’ crime”); *State v. Spicer*, 42 P.3d 742, 748 (Kan. Ct. App. 2002) (stating that aggravated battery requires only general intent); *State v. Hernandez*, 686 So. 2d 92, 94 (La. Ct. App. 1996) (“Simple battery is a general intent offense.”); *Wieland v. State*, 643 A.2d 446, 459 (Md. Ct. App. 1994) (stating that assault and battery are “general intent crime[s]”); *Com. v. Deschaine*, 932 N.E.2d 854, 860 (Mass. Ct. App. 2010) (holding that “assault and battery is considered a typical general intent crime not requiring a specific intent to injure”); *State v. Fleck*, 810 N.W.2d 303, 309 (Minn. 2012) (“We conclude that assault-harm is a general-intent crime.”); *State*

terms of reckless and negligent mens rea—are not easily applied to the one third of states that still define potential crimes of violence in terms of general or specific intent. Because of this, federal courts have taken divergent and often contradictory positions on the issue of whether a general intent crime carries the necessary mens rea to be a crime of violence.

This is precisely what happened here. The Supreme Court of California has clarified that “assault” under Cal. Penal Code § 245 is “a general intent crime.” *People v. Williams*, 29 P.3d 197, 203 (Cal. 2001). It has further clarified that a defendant guilty of assault “must be aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct.” *Id.* However, a defendant “need not be *subjectively aware* of the risk that a battery might occur.” *Id.* Rather, a defendant who “honestly believes” that he is not committing a battery is still culpable if “a *reasonable person*” would find that his act was likely to result in a battery. *Id.* n.3 (emphasis added). Use of this “reasonable person” standard, rather than a defendant’s “subjective[] aware[ness],” means that the mens rea for § 245 most closely aligns with current definitions of negligence or something lower than recklessness. See *J.D.B. v. N. Carolina*, 131 S. Ct. 2394, 2404 (U.S. 2011) (noting that negligence “turns on what an *objectively reasonable person* would do in the circumstances”) (emphasis added).⁴

v. Gonzalez, 107 P.3d 547, 553 (N.M. 2005) (stating that assault is a general intent crime); *James v. State*, 599 P.2d 411, 412 (Okla. 1979) (stating that “[s]pecific intent is not an element of aggravated assault and battery”); *State v. Barrientos*, 444 N.W.2d 374, 376 (S.D. 1989) (stating that aggravated assault “is a general intent crime”); *Cox v. State*, 829 P.2d 1183, 1185 (Wyo. 1992) (acknowledging that “aggravated assault under § 6-2-502(a)(iii) is not a specific intent crime”).

⁴ Indeed, the Ninth Circuit’s own en banc holding in *Ceron v. Holder*, 747 F.3d 773 (9th Cir. 2014) (en banc), suggests that § 245 carries a mens rea of less than recklessness. In *Ceron*, the Ninth Circuit considered whether aggravated assault under § 245 categorically qualified as a “crime involving moral turpitude” in the immigration context. Finding “no obvious answer” within federal and immigration precedent, it compared the mental state of § 245 (which required “knowledge of

But because California has described § 245 in terms of “general intent,” rather than “negligence,” the Ninth Circuit has not directly applied *Leocal* and instead held that the statute is categorically a crime of violence. In Mr. Oregon’s case, for instance, the Ninth Circuit relied on its past precedent regarding general intent crimes to find that California assault—which requires no subjective awareness of the risk that a battery may occur—is nevertheless a crime of violence. See Appendix A (citing *United States v. Grajeda*, 581 F.3d 1186 (9th Cir. 2009)); see also *United States v. Laurico-Yeno*, 590 F.3d 818, 822 n.4 (9th Cir. 2010) (“A general intent crime can satisfy the generic definition of a ‘crime of violence.’”). But only several years earlier, the Ninth Circuit relied on *Leocal* to find that Arizona assault—which requires recklessness (i.e., a conscious disregard of a substantial and unjustifiable risk)—is *not* a “crime of violence.” See *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1123 (9th Cir. 2006) (en banc). In other words, the Ninth Circuit holds that an offense involving *no* awareness of resulting force *is* a crime of violence while an offense involving a *conscious disregard* of resulting force is *not* a crime of violence. This absurd result demonstrates the urgent need for this Court to clarify its crime of violence jurisprudence in the context of general and specific intent crimes.

the circumstances” without any “subjective appreciation of the risk”) to that of an Illinois aggravated assault statute the Board of Immigration Appeals had previously found to involve moral turpitude (which required recklessness and the “conscious[] disregard [of] a substantial and unjustifiable risk”). *Id.* at 784 (citing *Matter of Medina*, 15 I&N Dec. 611 (BIA 1976) (emphasis in original)). But because the Ninth Circuit found that even *Medina* did not “instruct[] us definitively” on whether § 245 would involve moral turpitude, it remanded to the Board to consider the issue in the first instance. *Id.* Had *Ceron* had found that § 245 actually required an intentional or reckless use of force, it would have simply applied *Medina* to find that the offense involved moral turpitude, instead of remanding.

B. Circuit Courts Are Split on Whether “General Intent” Crimes May Qualify as a “Crime of Violence.”

A review of circuit court precedent reveals sharp disagreement over whether general intent crimes contain the necessary mens rea to be a crime of violence. For instance, in *United States v. Torres-Miguel*, the Fourth Circuit disagreed with the Ninth Circuit on whether criminal threats under Cal. Penal Code § 422 qualified as a “crime of violence.” 701 F.3d 165, 168 (4th Cir. 2012). Observing that the statute criminalized threats to commit a crime that would “*result* in death or great bodily injury,” the Fourth Circuit distinguished this from “a threatened *use* of physical force to accomplish that result,” as required by the crime of violence definition. *Id.* (internal quotations omitted) (emphasis in original). Expressly rejecting the Ninth Circuit’s position and adopting that of other circuits, the Fourth Circuit confirmed that “a state offense must constitute a *use or threatened use* of violent force, not simply *result* in physical injury or death” to satisfy the Guidelines definition of a crime of violence. *Id.* at 169 (emphasis in original).

Similarly, in *Larin-Ulloa v. Gonzales*, the Fifth Circuit found that a Kansas general intent battery statute that required only an intent to cause physical contact with another was not a crime of violence. 462 F.3d 456 (5th Cir. 2006). The Fifth Circuit took notice of a variety of situations that would involve “intentional physical contact that creates a *risk* of great bodily harm” but that were not “the type of violent or destructive contact that constitutes a *use* of physical force.” *Id.* at 467 (emphasis added). Accordingly, the Fifth Circuit concluded that while a risk of harm “certainly opens up the possibility that the intentional physical contact used to commit the offense might in some instances amount to physical force,” the statute “does not require that the

defendant intend to injure or use force on the victim,” as the crime of violence definition mandates. *Id.* at 466.

At least five other circuits agree with the Fourth and Fifth Circuits. See *United States v. Johnson*, 616 F.3d 85, 88 (2d Cir. 2010) (finding that the general intent crime of rioting at a correctional institution was not a crime of violence under the “use, attempted use, or threatened use of physical force” definition); *Tran v. Gonzales*, 414 F.3d 464, 470 (3d Cir. 2005) (“The plain language of the [crime of violence] statute therefore compels the conclusion that the ‘use’ of force requires specific intent to employ force, and not mere recklessness as to causing harm.”); *United States v. Rede-Mendez*, 680 F.3d 552, 558 (6th Cir. 2012) (finding that the general intent offense of unlawfully brandishing a knife was not a threat of force without an intent to frighten the victim); *United States v. Woods*, 576 F.3d 400, 410 (7th Cir. 2009) (rejecting the government’s argument that an offense in which the defendant “intends the *act* but was reckless as to the consequences of that act” qualified as a crime of violence) (emphasis in original); *United States v. Malagon-Soto*, 764 F.3d 925, 928 (8th Cir. 2014) (“[T]he use of force required for a crime of violence, under § 16, includes some level of intent to use force against another that is greater than mere negligence and more specific than ‘the possibility that harm will result from a person’s conduct’”) (quoting *Leocal*, 543 U.S. at 10) (cert. denied, 135 S. Ct. 994 (2015)).

But three circuits have joined the Ninth Circuit to reach the opposite conclusion. For instance, in *United States v. Ramon-Silva*, the Tenth Circuit considered whether a New Mexico general intent assault statute could be a crime of violence when it required that a defendant “act[] intentionally” but did not require “any showing that the defendant specifically intended to inflict bodily harm on his victim.” 608 F.3d 663, 673 (10th Cir. 2010) (internal quotations and citations

omitted). Finding that such an offense could be a crime of violence, the Tenth Circuit held that “[t]he presence or absence of an element of specific intent does not dispositively determine whether a prior conviction qualifies as a [crime of violence.]” *Id.* See also *United States v. Am*, 564 F.3d 25 (1st Cir. 2009) (finding that a general intent statute that could be violated by the “intentional commission of a wanton or reckless act . . . causing physical or bodily injury to another” qualified as a crime of violence); *United States v. Romo-Villalobos*, 674 F.3d 1246, 1251 (11th Cir. 2012) (finding that Florida general intent crimes, in which “[a] person’s subjective intent to cause the particular result is irrelevant,” may qualify as crimes of violence).

What these cases show is that circuit courts have struggled to translate the holdings of *Leocal* and *Castleman* into the context of general and specific intent crimes. But because one third of states still describe assault offenses in terms of general and specific intent, this leads to inconsistent and anomalous results—such as where State X’s general intent assault statute *will* be found a crime of violence despite having a lower mens rea than State Y’s reckless assault statute, which *will not* be found a crime of violence. Thus, the Court should grant certiorari to clarify its crime of violence jurisprudence in the context of general and specific intent crimes.

II.

THE APPROACH OF THE FIRST, NINTH, TENTH, AND ELEVENTH CIRCUITS CONTRADICTS THIS COURT’S DECISION IN *LEOCAL*.

A grant of certiorari is also necessary because the First, Ninth, Tenth, and Eleventh Circuits have decided an important federal question in a way that conflicts with relevant decisions of this Court. Although *Leocal* spoke in terms of negligence, rather than general intent, its holding all but resolves the question of whether a general intent crime may be a crime of

violence. By holding to the contrary, these circuits in the minority threaten the integrity of *Leocal* and undermines the Court's entire jurisprudence on crimes of violence.

The key principle in *Leocal* is that to have committed a crime of violence, a defendant must both intend to commit an act *and* intend that this act be directed against another. In *Leocal*, the defendant was convicted of driving under the influence of alcohol and causing serious bodily injury. 543 U.S. at 3. The Court first noted that the “critical aspect of § 16(a) is that a crime of violence is one involving the ‘use . . . of physical force *against the person or property of another.*’” *Id.* at 9 (emphasis in *Leocal*). Thus, a person would only “‘use . . . physical force against’ another when pushing him,” not “by stumbling and falling into him”—the latter of which is analogous to injury resulting from a DUI. *Id.* And because the “use of force” requires “a higher degree of intent than negligent or merely accidental conduct,” this Court held that even an intent to drive while drunk did not imply an intent to cause harm or injury, and the offense “is not a crime of violence under § 16(a).”⁵ *Id.* See also *Castleman*, 134 S. Ct. at 1415 (explaining that one engages in the “use of force” when one employs a “device to cause physical harm”).

California case law shows that a person may be convicted for California assault on the basis of nearly identical conduct. In *People v. Aznavoleh*, the California Court of Appeals considered whether a defendant who “deliberately races through a red light at a busy intersection and collides with another vehicle” could be convicted of assault with a deadly weapon under § 245. 148 Cal. Rptr. 3d 901, 903 (2012). The court answered this question in the affirmative,

⁵ After finding that DUI causing serious bodily injury did not satisfy § 16(a), *Leocal* went on to hold that it did not even meet the less stringent definition of a crime of violence under § 16(b), which requires only “a substantial risk that physical force against the person or property of another may be used,” and thus does not require force as an actual element of the offense. See *id.* at 10-11.

and also rejected an instruction that the prosecution must prove the defendant “intended to drive through the red light knowing his action would result in injury to another.” *Id.* at 906. Noting that § 245 “does not require *any intent* to cause an application of physical force,” the court found this jury instruction to be “an incorrect statement of the law.” *Id.* at 906, 907 (emphasis added). The court further noted that this jury instruction violated California Supreme Court precedent, which “made clear that assault does *not* require intent to commit a battery,” as well as California jury instructions stating that “an assault does not require an intent to cause injury to another person” *Id.* at 907 (citing *Williams*, 29 P.3d at 203 n.3 & CALJIC No. 9.00) (emphasis in *Aznavoleh*).

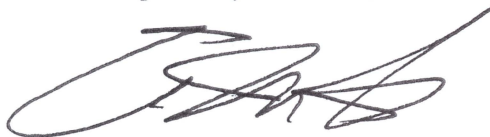
In other words, even though the defendants in *Leocal* and *Aznavoleh* both drove vehicles in a manner that made it *likely* physical injury to another person would occur, neither statute required the defendant to have an *intent* to cause such injury. And it is this *intent* to cause injury that matters because “the critical aspect of [§ 241.2]” is that it involve the “‘use . . . of physical force *against the person or property of another.*’” *Leocal*, 543 U.S. at 9 (emphasis in original). Even though the defendants in *Leocal* and *Aznavoleh* both acted intentionally (by getting behind the wheel while drunk or racing through an intersection), the law distinguishes between an intent to *commit* an act and an intent to *bring about certain consequences* as a result of that act. *See Woods*, 576 at 411 (stating that “[e]very crime of recklessness necessarily requires a purposeful, volitional act that sets in motion the later outcome” and noting that the government could not give an example of “a situation where a defendant would be reckless as to the outcome and not begin with an intentional act”). But because *Leocal* requires both an intent to commit an act *and* an intent to bring about certain consequences of that act, general intent statutes such as Cal. Penal

Code § 245 cannot categorically meet the definition of a crime of violence. Thus, the Court should grant certiorari in order to correct the approach of the First, Ninth, Tenth, and Eleventh Circuits.

CONCLUSION

Because one third of states still define offenses in terms of general or specific intent, the Court should grant certiorari to resolve the sharp circuit split over whether a general intent crime such as Cal. Penal Code § 245 may categorically qualify as a crime of violence under the aggravated felony definition of 8 U.S.C. § 1101(a)(43)(F).

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'E. Johnston III', with a large, sweeping initial 'E'.

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APPENDIX A

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

SEP 29 2017

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CARLOS OREGON-MENDOZA,

Defendant-Appellant.

Nos. 15-50455

15-50456

D.C. Nos. 3:14-cr-01523-BEN

3:10-cr-04723-BEN

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Roger T. Benitez, District Judge, Presiding

Submitted September 26, 2017**

Before: SILVERMAN, TALLMAN, and N.R. SMITH, Circuit Judges.

In these consolidated appeals, Carlos Oregon-Mendoza appeals his bench-trial conviction and the 64-month sentence imposed for being a removed alien found in the United States, in violation of 8 U.S.C. § 1326, and the 24-month consecutive sentence imposed upon revocation of supervised release. We have

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

jurisdiction under 28 U.S.C. § 1291, and we affirm.

Oregon-Mendoza contends that his prior conviction for assault with a deadly weapon under California Penal Code § 245(a)(1) is not a “crime of violence” for purposes of 18 U.S.C. § 16(a) or U.S.S.G. § 2L1.2(b)(1)(A)(ii) (2014). He argues that, therefore, the district court erred by denying his motion to dismiss under 8 U.S.C. § 1326(d) and by applying a 16-level enhancement to his offense level. This argument is foreclosed. *See United States v. Grajeda*, 581 F.3d 1186, 1190-91, 1197 (9th Cir. 2009) (violation of section 245(a)(1) “is categorically a crime of violence”). Contrary to Oregon-Mendoza’s contention, our decision in *Grajeda* is not “clearly irreconcilable” with *Descamps v. United States*, 133 S. Ct. 2276 (2013). *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc).

Oregon-Mendoza next contends that the revocation sentence is substantively unreasonable. The sentence is not an abuse of discretion in light of the 18 U.S.C. § 3583(e) sentencing factors and the totality of the circumstances, including Oregon-Mendoza’s breach of the court’s trust. *See Gall v. United States*, 552 U.S. 38, 51 (2007). Further, contrary to Oregon-Mendoza’s contention, the record reflects that the district court relied on only proper sentencing factors. *See United States v. Miqbel*, 444 F.3d 1173, 1181-82 (9th Cir. 2006).

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

FEB 1 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CARLOS OREGON-MENDOZA,

Defendant-Appellant.

Nos. 15-50455
15-50456

D.C. Nos. 3:14-cr-01523-BEN
3:10-cr-04723-BEN
Southern District of California,
San Diego

ORDER

Before: SILVERMAN, TALLMAN, and N.R. SMITH, Circuit Judges.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Oregon-Mendoza's petition for rehearing en banc (Docket Entry No. 35) is denied.