05-41461

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JORGE GOMEZ-GOMEZ,
a.k.a. Jose L. Lopez,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
Brownsville Division, Criminal Action No. B-05-217

SUPPLEMENTAL *EN BANC* BRIEF OF PLAINTIFF-APPELLEE

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The United States of America, Plaintiff-Appellee ("United States"), through the United States Attorney for the Southern District of Texas, files this supplemental *en banc* brief in response to that of Defendant-Appellant, Jorge Gomez-Gomez ("Gomez").

STATEMENT OF JURISDICTION

This appeal is from the judgment of conviction entered by the district court (Tagle, J.) on September 22, 2005. (R. 105).[1] Gomez timely filed a notice of appeal on September 13, 2005 (R. 103), thereby vesting this Court with jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

On July 20, 2007 (revised on July 26, 2007), a panel of this Court affirmed the conviction but reversed the sentence in a published opinion. *United States v. Gomez-Gomez*, 493 F.3d 562 (5th Cir. 2007). On February 11, 2008, this Court granted rehearing en banc. *United States v. Gomez-Gomez*, 517 F.3d. 730 (5th Cir. 2008).

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[1]"R." refers to the single volume of documents referenced in the district court docket sheets. "TT" refers to the jury trial transcript. "ST" refers to the sentencing hearing transcript. The number following refers to the page.

STATEMENT OF THE ISSUES

I. Whether *United States v. Sarmiento-Funes*, 374 F.3d 336 (5th Cir. 2004) should be modified or overruled because its application has rendered the term "forcible" in "forcible sex offenses" to be meaningless in contradiction to statutory construction rules by requiring the same proof for the enumerated offense as is required for showing "physical force" under the elements test.

II. Whether, upon modifying or overruling *Sarmiento-Funes*, Gomez' California forcible rape conviction qualifies for the 16-level crime of violence enhancement as a "forcible sex offense" under USSG § 2L1.2(b)(1)(A)(ii).

III. Whether *United States v. Calderon-Pena*, 383 F.3d 254 (5th Cir. 2004) (en banc) should be modified or overruled regarding how the elements test for a "crime of violence" is analyzed and applied under USSG § 2L1.2.

IV. Whether, after modifying or overruling *Calderon-Pena*, Gomez' California forcible rape conviction qualifies for the 16-level crime of violence enhancement as his specific conviction required proof of an element involving the use, attempted use, or threatened use of physical force against the person of another under the elements test used in USSG § 2L1.2(b)(1)(A)(ii).

SUPPLEMENTAL STATEMENT OF THE CASE[2]

A. *Course of proceedings and disposition below.*

Border Patrol agents arrested Gomez on March 6, 2005, after finding him squatting in bushes outside of Brownsville, Texas. His wet clothing and muddy shoes

[2] Although a full factual statement is set forth in the government's prior briefs in this case, the instant brief includes all of the pertinent facts and circumstances applicable to the issues before the en banc court.

were conspicuous, and he admitted to the agents that he had waded the Rio Grande River and illegally reentered the United States. On June 6, 2005, a jury found Gomez guilty of unlawfully being present in the United States after being deported after an aggravated felony conviction, in violation of 8 U.S.C. § 1326. (R. 93; TT. 140). On September 8, 2005, the district court sentenced Gomez to serve 100 months of imprisonment in the custody of the Bureau of Prisons, followed by a three-year term of supervised release. (R. 102; ST. 16).

B. *Statement of the Facts*

1. Gomez' repeated illegal reentries, including his instant offense:

At the one-day trial, the uncontested evidence established that United States Border Patrol agents encountered Gomez by the Rio Grande River near Brownsville, Texas, on March 6, 2005. (TT. 77-79). Gomez was squatting in the brush with two other individuals near an art museum and the Texas National Guard building. (TT. 80-81). Gomez admitted being a national of Mexico and did not have any documents permitting him to be present in the United States. (TT. 82, 95). His clothing was wet and his shoes muddy, consistent with someone who had just waded through the Rio Grande river. *Id.* Indeed, Gomez admitted that he entered the United States by swimming across the river. (TT. 95). The agents arrested Gomez and transported him to the Border Patrol station. (TT. 83-84).

A records check revealed that Gomez has utilized other names in the past. (TT. 87, 94). Gomez admitted being previously removed or deported from the United States. (TT. 95-96). Government documents established that Gomez was deported on February 8, 1995, December 4, 1998, and February 22, 2005. (TT. 107-109; Govt. Exs. 1, 3, 4). There was no evidence that he ever received authorization to reenter the United States. (TT. 112-13).

2. Gomez' extensive criminal history, including his 1991 forcible rape of an elderly woman in California (resulting in a six-year jail term):

Gomez amassed an extensive criminal history beginning with his 1991 forcible rape conviction from Los Angeles, California, for which he was sentenced to six years in jail. (PSR ¶ 6).[3] Gomez was deported on February 8, 1995, after serving his jail term for forcibly raping an elderly women. (PSR ¶¶ 7, 24).

Gomez continued his criminal ways by illegally returning to California immediately after his deportation. He exacerbated his prior violent conduct and his illegal presence by adding drug offenses to his resume. In June 1995, he was arrested for possessing several bags of marijuana and two rocks of cocaine. (PSR ¶ 25). The next month (July 1995), he was arrested for possessing marijuana and hashish for sale. (PSR ¶ 26). On January 22, 1996, he was convicted of the June 1995 offense

[3] "PSR" refers to the presentence investigation report. The number following refers to the paragraph.

and sentenced to 26 days in custody. (PSR ¶ 25). His July 1995 drug offense apparently remained pending.

Undeterred by his second criminal conviction, Gomez resumed his criminal conduct by committing more drug offenses. He was arrested in California on February 15, 1996 – less than one month after his drug offense conviction – when he offered to sell crack cocaine to undercover police officers. (PSR ¶ 27). Two months later, Gomez was again arrested when police observed him selling narcotics. (PSR ¶ 28). He was convicted on May 7, 1996, for the April 1996 offense and sentenced to 32 days custody. *Id.* He was also convicted on June 4, 1996, for the February 1996 drug offense under California's transport/sell of controlled substance statute. (PSR ¶ 27). He was sentenced to 3 years probation with a special condition of serving 6 months in county jail. *Id.*

In October 1997, Gomez was arrested in New York for criminal trespass. (PSR ¶ 29). He was convicted and sentenced to one day of community service. *Id.* However, a bench warrant remains outstanding for Gomez' failure to complete community service. *Id.*

In April 1998, Gomez was finally convicted in California for the July 1995 drug offense. (PSR ¶ 26). He was again sentenced to 3 years probation with a special condition of serving 6 months in county jail. *Id.* His probation for his February 1996

drug trafficking conviction was also revoked – the court sentenced Gomez to nine months in jail for violating his parole terms and continued him on probation. (PSR ¶ 27). He was released from custody on September 13, 1998. *Id.* On October 10, 1998, Gomez was arrested for shoplifting in California. (PSR ¶ 30). He was convicted of shoplifting on November 4, 1998, and sentenced to 45 days in custody. *Id.* Gomez was deported again on December 4, 1998. (TT. 108; Govt. Ex. 3).

The following month, January 1, 1999, Border Patrol agents arrested Gomez at the El Paso, Texas, Greyhound bus station. (PSR ¶ 31). On April 14, 1999, he was convicted in the United States District Court, Western District of Texas, of illegal reentry after deportation and sentenced to **77 months** followed by a three-year term of supervised release. *Id.* Gomez was released from federal custody on January 25, 2005, and deported for the third time on February 22, 2005. *Id.* Still undeterred, he illegally returned to the United States on March 6, 2005; approximately 13 days after his last deportation. (TT. 77-79; PSR ¶¶ 4, 5).

3. The calculation of Gomez' applicable Guideline Range:

In the present case, the 2004 edition of the Guidelines determined the applicable guideline range. (PSR ¶ 12). The base offense level was eight, with a sixteen-level increase under USSG § 2L1.2(b)(1)(A)(ii) for Gomez' prior California forcible rape conviction, for a total offense level of 24. (PSR ¶¶ 13-22). Gomez'

criminal history score was 17 landing him in the highest criminal history category – VI. (PSR ¶ 35). His applicable guideline range was 100 to 125 months. (PSR ¶ 54).

4. The California forcible rape statute and Gomez' state indictment:

Gomez forcibly raped an elderly woman and was convicted under the California forcible rape statute that required proof that the rape was against the victim's will. Cal. Penal Code § 261(a)(2). There is no factual dispute regarding Gomez' conviction falling under subparagraph 261(a)(2) of California Penal Code § 261 (forcible rape statute). (App. En Banc Br. at 4, 44-45).

The California rape statute generally defines rape as an act of sexual intercourse accomplished with a person not the spouse of the perpetrator under any one of seven statutorily listed circumstances. Cal. Penal Code § 261(a). Subsection 261(a)(2) requires proof that the rape is "accomplished against a person's will" and lists the following "means" of committing the offense against that person's will: "**by means** of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another." Cal. Penal Code § 261(a)(2) (emphasis added). The term "duress" was added by amendment in 1990. (*See* Historical and Statutory Notes following statute). The statute further defines the manner and means of "duress" as:

> a direct or implied threat of force, violence, danger, hardship, or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act which otherwise would not have been

> performed, or acquiesce in an act to which one otherwise would not have submitted. The total circumstances, including the age of the victim, and his or her relationship to the defendant, are factors to consider in appraising the existence of duress.

Cal. Penal Code § 261(b) (emphasis added).

Gomez' 1991 California indictment included three counts, but he pleaded guilty only to Count One which alleged:

> On or about June 11, 1991, in the County of Los Angeles, the crime of FORCIBLE RAPE, in violation of PENAL CODE SECTION 261(a)(2), a Felony, was committed by JORGE GOMEZ GOMEZ, who did willfully and unlawfully have and accomplish an act of sexual intercourse with a person, to wit, MARGIE ROW, not his/her spouse, **against said person's will**, by means of force, violence, duress, menace and fear of immediate and unlawful bodily injury on said person and another.
>
> It is further alleged that the above offense is a serious felony within the meaning of Penal Code Section 1192.7(c)(3).
>
> It is further alleged that the defendant(s), JORGE GOMEZ GOMEZ, committed the above offense on MARGIE ROW, who was over the age of 60 years, within the meaning of Penal Code Section 1203.09(f).

(Govt. Sentencing Ex. 1) (emphasis added).

5. Sentencing hearing:

Gomez objected to the "crime of violence" 16-level enhancement and to the use of any of his prior convictions without a certified copy of the judgment in each instance. (R. 96). He also objected to ¶ 27 in the PSR claiming that his June 1996

drug conviction under a California statute could not be classified as a drug trafficking conviction. *Id.* At the September 8, 2005 sentencing hearing, the district court addressed the objections. Regarding the drug offense, the district court found that "it's a drug trafficking offense," but the district court did not use the drug offense to support the 16-level enhancement.[4]

Gomez submitted and asked the court to consider a document from the California Legislative Service referring to the California rape statute under which Gomez was convicted. (ST. 2; Def. Ex. 1). The Government offered the felony complaint with the abstract of judgment and a guilty plea document attached. (ST. 3; Govt. Sentencing Ex. 1). Gomez claimed that the applicable portion of the forcible rape statute included committing the rape by "duress" and argued that this "**means** of how this offense can be ... committed" does not require force. (ST. 5). He added that the "entire statute has several **means** by which this offense can be prosecuted or accomplished not involving force." (ST. 6). The Government responded that the

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[4] While the district court concluded that the 1996 drug offense is "a drug trafficking offense," the court did not expressly utilize that offense or finding to support the 16-level enhancement. Gomez challenged the conclusion on direct appeal before the panel. The panel concluded that the district court "never actually relied upon [the 1996 drug offense]" at sentencing, and as such, "it is not our place to consider it at this time." *Gomez-Gomez*, 493 F.3d at 569. This issue is likewise not before this Court during the instant *En Banc* hearing. Should this Court conclude that the forcible rape conviction does not qualify for the 16-level crime of violence enhancement, the question of whether the 1996 California drug offense qualifies for a 16-level enhancement under USSG § 2L1.2 is a matter that the district court should be permitted to consider upon remand for resentencing.

conviction is a "forcible sexual offense" meriting a 16-level increase. (ST. 7-8). The district court overruled Gomez' objection stating, "The Fifth Circuit's going to have to decide this one." (ST. 8).[5]

The court sentenced Gomez to 100 months imprisonment stating its hope "that this will deter you from committing the same or similar crimes in the future." (ST. 16-17). The court specifically noted that Gomez had just been released from a long jail term and had committed the very same offense "within a month's time." (ST. 17). The court added, "it appears that ... you are inclined to violate the law at ... the earliest opportunity." *Id.* The court also recalled that Gomez had numerous aliases and birth dates indicating to the court that Gomez attempted to hide his prior criminal history whenever arrested. *Id.* The court concluded that unless it assessed a sentence of 100 months, that Gomez was "not going to believe that the law applie[d] to [him]." (ST. 18). The court articulated a need to protect the public from Gomez noting that 77 months did not previously deter Gomez whereas it would have been sufficient for most people – "I do so [protect the public] by imposing that sentence of 100 months." *Id.*

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[5] The district court did note that California's definition of "duress" in this statute states that the total circumstances, including age of the victim, are "factors to consider in appraising the existence of duress." (ST. 8-9; Def. Ex. 1, p.2).

6. Proceedings before the panel court on direct appeal.

Gomez appealed. The question before the panel was whether the district court properly assessed a 16-level enhancement for Gomez' prior California forcible rape conviction under the USSG § 2L1.2 "crime of violence" enhancement. *Gomez-Gomez*, 493 F.3d at 564. The panel in this case (Reavley, Jolly, Benavides, JJ.) issued its decision on July 20, 2007 (revised on July 26, 2007), without dissent. Compelled by the precedent of *United States v. Sarmiento-Funes*, 374 F.3d 336, 345 (5th Cir. 2004), the panel vacated the sentence and remanded for re-sentencing, holding that Gomez' forcible rape conviction was not a "forcible sex offense." *Gomez-Gomez*, 493 F.3d at 546-69. The majority opinion acknowledged several of the United States' arguments supporting affirmation, but ultimately concluded that such arguments could only be considered by this Court sitting en banc. *Id.* at 568.

Judge Jolly specifically concurred to encourage this Court sitting en banc to reconsider the application of *Sarmiento-Funes* and avoid future conclusions "that forcible sex is not forcible sex." *Id.* at 568 (Jolly, J., specially concurring). The panel opinion expressly identified existing conflicts with other circuits on this issue and even acknowledged a plausible argument of a conflict existing within this circuit. *Id.* at 567-68 & n.6. Nevertheless, the panel vacated the sentence noting that "[o]ur precedent compels the result." *Id.* at 569. The Solicitor General authorized the United

States to seek rehearing en banc on this issue due to the lack of clarity and consistency in applying "crime of violence" enhancements and due in part to the apparent conflicts among the circuits which are resulting in disparity in sentencing for illegal reentry offenses.

SUMMARY OF THE SUPPLEMENTAL ARGUMENT

Gomez received a 16-level enhancement for his prior California forcible rape conviction. The district court found that the conviction qualified as a "crime of violence" under USSG § 2L1.2. Under that provision, an offense may qualify for the enhancement in one of two ways: (1) it can be an enumerated offense, or (2) it can be an offense that has as an element the use, attempted use, or threatened use of physical force against the person of another. Gomez challenges the application of this enhancement on appeal.

Issues I and II.

The first question for this Court is whether Gomez' California forcible rape conviction qualifies as a "forcible sex offense." The application of this enumerated offense has been severely affected by the application of *United States v. Sarmiento-Funes*, 374 F.3d 336 (5th Cir. 2004). The application of *Sarmiento-Funes* has resulted in violation of statutory construction rules and has rendered the word "forcible" to be meaningless in the "forcible sex offenses" enumerated enhancement.

As an example, applying *Sarmiento-Funes*, a panel of this Court concluded that "forcible" in "forcible sex offenses" denotes "a species of force that either approximates the concept of forcible compulsion or, at least, does not embrace some of the assented-to-but-not-consented-to conduct at issue for statutory rape." *United States v. Fernandez-Cusco*, 447 F.3d 382, 385 (5th Cir. 2006) (quoting *Sarmiento-Funes*, 374 F.3d at 344). Follow this precedent and other cases, the panel in the instant case recognized that the end result of applying *Sarmiento-Funes'* definition of "forcible" is that the "forcible sex offense" inquiry essentially "mimics the 'elements' inquiry." *Gomez-Gomez*, 493 F.3d at 566 (adding in footnote 4 that Fifth Circuit case law leads to the conclusion that any statute failing to satisfy the "elements" prong will also fail to qualify as a "forcible sex offense."). This is inherently at odds with normal statutory construction rules which require interpretation of provisions to give every word meaning and to avoid an interpretation that would render any word "'superfluous, void, or insignificant.'" *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001); *Taylor v. United States*, 495 U.S. 575, 596-97 (1990). As such, *Sarmiento-Funes* must be reversed or wholly modified.

The term "forcible sex offense" must be given a meaning distinct from the meaning of "physical force" in the elements test. The Sentencing Commission has conveyed its intent that the enumerated offenses do not require proof of physical

force. USSG App. C, amend 658. Likewise, both the Third Circuit and the Tenth Circuit have concluded that "forcible" in "forcible sex offenses" essentially means a sexual act that is against the victim's will. *See United States v. Romero-Hernandez*, 505 F.3d 1082, 1086-89 (10th Cir. 2007), *pet. for cert. filed*, Jan. 10, 2008; *United States v. Remoi*, 404 F.3d 789, 796 (3d Cir. 2005). This Court should reach a similar conclusion and apply a definition to the term "forcible" under "forcible sex offenses" that includes sexual offenses committed against a victim's will therein distinguishing the enumerated offense from the elements tests, as other circuits have held. Under such a reading of "forcible sex offense," Gomez' forcible rape conviction would qualify for the 16-level enhancement because the conviction established that the rape was against the victim's will.

Issues III and IV.

This Court should modify or overrule *Calderon-Pena*'s holding regarding how elements are defined and analyzed and how the term "physical force" is defined. This Court should first align its articulation of the categorical approach by discarding the "any set of facts" test in according with recent Supreme Court precedent. *United States v. James*, 127 S.Ct. 1586 (2007); *Gonzales v. Duenas-Alvarez*, 127 S.Ct. 815, 822 (2007). This Court should also consider adopting a refined categorical approach in defining an "elements" that permits consideration of statutorily listed and alleged

means of committing an offense only where those means are either judicially admitted by the defendant or found by a jury as evidenced in supporting charging documents.

This Court should also modify the definition of "physical force" to include bodily injury where it is accompanied in the statute by a required intentional act. To date, this Court's only definition of "physical force" has been tied to an analysis involving damage to property – holding that the concept of "force" is "synonymous with destructive or violent force." *United States v. Landeros-Gonzales*, 262 F.3d 424, 426 (5th Cir. 2001) (quoting a footnote from *United States v. Rodriguez-Guzman*, 56 F.3d 18, 20 n.8 (5th Cir. 1995)). The footnote was from a case addressing arson and is not applicable to force against the person of another. Rather, this Court should hold that "physical force" means "power, violence, or pressure directed against another person's body." *See United States v. Nason*, 269 F.3d 10, 16 (1st Cir. 2001). Considering *Vargas-Duran* and *Calderon-Pena* together, it would seem that this Court could also hold that proof of an intentional act with proof of either bodily contact or bodily injury would suffice to be "physical force" under § 2L1.2. This Court could also follow the rationale in *United States v. Shelton*, 325 F.3d 553 (5th Cir. 2003), which noted that "the term 'physical' is implicit in any type of '*bodily* injury' inasmuch as 'bodily' is defined as 'having a body: PHYSICAL' or 'of or relating to the body." Under any of these definitions of "physical force," Gomez'

rape conviction qualifies as a "crime of violence" under the elements test for USSG § 2L1.2.

ARGUMENT AND AUTHORITIES

I and II.

UNDER USSG § 2L1.2, AN OFFENSE QUALIFIES AS A CRIME OF VIOLENCE IF IT IS EITHER A "FORCIBLE SEX OFFENSE" OR IF IT HAS AS AN ELEMENT THE USE, ATTEMPTED USE OR THREATENED USE OF PHYSICAL FORCE. UNDER STATUTORY CONSTRUCTION RULES, THE TERM "FORCIBLE" IN "FORCIBLE SEX OFFENSES" MUST HAVE A DEFINITION DISTINCT FROM THE MEANING OF "PHYSICAL FORCE" UNDER THE "ELEMENTS TEST." TO THE EXTENT THAT APPLICATION OF *SARMIENTO-FUNES* VIOLATES THIS STATUTORY CONSTRUCTION RULE, IT SHOULD BE OVERRULED OR MODIFIED. GOMEZ' CALIFORNIA FORCIBLE RAPE CONVICTION QUALIFIES AS A "FORCIBLE SEX OFFENSE" UNDER A PROPER DEFINITION OF THIS ENUMERATED OFFENSE.

Gomez claims his California forcible rape conviction is not a "crime of violence" under USSG § 2L1.2(b)(1)(A) because the California statute could be committed by the means of "duress" which he argues does not require "force." (App. En Banc Br. at 12-17). Gomez claims that the Sentencing Commission's use of "forcible sex offenses" indicates an intent to specifically exclude common felony rapes from the 16-level enhancement unless those rapes "involve some quantum of physical force" to overcome the victim's resistence. (App. En Banc Br. at 4, 14-26).

Gomez' argument is dependent upon the holding and analysis in *United States v. Sarmiento-Funes*, 374 F.3d 336 (5th Cir. 2004). However, as indicated by Gomez' argument, the application of *Sarmiento-Funes* has resulted in violation of statutory construction rules and has rendered "forcible sex offenses" to be meaningless in the crime of violence enhancement. Contrary to Gomez's argument and to the holding in *Sarmiento-Funes*, this Court should apply a definition to the term "forcible" under "forcible sex offenses" that includes sex acts committed against a victim's will, therein distinguishing the enumerated offense from the elements tests, as other circuits have held. *See United States v. Romero-Hernandez*, 505 F.3d 1082 (10th Cir. 2007), *pet. for cert. filed*, Jan. 11, 2008 (No. 07-8802); *United States v. Remoi*, 404 F.3d 789 (3rd Cir. 2005).

A. Standard of Review:

This Court conducts a *de novo* review of a lower court's characterization of a prior conviction as a "crime of violence." *United States v. Izaguirre-Flores*, 405 F.3d 270, 272 (5th Cir. 2005); *see also United States v. Calderon-Pena*, 383 F.3d 254, 256 (5th Cir. 2004) (en banc); *United States v. Vargas-Duran*, 356 F.3d 598, 602 (5th Cir.) (en banc).

B. Application of USSG § 2L1.2(b)(1)(A):

The 2004 guidelines applied in this case. (PSR ¶ 12). Under Section 2L1.2, a crime of violence is defined, in pertinent part, as an enumerated offense of "forcible sex offenses" or as an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another." USSG § 2L1.2, comment, (n.1(B)(ii)). Thus, a prior conviction can qualify for the 16-level enhancement either as an enumerated offense or under the "elements test." *See United States v. Rayo-Valdez*, 302 F.2d 314, 317 (5th Cir. 2002) (noting that the Sentencing Commission "predetermined that, regardless of their circumstances or the way they are defined by state laws, the listed offenses are inherently violent and forceful, or inherently risk violence and use of force. Thus, their enumeration in the commentary ensures that they are treated as 'crimes of violence.'"); *see also Vargas-Duran*, 356 F.3d at 608 (DeMoss, J., concurring) (stating that "[i]f the predicate offense at issue is one of these listed offenses, a 16-level enhancement is appropriate and no further analysis is required."). In essence, the enumerated offenses and the "elements test" are **alternative ways** in which a prior conviction may qualify for a 16-level enhancement under USSG § 2L1.2.

This Court has repeatedly addressed questions regarding whether a prior conviction qualifies as a "crime of violence" under USSG § 2L1.2. Recently, this

Court provided a concise summary of the overall analysis and clearly set forth the distinctive approaches involved in the enumerated offenses analysis and in an "elements test" analysis. *United States v. Carbajal-Diaz*, 508 F.3d 804 (5th Cir. 2007). Both inquiries begin with the "categorical" analysis of the state criminal statute, looking to the elements of the crime as defined by that statute. *Id.* at 807 (citing *Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143 (1990); *Calderon-Pena*, 383 F.3d at 257). It is a general analysis focused solely upon the fact of conviction and the statutory definition of the prior offense with a desire to avoid mini-trials related to the prior offense. *Id.*

If the statute criminalizes multiple offenses within the single code provision, this Court then conducts a "narrowing analysis" for both inquiries. *Carbajal-Diaz*, 508 F.3d at 807-808. However, the "narrowing analysis" proceeds differently depending on whether the inquiry involves an enumerated offense or involves the elements test. *Id.* Both inquiries review the charging papers to narrow the definition of the crime, "but in each respective instance [the Court] look[s] for different things." *Id.* Under the elements test, the analysis is restricted to evaluating the strict legal concept of disjunctive "elements." *Id.* (citing *Calderon-Pena*, 383 F.3d at 258 (holding that, in defining an element, specific facts in an indictment can only be considered to narrow down the statutory options)). "If determining whether that

crime has an element involving use of force, we look with a squint to the charging papers – only to determine which of a series of disjunctive statutory elements the crime implicated." *Id.* at 810. Under the enumerated offense inquiry however, the analysis focuses on the whole crime rather than the particular "elements" therein dictating a less formal approach and a more functional narrowing analysis. *Id.* at 808. This Court has dubbed the narrowing step in the analysis of enumerated offenses as the "common sense approach." *Id.* at 808.

Under the common sense approach, "specific facts contained in the indictment or jury instructions can be used more freely to define the crime with a somewhat greater level of specificity." *Carbajal-Diaz*, 508 F.3d at 808 (citing *United States v. Mendoza-Sanchez*, 456 F.3d 479, 482 (5th Cir. 2006); *United States v. Izaguirre-Flores*, 405 F.3d 270, 273-75 (5th Cir. 2005)). Importantly, where the conviction is based upon a guilty plea, the court may consider "adequate judicial record evidence." *Shepard v. United States*, 125 S. Ct. 1254, 1259 (2005). The "adequate judicial record evidence" includes, but is not limited to, the charging instrument, jury instructions, the judge's "formal rulings of law and findings of fact," and a statement of the factual basis for the charge, as shown by the plea colloquy transcript, written plea agreement, or "record of comparable findings of fact adopted by the defendant upon entering the plea." *Id.* at 1259-60. The court can also consider "any explicit

factual finding by the trial judge to which the defendant assented." *Id.* at 1257. "In determining whether the crime amounts to an enumerated offense, we look with wider eyes to the charging papers, to determine which of the crime's underlying facts were necessary to the plea or verdict." *Carbajal-Diaz*, 508 F.3d at 810.

There is a third step in the enumerated offense inquiry: once the prior conviction is defined, the definition of that conviction is compared to the definition of the enumerated crime of violence at issue. *Carbajal-Diaz*, 508 F.3d at 810. The enumerated offense is defined "according to its generic, contemporary meaning, and should rely on a uniform definition, regardless of the labels employed by the various States criminal codes." *Id.* (citing *United States v. Dominguez-Ochoa*, 386 F.3d 639, 642-43 (5th Cir. 2004)). If the prior conviction is substantially similar to the generic, contemporary meaning of the applicable enumerated offense, then the crime of violence enhancement applies. *Id.*; *see also United States v. Torres-Diaz*, 438 F.3d 529, 537 (5th Cir. 2006) (only requiring state statute and prior conviction to be "similar" to Model Penal Code's definition of aggravated assault when considering whether prior conviction qualifies as enumerated offense of aggravated assault)).

With regard to enumerated offense of sexual abuse of a minor, which is not a traditional common law crime, this Court repeatedly has looked to legal and nonlegal dictionaries in determining the ordinary, contemporary, common meaning of sexual

abuse of a minor. *See United States v. Ramos-Sanchez*, 483 F.3d 400, 402-03 (5th Cir. 2007); *Izaguirre-Flores*, 405 F.3d at 273-76; *United States v. Zavala-Sustaita*, 214 F.3d 601, 604-05 (5th Cir. 2000). The Ninth and Tenth Circuits similarly have looked to dictionaries in determining the ordinary, contemporary, common meaning of forcible sex offense, also not a traditional common law crime. *See United States v. Romero-Hernandez*, 505 F.3d 1082, 1088 (10th Cir. 2007), *pet. for cert. filed*, Jan. 10, 2008 (No. 07-8802); *United States v. Bolanos-Hernandez*, 492 F.3d 1140, 1143-44 (9th Cir.), *cert. denied*, 128 S. Ct. 731 (2007).

C. The enumerated offense of "forcible sex offenses":

In the instant case, the enumerated offense inquiry applies. The categorical analysis of the California statute reveals that the statute has multiple offenses within the code provision. Cal. Penal Code § 261(a) (containing seven subparagraphs of circumstances supporting separate convictions). The narrowing analysis for the enumerated offense applies the common sense approach and considers all of the alleged facts in the indictment to which Gomez pleaded guilty. The indictment alleged that Gomez engaged in sexual intercourse with the elderly victim against her will by means of "force, violence, duress, menace and fear of immediate and unlawful

bodily injury." (Govt. Sentencing Ex. 1).[6] Thus, the initial question is whether his rape "by duress" would qualify as a "forcible sex offense." The third step of the enumerated analysis therein requires a comparison of Gomez' conviction to the definition of "forcible sex offenses."

Prior precedent from this Court has caused confusion and misunderstanding with regard to the appropriate definition of "forcible sex offenses." The application of the holding in *United States v. Sarmiento-Funes*, 374 F.3d 336 (5th Cir. 2004) has rendered the term "forcible" in "forcible sex offenses" to be meaningless in contradiction to rules of statutory construction by requiring the same proof for the enumerated offense as is required for the element of "physical force."

As previously noted, under USSG § 2L1.2, a prior conviction for a "crime of violence" garners a 16-level increase in the offense level in one of two distinctive ways. USSG § 2L1.2, cmt. n.1(B)(iii). Gomez' prior conviction would qualify as a "crime of violence" if it was the equivalent of the enumerated offense of "forcible sex offenses" or alternatively, if it was an offense "that has as an element the use, attempted use, or threatened use of physical force against the person of another." USSG § 2L1.2, cmt. n.1(B)(iii) (2004). An enumerated offense is *always* a crime of

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[6] Gomez appears to have pled guilty without reservation to the conjunctively constructed indictment. Thus, he arguably admitted all of the means of committing the offense. Whether this has any bearing on the issues raised will be addressed subsequently.

violence regardless of whether the enumerated offense expressly has as an element the use, attempted use, or threatened use of physical force against another person. USSG App. C, amend. 658 (eff. Nov. 1, 2003). Importantly, this amendment note from the Sentencing Commission would be erroneous if, in accordance with the application of *Sarmiento-Funes*, the enumerated offense of "forcible sex offense" required the same proof of using physical force as is required under the "elements test."

The guideline does not define "forcible sex offenses," so normally this Court would determine the "generic, contemporary meaning" of the undefined term. *Dominguez-Ochoa*, 386 F.3d at 642-43 (defining enumerated offense of "manslaughter" according to generic, contemporary meaning). The term "forcible sex offense," however, is not a crime with a "generic" definition, used in the Model Penal Code, or "widely used in the case law, statutes, or scholarly writings." *United States v. Luciano-Rodriguez*, 442 F.3d 320, 327, 328 (5th Cir. 2006) (Owen, J., dissenting). As Judge Owen correctly observed, "[t]he best source of the Sentencing Commission's intent is the Sentencing Guidelines Manual itself, including the commentary and the history of its promulgation." *Id.* at 328 (Owen, J., dissenting). Applying *Sarmiento-Funes*, a panel of this Court concluded that "forcible" in "forcible sex offenses" denotes "a species of force that either approximates the

concept of forcible compulsion or, at least, does not embrace some of the assented-to-but-not-consented-to conduct at issue for statutory rape." *United States v. Fernandez-Cusco*, 447 F.3d 382, 385 (5th Cir. 2006) (quoting *Sarmiento-Funes*, 374 F.3d at 344).[7] As the panel in the instant case recognized, the end result of applying *Sarmiento-Funes'* definition of "forcible" is that the "forcible sex offense" inquiry essentially "mimics the 'elements' inquiry." *Gomez-Gomez*, 493 F.3d at 566 (adding in footnote 4 that Fifth Circuit case law leads to the conclusion that any statute failing to satisfy the "elements" prong will also fail to qualify as a "forcible sex offense."). This is inherently at odds with normal statutory construction rules which require interpretation of provisions to give every word meaning and to avoid an interpretation that would render any word "'superfluous, void, or insignificant.'" *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001); *see Taylor v. United States*, 495 U.S. 575, 596-97 (1990) (rejecting petitioner's interpretation of the enumerated offense of burglary in the definition of violent felony in 18 U.S.C. § 924(e) because under that interpretation, which included part of the definition already in existence, there would have been no reason to add burglary to the definition, and Congress must have had

[7] However, as Judge Owen notes in her dissent in *Luciano-Rodriguez*, this "assented-to-but-not-consented-to" analysis is substantially inconsistent with the Model Penal Codes' treatment of criminal sexual conduct between adults, and is inherently at odds with the rationale behind the Sentencing Commission's 2003 amendments to the "crime of violence" enhancements under USSG § 2L1.2. 442 F.3d at 327-330.

a purpose in adding burglary to the definition); *United States v. Rayo-Valdez*, 302 F.3d 314, 318 (5th Cir. 2002) (observing that *Taylor*'s analysis "reflects the principle that when interpreting a statute, it is necessary to give meaning to all its words and to render none superfluous"). Taking *Sarmiento-Funes* to its logical conclusion renders the "forcible" aspect of the enumerated offense of "forcible sex offenses" meaningless and often results in conclusions that "forcible sex is not forcible sex." *Gomez-Gomez*, 493 F.3d at 569 (Jolly, J., specially concurring).

The present case demonstrates why the application of the holding in *Sarmiento-Funes* violates statutory construction rules and ultimately leads to absurd results. *See United States v. Wallington*, 889 F.2d 573, 576-77 (5th Cir. 1989) (statutory construction rules look to the literal reading of the text, unless that would lead to an absurd result). Gomez forcibly raped an elderly woman but was convicted under a subsection that included the manner and means of among other things, "force" or "duress." Notwithstanding the fact that every rape conviction under this California statute requires proof of the element that the sexual intercourse be "accomplished against a person's will," the panel concluded that this Circuit's precedent "compels the conclusion that the California statute does not qualify" as a "forcible sex offense" under USSG § 2L1.2. *Gomez-Gomez*, 493 F.3d at 566 (essentially relying upon *Sarmiento-Funes* and cases that have applied *Sarmiento-Funes*). The essence of this

conclusion is that a duress-type rape under this California statute could be committed by a threat of "hardship" or "retribution" which did not require physical force upon or injury to the victim. In light of this Court's precedent defining "forcible" in such a way as to exclude duress, the rape conviction did not qualify under either the "elements test" or as a "forcible sex offense" under the enumerated "crime of violence" enhancement.

The panel first concluded that the California statute did not require proof of an element of using, attempting to use, or threatening to use "physical force" under the alternative "elements test." *Gomez-Gomez*, 493 F.3d at 564-565. In its subsequent analysis of the enumerated offense of "forcible sex offenses," the panel recognized a troubling aspect of the application of *Sarmiento-Funes*:

> [T]he "forcible sex offense" inquiry usually mimics the "elements" inquiry.[footnote omitted]. The former requires us to consider ways in which the state statute could be violated without "forcible" conduct, while the latter requires us to consider ways in which the statute could be violated without the use, attempted use or threatened use of force. These are essentially the same question, particularly after *Sarmiento-Funes*, which defined "forcible" as denoting "a species of force that either approximates the concept of forcible compulsion or, at least, does not embrace some of the assented-to-but-not-consented-to conduct at issue here." 374 F.3d at 344 (citing *Black's Law Dictionary*, 657 (7th ed. 1999)).[footnote omitted].

Gomez-Gomez, 493 F.3d at 566. In a footnote, the panel added that it seems that any statute failing to satisfy the elements prong would also fail to qualify as a "forcible

sex offense." *Id.* at 566 n.4. In another footnote, the panel considered a definition for "forcible compulsion" in the context of "forcible sex offenses" and rested upon a definition that requires the concept of "physical force." *Id.* at 566 n.5. The panel accurately described the dilemma in this circuit via the application of *Sarmiento-Funes* – the term "forcible" in "forcible sex offense" no longer has any distinctive meaning apart from the "physical force" required under the elements test.

Another panel of this Court avoided this problem by expanding the term "forcible sex offense" through the "fiction of 'constructive force.'" *United States v. Beliew*, 492 F.3d 314, 316 (5th Cir. 2007) (analyzing Louisiana statute of molesting a minor which permits conviction upon "use of influence by virtue of a position of control or supervision over the juvenile"). The *Beliew* panel construed the term so as to avoid the absurd result that rape by "duress" and/or "psychological intimidation" is some type of less significant crime than other rapes. *Id.* The holding in *Beliew* has created tension within the circuit on how to define "forcible sex offenses," but is consistent with statutory construction rules and is in line with other circuits that have addressed the question currently before the en banc court. *See United States v. Romero-Hernandez*, 505 F.3d 1082, 1086-89 (10th Cir. 2007), *pet. for cert. filed*, Jan. 10, 2008 (No. 07-8802); *United States v. Remoi*, 404 F.3d 789, 796 (3d Cir. 2005).

In *Remoi,* the Third Circuit looked to the plain language of the crime of violence definition and rejected the defense argument that "forcible sex offense" requires some form of physical force applied against another. The court observed that a crime of violence is defined as a crime that has as an element the use of *physical* force against another or is a forcible sex offense, not a *physically* forcible sex offense. *Remoi*, 404 F.3d at 794 (emphasis added). The court held that the absence of the word physical as an antecedent modifier, when it is used as such in the same application note in the alternative elements definition, shows that "forcible sex offense" is not limited to physical force:

> Because this difference appeared within the same application note, we must conclude that it was deliberate and that the Sentencing Commission did not mean to limit "forcible sex offenses" to those involving the application of direct physical force, as opposed to some other type of compulsion.

Id.

If "forcible sex offense" required physical force, there would be no need to enumerate "forcible sex offense" as a crime of violence because it would already be covered by the alternative elements definition. In other words, if "forcible sex offense" required physical force, as opposed to other types of compulsion, the enumeration of forcible sex offense as a crime of violence would be superfluous. *Id.* at 794-95. By adding "forcible sex offense" as a separate enumerated crime of

violence, the Commission intended that sexual penetration against the victim's will is always a crime of violence, regardless of whether the crime has as an element the use, attempted use, or threatened use of physical force against another person. *See* USSG App. C, amend. 658 (eff. Nov. 1, 2003).

Remoi involved a conviction under a 1990 New Jersey sexual assault statute that prohibited sexual penetration where the lack of consent was because the victim was physically helpless, mentally defective, or mentally incapacitated. *Remoi*, 404 F.3d at 793. After looking at the charging instrument, which showed that Remoi was charged with sexual penetration of victims who were "physically helpless," the court observed, "the sexual contact for which Remoi was convicted does not require physical force; it may be satisfied by proof that the contact occurred through exploitation of the victim's helplessness." *Id.* at 793-94. The court applied the 2002 version of the Guidelines, which included as an enumerated offense "forcible sex offenses (including sexual abuse of a minor) . . . ." *Id.* at 794. According to the Third Circuit, this provision indicated that even in the absence of physical force, sex crimes against minors are *per se* "forcible sex offenses" because a minor's legal incapacity to consent to sex renders such relations "forcible." *Id.* at 795. The court found that this logic applied to "other types of vulnerable victims," such as one who is

"physically helpless, mentally defective, or mentally incapacitated," as defined by the New Jersey statute. *Id.*

Amendment 658 de-coupled "sexual abuse of a minor" from "forcible sex offenses" and clarified that all enumerated offenses, including "forcible sex offenses," are crimes of violence regardless of whether the crime expressly has as an element the use of physical force against another. *See* USSG App. C, amend. 658 (eff. Nov. 1, 2003). Relying on Amendment 658, the Third Circuit held that a "forcible sex offense" can be committed without use of physical force and is a sex act "against the victim's will or consent." *Remoi*, 404 F.3d at 796. The court held that Remoi's conviction was a sex act against the complainant's will or consent and therefore a "forcible sex offense" because the victims were "physically helpless." *Id.* at 793-96.

In *Romero-Hernandez*, the Tenth Circuit similarly interpreted "forcible" in "forcible sex offense" to have a meaning distinct from the elements test use of physical force. The court looked to the language in the guideline, as well as the guideline's interpretative and explanatory commentary. *Romero-Hernandez*, 503 F.3d at 1085. "Because the Guidelines do not define the term 'forcible sex offense,' [the Tenth Circuit] look[ed] to the 'ordinary, contemporary, and common meanings of the words used." *Id.* at 1087. The court observed that Black's Law Dictionary defined forcible as force against opposition or resistance, which does not necessarily have to

be physical. *Id.* at 1088. Following *Remoi*, the Tenth Circuit held that "[w]hen an offense involves sexual contact with another person, it is necessarily forcible when that person does not consent." *Id.* at 1089.

Romero-Hernandez had a prior conviction for misdemeanor unlawful sexual contact in violation of Colorado Revised Statute § 18-3-404(1). Several provisions under the statute permitted a conviction based upon nonconsensual sexual contact that was not necessarily achieved by physical force. 505 F.3d at 1086-87. The statute covered situations where the sexual contact was nonconsensual due to the following circumstances: "victims unable to comprehend the nature of their conduct; physically helpless victims; victims whose self-control is impaired through perpetrator's actions; or victims who are in the power of the perpetrator for medical purposes or pursuant to some legal or disciplinary authority." *Id.* at 1089. The statute covered circumstances "in which the victims' situational lack of power, influence, or control render[ed] them unable to give consent." *Id.* The court held that the statute was a forcible sex offense. *Id.*

Under a plain reading of the guideline, as employed by the Third and Tenth Circuits, a "forcible sex offense" is a sex act against the complainant's will; physical force is not required. Under *Sarmiento-Funes*, however, the term "forcible sex

offense" is superfluous because it has no independent meaning from the alternative elements definition, which requires physical force.

The argument advanced by Gomez before this Court demonstrates the absurdity of the continued application of *Sarmiento-Funes*. In line with *Sarmiento-Funes'* rendering of "forcible" as requiring physical force, Gomez claims that "forcible sex offenses" requires "some quantum of physical force to overcome resistence by the victim." (App. En Banc Br. at 19-26). As a precursor to this argument, Gomez construes the intent of the Sentencing Commission to be that "forcible sex offenses" are "**qualitatively more serious than the 'aggravated felony' of 'rape'** listed in 8 U.S.C. § 1101(a)(43)(A)." (App. En Banc Br. at 14-15)(emphasis added). Gomez suggests that when the Sentencing Commission amended Section 2L1.2 to permit 4, 8, 12, and 16 level enhancements, the Commission utilized their own definition for a 16-level crime of violence enhancement and relegated all other "aggravated felonies" under 8 U.S.C. § 1101(a)(43)(A) to be only 8-level enhancements, including all felony rapes that did not involve "some quantum of physical force." Gomez claims that if the Commission wanted "forcible sex offenses" to include "a broad spectrum of sex offenses," it would have used a broader term such as "coercive sex offenses," "unconsented-to sex offenses," or even just "sex offenses." However, Gomez fails to recognize or acknowledge that the term "forcible sex offense" is a

broad-reaching phrase that includes felony rape. The Sentencing Commission did not need to expressly list "rape" when the term it chose already incorporated common felony rape.

Gomez' suggested terms are overly broad because the term "forcible sex offense" clearly was not intended to reach all sex offenses. Some sexual conduct is criminally proscribed simply for so-called "morality" reasons, such as adultery. Indeed, until recently, the State of Texas deemed consensual adult sodomy between members of the same gender to be a criminal sex offense. *See* Tex. Penal Code § 21.06 (2002); *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding the statute unconstitutional). If the guideline at issue had deemed all sex offenses to be an enumerated crime of violence, the guideline would have reached the "morality" sex offenses described above. Even if the guideline had listed non-consensual sex offenses as enumerated crimes of violence, the guideline could have reached such offenses as public lewdness and indecent exposure to an adult. *See* Tex. Penal Code §§ 21.07, 21.08. By using the term, "forcible sex offenses," the guideline properly does not reach any of the above conduct. *See Sarmiento-Funes*, 374 F.3d at 343 (forcible sex offense does not include adultery). Although Gomez argues that the Sentencing Commission could have used the term "coercive sex offense," the issue is not what other terms the Commission could have used, but the meaning of the term

that it did use – forcible sex offense. Gomez' argument illuminates the very problem at the heart of the application of the current application of *Sarmiento-Funes* – it relegates various forms of sexual intercourse against a victim's will as being something less egregious than sexual intercourse accomplished by physical force. Recalling that the scope of the analysis is recidivist sentencing, it would seem that society would equally condemn as seriously egregious a rapist who accomplishes sexual intercourse by duress or against a victim that is otherwise incapacitated and unable to resist, as a rape by physical force. *See United States v. Beltran-Munguia*, 489 F.3d 1042, 1053-55 (9th Cir. 2007) (Tallman, J., concurring) (following Ninth Circuit precedent similar to *Sarmiento-Funes*, but noting that in so doing the court is "abandoning the role of common sense" because any non-consensual sex act is a forcible sex offense). The instant case bears out these concerns. The indictment to which Gomez pled guilty alleges that Gomez accomplished sexual intercourse against the will of his elderly victim. Even if the offense was narrowed to only rape by duress through a threat of a hardship, or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act which otherwise would not have been performed, such a rape is not qualitatively less serious than a traditional rape by force.

Indeed, application of *Sarmiento-Funes* leads to patently absurd results. Such crimes as Texas aggravated assault, Louisiana forcible rape, and Mississippi sexual battery would not be a forcible sex offense because they criminalize assented-to-but-not-consented-to conduct. Texas aggravated sexual assault includes situations where multiple actors engage in sexual penetration without the complainant's consent, where the actor gives the complainant a "date rape" drug, such as Rohypnol, or where the complainant is elderly or disabled. *See* Tex. Penal Code § 22.021(a)(2)(A)(v), (vi), (a)(2)(C). Louisiana forcible rape includes sexual intercourse without consent "[w]hen the victim is incapable of resisting or of understanding the nature of the act by reason of stupor or abnormal condition of the mind produced by a narcotic or anesthetic agent or other controlled dangerous substance administered by the offender and without the knowledge of the victim." La. Rev. Stat. § 42.1(A)(2). Mississippi sexual battery includes non-consensual sexual penetration of a person who is not the actor's spouse and sexual penetration with a "mentally defective, mentally incapacitated or physically helpless person." Miss. Code §§ 97-3-95(1)(a)-(b), 97-3-99.

Gomez adds that, if this Court finds ambiguity in the meaning of "forcible sex offense," that the rules of lenity should apply to him and require the ambiguity to be resolved in his favor. (App. En Banc Br. at 26-27). However, any ambiguity in

defining "forcible" was created by application of case law and not by the language used. As the Third and Tenth Circuits found, the use of "forcible" in the enumerated offense must have a meaning distinct from physical force as used in the elements test. Thus, the rule of lenity would not apply here because the Guideline provision at issue is not ambiguous on its face. *United States v. Lamm*, 392 F.3d 130 (5th Cir. 2004).

Gomez also attempts to construe the holding of *Sarmiento-Funes* as a limited holding — something that has not been advanced by any prior defendant challenging an enhancement based upon the enumerated offense of forcible sex offenses. Even if the holding were intended to be a "very limited holding," it has not been applied in a limited manner. Indeed, if a defendant could imagine some hypothetical under the applicable state statute in which the sexual conduct might remotely have been "assented to in fact" notwithstanding the lack of legal consent, then the defendant advanced an argument that the relevant conviction could not be a forcible sex offense under *Sarmiento-Funes*. In any event, if the holding in *Sarmiento-Funes* was intended to be very narrowly construed, it would be appropriate for this Court to articulate the limited nature of that opinion at the same time as this Court provides guidance regarding the appropriate definition for "forcible sex offenses."

D. Gomez' conviction qualifies as a forcible sex offense.

In the instant case, the Court is left to consider the full range of conduct alleged in the indictment, including whether rape by duress would qualify as a "forcible sex offense" under 2L1.2. Importantly, even a rape by duress under this California statute includes qualifying language in the statutory definition: the "hardship or retribution" that defines "duress" must be "sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act which otherwise would not have been performed ..." Cal. Penal Code § 261(b). Moreover, whether a sufficient level of "duress" exists to support a conviction is evaluated in terms of the total circumstances. *Id.* An innocuous threat of hardship or retribution would not support a conviction of rape by means of duress. The threat must be substantially coercive essentially overcoming the will of the victim. Even if this Court did not overrule *Sarmiento-Funes*, a conviction under this subdivision could arguably exclude the assented-to-but-not-consented to conduct addressed in *Sarmiento-Funes*. However, if this Court applied the definition of "forcible sex offense" utilized by the Third and Tenth Circuits, Gomez' conviction would clearly qualify as a "forcible sex offense." Any conviction under this California statute, including "rape by means of duress," would be inherently and substantially coercive in nature, and would require proof that the rape was against the victim's will. As such, with a holding that modifies or overrules

Sarmiento-Funes, Gomez' forcible rape conviction qualifies as a "forcible sexual offense."

E. If the case is remanded for resentencing, the district court should consider the implications of conjunctively alleged indictments and guilty pleas.

If this Court determines that the offense at issue is not a crime of violence based on the instant record, the district court upon remand should be able to consider whether Gomez' guilty plea to the conjunctively-alleged indictment showed that his conviction is in fact a crime of violence. After this Court granted the petition for en banc hearing in this case, an issue arose regarding whether the panel should have had an opportunity to consider the procedural impact of Gomez' guilty plea based on the the unpublished opinion in *United States v. Godino-Madrigal*, No. 07-40023 (5th Cir., Feb. 12, 2008) (unpublished). The *Godino-Madrigal* holding relied upon the California case of *People v. Mendias*, 21 Cal.Rptr.2d 159, 163-64 (Cal.Ct.App. 1993), which held that the "defendant pleaded guilty to robbery by force and fear, as charged, although the conviction was possible on force alone." *Godino-Madrigal*, *slip op.* at 5. *Godino-Madrigal* also cites *United States v. Garcia-Medina*, 497 F.3d 875, 878 (8th Cir. 2007), which held that a plea of guilty to conjunctively-listed offenses qualified as a conviction for a drug-trafficking offense under a California statute. *Id.*

Gomez contends that the government represented that it "waived" the argument of applying the conjunctive-pleading concept to the instant case. He is incorrect. What the United States represented was that the panel in this case upon a panel rehearing would likely hold that the United States waived the argument by failing to raise the issue to the panel in the first instance. However, such is not the case before an *en banc* review as the appeal is addressed anew. In any event, whether the conjunctive-pleading applies in this case is a matter that the district court upon remand should consider within the second step of the enumerated offense inquiry – the common sense narrowing step. Although the holding of *Godino-Madrigal* might be distinguishable as it concerned a different standard of review and a different type of prior conviction, district courts are permitted to consider judicial admissions that are contained in the state indictment when defining a state conviction for purposes of the enumerated offense inquiry.

This Court has held that "drug trafficking" convictions fall into a narrow range of cases permitting a broader analysis of the conviction, including consideration of information other than just statutory definitions of an offense. *United States v. Garza-Lopez*, 410 F.3d 268, 273 (5th Cir.), *cert. denied*, 126 S.Ct. 298 (2005); *United States v. Rodriguez-Duberney*, 326 F.3d 613, 616-17 (5th Cir. 2003). *Godino-Madrigal* involved a drug trafficking conviction, but *Gomez-Gomez* obviously does

not. Nevertheless, *Carbajal-Diaz* held that, under the common sense approach, "specific facts contained in the indictment or jury instructions can be used more freely to define the crime with a somewhat greater level of specificity." 508 F.3d at 808. Moreover, the Supreme Court has expressly held that where the conviction is based upon a guilty plea, the court may consider "adequate judicial record evidence," which includes a statement of the factual basis for the charge, such as the plea colloquy transcript, written plea agreement, or "record of comparable findings of fact adopted by the defendant upon entering the plea." *Shepard*, 125 S. Ct. at 1259-60. The court can also consider "any explicit factual finding by the trial judge to which the defendant assented." *Id.* at 1257.

Gomez' indictment alleged various means of committing the rape, including by force and by duress. Gomez objected at sentencing preserving his challenge to using his rape conviction. Because Gomez preserved his issue, the evidence supporting judicial admissions by Gomez during his plea to the California rape offense arguably must expressly demonstrate that Gomez actually pled to, or was found guilty of, the pertinent parts of the conjunctive allegations in the charging documents that support application of the enhancement. *See United States v. Morales-Martinez*, 496 F.3d 356, 360 (5th Cir. 2007)(holding that under a *de novo* review for a conjunctively-charged indictment for drug trafficking, the government

has to present some evidence, such as the plea colloquy or other admissions by the defendant indicating what evidence the State presented to support the conviction or what evidence the state court relied upon to support the conviction). Finding that the government failed to present such precise proof, the *Morales-Martinez* court held that the conjunctive-pleading analysis did not prevail under a *de novo* review because neither the statutory language nor the offered charging documents necessitated the requisite finding for a drug trafficking offense. *Id.*

The charging document in the instant case established that Gomez pleaded guilty to Count One of a three-count 1991 California indictment. The indictment conjunctively alleged the Gomez committed forcible rape by willfully and unlawfully having and accomplishing an act of sexual intercourse with the victim against her will "by means of force, violence, duress, menace and fear of immediate and unlawful bodily injury on said person." (Govt. Sentencing Ex. 1). On its face, the indictment permits a conclusion that Gomez could have been convicted of rape solely by duress. Absent some evidence establishing that Gomez admitted or was found guilty of specific aspects of the indictment, it would be appropriate to conclude that the government failed to present sufficient prove here, as was the case in *Morales-Martinez*. Nevertheless, this Court could provide needed guidance to district courts by holding, as it did in *Morales-Martinez*, that the concept of conjunctive pleading

is appropriately applicable with the burden upon the government to prove the specific judicial admissions made by the defendant-appellant.

III and IV.

THIS COURT'S HOLDING IN *CALDERON-PENA* SHOULD BE MODIFIED OR OVERRULED REGARDING THE DEFINITION OF WHAT IS AN "ELEMENT" AND WHAT IS "PHYSICAL FORCE" AGAINST THE PERSON OF ANOTHER UNDER USSG § 2L1.2. UPON MODIFYING OR OVERRULING *CALDERON-PENA*, GOMEZ' FORCIBLE RAPE CONVICTION QUALIFIES AS A "CRIME OF VIOLENCE" UNDER THE ELEMENTS TEST.

In addition to the questions involving the enumerated offense of "forcible sex offense," this Court directed the parties to address whether *United States v. Calderon-Pena*, 383 F.3d 254 (5th Cir. 2004) (en banc), should be modified or overruled. In *Calderon-Pena*, the district court utilized the 2001 edition of the Sentencing Guidelines to hold that a prior Texas conviction for child endangerment qualified as a "crime of violence" enhancement under the "elements test" in USSG § 2L1.2. 383 F.3d at 256. The majority opinion in *Calderon-Pena* reached two conclusions that have resulted in much confusion among both district and appellate courts: (1) it defined an "element" to include "any set of facts" and prohibited any consideration of statutorily listed, alleged, and proven manner and means, and (2) it described "physical force" as requiring "bodily contact."

The majority in *Calderon-Pena* first tackled the difficult task of how to define "elements" under USSG § 2L1.2. The majority first rejected using the manner and means of committing an offense as contributing anything to defining an element of that offense under the elements test. *Calderon-Pena*, 383 F.3d at 258. The majority concluded that an "element" is defined as "a constituent part of a claim that must be proved for the claim to succeed" and then reached back to what was arguably *dictum* in *Vargas-Duran* and expressly held that "If any set of facts would support a conviction without proof of that component, then the component most decidedly is not an element – implicit or explicit – of the crime." 383 F.3d at 260.[8] The so-called "any set of facts" test has resulted in a multitude of interesting and sometimes absurd results.

The majority in *Calderon-Pena* also addressed the phrase "physical force" in the definition of "crimes of violence" under USSG § 2L1.2. The majority narrowly construed the term "physical force" to essentially require some "bodily contact." 383 F.3d at 259. This Court in *Vargas-Duran* had already stated that there is "a difference between a defendant's causation of an injury and the defendant's use of force." *Vargas-Duran*, 356 F.3d at 606. Subsequently, the concept of "force" was declared

[8] The panel relied upon the "any set of facts" language, citing *Vargas-Duran*, in concluding that Gomez' forcible rape conviction did not have an element of using, attempting to use, or threatening to use physical force. *Gomez-Gomez*, 493 F.3d at 564.

to be "synonymous with destructive or violent force." *United States v. Landeros-Gonzales*, 262 F.3d 424, 426 (5th Cir. 2001) (quoting a footnote from *United States v. Rodriguez-Guzman*, 56 F.3d 18, 20 n.8 (5th Cir. 1995)). Thus, if a prior conviction did not involve some "bodily contact" that was overtly violent or destructive, then the prior conviction could not be said to require even the "attempted use of physical force." The application of this very narrow construction excludes uses of subtle and indirect force, such as where a person commits a murder by poising, a rape by drugging the victim's drink, or intentionally assaulting a person and causing bodily injury by use of subtle or indirect force.

The effects, and arguably the confusion, flowing from the holding in *Calderon-Pena* can be observed in the instant case. The panel first concluded that the California statute did not require proof of an element of using, attempting to use, or threatening to use "physical force" under the "elements test." *Gomez-Gomez*, 493 F.3d at 564-565. The panel began with the "any set of facts" test and specifically considered examples of how "rape by duress" in California might be committed. *Id.* at 564-565. The panel concluded that Gomez' California rape conviction does not contain any required element of physical force because it can be committed by the means of duress. However, the panel reached this conclusion by considering the manner and means of how the crime was alleged – by means of duress – which is

seemingly inconsistent with *Calderon-Pena's* holding that the elements of a crime do not include "the particular manner and means that attend a given violation of the statute." 383 F.3d at 257. Thus, a strict application of *Calderon-Pena* to Gomez' California rape conviction would mandate that the Court only consider the more basic statutory elements of (1) an act of sexual intercourse and (2) that the sexual intercourse is accomplished against the person's will. Cal. Penal Code § 261(a)(2). Under this strict application of *Calderon-Pena*, the Court would then have to address whether these elements reach the definition of some form of "physical force." However, the panel never even reached that question because the panel's elements test analysis was focused on the manner and means alleged in the indictment.

Under the current application of *Calderon-Pena* the Court would address whether sex against a person's will involved some form of "physical force." Under a modified application of *Calderon-Pena*, the Court would address whether rape by duress (or some other means that was judicially admitted) involves the requisite form of "physical force." In either analysis, it seems that "bodily contact" exists in the sexual act itself. Nevertheless, the question remains as to what type of "force" is required under the "elements test." Here, it would be some level of "force" sufficient to overcome the victim's will. *Calderon-Pena*, together with *Vargas-Duran* and

cases applying those holdings, did not adequately or appropriately define the entire term "physical force."

A. Historical background of the "element's test" under USSG § 2L1.2:

The sentencing guidelines under § 2L1.2 utilized the definition of "crime of violence" from 18 U.S.C. § 16 as a sentencing enhancement for prior convictions under the specific offense characteristics. Prior to November 2001, § 2L1.2 only had two types of sentencing enhancements for felonies: a 16 level enhancement for all prior aggravated felonies, and a four level enhancement for any other felonies. U.S.S.G. § 2L1.2(b)(1)(A) and (B) (2000 ed.). The term "aggravated felony" was therein defined at 8 U.S.C. § 1101(a)(43). U.S.S.G. § 2L1.2, comment. (n.1). The term "crime of violence" was defined by reference to 18 U.S.C. § 16. 8 U.S.C. § 1101(a)(43)(F).

On November 1, 2001, the Sentencing Commission amended U.S.S.G. § 2L1.2 to provide more varying enhancements for prior felony convictions. The level of enhancement became more distinguished based on the aggravating nature of the previous conviction and the sentence imposed for that offense. The base offense level remained at eight, but the enhancement provision after the amendment provided in part:

(1) Apply the Greatest:

If the defendant previously was deported, or unlawfully remained in the United States, after –

(A) a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) **a crime of violence**; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense committed for profit, increase by 16 levels;

(B) a conviction for a felony drug trafficking offense for which the sentence imposed was 13 months or less, increase by 12 levels;

(C) a conviction for an **aggravated felony**, increase by 8 levels;

(D) a conviction for any other felony, increase by 4 levels; or

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by 4 levels.

U.S.S.G. § 2L1.2(b)(1) (2001 ed.) (emphasis added). The term "aggravated felony" in subparagraph (1)(C) retained the definition from 8 U.S.C. § 1101(a)(43). U.S.S.G. § 2L1.2, comment. (n.2) (2001). For the 16-level "crime of violence," the sentencing provision contained its own definition:

(I) [Crime of violence] means an offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another; and

(II) includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including sexual abuse of a minor), robbery,

> arson, extortion, extortionate extension of credit, and burglary of a dwelling.

U.S.S.G. § 2L1.2, comment. (n.1(B)(ii)) (2001 ed.)[9]. The language under subsection (I) is identical to the language of 18 U.S.C. § 16(a) with the exception of force against property. Expressly deleted from the 16-level enhancement was any reference to evaluating an offense "by its nature." The "by its nature" evaluation now falls under the 8-level enhancement. USSG § 2L1.2 (b)(1)(C).

B. The statute and underlying charging documents in Calderon-Pena:

Calderon-Pena's 1999 convictions fell under the Texas child endangerment statute which stated:

> A person commits an offense if he intentionally, knowingly, recklessly, or with criminal negligence, by act or omission, engages in conduct that places a child younger than 15 years in imminent danger of death, bodily injury, or physical or mental impairment.

V.T.C.A., Penal Code § 22.041(c). The charging documents in the 1999 convictions alleged the following:

> Calderon[-Pena], hereafter styled the Defendant, heretofore on or about January 3, 1999, did then and there unlawfully, intentionally and knowingly engage in conduct that placed [name of child], a child

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[9] The definition of "crime of violence" in the current version of the Sentencing Guideline was amended and now states that "Crime of violence" means any of the following: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another. U.S.S.G. § 2L1.2, comment. (n.1(B)(iii) (2007 ed.)).

younger than fifteen years of age and hereafter called the Complainant, in imminent danger of bodily injury, namely, by striking a motor vehicle occupied by the Complainant with the Defendant's motor vehicle.

This Court held that the above offense did not include as an element the use, attempted use, or threatened use of physical force against the person of another. *Calderon-Pena*, 383 F.3d at 262.

C. The current elements test inquiry, the need to modify or overrule *Calderon-Pena*, and ultimately why Gomez' conviction qualifies for the enhancement under the elements test:

A 16-level enhancement for a "crime of violence" under USSG § 2L1.2 includes "any offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another." This inquiry has been referred to as the "elements test" and a specific methodology has developed over time. Like the enumerated offenses inquiry, the terms in the elements test – "element," "use,"[10] and "physical force" – are not defined in § 2L1.2.

1. The methodology of conducting the elements test inquiry:

In conducting the elements test inquiry, a court begins with the "categorical" analysis, looking to the elements of the criminal statute as defined by that statute. *Carbajal-Diaz*, 508 F.3d at 807 (citing *Taylor*, 495 U.S. 575). This step defines the

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[10] This Court has held that the term "use" in this phrase requires proof of the intentional application of the requisite force. *Vargas-Duran*, 356 F.3d at 602 (the "use of force" means "the act of employing force for any ... purpose," or "to avail oneself of force.").

crime at a level of generality without regard to specific facts of the defendant's conduct. *Id.* If the crime's definition includes sets of elements that both do and do not involve some aspect of physical force, then the crime's definition may be narrowed based upon specific facts contained in the charging papers. *Id.* Under the elements test, the charging papers are considered "for the limited purpose of determining which of a series of disjunctive elements a defendant's conviction satisfies." *Carbajal-Diaz*, 508 F.3d at 808 (citing *Calderon-Pena*, 383 F.3d at 258). However, under the current application of *Calderon-Pena*, the disjunctive statutory elements may not be further narrowed by any specific facts alleged in the indictment such as those that focus on the manner and means of committing the offense. *Id.*

2. Defining "element":

To accurately evaluate and apply the elements test methodology, courts must utilize common definitions regarding the terms in the crime of violence enhancement. This Court has held that the term "element" means "a constituent part of a claim that must be proved for the claim to succeed." *Vargas-Duran*, 356 F.3d at 605; *see also Black's Law Dictionary* 538 (7th ed. 1999). In what appeared to be *dicta* in *Vargas-Duran*, this Court added the following: "if any set of facts would support a conviction without proof of that component [intentional use of physical force against the person of another], then the component ... is not an element ... of the crime."

Vargas-Duran, 356 F.3d at 605. In *Calderon-Pena*, this Court affirmed that this "any set of facts" language is applicable as an alternative holding in evaluating the elements of an offense under the elements test. *Calderon-Pena*, 383 F.3d at 260.

The "hyper-categorical" approach required by the "any set of facts" test essentially establishes that a criminal act can never be a "crime of violence" under the elements test "unless *every imaginable way* that an offense could be committed under a given statute of conviction requires the use, attempted use, or threatened use of physical force." *Calderon-Pena*, 383 F.3d at 262 (Jones, J., dissenting). In a case attempting to ascertain whether a California code provision reached crimes beyond generic theft, the Supreme Court discussed the concept of considering hypotheticals:

> [I]n our view, to find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute's language. It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of crime. To show that realistic possibility, an offender, of course, may show that the statute was so applied in his own case. But he must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues.

Gonzales v. Duenas-Alvarez, 127 S.Ct. 815, 822 (2007). While *Duenas-Alvarez* is not directly on point, it provides insight regarding how to analyze what conduct might

be governed by a specific criminal statute as is demonstrated in *United States v. James*, 127 S.Ct. 1586 (2007).

In *James*, the Supreme Court addressed whether a Florida attempted burglary qualified as a "violent felony" under the Armed Career Criminal Act, 18 U.S.C. § 924(e). 127 S.Ct. at 1590. Citing the categorical approach from *Taylor*, James argued that his Florida attempted burglary could qualify as a "violent felony" only if "*all* cases [under the statute] present" the requisite serious potential risk of physical injury to another under Section 924(2)(B). *James*, 127 S.Ct. at 1597. Citing *Duenas-Alvarez*, the Supreme Court declared that James had misapprehended *Taylor's* categorical approach and stated that the Court did "not view [the categorical] approach as requiring that every conceivable factual offense covered by a statute must necessarily present a serious potential risk of injury before the offense can be deemed a violent felony." *Id.* The Court added that the proper inquiry focuses upon ordinary cases under a specific statutory provision – not hypothesized unusual cases. *Id.* As an example of a rejected hypothetical under one of the enumerated offenses in § 924(e)(2)(B)(ii), the Court imagined an extortion by a threat of releasing embarrassing personal information about the victim which would not carry a risk of physical injury. 127 S.Ct. at 1597. The Court concluded that even if that hypothetical fit under the statutory offense, "that does not mean that the offense[] of ... extortion

[is] categorically nonviolent." Thus, *James* essentially rejected the "any set of facts" test as a way to measure the reach of a particular criminal statute. As such, it casts substantial doubt upon the "any set of facts" test.

In light of *Duenas-Alvarez* and *James*, this Court should discard the "any set of facts" test as it is now apparent that the categorical approach of *Taylor* did not encompass such a broad concept of defining the scope of a criminal statute. Instead, this Court should adopt a refined categorical approach and redefine "elements." As Chief Judge Jones suggested in her dissenting opinion in *Calderon-Pena*, "elements" can be viewed in light of what the defendant actually did to comprise the offense of conviction. 383 F.3d at 265 (Jones, J., dissenting). "Element" could still begin with the basic definition of being "a constituent part of a claim that must be proved for the claim to succeed." The statute could then be pared down to those statutorily listed[11] means that were alleged in the specific indictment, and to which the defendant either pled guilty or was found guilty by a jury based on supporting charging documents.

Of note, the panel in the initial opinion actually utilized part of this approach in the present case when it conducted the elements test inquiry and considered one

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[11] If the inquiry is limited to the statutory list of manner and means, it would not be expanding the elements "beyond the statute." The majority in *Calderon-Pena* voiced concern about such an approach. 383 F.3d at 257. Consideration of alleged conduct in the indictment which was found by a jury or judicially admitted would also not result in mini-trials. Such an approach would, as Chief Judge Jones noted, align the inquiry with the "purpose of identifying and penalizing more strictly recidivists who engage in violent crimes." *Calderon-Pena*, 383 F.3d at 265 (Jones, J., dissenting).

of the alleged means to which Gomez pled guilty. *See Gomez-Gomez*, 493 F.3d at 564-565. However, in contrast to *James* and *Duenas-Alvarez*, but consistent with *Calderon-Pena* and *Vargas-Duran*, the panel also considered hypothetical sets of facts without identifying state court decisions that actually applied the statute in that manner. The "any set of facts" test conflicts with the analysis in *James* and *Duenas-Alvarez* and should be modified or discarded. The refined categorical approach could be used instead.[12]

Absent adoption of the refined categorical approach, the elements test inquiry of Gomez' rape conviction will be limited to (1) accomplishing sexual intercourse and (2) against the victim's will. If the refined categorical approach is adopted, then the statutory means of by "force, violence, duress, menace and fear of immediate and unlawful bodily injury" will be considered to determine the elements of Gomez' conviction. The existing documents do not appear to establish which of these

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[12] Gomez sites a Memorandum from the Office of Legal Counsel (OLC) and quotes portions of the memorandum apparently to show that portions of the Department of Justice have followed *Calderon-Pena* when providing legal advice. (App. En Banc Br. at 42-43). It should be noted that OLC is a legal body that provides a wide range of legal advice, and in the specific memorandum referenced by Gomez, OLC was providing guidance to law enforcement officers in the field as opposed to stating the official position of the Department. Moreover, as should be expected, the guidance was predicated upon the existing case law, including *Vargas-Duran* and *Calderon-Pena.* Should either of those opinions be modified or reversed, it is likely that OLC would have to provide additional and/or new advice to law enforcement officers in the field. As it is unclear for what purpose Gomez refers to the OLC memorandum, the United States does not presently deem it necessary to respond further regarding the OLC memorandum.

Gomez' judicially admitted. As such, the district court's holding inherently rested upon the possibility that Gomez pled guilty to rape by duress. As such, the analysis would then turn to whether rape by duress involves use of physical force against the person of another.[13]

3. Defining "physical force":

This Court has not defined the term "physical" in the elements test. In *Calderon-Pena*, this Court noted that the Texas child endangerment statute did not require any "bodily contact." 383 F.3d at 259. The Court subsequently added that one can knowingly endanger "without trying to make any bodily contact with the victim's person and without trying to inflict bodily injury on the person." *Id.* at 261. Arguably, one could interpret the Court's statements as defining "physical" to require either "bodily contact" or "bodily injury." In his dissent, Judge Smith stated that a requirement of "bodily contact" was too much and asserted that the concept of using or attempting to use physical force "should extend to cover those applications of force that are subtle or indirect." *Calderon-Pena*, 383 F.3d at 270 (Smith, J., dissenting).

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[13] If this Court holds that rape by duress is not a "forcible sex offense" and does not involve some aspect of physical force, then this case should be remanded to permit the district court to consider whether evidence exists to demonstrate that Gomez actually pled guilty and judicially admitted one of the other alleged means of committing California forcible rape. Because the district court essentially concluded that rape by duress qualified as a crime of violence, the government was not required to submit evidence regarding whether Gomez actually pled to the other alleged means.

With regard to "force," this Court has suggested that "force" is "synonymous with destructive or violent force." *United States v. Landeros-Gonzalez*, 262 F.3d 424, 426 (5th Cir. 2001). However, that suggestion was premised upon a footnote from *United States v. Rodriguez-Guzman*, 56 F.3d 18, 20 n.8 (5th Cir. 1995) which proposed that "force" carried the meaning of "destructive or violent force." *Rodriguez-Guzman* involved prior convictions for burglary of a nonresidential building and burglary of a vehicle. *Id.* at 19-20. The *Rodriguez-Guzman* panel analyzed whether these were aggravated felonies under the "crime of violence" definition in 18 U.S.C. § 16(b) as it related to force used against property. 56 F.3d at 20. The Court reasoned in the footnote, without citation to authority, that the term "force" must mean more than "mere asportation of some property of the victim," and therein concluded that "force" in this context is "synonymous with destructive or violent force." *Id.* It is certainly reasonable to reach such a conclusion when considering force applied to a building. However, it is an entirely different context when considering force applied against the person of another. Thus, this definition of force with regard to a building is not really useful in evaluating force to a body.

Utilizing several dictionary definitions, the First Circuit has held that "physical force" as used in 18 U.S.C. § 921(a)(33)(A) - "has as an element the use or attempted use of physical force" - means "power, violence, or pressure directed against another

person's body." *United States v. Nason*, 269 F.3d 10, 16 (1st Cir. 2001). Indeed, the term "force" itself has a variety of possible meanings, including "to compel through pressure" or "to impose one's will on someone." *Webster's II New Riverside University Dictionary*, p. 496 (1984). Arguably, this Court's short analysis of "physical force" in *Calderon-Pena* could be construed to require proof of either "physical contact with the victim" or proof of "causing bodily injury to the victim." 383 F.3d 260, (n.8). Indeed, considering *Vargas-Duran* and *Calderon-Pena* together, it would seem that proof of an intentional act with proof of either bodily contact or bodily injury would suffice to be "physical force" under § 2L1.2. Such a conclusion would avoid the concerns of excluding subtle and indirect force while continuing to exclude mistakes and accidents as was at issue in *Vargas-Duran*. However, this Court should provide some workable definition of "physical force" other than merely requiring "bodily contact" and other than the definition courts have used in considering damage to property.

Although in a different context, one decision from this Court attempted to provide a workable definition of "physical force" prior to the en banc decisions of *Vargas-Duran* and *Calderon-Pena*. In *United States v. Shelton*, 325 F.3d 553 (5th Cir. 2003), this Court held that Texas Penal Code § 22.01(a)(1) categorically qualified as a misdemeanor crime of domestic violence under § 921(a)(33). The holding in

Shelton recognized that the "causes bodily injury" element in Texas Penal Code § 22.01(a)(1) encompasses the requirement that a defendant use force to cause the injury. Finding that a section in the Maine general-purpose assault statute providing "[a] person is guilty of assault if he intentionally, knowingly, or recklessly caused bodily injury" to be essentially identical to the Texas Penal Code § 22.01(a)(1), this Court found the "the term 'physical' is implicit in any type of '*bodily* injury' inasmuch as 'bodily' is defined as 'having a body: PHYSICAL' or 'of or relating to the body." 325 F.3d at 559.

Shelton found persuasive the First Circuit's reasoning in *Nason*, 269 F.3d at 20-21, that "the force inflicting such injury must be *physical* in nature, and thus the use of physical force is a necessary element of the crime." *Shelton*, 325 F.3d at 559. It also found persuasive the Eighth Circuit's reasoning in *United States v. Smith*, 171 F.3d 617, 621 (8th Cir. 1999). The predicate offense in *Smith* was an Iowa statute that prohibited an act intending to cause pain, injury or offensive or insulting physical contact. The Eighth Circuit disagreed with the defendant's argument that mere physical contact would not constitute use of physical force, "explaining that 'physical contact, by necessity, requires physical force to complete." *Shelton*, 325 F.3d at 559 (citing *Smith*, 171 F.3d at 621 n. 2 and Iowa Code § 708.1(1)). The *Shelton* court held the defendant in that case proposed various hypotheticals in which he contended

an individual could be charged with misdemeanor assault in Texas without having used physical force, and that he did so without citing actual cases to support this proposition. 325 F.3d at 561.

The *Shelton* holding comports with the First, Eighth and Eleventh Circuits' recognition that the causation of bodily injury necessarily entails the use of force. In *Nason*, the First Circuit held that a state statute criminalizing "offensive physical contact" requires the use of "physical force" so that a violation of it qualifies as a crime of domestic violence for § 922(g)(9) purposes. 269 F.3d at 20-21 .The First Circuit and Eleventh Circuit interpret the plain meaning of "physical force" for purpose of § 921(33)(A)(ii) as "power, violence, or pressure directed against another person's body." *United States v. Ivory*, 475 F.3d 1232, 1234 (11th Cir. 2007) (The "plain meaning of 'physical force' is "'[p]ower, violence or pressure directed against a person' 'consisting in a physical act.'"); *Griffith*, 455 F.3d at 1342 (finding simple battery under Georgia law satisfies the physical force requirement of the ACCA because "'a person cannot make physical contact – particularly of an insulting or provocative nature – with another without asserting some level of physical force."); *Singh v. Gonzales*, 432 F.3d 533, 539 (3d Cir. 2006) ("Physical menace" in this context has been defined as referring "to physical acts committed to threaten another with corporeal harm."); *Nason*, 269 F.3d at 216 (characterizing "physical force," for

purposes of § 921(33)(A)(ii), as "power, violence, or pressure directed against another person's body").

It is important to recall that the Sentencing Commission merely utilized the terminology Congress used in 18 U.S.C. § 16 with the exclusion of physical force against property. Thus, the question is whether "physical force" under Congress' definition of "crime of violence" required "destructive or violent" force as an element of the predicate crime with the concept of both bodily and property damage in mind. Moreover, a pertinent question for purposes of USSG § 2L1.2 would be whether the Sentencing Commission had any intent of requiring "destructive or violent" force and what did the Commission actually intend.

In *Vargas-Duran*, this Court wrote, "the fact that the statute requires that serious bodily injury result from the operation of a motor vehicle by an intoxicated person does not mean that the statute requires that the defendant have used the force that caused the injury." 356 F.3d at 606. The Court added, "There is . . . a difference between a defendant's causation of an injury and the defendant's use of force." *Id.* While it is true that such a difference exists, it is equally true that with an intentional act, the distinction dissipates. In other words, if a defendant intentionally commits an act causing bodily injury to the person of another, such an act inherently involves bodily contact that should suffice as "physical force against the person of another."

In *Shelton*, the Fifth Circuit held that "the term 'physical' is implicit in any type of '*bodily* injury' inasmuch as 'bodily' is defined as 'having a body: PHYSICAL' or 'of or relating to the body." 325 F3d at 559 (Emphasis in original and citations omitted); *but see United States v. Villegas-Hernandez,* 468 F.3d 874 (5th Cir. 2006), *cert. denied*, 127 S.Ct. 1351 (2007) (Applying *Vargas-Duran* and *Calderon-Pena* to hold that, because it is possible to violate the Texas general assault statute by causing injury without applying "violent or destructive force" (*e.g.*, by offering the victim a poisoned drink or reassuring the victim that he can safely back his car into the path of an oncoming vehicle), that the assault statute is not categorically a crime of violence); and *United States v. Rodriguez-Enriquez*, __ F.3d. __, 2008 WL 624433 (10th Cir. 2008) (holding that assault by drugging victim is not crime of violence based upon a conclusion that "physical force" requires some mechanical impact). In light of the statements in *Shelton*, *Vargas-Duran*, and *Calderon-Pena*, this Court could define "physical force" as being inherent in "bodily injury." Thus, a prior conviction that involves an intentional act that causes bodily injury would qualify as an offense that has as an element the use, attempted use, or threatened use of physical force. This Court should at least provide a definition of "force" with regard to the person of another that does not require "destructive" as part of the definition.

4. Gomez' forcible rape conviction is a crime of violence under the elements test.

Under the current application of *Calderon-Pena*, the elements of Gomez' conviction would be limited to (1) accomplishing sexual intercourse and (2) against the victim's will. The act itself is intentional and it inherently involves bodily contact. Reviewing only those elements, the requirement that the act be against the victim's will at least meets the threatened use of physical force part of the "crime of violence" definition.

Under a refined categorical approach, the elements of Gomez' conviction would include the alleged statutory means of committing the offense. Thus, the focus would turn to rape by duress unless the government could prove that Gomez judicially admitted the other alleged means. Importantly, even under the rape by duress means, the "hardship or retribution" that defines "duress" must be "sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act which otherwise would not have been performed ..." Cal. Penal Code § 261(b). Moreover, whether a sufficient level of "duress" exists to support a conviction is evaluated in terms of the total circumstances. *Id.* An innocuous threat of hardship or retribution would not support a conviction of rape by means of duress. The threat must be

substantially coercive essentially overcoming the will of the victim. Thus, even the rape by duress meets the threatened use of physical force when viewed as a whole.

Gomez cites a California state case in support of his claim that a more simple "threat of humiliation" would support a California forcible rape conviction. (App. En Banc Br. at 53 (citing *People v. Superior Court (Kniep)*, 219 Cal.App.3d 235 (Cal. 1990)). However, that case is not really on point. It is a case dealing with child-victims and a different statutory provision – Cal. Penal Code § 288, Lewd or lascivious acts. The statute permits a conviction upon a finding of "duress," yet the statute does not have a specific qualifying definition for the term "duress." Moreover, the California court simply held that the "facts" – including that the defendant was the father of one of the minor victim's – were sufficient to submit the issue of guilt to a jury on a charge of lewd and lascivious acts. *People*, 219 Cal.App.3d 235. That holding does not convey that some minimal form of duress would support a forcible rape conviction. Gomez' reliance upon that case is misplaced.

In summary, Gomez' California forcible rape conviction is a "Forcible Sex Offense" and therefore an enumerated crime of violence. The conviction also meets the alternative elements definition of crime of violence. The sentence should be affirmed.

CONCLUSION

This Court should overrule or wholly modify the holding in *Sarmiento-Funes* and define the term "forcible sex offenses" in USSG § 2L1.2 to mean sexual conduct against a person's will. As such, this Court should conclude that Gomez' California forcible rape conviction qualifies as a "forcible sex offense" and affirm the district court's application of the 16-level enhancement in this case.

This Court should also overrule or modify the holding in *Calderon-Pena* and discard the "any set of facts" test with regard to the "crime of violence" elements test. Moreover, this Court should consider adopting a refined categorical approach which permits consideration of statutorily listed and alleged means of committing an offense so long as those means have been judicially admitted or found by a jury. This Court should also redefine the term "physical force" to include subtle and indirect force by which a defendant intentionally commits an act that causes bodily injury.

Under this concept, this Court should conclude that an alternative finding in this case is that Gomez' California forcible rape conviction also qualifies as a "crime of violence" under the elements test utilized in USSG § 2L1.2.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Tony R. Roberts, Assistant United States Attorney, hereby certify that a true and correct copy of the foregoing supplemental en banc brief of Plaintiff-Appellee has been served by placing the same in the United States Mail, postage prepaid, on this day, April 11, 2008, addressed to:

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