No. 05-41461

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JORGE GOMEZ-GOMEZ,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

REPLY OF APPELLANT TO SUPPLEMENTAL EN BANC BRIEF OF APPELLEE

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas

MARGARET C. LING
LAURA FLETCHER LEAVITT
Assistant Federal Public Defender
Attorneys for Appellant
440 Louisiana Street, Suite 310
Houston, Texas 77002-1634
Telephone: (713) 718-4600

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STATEMENT OF THE REPLY ISSUES

EN BANC REPLY ISSUE ONE: Whether "forcible sex offenses" under the applicable version of the Guideline require at least some quantum of physical force or threat of violence.

EN BANC REPLY ISSUE TWO: Whether Mr. Gomez-Gomez's offense of conviction under Cal. Penal Code § 261(a)(2) "has as an element the use, attempted use, or threatened use of physical force against the person of another."

ARGUMENT

EN BANC REPLY ISSUE ONE RESTATED: "Forcible sex offenses" under the applicable version of the Guideline require at least some quantum of physical force or threat of violence.

(Responsive to Gov't Supp. Br. 17-44).

The first issue posed for en banc review is now moot as to future litigants, because the Sentencing Commission has issued an amendment to USSG § 2L1.2, effective November 1, 2008, that specifically defines "forcible sex offenses" to include unconsented-to sex. Therefore, this Court should dismiss the petition as improvidently granted and remand to the district court for resentencing. Further, the panel decision in Gomez-Gomez does not even present this Court with an error of law that it needs to correct under the applicable Guideline. Finally, rape by duress, which, as the government concedes, includes a "threat of hardship," does not meet the definition of "forcible sex offenses" under the applicable version of the Guideline.

A. The Amendments to USSG § 2L1.2, Effective November 1, 2008, Have Changed the Definition of "Forcible Sex Offenses" and Rendered This Issue Moot as to Future Litigants.

The Sentencing Commission recently proposed a substantive change to the definition of "forcible sex offenses" in USSG § 2L1.2, effective November 1, 2008, unless otherwise rejected by Congress. Specifically, the Commission has amended

the "crime of violence" definition to include the following definition of "forcible sex offenses":

> "Crime of violence" means any of the following ***offenses under federal, state, or local law***: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (***including where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced***), ...

USSG § 2L1.2 (comment. n.1(B)(iii)) (eff. Nov. 1, 2008) (changes emphasized).[1] The Commission explained that "[t]he amendment provides that the term 'forcible sex offense[s]' includes crimes 'where consent to the conduct is not given or is not legally valid, such as where consent to the conduct was involuntary, incompetent, or coerced.'" Id. (Reasons for Amendment).

This definition of "forcible sex offenses" is a substantive amendment to the Guideline because it defines the term in a manner contrary to this Court's existing precedent and thus overrules prior constructions of this term by this Court. See United States v. Diaz, 245 F.3d 294, 303 (3d Cir. 2001); United States v. Capers, 61 F.3d 1100, 1108-12 (4th Cir. 1995); see also United States v. Huff, 370 F.3d 454, 466-67 (5th Cir. 2004) (recognizing that some circuits have held that amendments altering existing law in the circuit are substantive). Although the Commission stated that "the

[1] See "Amendments to the Sentencing Guidelines" at 29-30 (May 1, 2008), located at http://www.ussc.gov/2008guid/finalamend08.pdf (last visited May 2, 2008).

amendment clarifies the scope of the term "forcible sex offense[s]," this statement is not conclusive. See Capers, 61 F.3d at 1110. It is clear from the "Reasons for Amendment" that the amendment constitutes a substantive change because the Commission explained that "[a]pplication of the amendment . . . would result in an outcome that is contrary to" United States v. Gomez-Gomez, 493 F.3d 562 (5th Cir. 2007), reh'g en banc granted, 517 F.3d 730 (5th Cir. 2008); United States v. Luciano-Rodriguez, 442 F.3d 320 (5th Cir. 2006); and United States v. Sarmiento-Funes, 374 F.3d 336 (5th Cir. 2004). See Diaz, 245 F.3d at 302-03 (finding amendment substantive rather than clarifying because amendment was intended, in part, to overturn prior contrary case law).

This substantive change, together with the reasons set forth in the other sections below, should convince this Court that en banc review of Mr. Gomez-Gomez's case is a waste of this Court's valuable judicial and economic resources. The new definition of "forcible sex offenses" will apply to federal offenses committed after November 1, 2008, for which sentencings raise the issue of whether a prior conviction qualifies as a "forcible sex offense." By expressly providing a definition of "forcible sex offenses" that includes sexual conduct for which there was no consent or for which the consent was involuntary, incompetent, or coerced, the Commission has addressed the concerns expressed by some members of the Court arising from this

Court's decision in Sarmiento-Funes. See Gomez-Gomez, 493 F.3d at 569-70 (Jolly, J., specially concurring); Luciano-Rodriguez, 442 F.3d at 324 (Jolly, J., specially concurring); id. at 329 (Owens, J., concurring). In amending § 2L1.2 to resolve a conflict over the interpretation of "forcible sex offenses," the Sentencing Commission properly performed the very function bestowed upon it by Congress, and there thus is no longer any reason for this Court to revisit its opinion in Sarmiento-Funes. See Braxton v. United States, 500 U.S. 344, 348-49 (1991) (discussing Commission's duty to review and revise Guideline and declining to decide issue in light of Commission's review of it); see also United States v. Booker, 543 U.S. 220, 264-65 (2005) (contemplating that the Sentencing Commission would continue to fill this role).

The purpose for rehearing en banc is not primarily to correct errors of law, but rather to address "questions of exceptional importance" raised by the case and to "secure or maintain uniformity of the court's decisions." Fed R. App. P. 35(b)(1)(A) & (B); see United States v. Calderon-Pena, 383 F.3d 254, 268 (5th Cir. 2004) (en banc) ("The en banc court is not, and should not be, primarily a court of error.") (Smith, J., dissenting); Church of Scientology of California v. Foley, 640 F.2d 1335, 1341 (D.C. Cir. 1981) (en banc) (Spottswood, J., dissenting; Ginsburg, [now Justice], joining) ("There is now general agreement among the circuits that the 'truly extraordinary' cases meriting en banc treatment are those involving 'issue(s) likely to

affect many other cases[,]' in other words, those of real significance to the legal process as well as to the litigants.") (footnotes omitted). In light of the amendment to the meaning of "forcible sex offenses" under § 2L1.2, the issue raised here is no longer a "question of exceptional importance" or worthy of en banc review, because it has been resolved as to future litigants. Accordingly, this Court should conserve its judicial resources, dismiss the petition for rehearing en banc, reinstate the panel opinion, and remand the case to the district court for resentencing.

B. Under the Applicable Version of the Guideline, Mr. Gomez-Gomez's Conviction Under Cal. Penal Code § 261(a)(2) Is Not a "Forcible Sex Offense."

Alternatively, the panel decision in Gomez-Gomez does not even present this Court with an error of law that it needs to correct. This is so because, as this Court correctly held in Sarmiento-Funes, a "forcible" sex offense in its generic criminal law sense does not include nonphysical impositions such as fraud, deception, psychological coercion, or duress.

1. Sarmiento-Funes Is Correct and Workable.

Sarmiento-Funes did not create, as the government claims, "confusion and misunderstanding," Gov't Supp. Br. 24, with regard to the appropriate definition of "forcible sex offenses." In the almost four years since Sarmiento-Funes, this Court has issued just ten decisions, including Gomez-Gomez, that decided on the merits

whether a particular prior conviction was one for a "forcible sex offense" under Sarmiento-Funes.[2] Including Mr. Gomez-Gomez's case, this Court has vacated seven sentences because the offenses in question could have been committed by nonforcible impositions,[3] and affirmed in three.[4] Although some members of the Court expressed their disagreement with Sarmiento-Funes – see Gomez-Gomez, 493 F.3d at 569-70 (Jolly, J., specially concurring); Luciano-Rodriguez, 442 F.3d at 324 (Jolly, J., specially concurring) – the Court has not suggested in any of these opinions that there was "confusion" or "misunderstanding" regarding the definition of "forcible sex offenses" or the application of Sarmiento-Funes. The upshot of these decisions is that, when an offense does not involve the "use of physical force" prong of USSG § 2L1.2's "crime of violence" definition, this Court still has been able to find, where appropriate, that an offense qualifies as a "forcible sex offense." See, e.g., United

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[2] See United States v. Jaramillo-Estrada, 235 Fed. Appx. 330, 331 (5th Cir. 2007) (unpublished); Gomez-Gomez, 493 F.3d at 564-69; United States v. Beliew, 492 F.3d 314, 315-17 (5th Cir. 2007); United States v. Portillo-Vela, 199 Fed. Appx. 354, 354-55 (5th Cir. 2006) (unpublished); United States v. Fernandez-Cusco, 447 F.3d 382, 385-88 (5th Cir. 2006); Luciano-Rodriguez, 442 F.3d at 321-23; United States v. Meraz-Enriquez, 442 F.3d 331, 332-34 (5th Cir. 2006); United States v. Shaw, 154 Fed. Appx. 416, 417-19 (5th Cir. 2005) (unpublished); United States v. Matute-Galdamez, 111 Fed. Appx. 264, 265-66 (5th Cir. 2004) (unpublished); United States v. Palomares-Candela, 104 Fed. Appx. 957, 960-61 (5th Cir. 2004) (unpublished).

[3] See Gomez-Gomez, 493 F.3d at 564-69; Portillo-Vela, 199 Fed. Appx. at 354-55; Luciano-Rodriguez, 442 F.3d at 321-23; Meraz-Enriquez, 442 F.3d at 332-34; Shaw, 154 Fed. Appx. at 417-19; Matute-Galdamez, 111 Fed. Appx. at 265-66; Palomares-Candela, 104 Fed. Appx. at 960-61.

[4] See Jaramillo-Estrada, 235 Fed. Appx. at 331; Beliew, 492 F.3d at 315-17; Fernandez-Cusco, 447 F.3d at 385-88.

States v. Fernandez-Cusco, 447 F.3d 382, 385-88 (5th Cir. 2006).

Contrary to the government's argument, see Gov't Supp. Br. 24, the Court in Sarmiento-Funes did not equate "forcible" with "the use, attempted use, or threatened use of physical force against the person of another," as required by § 2L1.2's "has as an element" definition. In other words, the Court did not hold that, in order to be a "forcible sex offense," the perpetrator had to apply, in every case, destructive and violent physical force directly against the person of another. Rather, after studying the various kinds of sex crimes that both traditionally and now generically were considered to be "forcible sex offenses," the Court determined that a "forcible sex offense" involved some kind of "forcible compulsion" as defined in the Missouri statute at issue in Sarmiento-Funes. Sarmiento-Funes, 374 F.3d at 343-45. Specifically, the Court determined that "it seems that the adjective 'forcible' ***centrally denotes a species of force*** that either approximates the concept of forcible compulsion [as defined in the Missouri statute] or, at least, does not embrace some of the assented-to-but-not-consented-to conduct at issue [in the Missouri statute]." Id. at 344 (emphasis added).

According to Sarmiento-Funes, this definition of "forcible compulsion," which includes non-violent and non-destructive physical force as well as threats of violence that are different than the use or threatened use of violent and destructive physical

force, is qualitatively broader than the "has as an element" intentional use or threatened use of violent and destructive physical force against the person of another. As pointed out in Mr. Gomez-Gomez's supplemental brief, q.v. at 19-26, Sarmiento-Funes's definition of "forcible compulsion" comports with: (1) the definition of "forcible" in Black's Law Dictionary – "[e]ffected by force or threat of force against opposition or resistance," Black's Law Dictionary 674 (8th ed. 2004); (2) the traditional meaning of "forcible" in the context of rape and other sexual offenses; and (3) the generic, contemporary meaning of "forcible" sex offenses in "a significant number of states, like Missouri." Sarmiento-Funes, 374 F.3d at 344-45.[5]

A careful reading of Sarmiento-Funes reveals that the very narrow holding in that case is: ***some*** prohibited but assented-to sexual intercourse unaccompanied by extrinsic force or threats of force falls outside the definition of "forcible sex offenses." Id. at 345. This limited holding is based on, and consistent with, the "assent in fact" and "consent in law" distinction made by this Court in United States v. Houston, 364 F.3d 243, 246-48 (5th Cir. 2004) (interpreting USSG § 4B1.2) – a decision that the government does not challenge. And, it is consistent with the common law and the

[5] The government suggests that, because "forcible sex offenses" does not represent a specific crime, a "generic" definition is not possible. See Gov't Supp. Br. 25. The government neither explains the basis for its suggestion nor supports it with any authority. Indeed, the fallacy of the government's claim is demonstrated by this Court's generic definition of "sexual abuse of a minor," also a category of offenses listed in the "crime of violence" definition. See, e.g., United States v. Izaguirre-Flores, 405 F.3d 270, 275-77 (5th Cir. 2005).

modern meaning of "forcible sex offenses." See App. Supp. Br. 19-26.

The government claims that the current application of Sarmiento-Funes not only "relegates various forms of sexual intercourse against a victim's will as being less egregious" than others, but also leads to "patently absurd results." Gov't Supp. Br. 36-37. However, the issue in this case is not whether one sex offense is more egregious than another; nor is the Court required to make such a value judgment. There is no question that rape, however committed, is a despicable crime. Rather, the issue here concerns the generic meaning of "***forcible*** sex offenses" at the time of Mr. Gomez-Gomez's sentencing, as that term is used in the context of "crimes of ***violence***." As previously explained, the Commission chose the adjective "forcible" in order to include only certain categories of sex offenses as "crimes of violence," and graduated the penalties of § 2L1.2, reserving the highest punishment for the most "violent" crimes. See App. Supp. Br.15-18.

The government also urges this Court to follow the Third Circuit's decision in United States v. Remoi, 404 F.3d 789 (3d Cir. 2005), and the Tenth Circuit's decision in United States v. Romero-Hernandez, 505 F.3d 1082 (10th Cir. 2007), petition for cert. filed (Jan. 10, 2008) (No. 07-8802), both of which held that the term "forcible sex offenses" includes sexual intercourse with a helpless or incapacitated victim. See Gov. Supp. Br. 29-34. Neither of these cases, however, engaged in a careful

consideration of the evolution of the common law crime of "forcible rape" into the contemporary crimes of "forcible" and "nonforcible" sex offenses.

In Romero-Hernandez, the Tenth Circuit considered the Black's Law Dictionary definition of "forcible" as used in the context of trespass, which stems from "[a] legal right to be free from interference" – not, as it should have, in the context of a "crime of violence." See Romero-Hernandez, 505 F.3d at 1088. The Tenth Circuit failed to note, however, that Black's Law Dictionary actually states that the term "forcible" in the context of trespass is used "***in a wide and somewhat unnatural sense***" and includes "[t]o lay one's finger on another person without lawful justification" or to "walk peacefully across another man's land." Black's Law Dictionary 674 (8th ed. 2004) (internal quotation marks omitted; emphasis added). It goes without saying that Mr. Gomez-Gomez's case is a criminal, not a civil, case involving the law of "crime of violence," in which the traditional and contemporary meanings of "forcible" are at issue.

Both Romero-Hernandez and Remoi erroneously placed too much significance on the fact that the Sentencing Commission did not modify "forcible sex offenses" with the adjective "physical" and that it included "statutory rape" and "sexual abuse of a minor" – neither of which requires physical compulsion – as enumerated "crimes of violence." See Romero-Hernandez, 505 F.3d at 1088; Remoi, 404 F.3d at 794-95.

Neither Romero-Hernandez nor Remoi, however, considered the Sentencing Commission's purposeful inclusion and exclusion of certain "aggravated felonies" as enumerated "crimes of violence" for the sixteen-level enhancement when it amended § 2L1.2(b) in 2001 and 2003 or the traditional and contemporary meaning of "forcible" in the context of sex offenses. See App. Supp. Br. 14-26.[6]

In sum, the narrow opinion in Sarmiento-Funes not only correctly interpreted the meaning of "forcible sex offenses," but also did so in a way that is consistent with the common law and modern meaning of the term.

2. Mr. Gomez-Gomez's Prior Offense Is Not a "Forcible Sex Offense."

The government next asserts that, "[e]ven if this Court did not overrule Sarmiento-Funes," a conviction for rape by duress under Cal. Penal Code § 261(a)(2) could qualify as a "forcible sex offense" because it "could arguably exclude the assented-to-but-not-consented-to conduct addressed in Sarmiento-Funes." Gov't Supp. Br. 39. Since duress by definition involves assent without legal consent, the

[6] Moreover, the Third Circuit itself expressly recognized that its decision was not in conflict with Sarmiento-Funes, because "the state statute in [Sarmiento-Funes] included ***any*** non-consensual intercourse, whether or not the victim was a minor or incapacitated." Remoi, 404 F.3d at 796 (italics in original). Sarmiento-Funes, which carefully followed Houston's distinction between consent-in fact and consent-in-law, "le[ft] open the question whether intercourse not accompanied by extrinsic force or threats could nonetheless be said to involve the 'use of force' when there is ***no factual assent*** to the sex act" – i.e., such as with an unconscious or drugged victim. Sarmiento-Funes, 374 F.3d at 341 n.8 (emphasis added). The question left open in Sarmiento-Funes, however, is not raised here. This Court therefore need not, and indeed should not, reach that issue.

government understandably does not elaborate on how rape by duress under § 261(a)(2) could not involve the "assented-to-but-not-consented-to conduct" at issue in Sarmiento-Funes. Indeed, the statute at issue in Sarmiento-Funes expressly provided that "[a]ssent does not constitute consent if . . . [i]t is induced by force, ***duress***, or deception." Sarmiento-Funes, 374 F.3d at 341 n. 6 (citing Mo. Code Ann. §556.061(5)) (emphasis added).

Importantly, rape by duress under Cal. Penal Code § 261(a)(2) could occur where the perpetrator threatened some form of humiliation or deprivation to the victim. See, e.g., People v. Bergschneider, 259 Cal. Rptr. 219, 223 (Cal. Ct. App. 1989) (defendant's threat to put victim "on restriction" if she did not have sex with him sufficient to constitute duress), approved by People v. Leal, 16 Cal. Rptr. 3d 869, 873-74 (Cal. 2004). As shown in Mr. Gomez-Gomez's supplemental brief, q.v. at 14-35, such scenarios are not included within the best understanding of the meaning of the term "forcible sex offenses," as delineated in Sarmiento-Funes. The panel therefore correctly found that Mr. Gomez-Gomez's prior conviction was not a "forcible sex offense" within the meaning of the Guidelines.

C. California Pleading Rules

The government correctly concedes that, "[o]n its face, the indictment permits a conclusion that Gomez could have been convicted of rape solely by duress," and

that, "[a]bsent 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 [sic] here, as was the case in Morales-Martinez."[7] Gov't Supp. Br. 43. Nevertheless, the government urges that, if this case is remanded, the district court should be permitted to consider "whether Gomez's guilty plea to the conjunctively alleged indictment showed that his conviction is in fact a crime of violence." Gov't Supp. Br. 40.

The government should not be permitted to supplement the record on remand for a second bite at the apple. See Gov't Supp. Br. 41, 57 n.13. The government was on notice of Mr. Gomez-Gomez's objection even before the sentencing hearing, as Mr. Gomez-Gomez filed a timely written objection to the enhancement. See Dkt. No. 96. The government chose not to file a response to that objection. Instead, it entered into the record at sentencing the indictment, abstract of judgment, and minutes from the prior case. See Gov't Sent. Exh. 1. Moreover, this case has been pending on appeal since November 7, 2005. If the government had wanted to supplement the record on appeal with Shepard-approved documents, it had plenty of time to move the Court to do so. The fact that the government has not done so in the almost two and half years since this case has been pending speaks volumes.

[7] United States v. Morales-Martinez, 496 F.3d 356 (5th Cir. 2007).

In addition, contrary to the government's claim, see Gov't Supp. Br. at 41, the government indeed has waived the conjunctive pleading issue, and this Court therefore should not consider it. The government explicitly represented in its opposition to appellant's motion for reconsideration of en banc rehearing that, "under the circumstances presented here, it would be entirely consistent for this Court to conclude that the United States waived this new argument by failing to brief it in the first instance." Gov't Opp. at 3; see also United States v. Maldonado, 42 F.3d 906, 910 n.7 (5th Cir. 1995) (noting that failure to brief issue in accordance with Fed. R. App. P. 28 constitutes a waiver of issue on appeal); McKethan v. Texas Farm Bureau, 996 F.2d 734, 739 n.9 (5th Cir. 1993) (noting that plaintiff's failure to sufficiently brief issue waived it on appeal). If the issue was not appropriate for the panel to consider, it certainly is not appropriate for the en banc court to consider in the first instance. See, e.g., Lowry v. Bankers Life and Cas. Retirement Plan, 871 F.2d 522, 525 (5th Cir. 1989) (holding that a party cannot raise a new issue in a petition for rehearing).

Significantly, the government does not address Mr. Gomez-Gomez's authority showing that, contrary to the holding of the panel in United States v. Godino-Madrigal, No. 07-40023, 2008 WL 658613 (5th Cir. Feb. 12, 2008) (unpublished), under California law, by pleading guilty, a defendant will be deemed to have admitted all of the allegations of a charging instrument ***only when*** a Shepard-approved

document indicates that the defendant pleaded guilty "as charged." United States v Vidal, 504 F.3d 1072, 1087 (9th Cir. 2007) (en banc); see App. Supp. Br. 48-50 (and cases cited therein). Moreover, the government argued in its opposition to reconsideration of the case for en banc review that, "because this was a rape conviction rather than a drug trafficking case, and because Gomez' case was reviewed de novo, the holding of Godino-Madrigal is too attenuated to apply to this case." Gov't Opp. at 8. The government has not diverged from its position regarding the inapplicability of Godino-Madrigal in its supplemental brief. See Gov't Supp. Br. 41-43. Since the government's clearly stated position is that the conjunctive pleading rules are inapplicable to this case, there is no need for either this Court or the district court on remand to consider the issue further.

As a final note, the government suggests that "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." Gov't Supp. Br. 43-44. Not only is this suggestion outside the scope of what the government requested, and this Court approved, for en banc review, but it is utterly unnecessary in light of both this Court's decisions in Morales-Martinez, 496 F.3d at 359-60, and United States v. Gutierrez-Bautista, 507 F.3d 305, 308 (5th Cir.

2007), regarding the effects of conjunctive pleading rules, and this Court's long-standing requirement that the government bears the burden to prove with competent evidence that an enhancement applies. See, e.g., United States v. Herrera-Solorzano, 114 F.3d 48, 50 (5th Cir. 1997).

EN BANC REPLY ISSUE TWO RESTATED: Mr. Gomez-Gomez's offense of conviction under Cal. Penal Code § 261(a)(2) does not "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another."

(Responsive to Gov't Supp. Br. 44-65).

The government asserts that this Court's decision in United States v. Calderon-Pena, 383 F.3d 254 (5th Cir. 2004) (en banc), has caused "much confusion among both district and appellate courts" because: "(1) it defined '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.'" Gov't Supp. Br. 44. The government misreads Calderon-Pena, and this misreading undermines the government's entire argument.

A. *Calderon-Pena* Permits the Use of Charging Papers to Determine Which of Alternative Statutorily Listed Methods of Committing the Offense Are Involved in a Particular Case.

The majority decision in Calderon-Pena did not, as the government claims, prohibit consideration of any "statutorily listed, alleged, and proved manner and means." Rather, the majority said that

> whenever a statute provides a list of alternative ***methods of commission*** – just as the statute in Taylor[8] referred to burglaries of several different types of structures – ***we may look to charging papers to see which of the***

[8] Taylor v. United States, 495 U.S. 575, 578 n.1 (1990).

> ***various statutory alternatives are involved*** in the particular case. ***We agree that such a use of the indictment – a matter not at issue in Vargas-Duran[9] – is permissible.***

Calderon-Pena, 383 F.3d at 258 (emphasis added).

The statute at issue in Calderon-Pena, Tex. Penal Code § 22.041(c), made it an offense to "'intentionally, knowingly, recklessly, or with criminal negligence, ***by act or omission***, engage[] in conduct'" that placed a child under fifteen at risk of death, bodily injury, or physical or mental impairment. Calderon-Pena, 383 F.3d at 256 (setting forth language of Texas statute) (emphasis added). Clearly, this Court held it was permissible to look at the indictment to see which of the statutory alternatives – "intentionally, knowingly, or recklessly" and "by act or omission" – was at issue in the offense. Id. at 260. And the Court did so by finding that the indictment showed that the defendant "***knowingly***, ***. . .by act . . .*** engaged in conduct . . . ." Id. (emphasis added). What the Court held was ***not*** permissible, in light of Taylor and most particularly in light of the statutory "has as an element" language, was to consider the ***particular factual or evidentiary*** allegations in the indictment, i.e., that the defendant committed the act "by striking a motor vehicle occupied by the Complainant with the Defendant's motor vehicle." Id. at 256-57.

To the extent the government is arguing – consistently with the above-quoted,

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[9] United States v. Vargas-Duran, 356 F.3d 598 (5th Cir. 2004) (en banc).

actual holding of Calderon-Pena – that the Court can consider in its "has as an element" analysis any ***statutorily listed*** alternative means of committing an offense alleged in the indictment, see Gov't Supp. Br. 55, Mr. Gomez-Gomez agrees. And, in Mr. Gomez-Gomez's case, the indictment tracked the language of the statute, including every statutory means of committing the offense, and alleged nothing more factually. See Gov't Sent. Exh. 1.

The fundamental flaw that pervades the government's entire argument stems from its erroneous conflation of the statutory language "by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person of another" (i.e., the statutory means of committing the offense), Cal. Penal Code § 261(a)(2), and Calderon-Pena's discussion of "manner and means." California's statutory means of committing the offense clearly are alternative "elements" of the offense. See United States v. Vargas-Duran, 356 F.3d 598, 605 (5th Cir. 2004) (en banc) ("[A]n element is '"[a] constituent part of a claim that must be proved for the claim to succeed."'") (quoting Black's Law Dictionary 538 (7th ed. 1999)). Because the government fails to recognize that the statutory means of committing the offense are "elements" and not particular factual or evidentiary allegations alleged in an indictment, see Calderon-Pena, 383 F.3d at 256-57, the government erroneously concludes that the panel, contrary to Calderon-Pena, impermissibly considered the

"manner and means" to narrow the offense of conviction to rape by duress. Gov't Supp. Br. 46-47.

Because of its flawed statutory analysis, the government contends that there are only two elements comprising the offense of rape under Cal. Penal Code § 261(a)(2): (1) sexual intercourse and (2) against the will of the victim. Gov't Supp. Br. 47, 56, 64. The government is wrong. It is hornbook law that the elements of an offense constitute "the definition" of that offense – the basic requirements for criminal liability – whether the offense is a statutory crime (as in this case) or a common law crime. See 2 Wayne R. LaFave, Substantive Criminal Law § 1.2(c) (2d ed. as updated on Westlaw 2007); see also Vargas-Duran, 356 F.3d at 605.

The relevant California pattern jury instruction includes in the elements of the offense, which the jury must find beyond a reasonable doubt before it can find a defendant guilty of rape as defined in § 261(a)(2), that "[***t***]***he act was accomplished by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury*** [to the alleged victim] [or] [to another person]." Cal. Jury Instructions – Criminal No. 10.00 (2008) (emphasis added); see also People v. Griffin, 16 Cal. Rptr. 3d 891, 895 (Cal. 2004) (noting that rape under § 261(a)(2) is defined as "an act of sexual intercourse accomplished with a person not the spouse of the perpetrator . . . [w]here it is accomplished against a person's will by means of force, violence,

duress, menace, or fear of immediate and unlawful bodily injury").

It thus is quite clear that, according to the plain language of § 261(a)(2), there is no offense of rape without proof of at least one of the statutory means (i.e., elements or constituent parts) of committing the offense. That the California statute provides ***alternative*** methods of committing the offense does not alter the legal fact that they are alternative "elements" from which the government must select in order to prove a defendant guilty of the crime. And, because they are elements, they are not the "manner and means" discussed in Calderon-Pena and are well within the "has as an element" analysis required under USSG § 2L1.2. Consequently, the government's request for this Court to adopt a "refined categorical approach," Gov't Supp. Br. 55-57, is not only unnecessary but also is based on a fundamental misunderstanding of what constitutes the definition of an offense.

B. Any Modifications of This Court's Decision in *Calderon-Pena* to Expand the Meaning of the Term "Element" and the Definition of "Physical Force" as Used in USSG § 2L1.2 Would Not Affect the Result in This Case, and Thus Would Be an Improper Advisory Opinion.

This Court's opinion in Calderon-Pena held that, under the "has as an element" prong of USSG § 2L1.2's "crime of violence" definition, the Court could not consider factual or evidentiary allegations about the offense contained in the charging papers to determine if the offense had the requisite element of "use . . . of physical force

against the person of another." Calderon-Pena, 383 F.3d at 257-59. In its brief, the government seeks to have that holding overruled or modified to expand the term "element" in the "has as an element" definition to include factual allegations specific to the prior offense in order to determine whether there is an "element" of use of physical force. See Gov't Supp. Br. 55 n.11. The record in this case does not provide any basis for the government's argument.

In Calderon-Pena, this Court held that it could not consider, under the "has as an element" analysis, a factual allegation in the indictment that the defendant had committed the offense "by striking a motor vehicle occupied by the Complainant with the Defendant's motor vehicle." Calderon-Pena, 383 F.3d at 256. Here, unlike in Calderon-Pena – apart from date of the offense and name of victim – there are ***no*** factual allegations in any of the documents introduced and relied on by the government in the district court. Rather, the indictment simply tracks the language of the statute. See Gov't Sent. Exh. 1.[10] And, as even the government does not dispute, when the offense cannot be further narrowed by the relevant Shepard-approved documents, whether the offense "has as an element the use . . . of physical force against the person of another" must be determined by analyzing the entire statute

[10] Although the indictment also contains an enhancement paragraph alleging that the victim was "over the age of 60, within the meaning of Penal Code Section 1203.09(f)", the abstract of judgment reflects that Mr. Gomez-Gomez did not plead to the enhancement. See Gov't Sent. Exh.1 (Abstract of Judgment).

– here, Cal. Penal Code § 261(a)(2), which includes sexual intercourse accomplished by duress. See Gov't Supp. Br. 56-57. There thus is no factual allegation to be considered in this case that could serve as a basis for the holding the government seeks.

The government also wants this Court to redefine the "physical force" component of the "has as an element" prong to include "causing bodily injury," or, at least, to eliminate the requirement that the physical force be "violent and destructive." Compare Gov't Supp. Br. 57-63, with Calderon-Pena, 383 F.3d at 260 (recognizing that force must be violent). Significantly, the requirement that the physical force be "violent and destructive" was not at issue in Calderon-Pena. The Court therefore should not entertain the government's request to eliminate this well-established component of the "has as an element" definition. See United States v. Landeros-Gonzales, 262 F.3d 424, 426 (5th Cir. 2001), and United States v. Rodriguez-Guzman, 56 F.3d 18, 20 n.8 (5th Cir. 1995).

Furthermore, even if "physical force" could be construed to include "causing bodily injury" – which it cannot, see infra, text, at 32-38 – rape by duress under Cal. Penal Code § 261(a)(2) would not provide a basis for this Court to so hold. At the time of Mr. Gomez-Gomez's offense in 1991, rape "by duress" under California law was defined to include a threat of "hardship." See People v. Leal, 16 Cal. Rptr. 3d

869, 873-874 (Cal. 2004). As the panel correctly noted, see Gomez-Gomez, 493 F.3d at 565 n.2, ***California has in fact – not merely hypothetically*** – interpreted "hardship" to include psychological coercion – i.e., threatening to place the victim "on restriction." People v. Bergschneider, 259 Cal. Rptr. 219, 223 (Cal. Ct. App. 1989), approved by Leal, 16 Cal. Rptr. 3d at 873-74. Not even the government has contended that "hardship" in that sense includes "bodily injury" or even the threatened use of ***physical*** force against the person.

Since the record contains no facts or controversy that can serve as a basis for deciding the government's contentions, this Court should abide by the constitutional principles of judicial restraint and refrain from deciding them: "The 'case or controversy' requirement of Article III of the United States Constitution prohibits federal courts from considering questions that cannot affect the rights of the litigants before them." C&H Nationwide, Inc. v. Norwest Bank of Texas, 208 F.3d 490, 493 (5th Cir. 2000) (citation omitted). As the Supreme Court has stated:

> [I]t is quite clear that "the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions." Thus, ***the implicit policies embodied in Article III***, and not history alone, impose the rule against advisory opinions on federal courts.

Flast v. Cohen, 392 U.S. 83, 96 (1968) (quoting C. Wright, Federal Courts 34 (1963)) (emphasis added). Indeed, this Court has clearly recognized that "'a federal court has

neither the power to render advisory opinions nor "to decide questions that cannot affect the right of litigants in the case before them."'" John Doe # 1 v. Veneman, 380 F.3d 807, 814 (5th Cir. 2004) (quoting Preiser v. Newkirk, 422 U.S. 395, 401 (1975)). The bottom line is that modifying or overruling Calderon-Pena – as desired by the government here – would not change the result in this case, that the issues that were present in Calderon-Pena are not present in this case, and that any modification of Calderon-Pena as urged by the government would be an improper advisory opinion in violation of Article III.

C. *Calderon-Pena* Provides a Workable and Statutorily Correct Framework for Analyzing Whether a Prior Conviction Is a "Crime of Violence" Under the "Has as an Element" Definition in USSG § 2L1.2.

This Court also should not reconsider Calderon-Pena because it provides a workable and correct analytical framework, because it is in conformity with Supreme Court precedent, and because it is in accord with the ordinary meaning of the language in USSG § 2L1.2.

1. The Elements of an Offense Are Taken from the Statute that Defines the Offense and Cannot, Consistently with the Language of the Guideline and *Taylor*, Be Expanded to Include Factual Allegations of Conduct.

The government posits that Calderon-Pena should be reconsidered because defining the term "element" in USSG § 2L1.2 was a "difficult task" for the Court in

Calderon-Pena. Gov't Supp. Br. 45. On the contrary, while a few members of the Court took issue with the limitations that an "element-based" analytical approach posed, no member of the Court expressed difficulty with defining an "element" of an offense. As the Court recognized, the term "element" is a legal term of art with a straightforward meaning that clearly signals that the courts should look only to the definition of an offense in the relevant statute (or common law). See Calderon-Pena, 383 F.3d at 257; see also United States v. Singleton, 182 F.3d 7, 11 (D.C. Cir. 1999) ("The term of art 'element of the offense' makes clear that a court need look no further than the statute creating the offense to decide whether it describes a crime of violence.").

Moreover, as the majority in Calderon-Pena correctly recognized, it is the plain language of § 2L1.2 that limits the inquiry to the statutory elements of the crime as opposed to the defendant's actual conduct in committing the offense. Calderon-Pena, 383 F.3d at 257. After Calderon-Pena, the Supreme Court itself in Leocal approved this limitation when it analyzed the substantially similar "has as an element" definition of "crime of violence" in 18 U.S.C. § 16(a). See Leocal v. Ashcroft, 543 U.S. 1, 8-9 (2004). For the Court in Leocal, the "has as an element" analysis began and ended with the state statute at issue. See id. at 9.

Moreover, the importance of looking only to the statutory language defining the

offense when determining whether that offense has a particular element is underscored by a comparison of the "crime of violence" definition in § 2L1.2 and the "crime of violence" definition in § 4B1.2(a). Unlike § 2L1.2, § 4B1.2(a)(2) specifically permits consideration of "***conduct*** [that is "expressly charged"] that presents a serious potential risk of physical injury to another." USSG § 4B1.2(a)(2) & comment. (n.1). Clearly, the Sentencing Commission knew how to write a Guideline that permits a broader view of "crime of violence" than the "has as an element" analysis, and it did so in § 4B1.2(a)(2). Cf. Bates v. United States, 522 U.S. 23, 29-30 (1997) (where Congress included language in one part of a statute but excluded it from another part, it is presumed that Congress acted intentionally). In fact, Congress made a similar distinction in 18 U.S.C. § 16 when it defined "crime of violence" not only in terms of "has as an element" but also more broadly in terms of "'by its nature involves a substantial risk that physical force against the person of another may be used in the course of committing the offense.'" Leocal, 543 U.S. at 10 (quoting 18 U.S.C. § 16(b)). Given the Sentencing Commission's purposeful choice of an "element-based" analysis over a "conduct-based" analysis, and the Supreme Court's distinction between the two, Calderon-Pena was correctly decided, and this Court should not modify or overrule it in any way.

The government also criticizes Calderon-Pena's use of Vargas-Duran's "any

set of facts" test[11] as leading to "a multitude of interesting and absurd results." Gov't Supp. Br. 45, 52-54. Without giving any examples of such "interesting and absurd results," the government argues that, under the "any set of facts test," "a criminal act can never be a 'crime of violence' 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." Gov't Supp. Br. 52 (quoting Calderon-Pena, 383 F. 3d at 262) (Jones, [now C.] J., and Barksdale, J., dissenting).

Contrary to the government's protestations, the Vargas-Duran "any set of facts" test does nothing more than restate the bedrock legal concept of what an "element" of an offense is: "an element of a crime [is] a constituent part of the offense which must be proved by the prosecution ***in every case*** to sustain a conviction under a given statute." United States v. Innie, 7 F.3d 840, 850 (9th Cir. 1993) (emphasis in original; citations and footnote omitted). The obvious and logical corollary to the government's proposition is that, if an offense – such as rape under Cal. Penal Code § 261(a)(2) – may be committed under "any set of facts" not involving the use, attempted use, or threatened use of physical force against the person of another, then the offense does not "ha[ve] as an element the use, attempted use, or threatened use

[11] See Vargas-Duran, 356 F.3d at 605 ("If any set of facts would support a conviction without proof of that component [here, as in Vargas-Duran, the use, attempted use, or threatened use of physical force against the person of another], then the component most decidedly is not an element – implicit or explicit – of the crime.").

of physical force against the person of another."

The government also asserts that the "any set of facts" test is contrary to the Supreme Court's decisions in James v. United States, 127 S. Ct. 1586 (2007), and Gonzales v. Duenas-Alvarez, 127 S. Ct. 815 (2007). Although conceding that neither of these cases is "directly on point," Gov't Supp. Br. at 53-54, the government tries nonetheless to shoehorn their inapposite legal analysis into the confines of this case. Gov't Supp. Br. 52-55. The problem with government's argument, however, is that neither Duenas-Alvarez nor James had anything to do with the "has as an element" analysis. In James, the Supreme Court considered whether attempted burglary under Florida law fell within the ACCA's "violent felony" definition as "'involv[ing] ***conduct*** that otherwise presents a serious potential risk of physical injury to another.'" James, 127 S. Ct. at 1590-91 (quoting 18 U.S.C.§ 924(e)(2)(B)(ii) (emphasis added)). In Duenas-Alvarez, the Court considered whether the California statutory offense of aiding and abetting the taking of a vehicle without consent was a "theft offense" for purposes of 8 U.S.C. § 1101(a)(43)(G). See Duenas-Alvarez, 127 S. Ct. at 818-23.

While it is certainly true that Duenas-Alvarez rejected the use of hypothetical fact scenarios to show that a particular statute applied to conduct that fell outside the generic definition of an enumerated crime, see Duenas-Alvarez, 127 S. Ct. at 822, this aspect of Duenas-Alvarez has nothing to do with the "has as an element" analysis.

The "any set of facts test" is not the equivalent of the use of hypothetical fact scenarios that was rejected in Duenas-Alvarez. The "has as an element" analysis, as informed by the "any set of facts test," is bound by the plain language of the Guideline, and, while case law may be informative, it does not relegate the language of the Guideline to the backseat. This is not so with the "hypothetical fact scenario" analysis, which understandably is unique to the enumerated offense analysis.

Moreover, the use of hypothetical fact scenarios was not the basis on which the panel found that Mr. Gomez-Gomez's offense did not "ha[ve] as an element" the use of physical force; rather, the panel's holding was based on a ***real*** – ***not hypothetical*** – California decision which found duress by "threat of hardship" satisfied when the defendant threatened the victim with being put "on restriction" if she refused to have sex with him. Gomez-Gomez, 493 F.3d at 565 n.2 (discussing and citing Bergschneider, 259 Cal. Rptr. at 223). Indeed, the panel in Gomez-Gomez cited Duenas-Alvarez as the reason that it was relying on a "real-world example" of a nonforcible way to violate the California statute. See id. at n. 2.

This Court's decision in Calderon-Pena has provided a straightforward and workable framework for this Court's "crime of violence" jurisprudence, as persuasively demonstrated by the Court's recent decision in United States v. Carbajal-

Diaz, 508 F.3d 804 (5th Cir. 2007).[12] Moreover, the "has as an element" language appears in numerous other statutes. See, e.g., 18 U.S.C. § 16(a); 18 U.S.C. § 921(a)(33)(A)(ii); 18 U.S.C. § 924(e)(2)(B)(ii); USSG § 4B1.2. Redefining the unambiguous definition of "element" in the "crime of violence" context, without any solid basis in law or practice, would undermine well-settled jurisprudence and create confusion in the bench and the bar not only in the context of § 2L1.2 but also in the context of other Guidelines and statutes that incorporate the "has as an element" language.

2. "Physical Force" in the Context of a "Crime of Violence" Under USSG § 2L1.2 Is Not the Same as Mere Physical Contact or Causing Bodily Injury.

The government also criticizes this Court's well-settled definition of "physical force" in the "crime of violence" context, which requires that the forced used against the person of another be "violent or destructive force." See Gov't Supp. Br. 57-63. According to the government, Vargas-Duran and Calderon-Pena together seem to

[12] In fact, in a memorandum to law enforcement, the Office of Legal Counsel ("OLC") of the Department of Justice ("DOJ") embraced the "has as an element" analysis as settled law. See United States v. Maldonado-Lopez, 517 F.3d 1207, 1211 (10th Cir. 2008) (McConnell, J., concurring); see also App. Supp. Br. at 42-43 (quoting OLC memorandum). The government dismisses the OLC's memorandum on the grounds that it relied in part on Vargas-Duran and Calderon-Pena and that the OLC was "providing advice to law enforcement in the field," not stating the official position of the DOJ. Gov't Supp. Br. 56 n.12. In light of the government's failure to cite any source indicating that this memorandum does not mean what it states or does not have the force of the DOJ behind it, the memorandum speaks for itself and clearly reflects that the government considered the existing "has as an element" analytical framework to be "unambiguous." App. Supp. Br. at 42.

suggest that "an intentional act with proof of either bodily contact or bodily injury would suffice to be 'physical force' under § 2L1.2." Gov't Supp. Br. 59 (emphasis in original); see also id. at 57-59, 62-63. Specifically, the government points to the pre-Vargas-Duran panel decision in United States v. Shelton, 325 F.3d 553 (5th Cir. 2003), as an "attempt[] to provide a workable definition of 'physical force.'" Gov't Supp. Br. 59.

Again, the validity vel non of this line of law is not factually presented by this case, and this Court should decline the government's invitation to issue an advisory opinion on this question. If, however, the Court does address it, the Court should adhere to what Calderon-Pena said on this question.

In Shelton, the Court held that a conviction for assault under Tex. Penal Code § 22.01(a)(1), which prohibited "intentionally, knowingly, or recklessly, causing bodily injury to another," was a "misdemeanor crime of domestic violence" under 18 U.S.C. § 921(a)(33)(A)(ii) because it had "as an element the use of physical force" as required by the statute. Shelton, 325 F.3d at 558-59. Shelton relied on the earlier panel decision in Vargas-Duran, which had held that "'the requirement that the offender "cause[] serious bodily injury' encompasses a requirement that the offender use force to cause that injury.'" Shelton, 325 F.3d at 558 (quoting United States v. Vargas-Duran, 319 F.3d 194, 196 (5th Cir.), overruled, 356 F.3d 598 (5th Cir. 2004)

(en banc)). Following the reasoning of the First Circuit in United States v. Nason, 269 F.3d 10 (1st Cir. 2001), which had considered a similarly worded Maine assault statute as interpreted by the Maine Supreme Court, the Shelton panel effectively redefined Texas simple assault to supply what it considered to be "the missing piece of the puzzle" – the "use of physical force" – and concluded that "the force inflicting [the bodily] injury must be ***physical*** in nature, and thus the use of physical force is an element of the crime." Shelton, 325 F.3d at 559.

Shelton was handed down before the Supreme Court's decision in Leocal – a decision that gave teeth to both Vargas-Duran and Calderon-Pena, by recognizing that "a crime of violence [as defined in 18 U.S.C. § 16(a)] is one involving the "use . . . of physical force ***against the person or property of another***." Leocal, 543 U.S. at 9 (italics in original; emphasis added); Taylor v. United States, 495 U.S. 575, 597 (1990) (noting that Congress added "risk of injury" language to the "violent felony" definition because certain categories of violent crimes did not have "use or threat of force against a person" as statutory elements). The Court gave the words in the "has as an element" definition their "'ordinary or natural'" meaning, Leocal, 543 U.S. at 9 (quoting Smith v. United States, 508 U.S. 223, 228 (1993), and concluded that "'use' requires ***active employment***" of physical force ***against the person of another***. Leocal, 543 U.S. at 9 (emphasis added) (citing Bailey v. United States, 516 U.S. 137,

145 (1995). As an example, the Supreme Court explained that "a person would 'use . . . physical force against' another when pushing him; however, we would not ordinarily say a person 'use[s] . . . physical force against' another by stumbling and falling into him." Leocal, 543 U.S. at 9. In other words, for a statute to have as an element the "use . . . of physical force against the person of another," it must require that the perpetrator actively employ physical force against the person of another. Doing something other than that, which results in bodily injury, does not suffice. The Supreme Court's post-Vargas-Duran and post-Calderon-Pena decision in Leocal requiring that a person actively employ force thus undercuts the position of the dissent in Calderon-Pena, which argued that "the 'use of physical force' and 'attempted use of physical force' under the 'crime of violence' guideline should extend to cover those applications of force that are subtle or indirect, rather than only those embracing 'physical contact.'" Calderon-Pena, 383 F.3d at 270 (Smith, J., dissenting).

Moreover, Shelton was overruled by the en banc decision in Vargas-Duran, which held that use of force must be intentional, and which recognized the logical distinction between use of physical force and causing bodily injury. Vargas-Duran, 356 F.3d at 606; see also United States v. Villegas-Hernandez, 468 F.3d 874, 880-81 (5th Cir. 2006) (holding that "use of physical force" is not an element of Texas assault). The government admits that distinction, but argues that because the use of

force must be ***intentional***, the distinction dissipates. Gov't Supp. Br. 62. Thus, according to the government, "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.'" Gov't Supp. Br. 62.

The fallacy of the government's argument is easily demonstrated by a close reading of the Texas assault statute. As noted above, Texas assault is defined as "intentionally, knowingly, or recklessly causing bodily injury to another." Tex. Penal Code § 22.01(a)(1). "'Bodily injury' means physical pain, illness, or any impairment of physical condition." Tex. Penal Code § 1.07(a)(8); Smith v. State, 135 S.W.3d 259, 265 (Tex. App.–Texarkana 2004). One can "intentionally . . . caus[e] bodily injury to another" under this statute without any use of physical force. See Villegas-Hernandez, 468 F.3d at 879 (recognizing that bodily injury under the Texas assault statute could result from a number of intentional acts that did not involve use of physical force). For instance, one could "mak[e] available to the victim a poisoned drink while reassuring him the drink is safe," id., and the drink makes him physically ill. Even more stark, it is well-known that one can get physically ill from emotional distress caused by, for example, bullying or verbal abuse, which is an act that requires no physical contact at all, even indirect. As these simple examples show, there is no

necessary connection between physical force and causing bodily injury, even intentionally causing bodily injury.

Furthermore, this Court's discussion in Shelton dealt with 18 U.S.C. § 921(a)(33)(A)(ii), which, while incorporating a "has as an element" analysis, does not include in its "misdemeanor crime of domestic violence" definition the requirement that the use of physical force be "against the person of another." But, the Supreme Court has made clear, it is precisely this portion of the "has as an element" analysis that informs how the use of physical force is to be defined. See Leocal, 543 U.S. at 8-10.

The Sentencing Commission likewise understood the difference between the use of physical force and causing physical injury, as can be seen by comparing § 4B1.2, which includes "conduct that presents a serious potential risk of physical injury to another," with § 2L1.2, which does not contain such language. In the context of § 2L1.2, it is also noteworthy that "causing bodily injury" is part of the generic definition of the enumerated offense of "aggravated assault." See United States v. Guillen-Alvarez, 489 F.3d 197, 200-01 (5th Cir.), cert. denied, 128 S. Ct. 418 (2007). Thus, "causing bodily injury" is already largely accounted for under the enumerated offenses prong of the "crime of violence" definition in § 2L1.2. Indeed, the government's own examples of offenses that it believes will fall through the cracks

absent adoption of its recommendation, see Gov't Supp. Br. 46, expose the fallacy of its argument. While "a person [who] commits a murder by poisoning" does not use physical force against that person, id., he does cause the death of that person, and "murder" is an enumerated "crime of violence." See USSG § 2L1.2, comment. (n.1(B)(iii)). While "intentionally assaulting a person and causing bodily injury by use of subtle or indirect force" may not involve the use of physical force against the person, id., it does constitute the enumerated "crime of violence" of "aggravated assault." See Guillen-Alvarez, 489 F.3d at 200-01. And, while "a rape by drugging the victim's drink" does not involve the use of physical force against that person, id., it will, under the new definition of "forcible sex offenses" qualify as that enumerated "crime of violence." See supra, text, at 2-4.

3. Physical Force Must, as This Court Has Held, Be "Violent and Destructive Force."

The government's fallback position, that the definition of "physical force" should at least not require violent and destructive force, is equally flawed. The government argues that the definition of "physical force" established by this Court in Landeros-Gonzales, 262 F.3d at 426, and Rodriguez-Guzman, 56 F.3d at 20 n.8, as "destructive or violent force" should not apply to the "has as an element" definition of "crime of violence" in USSG § 2L1.2, because the Court's definition of that term

in Rodriguez-Guzman was in the context of 18 U.S.C. § 16(b), as incorporated into USSG § 2L1.2, rather than in the context of the "has as an element" definition in USSG § 2L1.2, comment. (n.1(B)(iii)). See Gov't Supp. Br. 58. The word "physical force," however, also appears in the "has as an element" definition of "crime of violence" in 18 U.S.C. § 16(a), which is substantially the same (except for the additional property component) as the "has as an element" definition of "crime of violence" in USSG § 2L1.2, comment. (n.1(B)(iii)), and is exactly the same definition for purposes of the eight-level enhancement in USSG § 2L1.2(b)(1)(C). See USSG § 2L1.2, comment. (n.3(A)) (incorporating definition of "aggravated felony" in 8 U.S.C. § 1101(a)(43), which, in § 1101(a)(43)(F), incorporates definition of "crime of violence" in 18 U.S.C. § 16). As the Supreme Court has explained, the same terms in the same statute should be given the same meaning. See Leocal, 543 U.S. at 11. For purposes of this discussion, therefore, there is no difference between the "has as an element" definition of "crime of violence" in 18 U.S.C. § 16(a) and the "has as an element" definition in Application Note 1(B)(iii) of USSG § 2L1.2.

The government is certainly correct when it states that "[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." Gov't Supp. Br. 62. A good indication of what the Commission intended can

be gleaned from the fact that the enhancement is for prior "crimes of ***violence***." In the context of the criminal law, "violent" means: "**1.** Of, relating to, or characterized by strong physical force <violent blows to the legs>. **2.** Resulting from extreme or intense force <violent death>. **3.** Vehemently or passionately threatening <violent words>." Black's Law Dictionary 1601 (8th ed. 2004) (emphasis in original). The "physical force" required under the Guideline must be "violent" because the enhancement is directed at crimes that are violent in nature. As the Supreme Court has explained, "[i]nterpretation of a word or a phrase [in a statute] depends upon reading the whole statutory text, ***considering the purpose and context of a statute***, and consulting any precedents or authorities that inform the analysis." Dolan v. United States Postal Serv., 546 U.S. 481, 486 (2006) (emphasis added).

This conclusion is also borne out by the Supreme Court's recent opinion in Begay v. United States, 128 S. Ct. 1581 (2008). In that case, the Supreme Court considered whether the New Mexico offense of DUI was a "violent felony" within the meaning of the ACCA as a crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another." In determining that DUI was not such an offense, the Court stressed the need to look at the types of crimes covered by the statute, which indicated Congress's intent. Id. at 1584-85. The Court stated: "In our view, DUI differs from the example crimes – burglary, arson, extortion, and the

use of explosives – in at least one pertinent, and important, respect. The listed crimes all typically involve purposeful, 'violent,' and 'aggressive' conduct." Id. at 1586. Thus, said the Court, DUI was "simply too unlike the listed provisions" to believe that Congress intended it to be included as a "violent felony." Id. at 1584. And, so it is with § 2L1.2: the fact that the enhancement specifies "crimes of violence" indicates the Commission's intent that the "use of physical force" under the "has as an element" prong be violent and aggressive in nature.

4. Conclusion

In sum, the government has not provided this Court with a coherent alternative legal analysis that would be better than the one in Calderon-Pena. Moreover, there is no reason why this Court should upset settled law and redefine key components of the Sentencing Guideline scheme, especially when the district court in this post-Booker world has the power and the discretion to adjust sentences in individual cases.

D. Under the Correct Analysis, Mr. Gomez-Gomez's 1991 California Rape Conviction Does Not "Ha[ve] as an Element the Use, Attempted Use, or Threatened Use of Physical Force."

The government asserts, with no analysis, that, if Mr. Gomez-Gomez's offense is considered to include just the two elements of (1) sexual intercourse and (2) against the victim's will, then the offense "at least" has the "threatened use of physical force

because it "is intentional and inherently involves bodily contact." Gov't Supp. Br. 64. As shown above, see supra text, at 21-22, the offense of rape under Cal. Penal Code § 261(a)(2) is defined by three elements, not just the two identified by the government, as it requires that the conduct be committed by at least one of various statutory means, such as the means at issue here, rape "by duress."

Furthermore, as shown above, see supra text, at 32-38, mere "bodily contact," even if intentional, cannot suffice for the "physical force" element. If that were the case, a mere offensive touching, such as a grabbing and pinching of the breast – intentional and against the will, as in a simple battery – would garner the same sixteen-level enhancement as the enumerated "crime of violence" of "murder" and "aggravated assault." See United States v. Rosas-Pulido, ___ F.3d ___, 2008 WL 1903779, at *3-*4 (5th Cir. May 1, 2008) (holding that the force inherent in the unwanted touching and pinching of a breast is not "the use, attempted use, or threatened use of physical force against the person of another" for purposes of the 16-level "crime of violence" enhancement in § 2L1.2). This was precisely the result the Sentencing Commission sought to remedy by restructuring the "crime of violence" enhancements in 2001. See App. Supp. Br. 15-16. Moreover, this Court has never held that sexual penetration alone is sufficient to meet the "use of physical force" prong. See United States v. Houston, 364 F.3d 243, 246 (5th Cir. 2004); see also

United States v. Velazquez-Overa, 100 F.3d 418, 420 (5th Cir. 1996) (stating that "physical force is not an element of the crime" of sexual contact with a child).

According to the government, even considering rape by duress as a "threat of hardship" would meet the "threatened use of physical force" under the "has as an element" test. Gov't Supp. Br. 64-65. The government fails to offer any reason why ***any*** "threat of hardship" – even one that is "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) – inherently involves "the use, attempted use, or threatened use of ***physical*** force against the person of another." Indeed, California courts have demonstrated conclusively that it does not. See Bergschneider, 259 Cal. Rptr. at 223 (defendant's threat to put victim "on restriction" if she refused to have sex with him sufficient for duress by threat of hardship).

In sum, rape by duress under California law does not "ha[ve] 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)(iii)).

CONCLUSION

For the foregoing reasons, the defendant-appellant, JORGE GOMEZ-GOMEZ, respectfully requests that this Court dismiss the petition for rehearing en banc as improvidently granted and remand to the district court for resentencing in accordance with Booker and this Court's precedents. In the alternative, Mr. Gomez-Gomez respectfully requests that this Court adopt the panel's opinion and remand for resentencing.

Respectfully submitted,

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas

By_____
MARGARET C. LING
LAURA FLETCHER LEAVITT
Assistant Federal Public Defenders
Attorneys for Appellant
440 Louisiana Street, Suite 310
Houston, Texas 77002-1634
Telephone: (713) 718-4600

CERTIFICATE OF SERVICE

I, MARGARET C. LING, certify that today, May 7, 2008, a hard copy of appellant's supplemental en banc reply brief and a computer readable 3.5 inch disk containing a copy of appellant's supplemental en banc reply brief were served upon Mr. Tony Roberts and Ms. Renata Gowie, Assistant United States Attorneys, Southern District of Texas, by Federal Express, No. 8623 5825 5977 c/o United States Marshal, 515 Rusk Avenue, Houston, Texas 77002.

MARGARET C. LING

CERTIFICATE OF COMPLIANCE

1. This brief contains 10,460 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii), and is in excess of the type-volume limitation of FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Corel WordPerfect 13.0 software in Times New Roman 14 point font in text and Times New Roman 12 point font in footnotes.

3. This brief and the accompanying electronic copy of this brief on a 3.5 inch diskette comply with 5TH CIR. R. 31.1 because they have been converted into Portable Document File (PDF) format.

MARGARET C. LING