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

APPELLANT'S SUPPLEMENTAL BRIEF UPON REHEARING *EN BANC*

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CERTIFICATE OF INTERESTED PERSONS
United States v. Jorge Gomez-Gomez, No. 05-41461

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case.

1. The Honorable Hilda G. Tagle, United States District Judge.

2. The Honorable Felix Recio, United States Magistrate Judge.

3. Mr. Jorge Gomez-Gomez, Defendant-Appellant.

4. United States of America, Plaintiff-Appellee.

5. Counsel for Plaintiff-Appellee:
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Assistant Federal Public Defenders Reynaldo S. Cantu (trial counsel) and Margaret C. Ling and Laura Fletcher Leavitt (appellate counsel).

These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

MARGARET C. LING

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MISCELLANEOUS

STATEMENT OF THE ISSUE UPON REHEARING *EN BANC*

Whether the offense of rape by duress under Cal. Penal Code § 261(a)(2) is a "forcible sex offense" or "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)(iii)), and hence is a "crime of violence" warranting a sixteen-level enhancement pursuant to USSG § 2L1.2(b)(1)(A)(ii).

SUPPLEMENTAL STATEMENT OF THE CASE[1]

Defendant-Appellant Jorge Gomez-Gomez was charged with, and found guilty after a jury trial of, the offense of illegal reentry subsequent to deportation following an aggravated felony conviction, in violation of 8 U.S.C. § 1326(a) and (b).[2] Over his objection, the district court enhanced Mr. Gomez-Gomez's Guidelines base offense level by sixteen levels on the ground that his 1991 conviction for rape under California law was a "crime of violence" under USSG § 2L1.2(b)(1)(A)(ii).

On appeal, a panel of this Court agreed and vacated the sentence and remanded for resentencing, see United States v. Gomez-Gomez, 493 F.3d 562, 569 (5th Cir. 2007), with one judge specially concurring. See id. at 569-70 (Jolly, J., specially concurring).[3] On February 11, 2008, this Court granted the government's petition for

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[1] All references to the record on appeal ("R.") will be made, as they were in Mr. Gomez-Gomez's previous briefs, in the following manner: the ***pleadings*** are cited by docket number and internal page number if relevant ("Dkt. [number] at [page number]"). The ***transcripts*** of the jury trial and sentencing are cited as "Tr. Trial" and "Tr. Sent.," respectively, followed by the relevant page number. The presentence investigation report ("PSR") is cited by paragraph number.

[2] The particulars of the proceedings below and the facts of the underlying offense are set out in Mr. Gomez-Gomez's opening brief, q.v. at 3-5, copies of which have been filed contemporaneously with this brief, and therefore will not be repeated here. See also United States v. Gomez-Gomez, 493 F.3d 562, 564 (5th Cir. 2007), reh'g en banc granted, ___ F.3d ___, 2008 WL 373182 (5th Cir. Feb. 11, 2008) (en banc).

[3] Mr. Gomez-Gomez also appealed on the grounds that his prior conviction under Cal. Health & Safety Code § 11352(a) is not a qualifying "drug trafficking offense" for purposes of USSG § 2L1.2 (b)(1)(A)(i), and that 8 U.S.C. § 1326(b) is unconstitutional on its face and as applied to him. The panel did not reach the former issue. With respect to the constitutional issue, Mr. Gomez-Gomez acknowledged – and the panel agreed – that the issue was foreclosed by the United States Supreme Court's decision in Almendarez-Torres v. United States, 523 U.S. 224 (1998). See Gomez-

rehearing en banc. See United States v. Gomez-Gomez, ___ F.3d ___, 2008 WL 373182 (5th Cir. Feb. 11, 2008) (en banc).

Principally at issue on en banc rehearing is whether the offense of rape by duress under California law (which, at the time of Mr. Gomez-Gomez's offense, included a "threat of hardship or retribution") is a "crime of violence" under USSG § 2L1.2. In addition, the Court asked the parties to address whether the Court's en banc decision in United States v. Calderon-Pena, 383 F.3d 254 (5th Cir. 2004) (en banc), should be overruled or modified. For the reasons that follow, the panel was correct in holding that the offense of rape by duress under California law is not a "crime of violence." Furthermore, this Court's Calderon-Pena decision comports with the plain language of § 2L1.2 as well as the applicable Supreme Court precedents. The panel therefore correctly concluded that the district court reversibly erred in enhancing Mr. Gomez-Gomez's sentence pursuant to USSG § 2L1.2(b)(1)(A)(ii).

Gomez, 493 F.3d at 568-69. Mr. Gomez-Gomez still wishes to preserve the latter issue for possible Supreme Court consideration, but the issue requires no further consideration by the Court at this time.

SUMMARY OF THE SUPPLEMENTAL ARGUMENT

Mr. Gomez-Gomez's prior conviction for the offense of rape by duress under Cal. Penal Code § 261(a)(2) is not a "crime of violence" warranting a sixteen-level enhancement pursuant to USSG § 2L1.2(b)(1)(A)(ii) because it is neither a conviction for a "forcible sex offense" nor is it a conviction for an offense that "has as an element" the requisite use, threatened use, or attempted use of physical force against another. This conclusion follows from this Court's "crime of violence" analysis, which properly follows Supreme Court precedent.

Section 2L1.2 distinguishes between "rape," which qualifies for the eight-level "aggravated felony" enhancement, and "forcible sex offenses," which qualify for a sixteen-level enhancement. Whereas at common law, "rape" was always "forcible," in that it required some quantum of physical force, threat of physical force, or threat of violence necessary to overcome resistance from the victim, the generic, contemporary crime of "rape" includes sex acts accomplished by other impositions, such as fraud and forms of psychological coercion. The Sentencing Commission's specific distinction between "forcible sex offenses" and "rape" makes it clear that the Commission intended only those sex offenses that involve some quantum of physical force, threat of physical force, or threat of violence necessary to overcome resistance from the victim to be given the sixteen-level enhancement for "forcible sex offenses."

Such a conclusion is in accord with this Court's decisions in United States v. Houston, 364 F.3d 243 (5th Cir. 2004), and United States v. Sarmiento-Funes, 374 F.3d 336 (5th Cir. 2004).

This Court's decision in United States v. Calderon-Pena, 383 F.3d 254 (5th Cir. 2004) (en banc), correctly followed the plain language of USSG § 2L1.2 and Supreme Court precedent in holding that, under the "has as an element" prong of the Guideline, the use or threatened use of physical force must be "an element" (a constituent part) of the offense. The narrow exception to the categorical approach announced by the Supreme Court in Taylor v. United States, 495 U.S. 575 (2000), does not mandate a different result because Taylor did not involve the "has as an element" language in USSG § 2L1.2. Because Calderon-Pena correctly follows the statutory "has as an element" requirement and Supreme Court precedent, it should not be overruled or modified.

Moreover, the panel correctly found that under the California statute and the government's proof, Mr. Gomez-Gomez could have been convicted of rape by duress. Because rape by duress under California law, which at the time of Mr. Gomez-Gomez's offense included a threat of "hardship," can be accomplished by psychological coercion involving no threat of violence, a conviction for rape under California law does not categorically qualify as a "forcible sex offense." For similar

reasons, rape by duress under California law does not have "as an element" the intentional use or threatened use of physical force against the person of another. Consequently, this Court should vacate Mr. Gomez-Gomez's sentence and remand to the district court for resentencing.

ARGUMENT

> REHEARING ISSUE RESTATED: The offense of rape by duress under Cal. Penal Code § 261(a)(2) is not a "crime of violence" warranting a sixteen-level enhancement pursuant to USSG § 2L1.2(b)(1)(A)(ii) because (1) it is not a "forcible sex offense," and (2) it does not "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another."

A. Standard of Review.

Whether a prior conviction is a "crime of violence" under USSG § 2L1.2 is a question of law that this Court reviews de novo. See, e.g., United States v. Vargas-Duran, 356 F.3d 598, 602 (5th Cir. 2004) (en banc) (reviewing de novo whether an offense qualified as a "crime of violence" under USSG § 2L1.2).

B. Analytical Framework.

A person who is convicted of illegal reentry into, or being found unlawfully present in, the United States after deportation faces a sixteen-level Guideline sentencing enhancement if he had, prior to his deportation, "a conviction for a felony that is . . . (ii) a crime of violence; . . . ." USSG § 2L1.2(b)(1)(A)(ii). The term

> "[c]rime 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***.

USSG § 2L1.2, comment. (n.1(B)(iii)) (emphasis added). An offense will qualify as a "crime of violence" if it either has "as an element" the requisite "physical force" described in the last phrase of this definition, or is one of the offenses specifically enumerated in this definition. See United States v. Rayo-Valdez, 302 F.3d 314, 316-19 (5th Cir. 2002).

Three decisions from the United States Supreme Court provide the framework for determining when a prior conviction may be used to enhance a defendant's sentence. In Taylor v. United States, 495 U.S. 575 (1990), the Court addressed whether the defendant's prior convictions qualified as "burglaries" for purposes of sentence enhancement under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), which provided for sentence enhancement for, inter alia, any felony that

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise presents a serious potential risk of physical injury to another.

Taylor, 495 U.S. at 578 (quoting 18 U.S.C. § 924(e)(2)(B)(i) & (ii) (1988)).

Specifically at issue in Taylor was whether the defendant's convictions qualified as convictions for the enumerated offense of "burglary" under § 924(e)(2)(B)(ii). The Court first held that the term "burglary" did not apply to just any crime that a state happened to label "burglary," but rather applied only to those

crimes which, regardless of their labels, contained the core elements of the generic offense of "burglary" as that term was used in the criminal codes of most states: namely, unlawful or unprivileged entry into, or remaining within, a building or structure with intent to commit a crime. See id. at 598-99.

The Court then considered what proof the sentencing court could examine in making the determination whether an offense met this generic definition of "burglary": particularly, "whether the sentencing court in applying § 924(e) must look only to the statutory definitions of the prior offenses, or whether the court may consider other evidence concerning the defendant's prior crimes." Id. at 600. The Court held that "§ 924(e) mandates a formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." Id.

The Court cited three reasons for its conclusion. First, the language of § 924(e) supported a categorical approach. See id. at 600. The Court noted that the statute referred to "'a person who . . . has three previous convictions' for – not a person who has committed – three previous [predicate offenses]." Id. (quoting 18 U.S.C. § 924(e)(1)). It also noted that another subsection of the statute specifically focused on offense elements, as opposed to using the more inclusive term "involves." See id. (citing 18 U.S.C. § 924(e)(2)(B)(i)). "Read in this context," the Court said, "the

phrase 'is burglary' in § 924(e)(2)(B)(ii) most likely refers to the elements of the statute of conviction, not to the facts of each defendant's conduct." Id. at 600-01.

Second, the Court looked to the legislative history of the provision at issue, and concluded that, "[i]f Congress had meant to adopt an approach that would require the sentencing court to engage in an elaborate factfinding process regarding the defendant's prior offenses, surely this would have been mentioned somewhere in the legislative history." Id. at 601. Third, the Court noted that "the practical difficulties and potential unfairness of a factual approach are daunting." Id. The Court raised the specter of sentencing proceedings turning into "mini-trials" on the facts of prior offenses. See id. at 601-02. The Court therefore concluded that the burglary provision of the ACCA, "like the rest of the enhancement statute, [ ] generally requires the trial court to look only to the fact of conviction and the statutory definition of the prior offense." Id. at 602 (footnote omitted).

However, the Court recognized a narrow exception to the strict categorical approach in cases where the statute of conviction contains both qualifying and nonqualifying offenses. In such cases, "[t]his categorical approach [ ] may permit the sentencing court to go beyond the mere fact of conviction" to ascertain whether the charging instrument and the jury instructions show that the defendants were in fact convicted of a qualifying predicate offense. Id. Thus, the Court held that "an offense

constitutes 'burglary' for purposes of [an ACCA] enhancement if either its statutory definition substantially corresponds to 'generic' burglary, or the charging paper and jury instructions actually required the jury to find all the elements of generic burglary in order to convict the defendant." Id.

In Shepard v. United States, 544 U.S. 13 (2005), the Court addressed what proof could establish the generic offense of "burglary" under the ACCA in the context of a guilty plea. The Court held that the sentencing court could look ***only*** to the "statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." Shepard, 544 U.S. at 16. As in Taylor, the Court expressed its concern that reliance on less conclusive documents, such as police reports and presentence reports, would not only be unfair and inefficient, but also might implicate a defendant's Sixth Amendment right to a jury determination beyond a reasonable doubt of all facts necessary for enhancement. Id. at 19-26; see generally Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

The Court reaffirmed Taylor's categorical approach in Leocal v. Ashcroft, 543 U.S. 1 (2004). In Leocal, the Court considered whether a conviction for driving while under the influence ("DUI") under Florida law is a "crime of violence" under 18 U.S.C. § 16, which defines "crime of violence" as

> (a) an offense that ***has as an element*** the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, ***by its nature***, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 16 (emphasis added). In determining whether an offense qualifies under § 16, the Court held that courts must focus on the "offense" of conviction. Leocal, 543 U.S. at 7. In other words, courts must "look to the ***elements*** [under subsection (a)] and the ***nature*** [under subsection (b)] of the offense of conviction, rather than to the particular facts relating to [the defendant's] crime." Id. (emphasis added). The Court also held that the term "use" of force in subsection (a) requires the "active employment" of physical force. Id. at 9 (citing Bailey v. United States, 516 U.S. 137, 144 (1995)). Thus, the term "use" requires a "higher degree of intent than negligent or merely accidental conduct." Id.

C. Enumerated Offense Analysis Under USSG § 2L1.2.

1. *Taylor* and *Shepard* Require a Three-Step Analysis.

In United States v. Carbajal-Diaz, 508 F.3d 804 (5th Cir. 2007), Judge Smith set out a succinct and workable synthesis of this Court's "crime of violence" jurisprudence, following the analysis set out above in Taylor and Shepard. As Judge Smith explained, this Court follows a three-step analysis to determine whether a

particular offense qualifies as an enumerated offense. First, following the "categorical approach" laid down in Taylor, the Court looks "'only to the fact of conviction and the statutory definition of the prior offense.'" Carbajal-Diaz, 508 F.3d at 807 (quoting Taylor, 495 U.S. at 602).

Second, where a statute permits alternative methods of committing the offense, this Court, again in accordance with Taylor, follows what it has dubbed the "commonsense approach" in looking at the Shepard-approved documents to determine the precise offense of conviction. Specifically, courts can look at the facts contained in the charging papers, to the extent those facts were necessary to the verdict or plea. Carbajal-Diaz, 508 F. 3d at 809; see, e.g., United States v. Castillo-Morales, 507 F.3d 873, 876-77 (5th Cir. 2007) (finding that uncontradicted facts to which defendant stipulated at guilty plea established generic offense of burglary of a dwelling). Importantly, "[t]he search for such facts ends with the charging papers, the plea or verdict, and the fact of conviction." Carbajal-Diaz, 508 F. 3d at 809 (noting in footnote 7 that, in pleaded cases, Shepard also permits courts to look to facts admitted in the plea colloquy and plea agreement).

The third step is to compare the offense of conviction to the particular enumerated offense, defined "'according to its generic, contemporary meaning.'" Id. at 810 (quoting United States v. Dominguez-Ochoa, 386 F.3d 639, 642-43 (5th Cir.

2004)). In so doing, courts "should rely on a uniform definition, regardless of the labels employed by the various States criminal codes" and must "look[ ] to other sources of authority ([such as] the Model Penal Code and W. LaFave & A. Scott, Substantive Criminal Law (1986)) in order to determine [the enumerated offense's] generic meaning." Dominguez-Ochoa, 386 F.3d at 643; see also United States v. Torres-Diaz, 438 F.3d 529, 536 (5th Cir. 2006) (to same effect); United States v. Santiesteban-Hernandez, 469 F.3d 376, 378-79 (5th Cir. 2006) (same).

2. Meaning of "Forcible Sex Offenses."

Because the term "forcible sex offenses" is neither defined nor described in the Guidelines, under the analysis set out above, the Court must determine its "generic, contemporary meaning." Although not defined in USSG § 2L1.2, it is clear that a "forcible sex offense" for purposes of the sixteen-level enhancement in § 2L1.2(b)(1)(A)(ii) is qualitatively more serious than the "aggravated felony" of "rape" listed in 8 U.S.C. § 1101(a)(43)(A) for purposes of the eight-level enhancement under § 2L1.2(b)(1)(C). The Sentencing Commission signaled its intent by the way it structured the offense-level enhancements in § 2L1.2(b). The Sentencing Commission's decision to enumerate "forcible sex offenses," "statutory rape," and "sexual abuse of minor" – all sex offenses – for the sixteen-level enhancement, but not "rape" or other sex offenses, reflects a conscious decision by the Commission to

reserve the sixteen-level enhancement for only the most serious sex offenses. Indeed, if the Sentencing Commission had wanted "forcible sex offenses" to include a broad spectrum of sex offenses, it would not have had to list separately the sex offenses of "statutory rape" and "sexual abuse of a minor." Rather, the Commission would have labeled the category using a more inclusive or broader term, such as "coercive sex offenses," "unconsented-to sex offenses," or even just "sex offenses." As discussed more fully below, the fact that the Commission did not do so speaks volumes.

a. The History and Structure of the "Crime of Violence" Enhancement Provide the Key to Defining "Forcible Sex Offenses."

Before November 1, 2001, the Sentencing Guidelines provided for a sixteen-level enhancement for any prior conviction that was an "aggravated felony" as defined in 8 U.S.C. § 1101(a)(43). See USSG § 2L1.2(b)(1)(A) & comment. (n.1) (2000). The only other possible enhancement was a four-level enhancement if the prior conviction was for "any other felony" or for "three or more misdemeanor crimes of violence or misdemeanor controlled substance offenses." USSG § 2L1.2(b)(1)(B) (2000).

In 2001, in response to concerns from the judges, probation officers, and defense attorneys about the scope and severity of this sixteen-level enhancement, the Commission amended § 2L1.2 to establish the current graduated scheme of sixteen-,

twelve-, eight-, and four-level enhancements depending on the characterization of the prior conviction. See USSG § 2L1.2, comment. (n.1(B)(ii)) (2001); USSG App. C, amend. 632 (Reasons for Amendment) (2001). For purposes of the sixteen-level enhancement, the Commission enumerated certain offenses as "crimes of violence" that are also enumerated "aggravated felonies" under 8 U.S.C. § 1101(a)(43). See USSG § 2L1.2, comment. (n.1(B)(iii)) (2007). The Commission left for the eight-level enhancement all other offenses that were also "aggravated felonies" listed or defined in 8 U.S.C. § 1101(a)(43). See USSG § 2L1.2(b)(1)(C) (2007). It is from the Commission's purposeful inclusion of some "aggravated felonies" as enumerated "crimes of violence" for purposes of the sixteen-level enhancement and its exclusion of others that it becomes abundantly clear that the Commission intended "forcible sex offenses" to be limited to only the most aggravated forms of 'rape" and other sex offenses.

Most importantly, the Commission specifically included the "aggravated felonies" of "murder" and "sexual abuse of a minor" listed together in 8 U.S.C. § 1101(a)(43)(A) as enumerated "crimes of violence" warranting the sixteen-level enhancement. See USSG § 2L1.2, comment. (n.1(B)(iii)) (2007). Both "murder" and "sexual abuse of a minor," therefore, will always qualify for the sixteen-level enhancement – as long as the particular offense at issue meets the generic,

contemporary definition of those crimes. Notably, however, the Commission did ***not*** list "rape" – also listed in 8 U.S.C. § 1101(a)(43)(A) – as an enumerated "crime of violence" for purposes of the sixteen-level enhancement. Rather, the Commission carved out narrower offenses – "forcible sex offenses," "statutory rape," and "sexual abuse of a minor" – as warranting the sixteen-level enhancement. By ***not*** carving out "rape" as a "crime of violence" for purposes of the sixteen-level enhancement, the Commission gave a strong indication that it intended "forcible sex offenses" to mean something narrower than generic, contemporary "rape." See, e.g., United States v. Arnold, 213 F.3d 894, 896 (5th Cir. 2000) (applying the linguistic canon of statutory construction "expressio unius est exclusio alterius" in the context of USSG § 4A1.2(e)(1) and (2)).

The significance of the Commission's purposeful exclusion of "rape" as an enumerated "crime of violence" is further supported by other offenses that the Commission chose to enumerate as "crimes of violence" for purposes of the sixteen-level enhancement that are also related to some of the "aggravated felonies" listed in 8 U.S.C. § 1101(a)(43). For example, while "burglary" is listed as an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(G), the Commission carved out for the sixteen-level enhancement a specific subset of "burglary": the narrower and more serious offense of "burglary of a dwelling." See USSG § 2L1.2, comment. (n.1(B)(iii)). The

Commission also carved out of such theft-related "aggravated felonies" the offenses of "robbery," "extortion," and "extortionate extension of credit" as enumerated "crimes of violence," leaving for "aggravated felony" treatment other theft-, burglary- or extortion-type offenses. Compare USSG § 2L1.2, comment. (n.1(B)(iii)), with 8 U.S.C. § 1101(a)(43)(G) and (H) (including offenses "relating to the demand for or receipt of ransom").

In other words, the Commission recognized that certain "aggravated felonies" in 8 U.S.C. § 1101(a)(43) include offenses of varying seriousness, and purposefully extracted from these "aggravated felonies" the offenses it deemed the most serious and worthy of the sixteen-level "crime of violence" enhancement. The Commission left for the eight-level enhancement all other "crimes of violence" that did not otherwise qualify under the "has as an element" prong of the "crime of violence" definition. Thus, in order to justify the significantly higher offense level for a defendant with a prior "crime of violence" conviction, the Commission apparently intended by "forcible sex offenses" something narrower, and qualitatively more serious, than generic, contemporary "rape." As discussed below, it is from the evolution of the offense of "rape" that the definition of "forcible sex offenses" materializes, an evolution the Sentencing Commission obviously considered and understood.

b. "Forcible Sex Offenses" Means Only Those Sex Offenses Involving at Least Some Quantum of Physical Force or Threat of Violence, As Shown By the Evolution of the Law of Rape and Modern State Statutes.

At common law, rape was defined as "the carnal knowledge of a woman ***forcibly* and *against her will***." 2 Wayne R. LaFave, Substantive Criminal Law §§ 17.1, 17.3(a) (2d ed. as updated on Westlaw 2007) (emphasis added); see also id. at § 17.4. Traditional rape therefore was comprised of three elements: (1) sexual intercourse with a woman; (2) by force or threat of force; and (3) without the consent of the woman. Id. §§ 17.3(a) & (b), 17.4(a). This was the common understanding of the crime of rape until the relatively recent (and continuing) reforms to the rape laws. Id. § 17.1(a); see generally Cassia C. Spohn, The Rape Reform Movement: The Traditional Common Law and Rape Law Reforms, 39 Jurimetrics J. 119, 120-21, 130 (1999) (noting that the rape reform movement emerged in the early 1970s). Moreover, "[w]ith rare exception, the necessary manner of commission of t[he act of sexual intercourse] was 'forcibly,' which ordinarily required resort to force or threat of force above and beyond that inherent in the penetration." LaFave, supra, §17.1(a).

In practice, rape by "force" or "threat of force" meant rape by violence or threat of violence, including not only the use of some quantum of physical force to overcome resistance by the victim, but also including the threat of imminent death, serious bodily injury, great bodily harm, or kidnapping. LaFave, supra, § 17.3(b) & nn. 42-

45 (and cases and statutes cited therein). But what rape by "force" or "threat of force" did not include was other nonphysical impositions, such as fraud, deception, psychological coercion, or duress. Id.; see also 3 Charles E. Torcia, Wharton's Criminal Law § 281 (15th ed. as updated on Westlaw 2007).

Beginning with a reform movement in the 1970s that continues today, "[t]he modern approach to rape" has supplemented the traditional offense of rape by "force" or "threat of force" (hereinafter "forcible rape") by recognizing "a broader range of impositions as a basis for finding coercive conduct by the defendant," including "fraud" and "certain nonphysical coercion." LaFave, supra, §17.1(c); see also id. § 17.3(d); see generally Patricia J. Falk, Rape by Fraud and Rape by Coercion, 64 Brook. L. Rev. 39 (1998) (tracing evolution of modern rape and sexual assault statutes). While most of the states' rape laws today include "forcible rape," virtually all states have enacted statutes that significantly expand the common law definition of rape to include nonconsensual intercourse resulting from fraud, deception, coercion, or drugs or intoxicants, or by taking advantage of the mental incapacity of the victim, or by misusing supervisory authority or positions of trust. LaFave, supra, §§ 17.3(c)-(e), 17.4(a)-(b); see, e.g., Ala. Code § 13A-6-61; Cal. Penal Code § 261; 720 Ill. Comp. Stat. § 5/11-9.5; Tenn. Code § 39-13-503; Tex. Penal Code § 22.011(b); Wis. Stat. § 940.225(2). As well, states have expanded the common law

by enacting statutes that specifically criminalize other forms of nonconsensual sexual contact, in order to sweep in offenses other than those involving only prohibited sexual intercourse. See, e.g., Cal. Penal Code § 243.4; Ga. Code § 16-6-5.1; N.Y. Penal Law § 130-50; Tenn. Code § 39-13-504.

Importantly, this reform did not alter the meaning of "force" or "forcible." Rather, as one commentator noted in an exhaustive study of the subject, the reform created new, "nonforcible" sex offenses:

> This new wave of statutory enactments outlawing fraudulent, coercive, or simply nonconsensual sexual offenses has not come at the cost of eliminating protection of citizens from forcible rape. Rather, states adopting these new statutes have retained their violent rape provisions, declining to treat the criminalization of nonviolent sexual offenses as an either-or proposition. For example, while Tennessee provides an explicit fraud alternative in its rape statute, it continues to punish forcible sexual penetration as aggravated rape and forcible sexual contact as aggravated sexual battery. Similarly, Hawaii distinguishes between defendants' use of strong compulsion and compulsion, the former including violent rape and the latter covering nonviolent variations. These statutes retain the legislative judgment that sexual penetration or contact obtained by force may be a more serious harm than the same acts accomplished by nonviolent pressures. ***Criminal provisions outlawing rape by fraud or coercion supplement rather than replace violent sexual crimes***.

Falk, supra, at 131-32 (emphasis added).

Moreover, as Professor LaFave has observed, both traditional "forcible rape" and most modern rape and sexual assault statutes distinguish between the requirement that the offense be nonconsensual or against the victim's will and the requirement that

some imposition be used to effectuate the offense. See LaFave, supra, § 17.3 (noting that the victim's nonconsent and the perpetrator's means of imposition "are 'conceptually distinct,' but yet 'in practice . . . are not neatly separable'") (citation omitted). Thus, like the traditional common law formulation, many state statutes specify that penetration must be ***both*** against the victim's will ***and*** effectuated by force or other imposition. See, e.g., Cal. Penal Code § 261; Md. Code Art. 27, § 3-303; Wis. Stat. § 940.225. Indeed, only one state, Iowa, expressly states that "by force" and "against the will" are alternative rather than cumulative requirements. See LaFave, supra, § 17.1, Iowa Code § 709.1.

What is abundantly clear from the commentators discussing the development of sex offense crimes from common law until today is that the "force" or "threat of force" that was required at common law, and that has been incorporated into our states' modern statutes as one of several alternative impositions, does not include psychological compulsion that conveys no threat of violence. See, e.g., United States v. Lopez-Montanez, 421 F.3d 926, 929-30 (9th Cir.2005) (holding that conviction for sexual battery under Cal. Penal Code § 243.4(a), which included an unlawful restraint component that could be accomplished by "words that convey no threat of violence," was not a "forcible sex offense" under USSG § 2L1.2). Rather, a sex act by "force" or "threat of force" means what it meant at common law – a sex act by violence or

threat of violence, including not only the use of some quantum of physical force to overcome resistance by the victim, but also including the threat of imminent death, serious bodily injury, great bodily harm, or kidnapping. See LaFave, supra, § 17.3(a) & (b); Falk, supra, at 134-37; see also, e.g., Ark, Code § 5-14-101(2) (in the context of sexual offenses, defining "forcible compulsion" as "physical force or a threat, express or implied, of death or physical injury to or kidnapping of any person").

This distinction between "forcible" sex offenses and those "nonforcible" sex offenses effectuated by other impositions comports with rules of statutory construction as well as due process. As one commentator expressed: "The argument that neither fraud nor coercion is sufficient to satisfy statutes requiring force or threat is supported by the canon of statutory interpretation that criminal statutes must be strictly construed and implicates notions of fair notice and due process for defendant actors." Falk, supra, at 137.

There can be no doubt that the Sentencing Commission was aware of the literature, including Professor LaFave's well-known treatise (and the numerous law review articles cited therein), as well as the states' sex offense statutes when, in 2001, it designated "forcible sex offenses" as an enumerated "crime of violence." See Rita v. United States, 127 S. Ct. 2456, 2463-64 (2007) (discussing the Commission's ongoing work in researching sentences and collecting and studying cases in writing

the Guidelines); cf. also Kimbrough v. United States, 128 S. Ct. 558, 567-69 (2007) (describing the Commission's work in formulating and amending the crack Guidelines). The Commission realized, as the literature had observed, that, though the "force" or "threat of force" required at common law, as well as today, must be physical force, the quantum of "force" was not as restrictive as the "violent and destructive" force necessary for the "has as an element" prong of the "crime of violence" definition. See United States v. Bolanos-Hernandez, 492 F.3d 1140, 1145 (9th Cir. 2007) (holding that "forcible" in this context "does not refer to the heightened level of force" required under the "has as an element" prong, because "[r]equiring 'forcible sex offenses,' one of the enumerated crimes of violence, to contain the same level of force required to qualify a crime under the catch-all provision would subsume 'forcible sex offenses' within the catch-all category, rendering the enumeration superfluous"). In fact, unlike the use, or threatened use, of physical force required for the "has as an element" prong, the "force" or "threat of force" required for a sex offense to fall in the category of "forcible sex offenses" can be established where a statute defines the sex offense in terms of "causing serious bodily injury" or "threatening to cause serious bodily injury." Compare and contrast United States v. Calderon-Pena, 383 F.3d 254, 259-60 (5th Cir. 2004) (en banc) (holding that Texas offense of child endangerment was not a "crime of violence"

under the "has as an element" prong of § 2L1.2 because "[t]o commit the offense, one need only knowingly create a danger of bodily injury").

By its specific use of the adjective "forcible" to characterize "sex offenses," the Commission therefore intended to include only those sex offenses that involve some quantum of physical force, threat of physical force, or threat of violence necessary to overcome resistance from the victim. Any other imposition – fraud, deception, or coercion, to name a few – was more appropriately addressed by: (1) the eight-level "aggravated felony" enhancement under USSG § 2L1.2(b)(1)(C) either as generic, contemporary "rape" in 8 U.S.C. § 1101(a)(43)(A) or a "crime of violence" in 8 U.S.C. § 1101(a)(43)(F) (as defined under 18 U.S.C. § 16(b)); or (2) by the four-level "any other felony" enhancement under USSG § 2L1.2(b)(1)(D).

In sum, the only sex offense at common law, with rare exception, was "forcible rape," which, after many years, was expanded to include not only "forcible rape," but also other sex offenses involving sexual conduct procured by such nonforcible conduct as fraud, deception, coercion, drugs or intoxicants, or by taking advantage of a victim's incapacity, or misusing a position of authority or trust. At common law up to the present, the law has consistently distinguished between "forcible" and "nonforcible" sex offenses. The Sentencing Commission, in its ongoing duty to adapt the Guidelines to reflect the goals of sentencing, was certainly aware of this

distinction when, in 2001, it incorporated "forcible sex offenses" into USSG § 2L1.2. Because the modern crime of "rape" is now broader than traditional "forcible rape," and because the Sentencing Commission intentionally chose the adjective "forcible" to describe "sex offenses" warranting the sixteen-level enhancement, it is clear that the term "forcible sex offenses" within the meaning of the Guidelines cannot include sexual offenses unaccompanied by at least some quantum of physical force, threat of physical force, or threat of violence (such as imminent death, serious bodily injury, or kidnapping). While this result may be controversial, see Rita,127 S. Ct. at 2463 (noting that the Commission has made a "serious, and sometimes controversial," effort to carry out its Congressional mandate), none of that lessens the importance of, or undermines the fact that, the Commission consciously chose to limit the sixteen-level enhancement to categories of sex offenses that either (1) are "forcible sex offenses," "statutory rape," or "sexual abuse of a minor," or (2) meet the "has as an element" prong of the "crime of violence" definition.

c. The Rule of Lenity Requires Construing "Forcible Sex Offenses" in Favor of Mr. Gomez-Gomez.

As noted above, see supra text, at 14-26, the distinction between "forcible sex offenses" and those effectuated by other impositions such as fraud or coercion comports with rules of statutory construction as well as due process. However, insofar

as this Court finds that there is any ambiguity as to the meaning of "forcible sex offenses," applicable rules of lenity require that such ambiguity be resolved in favor of Mr. Gomez-Gomez. See Leocal 543 U.S. at 11 n.8 (noting that rule of lenity would require resolution in favor of criminal defendant of any ambiguity in statute's phrase "crime of violence"); United States v. RLC, 501 U.S. 291, 305 (1992) (applying rule of lenity to determine whether maximum sentence for juvenile was the maximum sentence under the Sentencing Guidelines); United States v. Orellana, 405 F.3d 360, 370-71 (5th Cir. 2005) (noting that doubt regarding intended scope of statute should be resolved in favor of criminal defendant); United States v. Lamm, 392 F.3d 130, 134 (5th Cir. 2004) (addressing rule of lenity question in context of Sentencing Guidelines but finding Guidelines provision at issue was not ambiguous).

d. This Court's Decision in *Sarmiento-Funes.*

In United States v. Sarmiento-Funes, 374 F.3d 336 (5th Cir. 2004), this Court understood the significance of the adjective "forcible" and that it was this adjective that distinguished sex offenses committed by force from sex offenses committed by other impositions. Due in large part to this distinction, the Court determined that a conviction under Missouri's sexual assault statute was not necessarily a "forcible sex offense." Sarmiento-Funes, 374 F.3d at 344-45.

At issue in Sarmiento-Funes was the Missouri sexual assault statute, which

prohibits a person from having "sexual intercourse with another person knowing that he does so without that person's consent." Mo. Rev. Stat. § 566.040(1) (1999); see also Sarmiento-Funes, 374 F.3d at 338. This Court observed that, although the Missouri sexual assault statute "speaks in terms of intercourse 'without consent,' the statute defining 'consent' distinguishes between 'assent' and 'consent,' providing that 'assent' sometimes does not count as 'consent.'" Sarmiento-Funes, 374 F.3d at 341 & n.6; see also Mo. Rev. Stat. § 556.061(5) (identifying when "[a]ssent does not constitute consent"). More particularly, a victim's "assent" (consent in fact) to a sexual act "does not constitute consent" (consent in law) – that is, the assent is a legal nullity – if the assent is the product of force, duress, deception, or with an underage victim or one impaired by lack of mental capacity, mental disease or defect, or intoxication. Mo. Rev. Stat. § 556.061(5)(a)-(c); see also Sarmiento-Funes, 374 F.3d at 341 & n.6. The Court recognized that the Missouri sexual assault statute was a broadly worded statute that prohibited sexual intercourse not only by force but also by such other impositions as by duress or deception or with an underage victim or one impaired by mental disease or defect, or intoxication. Sarmiento-Funes, 374 F.3d at 344-45.

In answering the question whether Missouri's sexual assault statute categorically defined "forcible sex offenses," the Court noted the following three key

points: (1) the question before the Court did not involve whether the defendant's prior conviction constituted "rape" for purposes of the eight-level enhancement under USSG § 2L1.2(b)(1)(C), which it noted might be an issue on remand, Sarmiento-Funes, 374 F.3d at 339 n.3; (2) the Guidelines provided no authoritative definition of the phrase "forcible sex offenses," id. at 344; and, (3) "in the last few decades, a [significant] number of jurisdictions [including Missouri] have modernized and liberalized their rape laws," supplementing those "requiring force, threats, or compulsion with separate sexual assault statutes that criminalize certain unconsented-to (or legally unconsented-to) intercourse ***that does not involve extrinsic force***." Id. at 344-45 (emphasis added).

In light of these considerations, the Court held that, "regardless of the precise boundaries of the phrase ["forcible sex offenses"], we do not think that all of the conduct criminalized by [the Missouri sexual assault statute] can be considered a 'forcible sex offense'" for purposes of the sixteen-level enhancement in USSG § 2L1.2(b)(1)(A)(ii). Id. at 345. In so holding, however, the Court did not fashion a precise definition of "forcible sex offenses" but, rather, created one very narrow rule from the following observations about the consensus core meaning of the adjective "forcible" as traditionally and currently used to described "forcible sex offenses":

1. "[I]t 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[4]] ***or, at least, does not embrace some of the assented-to-but-not-consented-to conduct at issue*** [in the Missouri statute]," Sarmiento-Funes, 374 F.3d at 344 (emphasis added) (citing Black's Law Dictionary 657 (7th ed. 1999), defining "forcible" as "[e]ffected by force or threat of force against opposition or resistance"); and

2. "when one specifically designates a sex offense as a 'forcible' sex offense, one probably does so in order to distinguish the subject sex offense as one that does require force or threatened force extrinsic to penetration," id. at 345 (citing in footnote 12 to representative states that distinguish between "forcible" and "nonforcible, but nonetheless coerced sexual intercourse" as evidence of the central meaning and typical usage of the term "forcible sex offenses"); see id. at 345 & n.12.

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 very 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 (5th Cir. 2004) (interpreting USSG §4B1.2). It is also consistent with the modern trend in rape and sexual assault statutes, as discussed above, see supra text, at 19-26, which not only include the traditional rape "by force" or "by threat of

[4] "Forcible compulsion" is defined in Mo. Rev. Stat. § 566.061(12) to mean either: "(a) [p]hysical force that overcomes reasonable resistance; or (b) [a] threat, express or implied, that places a person in reasonable fear of death, serious physical injury or kidnapping of such person or another person." See also Sarmiento-Funes, 374 F.3d at 339 n.2 (setting forth Missouri statutes's definition of "forcible compulsion").

force" offenses but also include sexual intercourse (and other sexual conduct) by such nonforcible impositions as fraud, duress, abuse of a position of trust or authority, or taking advantage of a physically incapacitated victim. The narrow opinion in Sarmiento-Funes, therefore, not only correctly interpreted the meaning of "forcible sex offenses," but did so in a way that is consistent with the common law and modern meaning of the term.

The government in its petition for rehearing en banc urged this Court to adopt the reasoning of the Third Circuit in United States v. Remoi, 404 F.3d 789 (3d Cir. 2005). See Gov't Pet. 11-12. This Court should decline the government's invitation because Remoi does not apply the correct analysis. In Remoi, the Third Circuit considered the meaning of "forcible sex offenses" in the context of a conviction under a New Jersey statute involving penetration of a physically helpless or mentally defective or incapacitated person. See Remoi, 404 F.3d at 793-94. The Third Circuit broadly interpreted a "forcible sex offense" to mean simply "a sexual act that is committed against the victim's will or consent." Id. at 796. However, the Third Circuit's broad interpretation is contrary to the history of the offense-level enhancements in USSG § 2L1.2(b), to 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, to the Commission's choice of the adjective "forcible" rather than the adjectives "unconsented-to" or "coerced" to characterize sex offenses warranting the sixteen-level enhancement, and to the traditional and contemporary meaning of "forcible" in the context of sex offenses. See supra text, at 14-26. History teaches, and the states' modern statutes confirm, that "forcible sex offenses" are those sex offenses that involve some quantum of physical force, threat of physical force, or threat of violence, but ***not*** psychological coercion that does not involve any threat of violence. See id. The Third Circuit's reasoning and conclusion in Remoi thus cannot withstand scrutiny under the proper historical, legal, and linguistic analysis of "forcible sex offenses" as discussed earlier in this brief.

In its petition for rehearing en banc, the government also claimed that this Court's panel decision in United States v. Beliew, 492 F.3d 314 (5th Cir. 2007), casts doubt on the validity of Sarmiento-Funes. See Gov't Pet. at 11-12. In Beliew, a panel of this Court considered whether a Louisiana conviction for molesting a minor was a "crime of violence" under the career offender Guideline, USSG § 4B1.2. The Louisiana statue at issue could be violated, inter alia, by the "use of influence by virtue of a position of control or supervision over the juvenile." Beliew, 492 F.3d at 315 (quoting La. Rev. Stat. § 14:81.2(A)). Relying primarily on a Fourth Circuit decision, United States v. Pierce, 278 F.3d 282 (4th Cir. 2002), the panel held that the

Louisiana offense qualified as a "forcible sex offense" through "the fiction of constructive force." Believ, 492 F.3d at 316. The panel acknowledged that its use of "the fiction of constructive force" was "bounded by Sarmiento-Funes," but distinguished it on the particular ground that "***here the Louisiana statute requires that an adult abuse his supervisory authority over a juvenile***, a form of psychological intimidation that carries an implicit threat of force, a species of force extrinsic to penetration." Believ, 492 F.3d at 316 (emphasis added).

Believ is distinguishable from this case and from Sarmiento-Funes on several important grounds. First, unlike Sarmiento-Funes and this case, Believ involved sexual conduct against a ***minor***, not sexual conduct against an adult. Second, the Court applied a "constructive force" doctrine in the context of "forcible sex offenses" that expanded the meaning of "forcible sex offenses," beyond the meaning the Commission intended, to include the coercion inherent in the adult-child sexual relationship. See Believ, 492 F.3d at 316. In the context of "forcible sex offenses" – as demonstrated by the evolution of the generic, contemporary meaning of "rape" and other sexually assaultive acts – "constructive force" is limited to threats of violence – that is, of physical force or, for example, of imminent death or serious bodily injury. See LaFave, supra, § 17.3(b).

Third, Believ not only involved sexual conduct against a minor, but it arose

under the "crime of violence" definition in the career offender provision in USSG § 4B1.2, comment. (n.1), not the "crime of violence" definition in USSG § 2L1.2, comment. (n.1(B)(iii)). Unlike § 2L1.2 – the Guideline at issue in this case and in Sarmiento-Funes – § 4B1.2 does ***not*** have as enumerated offenses either "statutory rape" or "sexual abuse of a minor." Compare USSG § 4B1.2, comment. (n.1), with USSG § 2L1.2, comment. (n.1(B)(iii)). Especially, in light of this Court's precedents,[5] it is virtually certain that, had Beliew arisen under § 2L1.2, it would have been decided under the enumerated offenses of "statutory rape" or "sexual abuse of a minor," not "forcible sex offenses."

Finally, Beliew went beyond what was necessary to decide that case, even under the § 4B1.2 "crime of violence" definition. Pierce, on which Beliew relied (and which also arose under the career offender Guideline and involved a statute proscribing sexual conduct against a minor), analyzed the North Carolina statute at issue in that case under the "catchall" provision of § 4B1.2, which includes any offense involving conduct that "by its nature, present[s] a serious potential risk of physical injury to another." USSG § 4B1.2, comment. (n.1); see Pierce, 278 F.3d at 288-89. Although the Fourth Circuit in Pierce went on to conclude that the offense

[5] See, e.g., United States v. Izaguirre-Flores, 405 F.3d 270 (5th Cir. 2005); United States v. Zavala-Sustaita, 214 F.3d 601 (5th Cir 2000).

at issue also qualified as a "forcible sex offense," see Pierce, 278 F.3d at 290, that finding was unnecessary to its holding. Indeed, as the dissent in Pierce pointed out, of the cases on which the majority relied for its assertion that, in "conclud[ing] that a violation of the North Carolina statute is categorically a crime of violence . . . we join every other circuit that has considered the question," id. at 291, ***none*** held that the offense was a crime of violence because it was a "forcible sex offense." Id. at 299 n.11 (Gregory, J., dissenting).[6]

In sum, the panel in Beliew could, and indeed should, have found that the defendant's Louisiana child molestation conviction was a "crime of violence" under the "catchall" provision of § 4B1.2. Although Beliew reached the right result, it did so for the wrong reason.

[6] See, e.g., United States v. Kirk, 111 F.3d 390, 394-96 (5th Cir. 1997) (holding that indecency with a child involving sexual contact under Tex. Penal Code § 21.11(a) is a "crime of violence" under USSG § 4B1.2 because it "present[ed] a serious potential risk of physical injury to another").

D. "Has As an Element" Analysis Under USSG § 2L1.2.

1. "Has As an Element" Analysis Under Current Circuit Law.

As with the enumerated offense analysis described above, this Court follows Taylor's categorical approach in determining whether a particular offense has "as an element" the use of physical force. Carbajal-Diaz, 508 F.3d at 807; see also Calderon-Pena, 383 F.3d at 257. The Court looks first "'only to the fact of conviction and the statutory definition of the prior offense.'" Carbajal-Diaz, 508 F.3d at 807 (quoting Taylor, 495 U.S. at 602). As with the enumerated offense analysis, where the statute allows the offense to be committed in different ways, the Court may look to the charging papers to "pare down" the statute to determine the precise offense of conviction. Carbajal-Diaz, 508 F.3d at 808; Calderon-Pena, 383 F.3d at 257-58. However, under the "has as an element" prong, the focus is narrower than the enumerated-offense analysis because the analysis is limited by the Guidelines' explicit reference to the "elements" of the offense. See USSG § 2L1.2, comment. (n.1(B)(iii)).

Consequently, under the "has as an element" prong, "a court may look to the indictment or jury instructions, ***for the limited purpose*** of determining which of a series of disjunctive elements a defendant's conviction satisfies." Calderon-Pena, 383 F.3d at 258 (internal quotation marks and citation omitted; emphasis added). The particular ***facts*** of the offense – the evidentiary allegations as to the manner of

commission of the offense – are not relevant and may not be considered. Id. at 258-59 & n.7. As the Court has explained, "[t]his approach takes judicial economy and the need for settled expectations as its animating principles, and it finds these principles rooted in § 2L1.2's choice of the word 'element.'" Carbajal-Diaz, 508 F.3d at 808. Finally, the court looks at the elements of the pared-down statute to determine if the offense "has as an element" the requisite use of physical force. See Calderon-Pena, 383 F.3d at 259-61.

2. This Court's Decison in *Calderon-Pena* Properly Implements *Taylor*, *Shepard*, and *Leocal* in the "Has As an Element" Context, and Is in Accord with Other Circuits' Case Law.

In Calderon-Pena, this Court established the "paring down" analysis described above and found that a defendant's conviction under the Texas child endangerment statute was not a "crime of violence" because it did not meet the "has as an element" prong of § 2L1.2. In that case, the statute at issue made it a crime 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). The Court found that specific facts in the indictment could be used "to narrow down the statutory options" to determine that the defendant had "'knowingly . . . by act . . . engag[ed] in conduct that place[d] a child younger than 15 years in

imminent danger of . . . bodily injury.'" Id. at 260 (quoting indictment). However, the disjunctive statutory elements – knowingly, by act, bodily injury – could not be further narrowed by the specific facts of the case (because of the Guidelines' reference to "element"). Id.;[7] see also Carbajal-Diaz, 508 F.3d at 808.

Then-Judge (now Chief Judge) Jones's dissent in Calderon-Pena faulted the majority opinion for misreading Taylor and pursuing a "'hyper-categorical' approach to sentencing enhancements for crimes of violence." Calderon-Pena, 383 F.3d at 262 (Jones, J., joined by Barksdale, J., dissenting). According to this dissent, "[t]he proper application of Taylor would allow consideration of the facts contained in Calderon-Pena's indictment not only to 'narrow' the statute of conviction, as the majority concedes, but also to demonstrate that the intentional use of force was a key fact in Calderon-Pena's underlying conviction for child endangerment." Id. at 263 (Jones, J., with Barksdale, J., dissenting). However, a close reading of Taylor and § 2L1.2 indicates that the majority position in Calderon-Pena is correct.

The analysis established in Calderon-Pena is mandated by the plain language of the Guideline, which requires that the use of force be "an element" of the offense. The words "offense" and "element" are legal terms of art that clearly signal that the

[7] Notably, Judge Smith agreed with this analysis, and simply dissented as to its application in that case. Calderon-Pena, 383 F.3d at 268-72 (Smith, J., joined by Barksdale, J., dissenting).

courts should look only to the statute defining the offense. As Justice Breyer has observed, "the word 'offense' is a technical term in the criminal law, referring to a crime made up of ***statutorily defined*** elements." United States v. LaBonte, 520 U.S. 751, 770 (1997) (Breyer, J., dissenting) (citing Staples v. United States, 511 U.S. 600, 604 (1994), and Liparota v. United States, 471 U.S. 419, 424 (1985); emphasis added). "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." United States v. Singleton, 182 F.3d 7, 11 (D.C. Cir. 1999) (so holding in context of 18 U.S.C. § 3156). Thus, "[t]he phrase 'as an element' only permits an examination of the statute under which the defendant was convicted to determine if the statute has as an ingredient the requisite use of force (or attempted or threatened use of force)." United States v. Gonzalez-Lopez, 911 F.2d 542, 546-47 (11th Cir. 1990) (so holding in context of 18 U.S.C. § 16(a)). Consistently with these definitions, the Court in Calderon-Pena stated: "The elements of an offense of course come from the statute of conviction, not from the particular manner and means that attend a given violation of the statute. Prior decisions of this court have accordingly held that the statute of conviction, not the defendant's underlying conduct, is the proper focus." Calderon-Pena, 383 F.3d at 257 (footnote and citations omitted).

Taylor's narrow exception to the categorical approach does not mandate a

different result. Taylor did not involve the "has as an element" language of the statute; rather, at issue was whether the defendant's two convictions for second-degree burglary under Missouri law should count as "burglary" convictions under the enumerated offense prong of 18 U.S.C. § 924(e)(2)(B)(ii). In determining whether a particular offense meets the generic, contemporary definition of the enumerated offense of "burglary," Taylor recognized the need to ascertain whether the charging instrument and the jury instructions showed that the defendant had in fact been convicted of generic burglary – in that case, whether the defendant had necessarily been convicted of burglary of a "building or structure." Taylor, 495 U.S. at 599. And, as discussed above, see supra text, at 12-14, this Court has correctly followed Taylor's modified approach in cases involving enumerated "crimes of violence" under the Guidelines.

However, the Taylor "enumerated offense" analysis is inapplicable to enhancement provisions that require that predicate offenses have "as an **element**" certain components. See United State v. Fulford, 267 F.3d 1241, 1248-51 (11th Cir. 2001). At issue in Fulford was whether the defendant's prior Florida aggravated assault conviction qualified as a "serious violent felony" under 18 U.S.C. § 3559, which in turn required that the offense have as an element "firearms use." The Florida statute defined aggravated assault in pertinent part as "'an assault . . . [w]ith a deadly

weapon without intent to kill.'" Id. at 1250 (quoting Fla. Stat. § 784.021(1)(a) (2000)). The statute thus covered assaults both with firearms and with other types of "deadly weapons." The government argued that the court should, under the Taylor exception discussed above, look to the defendant's information, which alleged that he committed the offense by "'[p]oint[ing] a firearm at or in the direction of [the victim] and/or sho[oting] at or in the direction of [the victim].'" Fulford, 267 F.3d at 1248 (quoting criminal information).

The Eleventh Circuit refused to do so. The court found that the Taylor exception was inapplicable to statutes that condition enhancement on predicate offenses that have "as an element" certain components. See Fulford, 267 F.3d at 1250-51. The court distinguished 18 U.S.C. § 924(e)(2)(B)(ii) – at issue in Taylor – from "has as an element" provisions on the ground that the latter "reference the elements of the offense," whereas the former "reference[s] the defendant's crime." Fulford, 267 F.3d at 1250. The Eleventh Circuit thus held that

> because [18 U.S.C.] § 3559(c)(2)(D) refers only to the elements of the offense on which the enhanced statute is to be predicated, the sentencing court may not look past the conviction to the charging document. The Florida statute under which [the defendant] was convicted for aggravated assault does not require proof of firearms use as an element of the crime, so it is not a qualifying crime under § 3559(c)(2)(D). Therefore, the district court correctly refused to look to the Information from [the defendant's] aggravated assault case in determining whether that conviction constitutes a "strike" under § 3559.

Id. at 1251.

The understanding of Taylor exemplified by Fulford and this Court's decision in Calderon-Pena has been followed without difficulty in subsequent decisions by this Court. See, e.g., United States v. Velasco, 465 F.3d 633, 640-41 (5th Cir. 2006) (use of a deadly weapon to cause bodily harm has an element the use of destructive physical force against the person of another); United States v. Alfaro, 408 F.3d 204, 208-09 (5th Cir. 2005) (discharging a firearm inside an unoccupied building or shooting at a building that happens to be occupied does not have as a necessary element the use of physical force against the person of another). Moreover, this is the view taken by the Office of Legal Counsel of the Department of Justice with respect to the "has as an element" language of 18 U.S.C. § 921(a)(33)(A)(ii), "a statute which defines a crime of violence by whether it 'has, as an element, the use or attempted use of physical force.'" United States v. Maldonado-Lopez, ___ F.3d ___, 2008 WL 510064, at *4 (10th Cir. Feb. 27, 2008) (McConnell, J., concurring). As Judge McConnell of the Tenth Circuit has pointed out:

> The OLC's view is that it is "unambiguous" that the "as an element" language is "limited to . . . a factual predicate specified by law and required to support a conviction." By contrast, it is permissible to look to the charging documents and plea proceedings if the statute itself has subparts with different enumerated elements, and it is not clear which set of elements the defendant was convicted under. ***In other words, the categorical approach permits the court to consult charging documents and related materials to determine what elements the jury had been***

required to find; it does not extend to factual details not part of the jury's verdict.

Id. (emphasis added, citations omitted) (quoting 31 Op. Off. Legal Counsel, at *1, *12 n.4 (May 17, 2007)) (McConnell, J., concurring).[8] Taylor's narrow exception thus does not, and indeed could not, override the Guideline's clear injunction to look only at the "elements" of the defendant's prior offense.

E. Under the Principles Set Out Above, Mr. Gomez-Gomez's 1991 Conviction for Rape Under Cal. Penal Code § 261(a)(2) Is Not a Qualifying "Crime of Violence."

Under the principles set out above, the government has the burden of proving, by at least "'a preponderance of the relevant and sufficiently reliable evidence,'" that a prior conviction qualifies for sentencing enhancement. United States v. Herrera-Solorzano, 114 F.3d 48, 50 (5th Cir. 1997) (quoting United States v. Alfaro, 919 F.2d 962, 965 (5th Cir. 1990)). And, in this context, "the relevant and sufficiently reliable evidence" is limited to "the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." Shepard, 544 U.S. at 16. The government's burden, in short, is to establish that "a plea of guilty to [a particular offense]

[8] This document is available at: http://www.usdoj.gov/olc/2007/atfmcdv-opinion.pdf, and is attached to this brief as Appendix A.

necessarily admitted elements of the generic offense." Id. at 26 (emphasis added). In light of the principles discussed above, the panel correctly held that the government had not met its burden and that Mr. Gomez-Gomez's prior conviction under Cal. Penal Code § 261(a)(2) is not a "crime of violence" for purposes of sentencing enhancement under USSG § 2L1.2(b)(1)(A)(ii).

1. Mr. Gomez-Gomez's Statute of Conviction.

At the time of Mr. Gomez-Gomez's offense, the statute of conviction, Cal. Penal Code § 261(a)(2), provided as follows:

> **§ 261. Rape** defined
>
> (a) **Rape** is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances:
>
> . . .
>
> (2) Where it is accomplished against a 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) (1991) (emphasis as in original). Under the statute, "duress" was defined 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 extent of duress.

Cal. Penal Code § 261(b) (1991).[9]

The felony complaint against Mr. Gomez-Gomez alleged, in pertinent part, that

> [o]n 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, [Complainant], 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).

Gov't Sent. Exh. 1.[10]

2. The Panel Correctly Found That Mr. Gomez-Gomez Could Have Been Convicted of Rape By Duress.

Apart from the name of the complainant, there are no evidentiary facts alleged in the felony complaint. Rather, the relevant language in the charging document tracks the statutory elements of Cal. Penal Code § 261(a)(2). The question then becomes whether this document establishes that Mr. Gomez-Gomez was convicted of

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[9] The statute was amended in 1993 to remove "hardship' from the definition of duress. See People v. Leal, 16 Cal. Rptr. 3d 869 (Cal. 2004) (discussing legislative history).

[10] The record contains the following documents pertaining to Mr. Gomez-Gomez's prior California guilty-plea conviction: (1) a felony complaint; (2) an abstract of judgment; and (3) court minutes. See Gov't Sent. Exh. 1, reproduced at Def.'s Record Excerpts, at Tab 4. However, a California abstract of judgment is not a Shepard-approved document, see, e.g., United States v. Gutierrez-Ramirez, 405 F.3d 352, 357-59 (5th Cir. 2005); nor are court minutes. See, e.g., United States v. Lopez-Solis, 447 F.3d 1201, 1210 n.61 (9th Cir. 2006).

a qualifying "crime of violence."

For purposes of this analysis, this Court has held that, "[b]ecause different jurisdictions have different rules, [the Court] must determine the effects of a guilty plea in the jurisdiction in which [the defendant under consideration] entered his guilty plea." United States v. Morales-Martinez, 496 F.3d 356, 359-60 (5th Cir.) (examining Texas state law to determine effect of guilty plea in Texas state court), cert. denied, 128 S. Ct. 410 (2007); see also, e.g., United States v. Gutierrez-Bautista, 507 F.3d 305, 308 (5th Cir. 2007) ("We look to Georgia law to determine the effect of Gutierrez-Bautista's [Georgia] guilty plea.") (citing, in footnote, Morales-Martinez, 496 F.3d at 359). Under this rubric, the relevant question in this case is the effect of Mr. Gomez-Gomez's plea under California law – more precisely, whether he was convicted of rape accomplished by all of the statutory alternative methods charged conjunctively in the information (including rape by "force"). The answer to that question is "no."

As an initial matter, the government has conceded that the panel correctly found that Mr. Gomez-Gomez could have been convicted only of rape by duress. Specifically, in its Opposition to Appellant's Motion to Reconsider Decision to Rehear This Case En Banc ("Gov't Opp."), the government has represented to this Court that: (1) the government has waived any argument based on this Court's recent

decision in United States v. Godino-Madrigal, No. 07-40023, 2008 U.S. App. LEXIS 3061 (5th Cir. Feb. 12, 2008) (unpublished); and, (2) in any event, Godino-Madrigal is inapplicable because, unlike this case, it was before the Court under plain-error review and involved a drug offense rather than a rape offense. See Gov't Opp. at 4-9. In light of these representations by the government, Mr. Gomez-Gomez makes the following arguments as additional support for his position.

When it comes to questions of state law, the federal courts of appeals should, like the United States Supreme Court itself, "defer to the interpretation of the Court of Appeals for the Circuit in which the State is located," Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 16 (2004) (citation omitted), at least where that interpretation is a reasonable one. See also, e.g., Haring v. Prosise, 462 U.S. 306, 314 n.8 (1983) ("It is our practice to accept a reasonable construction of state law by the Court of Appeals even if an examination of the state-law issue without such guidance might have justified a different conclusion.") (internal quotation marks and citation omitted). Here, the court of appeals in which California is located – the United States Court of Appeals for the Ninth Circuit – has answered the critical question of California law at issue here, in the very context presented by this case. See United States v. Vidal, 504 F.3d 1072 (9th Cir. 2007) (en banc).

At issue in Vidal, as here, was whether the defendant's plea of guilty

established that he had been convicted of an offense that qualified for enhancement under USSG § 2L1.2. In Vidal, the Ninth Circuit, sitting en banc, first noted that the defendant's bare plea of guilty "d[id] not [ ] establish that [he] admitted to all, or any, of the factual allegations in the [charging instrument]." Vidal, 504 F.3d at 1087 (footnote omitted). The Ninth Circuit then held that, "[i]n order to identify a conviction as the generic offense through the modified categorical approach, when the record of conviction comprises only the indictment and the judgment, the judgment must contain 'the critical phrase "as charged in the Information."'" Id. (citations omitted).

Thus, the teaching of Vidal is that, under California law, a defendant will be deemed, by his guilty plea, to have admitted to all of the allegations of a charging instrument ***only when*** a Shepard-approved document indicates that the defendant pleaded guilty "as charged." This construction of California law is a reasonable one that is entitled to deference, as an examination of California cases reveals. For example, in a leading case, the issue was whether a defendant who had been charged with robbery by force and fear had, by his guilty plea, been convicted of robbery by force so as to qualify him for enhancement as a habitual offender. See People v. Tuggle, 283 Cal. Rptr. 422, 425-28 (Cal. Ct. App. 1991), overruled on another ground, People v. Jenkins, 40 Cal. Rptr. 2d 903 (Cal. 1995). The court found that the

defendant's guilty plea qualified him for enhancement, but only because the record showed that he had pleaded guilty "as charged," i.e., to robbery accomplished by both fear ***and*** force:

> The transcript of appellant's change of plea hearing demonstrates that he pled guilty to the offense of "violating section 211 of the California Penal Code, a felony, ***as set forth in Count 1 of the information.***" By pleading guilty as charged, appellant necessarily admitted the force allegation and cannot now escape the consequences of that admission.

Id. at 426 (citation omitted; emphasis in original).[11] See also, e.g., People v. Cortez, 86 Cal. Rptr. 2d 234, 238 (Cal. Ct. App. 1999) (emphasizing the importance of "the fact that the defendant in Tuggle pled guilty to robbery ***as charged*** in an information that ***expressly alleged*** that he committed it using 'force ***and*** fear'") (all emphasis in original).

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[11] Mr. Gomez-Gomez recognizes that, in Godino-Madrigal, 2008 U.S. App. LEXIS 3061, at *7-*8, the majority of a panel of this Court – relying on People v. Mendias, 21 Cal. Rptr. 2d 159, 163-64 (Cal. Ct. App. 1993), and an Eighth Circuit case citing Mendias – held that, under California law, the defendant's guilty plea qualified him for enhancement because it constituted an admission to having committed all of the conjunctively charged statutory alternatives in the charging instrument. Godino-Madrigal, however, is premised on an incorrect understanding of California law, as set forth above. In fact, Mendias (the California case on which both Godino-Madrigal and the Eighth Circuit decision rely) cites as its primary authority the Tuggle decision cited above. See Mendias, 21 Cal. Rptr. 2d at 164 (citing and discussing Tuggle). As such, Mendias must be understood as incorporating the Tuggle decision's "as charged" limitation, but finding that limitation inapplicable in that case.

In any event, even if the "as charged" limitation of Tuggle does not control the outcome here, Mr. Gomez-Gomez also agrees with Judge Dennis's suggestion, in his concurring opinion in Godino-Madrigal, that "a state judge-made law like Mendias, which appears to be a mere legal fiction, should not be used to short-circuit the categorical approach required by Taylor and Shep[a]rd." Godino-Madrigal, 2008 U.S. App. LEXIS 3061, at *10 (Dennis, J., concurring in the judgment).

Here, although Mr. Gomez-Gomez was charged, in Count 1 of a felony complaint, with violating Cal. Penal Code § 261(a) by "willfully and unlawfully hav[ing] and accomplish[ing] an act of sexual intercourse with a person . . . not his/her spouse, against said person's will, by means of force, violence, duress, menace and fear of immediate and unlawful bodily injury,"[12] no document introduced by the government respecting that prior conviction[13] (and certainly no Shepard-approved document) establishes that Mr. Gomez-Gomez pleaded guilty to a violation of § 261(a) "as charged" in Count 1 of the felony complaint. Therefore, under California law, as exemplified by Vidal, Mr. Gomez-Gomez cannot be deemed to have admitted to "sexual intercourse . . . by [all the means set forth in Count 1 of the felony complaint]." Rather, the applicable California jurisprudential rule is that, in the absence of proof, Mr. Gomez-Gomez must be deemed to have been convicted only of "the least adjudicated elements of the crime defined in [§ 261(a)]," People v. Rodriguez, 70 Cal. Rptr. 2d 334, 340 (Cal. 1998); see also id. at 339-40 – which in this case would be sexual intercourse accomplished by "duress," which, as explained below, is not a qualifying "crime of violence."

[12] See Gov't Sent. Exh. 1, reproduced at Def.'s Record Excerpts, at Tab 4.

[13] See id.

3. Rape by Duress Under Cal. Penal Code § 261(a)(2) Is Not a "Forcible Sex Offense."

Under the California statute in effect at the time of Mr. Gomez-Gomez's offense, rape committed by duress could have been committed by an implied threat of hardship or retribution. See Cal. Penal Code § 261(b). Thus, a crime under § 261(a)(2) would occur where, for instance, an employer threatened an employee with termination if he or she did not submit to sexual intercourse, or where a person submitted to sexual intercourse with a police officer under threat of being charged with a crime, or 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), disapproved on another ground, People v. Griffin, 16 Cal. Rptr. 3d 891 (Cal. 2004). As explained above, see supra text, at 14-35, such scenarios are not included within the meaning of "forcible sex offenses" as intended by the Sentencing Commission and 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.

4. Rape by Duress 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."

It is also clear that rape by duress under § 261(a)(2) does not meet the "has as an element" prong of the "crime of violence" definition, because it does not require the use, threatened use, or attempted use of physical force against the person of another. With respect to the "has as an element" prong, "force" is "'synonymous with destructive or violent force.'" United States v. Landeros-Gonzales, 262 F.3d 424, 426 (5th Cir. 2001) (quoting United States v. Rodriguez-Guzman, 56 F.3d 18, 20 n.8 (5th Cir. 1995)). And, in the particular context of sex offenses, the mere act of sexual penetration does not, in and of itself, amount to the "use of force" to which this Guideline refers. See Sarmiento-Funes, 374 F.3d at 340. Accordingly, sexual penetration that is accompanied by consent-in-fact or assent (albeit not by consent-at-law) is not a "crime of violence" under USSG § 2L1.2's "has as an element" prong. See id. at 341-42. This is consistent also with the "crime of violence" definition under the Guidelines, which specifies certain "consensual" sex offenses (e.g., statutory rape) as "crimes of violence," as well as with common sense. If the mere act of penetration was the "use of physical force" within the meaning of the Guideline, then crimes such as adultery and incest between consenting adults would also be "crimes of violence."

Here, as the panel correctly found, rape by duress, which includes a threat of

hardship or retribution, does not require the use or threatened use of physical force. See, e.g., Bergschneider, 259 Cal. Rptr. at 223 (defendant's threat to put victim "on restriction" if she did not have sex with him sufficient to constitute duress); see also People v. Superior Court (*Kniep)*, 268 Cal. Rptr. 1, 2-3 (Cal. Ct. App. 1990) (evidence that defendant had threatened the victim with humiliation if he refused to submit to molestation sufficient to support charge for molestation of a child by use of duress). Thus, a conviction for rape by duress under § 261(a)(2) does not necessarily "ha[ve] ***as an element*** the use, attempted use, or threatened use of physical force against the person of another."

In sum, the panel in this case reached the correct holding based on this Court's opinions in Sarmiento-Funes and Calderon-Pena, both of which are supported by the language and structure of the Guidelines, the law of other circuits, the common law, and contemporary law. Accordingly, this Court should vacate Mr. Gomez-Gomez's sentence and remand for resentencing.

CONCLUSION

For the foregoing reasons, the panel correctly held that Mr. Gomez-Gomez had not been convicted of a qualifying "crime of violence." Consequently, this Court should vacate Mr. Gomez-Gomez's sentence and remand for resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, MARGARET C. LING, certify that today, March 11, 2008, a hard copy of Appellant's Supplemental Brief Upon Rehearing En Banc, a computer readable 3.5-inch disk containing a copy of the Supplemental Brief was served upon Mr. Tony R. Roberts and Ms. Renata Gowie, Assistant United States Attorneys, Southern District of Texas, by Federal Express No. 8623 5825 6907 c/o United States Marshal, 515 Rusk Avenue, Houston, Texas 77002.

MARGARET C. LING

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because it contains 12,699 words, excluding the parts of the brief exempted by 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 X3 software in Times New Roman 14 point font in text and Times New Roman 12 point font in footnotes.

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

MARGARET C. LING