

**UNITED STATES COURT OF APPEALS**  
**TENTH CIRCUIT**

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**FEB 3 2004**

**PATRICK FISHER**  
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RUBEN GARCIA HERNANDEZ,

Defendant-Appellant.

No. 03-2032

(D.C. No. CR-01-1714)

(D. New Mexico)

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**ORDER AND JUDGMENT** \*

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Before **EBEL**, **HENRY**, and **HARTZ**, Circuit Judges.

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Defendant Ruben Garcia Hernandez pleaded guilty to an indictment charging him with being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2), and 924(e)(1). The district court sentenced Defendant to 180 months' imprisonment and five years' supervised release under 18 U.S.C. § 924(e)(1), which subjects a person "who violates section 922(g) . . .

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\*After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, *res judicata*, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

and has three previous convictions . . . for a violent felony” to a minimum of fifteen years’ imprisonment. He now appeals his sentence. We have jurisdiction under 28 U.S.C. § 1291 and affirm.

Defendant’s indictment and presentence report listed the following convictions for violent felonies: burglary, on February 2, 1968; sexual penetration and false imprisonment, on September 30, 1977; aggravated assault, on September 28, 1985; and escape from jail, on December 15, 1985. *See* 18 U.S.C. § 924(e)(2)(B) (defining “violent felony” as “any crime punishable by imprisonment for a term exceeding one year . . . that--(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary or . . . otherwise involves conduct that presents a serious potential risk of physical injury to another”); *United States v. Moudy*, 132 F.3d 618, 620 (10th Cir. 1998) (holding that a felony escape, violent or not, is necessarily a “violent felony” for the purposes of § 924(e), given the threat of injury it poses to others). Besides finding that § 924(e) applied, the district court also determined that Defendant was an armed career criminal under § 4B1.4 of the United States Sentencing Guidelines, which designates a person subject to an enhanced sentence under § 924(e) as an “armed career criminal.”

Defendant directed defense counsel to file a notice of appeal on his behalf, on the ground that the district court incorrectly determined that he was a career

criminal under U.S.S.G. § 4B1.1. Specifically, Defendant contends that the district court should not have counted his prior convictions for (i) criminal sexual penetration, because he had served his time for that conviction and completed a post-incarceration probation; and (ii) escaping from jail, because that should not count as a violent felony.

Defense counsel has filed an *Anders* brief indicating his belief that the case affords no non-frivolous issues for appeal. *See Anders v. California*, 386 U.S. 738, 744 (1967). Although *Anders* entitles the defendant to raise additional points in response to counsel's *Anders* brief, Defendant has made no such filing.

Agreeing with counsel that Defendant's claims are frivolous, we GRANT counsel's request to withdraw and DISMISS the appeal.

ENTERED FOR THE COURT

Harris L Hartz  
Circuit Judge