No. _____

IN THE

# Supreme Court of the United States

SHANE MCMAHAN,
*Petitioner*,
v.

UNITED STATES OF AMERICA,
*Respondent*.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

The Tenth Circuit held that Shane McMahan's prior Kansas aggravated-battery conviction, KSA § 21-3414(a)(1)(C), qualified as a violent felony under the Armed Career Criminal Act's element-of-violent-force clause, 18 U.S.C. § 924(e)(2)(B)(i). But the relevant section of Kansas's aggravated-battery statute has a causation element, not an element of violent force ("causing physical contact with another person"). A jury need only find that the defendant caused a particular result (here, physical contact with another person), not that the defendant used, attempted to use, or threatened to use violent force against another person to commit the crime. And so, in direct conflict with the Tenth Circuit, the Fifth Circuit has held that this section of the Kansas aggravated-battery statute does not have an element of violent force. *Larin-Ulloa v. Gonzales*, 462 F.3d 456, 467 (5th Cir. 2006). This sharp circuit split implicates a larger conflict left unresolved by this Court in *United States v. Castleman*: "[w]hether or not the causation of bodily injury necessarily entails violent force" in the violent-felony context. 134 S.Ct. 1405, 1413 (2014). The question presented is:

> Whether a prior Kansas aggravated-battery conviction under KSA § 21-3414(a)(1)(C) qualifies as a violent felony under 18 U.S.C. § 924(e)(1)'s element-of-violent-force clause.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner Shane McMahan respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

## OPINIONS BELOW

The Tenth Circuit's unpublished order is included as Appendix A. The district court's order denying Mr. McMahan's motion to vacate, 28 U.S.C. § 2255, is included as Appendix B.

## JURISDICTION

The Tenth Circuit's judgment was entered on April 24, 2018. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The Armed Career Criminal Act, 18 U.S.C. § 924(e), provides in relevant part:

> (1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years . . . .
>
> (2) As used in this subsection –
>
> > (B) the term "violent felony" means 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 . . . .

The applicable section of the Kansas aggravated battery statute, KSA § 21-3414(a)(1)(C) (2002), defines aggravated battery as:

> intentionally causing physical contact with another person when done in a rude, insulting or angry manner with a deadly weapon, or in any manner

whereby great bodily harm, disfigurement or death can be inflicted.[1]

## STATEMENT OF THE CASE

There are few statutes that garner more attention from this Court than the Armed Career Criminal Act, 18 U.S.C. § 924(e). And deservedly so. An armed-career-criminal designation increases a defendant's statutory penalty range from a maximum ten years' imprisonment to a mandatory minimum fifteen years' imprisonment (and up to life). 18 U.S.C. § 924(a)(2), (e)(1). It is thus important to ensure that defendants are not inaccurately labeled armed career criminals.

Shane McMahan's armed-career-criminal designation turned on the classification of his 2003 Kansas aggravated-battery conviction under KSA § 21-3414(a)(1)(C). Pet. App. 3a, 11a. Specifically, with § 924(e)'s residual clause gone, this conviction only counts as a violent felony under the Armed Career Criminal Act if it has an element of violent force. 18 U.S.C. § 924(e)(2)(B)(i). One court of appeals – the Fifth Circuit – has held that this particular provision does not have an element of violent force. *Larin-Ulloa v. Gonzales,* 462 F.3d 456, 467 (5th Cir. 2006). Had Mr. McMahan committed his federal gun-possession offense in Texas, Louisiana, or Mississippi, his statutory maximum term of imprisonment would have been ten years. But Mr. McMahan committed his federal gun-possession offense in Kansas, and the Tenth Circuit, in direct conflict with the Fifth Circuit, has held that this Kansas aggravated-battery statute has an element of violent force. Pet. App. 8a-9a.

Both Circuits cannot be correct. Either KSA § 21-3414(a)(1)(C) has an element of

[1] This provision has been recodified, without change, at KSA § 21-5413(b)(1)(C).

violent force or it does not. This Court should grant this petition to resolve this conflict.

Aside from the severe increase in punishment under the Armed Career Criminal Act, review is critically important for three additional reasons. First, this case is just a microcosm of a broader conflict in the Circuits on whether statutes with causation elements, rather than violent force elements, have elements of violent force. *See* Section II, *infra*. This Court expressly left open this broader question in *United States v. Castleman*, 134 S.Ct. 1405, 1413 (2014) (a case involving a different provision defining a misdemeanor crime of domestic violence, and holding that causation statutes fall within this definition). *Castleman* did nothing to quell the conflict, as the Circuits have also divided on *Castleman*'s applicability to the violent-felony context. *See*, *e.g.*, *United States v. Ontiveros*, 875 F.3d 533, 537 (10th Cir. 2017).

Second, this issue is exceptionally important in light of the prevalence of federal and state statutes with causation elements (and not elements of violent force). *See* Section II, *infra*. If causation elements are equivalent to elements of violent force, then the class of felons considered to be "violent" increases dramatically. And third, concomitantly, there are a number of other federal statutes that have elements of violent force that mirror (or substantially mirror) the violent-force-element language in § 924(e)(2)(B)(i). *See* Section II, *infra*. These statutes also increase statutory penalty ranges, *see*, *e.g.*, 18 U.S.C. § 924(c), and even determine an immigrant's eligibility to remain in this country, 8 U.S.C. § 1101(a)(43)(F) (cross-referencing 18 U.S.C. § 16)). The treatment of causation elements as violent force elements has

serious consequences in these other areas as well.

On the merits, the Tenth Circuit erred. Kansas's aggravated battery statute requires a jury to find that a defendant caused physical contact to another person, not that the defendant used, attempted to use, or threatened to use violent force against another person to commit the crime. Because the jury need not find violent physical force (and the defendant need not admit violent physical force when pleading guilty), violent force is not an element under KSA § 21-3414(a)(1)(C). And even if one could find that a causation-of-contact element could amount to a violent force element, the causation-of-physical-contact element here is not the type of "violent force" element that qualifies under § 924(e)(2)(B)(i).

Finally, this case is an excellent vehicle to resolve these conflicts. The issue was preserved below, there are no procedural hurdles to relief, and there is an irreconcilable conflict in the Circuits on the precise issue presented in this petition. Review is necessary.

**A. Statutory Background**

Despite our constitutional right to bear arms, gun restrictions abound. As relevant here, it is a federal crime for certain classes of individuals (like felons) to possess firearms. 18 U.S.C. § 922(g). The typical statutory penalty range for this unlawful-possession offense is 0 to 10 years' imprisonment. 18 U.S.C. § 924(a)(2). But stiffer penalties apply if an individual qualifies as an armed career criminal under § 924(e). As an armed career criminal, an individual is subject to a 15-year mandatory minimum sentence, with a statutory maximum penalty of life in prison.

An armed-career-criminal designation turns on whether a defendant has three or more prior convictions for violent felonies or serious drug offenses. 18 U.S.C. § 924(e)(1).[2] As the statute is written, a prior conviction can qualify as a violent felony in one of three different ways: (1) it can have "as an element the use, attempted use, or threatened use of physical force against the person of another" (the element-of-violent-force clause); (2) it can qualify as one of four enumerated offenses ("burglary, arson, or extortion, involves use of explosives") (the enumerated-offenses clause); or (3) it could "otherwise involve[] conduct that presents a serious potential risk of physical injury to another" (the residual clause). But in 2015, this Court struck down the residual clause as unconstitutionally vague. *Johnson v. United States*, 135 S.Ct. 2551 (2015). Congress has not amended the statute in light of *Johnson*. Thus, there are only two ways in which a prior conviction qualifies as a violent felony: the conviction has an element of violent force or qualifies as an enumerated offense.

This Court has interpreted the element-of-violent-force clause only once, holding that the word "force" in this clause means "violent force, that is, force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010). The element-of-violent-force clause is thus concerned with prior convictions that require "a substantial degree of force," or "strong physical force." *Id.* In adopting this ordinary-meaning definition of force, this Court refused to apply the common-law definition of force (which includes "the merest touching"). *Id.* at 141-142.

In contrast, in *Castleman*, this Court adopted the common-law definition of force

[2] This case has nothing to do with prior drug convictions, so we say no more about "serious drug offenses."

to define a "misdemeanor crime of domestic violence" in 18 U.S.C. § 922(g)(9). This term, "misdemeanor crime of domestic violence," is defined in 18 U.S.C. § 921(a)(33)(A) as a misdemeanor that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by" a domestic partner. This force clause differs in language from the element-of-violent- force clause in § 924(e). For instance, whereas § 921(a)(33)(A) includes prior crimes that have "an element, the use or attempted use of physical force, or the threatened use of a deadly weapon," § 924(e)(2)(B)(i) includes crimes that threaten the use of force, and not crimes that threaten the use of a deadly weapon. Moreover, whereas § 921(a)(33)(A)(i) requires that the element of force be used "against the person of another," § 921(a)(33)(A)(i) includes a list of individuals who must have "committed" the prior crime (i.e., the domestic abuser). There is no additional requirement that the domestic-abuser defendant's prior act be directed "against the person of another." Indeed, the statutes are so dissimilar that this Court has referred to § 921(a)(33)(A)'s force clause as a "comical misfit" to § 924(e)'s element-of-violent-force clause. *Castleman*, 134 S.Ct. at 1410 (quoting *Johnson*, 559 U.S. at 145).

The question in *Castleman* focused solely on the phrase "the use . . . of physical force." *Id.* at 1409. Using the common-law definition of "force," this Court in *Castleman* held that a causation-of-bodily-injury statute qualified as a misdemeanor crime of domestic violence under § 921(a)(33)(A). 134 S.Ct. at 1408. "[T]he knowing or intentional causation of bodily injury necessarily involves the use of physical force." *Id.* at 1414. This Court in *Castleman* reserved the question "[w]hether or not the

causation of bodily injury necessarily entails violent force" in the violent-felony context. *Id.* at 1413. This broader question is essentially the question presented here (although the statute at issue here merely requires "causing physical contact . . . in any manner whereby great bodily harm, disfigurement or death can be inflicted," with no requirement that any bodily injury actually result from the physical contact), with the reservation that our focus is primarily on the meaning of the "element" language in § 924(e)(2)(B)(i), rather than the meaning of "physical force" in this provision.

Although this Court has never been asked to interpret the "element" language in the element-of-violent-force clause, this Court has adopted an elements-based approach when interpreting the enumerated-offenses clause. In order to determine whether a prior conviction qualifies under the enumerated-offenses clause, "[a]ll that counts . . . are 'the elements of the statute of conviction'" (and not the defendant's actual conduct in committing the underlying offense). *Mathis v. United States*, 136 S.Ct. 2243, 2251 (2016). "Elements are the constituent parts of a crime's legal definition – the things the prosecution must prove to sustain a conviction." *Id.* at 2248 (cleaned up). "At a trial, they are what the jury must find beyond a reasonable doubt to convict the defendant, and at a plea hearing, they are what the defendant necessarily admits when he pleads guilty." *Id.* (citations omitted). If a statute's elements "are the same as, or narrower than, those of the generic offense," a conviction under that statute counts as a violent felony under the enumerated-offenses clause. *Id.*

Aggravated battery is not an enumerated offense, so (with the residual clause gone) Mr. McMahan's prior Kansas aggravated-battery conviction qualifies as a violent felony only if it has an element of violent force. Pet. App. 6a. The specific subsection at issue here defines aggravated battery as: "intentionally causing physical contact with another person when done in a rude, insulting or angry manner with a deadly weapon, or in any manner whereby great bodily harm, disfigurement or death can be inflicted." KSA § 21-3414(a)(1)(C).[3]

Although the statute appears to set out two different crimes (causing physical contact when done in a rude, insulting or angry manner with a deadly weapon. . . **or** in any manner whereby great bodily harm, disfigurement or death can be inflicted), the Kansas courts have interpreted the two phrases as alternative means, not alternative elements. *See United States v. Williams*, 893 F.3d 696, 699 n.3 (10th Cir. 2018). Thus, the use of a deadly weapon is not an element of this offense. *Id.*; *see also Mathis*, 136 S.Ct. at 2253 (elements matter; means do not). As the parties agreed below, the relevant question in this case asks whether "intentionally causing physical contact with another person when done in . . . any manner whereby great bodily harm, disfigurement, or death can be inflicted" qualifies as an element of violent force. Pet. App. 6a-7a.

**B. Proceedings Below**

1. In 2013, Shane McMahan pleaded guilty to possession of a firearm by a convicted felon, 18 U.S.C. § 922(g)(1). Pet. App. 2a, 10a. Prior to sentencing, the

[3] The other two subsections, (a)(1)(A) and (a)(1)(B), punish "causing great bodily harm" and "causing bodily harm," respectively.

probation officer authored a presentence investigation report (PSR), finding that, because Mr. McMahan had at least three prior convictions for violent felonies, he qualified as an armed career criminal under 18 U.S.C. § 924(e). *Id.* 10a. This designation increased the statutory penalty range from a statutory *maximum* 10 years' imprisonment to a statutory mandatory *minimum* 15 years' imprisonment. *Id.* The parties entered into a plea agreement under Federal Rule of Criminal Procedure 11(c)(1)(C) to a 15-year term of imprisonment. *Id.* 2a, 10a. At sentencing in July 2013, the district court imposed the 15-year mandatory minimum sentence. *Id.*

2. Mr. McMahan did not appeal. But in 2015, this Court struck down § 924(e)'s residual clause in *Johnson*, 135 S.Ct. at 2557, and then made *Johnson* retroactively applicable to cases on collateral review in *Welch v. United States*, 136 S.Ct. 1257, 1265 (2016). In light of *Johnson* and *Welch*, Mr. McMahan filed a timely motion to vacate sentence under 28 U.S.C. § 2255, asserting that he no longer qualified as an armed career criminal. *Id.* 3a, 10a-11a. The parties agreed that Mr. McMahan had two qualifying convictions, but disputed whether Mr. McMahan's prior 2003 Kansas aggravated-battery conviction, KSA § 21-3414(a)(1)(C), still qualified as a violent felony under § 924(e)(1)'s element-of-violent-force clause. *Id.* 3a, 11a. If so, Mr. McMahan was still an armed career criminal. If not, he would have to be resentenced to no more than 10 years' imprisonment. *See id.*

In the district court, Mr. McMahan asserted that his Kansas aggravated-battery conviction did not count as a violent felony because it had a causation-of-injury element, not an element of violent force. R1.58 at 37-44. "The statute asks whether

contact was made in a manner in which serious injury might result, not whether force was applied or threatened." *Id.* at 41.

Mr. McMahan acknowledged a prior Tenth Circuit decision holding otherwise, *see United States v. Treto-Martinez*, 421 F.3d 1156 (10th Cir. 2005) (in the context of the guidelines, not § 924(e)), but explained that *Treto-Martinez* was not good law. R1.58 at 40-44 (citing *United States v. Zuniga-Soto*, 527 F.3d 1110 (10th Cir. 2008); *United States v. Rodriguez-Enriquez*, 518 F.3d 1191 (10th Cir. 2008); *United States v. Perez-Vargas*, 414 F.3d 1282 (10th Cir. 2005)). Rather, prior to *Treto-Martinez*, the Tenth Circuit had held in *Perez-Vargas* that a causation-of-injury element is not an element of violent force. R1.58 at 42-43. And after *Treto-Martinez*, in *Zuniga-Soto*, the Tenth Circuit acknowledged its mistake in *Treto-Martinez*. *Id.* at 40-41. Mr. McMahan further noted that the Fifth Circuit held in *Larin-Ulloa*, 462 F.3d 456, that the specific subsection of the Kansas aggravated-battery statute at issue here does not have an element of violent force. *Id.* at 43-44.

3. The district court denied the § 2255 motion. Pet. App. 10a-17a. The district court found itself bound by the Tenth Circuit's decision in *Treto-Martinez*. Pet. App. 7a, 14a-16a. In doing so, the district court acknowledged the conflict between *Treto-Martinez* and the Fifth Circuit's decision in *Larin-Ulloa*, but noted that it could not "follow the Fifth Circuit's opinion in the face of contrary Tenth Circuit authority." *Id.* 16a n.2. The district court also denied a certificate of appealability. R1.79.

4. Mr. McMahan appealed, and the Tenth Circuit granted a certificate of appealability. Pet. App. 4a. On the merits, the Tenth Circuit addressed two

preliminary questions, finding that Mr. McMahan could still challenge his sentence despite his Rule 11(c)(1)(C) plea agreement and the appeal waiver within that agreement. *Id.* 4a-6a. But the Tenth Circuit ultimately affirmed. Pet. App. 8a. The Tenth Circuit relied on its prior decision in *Treto-Martinez*, finding that the decision "remains the law of this circuit," and held that Kansas aggravated battery qualified as a violent felony under § 924(e)(1)'s element-of-violent-force clause. *Id.* 8a-9a. This timely petition follows.

## REASONS FOR GRANTING THE WRIT

The federal courts of appeals are split over whether Kansas's aggravated-battery statute, KSA § 21-3414(a)(1)(C), has an element of violent force. The split on this narrow question is representative of a much larger conflict in the Circuits over whether statutes with causation elements necessarily have elements of violent force. The reach of this Court's decision in *Castleman* is at the heart of this larger split. This Court should use this case – which turned entirely on the belief that a causation element is an element of violent force – to resolve these important conflicts. This Court should hold that the Kansas aggravated-battery statute at issue here does not have an element of violent force. A causation-of-physical-contact element does not require that a jury find (or a defendant admit) that the defendant used, attempted to use, or threatened to use violent physical force to commit the crime.

### I. The Circuits are divided over whether Kansas aggravated battery, KSA § 21-3414(a)(1)(C), has an element of violent force.

An established conflict exists between the Fifth and Tenth Circuits over whether Kansas's aggravated-battery statute has an element of violent force. This conflict

creates a disparate application of the Armed Career Criminal Act's heightened penalty provisions in the nine states within the Fifth and Tenth Circuits. Particularly because the two Circuits share a roughly 1,200-mile border (Texas with New Mexico and Oklahoma), this Court should resolve the conflict.

1. The Tenth Circuit held below that the Kansas aggravated-battery statute's causation-of-physical-contact element was an element of threatened violent physical force. Pet. App. 8a. According to the Tenth Circuit, causing physical contact "in any manner whereby great bodily harm, disfigurement, or death can be inflicted" is "at the very least the threatened use of physical force." *Id.* (cleaned up).

The Tenth Circuit did not provide any reasoning for its holding, but instead relied on its prior decision in *Treto-Martinez*. *Id. Treto-Martinez* had earlier held (in 2005) that Kansas's aggravated-battery statute had an element of violent force under USSG § 2L1.2(b)(1)(A) (2004). This guideline's violent-force provision is almost identical to § 924(e)'s violent-force provision. *Compare* USSG § 2L1.2(b)(1)(A) ("has as an element the use, attempted use, or threatened use of physical force against the person or property of another"), *with* 18 U.S.C. § 924(e)(2)(B)(i) ("has as an element the use, attempted use, or threatened use of physical force against the person of another"). *Treto-Martinez* disposed of this issue in one paragraph. 421 F.3d at 1160. "No matter what the instrumentality of the contact, if the statute is violated by contact that can inflict great bodily harm, disfigurement or death, it seems clear that, at the very least, the statute contains as an element the 'threatened use of physical force.'" *Id.*

The Tenth Circuit in this case also cited its recent decision in *United States v. Williams*, 893 F.3d 696 (10th Cir. 2018). Pet. App. 8a.[4] *Williams* involved a different subsection of Kansas's aggravated-battery statute ("causing bodily harm" as opposed to "causing physical contact"). 893 F.3d at 699 (quoting KSA § 21-5413(b)(1)(B)). *Williams* also involved the violent force provision in USSG § 4B1.2(a)(1), which is identical (and interpreted identically) to § 924(e)'s violent force provision. *Id.* at 703.

The defendant in *Williams* made arguments analogous to Mr. McMahan's arguments (our office represents Mr. Williams as well), including the argument that a causation element is not an element of violent force. 893 F.3d at 703. The Tenth Circuit rejected this argument in light of *Treto-Martinez*. *Id.* at 703-704. The Tenth Circuit found that *Treto-Martinez* was still good law in light of this Court's decision in *Castleman*. *Id.* The Tenth Circuit did not acknowledge that this Court has referred to the provision at issue in *Castleman* as a "comical misfit" to the provision at issue here. *See id.* Instead, the Tenth Circuit in *Williams* applied *Castleman* to the violent-crimes context, holding that "the knowing or intentional causation of bodily injury necessarily involves the use of physical force." *Id.* at 703 (quoting *Castleman*).

2. The Fifth Circuit disagrees with the Tenth Circuit's decision in this case and has held that KSA § 21-3414(a)(1)(C) does not have an element of violent force. *Larin-Ulloa*, 462 F.3d at 467. The question in *Larin-Ulloa* was whether a conviction under KSA § 21-3414(a)(1)(C) qualified as an aggravated felony under 8 U.S.C. § 1227(a)(2)(A)(iii). *Id.* at 458. An aggravated felony includes a "crime of violence,"

[4] The decision below actually cites a since-vacated version of *Williams*. We cite to the amended decision, which is not materially different from the vacated decision. *See Williams*, 893 F.3d at 698.

defined in 18 U.S.C. § 16(a) to include "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." *Id.* at 464. This provision is almost identical to § 924(e)'s violent-force provision, and courts interpret the two provisions identically. *See*, *e.g.*, *United States v. Campbell*, 865 F.3d 853, 856 (7th Cir. 2017); *Whyte v. Lynch*, 807 F.3d 463, 468 (1st Cir. 2015).

The Fifth Circuit held that § "21-3414(a)(1)(C) does not require that the defendant use physical force in order to support a conviction. Rather, it requires only that the defendant 'intentionally caus[e] physical contact with another person' under circumstances where 'great bodily harm, disfigurement or death' can result." 462 F.3d at 466. "As numerous cases have recognized, physical contact is **not** the equivalent of physical force." *Id.* (emphasis added).

The Fifth Circuit further rejected the claim that the Kansas aggravated-battery statute had a violent force element because the physical contact must be done in a manner "whereby great bodily harm, disfigurement or death can be inflicted." *Id.* Even under this language, the statute "does not require that the defendant intend to injure or use force on the victim or that the physical contact itself be violent, harmful, offensive, or even non-consensual." *Id.* Thus, "the use, attempted use, or threatened use of physical force is not an element of" § 21-3414(a)(1)(C). *Id.*

Post-*Castleman*, the Fifth Circuit has held firm to its position that causation elements are not the equivalent of elements of violent force. *See*, *e.g.*, *United States v. Burris*, 892 F.3d 801, 805 (5th Cir. 2018) ("a person can 'cause bodily injury' without

using force, so Burris's conviction . . . is not a violent felony" under § 924(e)); *United States v. Rico-Mejia*, 859 F.3d 318, 322 (5th Cir. 2017) ("a person could cause physical injury without using physical force"). "If a defendant could cause injury without using force, then using force is not a constituent part of a crime that requires causing injury." *Burris*, 892 F.3d at 805 n.22 (citing, *inter alia*, *Mathis*, 136 S.Ct. at 2248-2252). The Fifth Circuit, in direct conflict with the Tenth Circuit, has refused to alter its precedent on this point in light of *Castleman*. *Burris*, 892 F.3d at 808. "By its express terms, *Castleman*'s analysis is not applicable to the physical force requirement for a crime of violence. Accordingly, *Castleman* does not disturb this court's precedent regarding the characterization of crimes of violence." *Id.* (cleaned up) (quoting *Rico-Mejia*, 859 F.3d at 322).

Thus, as it stands now, there is an entrenched conflict between the Fifth and Tenth Circuits over whether Kansas's aggravated battery statute, KSA § 21-3414(a)(1)(C), qualifies as a violent felony under § 924(e)'s element-of-violent-force clause. The two Circuits further disagree on the broader question of whether causation elements are violent force elements, and *Castleman*'s effect (if any) on this broader question. The Tenth Circuit has already considered the Fifth Circuit's established position on these issues and rejected it. *Ontiveros*, 875 F.3d at 537. The conflict will persist until this Court resolves it.

The two Circuits "articulate both sides of the split admirably." *United States v. Nichols*, 784 F.3d 666, 668 (10th Cir. 2015) (Gorsuch, J., dissenting from the denial of rehearing en banc), reversed by *Nichols v. United States*, 136 S.Ct. 1113 (2016).

"[T]here's no need for further amplification here, only resolution somewhere." *Id.* And that somewhere is this Court, as only this Court can resolve the conflict. Review is necessary.

**II. Resolution of the issue presented is critically important.**

Resolution of this issue is critically important for three reasons. First, the Armed Career Criminal Act dramatically increases the penalties for gun possession offenses by a minimum of five years in prison. *Compare* 18 U.S.C. § 924(a)(2), *with* 18 U.S.C. § 924(e)(1). This Court has made clear that "any amount of actual jail time" is prejudicial. *Glover v. United States*, 531 U.S. 198, 203 (2001); *see also Hicks v. United States*, 137 S. Ct. 2000, 2001 (2017) (Gorsuch, J., concurring) ("For who wouldn't hold a rightly diminished view of our courts if we allowed individuals to linger longer in prison than the law requires only because we were unwilling to correct our own obvious mistakes?"). And here, the geography of Mr. McMahan's offense alone has increased his sentence a minimum of five years. Had Mr. McMahan possessed a gun in Texas, Louisiana, or Mississippi, instead of Kansas (or any of the other states within the Tenth Circuit), his sentence would have been at least five years shorter than the 15-year sentence he is currently serving. And this fact is true for any individual in similar circumstances.

Second, this Court often reviews armed-career-criminal designations to ensure that individuals (like Mr. McMahan) do not serve sentences longer than the law allows, as well as to resolve conflicts in the Circuits with respect to § 924(e)'s reach. *See*, *e.g.*, *Mathis*, 136 S.Ct. 2243; *Johnson*, 135 S.Ct. 2551; *Descamps v. United States*,

570 U.S. 254 (2013); *Sykes v. United States*, 564 U.S. 1 (2011); *McNeill v. United States*, 563 U.S. 816 (2011); *Johnson*, 559 U.S. 133; *Chambers v. United States*, 555 U.S. 122 (2009); *United States v. Rodriquez*, 553 U.S. 377 (2008); *Begay v. United States*, 553 U.S. 137 (2008); *Logan v. United States*, 552 U.S. 23 (2007); *James v. United States*, 550 U.S. 192 (2007); *Shepard v. United States*, 544 U.S. 13 (2005); *Caron v. United States*, 524 U.S. 308 (1998); *Taylor v. United States*, 495 U.S. 575 (1990). Indeed, this Court has granted certiorari in three armed-career-criminal cases for the 2018 term. *Stokeling v. United States*, 138 S.Ct. 1438 (2018); *United States v. Sims*, 138 S.Ct. 1592 (2018); *United States v. Stitt*, 138 S.Ct. 1592 (2018). This Court's review is necessary here as well.

And third, review would give this Court the opportunity to address the issue expressly left open in *Castleman*: "[w]hether or not the causation of bodily injury necessarily entails violent force" in the violent-felony context. 134 S.Ct. at 1413. The resolution of this broader question is important because the Circuits are split over whether causation elements necessarily qualify as violent force elements.

Two Circuits -- the **Fourth** and **Fifth** -- have held in armed career criminal cases that causation elements are not equivalent to violent force elements. *Burris*, 892 F.3d at 808; *United States v. Middleton*, 883 F.3d 485, 490-491 (4th Cir. 2018) ("the Government erroneously conflates the use of violent force with the causation of injury"); *see also Rico-Mejia*, 859 F.3d at 321 (§ 16(a) context). These Circuits have further held that *Castleman* does not apply in the violent-felony context. *Id.*

The **First Circuit** has come to an analogous conclusion in *Whyte*, a case, like *Rico-Mejia* in the Fifth Circuit, that involved § 16(a)'s element-of-violent-force provision. 807 F.3d at 468-469. The state statute at issue in *Whyte* had a causation element (causing physical injury), rather than an element of violent force. *Id.* at 468. As the First Circuit explained:

> Missing from this text is any indication that the offense also requires the use, threatened use, or attempted use of "violent force." The text thus speaks to the "who" and the "what" of the offense, but not the "how," other than requiring "intent." In sum, to the extent that the plain language of the statute controls the definition of the crime, the crime does not contain as a necessary element the use, attempted use, or threatened use of violent force.

*Id.* at 468-469. Moreover, in *Whyte*, the government could not point to any precedent interpreting the statute at issue as requiring "that violent force need be employed to cause the injury." *Id.* at 469. And, like the Fourth and Fifth Circuits, the First Circuit in *Whyte* held that *Castleman* did not apply in the violent-crimes context. *Id.* at 470-471.

In contrast, consistent with the **Tenth Circuit**'s decision below, the **Second**, **Third**, **Seventh**, **Eighth**, and **Ninth Circuits** have held that a causation element qualifies as an element of violent force. *Villanueva v. United States*, 893 F.3d 123, 128-129 (2d Cir. 2018) ("[T]he knowing or intentional causation of bodily injury necessarily involves the use of physical force"); *United States v. Ramos*, 892 F.3d 599, 611-612 (3d Cir. 2018) ("a conviction under a statute proscribing 'the knowing or intentional causation of bodily injury' is a conviction that 'necessarily involves the use of physical force'"); *United States v. Jennings*, 860 F.3d 450, 459 (7th Cir. 2017)

("a criminal act (like battery) that causes bodily harm to a person necessarily entails the use of physical force to produce the harm"); *United States v. Winston*, 845 F.3d 876, 878 (8th Cir. 2017) ("it is impossible to cause bodily injury without using force"); *United States v. Studhorse*, 883 F.3d 1198, 1205 (9th Cir. 2018) ("the 'use of physical force' may not be dissociated from intentionally or knowingly causing physical injury"). These Circuits have also held that *Castleman* applies in the violent-felony context. *Villanueva*, 893 F.3d at 129-130; *Ramos*, 892 F.3d at 611; *Jennings*, 860 F.3d at 459; *Winston*, 845 F.3d at 878; *Studhorse*, 883 F.3d at 1204-1205.[5]

In *United States v. Gatson*, 776 F.3d 405, 410-411 (6th Cir. 2015), the **Sixth Circuit** also held that a statute with a causation element had an element of violent force under § 924(e)(2)(B)(i). The state statute at issue punished the causation of "physical harm," which was defined as "any injury, illness, or other physiological impairment, regardless of its gravity or duration." *Id.* The Sixth Circuit assumed that an individual had to use force to cause any of these results, even though the statute did not require the use of force. *Id.* at 411; *see also United States v. Maynard*, __ F.3d __, 2018 WL 3232687, at *2 (6th Cir. July 3, 2018) (finding an element of force based on a "statute's plain language requiring that the defendant intentionally cause a physical injury in committing the underlying assault"). In doing so, however, the Sixth Circuit in *Gatson* did not extend *Castleman* to the violent-felony context,

[5] The Second Circuit had earlier held that a causation element is not an element of violent force in *Chrzanoski v. Ashcroft*, 327 F.3d 188 (2d Cir. 2003). But in *Villanueva*, the Second Circuit abandoned *Chrzanoski*'s reasoning in light of *Castleman*. 893 F.3d at 130.

instead noting that the common-law force provision in *Castleman* had a "broader meaning" than the violent force provision in § 924(e)(2)(B)(i). *Id.*

In *United States v. Vail-Bailon*, the **Eleventh Circuit** relied on a state statute's causation element to find that the statute had an element of violent force. 868 F.3d 1293, 1305 (11th Cir. 2017) ("the defendant must touch or strike the victim in a manner that causes not just offense or slight discomfort but great bodily harm"). But five judges dissented in *Vail-Bailon*. Judge Wilson's dissent took issue with the majority's use of the causation element (or "result element") to label the statute a violent crime. *Id.* at 1311-1313. "The result element is not relevant under *Curtis Johnson* because the element has no bearing on the degree of force necessary to commit felony battery. The degree of force associated with a touching is not somehow altered because the touching happens to result in great bodily harm." *Id.* at 1311-1312. In line with the First, Fourth, and Fifth Circuits, Judge Wilson disagreed that "all contact that is capable of causing pain or injury is 'physical force.'" *Id.* at 1313.

There has been dissension in one other Circuit as well. Judge Pooler dissented from the Second Circuit's decision in *Villanueva*. 893 F.3d at 132. Citing the Fifth Circuit's decision in *Rico-Mejia*, Judge Pooler criticized the panel decision's reliance on *Castleman* as an improper extension "to the very statutory context that the *Castleman* Court specifically and repeatedly differentiated." *Id.* at 133. "*Castleman* did not create a regime where causation of an injury is the dispositive question for force inquiries under federal law." *Id.* at 134. Because the statute at issue in

*Villanueva* had a causation element, rather than an element of violent force, Judge Pooler would have held that the statute did not qualify as a violent felony. *Id.* at 139.

This Court should use this case to resolve this broader Circuit split. The need to resolve this broader split is heightened in light of the number of federal statutes with element-of-violent-force provisions that are identical or analogous to § 924(e)(2)(B)(i). *See*, *e.g.*, 8 U.S.C. § 1227(a)(2)(A)(iii) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable"); 8 U.S.C. § 1101(a)(43) (defining an aggravated felony via 18 U.S.C. § 16, which includes a violent-force provision); 18 U.S.C. § 16(a) (discussed above); 18 U.S.C. § 25(a)(1) (incorporating § 16(a)'s violent-force definition in statute prohibiting the use of minors in crimes of violence); 18 U.S.C. § 119(b)(3) (incorporating § 16(a)'s violent-force provision in statute prohibiting the disclosure of personal information to incite a crime of violence); 18 U.S.C. § 373(a) (prohibiting solicitation to commit a crime of violence); 18 U.S.C. § 521(c)(2) (prohibiting crimes of violence committed by criminal street gangs); 18 U.S.C. § 844(o) (penalties for transporting explosives with reasonable cause to believe that they will be used to commit a crime of violence as defined in 18 U.S.C. § 924(c)(3)); 18 U.S.C. § 924(c)(3)(A) (prohibiting use of a firearm during a crime of violence); 18 U.S.C. § 929(a)(1) (enhanced penalties for possessing restricted ammunition during a crime of violence); 18 U.S.C. § 931(a)(1) (prohibiting possession of body armor by anyone with a prior conviction for a crime of violence, as defined in § 16); 18 U.S.C. § 1028(b)(3)(B) (enhanced penalties for committing identity fraud in connection with a crime of violence, as defined in § 924(c)(3)); 18 U.S.C. § 1039(e)

(enhanced penalties for certain fraud offenses knowing that information obtained will be used to further a crime of violence); 18 U.S.C. § 1956(c)(7)(ii) (defining "specified unlawful activity" as, *inter alia*, a crime of violence under § 16); 18 U.S.C. § 2250(d)(1) (enhanced penalties for sex offenders who fail to register and commit "a crime of violence under Federal law"); 18 U.S.C. § 3156(a)(4) (defining "crime of violence" in bail statutes); 18 U.S.C. § 3181(b)(1) (incorporating § 16 definition of crime of violence in extradition context); 18 U.S.C. § 3663A(c)(1)(A)(i) (restitution in cases involving crimes of violence under § 16). The broader conflict in the Circuits in the violent-felony context necessarily spills over into these other contexts as well.

Additionally, the resolution of the broader conflict is necessary in light of the number of federal and state statutes that have causation elements (but not violent force elements). *See* p. 30, infra for a list of federal statutes with causation elements. For instance, within the three states in the Fifth Circuit (Louisiana, Mississippi, and Texas), we have identified at least 22 provisions with causation elements. La. Rev. Stat. § 32.9(A) (prohibiting an abortion that causes the death of the unborn child); La. Rev. Stat. § 32.12(A)(2) (advising another to commit suicide that causes the person to commit suicide); Miss. Code § 97-3-3(1) (causing any woman with child to abort or miscarry by any means); Miss. Code § 97-3-4(1) (causing child born during an abortion procedure to die); Miss. Code § 97-3-7(1)(a), (2)(a), (3)(a), 4(a) (defining assault as causing bodily injury or serious bodily injury to another); Miss. Code § 97-3-39 (administering medicine that causes death); Miss. Code § 97-3-93 (causing death via substances placed in merchantable timber); Miss. Code § 97-3-109(1), (2)

(attempting to cause or causing serious bodily injury via a drive-by shooting); Miss. Code § 97-3-105(1) (prohibiting hazing via "engag[ing] in conduct which creates a substantial risk of physical injury to such other person or a third person and thereby causes such injury")[6]; Tex. Stat. § 19.01(a) (criminal homicide defined as causing the death of an individual); Tex. Stat. § 19.02(b)(1) (same – murder); Tex. Stat. § 19.04 (same – manslaughter); Tex. Stat. § 19.05(a) (same – criminally negligent homicide); Tex. Stat. § 22.01(a)(1), (2), (3) (defining assault as causing bodily injury/physical contact); Tex. Stat. § 22.02(a)(1) (defining aggravated assault as causing serious bodily injury); Tex. Stat. § 22.021(a)(1)(A) (defining aggravated sexual assault as causing penetration "by any means"); Tex. Stat. § 22.04(a) (causing serious bodily injury to a child, elderly person, or disabled person by any act or omission); Tex. Stat. § 22.08(b) (aiding suicide where the defendant causes suicide or attempted suicide).

Within the Tenth Circuit, we have identified over thirty statutes with causation elements. C.R.S. § 18-3-102(1) (causing death); C.R.S. § 18-3-103 (same); C.R.S. § 18-3-104(b) (causing another person to commit suicide); C.R.S. § 18-3-15 (causing death via criminal negligence); C.R.S. § 18-3-106(a) (causing death via reckless driving); C.R.S. § 18-3-106(b) (causing death via drunk driving); C.R.S. § 18-3-202 (assault defined as causing injury); C.R.S. § 18-3-203 (same); C.R.S. § 18-3-204 (same); C.R.S. § 18-3-205(a) (causing serious bodily injury via reckless driving); C.R.S. § 18-3-205(b) (causing serious bodily injury via drunk driving); C.R.S. § 18-6-401(1)(a) (causing

[6] This statute is a particularly good example why the Tenth Circuit's approach is wrong. This statute punishes residual-clause conduct, yet, because of its causation element, the Tenth Circuit would hold the crime a violent felony, even though the residual clause no longer exists.

injury to a child); C.R.S. § 18-9-115(d) (causing bodily injury to another on a public conveyance); KSA § 21-5413 (current version of assault statute at issue here); KSA § 21-5426(a)(3) (coercing employment or labor by causing or threatening to cause physical injury); N.M. Stat. § 30-24-3(B) (defining retaliation against a witness as causing bodily injury to another person); N.M. Stat. § 66-8-102(D)(2) (causing bodily injury while driving drunk); N.M. Stat. § 66-13-3(D)(2) (causing bodily injury while driving a motorboat drunk); Okla. Stat. Tit. 21 § 701.7 (causing death); Okla. Stat. Tit. 21 § 1752.1(a) (causing the derailment of a train); Okla. Stat. Tit. 47 § 11-403.1 (causing death or serious bodily injury when failing to yield a right-of-way); Okla. Stat. Tit. 47 § 11-904 (causing great bodily injury while driving a vehicle); Okla. Stat. Tit. 47 § 11-905(a) (causing injury while driving a vehicle); Utah Stat. § 76-5-111(1)(b) (defining abuse as causing harm or physical injury); Utah Stat. § 76-5-203(2) (causing death or serious bodily injury); Utah Stat. § 76-6-203 (causing bodily injury while fleeing from a burglary); Wy. Stat. § 6-2-106 (causing death while driving); Wy. Stat. § 6-2-402(c) (causing bodily injury in the course of committing blackmail); Wy. Stat. § 6-2-501(a) (defining assault as an attempt to cause bodily injury); Wy. Stat. § 6-2-501(b) ("A person is guilty of battery if he intentionally, knowingly or recklessly causes bodily injury to another person by use of physical force")[7]; Wy. Stat. § 6-2-502 (causing serious bodily injury or bodily injury); Wy. Stat. § 6-2-510(a) (defining domestic assault as attempting to cause bodily injury); Wy. Stat. § 6-2-511(a)

[7] This statute in particular undermines the Tenth Circuit's position, as it punishes the use of force to cause injury, thus proving that, when a legislature wants to punish causing injury via force, it does so expressly. *See also* Wy. Stat. § 6-2-511(a) (defining domestic battery as causing bodily injury to a household member by use of physical force).

(defining domestic battery as causing bodily injury by use of physical force); Wy. Stat. § 6-5-204(b) (causing bodily injury to a peace officer).

Until this broader conflict is resolved, the classification of these statutes as violent crimes will depend entirely on the geography of the district court.[8] And because the Fifth and Tenth Circuits share a border, individuals are bound to be treated differently until this Court resolves the conflict. As just one example, consider the El Paso/Las Cruces metropolitan area. This area merges Texas and New Mexico, with a population of over one million people.[9] Disparities within this region are bound to exist in light of the conflicts between the Fifth and Tenth Circuits.

Additionally, consider that this area sits on the border, across from Ciudad Juarez, Mexico, which increases the region's population to over 2.7 million.[10] As mentioned above, immigration law is also affected by the classification of crimes as violent (or not). For instance, statutes with violent force elements render an individual deportable as an aggravated felon. 8 U.S.C. § 1101(a)(43); 8 U.S.C. § 1227(a)(2)(A)(iii). As the law stands now, an immigrant with a prior conviction that has a causation element, but not an element of violent force (like the Kansas statute at issue here), is

[8] To be clear, if this Court had not struck down the residual clause as unconstitutionally vague, we have no doubt that most statutes that cause injury would fit comfortably within the residual clause's reach. A crime that causes injury, for instance, would most likely involve "conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii). But now that the residual clause is gone, the lower courts should not be free to interpret the element-of-violent-force clause atextually to get within its reach residual-clause crimes. That task is a matter "for Congress, not this Court, to resolve." *Henson v. Santander Consumer USA Inc.*, 137 S.Ct. 1718, 1725 (2017); *see also Perry v. Merit Sys. Prot. Bd.*, 137 S. Ct. 1975, 1990 (2017) (Gorsuch, J., dissenting) ("If a statute needs repair, there's a constitutionally prescribed way to do it. It's called legislation.").

[9] https://en.wikipedia.org/wiki/El_Paso%E2%80%93Las_Cruces,_Texas%E2%80%93New_Mexico,_combined_statistical_area

[10] https://en.wikipedia.org/wiki/El_Paso%E2%80%93Ju%C3%A1rez#cite_note-4

deportable if found (or moved to) New Mexico, but (likely) not deportable if found (or moved to) Texas. Immigration officials could move immigrants from one side of the Texas/New Mexico border to the other to make an immigrant an aggravated felon (or not). In light of the number of violent-felony statutes like § 924(e), and causation statutes like KSA § 21-3414(a)(1)(C), this disparate treatment further highlights the need for this Court to resolve the issue presented in this petition.

**III. The Tenth Circuit Erred.**

For two reasons, the Tenth Circuit erred.

1. Under the plain text of the relevant statutes (§ 924(e)(2)(B)(i) and KSA § 21-3414(a)(1)(C)), Kansas's aggravated-battery statute does not have an element of violent force. Start with § 924(e)(2)(B)(i)'s element-of-violent-force clause. This provision defines a violent felony as any crime that "has as an *element* the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i) (emphasis added). "Elements are the constituent parts of a crime's legal definition—the things the prosecution must prove to sustain a conviction." *Mathis*, 136 S.Ct. at 2248 (cleaned up). "At a trial, they are what the jury must find beyond a reasonable doubt to convict the defendant, and at a plea hearing, they are what the defendant necessarily admits when he pleads guilty." *Id.* (citations omitted); *see also In re Winship*, 397 U.S. 358, 361 (1970) (describing reasonable doubt "as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt"); *Torres v. Lynch*, 136 S. Ct. 1619, 1624 (2016) ("substantive elements primarily define the behavior that the statute calls a violation of federal law") (cleaned up).

Thus, in order for a crime to have an "element" of violent force (use, attempted use, or threatened use), the jury must be required to find beyond a reasonable doubt that the defendant used, attempted to use, or threatened to use violent physical force against the person of another (or the defendant must admit the use, attempted use, or threatened use of violent force in order to plead guilty to the offense). *Mathis*, 136 S.Ct. at 2248. When a statute's text gives no "indication that the offense [] requires the use, threatened use, or attempted use of 'violent force,' . . . the crime does not contain as a necessary element the use, attempted use, or threatened use of violent force." *Whyte*, 807 F.3d at 468-469. As Judge Pooler explained in dissent in *Villanueva*, "for offenses created by statute, rather than common law, we ascertain the elements from the text of the statute itself." 893 F.3d at 136. When the statute's text does not have a violent force element, the crime does not count as a violent felony under § 924(e)(2)(B)(i). *Id.* at 136-137. Or as this Court explained in *Torres*, an element-of-violent-force provision "would not pick up demanding a ransom for kidnapping," as this crime is defined "without any reference to physical force." 136 S.Ct. at 1629.

When this plain-text approach is applied to the Kansas aggravated-battery statute at issue here, it is obvious that the statute does not have an element of violent force. The statute requires that the defendant "intentionally caus[e] physical contact with another person when done in . . . any manner whereby great bodily harm, disfigurement or death can be inflicted." KSA § 21-3414(a)(1)(C). It does not require that the defendant use any amount of force (attempted force, or threatened force) to

commit the crime. As a practical matter, a Kansas jury need not find that the defendant used any amount of force to commit the crime. And in order to plead guilty, a Kansas defendant need not admit that he used any amount of force to commit the crime. *See*, *e.g.*, *Burris*, 892 F.3d at 805 ("a person can 'cause bodily injury' without using force, so Burris's conviction . . . is not a violent felony" under § 924(e)); *Middleton*, 883 F.3d at 490-491 ("the Government erroneously conflates the use of violent force with the causation of injury"); *Rico-Mejia*, 859 F.3d at 322 ("a person could cause physical injury without using physical force").

A survey of the federal criminal code confirms that Congress knows the difference between a force element and a causation element. There are numerous federal statutes with force elements. *See*, *e.g.*, 18 U.S.C. § 111(a)(1) ("forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person"); 18 U.S.C. § 111(a)(2) ("forcibly assaults or intimidates"); 18 U.S.C. § 245(b) ("Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with . . ."); 18 U.S.C. § 247(a)(2) (Whoever . . . intentionally obstructs, by force or threat of force, any person in the enjoyment of that person's free exercise of religious beliefs, or attempts to do so"); 18 U.S.C. § 248(a)(1), (2) ("by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person"); 18 U.S.C. § 372 ("If two or more persons . . . conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office"); 18 U.S.C. § 593 ("Whoever . . . prevents or attempts to prevent by force, threat,

intimidation, advice or otherwise any qualified voter of any State from fully exercising the right of suffrage at any general or special election"); 18 U.S.C. § 670(b)(2)(A) (making theft of medical products an aggravated offense if the violation "involves the use of violence, force, or a threat of violence or force"); 18 U.S.C. § 831(a)(4)(A) (whoever "knowingly . . . uses force . . . and thereby takes nuclear material or nuclear byproduct material belonging to another from the person or presence of any other"); 18 U.S.C. § 874 ("Whoever, by force, intimidation, or threat of procuring dismissal from employment"); 18 U.S.C. § 1033(d) ("Whoever, by threats or force or by any threatening letter or communication, corruptly influences, obstructs, or impedes or endeavors corruptly to influence, obstruct, or impede the due and proper administration of the law"); 18 U.S.C. § 1231 ("Whoever willfully transports in interstate or foreign commerce any person who is employed or is to be employed for the purpose of obstructing or interfering by force or threats"); 18 U.S.C. § 1503(a) ("Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror"); 18 U.S.C. § 1505 ("Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law"); 18 U.S.C. § 1509 ("Whoever, by threats or force, willfully prevents, obstructs, impedes, or interferes with, or willfully attempts to prevent, obstruct, impede, or interfere with"); 18 U.S.C. § 1512(a)(2) ("Whoever uses physical force or the threat of physical force against any person, or attempts to do so"); 18 U.S.C. § 1589(a)(1) ("Whoever

knowingly provides or obtains the labor or services of a person . . . by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person"); 18 U.S.C. § 1591(b)(1) ("if the [sex trafficking] offense was effected by means of force, threats of force, fraud, or coercion"); 18 U.S.C. § 1859 ("Whoever, by threats or force, interrupts, hinders, or prevents the surveying of the public lands"); 18 U.S.C. § 1951(b)(1) ("The term 'robbery' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force"); 18 U.S.C. § 1951(b)(2) ("The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force"); 18 U.S.C. § 2111 ("Whoever, within the special maritime and territorial jurisdiction of the United States, by force and violence, or by intimidation, takes or attempts to take from the person or presence of another anything of value"); 18 U.S.C. § 2113(a) ("Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another"); 18 U.S.C. § 2118(a) ("Whoever takes or attempts to take from the person or presence of another by force or violence or by intimidation any material"); 18 U.S.C. § 2119 ("takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so"); 18 U.S.C. § 2194 ("Whoever . . . procures or induces, or attempts to procure or induce, another, by force or threats or by representations which he knows or believes to be untrue"); 18 U.S.C. § 2231(a) ("Whoever forcibly assaults, resists, opposes, prevents, impedes, intimidates, or

interferes with any person authorized to serve or execute search warrants"); 18 U.S.C. § 2241(a)(1) ("Whoever . . . knowingly causes another person to engage in a sexual act . . . by using force against that other person"); 18 U.S.C. § 2241(b)(2) ("Whoever . . . administers to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance"); 18 U.S.C. § 2280(a)(1) ("A person who unlawfully and intentionally . . . seizes or exercises control over a ship by force or threat thereof or any other form of intimidation"); 18 U.S.C. § 2281(a)(1) ("A person who unlawfully and intentionally . . . seizes or exercises control over a fixed platform by force or threat thereof or any other form of intimidation"); 18 U.S.C. § 2332i(a)(2) ("Whoever demands possession of or access to radioactive material, a device or a nuclear facility by threat or by use of force"); 18 U.S.C. § 2441(d)(1)(E) (defining rape as "[t]he act of a person who forcibly or with coercion or threat of force wrongfully invades . . ."); 18 U.S.C. § 2441(d)(1)(H) (defining sexual assault or abuse as "[t]he act of a person who forcibly or with coercion or threat of force engages, or conspires or attempts to engage . . ."); 18 U.S.C. § 3559(c)(2)(E) ("the term 'kidnapping' means an offense that has as its elements the abduction, restraining, confining, or carrying away of another person by force or threat of force").[11]

There are also numerous federal statutes with causation elements. *See*, *e.g.*, 18 U.S.C. § 13(b)(2)(A) ("if serious bodily injury . . . or if death of a minor is caused"); 18

[11] Without getting too far into the weeds, it is possible (even likely) that some of these force elements are in fact force means. But the point still remains: when Congress wants to punish a crime involving force, it does so expressly. Thus, there is no reason to interpret non-force elements (like causation elements) as elements of force (or non-force means as means of force).

U.S.C. § 36(b)(1) ("in the course of such conduct, causes grave risk to any human life"); 18 U.S.C. § 37(a)(1) ("performs an act of violence against a person at an airport serving international civil aviation that causes or is likely to cause serious bodily injury"); 18 U.S.C. § 249(a)(1) ("Whoever, whether or not acting under color of law, willfully causes bodily injury to any person"); 18 U.S.C. § 1030(a)(5)(A) ("knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer"); 18 U.S.C. § 1030(a)(7)(A) ("with intent to extort from any person any money or other thing of value, transmits in interstate or foreign commerce any communication containing any . . . threat to cause damage to a protected computer"); 18 U.S.C. § 1091(a)(2), (3) ("Whoever . . . . with the specific intent to destroy, in whole or in substantial part, a national, ethnic, racial, or religious group as such . . . causes serious bodily injury to members of that group [or] causes the permanent impairment of the mental faculties of members of the group through drugs, torture, or similar techniques"); 18 U.S.C. § 1111(c)(3) (defining child abuse as "intentionally or knowingly causing death or serious bodily injury to a child"); 18 U.S.C. § 1368(a) (enhanced penalties for harming law enforcement animals if the offense "causes serious bodily injury to or the death of the animal"); 18 U.S.C. § 1513(b) ("Whoever knowingly engages in any conduct and thereby causes bodily injury to another person").

The existence of these statutes confirms that Congress knows the difference between an element of force and a causation element. Because § 924(e)(2)(B)(i)

requires an element of violent force, and not an element of causation, the Tenth Circuit erred in holding that Kansas's aggravated battery statute, KSA § 21-3414(a)(1)(C), qualifies as a violent felony. The Kansas statute has a causation element ("causing physical contact"), not an element of violent force.

The Tenth Circuit's contrary holding not only overlooks Congress's drafting decisions in the federal criminal code, but it infringes significantly on the states' authority to define the elements of state law. The Kansas legislature consciously chose to define aggravated battery in terms of causation of injury, rather than use of force. KSA § 21-3414(a). When the Kansas legislature wants to define a crime in terms of force, it does so expressly. *See*, *e.g.*, KSA § 21-5407(a) (defining assisted suicide as "knowingly, by force or duress, causing another person to commit or attempt to commit suicide"); KSA § 21-5408(a) (defining kidnapping as "the taking or confining of any person, accomplished by force, threat, or deception"); KSA § 21-5420(a) (defining robbery as "knowingly taking property from the person or presence of another by force or by threat of bodily harm to any person"); KSA § 21-5426(a) (defining human trafficking via "the use of force, fraud or coercion"); KSA § 21-5503 (defining rape as sex when the victim is "overcome by force or fear"); KSA § 21-5504 (defining aggravated criminal sodomy as sodomy when the victim is "overcome by force or fear"); KSA § 21-5909(b) (defining aggravated intimidation of a witness as "an expressed or implied threat of force or violence"); KSA § 21-5922(a)(2) (prohibiting impeding a public employee's duties "by force and violence or threat thereof"); KSA § 21-6201(a) (defining riot via "use of force or violence"). For all of these reasons, KSA

§ 21-3414(a)(1)(C) does not have an element of violent force.

Second, even under the Tenth Circuit's erroneous decision equating a causation-of-physical-contact element with a violent-force element, the causation-of-physical-contact element here is not the type of "violent force" element that qualifies under § 924(e)(2)(B)(i), as interpreted by this Court in *Johnson*. *Johnson* held that the word "force" in this clause means "violent force, that is, force capable of causing physical pain or injury to another person." 559 U.S. at 140. The element-of-violent-force clause is thus concerned with prior convictions that require "a substantial degree of force," or "strong physical force." *Id.* In adopting this ordinary-meaning definition of force, this Court refused to apply the common-law definition of force (which includes "the merest touching"). *Id.* at 141-142.

The lower courts, like the Tenth Circuit, that have applied *Castleman*'s common-law definition of "force" to the violent-felony context have done so incorrectly. *Castleman* involved the meaning of a different term – "misdemeanor crime of domestic violence." This term is defined in 18 U.S.C. § 921(a)(33)(A) as a misdemeanor that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by" a domestic partner.

As explained above, this force clause differs in language from the element-of-violent-force clause in § 924(e). *See* p. 6, *supra*. And to reiterate, the statutes are so dissimilar that this Court has referred to § 921(a)(33)(A)'s force clause as a "comical misfit" to § 924(e)'s element-of-violent-force clause. *Castleman*, 134 S.Ct. at 1410 (quoting *Johnson*, 559 U.S. at 145). "By its express terms," *Castleman* is inapplicable

to the violent-felony context. *Burris*, 892 F.3d at 808.

The Kansas aggravated-battery statute's causation-of-physical-contact element in no way requires a jury to find that the defendant used, attempted to use, or threatened to use violent force. As the Fifth Circuit explained in *Larin-Ulloa*, the statute is violated when a "physician negligently inject[s] a medication to which the patient is extremely allergic" or when "a dentist [] negligently use[s] non-sterile equipment to clean a patient's teeth." 462 F.3d at 466. The statute reaches conduct that can be committed without the use of a "substantial degree of force" or "strong physical force." *Johnson*, 559 U.S. at 140. Under any measure, the statute does not have an element of violent force.

**IV. This Case Is An Ideal Vehicle To Resolve The Conflicts.**

Finally, this case is an ideal vehicle to resolve the conflicts. The question presented was preserved below, and there are no procedural hurdles to this Court's review. The Tenth Circuit granted a certificate of appealability on the merits, then affirmed the district court's decision on the merits. Pet. App. 1a-9a. In doing so, the Tenth Circuit solidified a conflict with the Fifth Circuit on the precise issue presented here (whether KSA § 21-3414(a)(1)(C) qualifies as a violent felony), and a conflict with the First, Fourth, and Fifth Circuits on the broader issue (whether causation elements are the equivalent of elements of violent force). This Court should use this case to resolve the conflicts.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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**FILED**
**United States Court of Appeals**
**Tenth Circuit**

**April 24, 2018**

**Elisabeth A. Shumaker**
**Clerk of Court**

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

SHANE MCMAHAN,

Defendant - Appellant.

No. 16-3308
(D.C. Nos. 2:16-CV-02319-JWL and 2:12-CR-20120-JWL-1)
(D. Kan.)

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**ORDER AND JUDGMENT***

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Before **BRISCOE**, **McHUGH**, and **MORITZ**, Circuit Judges.

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Shane McMahan appeals the district court's order denying his 28 U.S.C. § 2255 motion. Specifically, McMahan argues that the sentencing court erred by relying on the now-defunct residual clause of the Armed Career Criminal Act (ACCA) of 1984, 18 U.S.C. § 924(e), when it imposed a 15-year prison sentence. *See Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015) (striking down ACCA's residual clause as unconstitutionally vague). But McMahan concedes that he has two convictions for crimes that constitute violent felonies under the ACCA's enumerated-offense clause. And we conclude today that his Kansas conviction for aggravated

* This order and judgment isn't binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. But it may be cited for its persuasive value. *See* Fed. R. App. P. 32.1; 10th Cir. R. 32.1.

battery, *see* Kan. Stat. Ann. § 21-3414(a)(1)(C) (1995) (repealed 2011), constitutes a violent-felony conviction under the ACCA's elements clause. Thus, the sentencing court correctly imposed the ACCA's enhanced penalty. *See* § 924(e)(1) (imposing mandatory minimum 15-year prison sentence for defendants with three or more prior convictions for violent felonies or serious drug offenses who are subsequently convicted of being a felon in possession of a firearm). Accordingly, we affirm the district court's order denying McMahan's § 2255 petition.

**Background**

In 2013, McMahan pleaded guilty to possession of a firearm by a convicted felon. *See* 18 U.S.C. § 922(g)(1). As part of the plea, McMahan admitted he had six prior convictions for Kansas felonies: two for burglary of a dwelling, one for burglary of a vehicle, one for attempted criminal threat, one for conspiracy to commit robbery, and one for aggravated battery. The parties stipulated that McMahan would serve a 15-year prison sentence in exchange for the plea. *See* Fed. R. Crim. P. 11(c)(1)(C) (authorizing parties to a plea agreement to stipulate to appropriate sentence). The district court accepted McMahan's plea and sentenced him to 15 years in prison. *See id.* (stating that parties' stipulation regarding appropriate sentence "binds the court once the court accepts the plea agreement").

McMahan didn't appeal. But in 2015, the Supreme Court struck down the ACCA's residual clause as unconstitutionally vague. *Johnson*, 135 S. Ct. at 2557; *see also Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) (applying *Johnson*

retroactively). Thus, after *Johnson* and *Welch*, the only offenses that constitute violent felonies for ACCA purposes are those that satisfy either its enumerated-offense clause or its elements clause. *See United States v. Pam*, 867 F.3d 1191, 1203 (10th Cir. 2017). In other words, predicate convictions for burglary, arson, extortion, or crimes that involve the use of explosives, *see* § 924(e)(2)(B)(ii), or for offenses that "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another," § 924(e)(2)(B)(i), remain convictions for violent felonies under the ACCA. *See Pam*, 867 F.3d at 1203.

In light of this new legal landscape, McMahan moved to vacate his sentence under § 2255. He conceded that his two burglary-of-a-dwelling convictions remain convictions for violent felonies under the ACCA. But he argued that his other four convictions do not. The government responded that McMahan's 2003 aggravated-battery conviction under § 21-3414(a)(1)(C) "has as an element the use, attempted use, or threatened use of physical force against the person of another" and is thus a violent felony under the ACCA's elements clause. § 924(e)(2)(B)(i). Citing *United States v. Treto-Martinez*, 421 F.3d 1156 (10th Cir. 2005), the district court agreed and thus denied McMahan's petition. *See Treto-Martinez*, 421 F.3d at 1160 (holding that § 21-3414(a)(1)(C) constitutes "crime of violence" under United States Sentencing Guidelines' elements clause); *United States v. Williams*, 559 F.3d 1143, 1147 n.7 (10th Cir. 2009) (explaining that because ACCA's elements clause and

Guidelines' elements clause are substantively identical, we may look to cases interpreting one to interpret other).

We granted McMahan a certificate of appealability because we determined that the district court's conclusion was at least debatable. *See Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000). But for the reasons stated below, we ultimately agree with the district court's conclusion that § 21-3414(a)(1)(C) satisfies the ACCA's elements clause. Therefore, we affirm its order.

## Analysis

### I. Preliminary Issues

Initially, we address two preliminary issues that arose at oral argument. First, we questioned whether the nature of McMahan's plea allows him to now attack his sentence under *Johnson*. As part of McMahan's plea agreement, the parties stipulated to a 15-year prison sentence. And once the district court accepted McMahan's plea, it became bound by that stipulation. *See* Fed. R. Crim. P. 11(c)(1)(C). Thus, McMahan arguably wasn't sentenced under the ACCA at all. *See Pam*, 867 F.3d at 1198 (explaining that under Rule 11(c)(1)(C), it's technically "the binding plea agreement that is the foundation for the term of imprisonment to which the defendant is sentenced" (quoting *Freeman v. United States*, 564 U.S. 522, 535 (2011) (Sotomayor, J., concurring))). And if McMahan wasn't sentenced under the ACCA, then he couldn't have been sentenced under the ACCA's unconstitutional residual clause.

But as we've previously explained, when a defendant's "plea agreement expressly used the ACCA—specifically its statutorily mandated minimum term of imprisonment—to establish the agreed-upon 180-month sentence," the defendant may challenge that sentence as illegal under *Johnson*. *Pam*, 867 F.3d at 1198–99. Here, both McMahan's plea agreement and the district court's judgment expressly referenced § 924(e), which codifies the ACCA's mandatory 15-year minimum sentence. Thus, McMahan's sentence is based on the ACCA. And he may therefore challenge it as illegal under *Johnson*. *See Pam*, 867 F.3d at 1198–99.

Next, we questioned at oral argument whether we should reach the merits of McMahan's appeal given that he waived his right to collaterally attack his sentence as part of his plea. We assume without deciding that we could enforce McMahan's waiver had the government asserted it. *See United States v. Porter*, 405 F.3d 1136, 1145 (10th Cir. 2005) (declining to invalidate plea agreement based on subsequent change in substantive law). But the government didn't invoke McMahan's collateral-attack waiver below. And it expressly declined to rely on the waiver at oral argument.

Collateral-attack waivers aren't jurisdictional, so we have no duty to enforce them sua sponte. *See United States v. Parker*, 720 F.3d 781, 786 n.4 (10th Cir. 2013). Whether we *may* enforce them sua sponte is, however, "not entirely clear." *Id.*; *cf. Day v. McDonough*, 547 U.S. 198, 202 (2006) (holding that courts may sua sponte dismiss habeas petitions as untimely when they "confront[] no intelligent waiver on the [s]tate's part," but warning that it would be "an abuse of discretion to override a

[s]tate's deliberate waiver of a limitations defense"). We need not resolve this question today; to the extent we have discretion to sua sponte enforce McMahan's collateral attack-waiver, we decline to exercise that discretion. Thus, we turn to the merits of McMahan's appeal.

## II. McMahan's Aggravated-Battery Conviction

In relevant part, the ACCA imposes a 15-year mandatory minimum prison sentence on offenders with at least three prior violent-felony convictions. § 924(e)(1). After *Johnson*, a violent felony is an offense that (1) is "punishable by imprisonment for a term exceeding one year," § 924(e)(2)(B), and (2) either "has as an element the use, attempted use, or threatened use of physical force against the person of another," § 924(e)(2)(B)(i); or "is burglary, arson, or extortion, [or] involves use of explosives," § 924(e)(2)(B)(ii). Because aggravated battery doesn't satisfy any portion of § 924(e)(2)(B)(ii)'s enumerated-offense clause, the only dispute here is whether McMahan's aggravated-battery conviction satisfies the ACCA's elements clause—that is, whether "the use, attempted use, or threatened use of physical force against the person of another" is an element of § 21-3414(a)(1)(C). § 924(e)(2)(B)(i).

At the time of McMahan's prior offense, § 21-3414(a)(1)(C) defined aggravated battery, in relevant part, as "intentionally causing physical contact with another person when done in a rude, insulting or angry manner with a deadly weapon, or in any manner whereby great bodily harm, disfigurement[,] or death can be inflicted." And the parties agree that "intentionally causing physical contact with

another person when done in . . . any manner whereby great bodily harm, disfigurement[,] or death can be inflicted," *id.*, is "the least of the acts" that § 21-3414(a)(1)(C) "criminalized" at the time of McMahan's offense, *United States v. Hammons*, 862 F.3d 1052, 1054 (10th Cir. 2017). Likewise, the parties agree we therefore need only resolve whether this particular language satisfies the elements clause. *See Hammons*, 862 F.3d at 1054 (explaining that under categorical approach, we look to whether "the least of the acts criminalized by the [applicable] statute" satisfies the elements clause).

Citing our opinion in *Treto-Martinez*, the district court ruled that § 21-3414(a)(1)(C) proscribes a violent felony under the ACCA's elements clause. In *Treto-Martinez*, we considered whether a violation of the exact same version of § 21-3414(a)(1)(C) constituted a crime of violence under a substantively identical elements clause in the United States Sentencing Guidelines.[1] *See* 421 F.3d at 1158–59. *Compare* U.S.S.G. § 2L1.2 cmt. n.1(B)(iii) (2005) (defining crime of violence, in relevant part, as "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"), *with* § 924(e)(2)(B)(i) (defining violent felony, in relevant part, as felony that "has as an element the use, attempted use, or threatened use of physical force

[1] Because of the similarity between the ACCA's elements clause and the Guidelines' elements clause, we often look to cases interpreting one to interpret the other. *Williams*, 559 F.3d at 1147 n.7. For our purposes—i.e., asking whether § 21-3414(a)(1)(C) contains, as an element, "the use, attempted use, or threatened use of physical force against the person of another," § 924(e)(2)(B)(i)—the analyses are identical under the ACCA and the Guidelines. McMahan doesn't argue otherwise.

against the person of another"). In concluding that § 21-3414(a)(1)(C) constitutes a crime of violence for purposes of § 2L1.2, we noted that the statute requires contact in a manner "whereby great bodily harm, disfigurement[,] or death can be inflicted." *Treto-Martinez*, 421 F.3d at 1160 (quoting § 21-3414(a)(1)(C)). And we reasoned that any such contact must inherently involve "at the very least . . . the 'threatened use of physical force.'" *Id.* at 1160 (quoting § 2L1.2 cmt. n.1(B)(iii)).

McMahan doesn't seek to distinguish *Treto-Martinez* from his case. Rather, he argues that *Treto-Martinez* is no longer good law. But we recently reaffirmed that *Treto-Martinez* remains the law of this circuit in *United States v. Trayon Williams*, No. 17-3071, 2018 WL 1885065, ---F.3d--- (10th Cir. Apr. 20, 2018), which we decided after oral argument in this case. *See id.* at *1, *5–6 (rejecting defendant's argument that *Treto-Martinez* is no longer good law and holding that current version of Kansas' aggravated-battery statute—which prohibits, in relevant part, "knowingly causing bodily harm to another person . . . in any manner whereby great bodily harm, disfigurement[,] or death can be inflicted"—is a crime of violence under Guidelines' elements clause (quoting Kan. Stat. Ann. § 21-5413(b)(1)(B))). Therefore, *Treto-Martinez* continues to bind us here. Accordingly, we conclude that aggravated battery, as defined by § 21-3414(a)(1)(C), is a violent felony under the ACCA's elements clause.[2]

[2] Even if we concluded that § 21-3414(a)(1)(C) is no longer a violent felony under the elements clause, it's not clear that this would entitle McMahan to relief under § 2255. The parties don't address what effect, if any, our recent decision in

**Conclusion**

McMahan concedes that his two convictions for burglary of a dwelling constitute ACCA predicates. And *Treto-Martinez*, which remains good law in this circuit, compels us to conclude that § 21-3414(a)(1)(C) contains "as an element the use, attempted use, or threatened use of physical force against the person of another." § 924(e)(2)(B)(i). Thus, aggravated battery under § 21-3414(a)(1)(C) is a violent felony, and McMahan has the three violent-felony convictions required to sustain his sentence under § 924(e)(1). Accordingly, we affirm the district court's order denying McMahan's § 2255 motion.

Entered for the Court

Nancy L. Moritz
Circuit Judge

*United States v. Snyder*, 871 F.3d 1122 (10th Cir. 2017), might have on McMahan's claim. Because we affirm on other grounds, we need not discuss it either.

**IN THE UNITED STATES DISTRICT COURT**
**DISTRICT OF KANSAS**

**United States of America,**

**Plaintiff,**

**v.** **Case No. 12-20120-01-JWL**
**17-2176-JWL**

**Shane McMahan,**

**Defendant.**

**MEMORANDUM & ORDER**

In April 2013, defendant Shane McMahan entered a plea of guilty, pursuant to a Rule 11(c)(1)(C) agreement with the government, to a violation of 18 U.S.C. § 922(g)(1). The Presentence Investigation Report (PSR) determined that Mr. McMahan was eligible for sentencing under the Armed Career Criminal Act (ACCA), which authorizes an enhanced penalty for a person who violates § 922(g) and has three or more previous convictions for crimes that meet the definition of a "violent felony." *See* 18 U.S.C. § 924(e). In light of the ACCA enhancement, the PSR calculated an applicable guideline range of 188 to 235 months imprisonment and required a mandatory minimum sentence of 15 years. In July 2013, the court sentenced Mr. McMahan to a term of 180 months imprisonment consistent with the parties' Rule 11(c)(1)(C) agreement.

In October 2016, this court denied Mr. McMahan's motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. In denying the motion, the court held that the ACCA enhancement still applies to Mr. McMahan after *Johnson v. United States*, ___ U.S. ___, 135 S. Ct. 2551 (2015). Specifically, the court held that Mr. McMahan's conviction for aggravated

battery under K.S.A. § 21–3414(a)(1)(C) constitutes a "violent felony" under the elements clause of the ACCA because it "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). Mr. McMahan has appealed that ruling which is presently pending before the Tenth Circuit Court of Appeals.

Mr. McMahan has now filed another motion to vacate his sentence in which he argues that his Kansas conviction for burglary does not qualify as a predicate felony for purposes of the ACCA because the conviction was more than 15 years old. Because Mr. McMahan's motion clearly constitutes a second or successive motion under § 2255, he must obtain authorization from the Tenth Circuit prior to filing it. *See* 28 U.S.C. § 2255(h). He has not shown that he obtained such authorization and, thus, this court lacks jurisdiction to consider the motion. *United States v. Baker*, 718 F.3d 1204, 1206 (10th Cir. 2013). Thus, the court must either dismiss the motion for lack of jurisdiction or transfer the motion to the Tenth Circuit for a determination whether to permit successive § 2255 proceedings. *See United States v. Harper*, 545 F.3d 1230, 1232 (10th Cir. 2008). The court should transfer such a motion to the Circuit only when it concludes that a transfer would be "in the interests of justice." *Id*.

The court declines to transfer Mr. McMahan's motion to the Circuit as it is not in the interest of justice to do so. It is unlikely that Mr. Mahan's claim has merit which counsels against transfer. *See In re Cline*, 531 F.3d 1249, 1251 (10th Cir. 2008). Specifically, he has not shown that his claims satisfy the requirements of § 2255(h). He has not directed the court to any newly discovered evidence or a new rule of constitutional law that would bear on his conviction or sentence. Moreover, his assertion that his burglary conviction is "too old" to qualify as a predicate felony under the ACCA lacks merit. *See United States v. Hill*, 392 Fed. Appx. 634,

636 (10th Cir. Aug. 4, 2010) (the ACCA contains no temporal limitation on predicate felonies) citing *United States v. Lujan*, 9 F.3d 890, 893 (10th Cir. 1993) (burglary conviction that was more than 20 years old qualified as predicate felony under ACCA; declining to conclude that prior convictions should be eliminated from consideration under the ACCA because they are "ancient")).

**IT IS THEREFORE ORDERED BY THE COURT THAT** Mr. McMahan's motion to vacate (doc. 80) is **dismissed**.

**IT IS SO ORDERED.**

Dated this 6th day of June, 2017, at Kansas City, Kansas.

s/ John W. Lungstrum
John W. Lungstrum
United States District Judge