No. _____

IN THE

Supreme Court of the United States

TRAYON L. WILLIAMS,
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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QUESTIONS PRESENTED

Trayon Williams argued in the district court and on appeal that his prior Kansas aggravated-battery conviction, KSA § 21-5413(b)(1)(B), did not qualify as a crime of violence under the guidelines (USSG § 4B1.2(a)(1)) for two reasons: (1) it could be committed recklessly; and (2) it did not have an element of violent force. On appeal, the government agreed that the claims were preserved and the standard of review was de novo. But the Tenth Circuit disagreed and sua sponte held the recklessness claim forfeited, then further held the claim waived and refused to consider it. In contrast, eight court of appeals would have reviewed the claim de novo because the government "waived the waiver." The Tenth Circuit also rejected the element-of-violent-force claim in light of Tenth Circuit precedent holding that causation-of-harm elements necessarily qualify as violent-force elements. The questions presented are:

I. When the government agrees that a claim was properly preserved below, can a court of appeals sua sponte hold the claim forfeited, then dismiss the claim as waived, or has the government "waived the waiver"?

II. If a crime has a causation-of-harm element, does it also necessarily have an element of violent force for purposes of classifying the crime as a violent crime?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Trayon Williams 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 decision is published at 893 F.3d 696 (10th Cir. 2018), and is included as Appendix A. The Tenth Circuit's published order granting panel rehearing in part, but otherwise denying rehearing and rehearing en banc, is included as Appendix C. The district court's unpublished order sustaining the government's objection to the Presentence Investigation Report is included as Appendix B.

JURISDICTION

The Tenth Circuit's judgment was entered on June 15, 2018. Pet. App. 1a-3a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2K2.1(a)(4)(A) of the United States Sentencing Guidelines provides for a base offense level of 20 if:

> the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense.

Section 4B1.2(a)(1) of the United States Sentencing Guidelines defines the term "crime of violence" as:

> any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that [] 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 § 21-5413(b)(1)(B), defines aggravated battery as:

> knowingly causing bodily harm to another person with a deadly weapon, or in any manner whereby great bodily harm, disfigurement, or death can be inflicted.

STATEMENT OF THE CASE

In most Circuits, including the Tenth Circuit, reckless crimes do not count as crimes of violence under USSG § 4B1.2. Pet. App. 5a; *In re Welch*, 884 F.3d 1319, 1325 n.5 (11th Cir. 2018); *United States v. Studhorse*, 883 F.3d 1198, 1203 (9th Cir. 2018); *United States v. Middleton*, 883 F.3d 485, 497 (4th Cir. 2018) (Floyd, J., two-judge concurrence); *United States v. Campbell*, 865 F.3d 853, 856-857 (7th Cir. 2017); *United States v. Lewis*, 720 Fed. Appx. 111, 114, 117 (3d Cir. 2018) (unpublished); *United States v. Windley*, 864 F.3d 36, 38-39 (1st Cir. 2017). In the district court, Mr. Williams explained that his prior Kansas conviction for aggravated battery, KSA § 21-5413(b)(1)(B), did not count as a crime of violence because it could be committed recklessly. R2.38 at 29-39. The district court disagreed. Pet. App. 26a, 31a.

On appeal, Mr. Williams explained that the court of appeals would review this preserved issue de novo. Br. 7. The government agreed. Gov't Br. 10. But the Tenth Circuit disagreed with the parties and sua sponte held that Mr. Williams forfeited the issue because, in its view, he did not raise it below. Pet. App. 9a-11a. Although the Tenth Circuit acknowledged that the government waived Mr. Williams's forfeiture (by conceding that the issue was preserved below), it nonetheless refused to reach the merits of the argument, holding that the forfeiture amounted to an

unreviewable waiver. Pet. App. 11a.

The Tenth Circuit's published decision directly conflicts with decisions from eight other courts of appeals, all of whom would have reviewed Mr. Williams's recklessness issue de novo. These courts of appeals hold that the government "waives the waiver" when it fails to argue waiver on appeal. And while one other Circuit (the Eighth) sometimes sua sponte holds claims *forfeited*, the Tenth Circuit is the only Circuit that sua sponte holds forfeited claims *waived*. In light of the Tenth Circuit's outlier status on this issue, this Court should grant this petition to resolve the conflict.

The resolution of this conflict is critically important. The Tenth Circuit's rule applies across the board to all criminal appeals. It is a rule that, because it is invoked sua sponte and without warning to the parties, has the potential to upset the rights of every criminal defendant in the Tenth Circuit. But the manner in which claims are reviewed (or not reviewed) should not turn on the location of the reviewing court.

On the merits, the Tenth Circuit's rule is wrong. It conflicts with the well-established principle of party presentation, it arises from a misreading of Tenth Circuit precedent (as then-Judge Gorsuch explained in dissent in *United States v. Games-Perez*, 695 F.3d 1104, 1122 (10th Cir. 2012)), and it results in arbitrariness and unfairness. Finally, this case is an excellent vehicle to resolve the conflict. The Tenth Circuit held a preserved claim waived, without any contrary briefing on the standard of review from the parties, the result of which precludes appellate review of an error that increased Mr. Williams's sentence.

Additionally, aside from this waiver issue, there is an entrenched conflict in the

Circuits over whether statutes with causation elements, rather than force elements, have elements of violent force under violent-crime provisions. 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-crimes context. *See*, *e.g.*, *United States v. Ontiveros*, 875 F.3d 533, 537 (10th Cir. 2017). We recently petitioned for certiorari on this issue as it applies to a similar subsection of Kansas's aggravated-battery statute. *McMahan v. United States*, No. 18-5393 (government's brief in opposition due September 28, 2018). This Court should grant the petition in *McMahan* and hold this case in abeyance pending the resolution of the issue in *McMahan*. Otherwise, this Court should grant this petition.

1. In August 2016, Trayon Williams pleaded guilty to possession of a firearm by a convicted felon, 18 U.S.C. § 922(g)(1). Pet. App. 18a. Prior to sentencing, a probation officer prepared the Presentence Investigation Report (PSR). The probation officer set the base offense level at 14, pursuant to USSG § 2K2.1(a)(6)(A). *Id.* The probation officer also applied a two-level reduction for acceptance of responsibility, USSG § 3E1.1, which resulted in a total offense level of 11 and, ultimately, an advisory guidelines range of 27 to 33 months' imprisonment. *See* Pet. App. 2a.

The government objected. *Id.* The government claimed that Mr. Williams's base offense level should have been enhanced from 14 to 20 under USSG § 2K2.1(a)(4)(A)

because his prior Kansas conviction for aggravated battery qualified as a crime of violence under USSG § 4B1.2(a)(1) (i.e., that it had "as an element the use, attempted use, or threatened use of physical force against the person of another"). Pet. App. 2a-3a, 18a-19a. The section of the Kansas aggravated battery statute at issue here criminalizes "knowingly causing bodily harm to another person with a deadly weapon, or in any manner whereby great bodily harm, disfigurement, or death can be inflicted." KSA § 21-5413(b)(1)(B); Pet. App. 4a, 20a.

Mr. Williams defended the probation officer's determination on two grounds: (1) that Kansas aggravated battery lacked the requisite mens rea to qualify as a crime of violence; and (2) that the statute's causation element was not a violent-force element under § 4B1.2(a)(1). *See* Pet. App. 4a, 19a. Mr. Williams's mens rea argument centered on Kansas's definition of "knowingly," which requires only that the individual "was aware that his or her conduct was reasonably certain to cause the result." *See id.* 6a-7a. He referred to this mens rea as a "diluted scienter requirement," *id.* 19a, and identified "the question the Court confronts here" as "whether a crime of violence under § 4B1.2 may be committed recklessly," R2.38 at 33. He explained why reckless crimes do not count as crimes of violence, and, in particular, why this Court's decision in *Voisine v. United States*, 136 S.Ct. 2272 (2016) (holding that reckless crimes count in the misdemeanor domestic violence context), did not require a contrary holding. R2.38 at 31-35.

Mr. Williams's force argument explained that statutes with causation-of-harm elements are not the equivalent of statutes with violent-force elements, and that only

the latter crimes qualify as crimes of violence under § 4B1.2(a)(1). Pet. App. 14a-15a.

2. The district court sustained the government's objection and set Mr. Williams's advisory guidelines range at 46 to 57 months' imprisonment. Pet. App. 2a-3a. The district court found that a crime with a mens rea of knowledge can count as a crime of violence. Pet. App. 22a-26a. The district court summarily rejected Mr. Williams's recklessness argument, finding that this section of the Kansas aggravated-battery statute "does not allow for a conviction based on reckless or criminally negligent conduct." *Id.* 31a. On force, the district court found that the statute had an element of violent force because it required the causation of bodily harm. *Id.* 27a-34a.

3. On appeal, Mr. Williams raised one issue: "Whether Kansas aggravated battery, KSA § 21-5413(b)(1)(B), qualifies as a crime of violence under USSG § 4B1.2(a)(1)." Br. 2. In accord with Tenth Circuit Rule 28.2(C)(2), Mr. Williams identified the specific pages where he raised the issue below, as well as the specific pages where the district court ruled on the issue. *Id.* 7. Because the issue was raised below, Mr. Williams identified the standard of review as de novo. *Id.* Mr. Williams then reiterated the arguments he made in the district court. *Id.* 7-27. On mens rea, he again asserted, *inter alia*, that "Kansas's definition renders its construction of 'knowingly' indistinguishable from recklessness." *Id.* 16.

In response, the government agreed that Mr. Williams raised the issue below and that the standard of review was de novo. Gov't Br. 10. With respect to Mr. Williams's force argument, the government cited Tenth Circuit precedent foreclosing the argument. *Id.* 22-33. On mens rea, the government "assum[ed] for the sake of

argument that knowing conduct equals reckless conduct in Kansas's criminal scheme." *Id.* 18. The government even cited Kansas case law establishing that "[g]eneral intent 'may be proven by demonstrating intentional or reckless conduct.'" *Id.* 16 (quoting *State v. Spicer*, 42 P.3d 742, 748 (Kan. Ct. App. 2002)). Relying on *Voisine*, the government asserted that reckless crimes can count as crimes of violence. Gov't Br. 16-22. This was the only mens rea argument advanced by the government. The government did not alternatively argue that the statute qualified as a crime of violence because it required general criminal intent. *See generally id.* 10-22. In light of the government's position, Mr. Williams spent almost all of his reply arguing that reckless crimes do not count as crimes of violence. Reply Br. 2-8.

4. The Tenth Circuit affirmed in a published decision. Pet. App. 1a-16a. The Tenth Circuit held that the statute had an element of violent force in light of binding Tenth Circuit precedent holding that causation statutes necessarily have elements of violent force. *Id.* 12a-15a. On mens rea, rather than address the recklessness argument briefed by the parties, the panel held that Mr. Williams forfeited this particular argument because he did not raise it below. Pet. App. 7a-11a. The panel claimed that, contrary to Tenth Circuit Rule 28.2(C)(2), "Mr. Williams did not provide a record citation for where this issue had been raised or decided in district court." *Id.* 8a. The panel further claimed that Mr. Williams "cited his objection to the presentence report," but "that objection had not included an argument that Kansas's definition of 'knowing' conduct was equivalent to recklessness." *Id.*

Although the panel referred to the claim as "forfeited," the panel ultimately

"decline[d] to reach the merits of Mr. Williams's forfeited argument." *Id.* 11a. It did so after applying a "dueling waivers/forfeitures" test. *Id.* 9 (quoting *United States v. Rodebaugh*, 798 F.3d 1281, 1334 (10th Cir. 2015)). Under this test, the panel had "discretion in deciding whose forfeiture or waiver to overlook." Pet. App. 9a. The panel then chose to overlook the government's *waiver* (of a heightened standard of review), finding that Mr. Williams's *forfeiture* "created the greater harm." *Id.* This was so for three reasons: (1) "neither party briefed the issue" in the district court; (2) Mr. Williams "has not identified a single opinion supporting his assertion"; and (3) the panel also "lack[ed] any pertinent case citations from the government, which declined to address the [recklessness] issue." *Id.* 9-10.

For these reasons, the Tenth Circuit thought it "lack[ed] meaningful input from the parties or 'a reasoned district court decision on the subject.'" *Id.* 10. The Tenth Circuit held that it could not consider the issue because its resolution was "not beyond doubt." *Id.* 10-11. Despite its refusal to consider Mr. Williams's recklessness claim – the resolution of which is necessary to analyze this statute properly – the Tenth Circuit labeled the aggravated-battery statute a general intent crime and held that general intent crimes qualified as crimes of violence. *Id.* 5a-7a, 11a-12a.

Mr. Williams petitioned for panel rehearing and rehearing en banc. He noted that the panel's "dueling waiver/forfeiture" holding conflicted with precedent from almost every other court of appeals, as well as this Court. Pet. for Reh'g 14-16. The panel granted panel rehearing and made minor changes to the decision, but rehearing en banc was denied. Pet. App. 35a-36a.

REASONS FOR GRANTING THE WRIT

I. Review is necessary to resolve an entrenched conflict over the application of waiver principles in cases where the parties agree that an issue was properly preserved below.

In conflict with published decisions from (at least) eight other courts of appeals, the Tenth Circuit regularly holds an issue waived even where the parties agree that the issue was preserved below. This Court should use this case – which turned entirely on waiver principles invoked sua sponte by the Tenth Circuit – to resolve the conflict on this important question. This Court should hold that a party who concedes that an issue was properly preserved below has waived any claim to the contrary, and that it is improper for the court or appeals to sua sponte hold the claim waived. It follows then that, contrary to the Tenth Circuit's holding below, Mr. Williams did not waive his recklessness claim where the government "waived the waiver."

A. The Circuits are divided over whether it is proper for a court of appeals to sua sponte hold a preserved claim waived on appeal.

It is well established that, aside from jurisdictional issues, appellate courts "are generally limited to addressing the claims and arguments advanced by the parties." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434 (2011). Particularly in criminal cases, almost all of the courts of appeals apply this general rule to waiver principles; if a party does not invoke waiver on appeal, then the court of appeals will not sua sponte hold another party's claim waived. But the Tenth Circuit has a contrary rule, thus splitting the Circuits on this important issue.

1. In published decisions, eight courts of appeals – the **First**, **Second**, **Fourth**, **Fifth**, **Seventh**, **Ninth**, **Eleventh**, and **D.C.** Circuits – have held that the

government "waives the waiver" when it agrees that an issue was properly preserved below (and thus not waived on appeal). *United States v. Gonyer*, 761 F.3d 157, 166 n.4 (1st Cir. 2014) (addressing the merits where the government "waived [the defendant's] waiver"); *United States v. Quiroz*, 22 F.3d 489, 491 (2d Cir. 1994) (where the government "has neglected to argue on appeal that a defendant has failed to preserve a given argument in the district court . . . courts have consistently held that the government has 'waived waiver'"); *United States v. Palomino-Coronado*, 805 F.3d 127, 130 (4th Cir. 2015) ("We are entitled to excuse a defendant's waiver in the district court if the government fails to properly and timely raise a waiver contention in its brief."); *United States v. Moody*, 564 F.3d 754, 760-761 (5th Cir. 2009) ("the government never argued that he waived the issue, so the government has waived its potential waiver argument"); *United States v. Leichtnam*, 948 F.2d 370, 375 (7th Cir. 1991) ("[T]he government has now waived waiver as a defense. And its waiver leaves us to confront [the defendant's] argument on the merits."); *United States v. Kortgaard*, 425 F.3d 602, 610 (9th Cir. 2005) (where "the government nonetheless elected to address the merits of" the defendant's claim, "the government has 'waived' any waiver argument it may have had"); *Ochran v. United States*, 117 F.3d 495, 503 (11th Cir. 1997) ("[T]he government met Ochran's contentions head-on in its brief as well as oral argument. We do not believe it is incumbent upon us to make a waiver argument which the government was willing to forego."); *United States v. Beckham*, 968 F.2d 47, 54 (D.C. Cir. 1992) (although the defendant never made the argument

below, "the government failed to object to it, or even to comment upon it, in its brief, thus waiving any waiver argument it may have had").

2. The **Third** Circuit has also invoked this "waive-the-waiver" doctrine to address an otherwise waived claim on the merits, although it views the doctrine as "discretionary." *United States v. Washington*, 869 F.3d 193, 208 (3d Cir. 2017). The Third Circuit addressed the issue in *Washington* because the argument raised below "came within a stone's throw of the one" raised on appeal. *Id.* Considering the closeness of Mr. Williams's recklessness claim to the general-intent claim addressed by the Tenth Circuit below, the Third Circuit almost certainly would not have held that Mr. Williams waived his argument below.

3. Similarly, the **Sixth** Circuit has held that the government waives plain error review (of a defendant's forfeiture) if a party does not invoke plain error review. *United States v. Poulsen*, 655 F.3d 492, 502 n.1 (6th Cir. 2011). This logic – that a party waives a more favorable standard of review when it fails to invoke it – is on all fours with the waive-the-waiver cases just cited.

4. The **Eighth** Circuit has published a decision identical to the Sixth Circuit's decision in *Poulsen*. *United States v. Ashburn*, 865 F.3d 997, 999 (8th Cir. 2017) (the government waives plain error review "through a failure to invoke it"). And in an unpublished decision, the Eighth Circuit actually invoked the waive-the-waiver doctrine where the government failed to argue on appeal that the defendant did not properly preserve the issue below. *United States v. Albin*, 297 Fed. Appx. 551, 552 (8th Cir. 2008) (unpublished). But the Eighth Circuit held the opposite in a different

case. *United States v. Bain*, 586 F.3d 634, 639 n.4 (8th Cir. 2009). Even then, the Eighth Circuit did not hold that the defendant *waived* review of the underlying issue; instead, it reviewed that issue for *plain error*. *Id.* at 640-641.

4. The Tenth Circuit below adopted a similar, but even more punitive, rule than the one adopted by the Eighth Circuit in *Bain*. Although the government conceded that Mr. Williams raised the issue below, and, thus, that review was de novo, the Tenth Circuit nonetheless held, consistent with the Eighth Circuit's decision in *Bain*, that Mr. Williams forfeited the issue by not raising it below. Pet. App. 9a. Unlike the Eighth Circuit, however, the Tenth Circuit then refused to consider the issue at all (effectively finding the issue waived). *Id.* 11a.

The Tenth Circuit cited *United States v. Rodebaugh*, 798 F.3d 1281, 1314 (10th Cir. 2015), in support of its decision. Pet. App. 9a. There, a divided panel of the Tenth Circuit reached the same result as here, holding that the defendant waived the claim, even though the government did not argue waiver or forfeiture on appeal. *Id.* As in this case, the Tenth Circuit discussed "dueling 'waivers/forfeitures'" – the defendant "would have forfeited the challenge by failing to speak up in district court, and the government would have waived or forfeited its challenge to [the defendant's] forfeiture by failing to speak up in the appeal." *Id.* The Tenth Circuit then exercised its discretion to choose which forfeiture/waiver to invoke, and, like here, it chose the defendant's forfeiture over the government's waiver. *Id.* at 1315. In dissent, Judge Matheson opined that the government waived a heightened standard of review by addressing the claim under an abuse-of-discretion standard. *Id.* at 1306.

5. We recently asked this Court to resolve an analogous issue in *Kearn v. United States*, but this Court denied certiorari. 138 S.Ct. 2025 (2018). In *Kearn*, the Tenth Circuit, as it did here, summarily held that the defendant waived an issue, even though the government conceded that the issue was preserved. 863 F.3d 1299, 1313 (10th Cir. 2017); *See also United States v. McGehee*, 672 F.3d 860, 873 n.5 (10th Cir. 2012) (same). These cases, along with this one, demonstrate that the Tenth Circuit will continue to sua sponte hold claims waived in cases where the parties think otherwise. And each time the Tenth Circuit does so, its decision squarely conflicts with decisions from essentially every other court of appeals.

This conflict has existed for years. The Tenth Circuit refused to switch sides in this case (and others, including *Kearn*). Pet. App. 36a. This Court's intervention is the only hope of uniformity. Review is necessary.

B. The Tenth Circuit's decision is incorrect.

The Tenth Circuit's decision is incorrect for two overarching reasons. First, as almost every other court of appeals would have held, the government "waived the waiver." For this reason, the Tenth Circuit should have addressed the merits of Mr. Williams's recklessness claim. And second, the Tenth Circuit erred when it held that Mr. Williams did not raise his recklessness claim below. Mr. Williams preserved the issue, and the Tenth Circuit should have reviewed the issue de novo.

1. For four reasons, the "waive-the-waiver" doctrine, embraced by almost every court of appeals other than the Tenth Circuit, is sound.

1a. The "waive-the-waiver" doctrine is consistent with this Court's well-

established principle of party presentation. "In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Greenlaw v. United States*, 554 U.S. 237, 243 (2008). Under this principle, aside from jurisdictional issues (which standards of review are not), "courts are generally limited to addressing the claims and arguments advanced by the parties." *Henderson ex rel. Henderson*, 562 U.S. at 434. Thus, this Court has often cautioned appellate courts not to address arguments not anticipated by the parties "in developing their arguments on appeal." *Wood v. Milyard*, 566 U.S. 463, 473 (2012). In *Wood*, this Court reversed a decision from the Tenth Circuit that failed to honor a government's waiver of a statute of limitations defense. *Id.* at 474.

As in *Wood*, this Court should reverse the Tenth Circuit's decision not to honor the government's waiver. Federal Rule of Appellate Procedure 28 requires the appellant to set forth "for each issue, a concise statement of the applicable standard of review." Fed.R.App.P. 28(a)(8)(A). If the appellee is dissatisfied with the appellant's standard of review, Rule 28 further requires the appellee to set forth its own concise statement of the applicable standard of review. Fed.R.App.P. 28(b)(4). The government conceded in its brief that Mr. Williams preserved his issue and that review was de novo. Gov't Br. 10. This is textbook waiver of any other standard of review. *See Wood*, 566 U.S. at 474; *see* cases cited on p.10-11, *supra*. Thus, the Tenth Circuit erred because the government "waived the waiver."

1b. The "waive-the-waiver" doctrine also eliminates the serious due process concerns raised by the Tenth Circuit's rule. An "essential principle of due process" is that a deprivation of liberty be preceded by notice and an opportunity to be heard. *See, e.g.*, *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985). But under the Tenth Circuit's rule, a criminal defendant is not given notice before the Tenth Circuit sua sponte finds a claim waived. Nor is a criminal defendant given an opportunity to explain why the claim has not been waived, or argue that the claim, if forfeited, amounts to plain error. Instead, the Tenth Circuit simply finds the claim waived on its own, without notice, and then dismisses the claim. Pet. App. 9a-11a. Such a procedure, dismissing a criminal defendant's liberty-based claim on a ground unknown to the defendant, untested by the parties, and opposed by the government, hardly aligns with basic principles of due process.

1c. The Tenth Circuit's rejection of "waive-the-waiver" doctrine is also premised upon a misreading of its own precedent. Traced to its roots, this rule derives from *McKissick v. Young*, 618 F.3d 1177, 1189-1190 (10th Cir. 2010), and *Richison v. Ernest Grp.*, Inc., 634 F.3d 1123, 1131 (10th Cir. 2011). In these cases, the Tenth Circuit established the general principle that a party's failure to argue for plain error review "marks the end of the road for an argument for reversal not first presented to the district court." In other words, a *forfeited* claim is *waived* if the defendant does not argue plain error on appeal. *Id.* Both decisions were authored by then-Judge Gorsuch. But, as then-Judge Gorsuch later noted, in "those civil cases the appellees *invoked forfeiture* and the appellants didn't proceed to identify any plain error."

Games-Perez, 695 F.3d at 1122 (Gorsuch, J., dissenting) (emphasis added).

Thus, this line of precedent begins from the premise that one party has necessarily not "waived the waiver." In contrast, in this case, the government did just that. The government conceded that Mr. Williams preserved the issue below and that the standard of review was de novo. Gov't Br. 10. As then-Judge Gorsuch explained in *McKissick*, a "party cannot count on us to pick out, argue for, and apply a standard of review for it on our own initiative, without the benefit of the adversarial process, and without any opportunity for the adversely affected party to be heard on the question." 618 F.3d at 1189. But this is precisely what the Tenth Circuit did in this case. On its own initiative, the Tenth Circuit picked out a standard of review for the government, without the benefit of briefing by either party, and without giving Mr. Williams a meaningful opportunity to be heard on the standard of review, and applied it in this case. Pet. App. 9a-11a. It did so even though, as explained below, Mr. Williams did not in fact affirmatively "waive" the issue (or plain-error review). That is an extraordinary result, and one that conflicts with what every other Circuit would have done in this situation.

1d. The Tenth Circuit has not always rejected "waive-the-waiver" doctrine. *See, e.g.*, *United States v. Reider*, 103 F.3d 99, 103 n.1 (10th Cir. 1996); *United States v. Heckenliable*, 446 F.3d 1048, 1049 n.3 (10th Cir. 2006); *United States v. White*, 584 F.3d 935, 947 (10th Cir. 2009); *United States v. De Vaughn*, 694 F.3d 1141, 1155 (10th Cir. 2012); *United States v. Ray*, 704 F.3d 1307, 1316 (10th Cir. 2013). Those cases were correctly decided, but it is clear that, with the decision below (and the

decisions in *McGehee*, *Rodebaugh*, and *Kearn*) the Tenth Circuit has definitively rejected the "waive-the-waiver" doctrine. The Tenth Circuit's current rule – that a party "waives" a claim even though the government has waived the waiver (and without at least reviewing the claim for plain error) – is without merit and must be corrected.

2. Additionally, aside from the waiver debate, the Tenth Circuit should have reviewed the recklessness issue for four reasons.

2a. The Tenth Circuit erred when it found that Mr. Williams did not raise his recklessness argument in the district court. Mr. Williams explained in the district court that Kansas's aggravated-battery statute did not have the requisite mens rea to qualify as a crime of violence. R2.38 at 29-39. He cited Kansas's "dilute[d]" scienter requirement, *id.* 29, and he identified "the question the Court confronts here" as "whether a crime of violence under § 4B1.2 may be committed recklessly," *id.* at 33. He explained why reckless crimes do not count as crimes of violence, and, in particular, why this Court's decision in *Voisine* did not require a contrary holding. *Id.* at 31-35. On appeal, in accord with Tenth Circuit Rule 28.2(C)(2), Mr. Williams identified the specific pages where he raised the issue below, as well as the specific pages where the district court ruled on the issue. Br. 7. In light of this record, the government sensibly agreed that Mr. Williams raised this issue below and that the standard of review was de novo. Gov't Br. 10. The Tenth Circuit erred in holding otherwise.

2b. The district court in fact addressed the recklessness issue. R1.49 at 15 ("the

statute at issue [] does not allow for a conviction based on reckless or criminally negligent conduct"). Because the district court addressed this particular argument, the Tenth Circuit should have reviewed the issue de novo for that reason alone. *United States v. Todd*, 446 F.3d 1062, 1066 (10th Cir. 2006); *see also United States v. Williams*, 504 U.S. 36, 41 (1992) (issues are preserved when either "pressed or passed upon below").

2c. The Tenth Circuit also incorrectly held that Mr. Williams waived what it labeled a "forfeited" claim. Forfeited claims – claims that a party negligently fails to raise – are reviewed for plain error. *United States v. Olano*, 507 U.S. 725, 733 (1993). Only issues that a party intentionally abandons are waived (i.e., not reviewed at all). *Id.* "Mere forfeiture, as opposed to waiver, does not extinguish an 'error.'" *Id.* Thus, even assuming that the Tenth Circuit should have forgiven the government's waiver, under blackletter law, it should have reviewed Mr. Williams's recklessness claim for plain error. Its refusal to do so highlights just how far the Tenth Circuit has strayed in this particular area of the law.

2d. Finally, even assuming that the courts of appeals should entertain "duels" between parties' forfeitures and waivers, none of the reasons the Tenth Circuit gave to excuse the government's waiver has merit. The panel incorrectly stated that the government both "declined to address" the recklessness issue on appeal and failed to provide "any pertinent case citations." Pet. App. 10a. But the government cited a case supporting Mr. Williams's argument. Gov't Br. 16 (*Spicer*, 42 P.3d at 748) (under Kansas law, "[g]eneral intent 'may be proven by demonstrating intentional

or reckless conduct'"). Which is likely why the government also "assum[ed] for the sake of argument that knowing conduct equals reckless conduct in Kansas's criminal scheme." *Id.* 16-18.

Courts routinely assume, without deciding, legal issues not disputed by the parties. *See*, *e.g.*, *NASA v. Nelson*, 562 U.S. 134, 138, 147 n.10 (2011). In light of the government's position, the Tenth Circuit was wrong to think that it was required to rule definitively on whether Kansas's definition of "knowingly" aligns with recklessness. The Tenth Circuit could have assumed the point without deciding it for purposes of this appeal. *Id.* Indeed, the Tenth Circuit did just that with respect to divisibility and the subsection of the statute at issue in this appeal. Pet. App. 4a n.2. If the resolution of this issue was "not beyond doubt," *id.* 10a-11a, the Tenth Circuit should have accepted the government's assumption in this case and moved to the merits of the claim. *NASA*, 562 U.S. at 138, 147 n.10.

The Tenth Circuit also wrongly concluded that it "lack[ed] meaningful input from the parties." Pet. App. 10a. It was this issue that the parties primarily briefed (and argued at oral argument). Gov't Br. 10-22; Reply Br. 2-8. In fact, the issue the Tenth Circuit decided – that general intent crimes count as crimes of violence – was not briefed by the government (because the government conceded that knowledge in Kansas is the equivalent of recklessness). Gov't Br. 10-22. Review is necessary.

C. The question presented is vitally important to the administration of federal appeals.

The question presented merits this Court's attention. Standards of review are important to the administration of justice. Not only do they frame the issues for

appeal, and, as this case illustrates, often determine the result of the appeal, but they also provide context for practitioners litigating issues in the district and appellate courts (as well as inform the district courts how their rulings will be reviewed). Standards of review should not differ depending on the geographic location of the court of appeals. The government should not have a better opportunity at an affirmance in one court over another. *See, e.g.*, *Concrete Pipe v. Construction Laborers Pension*, 508 U.S. 602, 625-626 (1993) (explaining that the case turned on the proper standard of review); *United States v. Gallegos*, 314 F.3d 456, 463 (10th Cir. 2002) (explaining that the standard of review can have a "substantial impact on the resolution of a particular case").

This Court often grants certiorari to resolve conflicts on standard-of-review issues. *See, e.g.*, *Johnson v. California*, 543 U.S. 499, 502 (2005) ("We consider whether strict scrutiny is the proper standard of review for an equal protection challenge to that policy."); *Adarand Constructors v. Pena*, 515 U.S. 200, 204 (1995) (holding that "courts should analyze cases of this kind under a different standard of review than the one the Court of Appeals applied"). This Court recently issued two decisions resolving such conflicts. *U.S. Bank Nat'l Ass'n v. Village at Lakeridge*, 138 S.Ct. 960, 963 (2018) ("we address how an appellate court should review that kind of determination: de novo or for clear error"); *McLane v. EEOC*, 137 S.Ct. 1159, 1164 (2017) (resolving "whether a court of appeals should review a district court's decision to enforce or quash an EEOC subpoena de novo or for abuse of discretion").

The same need for this Court's guidance exists here. This Court agrees to resolve

so many standard-of-review issues because those issues affect virtually every aspect of any given case. Standards of review are the equivalent of rules to a game. If those standards differ in the appellate courts, then those courts will necessarily resolve legal issues under different rules. Because the courts of appeals are currently operating under different rules in this context, the conflict presented in this petition is in need of prompt resolution. Moreover, in light of the differing lower court rulings, the length of the conflict, and the Tenth Circuit's denial of en banc rehearing here, there is no reason to think that the lower courts could resolve the conflict on their own. As it stands now, only this Court can resolve this entrenched conflict.

Resolution of the conflict is especially important because it involves all criminal appeals. On March 31, 2018, there were 280 pending criminal appeals in the Tenth Circuit.[1] In each appeal, the Tenth Circuit could decide, sua sponte and without notice, to hold a preserved or forfeited claim waived, thus precluding what might be relief for the criminal defendant. As a practical matter, criminal defendants are at the whim of the Tenth Circuit and must hope that it does not find claims (whether raised below or not) waived. This rule creates a malfunctioning appeals process. *See, e.g.*, *United States v. Ventura-Perez*, 666 F.3d 670, 676 (10th Cir. 2012) ("Courts could not function properly if concessions by counsel cannot be relied upon.").

Resolution of this issue is also important because, as it stands now, the Tenth Circuit forgives the government's *waiver* of a standard of review and punishes a criminal defendant's (possible) *forfeiture* of the merits of a claim. But an intentional

[1] U.S. Courts of Appeals Federal Judicial Caseload Statistics (March 31, 2018), available at: http://www.uscourts.gov/statistics/table/b-1/federal-judicial-caseload-statistics/2018/03/31

waiver should never "outduel" an unintentional forfeiture, particularly when the waiver deals with the standard of review (not the merits), and it is the government who has waived the standard of review. *See, e.g.*, *Berger v. United States*, 295 U.S. 78, 88 (1935) (noting that the government's interest "in a criminal prosecution is not that it shall win a case, but that justice shall be done"); *Games-Perez*, 695 F.3d at 1122 (Gorsuch, J., dissenting) ("Neither in any event is it clear why we would want to tie ourselves to the mast and press a waivable objection for the government when doing so yields the injustice of denying an individual the day in court promised to him by Congress."); *United States v. Alexander*, 679 F.3d 721, 728 (8th Cir. 2012) ("our role is not to remedy deficiencies in the government's case").

Finally, this Court has also repeatedly granted certiorari to resolve violent-crimes issues and to ensure that individuals (like Mr. Williams) do not serve sentences longer than the law recommends. *See*, *e.g.*, *Mathis v. United States*, 136 S.Ct. 2243 (2016); *Johnson v. United States*, 135 S.Ct. 2551 (2015); *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 v. United States*, 559 U.S. 133 (2010); *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); *James v. United States*, 550 U.S. 192 (2007); *Shepard v. United States*, 544 U.S. 13 (2005); *Taylor v. United States*, 495 U.S. 575 (1990). Indeed, this Court has granted certiorari in three violent-crimes 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.

D. This case is an ideal vehicle to resolve the conflict.

For two reasons, this case is an ideal vehicle to resolve the conflict.

1. The question presented arises on direct review from a published decision of a federal court of appeals. After the Tenth Circuit sua sponte held the claim forfeited, then sua sponte refused to consider the claim, Mr. Williams sought rehearing en banc, expressly asking the Tenth Circuit to reconsider its sua sponte decision. The Tenth Circuit denied the petition without comment. Pet. App. 35a-36a. The conflict is thus ripe for review. There are no procedural hurdles to overcome for this Court to address the merits of this important question.

2. If this Court grants certiorari and holds that an appellate court should not sua sponte invoke waiver in cases where the government agrees with the defendant that the claim was properly preserved below (i.e., waives the waiver), Mr. Williams would be entitled to relief on remand. As the government admitted below, in Kansas, "[g]eneral intent 'may be proven by demonstrating intentional or reckless conduct.'" Gov't Br. 16 (quoting *Spicer*, 42 P.3d at 748). And in the Tenth Circuit, reckless crimes do not count as crimes of violence under § 4B1.2(a)(1). Pet. App. 5a. Thus, review is especially necessary here.

II. The Circuits are divided over whether crimes with causation elements necessarily qualify as crimes with elements of violent force.

The federal courts of appeals are split 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. As mentioned earlier, we have asked this Court to resolve this conflict in a different case (also involving Kansas aggravated battery, although a different subsection). *McMahan*, No. 18-5393 (government's brief in opposition due September 28, 2018). *McMahan* is an excellent vehicle to resolve this conflict. If this Court grants certiorari in *McMahan*, it would make sense to hold this case in abeyance pending a decision in *McMahan*.

Otherwise, this Court could use this case – which turned entirely on the belief that a causation element is an element of violent force – to resolve this conflict. This Court should hold that the Kansas aggravated-battery statute at issue here does not have an element of violent force. A causation-of-harm 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.

A. The Circuits are divided over whether statutes with causation elements necessarily have elements of violent force.

The Tenth Circuit held below that the Kansas aggravated-battery statute's causation-of-bodily-harm element was an element of violent physical force. Pet. App. 11-15a. According to the Tenth Circuit, causing bodily harm "necessarily involves the use of physical force." *Id.* 13a, 15a n.6.

The Tenth Circuit did not provide any reasoning for its holding, but instead relied on its prior decision in *United States v. Treto-Martinez*, 421 F.3d 1156 (10th Cir. 2005). Pet. App. 13a. *Treto-Martinez* had earlier held (in 2005) that Kansas's aggravated-battery statute had an element of violent force under the guidelines. 421 F.3d at 1159-1160. *Treto-Martinez* disposed of this issue in one paragraph. *Id.* 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 held below 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 applied *Castleman* to the violent-crimes context, holding that "the knowing or intentional causation of bodily injury necessarily involves the use of physical force." Pet. App. 13a. (quoting *Castleman*).

But the Tenth Circuit's reliance on *Castleman* is misplaced. *Castleman* expressly left open the question "[w]hether or not the causation of bodily injury necessarily entails violent force" in the violent-crimes 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 that causation elements are not equivalent to violent force elements. *United States v. Burris*, 892 F.3d 801, 808 (5th Cir. 2018) ("a person can 'cause bodily injury' without using force"); *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"); These Circuits have further held that *Castleman* does not apply in the violent-crimes context. *Id.*

The **First Circuit** has come to an analogous conclusion in *Whyte v. Lynch*, 807 F.3d 463, 468-469 (1st Cir. 2015), a case that involved 18 U.S.C. § 16(a)'s identical element-of-violent-force provision. 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.

The **Third Circuit** also recently published a decision recognizing that bodily injury is not "always and only the result of physical force." *United States v. Mayo*, __ F.3d __, 2018 WL 3999884, at *8 (3d Cir. Aug. 22, 2018). In *Mayo*, the Third Circuit held that an aggravated-assault statute punishing the causation of serious bodily injury did not count as a violent crime because state-law cases made clear that the crime could be committed either without the use of any physical force or the use of violent physical force necessary under federal law. *Id.* In so holding, the Third Circuit cited with approval decisions from the Fourth and Fifth Circuits, while

acknowledging contrary authority. *Id.* The Third Circuit also held that *Castleman* did not apply in the violent-crimes context. *Id.* at *7-8.

But there is internal inconsistency within the Third Circuit, as it has also held that crimes with causation elements qualify as violent crimes. *See*, *e.g.*, *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'"). It appears as if the Third Circuit's test is whether a criminal defendant can point to an application of the statute in a previous case not involving the use of physical force. *Mayo*, 2018 WL 3999884, at *8-*9. Because the statute at issue in *Mayo* has been used to prosecute failures to act, the statute was not a violent crime. *Id.* This logic is in direct conflict with the Tenth Circuit's decision in *Ontiveros*, which holds that a statute with a causation element that can be (and has been) violated via a failure to act still qualifies as a violent crime. 875 F.3d at 538.

Consistent with the **Tenth Circuit**'s approach, the **Second**, **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. 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-crimes context. *Villanueva*, 893 F.3d at 129-130; *Jennings*, 860 F.3d at 459; *Winston*, 845 F.3d at 878; *Studhorse*, 883 F.3d at 1204-1205.[2]

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. 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*, 894 F.3d 773, 775 (6th Cir. 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-crimes context, instead noting that the common-law force provision in *Castleman* had a "broader meaning" in the misdemeanor-domestic-crimes context. *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

[2] 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.

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, Third, 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 Fifth Circuit precedent, 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.

Thus, as it stands now, there is an entrenched conflict in the Circuits over whether crimes with causation elements necessarily have elements of violent force. The Circuits further disagree over *Castleman*'s effect (if any) on this broader question. As

the Third Circuit's recent decision in *Mayo* confirms, this conflict will persist (and grow more unworkable) unless and until this Court resolves it.

B. The resolution of the issue presented is critically important.

Resolution of this issue is critically important for two reasons. First, violent-crime provisions like § 4B1.2(a)(1) undoubtedly increase sentences for gun possession offenses. 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?"). As the previous section demonstrates, the geography of Mr. Williams's offense alone has increased his sentence. And this fact is true for any individual in similar circumstances.

Second, the need to resolve this conflict is heightened in light of the number of federal statutes with element-of-violent-force provisions that are identical or analogous to § 4B1.2(a)(1). *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. § 922(e)(2)(B)(i) (armed career criminal act); 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 conflict at issue here 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. 38-39, *infra*, for a list of federal statutes with causation

elements. Until this broader conflict is resolved, the classification of these statutes as violent crimes will depend entirely on the geography of the district court. In light of the number of violent-crimes provisions like § 4B1.2(a)(1), and causation statutes like the Kansas statute at issue here, this disparate treatment further highlights the need for this Court to resolve the issue presented in this petition.[3]

C. The Tenth Circuit erred.

Under the plain text of the relevant provisions (§ 4B1.2(a)(1) and KSA § 21-5413(b)(1)(B)), Kansas's aggravated-battery statute does not have an element of violent force. Start with § 4B1.2(a)(1)'s element-of-violent-force clause. This provision defines a crime of violence as any crime that "has as an *element* the use, attempted use, or threatened use of physical force against the person of another." USSG § 4B1.2(a)(1) (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

[3] 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.").

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 "knowingly caus[e] bodily harm to

another person with a deadly weapon, or in any manner whereby great bodily harm, disfigurement or death can be inflicted." KSA § 21-5413(b)(1)(B).[4] 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").

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,

[4] These two alternative ways of committing the crime are means, not elements. Pet. App. 4a. Thus, one can commit the crime without a jury finding (or an admission) that a deadly weapon was used. *Id.*

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").[5]

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 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

[5] 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).

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").

These statutes highlight the differences between the two types of provisions. Because § 4B1.2(a)(1) 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 § 21-5413(b)(1)(B), qualifies as a crime of violence. 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 the above-listed drafting decisions, 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 force. KSA § 21-5413(b)(1)(B). 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 § 21-5413(b)(1)(B) does not have an element of violent force.

D. This case is an excellent vehicle to resolve the conflict.

Finally, this case is an excellent vehicle to resolve the conflict. The question presented was preserved below, and there are no procedural hurdles to this Court's review. The Tenth Circuit affirmed the district court's decision on the merits. Pet. App. 12a-15a. In doing so, the Tenth Circuit solidified a conflict within the Circuits on this issue. This Court should use this case to resolve the conflict.

CONCLUSION

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

Respectfully submitted,

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Tenth Circuit

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Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

TRAYON L. WILLIAMS,

Defendant - Appellant.

No. 17-3071

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 6:15-CR-10181-EFM-1)

Daniel T. Hansmeier, Appellate Chief (Melody Brannon, Federal Public Defender, Kirk C. Redmond, First Assistant Federal Public Defender, with him on the briefs), Kansas Federal Public Defender Office, Topeka, Kansas, for Defendant-Appellant.

Jared Maag, Assistant United States Attorney (Thomas E. Beall, United States Attorney, James A. Brown, Assistant United States Attorney, on the brief), Topeka, Kansas, for Plaintiff-Appellee.

Before **BRISCOE**, **KELLY**, and **BACHARACH**, Circuit Judges.

BACHARACH, Circuit Judge.

Mr. Trayon Williams was convicted of possessing a firearm after a felony conviction. *See* 18 U.S.C. § 922(g). The conviction led the district

court to consider the sentence, beginning (as required) with the sentencing guidelines. *See Peugh v. United States*, 569 U.S. 530, 541 (2013). To apply the guidelines, the district court classified Mr. Williams's prior conviction for aggravated battery under Kansas law as a crime of violence. This classification triggered enhancement of the offense level. U.S. Sentencing Guidelines Manual § 2K2.1(a)(4)(A).

Mr. Williams challenges the enhancement on the ground that his prior conviction was not for a crime of violence. Mr. Williams is mistaken. In Kansas, aggravated battery is a crime of violence because the crime involves general criminal intent, requiring the knowing use of force. Thus, we affirm.

I. Mr. Williams's sentence level was enhanced under § 2K2.1.

Following a guilty plea, a probation officer prepared a presentence investigation report for Mr. Williams. The probation officer did not treat aggravated battery as a crime of violence under § 2K2.1 of the sentencing guidelines. As a result, the probation officer calculated the guideline range at 27 to 33 months' imprisonment.

The government objected, arguing that the Kansas crime of aggravated battery constituted a crime of violence. The district court

sustained the objection and set the guideline range at 46 to 57 months.[1] Mr. Williams appeals the enhancement under § 2K2.1.

II. We must determine whether aggravated battery in Kansas constitutes a crime of violence.

Section 2K2.1 requires enhancement of the offense level when the defendant has a prior conviction for a "crime of violence." The definition of "crime of violence" appears in § 4B1.2. U.S. Sentencing Guidelines Manual § 2K2.1, cmt. n.1. There a "crime of violence" is defined as a felony that "has as an element the use, attempted use, or threatened use of physical force against the person of another." *Id.* § 4B1.2(a)(1). Focusing on this definition, Mr. Williams argues that his conviction does not constitute a crime of violence.

To address this argument, we engage in de novo review. *See United States v. Wray*, 776 F.3d 1182, 1184 (10th Cir. 2015). This review requires us to compare the statutory elements to the guidelines' definition of a "crime of violence." *See Mathis v. United States*, ___ U.S. ___, 136 S. Ct. 2243, 2248 (2016). We must "look *at* (and not beyond) the statute of conviction in order to identify the elements of the offense." *United States v. Zuniga-Soto*, 527 F.3d 1110, 1120 (10th Cir. 2008) (emphasis in original).

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[1] After calculating the guideline range, the district court departed downward to 40 months' imprisonment.

Mr. Williams was convicted of "knowingly causing bodily harm to another person with a deadly weapon, or in any manner whereby great bodily harm, disfigurement, or death can be inflicted." Kan. Stat. Ann. § 21-5413(b)(1)(B).[2] The resulting issue is whether this crime constitutes a crime of violence.[3] *Id*. The district court answered "yes."

Mr. Williams argues that

- aggravated battery in Kansas cannot constitute a crime of violence because the crime can be committed recklessly and unintentionally and
- causing bodily harm does not have "as an element the use, attempted use, or threatened use of physical force against the person of another." U.S. Sentencing Guidelines Manual § 4B1.2(a)(1).

Both arguments fail.

III. The mens rea for aggravated battery in Kansas suffices for a crime of violence.

Mr. Williams argues that the mens rea requirement for aggravated battery does not suffice for a crime of violence. For this argument, Mr.

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[2] The parties have agreed that the Kansas statute on aggravated battery is divisible and that Mr. Williams was convicted under Kan. Stat. Ann. § 21-5413(b)(1)(B).

[3] The Kansas Supreme Court has held that the use of a deadly weapon constitutes a means of committing aggravated battery rather than an element. *State v. Ultreras*, 295 P.3d 1020, 1036 (Kan. 2013). This holding requires us to treat aggravated battery in Kansas as a single crime even though the crime can be committed through different means. *See Mathis v. United States*, __ U.S. __, 136 S. Ct. 2243, 2256 (2016).

Williams asserts that his statute of conviction encompasses conduct that is reckless and unintentional. We reject Mr. Williams's argument.

A. "Knowing" conduct can constitute a "crime of violence" under § 2K2.1.

Under our prior opinions, statutes permitting convictions for reckless conduct do not qualify as crimes of violence under the guidelines. *United States v. Zuniga-Soto*, 527 F.3d 1110, 1123 (10th Cir. 2008); *United States v. Duran*, 696 F.3d 1089, 1093 (10th Cir. 2014).[4] To qualify, the crime must require intent or purpose. *United States v. Armijo*, 651 F.3d 1226, 1237 (10th Cir. 2011); *see Duran*, 696 F.3d at 1093 ("The sentencing enhancement for a prior felony crime of violence may therefore only apply to [the defendant] if the mens rea for his conviction required intentional conduct, not recklessness.").

Aggravated battery in Kansas requires "knowing" conduct. *See* p. 4, above. But we have not yet addressed whether a mens rea of "knowing" can

[4] The government argues that these opinions have been superseded by *Voisine v. United States*, ___ U.S. ___, 136 S. Ct. 2272 (2016). *Voisine* held that a misdemeanor crime of domestic violence can be committed recklessly. 136 S. Ct. at 2280. According to the government, *Voisine* applies to the "crime of violence" designation under the sentencing guidelines. As discussed below, however, Kansas's aggravated-battery statute requires "knowing" conduct, which is sufficient under the guidelines. Thus, we need not decide whether reckless conduct would also suffice under the guidelines. *See Champagne Metals v. Ken-Mac Metals, Inc.*, 458 F.3d 1073, 1088 (10th Cir. 2006) (stating that we can affirm on any ground supported by the record).

qualify for a crime of violence under the guidelines. We now hold that "knowing" conduct is sufficient for a crime of violence under § 2K2.1.

We have concluded that offenses with a mens rea of "knowing" can constitute violent felonies under the Armed Career Criminal Act (ACCA). *See, e.g.*, *United States v. Hernandez*, 568 F.3d 827, 829-30 (10th Cir. 2009) (conviction for "knowingly discharg[ing] a firearm at or in the direction of . . . one or more individuals" qualified as a violent felony under the ACCA); *United States v. Herron*, 432 F.3d 1127, 1137-38 (10th Cir. 2005) (conviction for "knowingly plac[ing] or attempt[ing] to place another person in fear of imminent serious bodily injury" qualified as a violent felony under the ACCA). The ACCA's definition of "violent felony" is virtually identical to the guidelines' definition of a "crime of violence." *Compare* 18 U.S.C. § 924(e)(1), *with* U.S. Sentencing Guidelines Manual § 4B1.2(a). Thus, we have drawn on our ACCA case law when interpreting the guideline term "crime of violence." *See United States v. Martinez*, 602 F.3d 1166, 1173 (10th Cir. 2010) ("[W]e have looked to interpretations of the ACCA to guide our reading of § 4B1.2(a)."); *see also United States v. Armijo*, 651 F.3d 1226, 1231 (10th Cir. 2011) (stating that "this court has concluded analysis under the ACCA applies equally to § 4B1.2(a)").

Our ACCA case law supports a similar approach under § 2K2.1. For an aggravated battery in Kansas, the State must prove "that the accused

acted when he or she was aware that his or her conduct was reasonably certain to cause the result." *State v. Hobbs*, 340 P.3d 1179, 1184 (Kan. 2015). This requirement separates "knowing" conduct from conduct that is accidental, negligent, or reckless. *See* Kan. Stat. Ann. § 21-5202(b) (separately classifying "knowingly" and "recklessly"); *see also United States v. Ruacho*, 746 F.3d 850, 856 (8th Cir. 2014) (explaining that a crime committed "knowingly" is different from a crime committed "recklessly"). As a result, we conclude that a mens rea requirement of "knowing" is sufficient for characterization as a crime of violence under § 2K2.1.

B. We reject Mr. Williams's contrary arguments.

Mr. Williams makes two arguments for why a mens rea of "knowing" is not sufficient:

1. Kansas's definition of "knowing" equates to recklessness.
2. Conduct can be "knowing" without intent.

Both arguments fail.

1. Mr. Williams forfeited his argument that Kansas's standard of "knowing" equates to recklessness.

First, Mr. Williams argues that Kansas's definition of "knowing" conduct is indistinguishable from recklessness. We ordinarily define "knowing" conduct as conduct undertaken with an awareness that a particular result "is practically certain." *United States v. Manatau*, 647

F.3d 1048, 1050 (10th Cir. 2011). But Kansas uses a different phrase, requiring "reasonable certainty" rather than "practical certainty." Kan. Stat. Ann. § 21-5202(i); *see* pp. 6-7, above. Mr. Williams argues that Kansas's requirement of reasonable certainty is indistinguishable from recklessness. But this argument was forfeited.

Our local rules require that "[f]or each issue raised on appeal, all briefs must cite the precise reference in the record where the issue was raised and ruled on." 10th Cir. R. 28.2(C)(2). Mr. Williams omitted a record citation for where this issue had been raised or decided in district court, and we have elsewhere declined to consider issues based on similar omissions. *United States v. LaHue*, 261 F.3d 993, 1009, 1014 (10th Cir. 2001); *United States v. McClatchey*, 217 F.3d 823, 835-36 (10th Cir. 2000); *United States v. Janus Indus.*, 48 F.3d 1548, 1558-59 (10th Cir. 1995). And at oral argument, Mr. Williams conceded that he had not raised this issue in district court.

But after oral argument, Mr. Williams filed a supplemental letter, stating that he *had* presented the argument in district court. There Mr. Williams cited his response to the government's objection to the presentence report. But Mr. Williams's response had not included an argument that Kansas's definition of "knowing" conduct was equivalent to recklessness. By failing to raise the issue in district court, Mr. Williams

forfeited his present argument. *See United States v. Gould*, 672 F.3d 930, 938 (10th Cir. 2012).

Mr. Williams argues that we should consider the argument anyway because the government did not rely on the forfeiture. *See United States v. Reider*, 103 F.3d 99, 103 n.1 (10th Cir. 1996) (considering a forfeited appeal point because the government failed to argue on appeal that the appeal point had been forfeited). We disagree.

The government's omission leaves us with "dueling 'waivers/forfeitures.'" *United States v. Rodebaugh*, 798 F.3d 1281, 1314 (10th Cir. 2015). Mr. Williams forfeited his argument by failing to raise it in district court, and the government waived its challenge to Mr. Williams's forfeiture by failing to raise the challenge on appeal. *Id*. Thus, we must exercise discretion in deciding whose forfeiture or waiver to overlook. *Id*.

In deciding how to exercise this discretion, we can (1) weigh the harms from each party's failure to adequately present its argument and (2) consider the adequacy of input from the parties. *See id.* at 1314-17 (comparing the relative consequences of each party's failure to present its argument); *Abernathy v. Wandes*, 713 F.3d 538, 552 (10th Cir. 2013) (discussing the adequacy of input from the parties).

The weighing process leads us to conclude that Mr. Williams's failure created the greater harm. Because the issue was not raised in

district court, neither party briefed the issue there. On appeal Mr. Williams asserts that Kansas's standard of "knowing" equates to recklessness, but he has not identified a single opinion supporting his assertion. Thus, we lack the citation of any supporting opinion on this issue.

We also lack any pertinent case citations from the government, which declined to address the issue, focusing instead on the sufficiency of recklessness for a "crime of violence." Thus, we lack meaningful input from the parties *or* "a reasoned district court decision on the subject." *See Abernathy*, 713 F.3d at 552 (expressing a reluctance "to definitively opine" on an issue when the appellant forfeited an appeal point and the appellee waived the forfeiture because the appellee's scant attention to the issue left us without "the benefit of vigorous adversarial testing of the issue").

We have sometimes considered forfeited arguments that present "a strictly legal question the proper resolution of which is beyond doubt." *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1539 (10th Cir. 1992). Mr. Williams's argument, equating Kansas's standard of "knowing" to recklessness, presents a purely legal question. But proper resolution of the issue is not beyond doubt.

We have not addressed this issue in a published opinion, and no other federal court of appeals has expressly addressed this issue. But in an unpublished opinion, we confronted an analogous issue in *Marin-Gonzales v. Sessions*, No. 17-9503, 2018 WL 327437 (10th Cir. Jan. 9, 2018)

(unpublished). There we addressed an attempt statute criminalizing conduct undertaken with an awareness that the prohibited result was reasonably certain. *Marin-Gonzales*, 2018 WL 327437, at *3. Even though only reasonable certainty was required, we determined that the statute did not criminalize reckless behavior. *Id*. Instead, we concluded that the statutory language mirrored the state's definition of "knowing," which required reasonable certainty. *Id*.; *see* Utah Code Ann. § 76-2-103(2) (defining "knowingly"). This conclusion casts doubt on Mr. Williams's argument that "reasonable certainty" equates to recklessness.

* * *

Weighing the relative harms and considering the lack of input from the government and the uncertainty in the resolution, we decline to reach the merits of Mr. Williams's forfeited argument.

2. "Knowing" conduct involves general criminal intent, which suffices for a "crime of violence."

The resulting issue is whether a mens rea of "knowing" is sufficient for a "crime of violence" under the guidelines. The guidelines' reference to a "crime of violence" requires "purposeful or intentional behavior." *United States v. Armijo*, 651 F.3d 1226, 1236 (10th Cir. 2011). In light of this requirement, Mr. Williams contends that Kansas's mens rea of "knowing" is insufficient because it does not require intent. We reject this contention.

In Kansas, a crime committed "knowingly" is considered a crime of "general criminal intent." Kan. Stat. Ann. § 21-5202(i). Crimes requiring "general criminal intent" can constitute "violent felonies" under the ACCA. *United States v. Ramon Silva*, 608 F.3d 663, 673 (10th Cir. 2010); *see also United States v. Hernandez*, 568 F.3d 827, 831-32 (10th Cir. 2009) (characterizing a crime committed knowingly as a violent felony because the crime required an intent to undertake the prohibited action). Because "general criminal intent" suffices for a "violent felony" under the ACCA, we conclude that "general criminal intent" also suffices for a "crime of violence" under the guidelines. *See* p. 6, above (discussing the significance of ACCA case law in interpreting the guideline term "crime of violence").

* * *

The Kansas crime of aggravated battery entails general criminal intent, requiring "knowing" conduct. This requirement is sufficient for a crime of violence under § 2K2.1

IV. Aggravated battery in Kansas includes physical force as an element of the offense.

To constitute a crime of violence, the prior statute of conviction must have "as an element the use, attempted use, or threatened use of physical force against the person of another." U.S. Sentencing Guidelines Manual § 4B1.2(a)(1); *see* p. 3, above. Mr. Williams argues that Kansas's crime of aggravated battery does not require physical force because the crime is

triggered whenever "bodily harm" is caused. Kan. Stat. Ann. § 21-5413(b)(1)(B). Mr. Williams's argument fails because "the knowing or intentional causation of bodily injury necessarily involves the use of physical force." *United States v. Castleman*, ___ U.S. ___, 134 S. Ct. 1405, 1414 (2014).

We addressed a similar issue in *United States v. Treto-Martinez*, 421 F.3d 1156 (10th Cir. 2005). There we concluded that a prior version of Kansas's crime of aggravated battery required the use or threatened use of physical force and qualified as a crime of violence under the guidelines.[5] *Treto-Martinez*, 421 F.3d at 1159-60. For this conclusion, we relied on the need to intentionally cause physical contact with another person in a way that could cause great bodily harm, disfigurement, or death. This element, in our view, involved the use or threatened use of physical force. *Id*. at 1160. Our rationale in *Treto-Martinez* applies equally to Kansas's current statute on aggravated battery, which criminalizes the causation of "bodily harm." *Compare* Kan. Stat. Ann. § 21-5413(b)(1)(B), *with* Kan. Stat. Ann. § 21-3414(a)(1)(C) (repealed 2010).

[5] The section of the prior Kansas statute, addressed in *Treto-Martinez*, had defined 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." Kan. Stat. Ann. § 21-3414(a)(1)(C) (repealed 2010).

Mr. Williams contends that *Treto-Martinez* is no longer good law. For this contention, he argues that Kansas's current statute asks only whether an injury was caused and not whether force was used. Mr. Williams points to *United States v. Perez-Vargas*, 414 F.3d 1282 (10th Cir. 2005), where we concluded that the use of force and the causation of injury are not equivalent elements. 414 F.3d at 1285.

But after issuance of the opinion in *Perez-Vargas*, the Supreme Court decided *United States v. Castleman*, holding that a misdemeanor conviction for intentionally or knowingly causing bodily injury to a child's mother constituted a misdemeanor crime of domestic violence. 134 S. Ct. 1405, 1414 (2014). The Supreme Court explained that "the knowing or intentional causation of bodily injury necessarily involves the use of physical force." *Id.*

We applied *Castleman* in *United States v. Ontiveros*, 875 F.3d 533 (10th Cir. 2017). There the defendant argued that physical force was not an element of his crime because the statute of conviction had focused on the result of the conduct rather than on the conduct itself. We rejected this argument, explaining that *Castleman* had "specifically rejected the contention that 'one can cause bodily injury without the use of physical force.'" *Ontiveros*, 875 F.3d at 536 (quoting *Castleman*, 134 S. Ct. at 1414). We added that "*Perez-Vargas's* logic on this point is no longer good law in light of *Castleman*." *Id.*; *see also United States v. Kendall*, 876 F.3d

1264, 1271 (10th Cir. 2017) (recognizing that *Perez-Vargas* "has been abrogated by the Supreme Court").

Mr. Williams concedes that "the panel decision in *Ontiveros* effectively shutters most of [his] second argument." Appellant's Reply Br. at 3 n.1. But Mr. Williams attempts to distinguish *Ontiveros*, arguing that

- *Ontiveros* concerned only intentional conduct and
- the Kansas aggravated-battery statute can be violated unintentionally.

We have already addressed this argument: Kansas's crime of aggravated battery requires a mens rea of "knowing" and general criminal intent, which suffice for a crime of violence under the guidelines. Thus, *Ontiveros* is directly applicable.[6]

* * *

The Kansas statute on aggravated battery criminalizes the knowing causation of bodily harm. This element involves the use or threatened use of physical force. *See United States v. Castleman*, __ U.S. __, 134 S. Ct. 1405, 1414 (2014). As a result, aggravated battery in Kansas constitutes a crime of violence under § 2K2.1.

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[6] Mr. Williams also argues that his conviction is categorically not a crime of violence because the Kansas crime of aggravated battery does not require physical force. This argument fails for the same reasons. The statute requires a finding that the defendant caused bodily harm. Kan. Stat. Ann. § 21-5413(b)(1)(B). And intentionally causing bodily harm necessarily involves the use of physical force. *United States v. Castleman*, __ U.S. __, 134 S. Ct. 1405, 1414 (2014).

V. Conclusion

We conclude that Mr. Williams's prior crime of aggravated battery constitutes a crime of violence under § 2K2.1. Aggravated battery requires knowing conduct, which entails general criminal intent and suffices for a crime of violence. In addition, the Kansas statute criminalizes the causation of bodily harm, which requires the use or threatened use of physical force. As a result, the district court properly enhanced Mr. Williams's offense level. We affirm.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA, *Plaintiff*, vs. TRAYON L. WILLIAMS, *Defendant.*	Case No. 15-10181-01-EFM

MEMORANDUM

This matter comes before the Court on the Government's Objection Number 1 to the Presentence Investigation Report ("PSR") (Doc. 38) prepared in this case. The Government objects to Paragraph 25 of the PSR, which classifies Williams's base offense level as 14 pursuant to U.S.S.G. § 2K2.1(a)(6)(A). The Government argues that that Williams's base offense level should be 20 based on application of § 2K2.1(a)(4)(A), because his prior conviction for aggravated battery constituted a "crime of violence" under the U.S. Sentencing Commission Guidelines Manual ("Guidelines"). The Court reviewed the parties' arguments contained in the addendum to the PSR, and heard the parties' oral arguments at the sentencing hearing held on March 31, 2017. At the hearing, the Court sustained Government's Objection Number 1 to the PSR. The memorandum that follows states the Court's reasons for sustaining the Government's objection.

I. Factual and Procedural Background

On August 22, 2016, Defendant Trayon L. Williams entered a plea of guilty to possession of a firearm after having been convicted of a crime punishable by imprisonment for a term exceeding one year, in violation of 18 U.S.C. §§ 922(g)(1) & 924(a)(2). Before Williams's sentencing, the U.S. Probation Office prepared a PSR, which calculated Williams's base offense level as 14 pursuant to U.S.S.G. § 2K2.1(a)(6)(A). Section 2K2.1(a) describes the applicable base offense levels for offenses under 18 U.S.C. § 922(g)(1), and provides a base level of 14 if the defendant "was a prohibited person at the time the defendant committed the instant offense . . . ."

The PSR detailed Williams's criminal history, which included a 2014 conviction for aggravated battery in Sedgwick County District Court. The journal entry for that case stated that Williams pleaded guilty to aggravated battery, in violation of K.S.A. § 21-5413(b)(1)(B)(g)(2)(B), a "Felony, Severity Level 7." The PSR did not classify this offense as a "crime of violence," so Williams's base offense level was 14. The Government objected to this calculation, arguing that the aggravated battery conviction constitutes a "crime of violence," and therefore Williams's base offense level should be 20.[1]

II. Discussion

The Government contends that Williams's conviction under K.S.A. § 21-5413(b)(1)(B) qualifies as a "crime of violence" under the Guidelines because it "has as an element the use,

[1] *See* U.S.S.G. § 2K2.1(a)(4)(A) ("Base Offense Level . . . 20, if—the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of . . . a crime of violence . . . ."); *Id.* § 2K2.1(a)(6) ("Base Offense Level . . . 14, if the defendant . . . was a prohibited person at the time the defendant committed the instant offense . . . .").

attempted use, or threatened use of physical force against the person of another."[2] In making this argument, the Government relies heavily on *United States v. Treto-Martinez*,[3] which held that an offender's violation of Kansas's earlier aggravated battery statute, K.S.A. § 21-3414(a)(1)(C), involves the use or threatened use of physical force and thereby qualified as a "crime of violence" under the Guidelines.[4]

Williams disagrees with the Government's position for two reasons. First, *Treto-Martinez* considered the predecessor version of the statute under which Williams was convicted. According to Williams, the revised statute at issue here "contains a diluted scienter requirement, permitting conviction based on 'knowing' conduct." He contends that the Tenth Circuit "has consistently held that intentional conduct is required to support a federal enhancement, and that a 'knowing' scienter element does not meet that standard." Second, Williams asserts that the Supreme Court's decision in *Mathis v. United States*[5] "dooms the rationale of cases like *Treto-Martinez*." Under Williams's interpretation of *Mathis*, the Supreme Court "abrogated Tenth Circuit law concerning the definition of an "element," which requires this Court to focus only on the elements of the state offense." "*Treto-Martinez* violates that rule by speculating how the offense might be committed in an ordinary case instead of examining only the elements of the state offense."

The parties agree that if Williams's conviction for aggravated battery qualifies as a "crime of violence," it does so only under the "elements clause" of the Guidelines. Under that

[2] *See* U.S.S.G. § 4B1.2(a) (defining the term "crime of violence" for purposes of § 2K2.1(a)).

[3] 421 F.3d 1156 (10th Cir. 2005).

[4] *Id.* at 1159–60.

[5] 136 S. Ct. 2243 (2016).

clause, an offense is considered a "crime of violence" if it is punishable by imprisonment for a term exceeding one year, and it "has as an element the use, attempted use, or threatened use of physical force against the person of another."[6] The parties further agree that the Kansas aggravated battery statute, K.S.A. § 21-5413, is a divisible statute that lists multiple alternative elements defining multiple crimes such that the Court may consult state court documents to determine the specific crime of conviction.[7] The Government cites the Journal Entry of Judgment, which states that Williams pleaded guilty to a violation of K.S.A. § 21-5413(b)(1)(B)(g)(2)(B), a "Felony, Severity Level 7."

The journal entry's reference to "(g)(2)(B)" corresponds to § 21-5413(g)(2)(B), which specifies that aggravated battery "as defined in . . . subsection (b)(1)(B) . . . is a severity level 7, person felony." Thus, it appears that Williams was convicted under § 21-5413(b)(1)(B), and the journal entry's reference to (g)(2)(B) was simply to indicate that the offense is a severity level 7, person felony. Because the parties agree that this is the correct analysis, the Court concludes that Williams was convicted under § 21-5413(b)(1)(B). That provision prohibits "knowingly causing bodily harm to another person with a deadly weapon, or in any manner whereby great bodily harm, disfigurement or death can be inflicted."[8]

Subsection (b)(1)(B) is therefore divisible because it sets out elements of the offense in the alternative, creating two distinct offenses. First, § 21-5413(b)(1)(B) criminalizes "knowingly causing bodily harm to another person with a deadly weapon" ("aggravated battery with a deadly

[6] U.S.S.G. § 4B1.2(a)(1).

[7] *See Mathis*, 136 S. Ct. at 2249.

[8] K.S.A. § 21-5413(b)(1)(B).

weapon").[9] Second, it criminalizes "knowingly causing bodily harm to another person . . . in any manner whereby great bodily harm, disfigurement or death can be inflicted."[10] Unfortunately, the parties did not provide any additional records pertaining to Williams's conviction. Therefore, the Court must "turn to the plain language of the [Kansas] statute itself to determine if, standing alone, it would support the crime of violence enhancement."[11] In other words, the Court must separately analyze both offenses: (1) aggravated battery with a deadly weapon, and (2) aggravated battery in any manner whereby great bodily harm can be inflicted.

To support the crime of violence enhancement, both offenses must have as an element "the use, attempted use, or threatened use of physical force" against another person. This analysis has two components. First, the offense must have as an element the "use" of force. And second, the amount of force must be sufficient to constitute "physical force."

A. Aggravated Battery With a Deadly Weapon

1. The "Use" of Force

Williams argues that his conviction cannot qualify as a "crime of violence" because both aggravated battery offenses under K.S.A. § 21-5413(b)(1)(B) have a *mens rea* of "knowingly." He contends that the "Tenth Circuit has squarely and repeatedly held that only offenses with an intent element are crimes of violence under the guidelines. Because the prior conviction at issue here did not have intent as an element, it is not a crime of violence."

[9] *See State v. Steele*, 2016 WL 7178789, at *3 (Kan. Ct. App. 2016) (" 'Aggravated battery' includes 'knowingly causing bodily harm to another person with a deadly weapon.' ") (citing K.S.A. § 21-5413(b)(1)(B)).

[10] *See State v. Bradford*, 2016 WL 7429318, at *1 (Kan. Ct. App. 2016) ("As we just indicated, K.S.A. 2015 Supp. 21-5413(b)(1)(B) criminalizes 'knowingly causing bodily harm to another person . . . in any manner whereby great bodily harm, disfigurement or death can be inflicted.' ") (ellipsis in original).

[11] *United States v. Perez-Vargas*, 414 F.3d 1282, 1285 (10th Cir. 2005).

Under the elements clause, an offense is a "crime of violence" if it "has as an element the *use*, attempted *use*, or threatened *use* of physical force . . . ."[12] In *Leocal v. Ashcroft*,[13] the U.S. Supreme Court interpreted the word "use" in the elements clause of 18 U.S.C. § 16. Noting that a crime of violence must be one that involves the "use . . . of physical force," the Court observed that " 'use' requires active employment."[14] The Court then held that "use" requires "a higher degree of intent than negligent or merely accidental conduct."[15] In light of *Leocal*, the Tenth Circuit further clarified that the word "use" requires a higher degree of intent than recklessness.[16] And with these principles in mind, the Tenth Circuit has "unequivocally held that the text of [U.S.S.G.] § 4B1.2 only reaches purposeful or intentional behavior."[17]

To date, the Tenth Circuit has not addressed whether an offense with a *mens rea* of knowingly can satisfy the use of physical force requirement in order to be classified as a crime of violence under § 4B1.2's elements clause. However, the Tenth Circuit has provided some guidance, albeit in the context of violent felonies under the Armed Career Criminal Act ("ACCA").[18] First, the Tenth Circuit has previously found offenses with a *mens rea* of knowingly to be violent felonies under the ACCA's elements clause. For example, in *United*

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[12] U.S.S.G. § 4B1.2(a)(1) (emphasis added).

[13] 543 U.S. 1 (2004).

[14] *Id.* at 9.

[15] *Id.*

[16] *See United States v. Zuniga-Soto*, 527 F.3d 1110, 1124 (10th Cir. 2008).

[17] *United States v. Armijo*, 651 F.3d 1226, 1236 (10th Cir. 2011).

[18] "The language defining 'violent felony' in 18 U.S.C. § 924(e)(1) is virtually identical to the guidelines language defining 'crime of violence' under U.S.S.G. § 4B1.2(a). *United States v. Rooks*, 556 F.3d 1145, 1149 (10th Cir. 2009). Case law interpreting one phrase is persuasive to courts interpreting the other phrase. *United States v. Jackson*, 2006 WL 991114, at *2 (10th Cir. 2006).

States v. Hernandez,[19] the court concluded that a Texas conviction for "*knowingly* discharg[ing] a firearm at or in the direction of . . . one or more individuals" qualified as a violent felony under the elements clause of the ACCA.[20] Second, in *United States v. Ramon Silva*,[21] the court concluded that the "presence or absence of an element of specific intent does not dispositively determine whether a prior conviction qualifies as a violent felony under the ACCA."[22] The court then held that an offense requiring proof of general criminal intent is sufficient to satisfy the ACCA's elements clause.[23]

Under this framework, the Court concludes that the word "use" in the elements clause of the Guidelines encompasses offenses (such as Williams's aggravated battery conviction) with a *mens rea* of knowingly. To begin, "knowingly causing bodily harm to another person" necessarily requires "active employment."[24] The Kansas Supreme Court has stated that in order to obtain an aggravated battery conviction, the State must prove "that the accused *acted* when he or she was aware that his or her conduct was reasonably certain to cause the result."[25] Thus, unlike accidental, negligent, and reckless—"knowingly" requires the offender to take action,

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[19] 568 F.3d 827 (10th Cir. 2009).

[20] *Id.* at 829–30 (emphasis added); *see also United States v. Herron*, 432 F.3d 1127, 1137–38 (10th Cir. 2005) (concluding that a Colorado conviction for "knowingly plac[ing] or attempt[ing] to place another person in fear of imminent serious bodily injury" "easily" satisfies the requirement of the threatened use of physical force against the person of another.").

[21] 608 F.3d 663 (10th Cir. 2010).

[22] *Id.* at 673.

[23] *Id.* at 673–74.

[24] *See Leocal*, 543 U.S. at 9 (concluding that the word " 'use' requires active employment.").

[25] *State v. Kershaw*, 302 Kan. 772, 359 P.3d 52, 59 (2015) (emphasis added); *see also State v. Hobbs*, 301 Kan. 203, 340 P.3d 1179, 1185 (2015) ("K.S.A. 2011 Supp. 21-5413(b)(1)(A) requires proof that an aggravated battery defendant acted while knowing that some type of great bodily harm or disfigurement of another person was reasonably certain to result from the defendant's action.").

aware that his or her conduct was reasonably certain to cause the result. Put another way, aggravated battery only encompasses malfeasance,[26] while accidental, negligent, and reckless conduct can encompass nonfeasance, or the failure to act.[27] Accordingly, "knowingly causing bodily harm to another person" necessarily requires an offender to take action when he or she was aware that his or her action was reasonably certain to cause bodily harm. Unlike in *Leocal*, the degree of intent here—knowingly—does in fact require "active employment."

Next, this decision accords with the Tenth Circuit's pronouncement that "§ 4B1.2 only reaches purposeful or intentional behavior."[28] Although an offense cannot constitute a crime of violence if it reaches behavior that is not "purposeful" or "intentional,"[29] there is no requirement that the offense be a specific intent crime. Rather, a general intent crime can constitute a crime of violence under the elements clause. In *Ramon Silva*, the court effectively eliminated any perceived distinction between specific intent and general intent crimes. There, the court held that a plea of no contest to aggravated assault, which requires proof of general criminal intent, "was an admission of intentional conduct."[30] In reaching this decision, the court noted that proof of

[26] Black's Law Dictionary (10th ed. 2014), Malfeasance ("A wrongful, unlawful, or dishonest act.").

[27] Black's Law Dictionary (10th ed. 2014), Nonfeasance ("The failure to act when a duty to act exists."). *See* Pattern Instructions Kansas—Criminal § 52.010 (2016) ("A defendant acts recklessly when the defendant consciously disregards a substantial and unjustifiable risk . . . ."); *Leocal*, 543 U.S. at 9 ("While one may, in theory, actively employ *something* in an accidental manner, it is much less natural to say that a person actively employs physical force against another person by accident.").

[28] *Armijo*, 651 F.3d at 1236.

[29] *See United States v. Duran*, 696 F.3d 1089, 1093 (10th Cir. 2012).

[30] *Ramon Silva*, 608 F.3d at 673.

general criminal intent has "consistently" been defined by New Mexico courts "as conscious wrongdoing or the purposeful doing of an act that the law declares to be a crime."[31]

Not only did *Ramon Silva* equate "general criminal intent" with "intentional conduct," but it expressly disavowed the notion that an offense must have an element of specific intent in order to constitute a crime of violence or violent felony.[32] Here, an aggravated battery conviction under K.S.A. § 21-5413(b)(1)(B) requires proof of general criminal intent,[33] which the Kansas Supreme Court has defined as "the intent to do what the law prohibits."[34] And because general intent crimes fall under the same umbrella as specific intent crimes, the Court concludes that aggravated battery only encompasses "purposeful or intentional behavior."

Furthermore, the Circuit Courts of Appeal that have addressed this precise issue have unanimously held that general intent crimes still constitute crimes of violence under the Guidelines' elements clause.[35] For example, in *United States v. Melchor-Meceno*,[36] the Ninth

[31] *Id.* at 673; *see also State v. Wilson*, 147 N.M. 706, 228 P.3d 490, 494 (2009) (referring to general criminal intent as "the requirement that a defendant generally intend to commit the act."); *State v. Stewart*, 138 N.M. 500, 122 P.3d 1269, 1278 (2005) ("General criminal intent has been defined as acting 'intentionally,' which in turn has also been termed acting 'purposely.' "); *State v. Gonzalez*, 137 N.M. 107, 107 P.3d 547, 553 (2005) ("The element of general criminal intent is satisfied if the State can demonstrate beyond a reasonable doubt that the accused purposely performed the act in question." (citation, quotation, and alteration omitted)); *State v. Santillanes*, 130 N.M. 464, 27 P.3d 456, 469 n.5 (2001) ("General criminal intent means the purposeful doing of an act that the law declares to be a crime." (citation and quotation omitted)).

[32] *Ramon Silva*, 608 F.3d at 673 (concluding that the "presence or absence of an element of specific intent does not dispositively determine whether a prior conviction qualifies as a violent felony under the ACCA.").

[33] K.S.A. § 21-5202(i) specifies that when the mental culpability requirement for a crime is "knowingly," it is a general intent crime. *State v. Hobbs*, 301 Kan. 203, 212 (2015).

[34] *In re C.P.W.*, 289 Kan. 448, 213 P.3d 413, 417 (2009).

[35] *See, e.g.*, *United States v. Romo-Villalobos*, 674 F.3d 1246 (11th Cir. 2012) (holding that resisting officer with violence statute, a general intent crime which requires offender to "knowingly and willfully" resist, constitutes a crime of violence for purposes of the elements clause" of U.S.S.G. § 2L1.2(b)(1)(A)(ii)); *United States v. Velasco*, 465 F.3d 633, 639–40 (5th Cir. 2006) (upholding a sixteen-level enhancement where the predicate statute required that it be violated either intentionally or knowingly to sustain a conviction); *see also United States v. McDaniel*, 2016 WL 5371859, at *4 (D. Kan. 2016) (concluding that Kansas aggravated assault constituted a crime of violence

Circuit found a conviction for felony menacing under Colorado law categorically qualified as a crime of violence. The Colorado statute required a threat that knowingly placed another in fear of imminent serious bodily injury. The Ninth Circuit stated, "menacing is a general intent crime that requires the defendant to knowingly place another person in fear . . . . Therefore, the predicate offense of menacing includes the requisite *mens rea* of intent for a crime of violence."[37] Indeed, "[k]nowledge is a sufficiently culpable mental state to qualify as crime of violence."[38] The Court is unaware of any Circuit Courts of Appeal that have held otherwise.

Thus, Williams's plea of no contest to aggravated battery, which required proof of general criminal intent, was an admission of purposeful or intentional conduct. Accordingly, the Court concludes that the offense of knowingly causing bodily harm to another person with a deadly weapon necessarily requires the "use" of force.

2. Use of "Physical Force"

Having concluded that aggravated battery with a deadly weapon requires the "use" of force (active employment), the Court turns its analysis to whether "knowingly causing bodily harm with a deadly weapon" requires the use of a sufficient level of force. Under the Guidelines, an offense must have as an element the use, threatened use, or attempted use of "physical force."

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because statute required defendant to "*knowingly* cause 'reasonable apprehension of immediate bodily harm' with a deadly weapon." (emphasis in original)).

[36] 620 F.3d 1180 (9th Cir. 2010).

[37] *Id.* at 1186.

[38] *United States v. Palacios-Gomez*, 643 F. App'x 614, 615 (9th Cir. 2016) (holding that defendant's conviction for aggravated robbery is a "crime of violence" because "he acted with at least the mens rea of knowledge . . . ."); *see also United States v. Melchor-Meceno*, 620 F.3d 1180, 1184 (9th Cir. 2010) (holding that a Colorado menacing statute "includes the requisite mens reas of intent for a crime of violence" because it "requires the defendant to knowingly place another person in fear of imminent serious bodily harm.").

"The Supreme Court has clarified that the amount of force required to satisfy the elements clause is '*violent* force—that is, force capable of causing physical pain or injury to another person.' "[39]

A conviction under K.S.A. § 21-5413(b)(1)(B) requires proof that the defendant caused "bodily harm." In Kansas, "bodily harm" is defined as "any touching of the victim against the victim's will, with physical force, in an intentional hostile and aggravated manner."[40] It can constitute "slight, trivial, minor, or moderate harm," and can include "mere bruising."[41] This does not rise to the level of violent force prescribed by *Johnson*.[42] Therefore, the Court must decide whether § 21-5413(b)(1)(B) satisfies the requisite violent force necessary because it contains the additional element of a "deadly weapon."

To answer this question, *United States v. Treto-Martinez*[43] is instructive. In *Treto-Martinez* the Tenth Circuit analyzed Kansas's previous aggravated battery statute which contained nearly identical language to the statute in this case.[44] There, the court conclusively determined that "intentionally causing bodily harm to another person with a deadly weapon"[45] qualified as a crime of violence. The court wrote: "There is no dispute that [K.S.A.

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[39] *United States v. Mitchell*, 653 F. App'x 639, 644 (10th Cir. 2016) (quoting *Johnson v. United States*, 559 U.S. 133, 140 (2010)).

[40] Pattern Instructions Kansas—Criminal § 54.310 (2016).

[41] *State v. Green*, 280 Kan. 758, 127 P.3d 241, 246 (2006).

[42] *See Johnson*, 559 U.S. at 137–38 (holding that a "Florida felony offense of battery by actually and intentionally touching another person [does not have] as an element the use of physical force" because the offense may occur by the slightest offensive touching (alterations and internal quotation marks omitted)); *see also United States v. Smith*, 652 F.3d 1244, 1247 (10th Cir. 2011) (concluding that Oklahoma assault and battery statute does not contain the requisite "physical force" necessary to constitute a violent felony under the ACCA because "under Oklahoma law, mere offensive touching satisfies the requirement for force in a battery.").

[43] 421 F.3d 1156 (10th Cir. 2005).

[44] *Id.* at 1158–60 (analyzing Kansas's former aggravated battery statute, K.S.A. § 21-3414(a)(1)(B), (C) (repealed 2011)).

[45] K.S.A. § 21-3414(a)(1)(B) (repealed 2011).

§ 3414(a)(1)(B)] contains the requisite language to support a finding that Treto-Martinez's conviction was for a 'crime of violence.' "[46] Unfortunately, that was the extent of the court's analysis of § 3414(a)(1)(B) before moving on to § 3414(a)(1)(C).

The provision Williams pleaded guilty to, § 21-5413(b)(1)(B) mirrors § 21-3414(a)(1)(B) word-for-word, with the single exception that "intentionally" was replaced with "knowingly" in the current statute.[47] Because there was "no dispute" that the predecessor statute contained the requisite physical (or violent) force necessary to satisfy the elements clause, the Court must reach the same result here.

The fact that the predecessor statute contained specific criminal intent as opposed to general criminal intent is of no consequence. As discussed above, both "intentionally" and "knowingly" committing a battery constitute the "use" of force. The issue here is whether the statute Williams pleaded guilty to has as an element the use of "physical force." And based on the Tenth Circuit's pronouncement that there is "no dispute" that the predecessor statute—which contains identical language to the current statute—constitutes a crime of violence,[48] the answer must be in the affirmative.

Although the Tenth Circuit's analysis of § 3414(a)(1)(B) was brief and conclusory, one can surmise the court's rationale from its analysis of § 3414(a)(1)(C). Subsection (a)(1)(C) from the predecessor statute defined aggravated battery as "intentionally causing physical contact with

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[46] *Treto-Martinez*, 421 F.3d at 1159.

[47] *Compare* K.S.A. § 21-3414(a)(1)(B) (repealed 2011) ("intentionally causing bodily harm to another person with a deadly weapon, or in any manner whereby great bodily harm, disfigurement or death can be inflicted."); *with* K.S.A. § 21-5413(b)(1)(B) ("knowingly causing bodily harm to another person with a deadly weapon, or in any manner whereby great bodily harm, disfigurement or death can be inflicted.").

[48] *Treto-Martinez*, 421 F.3d at 1158–59.

another person when done in a rude, insulting or angry manner with a deadly weapon . . . ." The court

> conclude[d] that physical force is involved when a person intentionally causes physical contact with another person with a deadly weapon. Although not all physical contact performed in a rude, insulting or angry manner would rise to the level of physical force, we conclude that all intentional physical contact with a deadly weapon done in a rude, insulting or angry manner does constitute physical force under § 2L1.2(b)(1)(A). Thus, a person who intentionally touches another with a deadly weapon in a "rude, insulting or angry manner," uses physical force by means of an instrument calculated or likely to produce bodily injury which goes well beyond other, less violent, forms of touching such as grabbing a police officer's arm.[49]

The same analysis applies here. Except, as the Government points out, the statute now under consideration, § 21-5413(b)(1)(B), requires proof of *bodily harm* whereas the statute analyzed above, § 21-3414(a)(1)(C), merely required *physical contact*. Obviously, the Government argues, "causing 'bodily harm' involves a greater degree of harm than causing 'physical contact.' " The Court agrees. It is clear that anyone who "caus[es] bodily harm to another person with a deadly weapon" uses physical force by means of an instrument calculated or likely to produce bodily injury.[50] Even if the bodily harm is minor, "the manner in which the physical contact with a deadly weapon must occur to violate the Kansas statute clearly has an element the 'threatened use of physical force.' "[51]

In response, Williams argues that the U.S. Supreme Court's decision in *Mathis v. United States*[52] abrogates *Treto-Martinez*. According to Williams, the court in *Treto-Martinez*

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[49] *Id.* at 1159.

[50] Kansas defines "deadly weapon" as "an instrument which, from the manner it is used, is calculated or likely to produce death or serious bodily injury." Pattern Instructions Kansas—Criminal § 54.310 (2016); see also *State v. Colbert*, 244 Kan. 422, 769 P.2d 1168 (1989).

[51] *Id.* at 1160.

[52] 136 S. Ct. 2243 (2016).

improperly focused not solely on the elements of the crime (and, more specifically, whether the statute requires the use or threatened use of force) but on the likely result of the crime in an ordinary case (and, more specifically, whether the victim of an aggravated battery under the statute would normally perceive a threat of the use of physical force). Williams contends that the results-only approach utilized in *Treto-Martinez* conflicts with the elements-only approach endorsed by the Supreme Court in *Mathis* and utilized by the Tenth Circuit in *United States v. Zuniga-Soto*,[53] and *United States v. Perez-Vargas*.[54]

As the Government points out, this exact argument was rejected by Judge Lungstrum in *United States v. McMahan*.[55] The Court agrees with Judge Lungstrum's analysis and rejects Williams's efforts to undermine *Treto-Martinez* for the same reasons.

First, *Zuniga-Soto* and *Perez-Vargas* are both distinguishable from *Treto-Martinez*. Both of the statutes at issue in *Zuniga-Soto and Perez-Vargas* allowed for convictions based on reckless or negligent conduct.[56] But, as Judge Lungstrum explained,

> The Kansas aggravated battery statute [at issue in *Treto-Martinez*] does not allow for a conviction based on reckless or criminally [negligent] conduct because it does not focus on "bodily injury." Rather, the statute—unlike the statutes at issue in *Zuniga-Soto* and *Perez-Vargas*—requires that the defendant engage in "intentional . . . physical contact." Because the statute requires intentional conduct coupled with the potential for "great bodily harm," the Tenth Circuit appropriately concluded in *Treto-Martinez* that the statute necessarily requires, at a minimum, the threatened use of physical force. In fact, the Circuit summarized this distinction in *United States v. Ramon-Silva*, 608 F.3d 663, 672 (10th Cir.

[53] 527 F.3d 1110 (10th Cir. 2008).

[54] 414 F.3d 1282 10th Cir. 2006).

[55] 2016 WL 6083710 (D. Kan. 2016).

[56] *See Perez-Vargas*, 414 F.3d at 1285 (providing that third-degree assault occurs when a defendant "knowingly or recklessly causes bodily injury to another person or with criminal negligence he causes bodily injury to another person by means of a deadly weapon."); *Zuniga-Soto*, 527 F.3d at 1122 (concluding that defendant "could have been convicted for reckless conduct.").

> 2010) (*Zuniga-Soto* held that a mens rea of recklessness does not satisfy physical force requirement under § 2L1.2's definition of "crime of violence," while *Treto-Martinez* held that intentional physical contact with a deadly weapon or in a manner capable of causing great bodily harm always includes the threatened use of violent force).[57]

Here, the statute at issue also does not allow for a conviction based on reckless or criminally negligent conduct. As explained in great detail above, Williams's crime of conviction required him to engage in intentional conduct, which causes bodily harm, with a deadly weapon. The statute therefore requires both the use and threatened use of physical force.

Furthermore, the Tenth Circuit's discussion of *Treto-Martinez* in *Ramon Silva* "demonstrates that the Circuit has clearly not repudiated *Treto-Martinez* in any respect."[58] And the Tenth Circuit has continued to rely on *Treto-Martinez* as binding precedent in recent cases, including one case that was decided after the Supreme Court announced its decision in *Mathis*.[59] This leads the Court to conclude that *Treto-Martinez* was correctly decided and has not been abrogated as Williams asserts.

Accordingly, aggravated battery with a deadly weapon under K.S.A. § 21-5413(b)(1)(B) does indeed require proof of the element of the use and threatened use of *physical* force against

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[57] *McMahan*, 2016 WL 6083710, at *3 (internal citations omitted).

[58] *Id.*; *see Ramon Silva*, 608 F.3d at 672 (describing *Treto-Martinez* as a "persuasive" decision in analyzing whether a conviction under New Mexico's aggravated assault statute constituted a violent felony).

[59] *See Mitchell*, 653 F. App'x at 644–45 (relying in part on *Treto-Martinez* in concluding that defendant's use of a dangerous weapon to commit assault necessarily includes as an element the threatened use of physical force); *United States v. Rios-Zamora*, 599 F. App'x 347 (10th Cir. 2015) ("Our opinion in [*Treto-Martinez*] makes clear than any conviction under that statute satisfies the guidelines definition of a conviction for a crime of violence."). *Mitchell* was decided by the Tenth Circuit on June 29, 2016, while *Mathis* was decided by the Supreme Court on June 23, 2016.

the person of another.[60] The offense therefore qualifies as a crime of violence under the Guidelines.

B. Aggravated Battery Whereby Great Bodily Harm Can Be Inflicted

Next, under K.S.A. § 21-5413(b)(1)(B), aggravated battery can also occur when a person knowingly causes "bodily harm to another person . . . in any manner whereby great bodily harm, disfigurement or death can be inflicted." Again, the Court must decide whether this offense includes as an element the "use, attempted use, or threatened use of physical force." Above, the Court concluded that the offense of knowingly causing bodily harm to another person necessarily requires the "use" of force. Therefore, the only issue to resolve here is whether this offense includes as an element the use of "physical" or "violent" force.

"Knowingly causing bodily harm to another person" is not in itself sufficient to constitute *violent* force, that is, "force capable of causing physical pain or injury to another person."[61] This is because "bodily harm" includes "slight, trivial, minor, or moderate harm," and can include "mere bruising."[62] The issue thus becomes whether this offense contains the requisite violent force necessary because it contains the additional element of committing the offense "in any manner whereby great bodily harm, disfigurement or death can be inflicted."

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[60] *See also United States v. Lee*, 467 F. App'x 502, 503 (7th Cir. 2012) ("Lee's situation is straightforward: the Illinois indictment charged him with causing bodily harm through use of a deadly weapon, and the use of a deadly weapon presents at least the threat of physical force."); *United States v. Dominguez*, 479 F.3d 345, 348 (5th Cir. 2007) ("However, the touching of an individual with a deadly weapon creates a sufficient threat of force to qualify as a crime of violence.").

[61] *Johnson*, 559 U.S. at 140.

[62] *Green*, 127 P.3d at 246.

The analysis here is much more straightforward. Clearly, if an offender causes another person bodily harm, in a manner "whereby great bodily harm, disfigurement or death can be inflicted" he has used "force capable of causing physical pain or injury to another person."[63] The Tenth Circuit agrees. "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.' "[64]

Furthermore, the Fifth Circuit has also interpreted this exact language and arrived at the same conclusion. In *United States v. Flores-Gallo*,[65] the court interpreted Kansas's previous aggravated battery statute, addressing a provision with nearly identical language to this current provision.[66] After concluding that "causing bodily harm" alone was not sufficient to constitute physical force, the court wrote:

> But the "bodily harm" is only half of the picture. The statute requires that the harm must be conducted in a "manner whereby great bodily harm, disfigurement or death can be inflicted." So, in order to be convicted under the statute the defendant must with ill will or hostility intentionally use force that is more than mere touching and has the capability of causing significant injury.[67]

Accordingly, the court held that "the hostile intent and force used in conjunction with the risk of significant injury creates an offense which has as an element at least the threatened use of force

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[63] *See, e.g.*, *United States v. Ceron*, 775 F.3d 222, 229 (5th Cir. 2014) ("Touching or striking that causes great bodily harm is a paradigmatic example of the use of force.").

[64] *Treto-Martinez*, 421 F.3d at 1160.

[65] 625 F.3d 819 (5th Cir. 2010).

[66] *Compare* K.S.A. § 21-3414(a)(1)(B) ("Aggravated battery is: intentionally causing bodily harm to another person . . . in any manner whereby great bodily harm, disfigurement or death can be inflicted."), *with* K.S.A. 21-5413(b)(1)(B) ("Aggravated battery is: knowingly causing bodily harm to another person . . . in any manner whereby great bodily harm, disfigurement or death can be inflicted."). The only difference between these two provisions is that the previous statute has a *mens rea* of "intentionally," while the current statute has a *mens rea* of "knowingly."

[67] *Flores-Gallo*, 625 F.3d at 823.

that is capable of causing physical pain or injury to another person as contemplated by *Johnson*."[68]

The Court therefore concludes that "knowingly causing bodily harm to another person . . . in any manner whereby great bodily harm, disfigurement or death can be inflicted" has as an element the use and threatened use of physical force. The offense therefore qualifies as a crime of violence under the Guidelines.

III. Conclusion

In sum, both aggravated battery offenses contained in K.S.A. § 21-5413(b)(1)(B) constitute crimes of violence. Knowingly causing bodily harm to another person with a deadly weapon has as an element the use and threatened use of physical force. And knowingly causing bodily harm in any manner whereby great bodily harm, disfigurement or death can be inflicted has as an element the use and threatened use of physical force. Williams's aggravated battery conviction therefore constitutes a "crime of violence." Accordingly, the Court sustained Objection Number 1 to the Presentence Investigation Report.

Dated this 11th day of April, 2017.

ERIC F. MELGREN
UNITED STATES DISTRICT JUDGE

[68] *Id.* at 824.

FILED
United States Court of Appeals
Tenth Circuit

June 15, 2018

Elisabeth A. Shumaker
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

TRAYON L. WILLIAMS,

Defendant - Appellant.

No. 17-3071
(D.C. No. 6:15-CR-10181-EFM-1)
(D. Kan.)

ORDER

Before **BRISCOE**, **KELLY**, and **BACHARACH**, Circuit Judges.

This matter is before the court on the appellant's *Petition for Panel Rehearing and Rehearing En Banc.* Upon consideration, the request for panel rehearing is granted in limited part by the original panel members, and only to the extent of the minor amendments made in the attached revised decision. Panel rehearing is otherwise denied. The clerk is directed to file the revised opinion effective the date of this order.

The *Petition* was also circulated to all the active judges of the court. *See* Fed. R. App. P. 35(a). As no judge on the original panel or the en banc court requested that a poll be called, the request for en banc reconsideration is likewise denied.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk