No. 18-6005

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

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I. This Court should review the Tenth Circuit's sua sponte waiver rule.

An entrenched conflict exists over a court of appeals' ability to invoke, sua sponte, forfeiture or waiver principles when the government agrees that the defendant properly preserved an issue in the district court. The majority rule, adopted by eight courts of appeals, holds that the government "waives the waiver" when it agrees that the appellant preserved the issue below. Pet. 9-11. The Eighth Circuit disagrees and reviews forfeited issues (or issues the Eighth Circuit sua sponte deems forfeited) on the merits for plain error even when the appellee has not invoked forfeiture on appeal. Pet. 11-12. The Tenth Circuit also disagrees, but rather than conduct plain error review, the Tenth Circuit sua sponte invokes waiver principles, as it did here, and dismisses the issue without conducting a merits review. Pet. 12-13.

Here, Trayon Williams argued in the district court and on appeal that his prior Kansas aggravated battery conviction did not qualify as a crime of violence under USSG § 4B1.2 because, *inter alia*, the aggravated battery statute punishes reckless conduct. Pet. 2-3, 5-7. The government disputed the claim on the merits, both in the district court and on appeal. *Id.* The district court also addressed the claim on the merits, summarily rejecting it because, in its view, the statute "does not allow for a conviction based on reckless or criminally negligent conduct." *Id.* at 6 (quoting Pet. App. 31a). But the Tenth Circuit sua sponte held the claim forfeited, even though the government (properly) conceded that Mr. Williams raised the issue below. Pet. 7-8. And rather than review the supposed "forfeited" claim for plain error, the Tenth

Circuit treated the claim as waived and "decline[d] to reach the merits." *Id.* Thus, Mr. Williams lost his statutory right to appeal this issue because of the Tenth Circuit's sua sponte waiver rule.

Despite this patently unfair result, the government opposes certiorari because, in its view, the Tenth Circuit's rule is sound. BIO 12-13. The government also disagrees that the Circuits are split on this issue. BIO 13-14. And the government claims that this case is a poor vehicle to address this issue because it thinks that the Tenth Circuit actually reviewed the issue for plain error. BIO 13.

None of these counterarguments are persuasive. The Tenth Circuit's rule is indefensible in that it sua sponte holds waived an appellant's claim where the appellee has conceded that the appellant sufficiently raised the claim in the district court. And the Tenth Circuit's rule plainly conflicts with precedent from every other Circuit. Finally, any suggestion that the Tenth Circuit reached the merits of this claim is without merit; the Tenth Circuit expressly "decline[d] to reach the merits" of this issue. Pet. App. 11a.

A. The Tenth Circuit's sua sponte waiver rule conflicts with decisions from every other Circuit.

Eight courts of appeals hold that it is improper for an appellate court to sua sponte invoke forfeiture principles when the government agrees that a claim was properly presented in the district court. Pet. 9-11. Those courts of appeals instead hold that the government "waives the waiver" when the government agrees that the issue was properly preserved below. *Id.* The Eighth and Tenth Circuits disagree with this majority rule. The Eighth Circuit invokes plain error review when it sua sponte finds

that an issue was not properly preserved below. Pet. 11-12. The Tenth Circuit, unlike any other Circuit, goes further and sua sponte holds that the appellant has waived the issue in such circumstances and is not entitled to review. Pet. 12-13.

The government's summary assertion that this conflict does not exist is without merit. BIO 13-14. Although the government summarily claims that every Circuit uses a case-by-case discretionary rule in this context, it cites no authority whatsoever in support of its position. BIO 13-14. The cases cited in Mr. Williams's petition speak for themselves; eight Circuits employ the majority rule "waives the waiver" doctrine. Pet. 9-11.

Moreover, for three reasons, the government's claim that the Eighth and Tenth Circuits sometimes apply the majority rule is likewise inconsequential. BIO 14-15. First, the government fails to cite one case from the Eighth Circuit employing the majority rule. BIO 14-15. Thus, the government's assertion has no empirical support. Second, to the extent that the Tenth Circuit has applied the majority rule, it rarely does so. Since the decision in this case, the Tenth Circuit has again sua sponte held an issue waived where the government conceded that the issue was preserved below. *United States v. Dixon*, 901 F.3d 1170, 1184-1185 (10th Cir. 2018); *see also United States v. Marquez*, 898 F.3d 1036, 1049 n.5 (10th Cir. 2018) (holding issue waived where the government argued forfeiture, not waiver). Until this Court steps in, countless appellants will lose their statutory rights to appeal based on questionable (and often plainly incorrect, as in this case) sua sponte actions by the Tenth Circuit. No other Circuit employs such a rule. For that reason alone, review is necessary.

And finally, even if there is some internal variation within the Eighth and Tenth Circuits, that variation is a reason to grant this petition, not a reason to deny it. Whether the Eighth or Tenth Circuit always applies the minority rule is irrelevant; the fact that the Tenth Circuit applies the minority rule at all is reason enough for this Court's review in this case.

B. The Tenth Circuit erred.

The government claims that the Tenth Circuit's sua sponte waiver rule is supported by this Court's precedent. BIO 12-13. But the three cases the government cites have nothing to do with standards of review. The cases merely note that a party's concession does not bind the Court on a substantive issue of law. *Roberts v. Galen of Va., Inc.*, 525 U.S. 249, 253 (1999) (per curiam); *Grove City Coll. v. Bell*, 465 U.S. 555, 562 n.10 (1984); *Singleton v. Wulff*, 428 U.S. 106, 121 (1976).

In particular, *Wulff* has nothing to do with "whether parties preserved (or forfeited) legal arguments," as the government claims. BIO 13. *Wulff* instead concerns what substantive issues a court of appeals should consider on appeal. 428 U.S. at 121. *Wulff* further makes clear that "injustice was more likely to be caused than avoided by deciding the issue without petitioner's having had an opportunity to be heard." *Id.* And this is precisely the problem here. The Tenth Circuit sua sponte held that Mr. Williams forfeited the issue without any briefing on whether Mr. Williams in fact forfeited the issue. Both parties informed the Tenth Circuit (correctly) that Mr. Williams properly preserved the issue below. Pet. 6-7. In holding otherwise, without any briefing to support the contrary holding, the Tenth Circuit did just what *Wulff* says not to do – decide an issue without adversarial testing. *Wulff*, 428 U.S. at 121.

The government also cites Justice Scalia's concurrence in *NASA v. Nelson*, 562 U.S. 134, 163 n.* (2011), again noting that courts "are not bound by a litigant's concession on an issue of law." BIO 12. But this statement had nothing to do with a litigant's concession on a standard of review. And the majority in *NASA* assumed the correctness of the conceded substantive legal issue (without deciding the issue). 562 U.S. at 147. If a majority of this Court is willing to assume without deciding the correctness of a conceded substantive legal issue, then surely it is willing to assume without deciding the correctness of a conceded standard of review. Such a rule aligns perfectly with the principle of party presentation, Federal Rule of Appellate Procedure 28, and this Court's decision in *Wood v. Milyard*, 566 U.S. 463, 472 (2012), as we have already explained. Pet. 13-15.

We have also explained how the Tenth Circuit's rule raises serious due process concerns. Pet. 13-15. The government fails to respond to this point. And the rule also calls into doubt a criminal defendant's statutory right to appeal all components of his sentence. *See* 18 U.S.C. § 3742(a). Where both parties indicate that the issue was properly preserved, it raises serious constitutional and statutory problems when a court of appeals sua sponte departs from the parties' position and dismisses the issue in light of that departure (without additional briefing on the appropriate standard of review). The government has said nothing to indicate otherwise.

One last point. Throughout its argument, the government ignores the sua sponte nature of the Tenth Circuit's rule. Even assuming that the Tenth Circuit "may adopt its own interpretation of the law, including the applicable scope or standard of review,

notwithstanding the submissions of the parties," BIO 9, the Tenth Circuit cannot do so sua sponte, in a manner that erases a criminal defendant's statutory right to appeal his sentence, without any briefing on whether the issue was in fact preserved, and without giving the defendant an opportunity to argue plain error on appeal. Review is necessary.

C. This case is an excellent vehicle.

The government claims that the question presented does not merit review because the Tenth Circuit reviewed the issue for plain error. BIO 13. This argument is without merit for three reasons.

First, it is factually incorrect. By its own unambiguous terms, the Tenth Circuit did not conduct a merits review, but instead "decline[d] to reach the merits of Mr. Williams's forfeited argument." Pet. App. 11a. There is no room for interpretation there. The Tenth Circuit unambiguously held that the issue was waived. *Id.*

Second, even if it had conducted plain error review, the Tenth Circuit erred because Mr. Williams preserved the issue below. Pet. 17-18. The government claims that we do "not identify any portion of the district court record where [we] specifically argued that Kansas's definition of 'knowing' equates to recklessness." BIO 11-12. But that's not true either. As we have done throughout this litigation, we have explained that Mr. Williams raised this issue in his objections to the Presentence Investigation Report, which are documented in the Report's Addendum. Pet. 5, 17. It is there that Mr. Williams explained, *inter alia*, that "the question the Court confronts here" is "whether a crime of violence under § 4B1.2 may be committed recklessly." R2.38 at

33. The issue was preserved; the Tenth Circuit should have conducted de novo review.

Third, for purposes of certiorari review, it is irrelevant whether the Tenth Circuit conducted plain error review or instead held the claim waived. If the Tenth Circuit sua sponte conducted plain error review, it acted in accord with only one other Circuit (the Eighth). All of the other Circuits would have applied de novo review because the government "waived the waiver." Pet. 9-12. Review is necessary.

II. Review is necessary to resolve a conflict over whether crimes with causation elements qualify as crimes with elements of violent force.

There is an entrenched conflict over whether a statute with a causation-of-harm element necessarily has an element of violent force. Pet. 24-30. This Court expressly left open this question in *United States v. Castleman*, 134 S.Ct. 1405, 1413 (2014). This question is immensely important in light of the number of statutes (state and federal) that have causation elements and not elements of violent force. Pet. 30-40.

The government concedes that a conflict exists. BIO 19. But the government asks this Court not to resolve the conflict because, in its view, the lower courts might resolve the conflict on their own. On the merits, the government assumes that *Castleman* extends to the violent-crimes context and that our plain-text approach has no support in the law. BIO 17. None of these arguments are persuasive.

A. The Circuits are split.

The government asks this Court not to resolve an acknowledged conflict within the Circuits because the Fifth Circuit has granted rehearing en banc in *United States v. Reyes-Contreras*, 882 F.3d 113 (5th Cir. 2018). BIO 19. *Reyes-Contreras* involves Missouri's voluntary manslaughter statute. 882 F.3d at 117. Unlike Kansas's

aggravated battery statute, the Missouri statute does not have a causation element. *Id.* at 118 (defining voluntary manslaughter as "knowingly assist[ing] another in the commission of self-murder"). As such, the government's petition for rehearing en banc in *Reyes-Contreras* focuses not on whether causation elements qualify as elements of violent force, but on whether indirect uses of force can constitute elements of violent force. That is a different question. Regardless of the resolution in *Reyes-Contreras*, the conflict presented here will persist until this Court resolves it.

The government also claims that all other Circuits have "invoked" *Castleman* in the violent-crimes context and have held that causation elements necessarily qualify as elements of violent force. BIO 18-19. But that's not true. The First, Third, and Fourth Circuits (and to some extent the Sixth Circuit) have published decisions declining to extend *Castleman* to the violent-crimes context. Pet. 25-27.

The government suggests that the First Circuit has backtracked, citing *United States v. Edwards*, 857 F.3d 420 (1st Cir. 2017), and *United States v. Garcia-Ortiz*, 904 F.3d 102 (1st Cir. 2018). But *Edwards* expressly refused "to take sides" in the debate. 857 F.3d at 426. And the statute in *Edwards* did not have a causation element. 857 F.3d at 423-424. *Edwards*, like *Reyes-Contreras*, discussed indirect force, not causation of harm. *Id.* at 426-427.

So too *Garcia-Ortiz*. The statute at issue there did not have a causation element. 904 F.3d at 106. And nowhere does *Garcia-Ortiz* actually cite *Castleman* to support its holding (instead, Justice Scalia's concurrence). *Id.* at 107-108. Because the statute at issue in *Garcia-Ortiz* did not have a causation element, this portion of the decision

is dicta and cannot overrule *Whyte v. Lynch*, 807 F.3d 463 (1st Cir. 2015).

The government also suggests that the Fourth Circuit applies *Castleman* in the violent-crimes context, citing *United States v. Reid*, 861 F.3d 523, 528-529 (2017). BIO 21. But the Virginia statute at issue in *Reid* punished "inflicting" bodily injury, not "causing" it. *Id.* at 524). The statute, unlike the Kansas statute at issue here, does not have a causation element. And like *Reyes-Contreras* and *Edwards*, *Reid* discussed *Castleman* in terms of indirect v. direct force, not in terms relevant here (causation v. violent force). 861 F.3d at 526-528. With respect to causation, *Reid* merely acknowledged that *Castleman* reserved that issue. *Id.* at 528. And *Reid* further acknowledged that *United States v. Torres-Miguel*, 701 F.3d 165 (4th Cir. 2012), was still good law. *Reid*, 861 F.3d at 529. *Torres-Miguel* expressly holds that a causation element is not the equivalent of an element of violent force. 701 F.3d at 168-169.

The government further claims that the Third Circuit's decision in *United States v. Mayo*, 901 F.3d 218 (3d Cir. 2018), is limited to statutes that criminalize omissions. BIO 21. But the Third Circuit's decision says more than that. Similar to the Kansas statute at issue here, the Pennsylvania statute at issue in *Mayo* punished "caus[ing] serious bodily injury to another." *Id.* at 226 (quoting 18 Pa. Cons. Stat. § 2702(a)(1)). The Third Circuit expressly rejected the government's *Castleman*-based claim that "causing or attempting to cause serious bodily injury necessarily involves the use of physical force." *Id.* at 228. The conflict is alive, well, and expanding.

B. The Tenth Circuit erred.

The government barely makes an effort to defend the Tenth Circuit's decision. At

most, it asks this Court to reject our textual rule because it doesn't think this Court's precedent supports it. BIO 17-18. And the government further claims that the Tenth Circuit's decision is correct because it is consistent with *Castleman*. BIO 17.

This latter argument is a nonstarter. *Castleman* left open the question presented here. 134 S.Ct. at 1413. It did not resolve it. And as already explained, the Circuits are divided over *Castleman*'s applicability to the violent-crimes context. Pet. 24-30. The fact that the Tenth Circuit based its decision on *Castleman*, while other Circuits would have refused to do so, is a reason to grant certiorari, not a reason to deny it.

The former argument fares no better. The government summarily states that our plain-text argument has no support in this Court's precedent. BIO 17-18. But that's untrue. Our definition of an "element" of violent force flows straight from this Court's definition of an "element" in the violent-crimes context. Pet. 32-33. The government makes no effort to undermine this point. It merely notes the test adopted in *Johnson v. United States*, 559 U.S. 133, 140 (2010). BIO 16. But *Johnson* supplements the "element" of force with an additional requirement that this "element" require *violent* force. 133 U.S. at 140. Nowhere does *Johnson* hold that "element" means something other than "the constituent parts of a crime's legal definition – the things the prosecution must prove to sustain a conviction." *Mathis v. United States*, 136 S.Ct. 2243, 2248 (2016) (cleaned up).

Nor does the government explain why it disagrees with an argument rooted in the statute's text. It is "the clarity of the text" that wins the day. *Trump v. Hawaii*, 138 S.Ct. 2392, 2412 (2018). Kansas's aggravated battery statute has a causation-of-harm

element, not an element of violent force. Pet. 24-30. A Kansas jury need only find that the defendant caused harm, not that the defendant used force to cause the harm. *Id.* The Tenth Circuit erred. Review is necessary.

C. This case is an excellent vehicle.

The government claims that this case is an improper vehicle because it involves the guidelines. BIO 21-22. But this issue is much broader than the guidelines. Pet. 30-32. Resolution of this issue will clarify the law across the violent-crimes spectrum. And it is unrealistic to think that the Sentencing Commission "can amend the Guidelines to eliminate" this conflict. The conflict involves a judicial construction of the term "element" in the violent-crimes context, and it exists within a guideline designed to mirror federal statutory law. *See* Pet. 32-34. The government fails to explain how the Commission could eliminate the conflict under such circumstances.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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