# APPENDIX

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**PUBLISHED**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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**No. 18-6843**

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UNITED STATES OF AMERICA,

Plaintiff – Appellant,

v.

JIMMY LEE ALLRED,

Defendant – Appellee.

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Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. William L. Osteen, Jr. District Judge. (2:94-cr-00175-WO-1)

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Argued: September 18, 2019 Decided: November 7, 2019

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Before WILKINSON, NIEMEYER, and AGEE, Circuit Judges.

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Reversed and remanded by published opinion. Judge Wilkinson wrote the opinion, in which Judge Niemeyer and Judge Agee joined.

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**ARGUED:** Thomas Ernest Booth, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellant. Leza Lee Driscoll, LAW OFFICE OF LEZA LEE DRISCOLL, PLLC, Raleigh, North Carolina, for Appellee. **ON BRIEF:** Brian A. Benczkowski, Assistant Attorney General, Matthew S. Miner, Deputy Assistant Attorney General, Criminal Division UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Matthew G.T. Martin, United States Attorney, Angela H. Miller, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Greensboro, North Carolina, for Appellant.

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WILKINSON, Circuit Judge:

In 1995, a jury in the United States District Court for the Middle District of North Carolina found appellee Jimmy Lee Allred guilty of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). The district court sentenced him to 264 months in prison under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. 924(e). Just over twenty years later, in 2016, Allred filed a motion pursuant to 28 U.S.C. § 2255 protesting that his sentence was no longer valid because his predicate conviction for retaliation against a witness, see 18 U.S.C. § 1513(b)(1), did not qualify as an ACCA violent felony in light of the Supreme Court's decision in *Samuel Johnson v. United States*, 135 S. Ct. 2551 (2015). The district court granted relief and subsequently resentenced Allred to a term of 120 months in prison with credit for time served. See *Allred v. United States*, 2018 WL 1936481 (M.D.N.C., April 24, 2018); J.A. 143-49. Because we hold that causing bodily injury to a witness under § 1513(b)(1) is categorically a violent ACCA felony, we reverse the judgment.

I.

On June 16, 1994, Allred was arrested by local police outside a restaurant in Greensboro, North Carolina. Earlier that evening, a security guard at the restaurant had called the police after he observed Allred enter the restaurant with the outline of a firearm in his pants. When the police arrived, Allred left the restaurant and proceeded to a vehicle driven by a third party. As Allred entered the car, a police officer saw him place a firearm under the passenger's seat. The officer ordered both occupants out of the vehicle and, after finding a Glock semi-automatic handgun under the seat, placed Allred under arrest.

Because he was a convicted felon, Allred was charged in the Middle District of North Carolina with one count of possession of a firearm after a felony conviction in violation of 18 U.S.C. § 922(g)(1). A jury found him guilty on February 16, 1995.

Typically, a conviction under § 922(g) carries a statutory maximum sentence of ten years in prison. See 18 U.S.C. § 924(a)(2). But if the defendant is considered an armed career criminal under the ACCA, then he is subject to a mandatory minimum sentence of fifteen years with a maximum of life imprisonment. 18 U.S.C. § 924(e)(1); see also *United States v. Vann*, 660 F.3d 771, 772 (4th Cir. 2011) (en banc) (per curiam). A defendant is an armed career criminal if he has three predicate convictions for either a "violent felony or a serious drug offense." *Id.* Allred's pre-sentence report listed three such predicate convictions: (1) a 1986 North Carolina state conviction for felony assault with a deadly weapon with intent to kill inflicting serious injury, (2) a 1990 North Carolina state conviction for felony possession with intent to sell and deliver cocaine, and (3) a 1990 federal conviction for retaliating against a witness in violation of 18 U.S.C. § 1513(b)(1).[*] Consequently, the district court found Allred to be an armed career criminal and sentenced him to 264 months in prison.

[*] Allred was actually found guilty of violating 18 U.S.C. § 1513(a)(1), but since his conviction that provision has been moved to § 1513(b)(1). Congress made no changes to the provision other than renumbering. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 60017, 108 Stat. 1796, 1975. Thus, for ease of understanding, we will refer to Allred's conviction as being under § 1513(b)(1). Doing so has no effect on the substantive analysis because the text of the provision is exactly the same.

At the time of Allred's sentence, ACCA defined a "violent felony" as "any crime punishable by imprisonment for a term exceeding one year" that either (1) "has as an element the use, attempted use, or threatened use of physical force against the person of another," (2) "is burglary, arson, or extortion, [or] involves [the] use of explosives," or (3) "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). These three provisions are often referred to as (1) the "force clause," also known as the "elements clause;" (2) the "enumerated clause;" and (3) the "residual clause," respectively. See *Stokeling v. United States*, 139 S. Ct. 544, 556 (2019). In *Samuel Johnson v. United States*, the Supreme Court held that the residual clause was unconstitutionally vague. 135 S. Ct. 2551, 2563 (2015). As a result, "the elements clause and the enumerated clause are now the only channels by which a prior conviction can qualify as an ACCA 'violent felony.'" *Stokeling*, 139 S. Ct. at 556.

The Supreme Court applied *Samuel Johnson* retroactively to cases on collateral review in *Welch v. United States*, 136 S. Ct. 1257 (2016). Allred thereafter filed a motion pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. Because Allred had already filed a § 2255 motion, he needed this court's authorization to file a second or successive motion. Finding that he had "made a prima facie showing that the new rule of constitutional law announced in [*Samuel Johnson*] . . . may apply to his case," we granted Allred the requisite authorization on May 5, 2016, thus permitting consideration of his motion by the district court. J.A. 68-69.

Allred's claim for relief focused solely on his federal conviction for witness retaliation under 18 U.S.C. § 1513(b)(1). In pertinent part, § 1513(b)(1) makes it a felony

punishable by up to ten years in prison to "knowingly engage[] in any conduct and thereby cause[] bodily injury to another person or damage[] the tangible property of another person, or threaten[] to do so, with intent to retaliate against any person for" being a witness or party in certain official proceedings. 18 U.S.C. § 1513(b)(1). For the purposes of § 1513, "bodily injury" is defined as "(A) a cut, abrasion, bruise, burn, or disfigurement; (B) physical pain; (C) illness; (D) impairment of the function of a bodily member, organ, or mental faculty; or (E) any other injury to the body, no matter how temporary." 18 U.S.C. § 1515(a)(5).

The basis for Allred's § 2255 motion was that his conviction under § 1513(b)(1) no longer qualifies as a "violent felony" for ACCA purposes. Preliminarily, he argued that federal witness retaliation does not fall within the ambit of either the force or enumerated clauses. And because the government could no longer rely on the residual clause after *Samuel Johnson*, he concluded that it simply cannot count as a predicate offense under ACCA. Thus, Allred maintained that he has only two predicate convictions and was not properly subject to the ACCA sentence enhancement.

In response to Allred's motion, the government conceded that a conviction pursuant to § 1513(b)(1) cannot qualify as an ACCA predicate under the enumerated clause or the residual clause. But it nevertheless maintained that Allred's sentence was valid because his § 1513(b)(1) offense is a violent felony under the force clause.

The district court agreed with Allred. It held that Allred's conviction for witness retaliation was not a violent felony under the force clause. As a result, the court granted

Allred's requested relief and resentenced him to 120 months in prison with credit for time served.

The government appealed, challenging the district court's conclusion that witness retaliation under § 1513(b) is not a violent felony under the force clause.

II.

We begin by laying out the framework that governs our analysis of predicate offenses under ACCA. Whether an offense constitutes a "violent felony" and thus qualifies as a predicate conviction for purposes of ACCA is a question of law that we review de novo. *United States v. Cornette*, 932 F.3d 204, 207 (4th Cir. 2019).

At the outset, we must determine which of the two modes of analysis the Supreme Court has approved in this context applies to the instant case. Specifically, we must choose between the "categorical approach" and the "modified categorical approach." See *United States v. Hemingway*, 734 F.3d 323, 327 (4th Cir. 2013).

Where the criminal statute at issue is indivisible, that is it "sets out a single . . . set of elements to define a single crime," we are bound to apply the categorical approach. *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016); see also *United States v. Winston*, 850 F.3d 677, 683 & n.5 (4th Cir. 2017). In that mode of analysis, we focus "only [on] the elements of the . . . offense and the fact of conviction, not [on] the defendant's conduct." *United States v. Doctor*, 842 F.3d 306, 308 (4th Cir. 2016). To qualify as a predicate offense under the categorical approach and ACCA's force clause, the offense itself "necessarily must have as an element the 'use, attempted use, or threatened use of physical

force against the person of another.'" *United States v. Gardner*, 823 F.3d 793, 803 (4th Cir. 2016) (quoting 18 U.S.C. § 924(e)(2)(B)(i)).

In making that determination, we counterintuitively ignore whether the defendant's actual conduct involved such a use of force. *Doctor*, 842 F.3d at 308. Instead, we ask whether "the most innocent conduct that the law criminalizes" requires proof of the use, attempted use, or threatened use of force sufficient to satisfy the force clause. *United States v. Drummond*, 925 F.3d 681, 689 (4th Cir. 2019). If so, then the offense categorically qualifies as a violent felony; if not, then the opposite holds true. See *id.* at 689-91. Importantly, in undertaking this inquiry, "there must be a realistic probability, not a theoretical possibility," that the minimum conduct would actually be punished under the statute. *Id.* at 689 (quoting *Doctor*, 842 F.3d at 308); see also *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013) (noting that "our focus on the minimum conduct criminalized by the . . . statute is not an invitation to apply 'legal imagination'" to the offense).

Alternatively, the modified categorical approach applies where the prior conviction at issue is for violation of a "divisible" statute. *Descamps v. United States*, 570 U.S. 254, 257 (2013). A divisible statute is one that "includes multiple 'alternative elements' that create different versions of the crime, at least one of which would qualify under the [force clause] and at least one of which would not." *Gardner*, 823 F.3d at 802. Where the statute of conviction lists potential elements in the alternative, it "renders opaque which element played a part in the defendant's conviction." *Descamps*, 570 U.S. at 260. Thus, under the modified categorical approach, the sentencing court is permitted to consult a limited set of record documents (such as the indictment, jury instructions, or plea agreement) for the sole

purpose of determining "what crime, with what elements, a defendant was convicted of." *Mathis*, 136 S. Ct. at 2249.

Two final points about the modified categorical approach bear noting. First, the approach "serves a limited function," namely to "help[] effectuate the categorical analysis" when the sentencing court is faced with a divisible statute. *Descamps*, 570 U.S. at 260. In other words, once the court has consulted the record and isolated the specific crime underlying the defendant's conviction, it must then apply the categorical approach to that crime to determine if it constitutes a violent felony. See *Chambers v. United States*, 555 U.S. 122, 127-29 (2009). It is still not permitted to consider the actual facts of the defendant's conviction to determine if they meet the requirements of the force clause.

Second, a statute is divisible only if it sets forth alternative *elements* and in doing so effectively creates "distinct crimes." *Gardner*, 823 F.3d at 802. If, on the other hand, the statute merely lists alternative *means* of committing a single offense, then it is indivisible and the categorical approach applies. *Id.*; see also *Mathis*, 136 S. Ct. at 2247-48, 2256-57. Elements, as contrasted with means, are the "constituent parts of a crime's legal definition" that the "prosecution must prove to sustain a conviction" and which "the jury must find beyond a reasonable doubt to convict the defendant." *Mathis*, 136 S. Ct. at 2248 (internal quotation marks omitted).

III.

A.

We begin by asking whether the categorical or modified categorical approach applies to Allred's conviction under § 1513(b)(1). As a threshold matter, all parties

acknowledge that § 1513(b)(1) is an alternatively phrased statute. It prohibits "caus[ing] bodily injury to another person *or* damag[ing] the tangible property of another person, *or* threaten[ing] to do so." 18 U.S.C. § 1513(b)(1) (emphasis added). When faced with an alternatively phrased statute, "[t]he first task" is "to determine whether its listed items are elements," thus rendering the statute divisible, "or means," thus rendering it indivisible. *Mathis v. United States*, 136 S. Ct. 2243, 2256 (2016). Whether § 1513(b)(1) is divisible appears to be a question of first impression among the federal courts of appeals. See *United States v. Green*, 717 F. App'x 495, 496 (5th Cir. 2018) (noting as much).

Allred argues that the statute is indivisible so the categorical approach should govern. In other words, he contends that "causes bodily injury" and "damages . . . tangible property" are simply alternative means by which the government may prove a single offense. On Allred's view, since the categorical approach applies, his conviction for witness retaliation cannot constitute a violent felony under ACCA's force clause. If the statute were indivisible, the argument goes, it would permit conviction upon a showing that the defendant's conduct caused only property damage, and thus would not categorically have "as an element the use, attempted use, or threatened use of physical force *against the person of another*" required by the force clause. 18 U.S.C. § 924(e)(2)(B)(i) (emphasis added).

For its part, the government concedes that if the categorical approach applies then Allred's conviction under § 1513(b)(1) is not an ACCA predicate. See *United States v. Bowen*, 936 F.3d 1091, 1112-14 & n.5 (10th Cir. 2019). But it maintains that § 1513(b)(1) is divisible such that we should apply the modified categorical approach. On this view,

causing bodily injury and damaging tangible property are alternative elements of two different crimes. See *Descamps v. United States*, 570 U.S. 254, 263-64 (2013).

We think the government's position is correct. Section 1513(b)(1) easily divides into four separate general offenses: (1) engaging in conduct that causes bodily injury, (2) threatening to engage in conduct that causes bodily injury, (3) engaging in conduct that damages tangible property, and (4) threatening to engage in conduct that damages tangible property. Both the statute's plain text and other typical indicia of divisibility make this conclusion inescapable.

We start with the text. As the Supreme Court has observed, "the statute on its face may resolve the issue" of divisibility. *Mathis*, 136 S. Ct. at 2256. To begin with, § 1513(b) sets forth a disjunctive list of harms that constitute the prohibited conduct underlying the offense, namely "caus[ing] bodily injury" or "damag[ing] . . . tangible property." 18 U.S.C. § 1513(b). When a criminal statute is phrased disjunctively it serves as a signal that it may well be divisible. See *United States v. Cornette*, 932 F.3d 204, 211-12 (4th Cir. 2019). Of course, the use of disjunctive language may not invariably answer the divisibility question, as the listed terms could simply be alternative means rather than alternative elements. *Id.* Thus, we may parse the terms themselves to determine which they represent.

In *Chambers v. United States*, the Supreme Court explained that "[t]he nature of the behavior that likely underlies a statutory phrase matters" to the divisibility analysis. 555 U.S. 122, 126 (2009). Where the behavior underlying one statutory phrase "differs so significantly from the behavior underlying" another, "for ACCA purposes a sentencing court must treat the two as different crimes." *Id.*; see also *United States v. Rivers*, 595 F.3d

558, 564 (4th Cir. 2010) ("[A]fter *Chambers*, the modified categorical approach most naturally applies to statutes which proscribe *different types of behavior*") (emphasis added).

For an example of a statute that was divisible because it criminalized two different types of behavior, the *Chambers* Court considered its previous holding in *Shepard v. United States*, 544 U.S. 13 (2005). *Shepard* involved a Massachusetts burglary statute that "placed within a single, separately numbered statutory section," *Chambers*, 555 U.S. at 126, the burglary of a "building, ship, vessel or vehicle," *id.* (quoting Mass. Gen. Laws Ann., ch. 266, § 16 (West 2008)). The Court found this statute to be divisible because the behavior underlying breaking and entering each of the listed premises "differ[ed] so significantly" from one to the other. *Id.* (citing *Shepard*, 544 U.S. at 16-17). Likewise, in *United States v. Vinson*, we relied on *Chambers* to hold that a North Carolina assault statute was divisible because assault could be proven by "an attempted use of force; a show of violence without even an attempted use of force; and a completed, nonconsensual use of force." 794 F.3d 418, 425 (4th Cir. 2015). Since "each formulation of the crime involves a different type of conduct," we concluded that they "should be treated as separate crimes warranting the use of the modified categorical approach." *Id.*

Applying *Chambers* to the instant case, we have no trouble in concluding that § 1513(b) sets forth alternative elements and thus creates separate crimes. Put simply, the behavior typically underlying the causation of bodily injury "differs so significantly" from that underlying damage to property that those statutory phrases cannot plausibly be considered alternative means. *Chambers*, 555 U.S. at 126. The former is concerned with conduct threatening bodily integrity and safety, while the latter deals only with damage to

physical possessions. Congress's decision to employ different verbs to characterize each of the proscribed harms (i.e., "*causes*" bodily injury versus "*damages*" tangible property) bolsters this conclusion. In sum, "the radically distinct natures of the above two proscribed acts require that they be treated as different crimes for ACCA purposes." *United States v. Vann*, 660 F.3d 771, 800 (4th Cir. 2011) (en banc) (Keenan, J., concurring).

In addition to the text of the statute at issue, we may consult extrinsic sources to reach a conclusion with respect to divisibility. For example, because elements are those "factual circumstances of the offense that the jury must find unanimously and beyond a reasonable doubt," we "may consider how courts generally instruct juries with respect to that offense." *United States v. Gardner*, 823 F.3d 793, 802 (4th Cir. 2016) (internal quotations omitted); see also *United States v. Royal*, 731 F.3d 333, 341 (4th Cir. 2013). Virtually all of the model jury instructions we have found for § 1513(b) plainly contemplate that the jury be instructed regarding either bodily injury or damaging tangible property, not both. See Third Circuit Model Criminal Jury Instructions, 6.18.1513B (2014); Eighth Circuit Model Criminal Jury Instructions, 6.18.1513 (2017). And the few historical jury instructions that appear in the caselaw are likewise focused solely on one of the two variants. See, *e.g.*, *United States v. Cummiskey*, 728 F.2d 200, 207 (3d Cir. 1984) (approving jury instructions where the district court "charged that the jury must find whether 'these defendants actually engaged in conduct which threatened to cause bodily injury.'").

Beyond jury instructions, we also consider how the offense has historically been charged. *United States v. Marshall*, 747 F. App'x 139, 150 (4th Cir. 2018). As the

Supreme Court noted in *Descamps*, "[a] prosecutor charging a violation of a divisible statute must generally select the relevant element from its list of alternatives." 570 U.S. at 272 (citing *The Confiscation Cases*, 87 U.S. (20 Wall.) 92, 104 (1874)). Thus, "when a charging document reiterates all the terms of [the statute], that is an indication that each alternative is only a possible means of commission." *United States v. Jones*, 914 F.3d 893, 901 n.8 (4th Cir. 2019) (internal quotation marks and alteration omitted). On the other hand, if federal prosecutors typically select and charge only one of the statutory alternatives in § 1513(b), that suggests those alternatives are elements rather than means.

The government claims it does just that, specifically that it "often charges defendants with the bodily injury offense alone." Gov't Br. at 12. Allred does not seriously contest this assertion, and a review of both caselaw and historical indictments reveals its accuracy. See, *e.g.*, *United States v. Bullock*, 603 F. App'x 157, 160 (4th Cir. 2015) (indictment alleged that defendant "cause[d] bodily injury to another person" in violation of § 1513(b)(1)); *United States v. Smith*, 230 F.3d 300, 305 (7th Cir. 2000) (same); see also Superseding Indictment at 1, *United States v. Pettaway*, No. 09-cr-17 (E.D. Va. Jan. 13, 2010) (charging defendant with "knowingly threaten[ing] to cause death or bodily injury to" the victim)).

Finally, in previous cases, we have specifically articulated the elements of a § 1513(b)(1) offense in a manner that demonstrates the bodily injury and property damage variants are "fully functioning, stand-alone, alternative definitions of the offense itself," *Vinson*, 794 F.3d at 426 (emphasis omitted), rather than merely alternative means by which a single offense can be committed, see, *e.g.*, *United States v. Cofield*, 11 F.3d 413, 419 (4th

Cir. 1993) (listing "[t]he elements of an offense under 18 U.S.C. § 1513" as "(1) knowing engagement in conduct (2) either causing, or threatening to cause, bodily injury to another person (3) with the intent to retaliate for, *inter alia*, the attendance or testimony of a witness at an official proceeding."). Many of our sister circuits have done the same. See, *e.g.*, *United States v. Henderson*, 626 F.3d 326, 342 (6th Cir. 2010) ("The elements of an offense under 18 U.S.C. § 1513 are (1) knowing engagement in conduct (2) either causing, or threatening to cause, bodily injury to another person (3) with the intent to retaliate for, *inter alia,* the attendance or testimony of a witness at an official proceeding."); *United States v. Wardell*, 591 F.3d 1279, 1291 (10th Cir. 2009) (same).

And if all that were not enough, the indictment charging Allred himself with witness retaliation confirms beyond doubt that the statute is divisible. In *Mathis*, the Supreme Court authorized us to take a "peek" at the record documents "for the sole and limited purpose of determining whether [the listed statutory alternatives are] element[s] of the offense." *Mathis*, 136 S. Ct. at 2256-57 (internal quotation marks omitted). Specifically, if the indictment "referenc[es] one alternative term to the exclusion of all others," that "indicate[s]" that "the statute contains a list of elements, each one of which goes towards a separate crime." *Id.* at 2257. Allred's indictment does exactly that; it charged him with "knowingly engag[ing] in conduct and thereby caus[ing] bodily injury to Monica Michelle Warner, with intent to retaliate against Monica Michelle Warner for attendance as a witness and testimony given in an official proceeding." J.A. 16. The fact that only the bodily injury variant was charged in Allred's indictment indicates it is an alternative element comprising a wholly separate crime from the property damage variant.

Because § 1513(b)(1) sets forth alternative elements by which witness retaliation may be committed and is thus divisible, we must apply the modified categorical approach to determine which of the alternative crimes formed the basis for Allred's conviction. See *Descamps*, 570 U.S. at 257. To do so, we once again look to Allred's indictment. *Mathis*, 136 S. Ct. at 2249. As discussed above, this plainly reveals that Allred was charged with violating the variant of § 1513(b)(1) that criminalizes knowing engagement in conduct that causes bodily injury. See J.A. 16.

B.

Having determined that Allred was found guilty of the bodily injury variant of § 1513(b)(1), the final question we must confront is whether that conviction categorically qualifies as a crime of violence under ACCA's force clause. We hold that it does.

As previously discussed, a prior felony offense that does not match any of the crimes in the enumerated clause qualifies as a "violent felony" for purposes of ACCA only if it meets the requirements of the force clause. *Stokeling v. United States*, 139 S. Ct. 544, 556 (2019). In other words, it must have "as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i).

The Supreme Court has expounded on the force clause's definition of violent felony in two ways that are pertinent to this case. First, the term "physical force" has been interpreted to mean "*violent* force," that is, "force capable of causing physical pain or injury to another person." *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010). A mere "offensive touching," of the sort sufficient to sustain a prosecution for battery at common law, does not amount to "violent force" under the force clause. *Id.* at 139-40. Second, the

term "use" has been interpreted to require "a higher degree of intent than negligent or merely accidental conduct." *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004); see also *United States v. McNeal*, 818 F.3d 141, 154-55 (4th Cir. 2016) (noting that while the Supreme Court "reserved the question of whether a reckless application of force could qualify as a 'use' of force, [this court] answered that question . . . by ruling recklessness was not enough."). Thus, an offense will not have as an element the "use" of force sufficient to qualify as a violent felony if it does not have the requisite level of mens rea.

In *United States v. Castleman*, 572 U.S. 157 (2014), the Supreme Court considered whether the defendant's prior state law conviction for having "intentionally or knowingly cause[d] bodily injury to" the mother of his child qualified as "a misdemeanor crime of domestic violence" ("MCDV") under 18 U.S.C. § 922(g)(9). *Id.* at 159. Much like under the ACCA force clause, to qualify as a MCDV, the defendant's predicate offense must have, *inter alia*, "as an element, the use or attempted use of physical force." *Id.* at 161 (quoting 18 U.S.C. § 921(a)(33)(A)). In holding that Castleman's state law conviction counted as an MCDV, the Supreme Court announced several principles applicable to this case.

First, the *Castleman* Court firmly concluded that the term "use . . . of physical force" includes both direct and indirect applications of force. *Castleman*, 572 U.S. at 170-71. Second, the Court recognized that "the knowing or intentional causation of bodily injury *necessarily* involves the use of physical force." *Id.* at 169 (emphasis added). But because the Court held that the MCDV force clause could be satisfied by a "mere offensive touching," *id.* at 167, it left open the question whether every knowing or intentional

causation of bodily injury necessarily involves the use of "violent force" sufficient to constitute a violent felony under ACCA, *id.* at 170; see also *United States v. Reid*, 861 F.3d 523, 528 (4th Cir. 2017) (noting that *Castleman* "expressly reserved the question of whether the causation of 'bodily injury' . . . would 'necessitate violent force under [*Curtis*] *Johnson*'s definition of that phrase' in ACCA." (quoting *Castleman*, 572 U.S. at 170)).

With the teachings of *Castleman* in mind, we now analyze the argument made by Allred that his conviction under § 1513(b)(1) does not constitute a violent felony under ACCA's force clause. Preliminarily, to the extent that Allred continues to rely on a distinction between direct and indirect force, see *United States v. Torres-Miguel*, 701 F.3d 165, 168-69 (4th Cir. 2012), such arguments must be rejected. See *United States v. Covington*, 880 F.3d 129, 134 (4th Cir. 2018) ("[T]his Court has confirmed and reaffirmed in several decisions that the direct versus indirect use of force distinction articulated in *Torres-Miguel* has been abrogated by *Castleman*."). In *Reid*, we concluded that "ACCA's phrase 'use of physical force' includes force applied directly or indirectly." 861 F.3d at 529. Thus, it is of no moment whether a conviction for witness retaliation causing bodily injury under § 1513(b)(1) could be accomplished using only indirect force, as indirect force counts as "physical force" under ACCA.

*Castleman* did not, however, "abrogate the causation aspect of *Torres-Miguel* that a crime may *result* in death or serious injury without involving the *use* of physical force." *Covington*, 880 F.3d at 134 n.4 (internal quotation marks omitted). This part of *Torres-Miguel* dealt with the requirement that a crime include a heightened mens rea in order to involve the "use" of physical force. *Castleman* did nothing to disturb this portion of force

clause jurisprudence. If anything, *Castleman* reemphasized the importance of mens rea requirements in determining whether a given offense involves the "use" of physical force. See, *e.g.*, *Castleman*, 572 U.S. at 169 (holding that "the *knowing or intentional* causation of bodily injury necessarily involves the use of physical force.") (emphasis added); *id.* (noting that "the merely reckless causation of bodily injury" under a related state statute "may not be a 'use' of force."); see also *United States v. Battle*, 927 F.3d 160, 166 (4th Cir. 2019) ("*Castleman* teaches us that the requisite mens rea is crucial in the force analysis.").

The logic of *Torres-Miguel* and later of *United States v. Middleton*, 883 F.3d 485 (4th Cir. 2018), thus extends to those offenses that can be committed innocently, negligently, or recklessly. See *Battle*, 927 F.3d at 166 (noting that those cases "appl[y] only where a crime does not have as an element the intentional causation of death or injury."); *United States v. Shepard*, 741 F. App'x 970, 972 (4th Cir. 2018) ("*Middleton* stands for the proposition that *unintentionally* causing physical force to harm someone is not necessarily 'a use of violent physical force against the person of another.'") (emphasis added). For example, in *Middleton* itself, we held that a conviction for involuntary manslaughter under South Carolina law did not categorically qualify as a violent felony because it could be committed with "*reckless* disregard for the safety of other[s], which falls short of *knowingly* causing harm." 883 F.3d at 492 (internal quotation marks omitted).

The offense at issue here is very different. Although there is no mens rea specified for the element of causation, the statute contains not one, but *two* heightened mens rea requirements. Specifically, to find Allred guilty, the jury was required to agree that he

"*knowingly* engage[d]" in conduct with the specific "*intent* to retaliate against" a witness and thereby "cause[d] bodily injury" to another person. 18 U.S.C. § 1513(b)(1) (emphasis added). We find it difficult to imagine a realistic scenario in which a defendant would knowingly engage in conduct with the specific intent to retaliate against a witness and thereby only recklessly or negligently cause bodily injury. And any imaginative hypothetical that could conceivably illustrate this scenario would present no "realistic probability" of prosecutable misconduct under § 1513(b)(1). *United States v. Drummond*, 925 F.3d 681, 689 (4th Cir. 2019) (quoting *Doctor*, 842 F.3d at 308). Indeed, the parties have not pointed to any case in which a defendant was prosecuted under § 1513(b)(1) for reckless or negligent causation of bodily injury.

Intentional retaliation causing bodily injury thus necessitates the use of violent force under *Curtis Johnson*'s definition of that phrase. By analogy, a statute that has as an element the intentional or knowing causation of bodily injury categorically requires the use of "force capable of causing physical pain or injury to another person." *Curtis Johnson*, 559 U.S. at 140; see also *Castleman*, 572 U.S. at 174 (Scalia, J., concurring in part and concurring in the judgment) ("[I]t is impossible to cause bodily injury without using force 'capable of' producing that result."). Our precedents have stated as much. See, *e.g.*, *Battle*, 927 F.3d at 166 ("[A] crime requiring the 'intentional causation' of injury requires the use of physical force" within the meaning of ACCA); *Covington*, 880 F.3d at 133-34. And numerous sister circuits have held the same. See, *e.g.*, *United States v. Jennings*, 860 F.3d 450, 457 (7th Cir. 2017) (noting that "any number of forceful acts beyond simple touching may . . . inflict bodily harm upon a victim" and concluding that "[s]uch acts qualify as

violent force in the sense that they have the capacity to inflict physical pain."); *United States v. Winston*, 845 F.3d 876, 878 (8th Cir. 2017) (rejecting a defendant's "effort to show daylight between physical injury and physical force"); see also *United States v. Ontiveros*, 875 F.3d 533, 538 (10th Cir. 2017) (same).

The statute at issue here, 18 U.S.C. § 1513(b)(1), emphasizes intentionality throughout, not inadvertence, negligence, or recklessness. And the whole point of a defendant's intentional misconduct was to retaliate against someone for his or her participation as "a witness or party at an official proceeding." 18 U.S.C. § 1513(b)(1). And the bodily harm, consequent to such knowing conduct, was most certainly not of the trivial or nominal sort. See 18 U.S.C. § 1515(a) (defining the term "bodily injury" for the purposes of § 1513 as involving, *e.g.*, "disfigurement," "physical pain," or "impairment of the function of a bodily member [or] organ."). For in realistic terms, one would hardly go to the trouble of knowingly retaliating in such a manner that causes serious bodily injury to another without knowing or intending to inflict upon that person far more than a mere touch or scratch. See *Reid*, 861 F.3d at 529 (holding that a statute requiring "that the defendant 'knowingly and willfully inflict bodily injury' on the victim . . . falls within ACCA's definition of a violent felony"); see also *United States v. Burns-Johnson*, 864 F.3d 313, 318 (4th Cir. 2017) (same); *In re Irby*, 858 F.3d 231, 236 (4th Cir. 2017) (same).

In light of the foregoing, Allred's conviction under § 1513(b)(1), which requires knowing conduct that causes bodily injury to another, categorically involves the "use" of "violent force" sufficient to bring it within ACCA's elements clause.

IV.

Because the district court held otherwise, we reverse its judgment and remand the case for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

FILED: November 7, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 18-6843
(2:94-cr-00175-WO-1)
(1:16-cv-00611-WO-JLW)

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UNITED STATES OF AMERICA

Plaintiff - Appellant

v.

JIMMY LEE ALLRED

Defendant - Appellee

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J U D G M E N T

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In accordance with the decision of this court, the judgment of the district court is reversed. This case is remanded to the district court for further proceedings consistent with the court's decision.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

| | | |
|---|---|---|
| JIMMY LEE ALLRED, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | 1:16CV611 |
| v. | ) | 2:94CR175-1 |
| | ) | |
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Respondent. | ) | |

**MEMORANDUM OPINION AND ORDER**

**OSTEEN, JR., District Judge**

Petitioner Jimmy Lee Allred, a federal prisoner, brings a Motion (Doc. 120) and Amended Motion (Doc. 125) to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. In 1990, a jury in this court convicted Petitioner of felony retaliating against a witness in violation of 18 U.S.C. § 1513(a). Petitioner served his sentence for that conviction but, four years later, a jury in this court convicted Petitioner of one count of possession of a firearm after a felony conviction in violation of 18 U.S.C. § 922(g)(1). He then received a sentence of 264 months of imprisonment under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e).

Petitioner's Presentence Report (Doc. 116) reflects the bases for the ACCA enhancement were (1) a prior North Carolina conviction for felony assault with a deadly weapon with intent

to kill inflicting serious injury (id. ¶ 24), (2) a prior North Carolina conviction for felony possession with intent to sell and deliver cocaine (id. ¶ 28), and (3) the prior conviction in this court for felony retaliating against a witness (id. ¶ 30).

Petitioner unsuccessfully sought relief through a direct appeal and two prior motions (Doc. 59, 92) under § 2255 before filing a motion with the United States Court of Appeals for the Fourth Circuit seeking authorization to file a second or successive § 2255 motion under 18 U.S.C. §§ 2244 and 2255(h). In that filing, he claimed that his sentence under the ACCA is longer valid following Johnson v. United States, 576 U.S. ____, 135 S. Ct. 2551 (2015). The Fourth Circuit granted the authorization based on Petitioner having made a prima facie showing that Johnson might affect his case.

Following the Fourth Circuit's authorization, Petitioner filed a paper-writing which the court construed as his current motion (Doc. 120) under § 2255. In that filing, he states that he seeks to raise a claim that his "prior conviction for witness retaliation is under a broad statute that punishes one for force against property as well as persons" and that "under Descamps v. United States [570 U.S. 254 (2013)], the statute is not divisible and, therefore, no longer a crime of violence in light of Johnson." (Doc. 120 at 1.) "Specifically, [the statute] leaves open the possibility [Petitioner] was convicted for

retaliating by damaging the victim[']s property rather than [her] person." (Id.) The court later docketed an Amended Motion (Doc. 125) which it received from the Fourth Circuit. The Amended Motion, which Petitioner originally submitted to the Fourth Circuit as part of his motion seeking authorization to file his successive § 2255 Motion, raises a single claim for relief which states only that Petitioner was sentenced under the ACCA based in part on a prior conviction under what was then 18 U.S.C. § 1513(a)(1), which stated that "[w]hoever knowingly engages in any conduct and thereby causes bodily injury to another person or damages the tangible property of another person, or threatens to do so, with intent to retaliate against any person for" being a witness, party, or informant in federal proceedings may be fined and imprisoned for up to ten years.[1] (Doc. 125 at 4.)[2] Petitioner does not explicitly identify any problem with this predicate conviction in the portion of the Amended Motion listing grounds for relief. However, considering Petitioner's pleadings as a whole, Petitioner sets out a single

[1] Congress later recodified the provision as 18 U.S.C. § 1513(b)(1), but the quoted portion of the statute remained unchanged.

[2] All citations in this Memorandum Opinion and Order to documents filed with the court refer to the page numbers located at the bottom right-hand corner of the documents as they appear on CM/ECF.

ground for relief alleging that his conviction for retaliating against a witness is not a violent felony, and therefore not a valid ACCA predicate following Johnson.

Under the ACCA, 18 U.S.C. § 924(e)(1), a defendant is subject to enhanced sentencing penalties if he has three prior convictions for a "violent felony or a serious drug offense, or both, committed on occasions different from one another . . . . " A crime is a serious drug offense for purposes of 18 U.S.C. § 924(e) if it is one "involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance" and is a crime "for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. § 924(e)(2)(A))(ii). Before Johnson, a crime was a "violent felony" if it is punishable by imprisonment of more than a year and "has as an element the use, attempted use, or threatened use of physical force against the person of another" (hereinafter "force clause"), "is burglary, arson, or extortion" (hereinafter "enumerated offenses clause"), or involves the use of explosives, or "otherwise involves conduct that presents a serious potential risk of physical injury to another" (hereinafter "residual clause"). § 924(e)(1)(B)(i) and (ii). However, Johnson invalidated as unconstitutionally vague the residual clause of the statute. Johnson, 135 S. Ct. at 2563. The remainder of the ACCA stayed intact. Petitioner contends that

the challenged retaliation predicate was applied in his case under the stricken residual clause, that § 1513(a)(1) is an indivisible statute which allows for convictions based on harm to property or threats to harm property, and, therefore, that it cannot now apply in his case under the force clause of the ACCA.[3] Therefore, if he is correct, his retaliation conviction is not a proper ACCA predicate and he now has only two of three predicates necessary to support his enhanced sentence.

Respondent responded that 18 U.S.C. § 1513(a)(1) is, in its view, a divisible statute to which the court can apply the modified categorical approach described in Shepard v. United States, 544 U.S. 13 (2005), and Mathis v. United States, ____ U.S. ____, 136 S. Ct. 2243 (2016). This approach allows the court to use the indictment in the retaliation case to determine whether the portion of the statute under which Petitioner was convicted is a violent felony under the ACCA. Because that indictment alleges that Petitioner caused bodily injury to the witness against whom he retaliated, Respondent asserts that Petitioner was convicted only under the portion of the statute relating to bodily injury. It also maintains that this portion of the statute satisfies the force clause of the ACCA in that it "has as an element the use, attempted use, or threatened use of

[3] There is no question that Petitioner's retaliation conviction does not satisfy the enumerated offenses clause.

physical force against the person of another." 18 U.S.C. § 924(e)(2)(B). Therefore, Respondent concludes that Petitioner's prior conviction under § 1513(a)(1) remains a violent felony under the ACCA. Respondent does not contest Petitioner's argument that he prevails if the statute is not divisible.

Petitioner maintained in his Reply (Doc. 141) that he still prevails if the court uses the modified categorical approach espoused by the Government because even the bodily injury portion of § 1513(a)(1) allows for convictions based on conduct deemed not to be a use of physical force for purposes of the ACCA. The court thereafter ordered further briefing on this issue in light of United States v. Middleton, 883 F.3d 485 (4th Cir. 2018), which was decided after the filing of Petitioner's Reply. Both parties then filed supplemental briefs maintaining their respective positions following Middleton. (Docs. 147, 148.) The Government continues to assert that the statute is not divisible and that the bodily injury portion of the statute requires sufficient use of physical force. Petitioner insists that the statute is not divisible and that, even if it is, the bodily injury portion does not require a sufficient use of physical force.

Regarding the divisibility of § 1513(a)(1), the parties agree that Petitioner is entitled to relief if the statute is not divisible. Therefore, the court need not make a final

decision on divisibility unless the Government prevails on the question of whether the bodily injury portion of the statute requires the use of physical force.

Assuming purely for the purposes of discussion that the § 1513(a)(1) is divisible as discussed in Mathis, the statute sets out four alternative crimes based on four distinct harms - bodily injury, a threat of bodily injury, damage to tangible property, and a threat of damage to tangible property. Two of these harms, damage to tangible property and a threat of damage to tangible property, cannot possibly support an ACCA predicate under the force clause because they very clearly do not involve the "use, attempted use, or threatened use of physical force against the person of another." However, as an exhibit to its Response (Doc. 139), the Government provided the indictment from Petitioner's prosecution for retaliating against a witness. (Id., Attach. 1.) The indictment alleged that Petitioner "knowingly engaged in conduct and thereby caused bodily injury to Monica Michelle Warner, with intent to retaliate against Monica Michelle Warner for attendance as a witness and testimony given in an official proceeding of the United States District Court for the Middle District of North Carolina." (Id.) Based on that document, which the court may review as part of applying the modified categorical approach under Shepard, the Government asserts that Petitioner's conviction was clearly based on bodily

injury to a witness and not on any type of property damage. Petitioner does not deny this or claim that his conviction fell under any other portion of the statute. Therefore, the court finds that this was indeed the basis for his prior conviction for retaliating against a witness in this court.

The conclusion that Petitioner's prior conviction involved the portion of § 1513(a)(1) prohibiting retaliation that causes bodily injury to a witness does not end matters. This is because the court, having defined the nature of Petitioner's conviction, must still determine whether that "offense 'sweeps more broadly' than the ACCA's definition of a violent felony." Middleton, 883 F.3d at 488 (citing Descamps v. United States, 570 U.S. 254, 261 (2013)). If so, "the offense does not qualify as an ACCA predicate." Id.

As set out in Middleton,

> The ACCA's force clause requires "the use, attempted use, or threatened use of physical force against the person of another." [18 U.S.C. § 924(e)(2)(B)(ii)] (emphasis added). Congress did not define the term "physical force." Johnson v. United States, 559 U.S. 133, 138(2010) (hereinafter "Johnson I"). But the Supreme Court gave the phrase its ordinary meaning: "force exerted by and through concrete bodies" as opposed to "intellectual force or emotional force." Id. In Johnson I, the Court further explained that "because the term 'physical force' contributes to the definition of a 'violent felony,' it is understood to mean 'violent force — that is, force capable of causing physical pain or injury to another person.'" United States v. Reid, 861 F.3d 523, 527 (4th Cir. 2017) (quoting Johnson I, 559 U.S. at 140). Therefore, "physical force" under the ACCA's

> force clause must be both physical (exerted through concrete bodies) and violent (capable of causing pain or injury to another). De minimus physical force, such as mere offensive touching, is insufficient to trigger the ACCA's force clause because it is not violent.

Id. at 488-89 (parallel citations deleted). Further, the fact that a physical injury occurs does not mean that a defendant used violent force. "'[A] crime may result in death or serious injury without involving the use of physical force.'" Id. at 491 (quoting United States v. Covington, 880 F.3d 129, 134 n.4 (4th Cir. 2018)).[4] The causation of bodily injury does not necessarily equal a use of violent force sufficient to satisfy the force clause. Instead, the predicate conviction in question must require a defendant to actually use such force.

Turning first to the plain language of § 1513(b), it states only that "[w]hoever knowingly engages in any conduct and thereby causes bodily injury to another person . . . with intent to retaliate against any person" for being a witness or informant is guilty of a felony. Looking purely at the face of the statute, it does not require the use of violent force or any level of force, only "any conduct," which causes bodily injury.

[4] In its Supplemental Response (Doc. 148), the Government, relying on the concurrence in Middleton, questions that case based on its fractured rationale and its continued reliance on United States v. Torres-Miguel, 701 F.2d 165, 168-69 (4th Cir. 2012), partially abrogated by United States v. Castleman, ____ U.S. ____, 134 S. Ct. 1405 (2014). However, Middleton is a published opinion of the Fourth Circuit and, therefore, binding precedent which this court must follow.

Thus, the language used appears broader than language limited to only uses of violent force. See United States v. Torres-Miguel, 701 F.2d 165, 168-69 (4th Cir. 2012) (discussing similarly broad statutes). This reading is also consistent with the "broad purpose" of the statute, which was to "maintain[] the integrity of the judicial process" by "giv[ing] greater protection to . . . witnesses." United States v. Cofield, 11 F.3d 413, 419 (4th Cir. 1993).

A review of cases from the Fourth Circuit and other Circuit Courts of Appeals reveals that courts defining the elements of the crime consistently use language that does not narrow the term "conduct" or limit "conduct" to only uses of violent force. The Fourth Circuit holds that "[t]he elements of an offense under 18 U.S.C. § 1513 are (1) knowing engagement in conduct (2) either causing, or threatening to cause, bodily injury to another person (3) with the intent to retaliate for, inter alia, the attendance or testimony of a witness at an official proceeding." Id. Other Circuit Courts of Appeals, although defining the crime in slightly different ways, are in close

agreement on the point of only using the broad term "conduct" to describe the action necessary to violate the statute.[5]

This expansive definition of conduct is also generally supported by various model jury instructions. Modern Federal Jury Instructions - Criminal lists the three elements that must be proved for a conviction under § 1513 as being "[f]irst, that the defendant knowingly engaged in the conduct alleged in the indictment, . . . [s]econd, that the defendant's conduct caused

[5] See United States v. Gadson, 763 F.3d 1189, 1217 (9th Cir. 2014) (quoting United States v. Henderson, 626 F.3d 326, 342 (6th Cir. 2010) for the proposition that "[t]o prove a violation of § 1513(b)(2), the government must show: '(1) knowing engagement in conduct (2) either causing, or threatening to cause, bodily injury to another person (3) with the intent to retaliate for, inter alia,' providing information relating to a federal offense to a law enforcement officer"); United States v. Wardell, 591 F.3d 1279, 1292 (10th Cir. 2009) ("To convict a defendant under § 1513(b)(1), the government must prove beyond a reasonable doubt that (1) the defendant knowingly engaged in conduct either causing, or threatening to cause, bodily injury to another person, and (2) acted with the intent to retaliate for, inter alia, the testimony of a witness at an official proceeding."); United States v. Draper, 553 F.3d 174, 180 (2d Cir. 2009) ("[T]o sustain a witness retaliation charge, the government must establish three elements: One, the defendant engaged in conduct that caused or threatened a witness with bodily injury; two, the defendant acted knowingly, with the specific intent to retaliate against the witness for information the witness divulged to law enforcement authorities about a federal offense; and three, the officials to which the witness divulged information were federal agents."); United States v. Paradis, 802 F.2d 553, 562 (1st Cir. 1986) (citing United States v. Cummiskey, 728 F.2d 200, 206 (3d Cir. 1984), for the proposition that "[s]ection 1513 requires proof of (1) knowing engagement in conduct; (2) either causing or threatening to cause, bodily injury to another person; (3) with intent to retaliate against any person for, inter alia, providing information relating to the commission of a federal offense").

bodily harm to [name of person] . . . and [t]hird, the defendant acted with intent to retaliate" against the person harmed for being a witness or giving information concerning a federal offense. 2-46 Modern Federal Jury Instructions--Criminal, ¶ 46.12, Instruction 46-74 (Matthew Bender). Regarding the second element, a separate instruction states in pertinent part that "the government must prove beyond a reasonable doubt that the defendant's conduct caused bodily injury to" the witness, but that "it is not necessary that the defendant himself caused the bodily injury. It is sufficient if you find that the defendant knowingly participated in some activity which caused the consequence or effect of injuring" the witness. Id., Instruction 46-76. This instruction very clearly separates a defendant's conduct from any intent to cause a bodily injury, thereby allowing for convictions under a broad range of conduct.

Pattern jury instructions for the Third Circuit Court of Appeals and the United States District Court for the District of South Carolina track the language of the cases cited above which require only knowing conduct, with a separate element requiring the causation of bodily injury. See Third Circuit Model Criminal Jury Instructions, Instruction 6.18.1513B (2004) available at http://www.ca3.uscourts.gov/model-jury-instructions; Eric Wm. Ruschky, Pattern Jury Instructions for Federal Criminal Cases, District of South Carolina § 1513(b)

(2018 online ed.) available at http://www.scd.uscourts.gov/pji/. There is an instruction from the Eighth Circuit Court of Appeals which differs somewhat from the case law and instructions cited above. Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, Instruction 6.18.1513 (2014 online ed.) available at http://www.juryinstructions.ca8.uscourts.gov/criminal_instructions.htm. That instruction lists only two elements, with one being that the defendant knowingly caused bodily injury to the witness and the other being that he did so with intent to retaliate. The instruction does not mention "conduct" and, unlike the other formulations of the elements of § 1513(a)(1), ties the term "knowingly" not to the conduct engaged in, but to the causation of bodily injury to the witness. This instruction could be read to require a use of violent force by a defendant. However, the court did not locate any examples of its use and the instruction appears to be an outlier in conflict with the other instructions and, more importantly, with the elements of § 1513(a)(1) as established by the Fourth Circuit in Cofield, supra.

In the end, the plain language of § 1513(a)(1), its broad statutory purpose, the formulation of its elements by the Fourth Circuit and other Circuit Courts of Appeals, and the majority of the jury instructions cited above all favor a reading of § 1513(a)(1) allowing for a conviction based on conduct causing

bodily injury to a witness even though that conduct does not amount to a use of violent force sufficient to satisfy the ACCA. As the Government points out in its Supplemental Response (Doc. 148), the typical case prosecuted under § 1513(a)(1) will include the use of violent force and an actual intent to cause bodily harm. However, this does not mean that the statute does not cover more. Because "[t]he ACCA's force clause is written too narrowly to encompass such a broad range of criminal behavior" as is covered by § 1513(a)(1), Petitioner's conviction under that statute is no longer a valid ACCA predicate. Middleton, 883 F.3d at 492. Petitioner does not have the three predicate convictions necessary to sustain his sentence under the ACCA. His § 2255 Motion, as amended, will be granted on that basis, and the matter will be set for resentencing.[6]

**IT IS THEREFORE ORDERED** that Petitioner's Motion (Doc. 120) and Amended Motion (Doc. 125) to vacate, set aside or correct sentence under 28 U.S.C. § 2255 are **GRANTED** and the Clerk is directed to set this matter for resentencing, unless Petitioner, through counsel, requests the entry of a corrected judgment.

[6] The parties do not discuss the issue, but it appears that Petitioner has served more than the ten-year maximum allowed by statute for a conviction under 18 U.S.C. § 922(g)(1) absent the ACCA enhancement. If this is the case, Petitioner's attorney may request the alternative remedy of a corrected judgment sentencing Petitioner to the ten-year maximum in order to expedite matters.

Petitioner remains in custody, and the United States Attorney is directed to produce Petitioner for the resentencing hearing. The Probation Office is directed to prepare a Supplement to the Presentence Investigation Report in advance of the hearing.

This the 24th day of April, 2018.

William L. Osteen, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

| | | |
|---|---|---|
| JIMMY LEE ALLRED, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | 1:16CV611 |
| v. | ) | 2:94CR175-1 |
| | ) | |
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Respondent. | ) | |

**JUDGMENT**

For the reasons set forth in this court's Memorandum Opinion and Order entered contemporaneously with this Judgment,

**IT IS THEREFORE ORDERED AND ADJUDGED** that Petitioner's Motion (Doc. 120) and Amended Motion (Doc. 125) to vacate, set aside or correct sentence under 28 U.S.C. § 2255 are **GRANTED.** The Clerk is directed to set this matter for resentencing. Petitioner remains in custody, and the United States Attorney is directed to produce Petitioner for the resentencing hearing. The Probation Office is directed to prepare a Supplement to the Presentence Investigation Report in advance of the hearing.

This the 24th day of April, 2018.

William L. Osteen, Jr.
United States District Judge

AO 245B (NCMD Rev. 02/18) Sheet 1 - Judgment in a Criminal Case


# United States District Court
## Middle District of North Carolina

UNITED STATES OF AMERICA

v.

JIMMY LEE ALLRED

**AMENDED JUDGMENT IN A CRIMINAL CASE**

Case Number: 2:94-CR-00175-1

USM Number: 15889-057

*Leza Lee Driscoll
Defendant's Attorney

**Date of Original Judgment:** May 23, 1995.

***Reason for Amendment:** **Direct Motion to District Court pursuant to:** ☒ **28 U.S.C. 2255.**

## THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☒ was found guilty on count 1 after a plea of not guilty.

**The defendant is adjudicated guilty of these offenses:**

| Title & Section | Nature of Offense | Offense Ended | Count |
|---|---|---|---|
| *18:922(g)(1) and 924(a)(2) | Possess a Firearm in Commerce after a Felony Conviction | 06/16/1994 | 1 |

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the economic circumstances.

June 13, 2018
Date of Imposition of Judgment

William L. Osteen, Jr.
Signature of Judge

*William L. Osteen, Jr., United States District Judge
Name & Title of Judge

JUN 13 2018
Date

DEFENDANT: JIMMY LEE ALLRED
CASE NUMBER: 2:94-CR-00175-1

## IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: ***120 months.**

***[120 months imposed as to Count 1 with credit for time served]**

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district.

- ☐ at _____ am/pm on _____ .
- ☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

- ☐ before 2 pm on .
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

## RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at

_____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

BY _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: JIMMY LEE ALLRED
CASE NUMBER: 2:94-CR-00175-1

## SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: ***three (3) years.**

## MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*
4. ☐ You must make restitution in accordance with 18 U.S.C §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(Check, if applicable.)*
7. ☐ You must participate in an approved program for domestic violence. *(Check, if applicable.)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: JIMMY LEE ALLRED
CASE NUMBER: 2:94-CR-00175-1

## STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

## U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date_____

DEFENDANT: JIMMY LEE ALLRED
CASE NUMBER: 2:94-CR-00175-1

## SPECIAL CONDITIONS OF SUPERVISION

* The defendant shall cooperatively participate in a mental health treatment program, which may include inpatient treatment, and pay for those treatment services, as directed by the probation officer. With respect to the mental health treatment program, the Court directs that treatment program to include a particular emphasis on anger management treatment.

*The defendant shall submit to substance abuse testing, at any time, as directed by the probation officer. The defendant shall cooperatively participate in a substance abuse treatment program, which may include drug testing and inpatient or residential treatment, and pay for those treatment services, as directed by the probation officer. During the course of any treatment, the defendant shall abstain from the use of any alcoholic beverages.

*The defendant shall submit his person, residence, office, vehicle, or any property under his control to a warrantless search. Such a search shall be conducted by a United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to such a search may be grounds for revocation; the defendant shall warn any residents that the premises may be subject to such searches.

*The defendant shall abide by all conditions and terms of the location monitoring home detention program for a period of four (4) months followed by the curfew program for a period of six (6) months. At the direction of the probation officer, the defendant shall wear a location monitoring device, which may include GPS or other monitoring technology, and follow all program procedures specified by the probation officer. The defendant shall pay for the location monitoring services as directed by the probation officer. With respect to home detention, the Court directs that the defendant be allowed to leave the premises for purposes of employment, seeking employment, medical necessity, religious purposes, and/or educational opportunities as may be reasonably available to the defendant.

DEFENDANT: JIMMY LEE ALLRED
CASE NUMBER: 2:94-CR-00175-1

## CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

| | Assessment | JVTA Assessment* | Fine | Restitution |
|---|---|---|---|---|
| TOTALS | $50.00 | | $.00 | $.00 |

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

☐ Restitution amount ordered pursuant to plea agreement $

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived pursuant to 18 U.S.C. Section 3612(f)(3) for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

*** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.**
**** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.**

DEFENDANT: JIMMY LEE ALLRED
CASE NUMBER: 2:94-CR-00175-1

## SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☒ Lump sum payment of $50.00 due immediately, balance due
☐ not later than _____ , or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g. weekly, monthly, quarterly)* installments of $_____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g. weekly, monthly, quarterly)* installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are to be made to the Clerk of Court, United States District Court for the Middle District of North Carolina, 324 West Market Street, Greensboro, NC 27401-2544, unless otherwise directed by the court, the probation officer, or the United States Attorney. **Nothing herein shall prohibit the United States Attorney from pursuing collection of outstanding criminal monetary penalties.**

☐ Joint and Several

Defendant and Co-Defendant Names, Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

**Payments shall be applied in the following order: (1) assessment; (2) restitution principal; (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.**