

No. _____

IN THE
Supreme Court of the United States

WAYNE C. BENTON and JOSHUA L. MCDANIEL,
Petitioners,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

MELODY BRANNON
Federal Public Defender

DANIEL T. HANSMEIER
Appellate Chief
Counsel of Record

KIRK C. REDMOND
First Assistant Federal Public Defender
KANSAS FEDERAL PUBLIC DEFENDER
500 State Avenue, Suite 201
Kansas City, Kansas 66101
Phone: (913) 551-6712
Email: daniel_hansmeier@fd.org
Counsel for Petitioners

QUESTION PRESENTED

The United States Sentencing Guidelines define a crime of violence as, *inter alia*, any prior felony conviction that “has as an element the use, attempted use, or threatened use of physical force against the person of another.” USSG § 4B1.2(a)(1). Below, the Tenth Circuit held that a prior Kansas conviction for aggravated assault with a deadly weapon, KSA § 21-3410(a), qualifies as a crime of violence under § 4B1.2(a)(1). The Tenth Circuit relied on *United States v. Castleman*, 134 S.Ct. 1405 (2014), to hold that a statute’s threat-of-harm element is the equivalent of a threatened-use-of-force element. But other courts of appeals disagree that *Castleman* applies in this context. The question presented is:

Whether a prior Kansas conviction for aggravated assault with a deadly weapon, KSA § 21-3410(a), which has as an element a threat of harm, qualifies as a crime of violence under USSG § 4B1.2(a)(1)’s element-of-force clause.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Wayne Benton and Joshua McDaniel respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's panel decision in Mr. Benton's appeal is published at 876 F.3d 1260, and is included as Appendix A. The Tenth Circuit's unpublished Order in Mr. McDaniel's appeal is included as Appendix B. The district court's oral sentencing ruling in Mr. Benton's appeal is included as Appendix C. The district court's written sentencing decision in Mr. McDaniel's appeal is included as Appendix D.

JURISDICTION

The United States District Court for the District of Kansas originally had jurisdiction in both cases under 18 U.S.C. § 3231, which provides exclusive jurisdiction for offenses against the United States. Mr. Benton and Mr. McDaniel each timely appealed to the United States Court of Appeals for the Tenth Circuit under 28 U.S.C. § 1291. The Tenth Circuit affirmed Mr. Benton's appeal in a published opinion, and vacated and remanded Mr. McDaniel's appeal in an unpublished order. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND OTHER PROVISIONS INVOLVED

At the relevant times, the Kansas aggravated assault statute, KSA § 21-3410(a), provided:

Aggravated assault is assault, as described in K.S.A. 21-3408 and amendments thereto, committed [w]ith a deadly weapon.

The Kansas assault statute, KSA § 21-3408(a), provided:

Assault is intentionally placing another person in reasonable apprehension of immediate bodily harm.

USSG § 4B1.2(a)(1) provides:

(a) The term “crime of violence” means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another.

STATEMENT OF THE CASE

In 2015, this Court struck down the residual clause in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B), as unconstitutionally vague. *Johnson v. United States*, 135 S.Ct. 2551, 2557 (2015). In August 2016, the United States Sentencing Commission followed suit and removed the identically worded residual clause from its definition of “crime of violence” in USSG § 4B1.2. USSG Supp. to App. C, amend. 798 (2016). Since then, in both contexts, some of the courts of appeals have begun to interpret expansively the reach of the element-of-force clauses found in § 924(e)(2)(B) and USSG § 4B1.2(a)(1).

But the courts of appeals have not been uniform in this respect. Some courts of appeals, like the Tenth Circuit here, have interpreted the element-of-force clause to reach statutes with elements that do not expressly require a jury to find that the defendant used (or threatened to use) physical force. They have done so by applying this Court’s decision in *United States v. Castleman*, 134 S.Ct. 1405 (2014), which defined “physical force” in the context of a misdemeanor crime of domestic violence,

to the violent crimes context. But other courts of appeals have refused to extend *Castleman* to this context, thus creating a Circuit split on whether such statutes, like the one at issue here (prohibiting threats of harm, rather than threats to use physical force), qualify as violent crimes. Review is necessary.

A. Wayne Benton

In 2015, a federal grand jury in Kansas returned a one-count indictment against Wayne Benton, charging him with possession of a firearm by a convicted felon, 18 U.S.C. § 922(g)(1). Pet. App. 2a. Mr. Benton pleaded guilty without the benefit of a written plea agreement. *Id.*

The applicable guideline for a § 922(g)(1) offense is USSG § 2K2.1. In turn, the base offense level applicable to a particular defendant often turns on whether the defendant has one or more prior convictions that qualify a crimes of violence under USSG § 4B1.2. *See, e.g.*, USSG § 2K2.1(a)(1)-(6). The debate here involved just that, in particular, whether Mr. Benton’s prior Kansas conviction for aggravated assault with a deadly weapon, KSA § 21-3410(a), qualified as a crime of violence under § 4B1.2. Pet. App. 11a-17a. At the time of sentencing in November 2016, the Sentencing Commission had already done away with the residual clause in the crime-of-violence definition, USSG § 4B1.2(a)(2). Thus, the district court was tasked with determining whether aggravated assault under KSA § 21-3410(a) had “as an element the use, attempted use, or threatened use of physical force against the person of another.” USSG § 4B1.2(a)(1).¹ The district court acknowledged that “physical force”

¹ The government argued in the district court that the conviction counted under § 4B1.2(a)(2)’s enumerated offense clause as well, but the district court declined to resolve the issue. Pet. App. 15a.

means “violent force,” or “force capable of causing physical pain or injury to another person.” Pet. App. 14a-15a.

The district court noted that KSA § 21-3410(a) prohibits “intentionally placing another person in reasonable apprehension of immediate bodily harm with a deadly weapon.” Pet. App. 14a. The district court found that this provision “require[s] the violent force required to meet the federal definition of force.” Pet. App. 15a.

In other words, defendant must intend to threaten the victim using a weapon perceived by the victim as one likely to produce death or serious bodily injury to the point that the victim fears immediate bodily harm. The act necessarily requires the use or threatened use of physical force to create the apprehension of bodily harm.

Pet. App. 15a.

With this finding, the district court set Mr. Benton’s base offense level at 20, USSG § 2K2.1(a)(4). Pet. App. 2a. After other adjustments, Mr. Benton’s advisory guidelines range was set at 92 to 115 months’ imprisonment. *Id.* 2a, 16a-17a. Without the prior crime of violence, Mr. Benton’s base offense level would have been 14, USSG § 2K2.1(a)(6), and his advisory guidelines range would have been 51 to 63 months’ imprisonment. The district court ultimately imposed a 115-month term of imprisonment. Pet. App. 2a.

On appeal, Mr. Benton provided two reasons why his Kansas aggravated assault conviction did not qualify as a crime of violence under § 4B1.2(a)(1)’s element-of-force clause: (1) the statute had a threat-of-harm element, not a threatened-use-of-force element; and (2) even if the statute had a threatened-use-of force element, the amount

The Tenth Circuit also declined to address the argument. *See* Pet. App. 1a-8a. Thus, we do not address the argument either.

of threatened force required was less than the violent physical force necessary to qualify as a crime of violence. *Id.* 4a-5a. The Tenth Circuit rejected both arguments. *Id.* 5a-8a.

The Tenth Circuit first held that three cases foreclosed Mr. Benton's first argument – *Johnson v. United States*, 559 U.S. 133 (2010), *Castleman*, 134 S.Ct. 1415, and *United States v. Ontiveros*, 875 F.3d 533 (10th Cir. 2017). Pet. App. 5a. The Tenth Circuit did not expressly state how *Johnson* foreclosed the argument. *See id.* 5a. Instead, it explained that *Castleman* held that it was “impossible to cause bodily injury without applying force in the common-law sense,” and that “physical force can be applied indirectly.” *Id.* In turn, *Ontiveros* applied *Castleman*'s “logic” to the definition of “physical force” in the violent-crimes context. *Id.* “There is therefore no basis for a distinction between threatening bodily harm and threatening physical force.” *Id.* 6a.

The Tenth Circuit also held that Mr. Benton's second argument was “inconsistent with Kansas's definition of a deadly weapon.” Pet. App. 6a. Citing precedent from the Kansas Supreme Court, the Tenth Circuit noted that a deadly weapon under Kansas law is any “instrument which, from the manner in which it is used, is calculated or likely to produce death or serious bodily injury.” *Id.* 7a. (quotation and citation omitted). Moreover, in order to qualify as a deadly weapon, the weapon must have been “used in such a manner as to communicate to the person threatened an apparent ability to do bodily harm.” *Id.* 6a (quotation and alteration omitted). “Because a threat of death or serious bodily injury is at least force capable of causing physical pain or

injury to another person, the force required to convict under § 21-3410(a) is violent physical force.” *Id.* 7a (quotation and citation omitted). More specifically, an individual who violates § 21-3410(a) “necessarily threaten[s] violent physical force.” *Id.* 7a-8a.

B. Joshua McDaniel

In 2015, a federal grand jury in Kansas returned a three-count indictment against Joshua McDaniel, charging him in each count with possession of a firearm by a convicted felon, 18 U.S.C. § 922(g)(1). R1.1. In 2016, Mr. McDaniel pleaded guilty to all three counts without the benefit of a written plea agreement. *See* Pet. App. 19a. Prior to sentencing, a probation officer prepared the Presentence Investigation Report (“PSR”), setting Mr. McDaniel’s base offense level at 26, USSG § 2K2.1(a)(1), based on a determination that Mr. McDaniel had a prior crime of violence and a prior controlled substance offense. *Id.*

As in Mr. Benton’s case, Mr. McDaniel’s alleged prior crime of violence was a Kansas conviction for aggravated assault with a deadly weapon, KSA § 21-3410(a). *Id.* Mr. McDaniel objected to the use of this conviction, as well as his prior drug conviction, to enhance his base offense level, but the district court overruled his objections. *Id.* 19a-31a. With respect to the aggravated assault conviction, the district court found that the Kansas statute “incorporates” a force element in that it “involves the purposeful *threatened* use of physical force against the person of another.” *Id.* 25a-26a. The district court further found that Kansas’s definition of a “deadly weapon” did not negate this finding because, regardless of the weapon used, “a defendant must

threaten the use of physical force such that a reasonable person would apprehend bodily harm.” *Id.* 28a.

Having lost his objections, Mr. McDaniel’s advisory guidelines range was set at 110 to 137 months’ imprisonment. In December 2016, the district court imposed a 110-month term of imprisonment. R1.46.

Mr. McDaniel appealed. By the time of Mr. McDaniel’s direct appeal, Mr. Benton’s appeal was already pending in the Tenth Circuit. Pet. App. 9a. Moreover, another pending appeal challenged the identical controlled-substance-offense issue raised by Mr. McDaniel in the district court. *Id.* (citing *United States v. Madkins*). Thus, in order to save judicial resources, the Tenth Circuit suspended briefing pending the resolution of *Benton* and *Madkins*. *Id.* 9a. Ultimately, the Tenth Circuit affirmed in *Benton*, but vacated and remanded in *Madkins*. *Id.* Thus, the Tenth Circuit vacated Mr. McDaniel’s sentence and remanded for resentencing in light of *Madkins*. In doing so, the Tenth Circuit acknowledged that “*Benton* is not helpful to “[Mr. McDaniel’s] appeal.” *Id.*

On remand, without the controlled-substance offense, and left with just the one prior crime of violence (the Kansas aggravated assault conviction), the district court, with a total offense level of 21 and an advisory guidelines range of 77 to 96 months’ imprisonment, imposed a 77-month term of imprisonment. *See* D.E.67. Without the crime of violence, Mr. McDaniel’s total offense level would have been 15, and his advisory guidelines range would have been 41 to 51 months’ imprisonment.

REASONS FOR GRANTING THE WRIT

The federal courts of appeals are split over how to interpret the element-of-force clauses in the violent-crimes context. This Court should use this petition – which involves a preserved issue that a statute with a threat-of-harm element, not a threatened-use-of-physical force element, has an element of force – to resolve this conflict. This Court should hold that a threat to produce a result (here, harm or injury) is not a threat to use a particular means (physical force). Because the statute at issue here does not have an element of violent physical force, the Tenth Circuit’s decision should be reversed.

I. The Circuits Are Divided Over The Correct Reach Of An Element-Of-Force Clause In The Violent-Crimes Context.

This Court interpreted the element-of-force clause in § 924(e)(2)(B)(i) in *Johnson*. 559 U.S. 133. Because § 4B1.2(a)(1)’s element-of-force clause is identical to § 924(e)(2)(B)(i)’s element-of-force clause, the courts of appeals interpret the clauses identically. *See, e.g., United States v. Kendall*, 876 F.3d 1264, 1267 n.3 (10th Cir. 2017). In *Johnson*, the government urged this Court to give the phrase “physical force” its common-law meaning, a meaning that applied to misdemeanors and in which “even the slightest offensive touching” would suffice. 559 U.S. at 139.

But this Court refused to do so, instead defining “physical force” as “*violent* force – that is, force capable of causing physical pain or injury to another person.” *Id.* at 140. This Court described such violent force as “strong physical force,” “substantial” in degree. *Id.* This Court called it “unlikely” that Congress would have selected a common-law definition of force that applied to *misdemeanors* when defining a violent

felony provision. *Id.* at 141. It was “implausible,” this Court held, that Congress would have “import[ed] a term of art that is a comical misfit with the defined term ‘violent felony.’” *Id.* at 145.

In defining the elements of the Florida battery statute at issue in *Johnson*, this Court found itself “bound by the Florida Supreme Court’s interpretation of state law.” 559 U.S. at 138. The statute punished “actually and intentionally touching another person,” *id.* at 135 (alterations and quotations omitted), but, because this element required only slight offensive touching (and not violent physical force), *id.* at 138, the prior conviction did not count as a violent felony under § 924(e)’s element-of-force clause, *id.* at 145.

Four years later, this Court refused to extend *Johnson*’s definition of the phrase “physical force” to a statute (18 U.S.C. § 921(a)(33)(A)(i)) defining a *misdemeanor* crime of domestic violence as one that has “as an element, the use or attempted use of physical force.” *Castleman*, 134 S.Ct. at 1410-1413. Instead, this Court applied the common-law definition of “physical force” to this misdemeanor statute, holding that “offensive touching” was sufficient to establish the use-of-force element in this context. *Id.* “The very reasons we gave for rejecting that meaning in defining a ‘violent felony’ are reasons to embrace it in defining a ‘misdemeanor crime of domestic violence.’” *Id.* at 1411.

This Court then held that a Tennessee statute that punishes “intentionally or knowingly caus[ing] bodily injury to the mother of [the defendant’s] child” qualified as a misdemeanor crime of domestic violence because “the knowing or intentional

causation of bodily injury necessarily involves the use of physical force.” *Id.* 1414. This Court rejected the idea that poisoning an individual, “without making contact of any kind,” would not qualify as “physical force” under its common-law concept, as [the common-law] “concept of ‘force’ encompasses even its indirect application.” *Id.* “It is impossible to cause bodily injury without applying force in the common-law sense.” *Id.* at 1415.

Castleman expressly reserved the question similar to the one presented here: “[w]hether or not the causation of bodily injury necessarily entails violent force.” *Id.* at 1413. Since *Castleman*, a split in the Circuits has developed on this issue, particularly as it relates to threatened-use-of-force elements.

Below, the Tenth Circuit, citing prior precedent, held that *Castleman*’s indirect-causation-of-injury discussion applied to the violent crimes context. Pet. App. 5a. The Tenth Circuit then applied this logic to threats, finding “no basis for a distinction between threatening bodily harm and threatening physical force.” *Id.* 6a. In other words, if a statute has a threat-of-harm element, it necessarily has a threatened-use-of-violent-physical-force element.

The First, Third, Sixth, Seventh, Eighth, and Ninth Circuits have similarly held that *Castleman*’s indirect-force analysis applies to threats to harm under § 4B1.2. *United States v. Ellison*, 866 F.3d 32, 37-38 (1st Cir. 2017); *United States v. Chapman*, 866 F.3d 129, 135-136 (3d Cir. 2017); *United States v. Verwiebe*, 874 F.3d 258, 261 (6th Cir. 2017); *United States v. Harper*, 869 F.3d 624, 626 (8th Cir. 2017); *United States v. Waters*, 823 F.3d 1062, 1066 (7th Cir. 2016); *United States v.*

Studhorse, __ F.3d __, 2018 WL 1122301, at *5-*6 (9th Cir. Mar. 2, 2018).

In contrast, the Fourth Circuit has refused to extend *Castleman* to equate “a threat to use violent physical force” with a “threat to cause bodily injury.” *United States v. McNeal*, 818 F.3d 141, 156 (4th Cir. 2016); *see also United States v. Middleton*, __ F.3d __, 2018 WL 1056944, at *4 (4th Cir. Feb. 26, 2018) (reaffirming that a criminal threat statute “that results in physical injury, but does not involve the use or threatened use of force, simply does not meet the Guidelines definition of a crime of violence”). Similarly, the Fifth Circuit has refused to apply *Castleman* in determining whether a terroristic threats conviction qualifies as a crime of violence under the guidelines. *United States v. Rico-Mejia*, 859 F.3d 318, 322-323 (5th Cir. 2017). There, the Court held that a statute that punished a threat “to cause death or serious physical injury or substantial property damage to another person” lacked “physical force as an element.” *Id.* at 322.

The courts of appeals have acknowledged this Circuit split. *See, e.g., Waters*, 823 F.3d at 1065 (identifying two “conflicting” decisions); *Ontiveros*, 875 F.3d at 537. But it is clear that the court of appeals will not resolve the split on their own. Recently, the Fifth Circuit acknowledged the split (and the fact that the court is in the minority), yet refused to switch sides in the conflict. *United States v. Reyes-Contreras*, 882 F.3d 113, 123 (5th Cir. 2018) (“The government rightly points out that many circuits have rejected this view and have expanded *Castleman* to state that indirect causation of bodily injury may warrant a COV enhancement. But *Castleman* does not on its own terms make this expansion, and a previous panel

declined to interpret it as doing so, thus binding us.”). Even more recently, the Fourth Circuit reaffirmed its position that *Castleman* “does not control” in this context. *Middleton*, __ F.3d __, 2018 WL 1056944, at *3. This conflict in the circuits will continue until this Court resolves it. For this reason alone, review is necessary.

II. The Tenth Circuit Erred.

For three reasons, the Tenth Circuit erred when it held that KSA § 21-3410(a) has as an element the threatened use of physical force.

1. In order to qualify as a crime of violence under § 4B1.2(a)(1), the statute underlying the prior conviction must have an *element* the use (or, as here, the threatened use) of physical force against the person of another. This Court recently reaffirmed that a statute’s elements are “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). “At a trial, they are what the jury must find beyond a reasonable doubt to convict the defendant, and at a plea hearing, they are what the defendant necessarily admits when he pleads guilty.” *Id.* (citations omitted).

Mathis involved the enumerated offenses clause of § 924(e) (a “burglary” offense), rather than the element-of-force clause. *Id.* But the lower courts have uniformly applied *Mathis* to § 4B1.2’s element-of-force clause analysis as well. *See, e.g., Studhorse*, 2018 WL 1122301, at *3, 6; *Reyes-Contreras*, 882 F.3d at 120, 122-123; *United States v. Covington*, 880 F.3d 129, 132 (4th Cir. 2018); *Kendall*, 876 F.3d at 1268; *Jones v. United States*, 870 F.3d 750, 752 (8th Cir. 2017). And for good reason. Because § 4B1.2(a)(1) speaks expressly in terms of an “element” of force, it makes

sense that courts ensure that the underlying statute indeed have an “element” of force.

When a state statute is at issue, like here, state law determines the elements. *Johnson*, 559 U.S. at 138 (“We are . . . bound by the Florida Supreme Court’s interpretation of state law, including its determination of the elements of [the state crime of conviction].”). The Kansas statute prohibits: (1) intentionally; (2) placing another person in reasonable apprehension of immediate bodily harm; (3) with a deadly weapon. KSA § 21-3410(a); Pet. App. 4a. The question is whether the statute has as an element the threatened use of physical force against the person of another. Pet. App. 4A-6A. In order to have such an element, a jury, in order to convict under this provision, must necessarily have to find the defendant threatened the use of physical force against the person of another. *Mathis*, 136 S.Ct. at 2248.

But no such element exists. By its plain terms, the statute requires a jury to find that the defendant placed an individual in reasonable apprehension of immediate bodily harm, and not that the defendant threatened the use of physical force against that person. KSA § 21-3410(a). Contrary to the Tenth Circuit’s decision below, there is no basis under Kansas law to hold identical a threat of bodily harm with a threat of physical force. A Kansas jury is tasked with finding the former, not the latter. Nor is there anything within Kansas law to indicate that the Kansas courts treat threats of bodily harm identically to threats to use physical force.

2. The Tenth Circuit skirted state law by declaring that, under federal law, “physical force” can be done “indirectly, for instance, by administering poison, by

infecting with a disease, or by laser beam.” Pet. App. 5a. Because “indirect” physical force counts, the Tenth Circuit found “no basis for a distinction between threatening bodily harm and threatening physical force.” *Id.* 6a. The Tenth Circuit’s “indirect physical force” concept came from *Castleman*’s definition of common-law force. *Id.* 5a.

The problem with this analysis, however, is that this Court, in *Johnson*, refused to define “physical force” in the violent-crimes context as common-law force. 559 U.S. at 140. This Court called it “unlikely” and “implausible” that Congress would have imported a definition that applied to misdemeanors to define a violent *felony* provision. *Id.* at 141, 145. Indeed, common-law force is a “comical misfit” to “physical force” as defined in the violent-crimes context. *Id.* at 145. This Court excluded from the reach of “physical force” even some types of *direct* force. *Id.* at 138 (*i.e.*, slight offensive touching).

Nothing in *Castleman* supports its extension to the violent-crimes context. And this is particularly true in the context of an element of the threatened use of physical force, as the statute at issue in *Castleman* does not include this language. Instead, § 921(a)(33)(A)(i) includes prior misdemeanor convictions that have “as an element the use or attempted use of physical force, or the threatened use of a deadly weapon.” Moreover, unlike § 4B1.2(a)(1), which requires that the physical force be directed “against the person of another,” § 921(a)(33)(A)(i) contains no such similar language.

The Kansas aggravated assault statute has, at most, a “threatened use of a deadly weapon” element, not a “threatened use of physical force” element. And the

statute at issue in *Castleman* makes clear that these two things are not the same thing. 18 U.S.C. § 921(a)(33)(A)(i); *see also* 18 U.S.C. §§ 924(c)(1)(A), (c)(3)(A) (prohibiting the “use[] . . . of a firearm,” during a crime of violence, the latter term defined as, *inter alia*, one with an element the threatened use of physical force against a person or property). If the Sentencing Commission intended to include statutes with threatened-use-of-a-deadly-weapon elements, or statutes with threat-of-harm elements, it easily could have said so explicitly. *See, e.g., State Farm Fire & Cas. Co. v. U.S ex rel. Rigsby*, 137 S. Ct. 436, 442 (2016) (rejecting one reading of a statute because Congress knew how to draft just such a statute, but did not).

3. Finally, *Castleman* aside, the Tenth Circuit acknowledged that any threatened use of physical force must involve violent physical force. Pet. App. 6a-8a. Under Kansas law, “bodily harm” is defined as “any touching of the victim against [the victim’s] will, with physical force, in an intentional hostile and aggravated manner.” *State v. Taylor*, 217 Kan. 706, 714 (1975). But by “with physical force,” Kansas means only offensive touching. *State v. Hendrix*, 289 Kan. 859, 862 (2009) (“use of force, i.e., physical contact”); *State v. Peltier*, 249 Kan. 415, 427 (1991) (equating physical contact and physical force); *State v. Graham*, 27 Kan. App. 2d 603, 606 (2000) (physical contact is sufficient proof of force). Likewise, “hostile” and “aggravated” are empty adjectives. *Peltier*, 249 Kan. at 428 (rubbing victim was “hostile” and “aggravated”). But “physical force” under § 4B1.2 requires more than mere offensive touching. *Johnson*. 559 U.S. at 140-141. Thus, the aggravated assault statute’s “bodily harm” element cannot rise to the level of violent physical force. *Id.*

It is sufficient that the defendant's threat of harm with a deadly weapon be nothing more than a threat of slight offensive touching with the weapon.

Moreover, a "deadly weapon" in Kansas can be "absolutely harmless." *Graham*, 27 Kan. App. at 606. This could include something as innocuous as a water gun. *Id.* at 607. The threat of mere touching via the use of a harmless weapon is not sufficient to qualify as a crime of violence. The Tenth Circuit erred in holding otherwise.

III. This Issue Is Important, And This Is An Excellent Vehicle To Resolve The Conflict.

This issue is important in light of the obvious number of threat statutes on the books in the various states (and the United States Code). Moreover, although this case involves the interpretation of the element-of-force clause in § 4B1.2(a)(1), courts interpret various other crime-of-violence provisions similarly to § 4B1.2, including 18 U.S.C. § 924(c)(1)(A), (c)(3)(A), (e)(2)(B)(i), and 18 U.S.C. § 16(a). *See, e.g., Kendall*, 876 F.3d at 1267 n.3; *United States v. Vigil*, 334 F.3d 1215, 1221-1222 (10th Cir. 2003). There are also certain immigration-related provisions that address crimes of violence. *See, e.g.,* 8 U.S.C. §§ 1101(a)(43)(F), 1227(a)(2)(A)(iii), 1229b(a)(3). Because this issue affects countless defendants, it is necessary that this Court resolve the conflict.

Additionally, this case is an ideal vehicle to do so. Petitioners preserved the issue in the district court and in the Tenth Circuit, which reviewed this legal issue *de novo*. There are no procedural hurdles to this Court's review. And the resolution of this issue matters to these two petitioners, who undoubtedly will receive shorter sentences if their Kansas aggravated assault convictions do not count as crimes of

violence under the guidelines.

CONCLUSION

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

Respectfully submitted,

MELODY BRANNON
Federal Public Defender



DANIEL T. HANSMEIER
Appellate Chief
Counsel of Record
KANSAS FEDERAL PUBLIC DEFENDER
500 State Avenue, Suite 201
Kansas City, Kansas 66101
Phone: (913) 551-6712
Email: daniel_hansmeier@fd.org
Counsel for Petitioners

FILED

**United States Court of Appeals
Tenth Circuit**

PUBLISH

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

December 8, 2017

**Elisabeth A. Shumaker
Clerk of Court**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

No. 16-3332

WAYNE C. BENTON,

Defendant - Appellant.

**Appeal from the United States District Court
for the District of Kansas
(D.C. No. 2:15-CR-20075-CM-1)**

Kirk Redmond, Assistant Federal Public Defender (Melody Brannon, Federal Public Defender, with him on the briefs), Office of the Federal Public Defender for the District of Kansas, Topeka, Kansas, appearing for Appellant.

James A. Brown, Assistant United States Attorney (Thomas E. Beall, United States Attorney, with him on the brief), Office of the United States Attorney for the District of Kansas, Topeka, Kansas, appearing for Appellee.

Before **BRISCOE**, **EBEL**, and **MATHESON**, Circuit Judges.

BRISCOE, Circuit Judge.

This is a direct criminal appeal in which Defendant-Appellant Wayne C. Benton challenges his sentence. Benton pled guilty to one count of being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). The

Presentence Investigation Report (PSR) concluded that Benton's prior conviction for aggravated assault with a deadly weapon, in violation of Kan. Stat. Ann. § 21-3410(a) (2006), was a crime of violence as defined in United States Sentencing Guidelines (U.S.S.G.) § 4B1.2(a). Benton objected to this classification, which, if applied, would result in a six-level enhancement. The district court overruled his objection and sentenced him under U.S.S.G. § 2K2.1(a)(4), which incorporates § 4B1.2(a). Benton now appeals. Exercising jurisdiction pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291, we affirm.

I

On December 15, 2015, Benton pled guilty to one count of being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). The PSR concluded that Benton's 2006 Kansas conviction for aggravated assault with a deadly weapon was a crime of violence under § 4B1.2(a)(1) and that, as a consequence, Benton had a prior offense which satisfied § 2K2.1(a)(4). Based on this and the other findings in the PSR, Benton's total offense level was 23 and his criminal history category was VI, corresponding to a Guidelines range of 92 to 115 months.

In rejecting Benton's objections to the PSR's classification of his Kansas conviction for aggravated assault with a deadly weapon as a crime of violence, the district court held that his Kansas conviction "necessarily require[d]" physical force, and was therefore a crime of violence as defined by § 4B1.2(a)(1). Vol. II at 24. The district court sentenced Benton to 115 months in prison and three years of supervised

release. Benton argues his aggravated assault with a deadly weapon conviction does not qualify as a crime of violence under § 4B1.2(a)(1), and that he should have had a base offense of 14 and a corresponding Guidelines range of 51 to 63 months.

II

Whether a prior conviction qualifies as a “crime of violence” under the Sentencing Guidelines is a question of statutory interpretation that we review de novo. United States v. Maldonado-Palma, 839 F.3d 1244, 1246 (10th Cir. 2016). “In interpreting a guideline, we look at the language in the guideline itself, as well as the interpretative and explanatory commentary to the guideline provided by the Sentencing Commission.” Id. (quoting United States v. Reyes-Alfonso, 653 F.3d 1137, 1141 (10th Cir. 2011)).

U.S.S.G. § 2K2.1(a) sets the base offense level for unlawful possession of firearms at 20 if “the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense.” § 2K2.1(a)(4)(A). Application Note 1 of the Commentary to § 2K2.1 states that: “‘Crime of violence’ has the meaning given that term in § 4B1.2(a) and Application Note 1 of the Commentary to § 4B1.2.”

Turning to that guideline provision, U.S.S.G. § 4B1.2(a)(1) defines “crime of violence” as “any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that . . . has as an element the use, attempted use, or threatened use of physical force against the person of another.” Benton contends his

Kansas conviction for aggravated assault with a deadly weapon does not satisfy the elements clause.

At the time of Benton's conviction, the Kansas aggravated assault statute provided that:

Aggravated assault is an assault, as defined in K.S.A. 21-3408 and amendments thereto, committed:

- (a) With a deadly weapon;
- (b) while disguised in any manner designed to conceal identity; or
- (c) with intent to commit any felony.

Kan. Stat. Ann. § 21-3410 (2006). The assault statute referenced in § 21-3410 defined assault as "intentionally placing another person in reasonable apprehension of immediate bodily harm." Kan. Stat. Ann. § 21-3408 (2006).

Benton and the government agree that § 21-3410 is divisible, and that—using the modified categorical approach—Benton was convicted under § 21-3410(a) for aggravated assault with a deadly weapon. Aplt. Br. at 12; Aple. Br. at 12. Thus, Benton was convicted of (1) intentionally (2) placing another person in reasonable apprehension of immediate bodily harm (3) with a deadly weapon.

Benton advances two arguments in support of his contention that his conviction for aggravated assault with a deadly weapon under Kan. Stat. Ann. § 21-3410(a) was not a crime of violence. First, he argues that threatening bodily harm under § 21-3410 is not the same as threatening the use of force under the Sentencing Guidelines. Second, he argues that even if § 21-3410 requires force, the force it

requires does not rise to the level of violent physical force necessary for a crime of violence under the Sentencing Guidelines. We are not persuaded by either argument.

Benton's first argument—that threatening bodily harm is not the same as threatening physical force—is foreclosed by the Supreme Court's decisions in Curtis Johnson v. United States, 559 U.S. 133, 140 (2010) and United States v. Castleman, 572 U.S. ___, 134 S. Ct. 1405 (2014), and this court's recent decision in United States v. Ontiveros, ___ F.3d ___, No. 16-1362, 2017 WL 5147257, at *4 (10th Cir. Nov. 7, 2017). In Castleman, the Court held that “[i]t is impossible to cause bodily injury^[1] without applying force in the common-law sense,” and that “‘physical force’ is simply ‘force exerted by and through concrete bodies,’ as opposed to ‘intellectual force or emotional force.’” Castleman, 134 S. Ct. at 1414–15 (quoting Curtis Johnson, 559 U.S. at 138). Specifically, the Court said physical force can be applied indirectly, for instance, by administering poison, by infecting with a disease, or by laser beam. Id. And as this court recently held, “Castleman’s logic applies to ‘physical force’ in the context of violent felonies.” Ontiveros, 2017 WL 5147257, at *4. In so holding, we rejected the logic and rationale of United States v. Perez-Vargas, 414 F.3d 1282 (10th Cir. 2005) and United States v. Rodriguez-Enriquez,

¹ Black's Law Dictionary defines “injury” as “any harm or damage,” but notes “[s]ome authorities distinguish harm from injury.” *Injury*, Black's Law Dictionary (10th ed. 2014). Kansas does not make such a distinction, though. In examining a separate Kansas statute, the Kansas Supreme Court concluded that “bodily injury” and “bodily harm” “appear to be synonymous” and declined to “attach any significance to the use of ‘injury’ rather than ‘harm.’” Paida v. Leach, 917 P.2d 1342, 1348 (Kan. 1996). As we are bound by a state's interpretation of its own law, Curtis Johnson, 559 U.S. at 141, we will not make any distinction between injury and harm here.

518 F.3d 1191 (10th Cir. 2008), noting that these cases “relied on reasoning that is no longer viable in light of Castleman.” Ontiveros, 2017 WL 5147257, at *3. There is therefore no basis for a distinction between threatening bodily harm and threatening physical force.

Second, Benton’s argument that Kansas’s aggravated assault with a deadly weapon statute does not require the use of violent physical force is inconsistent with Kansas’s definition of a deadly weapon. To come within the definition of a crime of violence under U.S.S.G. § 4B1.2, a crime must involve violent physical force, which means “force capable of causing physical pain or injury to another person.” Curtis Johnson, 559 U.S. at 140 (interpreting identical language in 18 U.S.C. § 924(e)(2)(B)’s definition of “violent felony”).

Benton argues that aggravated assault with a deadly weapon cannot be a crime of violence because, in some cases, a perpetrator may commit the crime with a harmless object. Yet, under Kansas law, the actual ability to effectuate harm is irrelevant because assault “requires only an apparent ability, not a present ability, to do bodily harm.” State v. Deutscher, 589 P.2d 620, 624–25 (Kan. 1979). So the term deadly weapon, as used in § 21-3410(a), is not “limited to those weapons having a present ability to do bodily harm.” Id. at 625. Instead, a weapon that is used “in such a manner as to communicate to the person threatened an apparent ability to . . . do bodily harm is a deadly weapon within the meaning expressed by the legislature in the assault statutes, K.S.A. 21-3408, 21-3410, and 21-3411.” Id.

Since a deadly weapon is “an instrument which, from the manner in which it is used, is calculated or likely to produce death or serious bodily injury,” State v. Bowers, 721 P.2d 268, 272 (Kan. 1986)² (quoting State v. Hanks, 694 P.2d 407, 417 (Kan. 1985)), if a victim had a reasonable apprehension that the perpetrator threatened to harm him with such an object, then the perpetrator committed aggravated assault with a deadly weapon. Because a threat of “death or serious bodily injury,” id., is at least “force capable of causing physical pain or injury to another person,” Curtis Johnson, 559 U.S. at 140, the force required to convict under § 21-3410(a) is violent physical force.

This is not the first time we have been asked to decide whether a state’s assault with a deadly weapon statute satisfies § 4B1.2(a)(1). The analysis set forth above is consistent with our opinion in United States v. Taylor, 843 F.3d 1215 (10th Cir. 2016), in which we addressed Oklahoma’s assault and battery with a dangerous weapon statute. In Taylor, we held that “regardless of the type of ‘dangerous weapon’ that is employed by a particular defendant, the use of a ‘dangerous weapon’ during an assault or battery always ‘constitutes a sufficient threat of force to satisfy the elements clause’ of § 4B1.2(a)(1).” Id. at 1224–25 (quoting United States v. Mitchell, 653 F. App’x 639, 645 (10th Cir. 2016)).

The same reasoning applies here. Therefore, if a person violated § 21-3410(a) by committing aggravated assault with a deadly weapon, he necessarily threatened

² Bowers dealt with the Kansas aggravated battery statute. The analysis does not appear to differ when Kansas courts examine aggravated assault with a deadly weapon. See State v. Graham, 6 P.3d 928, 931–32 (Kan. Ct. App. 2000).

violent physical force. As that is the crime Benton committed, his 2006 aggravated assault with a deadly weapon conviction qualifies as a predicate offense under § 4B1.2(a)(1).

III

We AFFIRM the district court.

FILED

**United States Court of Appeals
Tenth Circuit**

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

December 12, 2017

**Elisabeth A. Shumaker
Clerk of Court**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

No. 16-3362

JOSHUA L. MCDANIEL,

Defendant - Appellant.

ORDER

Before **MATHESON, BACHARACH, and PHILLIPS**, Circuit Judges.

This matter is before the court following review of the appellant's Status Report filed on December 11, 2017. This appeal has been abated pending this court's issuance of decisions in *United States v. Benton*, No. 16-3332, and *United States v. Madkins*, No. 15-3299. Decisions in both cases have now been entered.

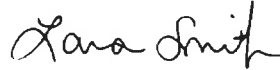
In the Status Report, the appellant suggests that because *Benton* and *Madkins* resolve the issues the appellant intended to raise in this appeal, briefing need not resume in this case. The appellant concedes that *Benton* is not helpful to his appeal but believes that *Madkins* is, and in light of *Madkins* the district court's sentence was entered in error. Consequently, the appellant recommends that this court remand the case to the district court for resentencing without completion of briefing. The appellee does not oppose the appellant's recommendation.

We construe the Status Report as containing a motion for remand and resentencing. As construed, the appellant's motion is granted.

The case is remanded to the United States District Court for the District of Kansas with instructions to vacate the judgment and to conduct any and all proceedings necessary to resentence the appellant in accordance with this court's decision in *United States v. Madkins*, No. 15-3299, 866 F.3d 1136 (10th Cir. 2017).

This appeal is dismissed. The mandate shall issue forthwith.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

A handwritten signature in cursive script that reads "Lara Smith".

by: Lara Smith
Counsel to the Clerk

11:42:23 1 the basis of the enhancement. It's a -- a threatened
11:42:25 2 use of physical force, and deadly force is physical
11:42:29 3 force as defined in Johnson to be force capable of
11:42:32 4 causing pain or injury to another. It has to be a
11:42:35 5 threatened use. Doesn't have to be a threatened use
11:42:38 6 that could actually occur. It has to just be a
11:42:41 7 threatened use. So, the -- the language of the
11:42:45 8 guideline does not require that that weapon be real, or
11:42:48 9 that that force actually be able to be employed. It
11:42:51 10 just has to be a threatened use of physical force.
11:42:56 11 And -- and we don't think that the -- the Kansas
11:42:58 12 distinction that my colleague on the other side makes
11:43:01 13 really has any relevance to either inquiry that the
11:43:03 14 court's charged with making today. Thank you.

11:43:09 15 THE COURT: Anything else, Mr. Redmond?

11:43:11 16 MR. REDMOND: No, Your Honor.

11:43:12 17 THE COURT: Court's ready to rule in regards
11:45:05 18 to defendant's Objection Number 2. Mr. Benton, again,
11:45:09 19 as I mentioned all ready, there was an initial
11:45:12 20 objection, Objection Number 1, which had to do with an
11:45:15 21 alias that was listed in the presentence investigation
11:45:17 22 report. I've all ready commented in regards to that.
11:45:21 23 That's not going to have any impact on your sentencing,
11:45:24 24 and so, the court's not choosing to rule on that
11:45:26 25 objection. Regarding Objection Number 2, again, I've

11:45:31 1 all ready mentioned part of it all ready, which had to
11:45:35 2 do with Paragraph 24 of your presentence investigation
11:45:38 3 report which lists a base offense level under the
11:45:44 4 sentencing guidelines, and which was listed as a 24.
11:45:50 5 Now, there were amendments that took place on August 1st
11:45:53 6 of this year, and in regards to that, again, both
11:45:59 7 Mr. Redmond on your behalf or Miss Ross on your behalf
11:46:03 8 and the government agree that one of the other
11:46:05 9 qualifying convictions that was previously a crime of
11:46:08 10 violence is no longer a crime of violence, which is that
11:46:11 11 burglary. So, they both agree that that conviction no
11:46:17 12 longer qualifies under the sentencing guideline section
11:46:20 13 addressing this. So, in that regard, without your prior
11:46:26 14 burglary conviction, arguably, what remains is one crime
11:46:32 15 of violence, which is this aggravated assault in your
11:46:35 16 criminal history. And if that is considered, then your
11:46:40 17 new base offense level with only one crime of violence
11:46:44 18 would be a base offense level of 20. That's under
11:46:48 19 Sentencing Guideline Section 2 K 2.1 A 4 A. Now,
11:46:54 20 Mr. Redmond on your behalf, however, has submitted these
11:46:58 21 documents, arguing that it shouldn't be a base offense
11:47:03 22 level of 20. He argues that aggravated assault is not a
11:47:11 23 crime of violence as defined in Section 4 B 1.2 A, and
11:47:15 24 that your base offense level should be 14 under
11:47:20 25 Section 2 K 2.1 A 6. And what helped the court even

11:47:28 1 before we had our hearing here was, again, the filings
11:47:31 2 or these pleadings that were filed from both
11:47:34 3 Mr. Redmond's office, Mr. Redmond, as well as the
11:47:37 4 government and the government's attorney. And I would
11:47:39 5 tell you that I've heard now also the oral arguments
11:47:46 6 they made here in the courtroom, and I'll incorporate
11:47:49 7 those arguments as well into what was all ready
11:47:51 8 previously submitted. And at this time, again, for the
11:47:57 9 record, here's the court's ruling. Defendant argues the
11:48:02 10 Kansas aggravated assault statute is not a crime of
11:48:06 11 violence under Section 4 B 1.2 A 1 because it does not
11:48:16 12 include an element of the use, attempted use or
11:48:21 13 threatened use of physical force against the person of
11:48:23 14 another. Defendant also argues the Kansas aggravated
11:48:28 15 assault statute is not a crime of violence under
11:48:32 16 Section 4 B 1.2 A 2 because the Kansas aggravated
11:48:36 17 assault statute is much broader than the generic
11:48:40 18 definition of aggravated assault. The US Sentencing
11:48:45 19 Guidelines define a crime of violence as any offense
11:48:49 20 under federal or state law punishable by imprisonment
11:48:52 21 for a term exceeding one year, that number one, has as
11:48:57 22 an element the use, attempted use or threatened use of
11:49:01 23 physical force against the person of another, or number
11:49:06 24 two, is murder, voluntary manslaughter, kidnapping,
11:49:13 25 aggravated assault, a forceable sex offense, robbery,

11:49:18 1 arson, extortion, or the use or unlawful possession of a
11:49:22 2 firearm described in 26 USC Section 5845 A, or explosive
11:49:31 3 material as defined in 18 USC Section 841 C. According
11:49:38 4 to the presentence investigation report, defendant was
11:49:41 5 convicted of aggravated assault in Johnson County,
11:49:46 6 Kansas in 2006. Aggravated assault was defined in 2006
11:49:53 7 in Kansas Statutes Annotated Section 21 -- or Statute
11:49:59 8 21-3410 as quote, an assault as defined in KSA 21-3408
11:50:11 9 committed, Paragraph A, with a deadly weapon, Paragraph
11:50:17 10 B, while disguised in any manner designed to conceal
11:50:21 11 identity, or Paragraph C, with intent to commit any
11:50:27 12 felony, end quote. Assault is defined as, quote,
11:50:34 13 intentionally placing another person in reasonable
11:50:36 14 apprehension of immediate bodily harm, end quote. Both
11:50:41 15 parties agree defendant was convicted of an aggravated
11:50:44 16 assault with a deadly weapon. Therefore, defendant was
11:50:48 17 found guilty of intentionally placing another person in
11:50:51 18 reasonable apprehension of immediate bodily harm with a
11:50:54 19 deadly weapon. Defendant argues that aggravated assault
11:50:59 20 with a deadly weapon in Kansas does not contain an
11:51:03 21 element of the use, attempted use or threatened use of
11:51:08 22 physical force against the person of another under
11:51:12 23 Section 4 B 1.2, Paragraph A 1. United States Supreme
11:51:20 24 Court has defined physical force as quote, violent
11:51:24 25 force, end quote, or quote, force capable of causing

11:51:28 1 physical pain or injury to another person, end quote.
11:51:34 2 Again, after much consideration, again, of what was
11:51:37 3 argued and presented to the court, again, not only here
11:51:40 4 in the courtroom but also with the written filings, the
11:51:43 5 briefing, as well as the court's own independent review
11:51:46 6 of the law, as well as the sentencing guidelines, and
11:51:50 7 again, the arguments advanced by the parties, the court
11:51:56 8 would determine that Kansas aggravated assault with a
11:52:00 9 deadly weapon does require the violent force required to
11:52:04 10 meet the federal definition of force. The Kansas
11:52:08 11 aggravated assault statute requires the defendant place
11:52:13 12 another person in reasonable apprehension of immediate
11:52:17 13 bodily harm while using a deadly weapon. In other
11:52:21 14 words, defendant must intend to threaten the victim
11:52:24 15 using a weapon perceived by the victim as one likely to
11:52:28 16 produce death or serious bodily injury to the point that
11:52:33 17 the victim fears immediate bodily harm. This act
11:52:39 18 necessarily requires the use or threatened use of
11:52:42 19 physical force to create the apprehension of bodily
11:52:46 20 harm. Because the court can determine defendant's
11:52:53 21 aggravated assault conviction is a crime of violence
11:52:55 22 under Sentencing Guideline Section 4 B 1.2 A 1, it does
11:53:02 23 not have to determine whether it qualifies as a crime of
11:53:05 24 violence under Section 4 B 1.1 A 2. For these reasons,
11:53:13 25 the court finds that defendant's aggravated assault

11:53:15 1 conviction contains an element of the use or threatened
11:53:18 2 use of physical force against the person of another, and
11:53:24 3 therefore, qualifies as a crime of violence under
11:53:29 4 Sentencing Guideline Section 4 B 1.2. Court would find
11:53:34 5 defendant's objection is overruled, and defendant's base
11:53:40 6 offense level, therefore, remains, or would be base
11:53:44 7 offense level of 20. In regards to the court's
11:53:53 8 findings, at this time the court has all ready noted for
11:53:57 9 the record, the presentence investigation report should
11:53:59 10 be sealed, should be made part of the record, be made
11:54:01 11 available for purposes of appeal, if any, in the future.
11:54:04 12 The court would also find at this time, again, based on
11:54:07 13 the court's ruling finding the total offense level a
11:54:11 14 total offense level of 20, the presentence investigation
11:54:13 15 report, Paragraph 25, added two additional levels based
11:54:21 16 on a specific offense characteristic, as well as
11:54:25 17 Paragraph 26, which added four levels, again, for a
11:54:29 18 specific offense characteristic, thereby making the
11:54:34 19 adjusted level adjusted level of 26. The court would
11:54:40 20 find that based on the acceptance of responsibility as
11:54:45 21 set out in Paragraphs 32 and 33, the offense -- the
11:54:49 22 adjusted offense level should be decreased by three
11:54:54 23 additional levels, resulting in a total offense level of
11:55:00 24 23, and a total offense level of 23. With a criminal
11:55:08 25 history category of six, the sentencing guideline

11:55:18 1 imprisonment range would be 92 to 115 months. Any
11:55:24 2 objection to those findings at this time by the
11:55:27 3 government?

11:55:28 4 MR. BROWN: No objection to those findings.

11:55:32 5 THE COURT: Mr. Redmond, on behalf of
11:55:34 6 defendant?

11:55:34 7 MR. REDMOND: No additional objections, Your
11:55:36 8 Honor.

11:55:36 9 THE COURT: The court is ready to announce
11:55:37 10 its proposed findings of fact and tentative sentence.
11:55:41 11 Prior to doing so, Mr. Redmond, are there any statements
11:55:44 12 or arguments you care to make in regards to the sentence
11:55:47 13 on behalf of defendant?

11:55:48 14 MR. REDMOND: Could I have just a moment,
11:55:50 15 Your Honor?

11:55:50 16 THE COURT: Yes.

11:55:56 17 (Mr. Redmond conferring with government's
11:55:58 18 counsel off the record.)

11:56:34 19 THE COURT: Proceed.

11:56:35 20 MR. REDMOND: Thank you very much, Your
11:56:36 21 Honor. Mr. Benton here in about ten days is going to
11:56:40 22 turn 46 years old. That is relevant to the court --

11:56:46 23 THE DEFENDANT: 47 years old.

11:56:47 24 MR. REDMOND: 47. You don't look a day
11:56:49 25 older. He's going to turn 47 years old. That's

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSHUA MCDANIEL,

Defendant.

Case No. 15-CR-20050-01-JAR

MEMORANDUM AND ORDER

This matter comes before the Court on Defendant Joshua McDaniel's Objections Number One and Two to the Presentence Investigation Report ("PSR") (Doc. 29).¹ Defendant first objects to Paragraph 44 of the PSR, which classifies his prior conviction for aggravated assault with a deadly weapon as a "crime of violence" under the United States Sentencing Guidelines ("USSG"). Second, Defendant objects to Paragraph 40, which classifies his prior conviction for possession of marijuana with intent to sell as a "controlled substance offense." Defendant submitted a sentencing memorandum (Doc. 30) in support of his Objection Number One, and the Government filed a sentencing memorandum (Doc. 37) in response, which addressed both objections. The Court held a sentencing hearing on June 3, 2016, at which time the Court took this matter under advisement and continued Defendant's sentencing hearing. The matter is fully briefed and the Court is prepared to rule. For the reasons stated below, the Court overrules Defendant's Objections Number One and Two.

¹Defendant filed four additional objections to the PSR. Because these objections do not affect the offense level calculations under the United States Sentencing Guidelines, the Court does not rule on these objections. The Court, however, notes these additional objections for the Record.

I. Background

Defendant pleaded guilty on January 4, 2016 to knowingly and unlawfully possessing, as a felon, a firearm that had been transported in interstate commerce, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).² Before Defendant's sentencing hearing, the United States Probation Office prepared a PSR, in which it calculated Defendant's base offense level as 26 pursuant to USSG § 2K2.1.³ Section 2K2.1(a) describes the applicable base offense levels for offenses under § 922(g)(1), and provides a base level of 26 when the offense involves the use of a semiautomatic firearm that is capable of accepting a large capacity magazine and the defendant commits the offense subsequent to two convictions of either a crime of violence or a controlled substance offense.⁴

The PSR described Defendant's criminal history, including two felony convictions relevant to this matter. First, Defendant was sentenced in 2009 in Wyandotte County District Court in Kansas for a conviction for possession of marijuana with intent to sell.⁵ The Information in that case alleged that "o[n] or about February 24, 2009, Joshua L. McDaniel did unlawfully, willfully and feloniously possess with the intent to sell a quantity of Marijuana, in violation of K.S.A. § 65-4163(a)."⁶ Second, Defendant was sentenced in 2012 in Wyandotte County District Court in Kansas for convictions on two counts of aggravated assault with a deadly weapon. The Amended Information in that case alleged that on or about December 3, 2010, the defendant "did unlawfully and intentionally place [two persons], to wit: [Solomon Young and Jerome Young], in a reasonable apprehension of immediate bodily harm, committed

²Doc. 21.

³Doc. 29 at 6.

⁴United States Sentencing Guidelines § 2K2.1(a)(1).

⁵Doc. 29 at 9.

⁶*Id.*

with a deadly weapon, in violation of K.S.A. § 21-3410(a).”⁷ The PSR classified the marijuana offense as a controlled substance offense and the aggravated assault offense as a crime of violence, and therefore calculated Defendant’s base offense level as 26. Defendant argues that the previous convictions were not for either a “controlled substance offense” or a “crime of violence,” and therefore his base offense level should be 20.

II. Discussion

A. Kansas Aggravated Assault

Defendant argues that his previous conviction for aggravated assault in Kansas was not for a crime of violence. At the time of the filing of the PSR, USSG § 4B1.2(a) defined the term “crime of violence” for purposes of § 2K2.1(a) as:

any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
 (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
 (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.⁸

Application Note 1 in the Commentary to § 4B1.2 added the following:

“Crime of violence” includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling.⁹

In *Johnson v. United States*, the Supreme Court held that the residual clause of the Armed Career Criminal Act (“ACCA”), which provides that “crimes of violence” include crimes that

⁷*Id.* at 11.

⁸The United States Sentencing Commission recently amended Guideline § 4B1.2, effective August 1, 2016, making changes to the definition of “crime of violence.” These changes included adding “aggravated assault” to the list of enumerated offenses in the text of § 4B1.2(a)(2). See United States Sentencing Guidelines § 4B1.2(a); *Beckworth v. United States*, No. 4:12CR88, 2016 WL 4203510, at *2 n.4 (N.D. Miss. Aug. 9, 2016).

⁹*United States v. Armijo*, 651 F.3d 1226, 1230 (10th Cir. 2011) (citing previous version of Application Note 1 to USSG § 4B1.2).

“otherwise involve[] conduct that presents a serious potential risk of physical injury to another,” is unconstitutionally vague.¹⁰ Relying on *Johnson*, the Tenth Circuit held in *United States v. Madrid* that the “virtually identical” residual clause in § 4B1.2(a)(2) is void for vagueness.¹¹ Thus, in the wake of *Johnson* and *Madrid*, a defendant’s prior conviction will be considered a crime of violence under § 4B1.2 only if the crime of conviction (1) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (2) meets the generic definition of one of the crimes enumerated in § 4B1.2(a)(2) or the Commentary to § 4B1.2.¹² The Supreme Court has defined “physical force” as “*violent* force—*i.e.*, force capable of causing physical pain or injury to another person.”¹³

In considering whether a past conviction is for a crime of violence, a court applies one of two approaches. First, a court may employ the “categorical approach,” under which it looks “not to the particular facts of the prior conviction but to the terms of the underlying statute.”¹⁴ The court then compares the elements of the statute forming the basis of the defendant’s conviction with the elements of the “generic” crime—*i.e.*, the offense as commonly understood, or determines whether the statute incorporates “the use, attempted use, or threatened use of physical

¹⁰ 135 S. Ct. 2551, 2557–63 (2015).

¹¹ 805 F.3d 1204, 1211 (10th Cir. 2015). The United States Sentencing Commission removed the residual clause from § 4B1.2(a) as part of the August 1, 2016 amendments. See United States Sentencing Guidelines § 4B1.2(a).

¹² *United States v. Mitchell*, -- F. App’x --, No. 15-7076, 2016 WL 3569764, at *3 (10th Cir. June 29, 2016) (explaining that after *Johnson*, offense must fit within the “elements clause” or the “enumerated offenses” clause to constitute a crime of violence under § 4B1.2); see *United States v. McConnell*, 605 F.3d 822, 824 (10th Cir. 2010) (quoting *United States v. Charles*, 576 F.3d 1060, 1066 (10th Cir. 2009)) (“Commentary to the Guidelines ‘is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.’”); *United States v. Hinton*, No. 4:15-CR-26-FL, 2016 WL 632447, at *2 (E.D.N.C. Feb. 17, 2016) (quoting *United States v. Mobley*, 687 F.3d 625, 629 (4th Cir. 2012)) (“The crimes specified in Application Note 1 of the Commentary to § 4B1.2 serve as additional enumerated offenses, or ‘example crimes’”).

¹³ *Johnson v. United States*, 559 U.S. 133, 134 (2010) (emphasis in original).

¹⁴ *United States v. Venzor-Granillo*, 668 F.3d 1224, 1228 (10th Cir. 2012) (quoting *United States v. Martinez-Hernandez*, 422 F.3d 1084, 1086 (10th Cir. 2005)); *United States v. Zuniga-Soto*, 527 F.3d 1110, 1118 (10th Cir. 2008) (citing *Taylor v. United States*, 495 U.S. 575, 600 (1990)).

force” as an element.¹⁵ If the relevant statute substantially corresponds to the generic offense, or if it incorporates physical force as an element, the conviction may be used for enhancement purposes.¹⁶ Second, Courts use the “modified categorical approach” when a statute of conviction is divisible, meaning that it contains multiple definitions of an offense, some of which do not qualify as crimes of violence.¹⁷ The modified categorical approach allows the court to examine certain judicial records, such as the charging document, plea agreement, plea colloquy, or jury instructions, to determine which alternative offense of a divisible statute formed the basis of the defendant’s prior conviction.¹⁸

Defendant was previously convicted of aggravated assault under K.S.A. § 21-3410, which defined the offense as follows:

Aggravated assault is assault, as described in K.S.A. 21-3408 and amendments thereto, committed:

- (a) With a deadly weapon;
- (b) While disguised in any manner designed to conceal identity; or
- (c) With intent to commit any felony.¹⁹

Assault was defined as “intentionally placing another person in reasonable apprehension of immediate bodily harm.”²⁰ As the statute makes clear, a person can commit aggravated assault by committing assault in one of three ways. The statute thus provides alternative definitions of aggravated assault, some of which may constitute crimes of violence and some of which may not. Accordingly, the Court must employ the modified categorical approach to determine which of these alternative offenses formed the basis of Defendant’s prior conviction. An examination

¹⁵*Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013); *Zuniga-Soto*, 527 F.3d at 1118–19.

¹⁶*Venzor-Granillo*, 668 F.3d at 1228 (quoting *United States v. Barney*, 955 F.2d 635, 638 (10th Cir. 1992)).

¹⁷*Descamps*, 133 S. Ct. at 2281; *United States v. Hood*, 774 F.3d 638, 645 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 2370, 192 L. Ed. 2d 159 (2015); *Zuniga-Soto*, 527 F.3d at 1117.

¹⁸*Descamps*, 133 S. Ct. at 2281; *Venzor-Granillo*, 668 F.3d at 1228 (citations omitted).

¹⁹K.S.A. § 21-3410 (2010) (currently at K.S.A. § 21-5412).

²⁰K.S.A. § 21-3408 (2010) (currently at K.S.A. § 21-5412).

of the Amended Information reveals that Defendant was convicted of aggravated assault “with a deadly weapon” under § 21-3410(a).²¹

Having determined that Defendant was convicted of aggravated assault with a deadly weapon under § 21-3410(a), the Court must determine whether that offense constitutes a “crime of violence” as defined by USSG § 4B1.2(a). The Government argues that § 21-3410(a) is a crime of violence because it incorporates “the use, attempted use, or threatened use of physical force” as an element. Defendant contends that the offense does not require “physical force,” but instead requires that a person only cause reasonable apprehension of “bodily harm.”

Defendant cites *United States v. Perez-Vargas*,²² in which the Tenth Circuit addressed whether a conviction under Colorado’s third-degree assault statute was a crime of violence. The statute provided that third-degree assault occurs when a defendant “knowingly or recklessly causes bodily injury to another person or with criminal negligence he causes bodily injury to another person by means of a deadly weapon.”²³ The court recited a number of cases in which the Tenth Circuit and other courts had previously found that statutes that focused on bodily harm or injury, rather than physical force, did not constitute crimes of violence.²⁴ The court emphasized that the Colorado statute allowed for “other possibilities” in which a defendant could commit third-degree assault without using or threatening physical force, including “recklessly shooting a gun in the air to celebrate, intentionally placing a barrier in front of a car causing an accident, or intentionally exposing someone to hazardous chemicals. One can imagine a number

²¹Doc. 29 at 11.

²²414 F.3d 1282 (10th Cir. 2005).

²³*Id.* at 1285.

²⁴*Id.* at 1286–87 (citing *United States v. Lucio-Lucio*, 347 F.3d 1202, 1206 (10th Cir. 2003); *Chrzanowski v. Ashcroft*, 327 F.3d 188 (2d Cir. 2003); *United States v. Gracia-Cantu*, 302 F.3d 308 (5th Cir. 2002)).

of other hypotheticals.”²⁵ Accordingly, the court found that the third-degree assault statute was not a crime of violence because it did not incorporate the use or threatened use of physical force as an element.²⁶

Defendant urges the application of the holding in *Perez-Vargas* to this case, and goes so far as to suggest that “*Perez-Vargas* resolves our case.”²⁷ Defendant argues that like the third-degree assault statute in *Perez-Vargas*, the aggravated assault statute here criminalizes the use of a deadly weapon and the causation or threat of bodily harm, but does not necessarily include the use or threatened use of physical force.

In *United States v. Ramon Silva*,²⁸ the Tenth Circuit addressed whether a conviction under New Mexico’s aggravated assault statute constituted a “violent felony” within the meaning of the ACCA. The New Mexico statute defined assault as “any unlawful act, threat or menacing conduct which causes another person to reasonably believe that he is in danger of receiving an immediate battery.”²⁹ The statute in turn defined aggravated assault as “unlawfully assaulting or striking another with a deadly weapon.”³⁰ Like here, the defendant argued that the statute did not have as an element the use, attempted use, or threatened use of physical force.³¹ The court rejected that argument, and held that the aggravated assault with a deadly weapon statute incorporated physical force as an element.³² The court explained:

²⁵*Id.* at 1286.

²⁶*Id.* at 1287.

²⁷Doc. 30 at 15.

²⁸608 F.3d 663 (10th Cir. 2010).

²⁹*Id.* at 669 (citing N.M. Stat. § 30-3-1).

³⁰*Id.*

³¹*Id.*

³²*Id.* at 670.

Threatening or engaging in menacing conduct toward a victim, with a weapon capable of producing death or great bodily harm, threatens the use of “*violent force*” because by committing such an act, the aggressor communicates to his victim that he will potentially use “*violent force*” against the victim in the near-future. Additionally, “apprehension causing” aggravated assault threatens the use of “*violent force*” because the proscribed conduct always has the potential to lead to “*violent force*.”³³

Drawing on this rationale, Chief Judge Marten of this District recently held in *United States v. Nicholas*³⁴ that a conviction under Montana’s aggravated assault statute constitutes a “violent felony” within the meaning of the ACCA.³⁵ The statute defined “aggravated assault—felony assault” as follows:

(2) A person commits the offense of felony assault if he purposely or knowingly causes:

- (a) bodily injury to another with a weapon;
- (b) reasonable apprehension of serious bodily injury in another by use of a weapon; or
- (c) bodily injury to a peace officer or a person who is responsible for the care or custody of a prisoner.³⁶

Judge Marten explained that because the statute required the use of a weapon resulting in “reasonable apprehension of serious bodily harm,” the statute “proscribe[d] conduct involving ‘force capable of causing physical pain or injury to another person.’”³⁷

The Court finds that Kansas aggravated assault incorporates as an element the use, attempted use, or threatened use of physical force. Like the statutes at issue in *Ramon Silva* and *Nicholas*, here aggravated assault requires a defendant to *knowingly* cause “reasonable apprehension of immediate bodily harm” with a deadly weapon.³⁸ As the court explained in

³³*Id.* at 670–71 (emphasis in original).

³⁴No. 14-10005-01-JTM, 2016 WL 300897 (D. Kan. Jan. 25, 2016).

³⁵*Id.* at *2.

³⁶*Id.* (citing M.C.A. 45-5-202(2)(a)).

³⁷*Id.* (citing *Johnson v. United States*, 559 U.S. 133, 140 (2010); *Ramon Silva*, 608 F.3d at 670–71).

³⁸K.S.A. § 21-3410(a) (2010) (currently at K.S.A. § 21-5412).

Ramon Silva, “even assuming ‘one could knowingly discharge a firearm at or in the direction of an individual without actually intending to injure him,’ the crime ‘still involve[s] the purposeful *threatened* use of physical force against the person of another.’”³⁹ Unlike the statute at issue in *Perez-Vargas*, here the statute does not allow for an aggravated assault conviction on the basis of reckless or criminally negligent conduct.⁴⁰ The Kansas aggravated assault with a deadly weapon statute does not allow for “other possibilities” that cause bodily harm without the use of physical force, such as the reckless discharge of a gun, the use of poison, or the placement of a barrier in the road. Rather, to be convicted under the statute, a defendant must knowingly cause reasonable apprehension of bodily harm with a deadly weapon. Although the statute refers to “reasonable apprehension of bodily harm,” the statute necessitates the use or threatened use of physical force to create the apprehension.

Defendant argues that, based on the definition of “deadly weapon” under the statute, § 21-3410(a) does not have as an element the use or threatened use of physical force. As Defendant correctly argues, Kansas “has adopted a subjective analysis for determining whether an assault was committed with a deadly weapon.”⁴¹ Under this approach, the brandishing of a loaded and operational firearm certainly constitutes the use of a deadly weapon. But an otherwise harmless object “can be a dangerous weapon if intended by the user to convince the victim that it is a dangerous weapon and the victim reasonably believes it is a dangerous weapon.”⁴² A deadly weapon can also be “[a]n instrument which, from the manner in which it is

³⁹*Ramon Silva*, 608 F.3d at 674 (citing *United States v. Hernandez*, 568 F.3d 827, 832 (6th Cir. 2009)) (emphasis in original).

⁴⁰See *Perez-Vargas*, 414 F.3d at 1285; see also *Nicholas*, 2016 WL 300897 at *2 (explaining that *Perez-Vargas* is “distinguishable” in part because the statute in that case “was very broad, applying to an action causing bodily injury to another, even if it was done ‘recklessly’ or ‘with criminal negligence’”).

⁴¹*State v. Graham*, 6 P.3d 928, 931 (Kan. Ct. App. 2000).

⁴²*State v. Davis*, 605 P.2d 572, 575 (Kan. 1980).

used, is calculated or likely to produce death or serious bodily injury.”⁴³ Accordingly, Kansas courts have held that the following conduct involved the use of deadly weapons: (1) a defendant’s use of a black toy pistol in an armed robbery, where the defendant “intended the victims to believe the gun was a dangerous or deadly weapon, and the victims reasonably believed it to be such a weapon”;⁴⁴ (2) the swinging of a “solid,” three-foot-long walking stick used to assault a victim;⁴⁵ and (3) a defendant’s assault by dousing a victim in gasoline, where the defendant intended to communicate the ability to inflict bodily harm, and the victim reasonably believed that the gasoline could cause eye damage, skin cancer, and other types of bodily harm.⁴⁶ The Kansas Court of Appeals has explained that “even a finger in one’s coat pocket could be considered a dangerous weapon under the subjective test.”⁴⁷

Defendant contends that the Tenth Circuit requires the use of “a weapon capable of producing death or great bodily harm” to constitute the use of physical force.⁴⁸ By contrast, the Kansas aggravated assault statute proscribes a broader range of conduct by referring to the term “deadly weapon” in a way that includes instruments that are not designed to cause great bodily harm.⁴⁹ Although a “deadly weapon” as defined under Kansas law may in some circumstances

⁴³*State v. Poppelreiter*, No. 110,843, 2015 WL 2131564 at *2 (Table) (May 1, 2015) (quoting *State v. Colbert*, 769 P.2d 1168 (Kan. 1989)).

⁴⁴*State v. Childers*, 830 P.2d 50 (Kan. Ct. App. 1991).

⁴⁵*Poppelreiter*, 2015 WL 21315464.

⁴⁶*Graham*, 6 P.3d at 931.

⁴⁷*Childers*, 830 P.2d at 56–57.

⁴⁸*See Ramon Silva*, 608 F.3d at 674 (explaining that under New Mexico aggravated assault statute, “the crime requires proof that a defendant purposefully threatened or engaged in menacing conduct *toward* a victim, with a weapon capable of producing death or great bodily harm”) (emphasis in original).

⁴⁹Even under the Kansas subjective test, many instruments found to be deadly weapons are in fact capable of causing bodily harm. For example, the court in *Poppelreiter* referred to evidence in the record that the walking stick at issue could have killed the victim if it had hit him in the head. *Poppelreiter*, 2015 WL 21315464. Additionally, the Court in *Graham* recognized that even in jurisdictions that apply an objective test, gasoline is typically found to be a dangerous weapon because it can cause death or great bodily harm when combined with fire. *Graham*, 6 P.3d at 931–32.

be incapable of producing great bodily harm, the Court is not convinced that this removes the element of physical force from the aggravated assault statute. Under the subjective test in Kansas, an otherwise benign instrument may constitute a “deadly weapon” where it is presented or concealed in such a way that it may reasonably appear to be a weapon capable of producing death or great bodily harm.⁵⁰ A toy gun, a defective gun, or a finger in a pocket may be a deadly weapon if the defendant presents the item as an actual firearm, and the victim reasonably fears that it is a real gun. The subjective test, however, does not allow for a benign object to qualify as a deadly weapon where it is presented as a benign object. Stated otherwise, a toy gun is not a deadly weapon if the defendant brandishes the toy gun and explains to the victim that it is just a toy. The Court is not aware of any authority in Kansas that allows for this result, and Defendant has pointed the Court to none.

Thus, the definition of “deadly weapon” in Kansas does not remove the element of physical force from the aggravated assault with a deadly weapon statute. To commit aggravated assault with a deadly weapon in Kansas, a defendant must threaten the use of physical force such that a reasonable person would apprehend bodily harm. While a defendant need not use actual physical force, a defendant must *threaten* to use physical force to commit the offense. Because § 21-3410(a) has as an element the threatened use of physical force, the Court finds that Defendant’s previous conviction under that statute constitutes a crime of violence.⁵¹

⁵⁰ *Colbert*, 769 P.2d at 1172 (quoting *State v. Davis*, 605 P.2d 572 (Kan. 1980)); *Graham*, 6 P.3d at 931–32.

⁵¹ Because the Court finds that § 21-3410(a) incorporates physical force as an element of the offense, the Court does not address whether the statute meets the generic elements of aggravated assault, as enumerated in the commentary to USSG § 4B1.2. The Court, however, notes that Judge Rogers of this District previously held that this precise statute meets the generic elements of aggravated assault, thereby qualifying as a “crime of violence.” *United States v. Olivera-Flores*, No. 11-40069-01-RDR, 2012 WL 481846 (D. Kan. Feb. 14, 2012).

B. Possession of Marijuana with Intent to Sell

Defendant also objects to the characterization of his previous conviction under K.S.A. § 65-4163(a) for possession of marijuana with intent to sell as a “controlled substance offense.” USSG § 4B1.2 defines the term “controlled substance offense” as “an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits . . . the possession of a controlled substance . . . with intent to manufacture, import, export, distribute or dispense.” At the time of Defendant’s 2009 arrest for the offense, § 65-4163(a) stated:

Except as authorized by the uniform controlled substances act, it shall be unlawful for any person to sell, offer for sale or have in such person’s possession with the intent to sell, deliver or distribute; cultivate; prescribe; administer; deliver; distribute; or dispense [a listed controlled substance].⁵²

Defendant argues that the statute is divisible because the words and phrases after the word “intent” constitute alternative definitions of the offense, some of which do not constitute controlled substance offenses. Defendant contends that although § 4B1.2 refers to possession with intent to “distribute,” it does not refer to possession with intent to “sell.” Thus, he argues that a conviction for possession with intent to “sell” under K.S.A. § 65-4163(a) does not qualify as a “controlled substance offense” under the Guidelines. Accordingly, Defendant asks the Court to apply the modified categorical approach to determine under which alternative of § 65-4163(a) he was convicted.

Because Defendant argues that possession with intent to “sell” is a separate offense from possession with intent to “distribute,” the Court applies the modified categorical approach to determine under which alternative Defendant was convicted.⁵³ Review of the Journal Entry of

⁵²K.S.A. § 65-4163(a) (2008) (currently at K.S.A. § 21-5705).

⁵³The Court’s application of the modified categorical approach is not an endorsement of Defendant’s argument that the words “sell” and “distribute” in fact create alternative offenses under § 65-4163(a). Rather, the Court applies the modified categorical approach to determine whether an analysis of this issue is even necessary.

Judgment in Defendant's 2009 case reveals that he was convicted of possession of marijuana with intent to sell.⁵⁴ Thus, the Court must determine whether this constitutes a "controlled substance offense."

Defendant cites the Kansas Court of Appeals case *State v. Waldrup*,⁵⁵ which addressed whether a jury instruction provided in a sale of cocaine case created alternative means of committing the offense. The instruction stated in part: "A sale under the Uniform Controlled Substances Act has a broader meaning than 'sale' usually has. Sale under the Act means selling for money, and also includes barter, exchange, or gift, or an offer to do any of these things."⁵⁶ The court ultimately held that this definition did not create alternative means of committing the offense.⁵⁷ Defendant also points to *United States v. Savage*,⁵⁸ a case in which the Second Circuit held that a similarly broad definition of the word "sale" in a Connecticut statute meant that a defendant's conviction for sale of drugs was not a controlled substance offense.⁵⁹ The court explained that the statute, which criminalized "a mere offer to sell, absent possession," allowed for the potential for fraudulent offers and therefore did not constitute a "controlled substance offense" under the Guidelines because a person did not need to "have the *intent* to distribute or sell the item."⁶⁰

Indeed, if Defendant was convicted under § 65-4163(a) of possession with intent to "distribute," this clearly constitutes a "controlled substance offense."

⁵⁴Doc. 30-5 at 1.

⁵⁵263 P.3d 867 (Kan. Ct. App. 2011).

⁵⁶*Id.* at 876.

⁵⁷*Id.*

⁵⁸542 F.3d 959 (2d Cir. 2008).

⁵⁹*Id.* at 965–66.

⁶⁰*Id.* (emphasis in original).

Unlike the statute at issue in *Savage*, here § 65-4163(a) requires both possession and intent to sell, so the statute does not allow for the potential for fraudulent offers.⁶¹ Thus, even under the broad definition of “sale,” the offense constitutes a “controlled substance offense.”⁶² Also unlike the Connecticut statutes at issue in *Savage*, Kansas statutes do not contain a definition of the word “sale.”⁶³ Rather, the “broad” definition for the term “sale” that the district court used in *Waldrup* “was based on a statutory definition that was part of a repealed statute and was subsequently approved and adopted by our Supreme Court.”⁶⁴ Kansas statutes, however, define the term “distribute” in a way that incorporates the term “sale.”⁶⁵ Possession with intent to “sell” necessarily involves intent to “distribute” because a person must have possession of the controlled substance and intent to sell it. Thus, a conviction for possession with intent to “sell” under § 65-4163(a) constitutes a “controlled substance offense” under the Guidelines. The Court overrules Defendant’s Objection Number Two.

IT IS THEREFORE ORDERED BY THE COURT that Defendant Joshua McDaniel’s Objections Number One and Two to the Presentence Investigation Report (Doc. 29) are **overruled**. The Court sets a sentencing hearing for December 12, 2016, at 1:30 p.m.

IT IS SO ORDERED.

Dated: September 26, 2016

S/ Julie A. Robinson
JULIE A. ROBINSON
UNITED STATES DISTRICT JUDGE

⁶¹See *United States v. Evans*, 699 F.3d 858, 866–67 (6th Cir. 2012) (holding that Ohio statute that criminalized offering to sell controlled substances did not allow for fraudulent offers because conviction required intent to sell, and thus conviction under the statute was a “controlled substance offense”).

⁶²See *id.*

⁶³*Waldrup*, 263 P.3d at 878 (explaining that in Kansas, there has been “no codified definition of the term ‘sale’” since amendment to the Uniform Controlled Substances Act).

⁶⁴*Id.*

⁶⁵K.S.A. 2010 Supp. 21-36a01(d); *Waldrup*, 263 P.3d at 878.