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Case No. 21-3043

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

BRIAR CLAYTON EUGENE ADAMS,
Defendant-Appellant.

On Appeal from the United States District Court
For the District of Kansas (Topeka)
The Honorable Judge Toby Crouse
Case No. 5:20-cr-40015-TC-1

APPELLANT'S OPENING BRIEF AND REQUIRED ATTACHMENTS

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Oral Argument Requested

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TABLE OF CASES AND AUTHORITIES

Cases

Statutes

Other Authorities

PRIOR OR RELATED APPEALS

None.

JURISDICTIONAL STATEMENT

1. The district court had jurisdiction under 18 U.S.C. § 3231. In March 2020, a federal grand jury in Kansas returned a one-count indictment, charging Briar Adams with possession of a firearm by a convicted felon, 18 U.S.C. § 922(g)(1). R1.8-9.[1] Mr. Adams pleaded guilty in September 2020. R1.4, 14-20.

2. This Court has jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a)(1), (2).

3. Relevant dates under Federal Rule of Appellate Procedure 4(b)(1)(A)(i):

   a. Judgment entered on: March 2, 2021. R1.6, 63.

   b. Notice of appeal filed on: March 2, 2021. R1.70.

4. This appeal is from a final order that disposes of all parties' claims.

[1] Our citations will take the following form: "R1.1," with "R1" indicating the volume of the record on appeal, and ".1" indicating the page number of that volume of the record on appeal. This latter number is the number that appears in the bottom right corner of the record on appeal. For digital readers, this number also corresponds with the .pdf page number of the referenced volume.

ISSUE PRESENTED FOR REVIEW

Whether the district court erred when it determined that Mr. Adams's prior Kansas aggravated battery conviction qualifies as a crime of violence under USSG § 4B1.2(a)(1) because:

(1) a conviction under the Kansas statute does not require that the offense be committed against a "person of another," as required by § 4B1.2(a)(1); and/or

(2) the Kansas statute includes a causation-of-contact element, and not an element of violent force.

STATEMENT OF THE CASE

This is a direct criminal appeal from a 51-month term of imprisonment imposed for Mr. Adams's unlawful-possession-of-a-firearm conviction.

A. Procedural Background

In March 2020, a federal grand jury in Kansas returned a one-count indictment against Mr. Adams, charging him with possession of a firearm by a convicted felon, 18 U.S.C. § 922(g)(1). R1.8-9. The indictment alleged that the offense occurred on January 14, 2020. R1.8. In September 2020, Mr. Adams pleaded guilty without a written plea agreement. R1.4, 14-20. Prior to sentencing, Mr. Adams raised objections to the Presentence Investigation Report (PSR). R1.22-26; R2.26-30. The district court overruled the objections, R3.45-47, and imposed a 51-month bottom-of-the-guidelines-range term of imprisonment, to be followed by a statutory maximum 3-year term of supervised release, R1.64-65.

Mr. Adams has timely appealed his federal sentence. R1.70. His appeal is limited to one issue: whether the district court erred in finding that his prior 2017 Kansas aggravated battery conviction under KSA § 21-5413(b)(1)(C) qualifies as a crime of violence under USSG § 4B1.2(a)(1). That statute defines aggravated battery as: "knowingly causing physical contact with another person when done in a rude, insulting or angry manner with a deadly weapon, or in any manner whereby great bodily harm, disfigurement or death can be inflicted." To frame the issue, we explore the sentencing proceedings below, including the PSR, the parties' sentencing memoranda, and the sentencing hearing.

B. The Sentencing Proceedings

1. The PSR includes a crime-of-violence increase.

The guidelines set the base offense level for a § 922(g)(1) offense at 14. USSG § 2K2.1(a)(6). But here, the probation officer set Mr. Adams's base offense level at 20 under USSG § 2K2.1(a)(4)(A), after determining that Mr. Adams's prior Kansas aggravated battery conviction qualified as a crime of violence under USSG § 4B1.2. R2.8. After subtracting three levels under USSG § 3E1.1 (for acceptance of responsibility), the probation officer set Mr. Adams's total offense level at 17. R2.8. With a total offense level of 17 and a criminal history category of VI, the probation officer set Mr. Adams's advisory guidelines range at 51 to 63 months' imprisonment. R2.22. The crime-of-violence increase was significant. Without it, Mr. Adams's total offense level would have been 11, and his advisory guidelines range a much lower 27 to 33 months' imprisonment.

2. Mr. Adams objects to the crime-of-violence increase.

Mr. Adams objected to the crime-of-violence increase on two grounds. R2.26-30; R1.22-26; R3.44-46. First, he argued that the Kansas aggravated battery conviction should not count because such a conviction does not require that the offense be committed against a "person of another," as is required under USSG § 4B1.2(a)(1). R2.26-28; R1.22-26; R3.44. This was so because the conviction could be committed against an "unborn child." *See id.* (citing KSA § 21-5419(c)). Because "person" was undefined in the guidelines, the definition of "person" in 1 U.S.C. § 8(a) (a provision within the Dictionary Act) controls. R1.23; R2.28; R3.44. And because that provision defines "person" as an individual who is "born alive," an "unborn child" is not a "person" under § 4B1.2(a)(1). *Id.* Mr. Adams also explained that the

common-law definition of "person," as well as the Model Penal Code's definition and dictionary definitions of "person," also excluded the unborn. R2.28. Under the categorical approach, because Kansas's aggravated battery statute covered batteries against the unborn, and because a "person" under § 4B1.2(a)(1) is an individual who is "born alive," the Kansas statute reached conduct not covered by § 4B1.2(a)(1). R1.22; R2.26-28; R3.44.

Mr. Adams explained that this claim was an open one in this Circuit. R1.23-26. Although this Court had rejected arguments that Kansas aggravated battery convictions did not qualify as violent crimes, those cases did not involve the precise issue here. *Id.* (discussing *United States v. Ash*, 917 F.3d 1238 (10th Cir. 2019) & *United States v. Williams*, 893 F.3d 696 (10th Cir. 2018)).

Second, Mr. Adams argued that his prior Kansas aggravated battery conviction did not count as a crime of violence because the Kansas statute had a causation-of-contact element and not an element of violent force. R2.29-30. Mr. Adams conceded that this Court had rejected this argument in *Williams*, 893 F.3d at 703, but he raised the issue to preserve it for further review, R2.30; R3.46.

3. The government defends the crime-of-violence increase.

The government agreed with the PSR that Mr. Adams's prior aggravated battery conviction qualified as a crime of violence even though it reached conduct committed against the unborn. R2.29-30; R1.46-61. The government also agreed that *Williams* foreclosed Mr. Adams's causation-of-contact argument. R3.36-37; R1.79-80; R2.54-55.

With respect to Mr. Adams's person-doesn't-include-the-unborn argument, the government conceded that the common law and the Model Penal Code both define

"person" as one who has been "born alive" (the government ignored the Dictionary Act's definition of "person," which, again, also excludes the unborn). R1.48-49. The government made no argument whatsoever as to why § 4B1.2(a)(1)'s use of the word "person" could somehow reach the unborn. *See generally* R1.49-61. Instead, the government sought to establish that the "generic definition of battery" included the unborn in light of "sweeping modifications to state laws that recognize unborn children as a proper victim where assaultive behavior is involved." R1.49, 60-61. The government cited legislation from most states to show that, as of today, the states criminally punish some offenses against the unborn. R1.50-60. But only a handful of the state statutes identified by the government involved battery statutes (most involved homicide statutes). *See generally id.*

The government never explained its focus on defining "generic battery." Mr. Adams's argument focused solely on § 4B1.2(a)(1)'s force clause (and its limitation to force used "against the person of another"). R2.26-30; R1.22-26; R3.44-46. The argument had nothing to do with whether a Kansas aggravated battery conviction meets the "generic definition of battery." *See generally id.* Such an argument would have made no sense because the Sentencing Commission has not enumerated battery (or aggravated battery) as a crime of violence under § 4B1.2(a)(2).

At the sentencing hearing, the government also claimed that Mr. Adams's position "would result in a ridiculous outcome" because, "carried out to the logical conclusion of this argument, even first-degree murder in Kansas would not be a crime of violence." R3.45. In making this perfunctory argument, the government did not mention that the Commission has enumerated "murder" as a crime of violence within § 4B1.2(a)(2).

4. The district court overrules Mr. Adams's crime-of-violence objections.

The district court overruled the objections. R3.44-46. The district court commented that the person-doesn't-include-the-unborn issue was "probably something that the circuit needs to resolve," but still found itself bound by this Court's decisions in *Ash* and *Williams*. R2.54-55. The district court cited a federal statute that neither party had discussed – 18 U.S.C. § 1841 – and surmised, without elaboration, that "it's not clear that Kansas law differs materially from federal law." R3.45. The district court also cryptically commented that, under its "understanding of the sentencing guidelines[,] we focus on the contents [sic] of the defendant, not on the status of the victim." R3.45. The district court also rejected Mr. Adams's causation-of-contact argument, finding itself bound by this Court's decision in *Williams*. R3.46.

With the objections overruled, the district court set the advisory guidelines range at 51 to 63 months' imprisonment, R3.47, and imposed a bottom-of-the-range 51-month term of imprisonment, R3.55. Had the district court sustained the crime-of-violence objection, a bottom-of-the-range guidelines sentence would have been 27 months' imprisonment (a two-year difference with the sentence imposed).

This timely appeal follows.

SUMMARY OF THE ARGUMENT

The district court erred when it determined that Mr. Adams's prior Kansas aggravated battery conviction qualifies as a crime of violence under USSG § 4B1.2(a)(1). Under that provision, a prior conviction qualifies as a crime of violence only if it has an element of force used "against the person of another." Because the guidelines do not define the term "person," the definition of "person" in 1 U.S.C. § 8 controls. This is so because § 8's definition of "person" plainly applies to any agency ruling or regulation, 1 U.S.C. § 8(a), and the sentencing guidelines are undoubtedly agency regulations, *Mistretta v. United States*, 488 U.S. 361, 393-394 (1989); *Stinson v. United States*, 508 U.S. 36, 45 (1993). Section 8(a) defines a "person" as one "who is born alive." In contrast, Kansas's aggravated battery statute covers batteries against the unborn. KSA §§ 21-5413, 5419(c). The statute categorically covers conduct not covered by § 4B1.2(a)(1), and, thus, does not qualify as a crime of violence. *United States v. O'Connor*, 874 F.3d 1147, 1151-1152, 1158 (10th Cir. 2017).

If § 8 does not control, the result is the same under the plain, ordinary meaning of "person," which, like § 8, excludes the unborn. Dictionary definitions, the Model Penal Code, and the common law similarly define "person" to exclude the unborn. And § 4B1.2(a)(1)'s text and context, as well as the guidelines as a whole, confirm that the Commission used this ordinary meaning of "person" in § 4B1.2(a)(1).

The prior conviction also should not count under *United States v. Perez-Vargas*, 414 F.3d 1282, 1285 (10th Cir. 2005), because it has a causation element and not a violent force element. While this theory was foreclosed by subsequent precedent, that precedent is no longer good law. *See Borden v. United States*, 141 S.Ct. 1817, 2021 WL 2367312, at *6-7 (2021).

ARGUMENT

The district court erred when it found that Mr. Adams's prior Kansas aggravated battery conviction qualifies as a crime of violence under § 4B1.2(a)(1).

A. Issue Raised and Ruled On

Mr. Adams argued below that his prior Kansas aggravated battery conviction did not qualify as a crime of violence under § 4B1.2(a)(1) for two reasons: (1) the statute applied to conduct not covered under § 4B1.2(a)(1), namely, batteries committed against the unborn; and (2) the statute had a causation-of-contact element and not an element of violent force. R2.26-30; R1.22-26; R3.44-46. The district court rejected each argument and found that the prior conviction qualified as a crime of violence under § 4B1.2(a)(1). R3.44-46.

B. Standard of Review

This Court reviews de novo whether a prior conviction qualifies as a crime of violence under § 4B1.2(a)(1). *O'Connor*, 874 F.3d at 1149. The government has the burden to prove that Mr. Adams's prior conviction qualifies as a crime of violence under § 4B1.2. *United States v. Bennett*, 108 F.3d 1315, 1316 (10th Cir. 1997). The government's burden is one of certainty. To affirm the district court, this Court must be "certain" that Mr. Adams's prior conviction qualifies as a crime of violence. *See United States v. Huizar*, 688 F.3d 1193, 1195 (10th Cir. 2012) (Gorsuch, J.); *Pereida v. Wilkinson*, 141 S.Ct. 754, 766 n.7 (2021) (in the violent-crimes context, courts "demand certainty from the government").

C. Kansas aggravated battery is not a crime of violence because it covers batteries against the unborn.

1. Legal Background

In 1984, Congress established the United States Sentencing Commission "as an independent commission in the judicial branch of the United States" to, *inter alia*, "establish sentencing policies and practices for the Federal criminal justice system." 28 U.S.C. § 991(b)(1). Despite its home within the judicial branch, the Commission "is an independent agency in every relevant sense." *Mistretta*, 488 U.S. at 393. "[T]he Commission is fully accountable to Congress, which can revoke or amend any or all of the Guidelines . . . at any time." *Id.* at 393-394. And the Commission's "rulemaking is subject to the notice and comment requirements of the Administrative Procedure Act." *Id.* at 394.

As we all know, Congress directed the Commission to promulgate and distribute sentencing guidelines "for use of a sentencing court in determining the sentence to be imposed in a criminal case." 28 U.S.C. § 994(a)(1). One such guideline is USSG § 2K2.1. As this case illustrates, § 2K2.1 (which applies to firearms offenses) provides for a higher base offense level if, *inter alia*, the defendant has a prior crime of violence. USSG § 2K2.1(a)(4). The guidelines define the term crime of violence in USSG § 4B1.2. *See* USSG § 2K2.1 comment. (n.1). While the definition has two parts, only the first part is at issue here: a crime of violence is any felony offense 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).[2]

[2] Section 4B1.2(a)(2), in its current form, enumerates certain crimes as crimes of violence. Because aggravated battery is not one of the enumerated crimes, § 4B1.2(a)(2) has nothing to do with this appeal.

Neither § 4B1.2's text nor its commentary define "person." Nor does any other provision within the guidelines define "person." But the Dictionary Act provides that, "[i]n determining the meaning of any . . . ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word[] 'person' . . . shall include every infant member of the species homo sapiens who is born alive at any stage of development." 1 U.S.C. § 8(a). This provision further defines "born alive" as "the complete expulsion or extraction from his or her mother of that member, at any stage of development, who after such expulsion or extraction breathes or has a beating heart . . . ." 1 U.S.C. § 8(b).

The prior conviction at issue here is for a violation of KSA § 21-5413(b)(1)(C). R1.34; R2.29.[3] This statute defines "Aggravated battery" as "knowingly causing physical contact with another person when done in a rude, insulting or angry manner with a deadly weapon, or in any manner whereby great bodily harm, disfigurement or death can be inflicted." Kansas law generally defines "person" as "an individual." KSA § 21-5111(t). But a "person" for purposes of § 21-5413(b)(1)(C) "also mean[s] an unborn child." KSA § 21-5419(c). And an "unborn child" is defined as "a living individual organism of the species homo sapiens, in utero, at any stage of gestation from fertilization to birth." KSA § 21-5419(a)(2).

To determine whether Kansas aggravated battery qualifies as a crime of violence under § 4B1.2(a)(1), this Court employs the categorical approach, which looks only "to the elements of the statute of conviction and not to the particular facts underlying that

[3] The judgment lists the statute of conviction as KSA § 21-5413(b). It does not indicate the specific subsection under § 21-5413(b). R1.34. Mr. Adams represented below that he was convicted under § 21-5413(b)(1)(C), R2.29, and neither probation, the government, nor the district court indicated any disagreement on this point. Thus, we focus on § 21-5413(b)(1)(C) as the specific statute of conviction in this case.

conviction." *O'Connor*, 874 F.3d at 1151 (quotations and alteration omitted). It is a two-step inquiry. First, this Court identifies the statute's elements. *United States v. Kendall*, 876 F.3d 1264, 1268 (10th Cir. 2017). But this specific argument is not about the first step.

Below, there was no dispute as to the elements of Kansas's aggravated battery statute. By its plain terms, KSA § 21-5413(b)(1)(C) has two elements: (1) a mens rea element of knowingly; and (2) a conduct element of causing physical contact with another person when done in a rude, insulting or angry manner with a deadly weapon, or in any manner whereby great bodily harm, disfigurement or death can be inflicted. *See* Pattern Instructions Kansas (PIK) Criminal 54.310. Moreover, there was no dispute below that this statute is indivisible (it defines only one crime; it is not divisible between the living and the unborn).

And for good reason. Section 21-5419(c)'s definition of "person" to include an "unborn child" does not create a separate crime (or separate penalties). Under Kansas law, "purely definitional statutory language that elaborates on or describes a material element has tended to signal a secondary matter—an option within a means." *State v. Brown*, 284 P.3d 977, 991 (Kan. 2012); *see also Kendall*, 876 F.3d at 1268 (explaining that definitions of terms within statutes qualify as separate means to violate the statute). Thus, § 21-5419(c)'s definition of "person" to include an "unborn child" merely provides another means of violating § 21-5413. *See Mathis v. United States*, 136 S.Ct. 2243, 2251-2252 (2016). The State of Kansas can obtain a conviction under § 21-5413 whether the jury unanimously believes that the "person" battered was an individual or an unborn child. *See* PIK Criminal 54.310. Again, the government has never argued otherwise. And the district court did not disagree either. *See* R3.45-46.

This specific argument is about the second step. At the second step, this Court "compare[s] the scope of conduct covered by the elements of the crime . . . with § 4B1.2(a)'s definition of 'crime of violence.'" *O'Connor*, 874 F.3d at 1151. "If some conduct that would be a crime under the statute would not be a 'crime of violence' under § 4B1.2(a), then any conviction under that statute will not qualify as a 'crime of violence' for a sentence enhancement under the Guidelines, regardless of whether the conduct that led to a defendant's prior conviction was in fact violent." *O'Connor*, 874 F.3d at 1151. This categorical analysis applies to § 4B1.2's requirement that physical force be used against "the person of another." *Id.* at 1152. If a statute covers conduct against something other than the "person of another," a prior conviction under that statute "is not categorically a crime of violence under [the element-of-force] clause." *Id.*; *see also id.* at 1158 (federal robbery is not a crime of violence under § 4B1.2(a)(1) because it "criminalizes conduct involving threats to property").

With this legal background established, we conduct this inquiry below. The end result is that Kansas aggravated battery is not a crime of violence because it covers batteries against the unborn, whereas § 4B1.2(a)(1) does not.

2. Because § 4B1.2(a)(1) does not cover crimes against the unborn, Kansas aggravated battery is not categorically a crime of violence.

At the second step, there is no dispute that Kansas aggravated battery categorically covers batteries to the unborn. KSA §§ 21-5413(b)(1)(C) & 21-5419(c). The question is whether the term "person" in § 4B1.2(a)(1) covers the unborn. For two reasons, it does not. First, the term "person" is defined in § 8(a) to exclude the unborn, and § 8(a)'s definition of "person" plainly applies to § 4B1.2(a)(1). And second, even if this Court concludes that § 8's

definition of "person" does not control, the plain, ordinary meaning of "person" excludes the unborn. The government's focus below on the "generic definition of battery" is a red herring. And the district court's contrary findings below are unpersuasive.

a. Section 8(a)'s definition of "person" excludes the unborn, and that definition plainly applies to § 4B1.2(a)(1).

Because the guidelines do not define the term "person," § 8's definition of "person" controls. This is so because § 8's definition of "person" unambiguously applies when "determining the meaning of . . . any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States." 1 U.S.C. § 8(a); *see Smith v. Berryhill*, 139 S.Ct. 1765, 1774 (2019) ("Congress' use of the word 'any' suggests an intent to use that term 'expansive[ly]'"). As explained above, the Supreme Court has already held that the Sentencing Commission is an "agency" of the United States. *Mistretta*, 488 U.S. at 393-394. And the guidelines, including § 2K2.1 and § 4B1.2, are undoubtedly agency "regulations" (or rulings) promulgated by the Commission under 28 U.S.C. § 994(a)(1). *Stinson*, 508 U.S. at 45 (referring to the guidelines as "rules" and "regulations"); *United States v. Nacchio*, 573 F.3d 1062, 1067 (10th Cir. 2009) ("Guidelines commentary is 'treated as an agency's interpretation of its own legislative rule,' i.e., 'it must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation.'") (quoting *Stinson*).

Section 8(a) provides that the meaning of "person" within any agency regulation "shall include every infant member of the species homo sapiens who is born alive at any stage of development." And "born alive" is further defined as "the complete expulsion or extraction from his or her mother of that member, at any stage of development, who after such expulsion or extraction breathes or has a beating heart . . . ." 1 U.S.C. § 8(b). This definition

necessarily excludes the unborn. *United States v. Montgomery*, 635 F.3d 1074, 1086 (8th Cir. 2011). An "unborn child" has necessarily not been "born alive."

It ineluctably follows from this analysis that the term "person" in § 4B1.2(a)(1) does not include the unborn. In contrast, Kansas's aggravated battery statute includes batteries committed against the unborn. KSA §§ 21-5413(b)(1)(C), 5419(c). Thus, the statute reaches conduct not covered by § 4B1.2(a)(1). For that reason, Mr. Adams's prior Kansas aggravated battery conviction is not a crime of violence under § 4B1.2(a)(1). *O'Connor*, 874 F.3d at 1151-1152, 1158. Just as the prior conviction in *O'Connor* did not qualify as a crime of violence because it could be committed against something other than a "person," so too here.

b. Even if § 8's definition of "person" does not control, the plain, ordinary meaning of "person" excludes the unborn.

Even if § 8's definition of "person" is not dispositive (although we think it plainly is), the end result is the same under traditional tools of statutory construction. When a term "is not defined in the Guidelines, we must rely on the accepted rules of statutory construction in defining the term. One of the most basic of those rules is to accord statutory language its plain meaning." *United States v. Archuleta*, 865 F.3d 1280, 1287 (10th Cir. 2017). In determining a guidelines term's plain meaning, this Court consults various sources, including dictionary definitions, the Model Penal Code, and the common law. *See id.* at 1287-1288 (consulting dictionary definitions); *United States v. Thomas*, 939 F.3d 1121, 1123-1124 (10th Cir. 2019) (same); *United States v. Faulkner*, 950 F.3d 670, 675 (10th Cir. 2019) (consulting, *inter alia,* the Model Penal Code to define an undefined term in § 4B1.2); *United States v. Gonzales*, 931 F.3d 1219, 1221 (10th Cir. 2019) ("If a guideline term . . . is undefined, we generally consider its established common-law definition (if there is one).").

Consistent with § 8's definition of "person," dictionary definitions confirm that the plain, ordinary meaning of "person" does not include the unborn. Oxford English Dictionary (2d Ed. 1989) (accessed online) (defining "person" as an "individual human being; a man, woman, or child"); Merriam-Webster's Online Dictionary (defining "person" as "human, individual"); American Heritage Dictionary 1310 (4th ed. 2000) (defining "person" as "a living human being"); Webster's Third New International Dictionary 1686 (2002) (defining "person" as "a living individual unit"); Black's Law Dictionary (11th ed. 2019) (accessed online) (defining "person" as a "human being"); Merriam-Webster's Collegiate Dictionary 865 (10th ed. 2001) (defining "person" as "human, individual").

Similarly, the Model Penal Code's definition of "person" does not include the unborn. Model Penal Code § 1.13(8) (defining "person" as "any natural person"). *See O'Connor*, 874 F.3d at 1151 (considering, *inter alia*, the Model Penal Code where § 4B1.2 did "not supply a definition"); *Faulkner*, 950 F.3d at 675 (same).

So too at common law. At common law, an unborn child "was not included within the definition of a 'person' or 'human being.'" *Meadows v. State*, 722 S.W.2d 584, 585 (Ark. 1987) (collecting cases). *See Gonzales*, 931 F.3d at 1221 (consulting the common law where a guidelines term was undefined).

Beyond definitions, statutory context also supports our position. *In re Taylor*, 899 F.3d 1126, 1129 (10th Cir. 2018) ("We give undefined terms their ordinary meanings, considering 'both the specific context in which the word is used and the broader context of the statute as a whole.'"). Section 4B1.2(a)(1)'s text refers to force used "against the person of another." The word "another" is generally "used to refer to a different person or thing from one

already mentioned or known about." New Oxford American Dictionary 65 (3d ed. 2010). It is "[a] second, further, additional" person or thing. Oxford English Dictionary (2d Ed. 1989) (accessed online). While "another" thing is obviously a different thing than what we already have, it is also similar in kind. When the Supreme Court says that a client "consults another lawyer," for instance, it does so only after discussing the client's prior interaction with a *lawyer*. *Kimelman v. Morrison*, 477 U.S. 365, 378 (1986). One would not say that a defendant consulted "another lawyer" if the defendant had only consulted with a paralegal. Similarly, when the Supreme Court says that Congress "wrote another subparagraph," it does so only after discussing a different *subparagraph*. *Guerrero-Lasprilla v. Barr*, 140 S.Ct. 1062, 1071(2020). The Supreme Court would not say that Congress wrote "another subparagraph" after a discussion of the entire statute (it would say Congress wrote "another statute").

Likewise, here, offenses that qualify as crimes of violence under § 4B1.2(a)(1) are committed by the living, not the unborn. Thus, when a living person uses force "against the person of another," it most naturally means that the other person is also a ("second, further, additional") living person. An "unborn child" is not naturally "another person" in such circumstances, just as a paralegal is not naturally a lawyer or an entire statute is not naturally a subparagraph in the examples above.

Our reading of § 4B1.2(a)(1) is also consistent with the guidelines as a whole. This Court "interprets the Guidelines 'as though they were a statute or court rule' and assumes that the Sentencing Commission 'adopts uniform judicial interpretations given a particular word, phrase, or provision.'" *United States v. Martinez-Cruz*, 836 F.3d 1305, 1310 (10th Cir. 2016); *see also Xlear, Inc. v. Focus Nutrition*, LLC, 893 F.3d 1227, 1237 (10th Cir. 2018) (a phrase that

appears in multiple statutes "should be interpreted in a 'consistent manner' across those statutes"). The Commission also used the phrase "person of another" in USSG § 2B1.1(b)(3): "If the offense involved a theft from the person of another." And there, the phrase "person of another" could not possibly include the unborn. *See* USSG § 2B1.1, comment. (n.1). (defining the phrase "Theft from the person of another" as theft of property "being held by another person or was in arms' reach"). There is no reason to think that the Commission would have used that phrase differently in § 4B1.2(a)(1). *Martinez-Cruz*, 836 F.3d at 1310; *see also* USSG § 2B3.1, comment. (n.1) (defining "carjacking" as "the taking or attempted taking of a motor vehicle from the person or presence of another").

Moreover, the guidelines use the phrase "another person" frequently (over forty times), and it is plain from the guidelines as a whole that the phrase was not intended to include the unborn. *See*, *e.g.*, USSG § 2A4.1(b)(6) ("If the victim . . . was placed in the care or custody of another person"); USSG § 5K1.1 (that the defendant has provided substantial assistance in the investigation or prosecution of another person"); USSG § 2D1.1, comment. (n.24) (same); USSG § 5D1.2, comment. (n.3) (same); USSG § 1B1.1, comment. (n.1(C)) ("or the presence of the weapon was otherwise made known to another person"); USSG § 1B1.8, comment. (n.6) ("the unlawful activity of another person"); USSG § 2A3.1, comment. (n.2(A)) ("engaging in, or causing another person to engage in"); USSG § 2G1.1, comment. (n.4(A) & (B), n.5(B)(i), (iii)) (same); USSG § 2G2.2, comment. (n.1) ("the defendant agreed to an exchange with another person"); USSG § 2G3.1, comment. (n.1) (same); USSG § 2J1.2, comment. (backg'd) ("to assist another person" & "whether such offense was committed by the defendant or another person"); USSG § 2L1.3, comment (n.7) ("or

induced another person to do so"); USSG § 2S1.1, comment. (n.1) ("any funds derived . . . by another person"); USSG § 3C1.1, comment. (n.4(D)) ("destroying or concealing or directing or procuring another person to destroy"). None of these provisions would make sense if "another person" meant (or included) an unborn child.

And when the Commission wanted to signal that "another person" had a broader meaning, it did so expressly. USSG § 5B1.3(c)(12) ("If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk"); USSG § 5D1.3(c)(12) (same). Yet, at no point within the guidelines did the Commission indicate that a "person" includes the unborn. *Rotkiske v. Klemm*, 140 S.Ct. 355, 360-361 (2019) ("It is a fundamental principle of statutory interpretation that 'absent provision[s] cannot be supplied by the courts.' To do so 'is not a construction of a statute, but, in effect, an enlargement of it by the court.'").

Finally, if nothing else, although we think that "person" in § 4B1.2 unambiguously excludes the unborn, if this Court finds the term ambiguous on this score, the rule of lenity resolves that ambiguity in Mr. Adams's favor. *O'Connor*, 874 F.3d at 1157-1158; *Bennett*, 108 F.3d at 1316-1317 ("we resolve any ambiguity in favor of narrowly interpreting the career offender provisions"); *United States v. Manatau*, 647 F.3d 1048, 1055-1056 (10th Cir. 2011) (Gorsuch, J.) (applying the rule of lenity in the guidelines context); *United States v. Weidner*, 437 F.3d 1023, 1046-1047 (10th Cir. 2006) (applying the rule in the guidelines context where there was a "lack of case law" and a "lack of a persuasive argument from the government").

In the end, the plain, ordinary meaning of the word "person" is consistent with the definition of that term in § 8(a). Under both § 8(a) and the term's ordinary meaning, a "person" in § 4B1.2(a)(1) plainly excludes the unborn. And because Kansas's aggravated battery statute includes the unborn, Mr. Adams's prior conviction under that statute is not a crime of violence. *O'Connor*, 874 F.3d at 1151-1152, 1158.

3. The government's attempt below to define the "generic definition of battery" is a red herring and otherwise unpersuasive.

The government's only developed counterargument below was to argue that the "generic definition of battery" now includes the unborn. R1.48-61. This argument is unpersuasive for three reasons.

First, the argument is a red herring. The question presented involves the meaning of § 4B1.2(a)(1)'s phrase "against the person of another." The interpretation of that phrase has nothing to do with a "generic definition" of a crime, but instead concerns "the elements of the crime" at issue. *O'Connor*, 874 F.3d at 1151-1152. If the elements of the specific crime at issue cover crimes against non-persons, then the statute is categorically not a crime of violence. *Id.* at 1152. A court only identifies a "generic definition" of a crime when interpreting § 4B1.2(a)(2)'s enumerated-offenses clause. *Id.* at 1151. But that clause is irrelevant here because § 4B1.2(a)(2) does not enumerate aggravated battery as a crime of violence. Either Kansas's aggravated battery statute is a crime of violence under § 4B1.2(a)(1)'s element-of-violent-force clause, or it is not a crime of violence at all.

Second, even if a "generic definition" approach were somehow relevant, the government did not show below that a "generic definition" of aggravated battery includes batteries against the unborn. Of the numerous state statutes discussed by the government below, only

a handful involved battery statutes. *See* R1.50-60. Under a "generic definition" approach, courts look to how "a majority of the States" define the crime at issue. *Quarles v. United States*, 139 S.Ct. 1872, 1877 (2019); *Martinez-Cruz*, 836 F.3d at 1309 (guidelines context). The government's own research thus reveals that a "generic definition of aggravated battery" does not include batteries against the unborn because, even today, most states do not criminalize such batteries. *See* R1.50-60.

And third, the government's "generic definition" approach improperly looks to "changes in state laws" over the last "35 years." R1.60. Supreme Court precedent makes clear that the appropriate temporal reference is the date the provision "was passed." *United States v. Stitt*, 139 S.Ct. 399, 406 (2018). That date here is November 1, 1987 (the date the Commission enacted § 4B1.2). USSG § 4B1.2, historical note. As the government demonstrated below, in 1987, no state punished batteries against the unborn. *See* R1.50-60. Thus, the government's "generic definition" analysis is not only a red herring, but if considered, further undermines the government's claim that, when the Commission adopted § 4B1.2(a)(1) in 1987, it meant the phrase "person of another" to include the unborn. *Quarles*, 139 S.Ct. at 1876-1877; *Stitt*, 139 S.Ct. at 406; *Martinez-Cruz*, 836 F.3d at 1313-1314 (applying this identical approach in the guidelines context to reject the government's claim that federal drug conspiracy convictions count as crimes of violence because federal drug conspiracies have different elements than most state conspiracy statutes).

The government's only other argument below was to state summarily at sentencing that Mr. Adams's reasoning "would result in a ridiculous outcome" because "carried out to the logical conclusion of this argument, even first-degree murder in Kansas would not be a

crime of violence." R3.45. To the extent that this summary claim invokes the absurdity doctrine, that doctrine "applies to unambiguous statutes . . . in only the most extreme of circumstances." *In re Taylor*, 899 F.3d at 1131 n.2. This is not such an extreme circumstance because the Sentencing Commission has enumerated "murder" as a crime of violence within § 4B1.2(a)(2). The government's "ridiculous outcome" is undermined by § 4B1.2's text.

4. The district court's reasoning is unpersuasive.

Turning to the district court's analysis (all of which was perfunctory), none of its reasoning is persuasive.

a. This issue is an open one in this Circuit.

The district court found itself bound by this Court's prior decisions in *Williams* and *Ash*. R3.44-46. The district court was wrong. To begin, *Ash* (which involved an entirely different issue) was just overruled by the Supreme Court in *Borden*. 2021 WL 2367312, at *2 (holding that reckless crimes do not qualify as violent crimes); *Ash v. United States*, __ S.Ct. __, 2021 WL 2519032 (June 21, 2021) (vacating and remanding in light of *Borden*). *Ash* is no longer binding precedent. And *Williams* involved "whether a mens rea of 'knowing' is sufficient for a 'crime of violence' under the guidelines," 893 F.3d at 702, and whether "Kansas's crime of aggravated battery does not require physical force because the crime is triggered whenever 'bodily harm' is caused," *id.* at 703. *Williams* did not involve the meaning of "person" in § 4B1.2(a)(1) or whether Kansas aggravated battery does not qualify as a crime of violence because it can be committed against the unborn.

"If 'an issue is not argued, or though argued is ignored by the court, or is reserved, the decision does not constitute a precedent to be followed.'" *Lowe v. Raemisch*, 864 F.3d 1205,

1209 (10th Cir. 2017); *see also United States v. Turrieta*, 875 F.3d 1340, 1346 (10th Cir. 2017) ("When parties do not raise or consider an issue and the court does not address it, 'the case is not a binding precedent on [that] point.'"); *Modoc Lassen Indian Hous. Auth. v. HUD*, 881 F.3d 1181, 1191 (10th Cir. 2017) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.").

This Court just applied this principle in the violent-crimes context in *United States v. Cantu*, 964 F.3d 924, 935 (10th Cir. 2020). The question presented in *Cantu* was whether an Oklahoma drug conviction under Okla. Stat. tit. 63, § 2-401(A)(1) did not qualify as a serious drug offense under 18 U.S.C. § 924(e)(1) because "there are multiple means by which the Oklahoma statute can be violated, and some of those means do not satisfy the ACCA definition of serious drug offense." *Id.* at 926. This Court acknowledged "prior precedential opinions of this court holding that a conviction under § 2–401 was a serious drug offense under the ACCA." *Id.* at 935. But those opinions were not binding because in "neither case, nor in any other published or unpublished decision of this court, did we address a claim that § 2-401 could not be a serious drug offense because some Oklahoma controlled dangerous substances are not controlled substances under federal law. Those opinions are therefore not in point." *Id.* (citing *Lowe*, 864 F.3d at 1209).

So too here. Contrary to its belief, the district court was not bound by *Williams* because that decision did not address the claim raised here. Nor is this Court bound by *Williams*. *Id.*

b. § 4B1.2(a)(1) requires force used "against the person of another."

Below, without citation to any authority, the district court appears to have sua sponte drawn a distinction between "the status of the victim" and "the contents of the defendant." R3.45. We think by "contents," the district court likely meant to say "conduct." As we understand the district court's cryptic one-liner, it viewed Mr. Adams's argument as involving the former (i.e., drawing a distinction between the status of the victim). But the premise is wrong. Mr. Adams's argument does not turn on "the status of the victim," but instead on the plain meaning of the term "person." The argument is no different than the one this Court accepted in *O'Connor*. 874 F.3d at 1151-1152, 1158.

The district court's comment also ignores § 4B1.2(a)(1)'s plain text. The Commission could have included within § 4B1.2(a)(1)'s reach all uses of force. It did not. It limited the uses of force covered by § 4B1.2(a)(1) to those "against the person of another." Those words necessarily limit § 4B1.2(a)(1)'s reach. *O'Connor*, 874 F.3d at 1151-1152, 1158 (excluding uses of force against property); *see also Borden*, 2021 WL 2367312, at *6-*7 (excluding reckless crimes). Just as the term "person" does not include property, *O'Connor*, 874 F.3d at 1151-1152, 1158, it does not include the unborn either. Whether one agrees with the decision to limit § 4B1.2(a)(1)'s reach, that is the decision the Commission (and Congress in § 8) made. The district court was not at liberty to ignore it. *See Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S.Ct. 1002, 1010 (2017) (applying "the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written").

c. The district court's unexplained citation to 18 U.S.C. § 1841 is unhelpful.

At the sentencing hearing, the district court, citing § 1841, commented, "it's not clear that Kansas law differs materially from federal law." R3.45. To the extent that this off-hand comment suggests that § 1841 somehow supports an interpretation of "person" in § 4B1.2(a)(1) to include the unborn, the district court was wrong. Section 1841 created new, separate federal offenses when certain crimes are committed against "a child, who is in utero at the time the conduct takes place." 18 U.S.C. § 1841. As the Eighth Circuit has persuasively explained, § 1841 does not define the term "person"; Congress instead defined that term in § 8. *Montgomery*, 635 F.3d at 1086 ("Congress did not, as the government suggests, expand the term 'person' to include the unborn in its enactment of the Unborn Victims of Violence Act of 2004."). By its plain terms, § 1841 "limits its definition [of "unborn child"] to § 1841." *Id.* "The term 'person' is not defined in the statute." *Id.* (citation omitted); *see also Gomez Fernandez v. Barr*, 969 F.3d 1077, 1087-1088 (9th Cir. 2020) ("Considering § 1841's plain language, purpose, and structure, we agree with the Eighth Circuit that § 1841 'has no applicability or reach beyond its own provisions'").

Indeed, Congress's express inclusion of the unborn within § 1841 undermines any argument that the Sentencing Commission meant to implicitly include the unborn in § 4B1.2(a)(1). The Commission could have included a definition of "person" in § 4B1.2(a)(1) to include the unborn, as Congress did in § 1841. But it did not. "What the government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function." *Iselin v. United States*, 270 U.S. 245, 251 (1926).

In sum, KSA § 21-5413(b)(1)(C) covers batteries against the unborn, and, therefore, reaches conduct not covered by § 4B1.2(a)(1). Mr. Adams's prior Kansas aggravated battery conviction is not a crime of violence.

D. Kansas aggravated battery is not a crime of violence because it has a causation-of-contact element and not an element of force.

Because Kansas's aggravated battery statute reaches conduct not covered by § 4B1.2(a)(1) (batteries of the unborn), this Court should vacate Mr. Adams's sentence and remand for resentencing. But if this Court disagrees, there is an additional reason to vacate and remand: Kansas's aggravated battery statute does not have an **element** of force. While this argument was seemingly foreclosed by precedent at the time of sentencing, the legal landscape has changed. In light of the Supreme Court's recent decision in *Borden*, this Court's prior precedent in *United States v. Perez-Vargas*, 414 F.3d 1282, 1285 (10th Cir. 2005), controls. And under *Perez-Vargas*, the Kansas aggravated battery statute's causation element is not an element of violent force.

1. Kansas's aggravated battery statute does not have an element of force.

Again, we start with § 4B1.2(a)(1)'s text. By its plain terms, that provision encompasses only those offenses that have "*as an element* the use, attempted use, or threatened use of *physical force* against the person of another." (emphasis added). An "element" is "what the jury must find beyond a reasonable doubt to convict the defendant at trial and what the defendant necessarily admits when he pleads guilty." *Mathis*, 136 S.Ct. at 2248. "'Elements' are the 'constituent parts' of a crime's legal definition,'" or more succinctly, "the crime's legal requirements." *Id.*; *see also In re Winship*, 397 U.S. 358, 361 (1970) (describing reasonable doubt "as the measure of persuasion by which the prosecution must convince the trier of all

the essential elements of guilt"); *Torres v. Lynch*, 136 S.Ct. 1619, 1624 (2016) ("substantive elements primarily define the behavior that the statute calls a violation of federal law") (cleaned up).

Kansas's aggravated battery statute does not have an "element" of force. There is no "legal requirement" that a defendant use, threaten to use, or attempt to use, force in order to convict a defendant under KSA § 21-5413(b)(1)(C). A defendant who pleads guilty under this provision need not admit that he used any amount of force, nor does a jury have to find that the defendant used (threatened or attempted to use) any amount of force in order to convict under this provision. The statute does not even include the word "force," and juries in Kansas are not instructed that "force" is an element of the offense. PIK Criminal 54.310.

Instead, the only "element," or "legal requirement," under § 21-5413(b)(1)(C) (aside from the mens rea element) is that the defendant, by whatever means (forceful or not), "caus[e] physical contact with another person," and that he do so in one of two ways: (1) "in a rude, insulting or angry manner with a deadly weapon," or (2) "in any manner whereby great bodily harm, disfigurement or death can be inflicted." KSA § 21-5413(b)(1)(C). Kansas case law makes clear that the alternative ways in which one can commit this latter element are not separate elements, but merely different means to commit the crime. *See State v. Ultreras*, 295 P.3d 1020, 1036 (Kan. 2013). And neither of these two alternative means requires a jury to find (or a defendant to admit) the use of force (or threatened or attempted use of force) against another person. By its plain terms, Kansas's aggravated battery statute has a *causation-of-contact* element, not an element of *force*. KSA § 21-5413(b)(1)(C). *See Torres*, 136 S.Ct. at 1629 (explaining that an element-of-violent-force provision "would not pick up demanding a

ransom for kidnapping," as such a crime is defined "without any reference to physical force").

Section 4B1.2(a)(1)'s text, context, and history confirm this distinction between a causation element and an element of force. By its plain terms, § 4B1.2(a)(1) requires a prior offense to have "as an element" "the use, attempted use, or threatened use of physical force against the person of another." This language plainly looks to the defendant's **conduct** (whether the defendant used, attempted to use, or threatened to use force). It does not look to the **results** of that conduct. In other words, the use-of-force clause encompasses statutes with **conduct elements** that punish the use (attempted use, or threatened use) of force against the person of another. The clause does not encompass **result elements**.

Statutory context supports the point. There are many guidelines that apply (or not) based not on the defendant's conduct, but on the results of that conduct.[4] If the Sentencing Commission wanted to tie § 4B1.2's crime-of-violence definition to a results-oriented causation element, rather than a conduct-oriented use-of-force element, it knew how to do

[4] *See*, *e.g.*, USSG § 2J1.2(b)(1)(B) ("If the offense involved causing or threatening to cause physical injury to a person"); USSG § 2J1.3(b)(1) (same); USSG § 2A2.3(b)(1)(B) ("If . . . the offense resulted in substantial bodily injury"); USSG § 2B1.1(b)(16) ("If the offense involved the conscious or reckless risk of death or serious bodily injury"); USSG § 2B5.3(b)(6) (same); USSG § 2D1.1(a)(1)-(4) ("death or serious bodily injury resulted"); USSG § 2D2.3(a)(2) ("if serious bodily injury resulted"); USSG § 2K1.4(a)(1), (2) ("if the offense created a substantial risk of death or serious bodily injury"); USSG § 2L1.1(b)(7) (same); USSG § 3C1.2 (same); USSG § 2K1.4(c) ("If death resulted"); USSG § 2M6.1(d)(1) ("conduct that resulted in the death or permanent, life-threatening, or serious bodily injury"); USSG § 2Q1.2(b)(2) ("If the offense resulted in a substantial likelihood of death or serious bodily injury"); USSG § 2Q1.3(b)(2) (same); USSG § 5C1.2(a)(3) ("the offense did not result in death or serious bodily injury to any person"); USSG § 8C4.2 ("If the offense resulted in death or bodily injury").

so, and it would have done so expressly. *See*, *e.g.*, *City of Albuquerque v. Soto Enterprises, Inc.*, 864 F.3d 1089, 1098 (10th Cir. 2017) ("Congress could have broadened [the statute's] language . . . but chose to use narrower language"); *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 632 (2018) (declining the government's invitation to interpret narrow statutory text in a "broad manner").

Section 4B1.2's statutory history confirms the point, as a results-oriented approach to the crime-of-violence inquiry was the province of the since-repealed residual clause. Up until August 2016, § 4B1.2(a)(2) covered crimes that "otherwise involve[d] conduct that presents a serious potential risk of physical injury to another." That provision plainly looked to the results (or potential results) of a defendant's conduct, and, if it still existed, would easily encompass Kansas's aggravated battery statute. But the Commission removed the residual clause from § 4B1.2(a)(2) in 2016. USSC App. C, Amend. 798. And now that the residual clause is gone, courts should not interpret the element-of-force clause atextually to get within its reach residual-clause crimes. *See Borden*, 2021 WL 2367312, at *13 (Thomas, J., concurring) (explaining that the "workaround" to the residual clause's demise "was to read the elements clause broadly," but criticizing the approach because "the text of that clause cannot bear such a broad reading"); *United States v. Eason*, 953 F.3d 1184, 1195 (11th Cir. 2020) (noting that federal robbery "historically has fallen 'within the crime of violence' definition" "until the 2016 amendments to the Guidelines," and holding that the offense is no longer a crime of violence).

This distinction between causation elements and elements of force is also well recognized in the statute books. For instance, there are numerous federal statutes with force elements.[5]

[5] *See*, *e.g.*, 18 U.S.C. § 111(a)(1) ("forcibly assaults, resists, . . . with any person"); 18 U.S.C. § 111(a)(2) ("forcibly assaults or intimidates"); 18 U.S.C. § 245(b) ("by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with . . ."); 18 U.S.C. § 247(a)(2) ("intentionally obstructs, by force or threat of force, any person in the enjoyment of that person's free exercise of religious beliefs, or attempts to do so"); 18 U.S.C. § 248(a)(1), (2) ("by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person"); 18 U.S.C. § 372 ("conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office"); 18 U.S.C. § 593 ("prevents or attempts to prevent by force, threat, intimidation, advice or otherwise"); 18 U.S.C. § 670(b)(2)(A) (making theft of medical products an aggravated offense if the violation "involves the use of violence, force, or a threat of violence or force"); 18 U.S.C. § 831(a)(4)(A) ("knowingly . . . uses force . . . and thereby takes nuclear material or nuclear byproduct material belonging to another from the person or presence of any other"); 18 U.S.C. § 874 ("by force, intimidation, or threat of procuring dismissal from employment"); 18 U.S.C. § 1033(d) ("by threats or force or by any threatening letter or communication, corruptly influences, obstructs . . ."); 18 U.S.C. § 1231 ("willfully transports in interstate or foreign commerce any person . . . for the purpose of obstructing or interfering by force or threats"); 18 U.S.C. § 1503(a) ("corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate . . ."); 18 U.S.C. § 1505 (same); 18 U.S.C. § 1509 ("by threats or force, willfully prevents, obstructs, impedes, or interferes with, or willfully attempts to prevent, obstruct, impede, or interfere with"); 18 U.S.C. § 1512(a)(2) ("uses physical force or the threat of physical force against any person, or attempts to do so"); 18 U.S.C. § 1589(a)(1) ("knowingly provides or obtains the labor or services of a person . . . by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person"); 18 U.S.C. § 1591(b)(1) ("if the [sex trafficking] offense was effected by means of force, threats of force, fraud, or coercion"); 18 U.S.C. § 1859 ("by threats or force, interrupts, hinders, or prevents the surveying of the public lands"); 18 U.S.C. § 1951(b)(1) ("The term 'robbery' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force"); 18 U.S.C. § 1951(b)(2) ("The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force"); 18 U.S.C. § 2111 ("by force and violence, or by intimidation, takes or attempts to take from the person or presence of another anything of value"); 18 U.S.C. § 2113(a) (same); 18 U.S.C. § 2118(a) ("takes or attempts to take from the person or presence of another by force or violence or by intimidation any material"); 18 U.S.C. § 2119 ("takes a motor vehicle . . . from the person or presence of another by force and violence or by intimidation, or attempts to do so"); 18 U.S.C. § 2194 ("procures or induces, or attempts to procure or induce, another, by force or threats"); 18 U.S.C. § 2231(a) ("forcibly assaults,

There are also numerous federal statutes that have causation elements.[6] These various statutes confirm that elements of force are not synonymous with causation elements.

Indeed, to conflate the two types of statutes would infringe significantly on the states' authority to define the elements of state law. The Kansas legislature consciously chose to define aggravated battery in terms of causation of contact (results), rather than use of force (conduct). KSA § 21-5413(b)(1)(C). When the Kansas legislature wants to define a crime in terms of force, it does so expressly.[7] But it did not draft its aggravated battery statute in this

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resists, opposes, prevents, impedes, intimidates, or interferes with any person authorized to serve or execute search warrants"); 18 U.S.C. § 2241(a)(1) ("knowingly causes another person to engage in a sexual act . . . by using force against that other person"); 18 U.S.C. § 2241(b)(2) ("administers to another person by force or threat of force"); 18 U.S.C. § 2280(a)(1) ("seizes or exercises control over a ship by force or threat thereof or any other form of intimidation"); 18 U.S.C. § 2281(a)(1) ("seizes or exercises control over a fixed platform by force or threat thereof or any other form of intimidation"); 18 U.S.C. § 2332i(a)(2) ("demands possession of or access to radioactive material, a device or a nuclear facility by threat or by use of force"); 18 U.S.C. § 2441(d)(1)(E) (defining rape as "[t]he act of a person who forcibly or with coercion or threat of force wrongfully invades . . ."); 18 U.S.C. § 2441(d)(1)(H) (defining sexual assault or abuse as "[t]he act of a person who forcibly or with coercion or threat of force engages, or conspires or attempts to engage . . ."); 18 U.S.C. § 3559(c)(2)(E) ("'kidnapping' means an offense that has as its elements the abduction, restraining, confining, or carrying away of another person by force or threat of force").

[6] *See*, *e.g.*, 18 U.S.C. § 13(b)(2)(A) ("if serious bodily injury . . . or if death of a minor is caused"); 18 U.S.C. § 36(b)(1) ("causes grave risk to any human life"); 18 U.S.C. § 37(a)(1) ("performs an act of violence against a person . . . that causes or is likely to cause serious bodily injury"); 18 U.S.C. § 249(a)(1) ("intentionally causes damage without authorization, to a protected computer"); 18 U.S.C. § 1030(a)(7)(A) ("transmits . . . any . . . threat to cause damage to a protected computer"); 18 U.S.C. § 1091(a)(2), (3) ("causes serious bodily injury to members of that group [or] causes the permanent impairment of the mental faculties of members of the group through drugs, torture, or similar techniques"); 18 U.S.C. § 1111(c)(3) (defining child abuse as "intentionally or knowingly causing death or serious bodily injury to a child"); 18 U.S.C. § 1368(a) (enhanced penalties for harming law enforcement animals if the offense "causes serious bodily injury to or the death of the animal"); 18 U.S.C. § 1513(b) ("knowingly engages in any conduct and thereby causes bodily injury to another person").

[7] *See*, *e.g.*, KSA § 21-5407(a) (defining assisted suicide as "knowingly, by force or duress, causing another person to commit or attempt to commit suicide"); KSA § 21-5408(a) (defining kidnapping as "the taking or confining of any person, accomplished by force,

manner. The statute does not have "as an element the use, attempted use, or threatened use of force against the person of another." USSG § 4B1.2(a)(1).

The statutory history of Kansas's aggravated battery statute proves the point. Until 1993, Kansas's aggravated battery statute included an element of force. KSA § 21-3414 (1992) (requiring proof of "the unlawful touching or application of force to the person of another with intent to injure that person or another"). But the Kansas legislature amended the statute in 1993, deleting the force element and adding a causation element. Under Kansas law, "[w]hen the legislature revises an existing law, it is presumed that the legislature intended to change the law as it existed prior to the amendment." *State v. Esher*, 922 P.2d 1123, 1127 (Kan. Ct. App. 1996), *overruled on other grounds by State v. Schoonover*, 133 P.3d 48 (2006). In *Esher*, the Kansas Court of Appeals refused to read into the aggravated battery statute language that the state legislature removed in 1993. *Id. Esher* thus makes clear that it would be impermissible to construe § 21-5413(b)(1)(C) to include a force element in light of the legislature's removal of that element in 1993.

This Court recognized the distinction between a force element and a causation element over fifteen years ago in *United States v. Perez-Vargas*, 414 F.3d 1282, 1285 (10th Cir. 2005). In *Perez-Vargas*, this Court held that a statute with a causation-of-harm element does not have

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threat, or deception"); KSA § 21-5420(a) (defining robbery as "knowingly taking property from the person or presence of another by force or by threat of bodily harm to any person"); KSA § 21-5426(a) (defining human trafficking via "the use of force, fraud or coercion"); KSA § 21-5503 (defining rape as sex when the victim is "overcome by force or fear"); KSA § 21-5504 (defining aggravated criminal sodomy as sodomy when the victim is "overcome by force or fear"); KSA § 21-5909(b) (defining aggravated intimidation of a witness as "an expressed or implied threat of force or violence"); KSA § 21-5922(a)(2) (prohibiting impeding a public employee's duties "by force and violence or threat thereof"); KSA § 21-6201(a) (defining riot via "use of force or violence").

an element of violent force. *Id.* This Court explained that a causation-of-harm element is a **results** element, whereas a use-of-force element is a **conduct** element. *Id.* And while it is "most likely" that a defendant's **conduct** will **result** in harm via "the use or threatened use of physical force," such a results element "allows for other possibilities." *Id.* at 1286 (listing such possibilities as "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"). This Court reiterated the point some three years later in *United States v. Rodriguez-Enriquez*, 518 F.3d 1191, 1194-1195 (10th Cir. 2008) (because "the adjective physical must refer to the mechanism by which the force is imparted to the person of another," this Circuit will "look to the means by which the injury occurs (the use of physical force), not the result of defendant's conduct, i.e., bodily injury.") (quotation omitted).

Perez-Vargas's distinction between a results element and a conduct element is sound. To "use" force is to actively employ it. *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004). Its focus is on the defendant's actions. *Id.* at 11 (referring to violent crimes as "active crimes"). It does not matter whether the victim suffers harm or not. It is the use (threatened, or attempted use) of force against another person that is targeted, not any results that flow from the defendant's conduct. USSG § 4B1.2(a)(1).

Consistent with *Perez-Vargas*, the Supreme Court has noted in the excessive force context that "[i]njury and force [] are only imperfectly correlated, and it is the latter that ultimately counts. An inmate who is gratuitously beaten by guards does not lose his ability to pursue an excessive force claim merely because he has the good fortune to escape without serious injury." *Wilkins v. Gaddy*, 559 U.S. 34, 38 (2010). *Wilkins* expressly rejected the Fourth

Circuit's "practice of using injury as a proxy for force." *Id.* As has this Court on at least one occasion. *United States v. Wolfname*, 835 F.3d 1214, 1223 (10th Cir. 2016) ("But a finding that Wolfname *used force* (or attempted or threatened to use it) isn't the same as a finding that Wolfname attempted or threatened to *inflict injury*.") (emphasis in original); *see also United States v. Middleton*, 883 F.3d 485, 490-491 (4th Cir. 2018) ("the Government erroneously conflates the use of violent force with the causation of injury").

More recently, in a different context (the Fourth Amendment), the Supreme Court reiterated this distinction. *Torres v. Madrid*, 141 S.Ct. 989, 1001 (2021). The Court explained that the use of a roadblock to seize a driver is not a "seizure by force." *Id.* The seizure is accomplished when the driver "crashe[s] into the[] roadblock," but the officers have not used force to accomplish the seizure. *Id.* The Court listed as another example of a non-forceful seizure "locking [a] person in [a] room." *Id.* These examples are all aimed at "achiev[ing] [a] result," not at applying force. *Id.*

In the end, a causation-of-harm or contact element differs from an element of force because it focuses not on a defendant's conduct (and whether it is forceful or not), but on the results of that conduct. In instructional terms, a jury who must find an element of force must find that the defendant actively employed force, whereas a jury who must find a causation element need not make any findings about the defendant's conduct whatsoever; it is enough simply to find that the specified statutory result occurred. Here, that means that a defendant is guilty of Kansas aggravated battery if a jury finds (or the defendant admits) that the defendant caused contact with the victim in one of the two specified ways. KSA § 21-5413(b)(1)(C). But the jury need not, and does not, make an additional finding about

whether the defendant used (threatened or attempted to use) force in causing the charged contact. PIK Criminal 54.310. There is no "element of physical force" within KSA § 21-5413(b)(1)(C). *Perez-Vargas*, 414 F.3d at 1285-1286.

The Fifth Circuit agrees with us on this point. *Larin-Ulloa v. Gonzales*, 462 F.3d 456, 466-467 (5th Cir. 2006) (holding that § 21-5413(b)(1)(C)'s materially identical predecessor statute (KSA § 21-3414(a)(1)(C)) did not have an element of force). An individual can violate this statute "without actually using physical force against another person." *Id.* at 467; *see also Whyte v. Lynch*, 807 F.3d 463, 469 (1st Cir. 2015) (when a statute's text gives no "indication that the offense [] requires the use, threatened use, or attempted use of 'violent force,' . . . the crime does not contain as a necessary element the use, attempted use, or threatened use of violent force"); *United States v. Vail-Bailon*, 868 F.3d 1293, 1312-1313 (11th Cir. 2017) (Wilson, J., dissenting) ("The result element is not relevant [] because the element has no bearing on the degree of force necessary to commit felony battery," and disagreeing that "all contact that is capable of causing pain or injury is 'physical force'"); *Villanueva v. United States*, 893 F.3d 123, 134-139 (2d Cir. 2018) (Pooler, J., dissenting) (explaining that a statute with a causation element does not have an element of force).

Perez-Vargas got all of this right and resolves this issue in our favor. 414 F.3d at 1285-1286. Because § 21-5413(b)(1)(C) does not have an element of force (only a causation of contact element), the district court erred in finding that Mr. Adams's prior aggravated battery conviction qualifies as a crime of violence.

2. *Perez-Vargas* is still good law.

In 2017, a panel of this Court held that *Perez-Vargas* was no longer good law. *United States v. Ontiveros*, 875 F.3d 533, 536 (10th Cir. 2017). More recently, in *Williams*, this Court, relying on *Ontiveros*, expressly held that the statute at issue here has an element of violent force, equating § 21-5413's results-oriented causation element with § 4B1.2(a)(1)'s conduct-related force element. 893 F.3d at 703. But the Supreme Court's recent decision in *Borden* confirms that the *Ontiveros* panel should have never overruled *Perez-Vargas*.

In *Borden*, the Supreme Court held that reckless crimes do not count as violent crimes, even though the Court had earlier held, in *Voisine v. United States*, 136 S.Ct. 2272 (2016), that reckless crimes can count as misdemeanor crimes of domestic violence under 18 U.S.C. § 921(a)(33). 2021 WL 2367312, at *11-12. As *Borden* explained, the statute at issue in *Voisine* was textually and contextually different than a violent-crimes provision, and it served different purposes. 2021 WL 2367312, at *11-*12. "So again, we see nothing surprising—rather, the opposite—in the two statutes' dissimilar treatment of reckless crimes." *Id.* at *12.

Prior to *Voisine*, this Court had (correctly) held that reckless crimes do not count as violent crimes. *United States v. Zuniga-Soto*, 527 F.3d 1110, 1113, 1124 (10th Cir. 2008). But a panel of this Court (improperly) overruled *Zuniga-Soto* under a mistaken view that *Voisine* required it to do so. *United States v. Bettcher*, 911 F.3d 1040, 1045-1046 (10th Cir. 2018), judgment vacated and remanded, __ S.Ct. __, 2021 WL 2519034 (June 21, 2021). *Borden* confirms that *Zuniga-Soto* is still good law (and should not have been overruled).

This Court's decision in *Perez-Vargas* is on all fours with its decision in *Zuniga-Soto*. In *Ontiveros*, a panel of this Court purported to overrule *Perez-Vargas* in light of the Supreme

Court's decision in *United States v. Castleman*, 572 U.S. 157 (2014). 875 F.3d at 536 ("we now hold that *Perez-Vargas*'s logic [] is no longer good law in light of *Castleman*"). But, like *Voisine*, *Castleman* interpreted § 921(a)(33)'s "misdemeanor crime of domestic violence" definition. 572 U.S. at 159. As *Borden* makes clear, that provision is textually and contextually different, and it serves different purposes, than violent-crime provisions like § 4B1.2. 2021 WL 2367312, at *11-*12. Thus, § 921(a)(33) receives "dissimilar treatment" when compared to violent-crimes provisions like the one at issue here. *Id.* at *12. For that reason alone, the panel in *Ontiveros* was wrong to overrule *Perez-Vargas* based on *Castleman*, just as the panel in *Bettcher* was wrong to overrule *Zuniga-Soto* based on *Voisine*. *See Borden*, 2021 WL 2367312, at *11-*12. And the panel in *Williams* was wrong to rely on *Ontiveros* to hold that the Kansas aggravated battery statute at issue here qualifies as a crime of violence under § 4B1.2(a)(1). 896 F.3d at 704.

The *Ontiveros* panel made the identical mistake made by the *Bettcher* panel. In *Voisine*, the Supreme Court expressly reserved whether reckless crimes count as violent crimes. 136 S.Ct. at 2279 n.4. Despite this reservation, the *Bettcher* panel improperly overruled *Zuniga-Soto* in light of *Voisine*. 911 F.3d at 1046. *Borden*, 2021 WL 2367312, at *11-12. In *Castleman*, the Supreme Court expressly reserved "[w]hether or not the causation of bodily injury necessarily entails violent force." 572 U.S. at 167. Despite this reservation, the *Ontiveros* panel improperly overruled *Perez-Vargas* in light of *Castleman*. 875 F.3d at 538. *Borden*, 2021 WL 2367312, at *11-12; *see also United States v. Doe*, 865 F.3d 1295, 1298-1299 (10th Cir. 2017) (refusing to overrule precedent because the intervening decision "carefully articulated [a] narrow question" not at issue in the prior decision).

The *Ontiveros* panel's reliance on *Castleman* was arguably even more erroneous than the *Bettcher* panel's reliance on *Voisine*. When *Castleman* was decided, the Supreme Court had already interpreted the word "force" in the violent-crimes context to mean "violent force, that is, force capable of causing physical pain or injury to another person." *Johnson v. United State*s, 559 U.S. 133, 140 (2010). In adopting this ordinary-meaning definition of force, the Supreme Court *refused to apply the common-law definition of force*. *Id.* at 141-142.

In contrast, in *Castleman*, in light of the differing text, context, and purpose of the statutory provision at issue there, the Court *adopted the common-law definition of force* to define a "misdemeanor crime of domestic violence" in 18 U.S.C. § 922(g)(9). 572 U.S. at 164, 166-168. In rejecting *Johnson*'s violent-crime definition of force, the Court went so far as to refer to § 921(a)(33)(A)'s force clause as a "comical misfit" to a violent-crime provision's force clause. *Castleman*, 572 U.S. at 163 (quoting *Johnson*, 559 U.S. at 145). It made little sense, then, for the *Ontiveros* panel to adopt *Castleman*'s logic that "[i]t is <u>impossible</u> to cause bodily injury without applying force *in the common-law sense*." *Ontiveros*, 875 F.3d at 538 (quoting *Castleman*) (emphasis added). By *Castleman*'s own terms, the common-law definition of force does not apply in the violent-crimes context. 572 U.S. at 163. And the Supreme Court just reinforced the point in *Borden*, again holding that it is improper to interpret a violent-crimes provision identically to the misdemeanor-crime-of-domestic-violence provision at issue in *Voisine* and *Castleman*. *Borden*, 2021 WL 2367312, at *11-12.

Indeed, as *Borden* explains, whereas § 4B1.2(a)(1) requires that the element of force be used "against the person of another," § 921(a)(33)(A)(i) includes a list of individuals who must have "committed" the prior crime (i.e., the domestic abuser). There is no additional

requirement that the domestic-abuser defendant's prior act be directed "against the person of another." The different text, context, and purposes of the statutes yield "dissimilar treatment," not similar treatment. *Id. Ontiveros* should not have overruled *Perez-Vargas* in light of *Castleman* (just as *Bettcher* should not have overruled *Zuniga-Soto* in light of *Voisine*).

One last point on this subject. *Perez-Vargas*'s analysis (consistent with our position here) focuses on whether a prior conviction has "as an element" the use of force. *See* 414 F.3d at 1285-1286. *Castleman* instead focused on the meaning of the phrase "physical force." 572 U.S. at 168. As did *Ontiveros*. 875 F.3d at 535-536. Those two inquiries are separate. A statute either has an "element" of physical force, or it does not, and if it does not have "an element" the use (threatened or attempted use) of force, then, by the provision's plain terms, it is not a crime of violence. USSG § 4B1.2(a)(1). Only if the statute has a force element does this Court then decide whether the statute reaches the appropriate level of "physical force" necessary to label it a violent crime. Unlike *Perez-Vargas*, neither *Castleman* nor *Ontiveros* addressed the threshold "element" question. For that reason as well, *Ontiveros* should not have overruled *Perez-Vargas*. *See*, *e.g.*, *Lucio-Rayos v. Sessions*, 875 F.3d 573, 582-583 (10th Cir. 2017) (intervening decision did not overrule precedent on a related, but different, issue)

The proper way out of this morass is to apply stare decisis principles: "[i]n cases of conflicting circuit precedent our court follows earlier, settled precedent over a subsequent deviation therefrom." *United States v. Hargrove*, 911 F.3d 1306, 1329 n.13 (10th Cir. 2019). In 2005, *Perez-Vargas* correctly held that a causation element is not an "element" of force. 414 F.3d at 1285-1286. To the extent that subsequent precedent conflicts with *Perez-Vargas* (i.e., *Ontiveros* and *Williams*), it does so via an improper extension of inapposite Supreme Court

precedent (*Castleman*). *Borden*, 2021 WL 2367312, at *11-*12. *Perez-Vargas* is still good law: Mr. Adams's prior Kansas aggravated battery conviction is not a crime of violence because it does not have an element of force (just a causation-of-contact element).

This approach has precedential support. In *United States v. Plakio*, 433 F.3d 692 (10th Cir. 2005), this Court correctly held that certain Kansas convictions do not count as felonies under federal law. But a panel decision in *United States v. Hill*, 539 F.3d 1213 (10th Cir. 2008), overruled *Plakio* based upon an incorrect reading of an intervening Supreme Court decision (*United States v. Rodriquez*, 553 U.S. 377 (2008))). Six years later, this Court overruled *Hill* in *United States v. Brooks*, 751 F.3d 1204, 1209-1211 (10th Cir. 2014), confirming that *Plakio* is still good law. This Court did so because of the Supreme Court's intervening decision in *Carachuri-Rosendo v. Holder,* 560 U.S. 563 (2010), which made clear that the panel's interpretation of *Rodriquez* in *Hill* was wrong. So too here. *Perez-Vargas* was correctly decided. *Ontiveros* should not have overruled it based on an incorrect reading of *Castleman*. *Borden* makes all of this clear. Just as this Court in *Brooks* re-affirmed *Plakio*'s earlier holding, this Court should reaffirm *Perez-Vargas*'s holding here. "To summarize, [*Ontiveros*] no longer controls, and we revert back to our prior precedent on this point." *Brooks*, 751 F.3d at 1211.

There is one additional decision to discuss: *United States v. Treto-Martinez*, 421 F.3d 1156 (10th Cir. 2005). Like *Williams*, *Treto-Martinez* also holds that a materially identical prior version of Kansas's aggravated battery statute has an element of force. *Id.* at 1160. But *Treto-Martinez* is no longer good law either. For starters, *Perez-Vargas* was decided before *Treto-Martinez*. Yet, *Treto-Martinez* never even mentioned *Perez-Vargas*. *See generally id.* The panel in *Treto-Martinez* should not have held that a causation element was an element of force when

an earlier panel in *Perez-Vargas* had already held "that the use of force and the causation of injury are not equivalent elements." *Williams*, 893 F.3d at 703 (discussing *Perez-Vargas*). As the earlier precedent, *Perez-Vargas* controls over *Treto-Martinez*. *Hargrove*, 911 F.3d at 1329 n.13.

Moreover, *Treto-Martinez* was decided well before the Supreme Court's decision in *Mathis* (and its explanation of the importance of "elements" to the violent-crimes inquiry), and contrary to *Mathis*, did not actually examine the elements of the aggravated battery statute. Instead, *Treto-Martinez* intuited "elements" from how a crime might ordinarily be committed. 421 F.3d at 1160 ("Causing physical contact with a deadly weapon in 'a rude, insulting or angry manner,' if not sufficient in itself to constitute actual use of physical force [], *could always lead to more substantial and violent contact*, and thus it would always include as an element the 'threatened use of physical force.'") (emphasis supplied); *id.* ("No matter what the instrumentality of the contact, if the statute is violated by contact that can inflict great bodily harm, disfigurement or death, it seems clear that, at the very least, the statute contains as an element the 'threatened use of physical force.'"). When *Treto-Martinez* said "element," it (improperly) meant factual circumstances likely to attend an ordinary commission of an aggravated battery. *Treto-Martinez* is no longer good law post-*Mathis*.

We also note that *Treto-Martinez* ultimately held that Kansas's aggravated battery statute contained an element the threatened use of physical force against another person. 421 F.3d at 1160. But there is no plausible way to read § 21-5413(b)(1)(C) to include "as an element" the "threatened use of physical force" against another person. The statute says nothing at all about threats, or force, let alone the threatened use of force. A jury's task is simple: did the

defendant cause physical contact in a way that great bodily harm might result? KSA § 21-5413(b)(1)(C). That determination has nothing whatsoever to do with threats to use force. Again, even putting aside *Perez-Vargas* and *Borden*, *Treto-Martinez* cannot possibly survive the Supreme Court's decision in *Mathis*.

3. Even if Kansas's aggravated battery statute has an element of force, it does not have an element of violent force.

If this Court is unwilling to return to *Perez-Vargas*'s causation-does-not-equal-force holding, Kansas's aggravated battery statute still does not qualify as a crime of violence under § 4B1.2(a)(1). This is because "force" "means *violent* force—that is, force capable of causing physical pain or injury to another person.'" *United States v. Winder*, 926 F.3d 1251, 1254 (10th Cir. 2019) (emphasis in original). "Force" in the violent-crimes context does not mean common-law force. *Castleman*, 572 U.S. at 163. And it is only "impossible to cause bodily injury without applying force *in the common-law sense*." *Id.* at 170. It follows, then, that it is possible to cause bodily injury without applying force outside of the common-law context.

This Court provided examples in *Perez-Vargas*: "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." 414 F.3d at 1286. This Court also listed as examples: "leaving a child unattended near a pool, failing to aid children during a kidnapping, failing to remove a child from an abusive caretaker, or failing to provide proper medical care to a child." Id. at 1287. In each circumstance, an individual can "caus[e] physical contact . . . in any manner whereby great bodily harm . . . can be inflicted." KSA § 21-5413(b)(1)(C). And in each circumstance, an individual has caused such contact without the use (threatened or attempted use) of physical force.

Moreover, the Kansas Court of Appeals has recognized that § 21-5413(b)(1)(C)'s use of the term "physical contact" "more closely parallels" the amount of force necessary to commit a common-law battery (*i.e.*, the "unlawful touching or application of force to the person of another, when done in a rude, insolent, or angry manner"). *Esher*, 922 F.3d at 1127. Thus, even ignoring the word "causing" in § 21-5413(b)(1)(C), the "physical contact" necessary to violate the statute is not the "violent force" necessary to qualify as a crime of violence. *Johnson*, 559 U.S. at 139 (holding that force necessary for common-law battery is not violent force in this context).

"If some conduct that would be a crime under the statute would not be a 'crime of violence' under § 4B1.2(a), then any conviction under that statute will not qualify as a 'crime of violence' for a sentence enhancement under the Guidelines, regardless of whether the conduct that led to a defendant's prior conviction was in fact violent." *O'Connor*, 874 F.3d at 1151. Section § 21-5413(b)(1)(C) reaches conduct that does not involve violent force "because the statute specifically says so." *United States v. Titties*, 852 F.3d 1257, 1274 (10th Cir. 2017). For this reason as well, Mr. Adams's prior Kansas aggravated battery conviction is not a crime of violence.

CONCLUSION

For the foregoing reasons, this Court should vacate Mr. Adams's sentence and remand for resentencing.

ORAL ARGUMENT STATEMENT

This appeal raises is an important issue of first impression. Oral argument would aid this Court. Thus, we respectfully request oral argument.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

The undersigned certifies that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(5) & (7)(B) in that it contains 12,948 words in a proportionally spaced typeface (13-point Garamond; as allowed by 10th Circuit Rule 32(a)), as shown by Microsoft Word 2016, which was used to prepare this brief.

s/ Daniel T. Hansmeier
DANIEL T. HANSMEIER
Appellate Chief

Dated: July 1, 2021

CERTIFICATE OF SERVICE

Undersigned counsel certifies that on July 1, 2021, he electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the CM/ECF system. Because opposing counsel (Assistant United States Attorney James Brown) is a registered CM/ECF user, he will also be served by the CM/ECF system. 10th Cir. R. 31.5. Pursuant to 10th Circuit Rule 31.5, 7 hard copies will be mailed to the Clerk of the Court at:

Mr. Christopher M. Wolpert, Clerk of the Court
Tenth Circuit Court of Appeals
1823 Stout Street
Denver, CO 80257

A copy of the brief will also be mailed to Mr. Adams.

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AO 245B (Rev. 09/19 - D/KS 04/20) Judgment in a Criminal Case
Sheet 1

United States District Court
District of Kansas

UNITED STATES OF AMERICA
v.
Briar Clayton Eugene Adams

JUDGMENT IN A CRIMINAL CASE

Case Number: 5:20CR40015 - 001
USM Number: 30088-031
Defendant's Attorney: Carl A. Folsom III

THE DEFENDANT:

☒ pleaded guilty to count(s): 1 of a one-count Indictment.
☐ pleaded nolo contendere to count(s) ___ which was accepted by the court.
☐ was found guilty on count(s) ___ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(a)(2)	Possession of a Firearm by a Prohibited Person, a Class C Felony	01/14/2020	1

The defendant is sentenced as provided in pages 1 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 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 material changes in economic circumstances.

03/02/2021
Date of Imposition of Judgment

Signature of Judge

Honorable Toby Crouse, U.S. District Judge
Name & Title of Judge

3/2/21
Date

AO 245B (Rev. 09/19 - D/KS 04/20) Judgment in a Criminal Case
Sheet 2 – Imprisonment

DEFENDANT: Briar Clayton Eugene Adams
CASE NUMBER: 5:20CR40015 - 001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 51 months.

☒ The Court makes the following recommendations to the Bureau of Prisons: The Court recommends placement at a facility which offers the UNICOR Program to allow the defendant the ability to obtain necessary skills.

☒ 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 ___ 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 ___ on ___.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Officer.

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 U.S. Marshal

AO 245B (Rev. 09/19 - D/KS 04/20) Judgment in a Criminal Case
Sheet 3 – Supervised Release

DEFENDANT: Briar Clayton Eugene Adams
CASE NUMBER: 5:20CR40015 - 001

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of 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, not to exceed eight (8) drug tests per month.

   ☐ The above drug testing condition is suspended based on the court's determination that you pose 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 the location where 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.

AO 245B (Rev. 09/19 - D/KS 04/20) Judgment in a Criminal Case
Sheet 3A – Supervised Release

DEFENDANT: Briar Clayton Eugene Adams
CASE NUMBER: 5:20CR40015 - 001

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, after obtaining court approval, require you to notify the person about the risk and you must comply with that instruction.
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. I understand additional information regarding these conditions is available at the www.uscourts.gov.

Defendant's Signature _____ Date _____

AO 245B (Rev. 09/19 - D/KS 04/20) Judgment in a Criminal Case
Sheet 3C - Supervised Release

DEFENDANT: Briar Clayton Eugene Adams
CASE NUMBER: 5:20CR40015 - 001

SPECIAL CONDITIONS OF SUPERVISION

1. You must participate as directed in a cognitive behavioral program and follow the rules and regulations of that program which may include MRT, as approved by the United States Probation and Pretrial Services Office. You must contribute toward the cost, to the extent you are financially able to do so, as directed by the U.S. Probation Officer.

2. You must submit your person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), other electronic communications or data storage devices or media, or office, to a search conducted by a United States Probation Officer. Failure to submit to a search may be grounds for revocation of release. You must warn any other occupants that the premises may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that you have violated a condition of supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.

3. You must successfully participate in and successfully complete an approved program for substance abuse, which may include urine, breath, or sweat patch testing, and/or outpatient treatment, and share in the costs, based on the ability to pay, as directed by the Probation Office. You must abstain from the use and possession of alcohol and other intoxicants during the term of supervision.

ACKNOWLEDGMENT OF CONDITIONS:
I have read or have had read to me the conditions of supervision set forth in this judgment; and I fully understand them. I have been provided a copy of them. I understand upon finding of a violation of probation or supervised release, the Court may (1) revoke supervision, (2) extend the term of supervision and/or (3) modify the conditions of supervision.

Defendant's Signature _____ Date _____

USPO Signature _____ Date _____

AO 245B (Rev. 09/19 - D/KS 04/20) Judgment in a Criminal Case
Sheet 5 – Criminal Monetary Penalties

DEFENDANT: Briar Clayton Eugene Adams
CASE NUMBER: 5:20CR40015 - 001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments set forth in this Judgment.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$100	Not Applicable	None	Not applicable	Not applicable

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

☐ The defendant shall make restitution (including community restitution) to the following payees in the amounts 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.

Name of Payee	Total Loss***	Restitution Ordered	Priority or Percentage
TOTALS	$	$	

☐ Restitution amount ordered pursuant to plea agreement $ ___.

☐ The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution 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 set forth in this Judgment 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 for the ☐ fine and/or ☐ restitution.

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

*Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
**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.

AO 245B (Rev. 09/19 - D/KS 04/20) Judgment in a Criminal Case
Sheet 6 – Schedule of Payments

DEFENDANT: Briar Clayton Eugene Adams
CASE NUMBER: 5:20CR40015 - 001

SCHEDULE OF PAYMENTS

Criminal monetary penalties are due immediately. Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows, but this schedule in no way abrogates or modifies the government's ability to use any lawful means at any time to satisfy any remaining criminal monetary penalty balance, even if the defendant is in full compliance with the payment schedule:

A ☐ Lump sum payment of $___ 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 monthly installments of not less than 5% of the defendant's monthly gross household income over a period of ___ years to commence ___ days after the date of this judgment; or

D ☐ Payment of not less than 10% of the funds deposited each month into the inmate's trust fund account and monthly installments of not less than 5% of the defendant's monthly gross household income over a period of ___ years, to commence ___ 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:

If restitution is ordered, the Clerk, U.S. District Court, may hold and accumulate restitution payments, without distribution, until the amount accumulated is such that the minimum distribution to any restitution victim will not be less than $25.

Payments should be made to Clerk, U.S. District Court, U.S. Courthouse - Room 204, 401 N. Market, Wichita, Kansas 67202, or may be paid electronically via Pay.Gov.

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 made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

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

Case Number **Defendant and Co-Defendant Names** **(including defendant number)**	**Total Amount**	**Joint and Several Amount**	**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 against any money judgment ordered as part of a forfeiture order should be made payable to the United States of America, c/o United States Attorney, Attn: Asset Forfeiture Unit, 1200 Epic Center, 301 N. Main, Wichita, Kansas 67202.

The Court orders forfeiture of the following property to the United States: Sig Sauer, model 1911, .45 caliber pistol, SN: 54A010260; and any accompanying ammunition.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

indicated. Would you all like to make argument for the record or would you just like me to issue a ruling based upon my review of the written materials that have been submitted?

And I'll look to you, Mr. Folsom, because they're your objections.

MR. FOLSOM: Your Honor, I think our objection that's stated in the presentence report and the sentencing memorandum sum it up pretty well. We-- you know, we obviously know that the Court's not bound by Judge Teeter's prior rulings on this. And the only thing I want to say in regard to the government's response to our sentencing memorandum, they cite a lot of state statutes, and our position on those statutes is they're really not relevant to the point that Congress-- you know, our position is the Dictionary Act defines this-- the word person and how it's to be used in the guidelines because that is a more narrow definition than what Kansas does. Kansas' definition is a broader swath of conduct than what's in the 4B1.2. And so I just wanted to briefly respond to that since I hadn't had a chance to do that in writing. But other than that, our objections are as stated in the memo and the PSR. We're happy to answer any questions the Court might have, but otherwise we would stand on the written materials.

THE COURT: Just generally speaking, I'm happy to answer any questions you have. I don't think I have any questions and generally think that this is probably something

that the circuit needs to resolve. And I think I'm bound by circuit precedent. But I appreciate that and I look forward to seeing what the circuit does with the arguments that I understand you have already got before it.

Mr. Hough, anything you would like to say before I rule?

MR. HOUGH: Your Honor, we would stand by the pleadings that we filed. I think that the last time this was before Judge Teeter she stated it perfectly when she mentioned that, carried out to the logical conclusion of this argument, even first-degree murder in Kansas would not be a crime of violence. It would result in a ridiculous outcome. So we'd ask the Court to follow Judge Teeter and reject this argument.

THE COURT: Okay. Thank you.

With regard to the objection number 1, it's the finding of the Court that that objection is overruled. I think that Williams and Ash hold that the statute is a crime of violence, without equivocation. I understand the victim of the state court crime at issue here was not a fetus. Even so, it's not clear that Kansas law differs materially from federal law. And I point out that 18 U.S.C. Section 1841 is similar to the Kansas law that Mr. Adams' arguments have addressed.

Final thing I would note is that the focus of-- my understanding of the sentencing guidelines is that we focus on the contents of the defendant, not on the status of the victim.

And so for those reasons, I would overrule defendant's objection number 1.

With regard to defendant's objection 2, same series of questions to you, Mr. Folsom. You indicated in here that binding precedent pins me down, but I want to give you an opportunity to make your appellate record so that you can make the right argument for your client at the circuit. So I'll do that now if you wish.

MR. FOLSOM: Thank you, Your Honor. On this one we do think the Court is bound. We stated before we didn't think the Court was bound on the first objection, but on this one we definitely think that Williams controls this issue, and we're just preserving it for further review by the circuit.

THE COURT: Sure. I appreciate that. And unless the government wants to say anything, I'm prepared to rule.

MR. HOUGH: I have nothing further, Your Honor.

THE COURT: Defendant's objection number 2 is overruled because United States v. Williams does bind me, and so that objection is overruled.

Are there any other objections that we need to take up, or can we now move to the calculation of the advisory guideline?

MR. FOLSOM: That, I believe's, it, Your Honor.

MR. HOUGH: I concur.

THE COURT: Okay. All right. So I will move to the

No. 21-3043

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BRIAR CLAYTON EUGENE ADAMS,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Kansas (No. 20-cr-40015)
Honorable Toby Crouse, United States District Judge

BRIEF OF APPELLEE THE UNITED STATES

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ORAL ARGUMENT IS REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

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PRIOR OR RELATED APPEALS

None.

STATEMENT OF JURISDCTION

This is an appeal from a final judgment in a criminal case in which the District Court had jurisdiction under 18 U.S.C. § 3231. The District Court entered judgment on March 2, 2021. 1.R.63;[1] *see also* Fed. R. App. P. 4(b)(6). Defendant-Appellant Briar Adams timely filed a notice of appeal on March 2, 2021. 1.R.70; *see also* Fed. R. App. P. 4(b)(1)(A). This Court has appellate jurisdiction under 28 U.S.C. § 1291, and authority to review Adams's challenge to his sentence under 18 U.S.C. § 3742(a).

[1] This brief cites the record on appeal as "[volume #].R.[page #]." It cites Adams's opening brief as "Br.[page #]."

ISSUE PRESENTED

Whether Adams's prior conviction for Kansas aggravated battery qualifies as a crime of violence under U.S.S.G. §§ 2K2.1(a)(4)(A) and 4B1.2(a)(1).

STATEMENT OF THE CASE

A. Procedural History

In March 2020, a federal grand jury in the District of Kansas indicted Defendant-Appellant Briar Adams on the charge of possessing a firearm and ammunition following a felony conviction, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). 1.R.8-9. Adams pled guilty to the felon-in-possession charge without a plea agreement. 1.R.14-20. At sentencing, the District Court found that Adams's prior felony conviction for Kansas aggravated battery was a crime of violence under U.S.S.G. §§ 2K2.1(a)(4)(A) and 4B1.2(a)(1), and sentenced him to 51 months in prison followed by three years of supervised release. 1.R.63-65. Adams timely appealed. *See* 1.R.70-71. On appeal, Adams challenges the District Court's determination that his Kansas aggravated battery conviction qualifies as a crime of violence.

B. Relevant Facts

In January 2020, officers with the Topeka, Kansas police department were dispatched on a report of an unsecured building.[2]

[2] The facts in this paragraph are taken from the presentence investigation report (PSR), 2.R.6-7. *See also* 3.R.22-23 (summarizing the facts the government could prove at trial).

When they arrived at the address, they met a witness who reported that a woman had been breaking into the property. The officers determined that the woman had an active warrant, located the woman at her camper, and took her into custody on the warrant. On the way to the law enforcement center, the woman told officers that her boyfriend, Adams, was in their camper cleaning his firearm, that he was a convicted felon, and that he also had an active warrant. Officers returned to the camper to speak with Adams. When he exited the camper, he had a holster on his waistband. Officers found a half-full box of .45 caliber ammunition in his coat, and after obtaining a warrant for the camper, located a Sig Sauer .45 caliber handgun loaded with ammunition matching the ammunition found in Adams's coat. A review of Adams's criminal history revealed he had been convicted of aggravated battery, a felony, in Shawnee County, Kansas District Court.

Adams was indicted on one count of possession of a firearm by a prohibited person in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). 1.R.8-9. He pled guilty to that charge without a plea agreement. 1.R.17. Adams's plea petition states that he was previously "convicted of

aggravated battery, intentional body harm in violation of Kansas Statutes Annotated 21-5413(b), in the Shawnee County District Court, Kansas, case no. 17CR000898, a felony offense." 1.R.15; *see also* 3.R.23 (same admission at change-of-plea hearing).

Adams committed the Kansas aggravated battery offense in June 2017. Officers with the Topeka, Kansas police department were dispatched to a residence regarding a domestic disturbance.[3] The responding officers met with a woman who advised that Adams, who was her boyfriend and the father of her child, was upset because she locked him out of the house. She indicated that he was using methamphetamine frequently and that she did not want him in her home. Nevertheless, Adams was able to get into the house and proceeded to drag the woman through the house by her hand and had her in a choke hold. The woman tried to call police, but Adams took her phone and threw it on the ground, causing the screen to break and the battery to fall out. Neighbors saw what was happening, entered the

[3] The following description of the Kansas aggravated battery offense are taken from the PSR, 2.R.13.

house to intervene, and physically restrained Adams until police arrived.

After Adams pled guilty to the felon-in-possession charge, the probation office prepared a presentence investigation report (PSR), using the 2018 edition of the U.S. Sentencing Commission Guidelines Manual ("U.S.S.G" or "Guidelines"). The PSR set Adams's base offense level at 20, as the Guidelines require for a felon-in-possession offense where the defendant committed the offense after a felony conviction for a crime of violence. 2.R.8 (citing U.S.S.G. § 2K2.1(a)(4)(A)).

A crime of violence is, among other things, "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." U.S.S.G. § 4B1.2(a)(1); *see also* U.S.S.G. § 2K2.1, comment. (n.1). Applying that definition, the PSR determined that Adams's prior conviction for Kansas aggravated battery was a crime of violence. 2.R.8 & n.1; 2.R.29.

The PSR then subtracted three levels for acceptance of responsibility and calculated Adams's total offense level to be 17. 2.R.8. Based on a total offense level of 17 and an uncontested criminal history

category of VI, the PSR determined Adams's advisory guidelines range to be 51 to 63 months in prison. 2.R.22.

Adams objected to the PSR on two grounds. Both objections asserted that Adams had not been convicted of a crime of violence. 2.R.26-30. If Adams's aggravated battery conviction was not a crime of violence, his base offense level would have been 14 instead of 20, which would have reduced his advisory guidelines range from 51 to 63 months in prison, to 30 to 37 months. *See* Br.4;[4] *see also* 2.R.8, 26-30; U.S.S.G. § 2K2.1(a)(6); U.S.S.G. ch. 5, pt. A.

First, Adams argued that his prior Kansas aggravated battery conviction did not qualify as a crime of violence because under Kansas law an aggravated battery can be committed against an unborn child. 2.R.26-28; *see also* Kan. Stat. Ann. § 21-5413(b)(1)(C); Kan. Stat. Ann. § 21-5419(c). He argued that such batteries do not require the use,

[4] Adams states that without the crime-of-violence increase in his base offense level, his total offense level would have been 11 and "his advisory guidelines range a much lower 27 to 33 months' imprisonment." Br.4. That assumes a three-level reduction for acceptance of responsibility. *See id.* But with a base offense level of 14, Adams would only have been eligible for a two-level reduction. *See* U.S.S.G. § 3E1.1(b) (providing that defendants are eligible for the one-additional-level reduction if the base offense level is "16 or greater").

attempted use, or threatened use of physical force against the person of another because the term "person" in the crime-of-violence definition should be limited to a "member of the species homo sapiens who is born alive." 2.R.26-28 (emphasis and internal quotation marks omitted) (quoting 1 U.S.C. § 8(b)); *see also* 1.R.22-26; 3.R.44. Adams acknowledged that this Court had already held that Kansas aggravated battery was a crime of violence. 2.R.26 (citing *United States v. Williams*, 893 F.3d 696 (10th Cir. 2018), and *United States v. Treto-Martinez*, 421 F.3d 1156 (10th Cir. 2005)). But he argued that this Court's previous decisions were not binding because they had not considered the specific unborn-child argument he raised. 1.R.24-25.

Second, Adams argued that his prior conviction for Kansas aggravated battery was not a crime of violence because it did not have as an element the use, attempted use, or threatened use of physical force. *See* 2.R.29-30. He stated that his prior conviction was for violating Kan. Stat. Ann. § 21-5413(b)(1)(C), which "penalizes the causation of physical contact." 2.R.29. And he argued that his conviction did not qualify as a crime of violence because "causing physical contact" does not require "physical force." 2.R.30. Adams conceded that this Court has

rejected this argument multiple times, noting that he raised the argument just to preserve it for further review. 2.R.29-30 (citing *United States v. McMahan*, 732 F. App'x 665, 669 (10th Cir. 2018) (unpublished); *Williams*, 893 F.3d 696; *Treto-Martinez*, 421 F.3d at 1160); *see also* 3.R.46.

In response to Adams's objections, the government agreed with the PSR that his prior Kansas aggravated battery conviction was a crime of violence. 2.R.28-29, 30; *see also* 1.R.46-61. The government argued that Adams's first objection should be rejected for the same reason that a similar objection was overruled in *United States v. Kissell*, 18-cr-40001-01-HLT (D. Kan.). The probation officer agreed, concluding that under principles of statutory construction and common sense, without indulging "'legal imagination' to consider hypothetical situations that technically violate the law but have no 'realistic probability' of falling within its application," Adams's prior conviction for Kansas aggravated battery was a crime of violence. 2.R.29.

In response to Adams's second objection, the government argued that Adams had correctly conceded that binding Tenth Circuit precedent foreclosed his argument that his prior conviction for Kansas

aggravated battery lacked an element of force because it punished causation of contact. 2.R.30 (citing *McMahan*, 732 F. App'x at 669; *Williams*, 893 F.3d 696; *Treto-Martinez*, 421 F.3d at 1160). The probation officer agreed. 2.R.30.

In addition to his objections to the PSR, Adams also filed a sentencing memorandum. 1.R.21-33. Adams's sentencing memorandum stated that he "advances all of the arguments presented in his PSR objections," 1.R.22, but it specifically raised only the first of his two objections. *See* 1.R.22-26. The government responded that the District Court had rejected similar "person" arguments in three different cases, 1.R.47; that this Court had already held in *Williams* that Kansas aggravated battery is a crime of violence, 1.R.47-48; and that state laws now commonly define "person" to include unborn children, 1.R.48-61.

At sentencing, Adams reiterated his two objections. 3.R.44-45, 46. The District Court overruled Adams's first objection, concluding that it was bound by this Court's decisions in *United States v. Ash*, 917 F.3d 1238 (10th Cir. 2019), which has since been vacated on other grounds,[5]

[5] *Ash v. United States*, No. 18-9639, 2021 WL 2519032 (U.S. June 21, 2021) (granting the petition for writ of certiorari, vacating, and

and *Williams*, which held that violations of the Kansas aggravated battery statute were crimes of violence. 3.R.44-45. The District Court resisted the premise of Adams's argument, noting that the focus of the Guidelines is on the "defendant, not on the status of the victim." 3.R.45. It noted that, "I understand the victim of the state court crime at issue here was not a fetus." 3.R.45. And it observed that the Kansas definition of "person" in Kan. Stat. Ann. § 21-5419 "is similar to" the definition in 18 U.S.C. § 1841. 3.R.45. The District Court overruled Adams's second objection, agreeing with the parties that *Williams* foreclosed the objection. 3.R.46.

Adams timely appealed, arguing that Kansas aggravated battery under Kan. Stat. Ann. § 21-5413(b)(1)(C) is not a crime of violence under U.S.S.G. §§ 2K2.1(a)(4)(A) and 4B1.2(a)(1).

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remanding); *United States v. Ash*, 7 F.4th 962 (10th Cir. 2021) (reversing and remanding).

SUMMARY OF ARGUMENT

Adams's prior conviction for Kansas aggravated battery is a crime of crime of violence and therefore warranted the sentence enhancement he received. His prior conviction was for "knowingly causing physical contact with another person when done in a rude, insulting or angry manner with a deadly weapon, or in any manner whereby great bodily harm, disfigurement or death can be inflicted." Kan. Stat. Ann. § 21-5413(b)(1)(C). This Court has already said that a materially identical prior version of that statute is a crime of violence. *See United States v. Treto-Martinez*, 421 F.3d 1156 (10th Cir. 2005).

A separate Kansas statute makes it a crime to commit aggravated battery against an "unborn child," but it only applies in certain circumstances. *See generally* Kan. Stat. Ann. § 21-5419. The Kansas Supreme Court has stated that § 21-5419 reflects the Kansas "legislature's expressed . . . intent to allow two units of criminal prosecution" for an act committed against "both a woman and her 'unborn child.'" *State v. Seba*, 380 P.3d 209, 220 (Kan. 2016).

The aggravated battery Adams was convicted of committing—under Kan. Stat. Ann. 21-5413(b)(1)(C)—is a crime of violence because

it "has as an element the use, attempted use, or threatened use of physical force against the person of another." *See* U.S.S.G. § 4B1.2(a)(1). Three aspects of this definition of a crime of violence are at issue in this appeal: (1) the "person of another" requirement; (2) the "force" requirement; and (3) the "*physical* force" requirement, which requires the use of violent force. Adams's prior conviction for Kansas aggravated battery satisfies all three.

1. Adams's prior conviction satisfies the "person of another" requirement for three reasons. First, Adams was convicted of ordinary aggravated battery under Kan. Stat. Ann. § 21-5413(b)(1)(C), and not under § 21-5419, which creates a separate crime of aggravated battery against an unborn child. Second, even if § 21-5413(b) and § 21-5419 are read together, they create separate, divisible crimes, and Adams was not convicted of aggravated battery against an unborn child. Third, aggravated battery against an unborn child necessarily requires physical force against the mother carrying the unborn child.

2. Adams has conceded that this Court has held that his prior conviction satisfies the "force" requirement. *See* 2.R.26 (citing *United States v. Williams*, 893 F.3d 696 (10th Cir. 2018), and *Treto-Martinez*,

421 F.3d 1156). Most of his arguments for ignoring or overturning these precedents have been waived. In addition, Adams's arguments for ignoring these precedents are foreclosed because one panel of this Court generally cannot overturn the decision of another panel just because it thinks the prior decision was wrong. *See United States v. Brooks*, 751 F.3d 1204, 1209 (10th Cir. 2014). Adams's argument that *Borden v. United States*, 141 S. Ct. 1817 (2021), overturned *Williams*, and the precedent on which it relied, *United States v. Ontiveros*, 875 F.3d 533, 538 (10th Cir. 2017), are misplaced. *Borden* focused on the *mens rea* required for a crime of violence, and did not address the issue Adams presents here—whether statutes with causation-of-contact elements satisfy U.S.S.G. § 4B1.2(a)(1)'s "force" requirement.

3. Adams's prior conviction satisfies the "physical force" or "violent force" requirement. Adams's arguments regarding the violent-force requirement are waived, foreclosed by binding precedent, *see, e.g.*, *Treto-Martinez*, 421 F.3d at 1159-1160, and in any event without merit because his prior conviction for Kansas aggravated battery required "force capable of causing physical pain or injury to another person." *See Johnson v. United States*, 559 U.S. 133, 138-139 (2010) (*Johnson I*).

ARGUMENT

Adams's prior conviction for Kansas aggravated battery is a crime of violence under U.S.S.G. §§ 2K2.1(a)(4)(A) and 4B1.2(a)(1).

A. Standard of Review

This Court reviews de novo whether a prior conviction qualifies as a crime of violence under U.S.S.G. § 4B1.2(a). *United States v. Treto-Martinez*, 421 F.3d 1156, 1158 (10th Cir. 2005). Arguments not raised before the district court are forfeited. *See United States v. Williams*, 893 F.3d 696, 701-702 (10th Cir. 2018). This Court "consider[s] forfeited arguments under the plain error standard of review." *United States v. Garcia*, 936 F.3d 1128, 1131 (10th Cir. 2019). Under plain-error review, the appellant must show the district court committed (1) error, (2) that is plain, (3) which affects his substantial rights, and (4) which seriously affects the fairness, integrity, or public reputation of judicial proceedings. *See United States v. Trujillo*, 960 F.3d 1196, 1201 (10th Cir. 2020). A forfeited argument is waived if an appellant does not argue plain error. *See McKissick v. Yuen*, 618 F.3d 1177, 1189 (10th Cir. 2010); *see also Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1130-1131 (10th Cir. 2011). *But see United States v. Courtney*, 816 F.3d 681, 683-

684 (10th Cir. 2016) (concluding that the defendant's plain-error argument, made for the first time in reply, had not been waived).

B. Legal Framework

Under the Guidelines, a defendant convicted of unlawful possession of a firearm or ammunition receives a higher base offense level of 20 (as opposed to 14), and therefore a higher advisory sentencing range, if he committed the crime after being convicted of a felony that is a "crime of violence." *Compare* U.S.S.G. 2K2.1(a)(4)(A) *with* U.S.S.G. § 2K2.1(a)(6). A conviction can qualify as a crime of violence in two ways—under the "elements clause" (U.S.S.G. § 4B1.2(a)(1)) or the "enumerated offense clause" (U.S.S.G. § 4B1.2(a)(2)). *See United States v. O'Connor*, 874 F.3d 1147, 1150 (10th Cir. 2017); *see also* U.S.S.G. § 2K2.1, comment. (n.1) ("'Crime of violence' has the meaning given that term in § 4B1.2(a) and Application Note 1 of the Commentary to § 4B1.2."). Under the elements clause, an offense is a crime of violence if it "has as an element the use, attempted use, or threatened use of physical force against the person of another." U.S.S.G. § 4B1.2(a)(1).

To determine whether a specific conviction constitutes a crime of violence, courts apply a "categorical approach." *Taylor v. United States*, 495 U.S. 575, 600 (1990); *United States v. Kendall*, 876 F.3d 1264, 1267 (10th Cir. 2017). The categorical approach requires courts to focus "solely on the 'elements of the statute forming the basis of the defendant's conviction'; the specific facts of the defendant's case are irrelevant." *Kendall*, 876 F.3d at 1267 (quoting *Descamps v. United States*, 570 U.S. 254, 257 (2013)).

In applying the categorical approach, courts compare the elements of the statute of conviction to the Guidelines' definition of a crime of violence. *See id.*[6] If the statute of conviction for the predicate offense "'sweeps more broadly' than the Guidelines' definition of a crime of violence—that is, if someone could be convicted of violating the statute but not commit a crime of violence—the statute cannot categorically be

[6] This Court applies the same analytical approach in assessing enhanced sentences under both the Guidelines' definition of "crime of violence" and the Armed Career Criminal Act (ACCA) definition of "violent felony." *See Kendall*, 876 F.3d at 1267-1268 & n.3. It relies on authorities from the two contexts interchangeably. *See, e.g.*, *id. Cf. United States v. Melgar-Cabrera*, 892 F.3d 1053, 1066 & n.7 (10th Cir. 2018) (noting difference between U.S.S.G. § 4B1.2(a) and another statute, 18 U.S.C. § 924(c)(3)).

considered a crime of violence." *Id.* at 1267-1268 (quoting *United States v. Titties*, 852 F.3d 1257, 1266 (10th Cir. 2017)).

The first step in applying the categorical approach is identifying the statute of conviction—here, Kan. Stat. Ann. § 21-5413(b)(1)(C)—and its elements. *See id.* at 1268. 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) (quoting Black's Law Dictionary (10th ed. 2014)).

"[N]ot everything in a statute is an 'element.'" *Kendall*, 876 F.3d at 1268. Sometimes, a statute will "enumerate[e] various factual means of committing a single element." *Id.* "Facts," unlike elements, "are mere real-world things—extraneous to the crime's legal requirements." *Mathis*, 136 S. Ct. at 2248. For example, "a statute might require the 'use of a "deadly weapon" as an element of a crime and further provide that the use of a "knife, gun, bat, or similar weapon" would all qualify' as a deadly weapon." *Kendall*, 876 F.3d at 1268 (brackets omitted) (quoting *Mathis*, 136 S. Ct. at 2249). The list of "examples are means, not elements, because 'that kind of list merely specifies diverse means

of satisfying a single element of a single crime.'" *Id.* (quoting *Mathis*, 136 S. Ct. at 2249).

Other times, a "single statute [will] list elements in the alternative, and thereby define multiple crimes." *Mathis*, 136 S. Ct. at 2249. Statutes that define more than one crime, or "multiple alternative versions" of a crime, are "'divisible.'" *Descamps*, 570 U.S. at 262; *accord Kendall*, 876 F.3d at 1268. In addressing divisible statutes, a sentencing court needs "a way of figuring out which of the alternative elements listed . . . was integral to the defendant's conviction." *Mathis*, 136 S. Ct. at 2249. "To address that need, [the Supreme] Court approved the 'modified categorical approach,'" *id.*, to "accommodate alternative statutory definitions," *Descamps*, 570 U.S. at 274 (internal quotation marks omitted). The modified categorical approach allows a sentencing court to "loo[k] to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of." *Mathis*, 136 S. Ct. at 2249. The court can then compare that crime to the Guidelines' definition of a crime of violence, applying the categorical approach. *Id.*

At the second step of the categorical approach, courts "compare the statute of conviction's elements to the Guidelines' definition of a crime of violence." *Kendall*, 876 F.3d at 1267. "[I]f someone can violate the statute [of conviction] in many different ways, some of which meet the definition of a crime of violence and some of which do not, the statute does not constitute a crime of violence." *Id.* at 1267-1268.

The government bears the burden of showing that Adams's prior conviction was for a crime of violence under U.S.S.G. § 4B1.2(a). *United States v. Bennett*, 108 F.3d 1315, 1316 (10th Cir. 1997). It must show that Adams's prior conviction "necessarily" qualifies as a crime of violence. *United States v. Huizar*, 688 F.3d 1193, 1195 (10th Cir. 2012). But this "is not an invitation to apply 'legal imagination' to the state offense; there must be 'a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.'" *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013) (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)); *see also United States v. Harris*, 844 F.3d 1260, 1270 (10th Cir. 2017) (finding "it more theoretical than realistic that conduct . . . not equating to physical force would be prosecuted as robbery in Colorado").

C. Adams's Kansas aggravated battery conviction satisfies the elements clause of U.S.S.G. § 4B1.2(a)(1).

Adams's prior felony conviction was for Kansas aggravated battery in violation of Kan. Stat. Ann. § 21-5413(b). 1.R.34. That statute has four subsections, each of which has subsections of its own. The journal entry of judgment in Adams's aggravated battery case does not specify which subsection of the statute he was convicted of violating. *See* 1.R.34. Adams's opening brief focuses on Kan. Stat. Ann. § 21-5413(b)(1)(C), which defines aggravated battery as "knowingly causing physical contact with another person when done in a rude, insulting or angry manner with a deadly weapon, or in any manner whereby great bodily harm, disfigurement or death can be inflicted."

The government will do the same,[7] with one caveat: Adams has affirmatively waived any argument that a prior conviction under Kan.

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[7] *See United States v. Treto-Martinez*, 421 F.3d 1156 (10th Cir. 2005) (suggesting that where it is unclear which subsection of an offense is the statute of conviction, the subsection that requires the least culpable conduct must satisfy the definition of a crime of violence); *see also United States v. Harris*, 844 F.3d 1260, 1268 (10th Cir. 2017) ("In applying the categorical approach, [we] identify the least culpable conduct criminalized by the state statute."). Although Kan. Stat. Ann. § 21-5413(b) also prohibits reckless conduct, *see id.* § 21-5413(b)(2), the parties agree that Adams was convicted of *knowing* aggravated battery under § 21-5413(b)(1).

Stat. Ann. § 21-5413(b)(1)(C) should be treated differently than a conviction under subsection (b)(1)(B) of that statute. Adams conceded below that *United States v. Williams*, 893 F.3d 696 (10th Cir. 2018), which addressed subsection (b)(1)(B), is binding and controlling authority with respect to his argument that his prior conviction lacked an element of physical force. *See* 2.R.29-30.

1. Adams's Kansas aggravated battery conviction was a crime against the "person of another."

Adams argues that Kansas aggravated battery is not a crime of violence under U.S.S.G. § 4B1.2(a)(1) because it includes aggravated battery of an "unborn child," whereas § 4B1.2(a)(1) limits crimes of violence to crimes "against the person of another." Br.13-20. This argument was raised (1.R.22-26; 2.R.23-25; 3.R.44-45) and rejected (3.R.45-46) below. It fails on appeal for three reasons. First, Adams was convicted of aggravated battery under Kan. Stat. Ann. § 21-5413(b)(1)(C), not aggravated battery of an unborn child under Kan. Stat. Ann. § 21-5419. Second, even if Kansas's general aggravated battery statute (§ 21-5413(b)) subsumes § 21-5419, together they create divisible aggravated battery offenses. Third, any aggravated battery against an unborn child necessarily requires physical force against the

pregnant woman carrying the unborn child. Accordingly, this Court need not delve into the definition of "person" to affirm Adams's sentence.[8] Although the government did not make these arguments below, this Court "may affirm on any basis supported by the record, even if it requires ruling on arguments not reached by the district court or even presented . . . on appeal." *Richison v. Ernest Grp., Inc.*, 634 F.3d

[8] That said, there are numerous flaws in Adams's argument that the word "person" unambiguously excludes crimes against an unborn child. First, the phrase at issue in U.S.S.G. § 4B1.2(a)(1) is "the person of another." Second, the Guidelines do not define the term "person." Third, the Dictionary Act, on which Adams heavily relies (Br.14-15), defines the term "person" to "include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals," 1 U.S.C. § 1, and also to "include every infant member of the species homo sapiens who is born alive at any stage of development," 1 U.S.C. § 8(a). The term "include" does not limit what the term "person" means. *See United States v. Faulkner*, 950 F.3d 670, 679 (10th Cir. 2019) (observing that the word "includes" is "'not exhaustive'" (quoting U.S.S.G. § 1B1.1, comment. (n.2)). Fourth, the Model Penal Code, on which Adams also relies (Br.15-16), defines "person" as "any natural person and, where relevant, a corporation or an unincorporated association." M.P.C. § 1.13(8) (2020). That definition is circular, defining a "person" as "any natural person," without defining what a "natural person" is. Fifth, even if Adams is correct that the common law did not consider an unborn child to be a person, the Supreme Court has stated that at common law when a fetus was not considered a person it was "regarded as part of the mother." *Roe v. Wade*, 410 U.S. 113, 134 (1973). Under that view, aggravated battery against a fetus would be aggravated battery against the woman carrying the fetus.

1123, 1130 (10th Cir. 2011); *see also United States v. Mobley*, 971 F.3d 1187, 1198 (10th Cir. 2020).

a. Adams was convicted of violating Kan. Stat. Ann. § 21-5413(b)(1)(C) alone.

Adams's argument that his prior conviction for Kansas aggravated battery is not a crime of violence is too clever by half. He was convicted under Kansas's general aggravated battery statute, Kan. Stat. Ann. § 21-5413(b), which by itself indisputably satisfies the "person of another" requirement of a crime of violence under U.S.S.G. § 4B1.2(a)(1). *See Williams*, 893 F.3d 696 (holding that Kan. Stat. Ann. § 21-5413(b)(1)(B) is a crime of violence); *Treto-Martinez*, 421 F.3d at 1160 (holding that Kan. Stat. Ann. § 21-3414 (a)(1)(C), a materially identical prior version of Kan. Stat. Ann. § 21-5413(b)(1)(C), was a crime of violence).

So instead, Adams relies on a separate statute: Kan. Stat. Ann. § 21-5419. That statute was enacted separately,[9] with a separate title

[9] The provisions now codified at Kan. Stat. Ann. § 21-5419 were first enacted in 2007. 2007 Kan. Sess. Laws, ch. 169, 1408, § 4. It was initially codified at Kan. Stat. Ann. § 21-3452—separate from the Kansas aggravated battery statute, which was codified at Kan. Stat. Ann. § 21-3414(a).

and separate requirements.[10] Perhaps most importantly, the Kansas Supreme Court has stated that § 21-5419 was intended to create a separate crime. *See Kansas v. Seba*, 380 P.3d 209, 220 (Kan. 2016).[11] Yet § 21-5419 is not mentioned in the state court judgment, which identifies Adams's statute of conviction as "21-5413(b)" and describes his offense of conviction as "AGGRAVATED BATTERY, INTENTIONAL, BODILY HARM." 1.R.34.

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[10] The Kansas legislature called the 2007 enactment "Alexa's law." 2007 Kan. Sess. Laws, ch. 169, 1408, § 4(a); *see also* Kan. Stat. Ann. § 21-5419(d). And it provided that Alexa's law would not apply if any one of three exceptions was met. 2007 Kan. Sess. Laws, ch. 169, 1408, § 4(c); *see also* Kan. Stat. Ann. § 21-5419(b).

[11] *See also* Marka B. Fleming, *Feticide Laws: Contemporary Legal Applications and Constitutional Inquiries*, 29 Pace L. Rev. 43, 59-60 (2008) (stating that Alexa's law allows prosecutors to charge crimes against a pregnant "woman and *a separate crime* against the fetus" (emphasis added)); Amy Renee Leiker, *He helped kill a pregnant girl 12 years ago. Now he wants to be pardoned.*, Wichita Eagle, June 19, 2018, https://www.kansas.com/news/local/article195708969.html (describing Alexa's law as "allow[ing] prosecutors to bring double charges against a person who attacks a pregnant woman and harms or kills her unborn child"); John Hanna, *'Alexa's Law' advances; critics question need for it*, Lawrence Journal-World, Feb. 16, 2007, https://www2.ljworld.com/news/2007/feb/16/alexas_law_advances_critics_question_need_it/ ("[T]he bill's backers said they want the criminal law to recognize that when a pregnant woman or girl is harmed, two separate individuals have been attacked.").

Adams's reliance on § 21-5419 to cast doubt on the nature of his aggravated battery conviction is not an application of the categorical approach, but an abuse of it. Because Adams was not convicted under Kan. Stat. Ann. § 21-5419, which created a separate offense, *see Seba*, 380 P.3d at 220, it has no role to play in determining whether Adams's aggravated battery conviction was a crime of violence. Therefore, Adams's sentence should be affirmed under this Court's binding precedent. *See Treto-Martinez*, 421 F.3d at 1159-1160; *see also*; *Williams*, 893 F.3d at 704.[12]

b. Kan. Stat. Ann. § 21-5413(b)(1)(C) and § 21-5419 create divisible crimes, and Adams was not convicted of aggravated battery against an unborn child.

Even if Kan. Stat. Ann. § 21-5413(b)(1)(C) and § 21-5419 are read together, as Adams advocates, the history, text and structure, and state-court decisions interpreting the statutes all indicate that the statutes create separate, divisible crimes. In determining whether a

[12] Although *Williams* addressed a different subsection of the Kansas aggravated battery statute—Kan. Stat. Ann. § 21-5413(b)(1)(B)—Adams conceded below that it also applied to his conviction under Kan. Stat. Ann. § 21-5413(b)(1)(C). *See* 2.R.29-30; 3.R.46.

statute of conviction is divisible, this Court follows the following framework for analysis: It "begin[s] by examining 'authoritative sources of state law,' including the statute on its face and state-court decisions." *United States v. Cantu*, 964 F.3d 924, 928 (10th Cir. 2020) (quoting *Mathis v. United States*, 136 S. Ct. 2243, 2256 (2016)). "Next, 'if state law fails to provide clear answers,'" this Court looks to "'the record of a prior conviction itself.'" *Id.* (quoting *Mathis*, 136 S. Ct. at 2256).

Starting with the statute of conviction on its face, Kan. Stat. Ann. § 21-5413(b)(1)(C) provides: "Aggravated battery is . . . knowingly causing physical contact with another person when done in a rude, insulting or angry manner with a deadly weapon, or in any manner whereby great bodily harm, disfigurement or death can be inflicted." Separately, Kansas law provides that, "[a]s used in . . . subsections (a) and (b) of 21-5413, . . . 'person' and 'human being' also mean an unborn child." Kan. Stat. Ann. § 21-5419(c). It defines "unborn child" to "mea[n] a living individual organism of the species homo sapiens, in utero, at any stage of gestation from fertilization to birth." *Id.* § 21-5419(a)(2). However, this definition of "person" "shall not apply to" "[a]ny act committed by the mother of the unborn child"; "any medical procedure,

including abortion, performed by a physician or other licensed medical professional at the request of the pregnant woman or her legal guardian"; or "the lawful dispensation or administration of lawfully prescribed medication." *Id.* § 21-5419(b).

Adams contends that Kan. Stat. Ann. § 21-5413(b)(1)(C) and § 21-5419 codify a single crime that "is not divisible between the living and the unborn" because "§ 21-5419(c)'s definition of 'person' to include an 'unborn child' merely provides another means of violating § 21-5413." Br.12. To the contrary, the indicia of divisibility that this Court typically considers demonstrate that the statutes create separate crimes.

First, the two statutes were enacted separately. The provisions now codified in § 21-5419 were first enacted in 2007 through legislation called "Alexa's law." *See* 2007 Kan. Sess. Laws, ch. 169, 1408, § 4. It was then codified at Kan. Stat. Ann. § 21-3452. At the time, Kansas's general aggravated battery statute was codified at § 21-3414(a). *See Treto-Martinez*, 421 F.3d at 1158. When the Kansas legislature later enacted a comprehensive recodification of the Kansas criminal code, the Kansas aggravated battery statute and Alexa's law were kept separate.

The Kansas aggravated battery statute was in § 48 of the recodification legislation and codified at Kan. Stat. Ann. § 21-5413(b), while Alexa's law was in § 54 and codified at Kan. Stat. Ann. § 21-5419. *See* 2010 Kan. Sess. Laws, ch. 136, 1432-1435, 1439 §§ 48, 54.

Second, the text and structure of the two statutes indicate that they create separate offenses. Although § 21-5419(c) adds "unborn child" to the definition of "person" in § 21-5413(a) and (b), it does not do so automatically. There are three fact-specific exceptions to the application of § 21-5419; if any one of them is satisfied the provision does not apply. Section 21-5419(b) provides:

> This section shall not apply to . . . (1) [a]ny act committed by the mother of the unborn child; (2) any medical procedure, including abortion, performed by a physician or other licensed medical professional at the request of the pregnant woman or her legal guardian; or (3) the lawful dispensation or administration of lawfully prescribed medication.

When read as a whole, § 21-5419 does not just provide an alternative factual way in which an ordinary Kansas aggravated battery may be committed. Rather, § 21-5419 creates a separate aggravated battery offense against an unborn child with the exceptions in § 21-5419 operating as "constituent parts of [the] crime's legal definition." *See Mathis*, 136 S. Ct. at 2248. That is, § 21-5419 defines

separate "legal requirements" for aggravated battery against an unborn child, *see id.*, by imposing specific limitations on the scope of the acts that are criminalized, *see* Kan. Stat. Ann. § 21-5419(b). And there is no way to know, just looking at the statutes categorically on their faces, whether § 21-5419 even applied in a particular case. *See Descamps*, 570 U.S. at 262-263. This stands in stark contrast to the lists of illustrative factual "means" the Court has said do not create separate crimes because they "hav[e] no legal effect or consequence." *See, e.g.*, *Mathis*, 136 S. Ct. at 2248 (explaining that "a statute [that] requires use of a 'deadly weapon' as an element of a crime and further provides that the use of a 'knife, gun, bat, or similar weapon' would all qualify . . . . merely specifies diverse means of satisfying a single element of a single crime").

While Adams characterizes Kan. Stat. Ann. § 21-5419 as simply a definitional provision, Br.12, it is not located in the definitions section of the Kansas criminal code, which is Kan. Stat. Ann. § 21-5111. Nor is § 21-5419 an ordinary definition provision—it only applies in certain circumstances. *See* Kan. Stat. Ann. § 21-5419(b). Adams's reliance on the Kansas pattern jury instruction for aggravated battery also is

misplaced because it recognizes that, "*subject to the exceptions in the statute*, K.S.A. 21-5419 makes this crime applicable when the victim is an 'unborn child.'" PIK Criminal 54.310 (4th ed. 2020 supp.) (emphasis added). And Adams's assumption that all definition provisions are necessarily and automatically swept wholesale into the substantive provision, as mere factual ways of committing the offense, proves too much. The definition section of the Kansas criminal code defines person as "an individual, public or private corporation, government, partnership, or unincorporated association," "except when a particular context clearly requires a different meaning." Kan. Stat. Ann. § 21-5111(t). It cannot be true that no "person" crime in Kansas can be a crime of violence because the definition of "person" includes corporations and other entities.

Third, the Kansas Supreme Court has stated that, "[t]hrough Alexa's law, the legislature expressed an intent to allow two units of criminal prosecution if one act—such as shooting one bullet—kills both a woman and her 'unborn child.'" *Seba*, 380 P.3d at 220 (citing *Kansas v. Schoonover*, 133 P.3d 48, 65 (Kan. 2006)). A "unit of prosecution" is "the minimum scope of the conduct proscribed by [a] statute."

Schoonover, 281 Kan. at 471; *accord United States v. Elliott*, 937 F.3d 1310, 1313 (10th Cir. 2019). Because "a double jeopardy issue arises when a defendant is convicted of multiple violations of a single statute," "there can be only one conviction for [each] unit of prosecution." *Schoonover*, 281 Kan. at 471.

In other words, the Kansas Supreme Court has stated that in enacting § 21-5419, the Kansas legislature intended to define a second, separate set of crimes against an unborn child. *See Seba*, 380 P.3d at 220; *see also* Fleming, *infra* n.10. This is consistent with the common understanding of the purpose of § 21-5419 when it was enacted. *See, e.g.*, Leiker, *supra* n.11; Hanna, *supra* n.11.

Based on the statutes' history, text, and structure, the Kansas Supreme Court's interpretation of Kan. Stat. Ann. § 21-5419, and the common understanding of the purpose and effect of Alexa's law, § 21-5413(b)(1)(C) and § 21-5419 create two aggravated battery offenses. The first, under § 21-5413(b)(1)(C) alone, does not apply to conduct committed against an unborn child. The second, under §§ 21-5413(b)(1)(C) and 21-5419 together, does apply to conduct committed

against an unborn child, and requires additional facts to be shown under § 21-5419(b).

Therefore, this Court must look beyond the statutes on their faces to determine "which version" of Kansas aggravated battery Adams "was convicted of." *See Descamps*, 570 U.S. at 262-263. To do so, this Court applies the modified categorical approach. *See Mathis*, 136 S. Ct. at 2249; *Kendall*, 876 F.3d at 1268. That "approach serves . . . as a tool to identify the elements of the crime of conviction when a statute's disjunctive phrasing," or here, the combination of two separate statutes' provisions, "renders one (or more) of them opaque." *Mathis*, 136 S. Ct. at 2253. Here, there is no way to know if Kan. Stat. Ann. § 21-5419's definition of "person" even applied in Adams's case without looking to extra-statutory state-court documents.

Under the modified categorical approach, a sentencing court can look "to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of." *Id.* at 2249. Once it has identified the offense of conviction, the court must then apply the

categorical approach, comparing the elements of that crime to the definition of a crime of violence. *See Kendall*, 876 F.3d at 1268-1269.

The judgment makes clear that Adams's prior conviction was for aggravated battery under Kan. Stat. Ann. § 21-5413(b) alone. *See* 1.R.34. The judgment describes the offense of conviction as, "AGGRAVATED BATTERY, INTENTIONAL, BODILY HARM." 1.R.34. The judgment says nothing about § 21-5419, or Alexa's law, or any of the exceptions to the application of that statute. That is sufficient to show that Adams was convicted of § 21-5413(b)(1)(C) alone, which indisputably satisfies the "person of another" requirement. Indeed, Adams does not assert that he was actually convicted under § 21-5419. In addition, the judgment indicates (1.R.38), and the PSR states (2.R.13) that Adams was charged with aggravated battery of his girlfriend, Whitney Stockwell, not an unborn child.

Because Adams's prior conviction was for aggravated battery under Kan. Stat. Ann. § 21-5413(b)(1)(C), and not an Alexa's law aggravated battery under Kan. Stat. Ann. § 21-5419, the prior conviction satisfies the "person of another" requirement of the elements clause in U.S.S.G. § 4B1.2(a)(1).

c. Committing an aggravated battery against an unborn child under Kan. Stat. Ann. § 21-5413(b)(1)(C) and § 21-5419 requires the use, attempted use, or threatened use of physical force against a pregnant woman.

Even if this Court concludes that Kan. Stat. Ann. § 21-5413(b)(1)(C) and § 21-5419 combine to create a single, indivisible aggravated battery offense, any conviction under those statutes satisfies the "person of another" requirement because they require the use, attempted use, or threatened use of physical force against the pregnant woman carrying the unborn child.

The categorical approach is a "formal" inquiry that focuses only on the elements of the defendant's prior conviction. *Descamps*, 570 U.S. at 261. But it "is not an invitation to apply 'legal imagination' to the state offense; there must be 'a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside'" the definition of a crime of violence. *See Moncrieffe*, 569 U.S. at 191 (quoting *Duenas-Alvarez*, 549 U.S. at 193). Adams's argument fails this test for two reasons.

First, it is difficult to imagine how a defendant could cause physical contact with an unborn child in the manner that Kan. Stat.

Ann. § 21-5413(b)(1)(C) and § 21-5419 prohibit—by knowingly causing physical contact in a rude, insulting, or angry manner with a deadly weapon, or in any manner whereby great bodily harm, disfigurement or death can be inflicted—without the use, attempted use, or threatened use of physical force against the pregnant woman carrying the unborn child. This is especially true given that crimes of violence can be committed by "force applied directly or indirectly," including by poisoning. *See United States v. Ontiveros*, 875 F.3d 533, 538 (10th Cir. 2017); *see also United States v. Baker*, 748 F. App'x 807, 812-813 (10th Cir. 2018) (unpublished) ("[T]ouching a person with a deadly weapon, even while intending to injure a third person, necessarily threatens the use of physical force against one or both of these persons.").

Second, the Kansas Supreme Court has said that Kan. Stat. Ann. § 21-5419 was "inten[ded] to allow two units of prosecution" for a single act. *Seba*, 380 P.3d at 215. In *Seba*, § 21-5419 applied because the defendant's "shot hit [the mother] in the head at a downward trajectory, killing her and ultimately killing her otherwise healthy fetus, which she had been carrying for 12 to 15 weeks." 380 P.3d at 215. In *Kansas v. Bollig*, 416 P.3d 179, 2018 WL 1976689, at *5 (Kan. Ct. App. 2018)

(unpublished), the court assumed that a conspiracy to terminate another woman's pregnancy without her consent was an agreement to commit two crimes—first-degree murder of the fetus and battery of the mother. *Id.* at *5.

Any suggestion that the Court "deny a categorical match based on the possibility that an offender could" commit aggravated battery on an unborn child without the use, attempted use, or threatened use of physical force against a pregnant woman would require this Court to "stretch [its] 'legal imagination' beyond what is 'realistically probable.'" *United States v. Hammons*, 862 F.3d 1052, 1057 (10th Cir. 2017) (quoting *Moncrieffe*, 133 S. Ct. at 1685). A defendant "need not come forward with instances of actual prosecution when the 'plain language' of the statute proscribes" conduct that sweeps more broadly than U.S.S.G. § 4B1.2(a)(1)'s ambit. *Cantu*, 964 F.3d at 934. But here it is clear, both as a practical matter and under Kansas case law, that aggravated battery against an unborn child requires the use, attempted use, or threatened use of physical force against the woman carrying the unborn child. *See, e.g.*, *Moncrieffe*, 133 S. Ct. at 1685; *Hammons*, 862 F.3d at 1057.

Therefore, § 21-5413(b)(1)(C) and § 21-5419 satisfy the "person of another" requirement of the crime of violence elements clause in U.S.S.G. § 4B1.2(a)(1). Concluding otherwise—that Kan. Stat. Ann. § 5419 makes Kansas aggravated battery not a crime of violence—would lead to absurd results. Crimes that obviously require the use of physical force against the person of another, even Kansas first-degree murder (Kan. Stat. Ann. § 21-5402), would not be a crime of violence under the elements clause under Adams's theory. *See* Kan. Stat. Ann. § 21-5419(c). Adams argues that Kansas first-degree murder would still be covered by the enumerated offenses clause (U.S.S.G. § 4B1.2(a)(2)), which includes murder. Br.22. But that is beside the point. Adams's interpretation of Kansas law and the Guidelines would mean that Kansas first-degree murder does not require the use of physical force against the person of another. That cannot be right.

2. Adams's Kansas aggravated battery conviction has as an element the use, attempted use, or threatened use of force.

Adams argues that "Kansas's aggravated battery statute does not have an element of force," and therefore is not a crime of violence under U.S.S.G. § 4B1.2(a)(1). Br.26 (emphasis omitted). Specifically, he argues

that U.S.S.G. § 4B1.2(a)(1)'s force requirement excludes statutes like Kansas aggravated battery because it has a "causation of harm element," which he describes as a "results element," as opposed to a "use-of-force element," which he calls a "conduct element." Br.33.

This Court has already rejected this argument numerous times. *See infra* n.15. And Adams conceded below that his element-of-force argument is foreclosed by binding Tenth Circuit precedent: *United States v. Treto-Martinez*, 421 F.3d 1156 (10th Cir. 2005), and *United States v. Williams*, 893 F.3d 696 (10th Cir. 2018). *See* 2.R.29-30 (also citing *United States v. McMahan*, 732 F. App'x 665 (10th Cir. 2018) (unpublished)); 3.R.45; *see also* 1.R.24. Now Adams asks this Court to overrule or refuse to follow these precedents, plus at least one other, *United States v. Ontiveros*, 875 F.3d 533, 536 (10th Cir. 2017). Most of Adams's arguments for overruling or ignoring the precedents have been waived. And none of them withstand scrutiny on the merits.

a. Adams waived his arguments that *Treto-Martinez* is not good law.

In *Treto-Martinez* this Court held that a prior version of the Kansas aggravated battery statute, Kan. Stat. Ann. § 21-3414(a)(1)(C), was a crime of violence under U.S.S.G. § 2L1.2. *See Treto-Martinez*, 421

F.3d at 1159-1160; *see also id.* at 1158 (quoting Kan. Stat. Ann. § 21-3414(a)(1)(B) and (a)(1)(C)). Adams conceded below that *Treto-Martinez* foreclosed his element-of-force argument. *See* 2.R.29-30. And it does. The elements clauses at issue in *Treto-Martinez* and in this case are the same. *Compare* U.S.S.G. § 4B1.2(a)(1) *with Treto-Martinez*, 421 F.3d at 1159 (quoting the applicable elements clause). And the Kansas aggravated battery provision at issue in *Treto-Martinez* (Kan. Stat. Ann. § 21-3414(a)(1)(C)) is materially identical to Adams's statute of conviction (Kan. Stat. Ann. § 21-5413(b)(1)(C)). *See* Br.40. The provisions define aggravated battery as intentionally, now knowingly, "causing physical contact with another person when done in a rude, insulting or angry manner with a deadly weapon, or in any manner whereby great bodily harm, disfigurement or death can be inflicted." Kan. Stat. Ann. § 21-5413(b)(1)(C); *Treto-Martinez*, 421 F.3d at 1158.

In *Treto-Martinez*, this Court first "conclude[d] that physical force is involved when a person intentionally causes physical contact with another person with a deadly weapon." 421 F.3d at 1159. It reasoned that "[a]lthough not all physical contact performed in a rude, insulting or angry manner would rise to the level of physical force, . . . all

intentional physical contact with a deadly weapon done in a rude, insulting or angry manner does constitute physical force." *Id.* "[A]t the very least," a person who touches another "with a deadly weapon in 'a rude, insulting or angry manner,' has . . . 'threatened use of physical force.'" *Id.* at 1160.

Next this Court concluded that "it is clear that" aggravated battery committed by "'physical contact . . . whereby great bodily harm, disfigurement or death can be inflicted' . . . is also sufficient to satisfy" the physical force requirement. *Id.* at 1160. "No matter what the instrumentality of the contact, if the statute is violated by contact that can inflict great bodily harm, disfigurement or death, it seems clear that, at the very least, the statute contains as an element the 'threatened use of physical force.'" *Id.*

Below, Adams conceded that *Treto-Martinez* was binding precedent that foreclosed his element-of-force argument. But on appeal he argues that *Treto-Martinez* is not and never was good law.

First, Adams argues that *Treto-Martinez* is not good law because it failed to consider this Court's prior decision in *United States v. Perez-Vargas*, 414 F.3d 1282 (10th Cir. 2005), which held that prior offenses

with causation-of-harm elements are not crimes of violence. Br.39-41. *Perez-Vargas* has since been overruled by *United States v. Ontiveros*, 875 F.3d 533, 536 (10th Cir. 2017).

Second, Adams argues that "*Treto-Martinez* is no longer good law post-*Mathis*," referring to *Mathis v. United States*, 136 S. Ct. 2243 (2016). Br.41. He argues that *Treto-Martinez*, "contrary to *Mathis*, did not actually examine the elements of the aggravated battery statute." Br.41-42.

These arguments were available to Adams in the District Court and he was given ample opportunity to make them. *See, e.g.*, 1.R.21; 2.R.29-30; 3.R.46. Instead of arguing that *Treto-Martinez* was not binding because it was not good law, Adams conceded that *Treto-Martinez* required the District Court to overrule his objection that Kansas's aggravated battery statute lacked an element of force. *See* 2.R.29-30 (conceding in his second PSR objection that *Treto-Martinez* is controlling); *see also* 1.R.22 (incorporating "all of the arguments presented in [Adams's] PSR objections"). By "conced[ing] that the Tenth Circuit has ruled against him on this issue," and by citing *Treto-Martinez* in support, 2.R.29, Adams invited the errors he now asserts on

appeal. *See United States v. Teague*, 443 F.3d 1310, 1314 (10th Cir. 2006). When a party "intentionally relinquishe[s] or abandon[s]" a "theory . . . in the district court, [this Court] usually deem[s] it waived and refuse[s] to consider it." *Richison*, 634 F.3d at 1127; *accord United States v. Hardwell*, 80 F.3d 1471, 1487 (10th Cir. 1996) (explaining that a "defendant cannot invite a ruling and then have it set aside on appeal"). Therefore, Adams's arguments that *Treto-Martinez* is not good law have been waived and this Court should not consider them.

Finally, Adams's arguments that the Supreme Court's reasoning in *Borden v. United States*, 141 S. Ct. 1817 (2021), invalidates this Court's other precedents does not appear to apply to *Treto-Martinez*, which did not rely on *United States v. Castleman*, 572 U.S. 157 (2014), or any other cases interpreting the misdemeanor crime of domestic violence provision the Supreme Court distinguished in *Borden*. Adams does not explain how *Borden* is contrary to or invalidates the reasoning of *Treto-Martinez*, which primarily turns on the "threatened use of physical force" prong of the elements clause. *See Treto-Martinez*, 421 F.3d at 1159. Because arguments not made in the opening brief are generally waived, *see Anderson v. U.S. Dep't of Lab.*, 422 F.3d 1155,

1174 (10th Cir. 2005), *Treto-Martinez* is binding and requires affirmance of Adams's sentence. In any event, *Treto-Martinez* was correctly decided for the reasons this Court stated in *Williams* and *McMahan*. *See McMahan*, 732 F. App'x at 669; *Williams*, 893 F.3d at 703-704.

b. *Williams* is binding precedent and forecloses Adams's argument that his Kansas aggravated battery conviction lacked an element of force.

Adams argues that this Court's decision in *United States v. Williams*, 893 F.3d 696 (10th Cir. 2018), should be overruled "[i]n light of the Supreme Court's recent decision in *Borden*," referring to *Borden v. United States*, 141 S. Ct. 1817 (2021). Br.26. Because he did not raise this argument below (*Borden* was decided after he was sentenced), plain error review applies. *See United States v. Trujillo*, 960 F.3d 1196, 1201 (10th Cir. 2020); *Treto-Martinez*, 421 F.3d at 1160-1161. And because Adams does not argue that he can satisfy plain error review, his argument that *Borden* requires overruling *Williams* should be deemed waived. *See Richison*, 634 F.3d at 1130-1131; *McKissick v. Yuen*, 618 F.3d 1177, 1189 (10th Cir. 2010). *But see United States v. Courtney*, 816 F.3d 681, 683-684 (10th Cir. 2016).

Adams preserved below the argument that *Williams* was wrongly decided at the time. *See* 1.R.22; 2.R.29-30; 3.R.46. But that is not how he presents the issue on appeal. Instead, he argues that while his element-of-force argument "was foreclosed by . . . precedent, that precedent is no longer good law" under *Borden*. Br.8. In any event, even if this Court considers Adams's *Borden* argument, the argument should be rejected.

"Absent *en banc* consideration," one panel of this Court "generally 'cannot overturn the decision of another panel of this court.'" *United States v. Brooks*, 751 F.3d 1204, 1209 (10th Cir. 2014) (quoting *United States v. Meyers*, 200 F.3d 715, 720 (10th Cir. 2000)). "This rule does not apply, however, when the Supreme Court issues an intervening decision that is 'contrary' to or 'invalidates [this Court's] previous analysis.'" *Id.* (quoting *Meyers*, 200 F.3d at 720). Therefore, Adams must show that *Borden* is contrary to or invalidates this Court's element-of-force analysis in *Williams*.[13] Adams's burden should be particularly heavy

[13] Adams argues this Court should instead apply *stare decisis* principles. Br.53 (quoting *United States v. Hargrove*, 911 F.3d 1306, 1329 n.13 (10th Cir. 2019)). But there is no conflicting circuit precedent here: *United States v. Ontiveros*, 875 F.3d 533 (10th Cir. 2017), expressly overruled *United States v. Perez-Vargas*, 414 F.3d 1282 (10th

here, because if his element-of-force argument is accepted it would cast doubt on numerous other precedents. *See, e.g.*, *infra* n.15.

Borden does not require the sweeping upheaval of precedent that Adams advocates. To the contrary, *Borden* did not address or shed any new light on the issue presented in this appeal—whether statutes that prohibit the causation of contact or harm have as an element the use, attempted use, or threatened use of physical force. Adams's concession below that his element-of-force argument was foreclosed by binding Circuit precedent was and still is correct. He has not carried his burden of showing that *Borden* is contrary to or invalidates *Williams*.

In *Williams*, this Court held that a provision of the Kansas aggravated battery statute (Kan. Stat. Ann. § 21-5413(b)(1)(B)) was a crime of violence under the elements clause of in U.S.S.G. § 4B1.2(a)(1). *Williams*, 893 F.3d at 703-704. That provision prohibited "knowingly causing bodily harm to another person with a deadly weapon, or in any

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Cir. 2005), "hold[ing] that *Perez-Vargas*'s logic . . . is no longer good law." *Ontiveros*, 875 F.3d at 536. Adams also argues that there is precedent for considering *Perez-Vargas* to be good law. *See* Br.39-40. There is not. The line of cases Adams cites did not apply *stare decisis* principles to revive overturned precedents. *See Brooks*, 751 F.3d at 1209 (applying the standard stated above).

manner whereby great bodily harm, disfigurement or death can be inflicted." Kan. Stat. Ann. § 21-5413(b)(1)(B). As Adams does here, Williams argued that "Kansas's crime of aggravated battery does not require physical force because the crime is triggered whenever 'bodily harm' is caused." *Williams*, 893 F.2d at 703. This Court disagreed, holding that the "argument fails because 'the knowing or intentional causation of bodily injury necessarily involves the use of physical force.'" *Id.* (quoting *Castleman*, 572 U.S. at 169).

In rejecting Williams's element-of-force argument, the Court reaffirmed its holding in *Treto-Martinez*—"that a prior version of Kansas's crime of aggravated battery" materially identical to Adams's statute of conviction, "required the use or threatened use of physical force and qualified as a crime of violence under the guidelines." *Williams*, 893 F.3d at 703. It explained that "intentionally caus[ing] physical contact with another person in a way that could cause great bodily harm, disfigurement, or death . . . . involved the use or threatened use of physical force," and that the "rationale in *Treto-Martinez* applies equally to Kansas's current statute on aggravated battery." *Williams*, 893 F.3d at 703.

This Court also rejected Williams's attempt to revive this Court's abandoned decision in *United States v. Perez-Vargas*, 414 F.3d 1282 (10th Cir. 2005), which Adams also reprises here. *See* Br.36-42. In *Perez-Vargas*, this Court "concluded that the use of force and the causation of injury are not equivalent elements." *Williams*, 893 F.3d at 703 (citing *Perez-Vargas*, 414 F.3d at 1285). But as this Court explained in *Williams*, *Perez-Vargas* was overruled by *Ontiveros*, which held that "*Perez-Vargas*'s logic on this point is no longer good law in light of *Castleman*." *Williams*, 893 F.3d at 703-704. Thus, this Court concluded that "aggravated battery in Kansas constitutes a crime of violence." *Id.* at 704.

Adams argues that *Borden* is contrary to or invalidates *Williams*. But *Borden* was limited to "whether a criminal offense can count as a 'violent felony' if it requires only a *mens rea* of recklessness—a less culpable mental state than purpose or knowledge." 141 S. Ct. at 1821. It is undisputed that Adams was previously convicted of committing aggravated battery with a *mens rea* of "*knowingly*." Kan. Stat. Ann. § 21-5413(b)(1)(C) (emphasis added); *see also* 1.R.34; Br.11 & n.3.

In answering the *mens rea* question, the *Borden* plurality's analysis focused on the phrase, "against the person of another," with particular emphasis on the word "against." *See* 141 S. Ct. at 1825, 1832-1833.[14] It said nothing new about the meaning of "force." *See id.* By contrast, Adams's entire argument rests on his interpretation of "force," which this Court has repeatedly rejected in light of *Johnson v. United States*, 559 U.S. 133 (2010) (*Johnson I*), and *Castleman*. *See, e.g.*, *Ontiveros*, 875 F.3d at 537; *see also infra* n.15.

Adams attempts to overcome the obvious mismatch between what *Borden* held (that "against" or "use" rules out prior offenses with a *mens rea* of recklessness) and what Adams argues (that "physical force" rules out any indirect use of force or "causation-of-harm or contact" crimes). He argues that *Borden* held "that it is improper to interpret a violent-crimes provision," like the ones at issue in *Ontiveros*, *Williams*, and this case, "identically to the misdemeanor-crime-of-domestic-violence

[14] The majority in *Borden* consisted of a plurality of four Justices plus Justice Thomas, who concurred in the judgment. The difference in approach between the plurality and Justice Thomas does not affect the analysis in this case. *See Borden*, 141 S. Ct. at 1829 n.6 (explaining that the plurality focused on "the 'against' phrase," as it modified "the 'use' phrase," whereas Justice Thomas focused on "the 'use' phrase alone").

provision at issue in *Voisine*, *Castleman*, and *Borden*." Br.38. That is not what *Borden* held, and Adams's argument fails for three reasons. But first, a bit of background.

Adams's argument relies on two lines of precedent, each of which addresses three sets of issues. The first line of precedent consists of decisions applying sentencing-enhancement provisions for prior convictions for violent crimes. These provisions appear in various places. *See, e.g.*, 18 U.S.C. § 16(a) ("crime of violence"); 18 U.S.C. § 924(c)(3)(A) (same); 18 U.S.C. § 924(e)(2)(B)(i) (ACCA) ("violent felony"); U.S.S.G. § 2K2.1(a)(4)(A) & comment. (n.1) ("crime of violence," but defined differently than in 18 U.S.C. § 16(a)); U.S.S.G. § 2L1.2 & comment. (n.2) (same); U.S.S.G. § 4B1.2(a)(1) (same). The second line of precedent consists of decisions applying sentencing-enhancement provisions for prior misdemeanor crimes of domestic violence. These provisions also appear in various places. *See, e.g.*, 18 U.S.C. § 921(a)(33)(A); 18 U.S.C. § 922(g)(9); U.S.S.G. § 2K2.1 comment. (n.13(B)). The three issues these lines of precedent address are the (1) amount of force, (2) nature of force, and (3) *mens rea* required to commit

a predicate offense, whether a violent crime or misdemeanor crime of domestic violence.

In *Johnson I*, the Supreme Court held that the phrase "physical force" in the elements clause of ACCA's definition of "violent felony" means "force exerted by and through concrete bodies—distinguishing physical force from, for example, intellectual force or emotional force." *Id.* at 138. It also held that "force" required "*violent* force—that is, force capable of causing physical pain or injury to another person," *id.* at 140, which it said required more force than would be required to commit a common-law battery, *id.* at 139. This Court has held that the phrase "physical force" in the elements clause of the U.S.S.G. § 4B1.2(a)(1)'s definition of "crime of violence" has the same meaning. *See, e.g.*, *Kendall*, 876 F.3d at 1267-1268 & n.3.

In *Castleman*, on the other hand, the Court held that the phrase "physical force" in the elements clause of the definition of "misdemeanor crime of domestic violence" in 18 U.S.C. § 922(g)(9) included prior offenses that were committed using less force: "the degree of force that supports a common-law battery conviction." 572 U.S at 168. It also concluded that "the common-law concept of 'force' encompasses even its

indirect application," though it declined to decide whether the same was true of violent force under *Johnson I. Castleman*, 572 U.S at 170.

With respect to *mens rea*, in *Voisine v. United States*, 136 S. Ct. 2272 (2016), the Supreme Court held that "'the use or attempted use of physical force'" in the elements clause of 18 U.S.C. § 921(a)(33)(A)'s definition of "misdemeanor crime of domestic violence" includes misdemeanors committed with a *mens rea* of recklessness. *Id.* at 2276 (quoting 18 U.S.C. § 921(a)(33)(A)), 2278. In *Borden*, on the other hand, the Supreme Court held that the phrase "'use, attempted use, or threatened use of physical force against the person of another'" in the elements clause of ACCA's definition of "violent felony" does not include offenses that criminalize reckless conduct. 141 S. Ct. at 1822 (quoting 18 U.S.C. § 922(e)(2)(B)(i)), 1825.

Now back to Adams's argument. Adams argues that *Williams* (and *Ontiveros*, on which *Williams* relied) does not survive *Borden*. *See* Br.39-40. He argues that *Borden* holds that it was improper for *Williams* and *Ontiveros* to rely on *Castleman* to interpret the element-of-force requirement for crimes of violence because *Castleman*

interpreted the definition of "misdemeanor crime of domestic violence." Again, Adams's arguments fail for three reasons.

First, Adams overstates this Court's reliance on *Castleman* in *Williams* and *Ontiveros*. To be sure, this Court relied on *Castleman* in *Ontiveros* to conclude that prior offenses with causation-of-harm elements satisfy the element-of-force requirement for prior crimes of violence, and to overrule *Perez-Vargas*. *See Ontiveros*, 875 F.3d at 535. And it relied on the reasoning of *Ontiveros* to decide *Williams*. *See Williams*, 893 F.3d at 703-704. But this Court has recognized, both in *Ontiveros* and in subsequent decisions, that its decision to overrule *Perez-Vargas* was rooted in the Supreme Court's decision in *Johnson I*—a decision interpreting and applying ACCA's violent-felony elements clause in 18 U.S.C. § 924(e)(2)(B)(i), which is the same as the U.S.S.G. § 4B1.2(a)(1) elements clause at issue here. *See Ontiveros*, 875 F.3d at 536 (citing *Hammons*, 862 F.3d at 1056 n.5); *United States v. Muskett*, 970 F.3d 1233, 1243-1244 (10th Cir. 2020).[15]

[15] *See also, e.g.*, *United States v. Benton*, 876 F.3d 1260, 1262-1263 (10th Cir. 2017) (holding that the defendant's "argument—that threatening bodily harm is not the same as threatening physical force—is foreclosed by" *Johnson I*, *Castleman*, and *Ontiveros*); *United States v. Pacheco*, 730 F. App'x 604, 609 (10th Cir. 2018) (unpublished) ("*Curtis*

As this Court stated in *Muskett*, "although [*Johnson I*] did not specifically reject the direct-indirect distinction accepted by *Perez-Vargas* the way *Castleman* ultimately did," *Johnson I*'s application of ACCA's violent felony elements clause provided "notice that 'physical force' might include *any* exertion of physical force (directly or indirectly) capable of causing physical pain or injury to another person, and that our previous interpretation to the contrary was incorrect." *Muskett*, 970 F.3d at 1243-1244. This Court has also relied on Justice Scalia's concurrence in *Castleman* in which he observed that because the phrase "physical force" in ACCA's violent felony elements clause means "force capable of causing physical pain or injury to another person," it follows that the elements clause includes crimes committed using indirect force "since it is impossible to cause bodily injury without using force 'capable of' producing that result," *Castleman*, 572 U.S. at 174 (2014) (Scalia, J., concurring in part and concurring in the judgment). *See, e.g.*, *Ontiveros*,

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Johnson defines the requisite quantum of force—'violent force'—in terms of the potential resulting harm—'physical pain or injury.' 559 U.S. at 140." (parallel citation omitted)); *United States v. Melgar-Cabrera*, 892 F.3d 1053, 1066 (10th Cir. 2018) ("[A]pplying the combination of *Johnson* and *Castleman*, we conclude that ACCA's phrase 'use of physical force' includes force applied directly or indirectly.").

875 F.3d at 538. This Court's recognition that *Ontiveros*, and in turn, *Williams*, is rooted in *Johnson I* undermines the premise of Adams's argument that *Borden* contradicts or invalidates *Ontiveros* simply because *Ontiveros* relied on *Castleman*, a misdemeanor-crime-of-domestic-violence case.

Second, although *Borden* distinguished *Voisine* and *Castleman* because they involved different statutes, it did not reject the rationale of *Williams* and *Ontiveros*—that under both *Johnson I* and *Castleman*, predicate offenses that prohibit the causation of harm can be crimes of violence. Rather, the focus of *Borden*'s plurality was on the phrase "against the person of another," and specifically whether the word "against" excluded prior offenses with a *mens rea* of recklessness. *See* 141 S. Ct. at 1826-1827. Justice Thomas focused on the word "use," and would hold that the elements clauses for both violent crimes and misdemeanor crimes of domestic violence do not include reckless offenses. *See* 141 S. Ct. at 1835 (Thomas, J., concurring in the judgment). *Borden* did not address the separate point made in *Johnson I* and *Castleman* that "force" includes force that may be applied directly or indirectly, *i.e.*, force that causes contact or harm.

Third, *Williams* and *Ontiveros* were correctly decided. *Williams* concluded that "knowingly causing bodily harm," Kan. Stat. Ann. § 21-5413(b)(1)(B), has as an element the use, attempted use, or threatened use of physical force. *Williams*, 893 F.3d at 703-704; *see also supra* n.12 (explaining that Adams has conceded that as long as *Williams* is good law, it is binding with respect to his prior conviction under Kan. Stat. Ann. § 21-5413(b)(1)(C)).

In *Johnson I*, which interpreted an elements clause identical to the one at issue here, the Supreme Court held that the phrase "physical force" requires "force capable of causing pain or injury to another person" that is "exerted by and through concrete bodies—distinguishing physical force from, for example, intellectual force or emotional force." 559 U.S. at 138. By defining force by reference to the pain or injury it is capable of causing, the Court inherently connected the use of force with the causation of contact or harm. Adams's argument that the element-of-force requirement excludes crimes that prohibit the causation of contact or harm "flies in the teeth of *Johnson*'s conception of physical force." *United States v. Folse*, 854 F. App'x 276, 293-294 (10th Cir. 2021) (unpublished) (quoting *Johnson I*, 559 U.S. at 140)).

In *Castleman*, the Court held that a defendant's prior conviction under Tennessee's domestic battery statute was a misdemeanor crime of domestic violence. 572 U.S. at 159. The state law required that the defendant have "intentionally or knowingly cause[d] bodily injury" to the mother of the defendant's child. *See id.* at 168-171. And it rejected the defendant's argument that an indirect causation of injury, such as by poisoning, did not amount to a "use of force." *Id.* at 170-171. The Court reasoned that even poisoning requires a use of force because "the act of employing poison knowingly as a device to cause physical harm" is a use of force. *Id.* To drive the point home, the Court underscored that the defendant's logic (which is the same as Adams's here) would lead to absurd results: "Under Castleman's logic, after all, one could say that pulling the trigger on a gun is not a 'use of force' because it is the bullet, not the trigger, that actually strikes the victim." *Id.* at 171.

To be sure, *Castleman* did not construe the elements clause in U.S.S.G. § 4B1.2(a)(1), and it expressly reserved the question of whether the causation of bodily injury would "necessitate violent force under *Johnson*'s definition of that phrase." 572 U.S. at 170. But as this Court has recognized, the Supreme Court's reasoning did not rest on

any distinction between the misdemeanor crime of domestic violence provision's elements clause and the elements clauses in ACCA or U.S.S.G. § 4B1.2(a)(1). *See Ontiveros*, 875 F.3d at 537 (compiling cases and noting that "[a]lmost every circuit that has looked at the issue has determined that Castleman's logic is applicable to the 'physical force' requirement as used in a felony crime of violence"). Thus, "[w]hile the *amount* of physical force needed for a misdemeanor crime of violence may be less than that needed in the violent felony context, the *nature* of the physical force applies in both contexts." *Id.* at 537 n.2.

Adams's argument (Br.41) that "[t]here is no 'legal requirement' that a defendant use, threaten to use, or attempt to use, force in order to convict a defendant under KSA § 21-5413(b)(1)(C)," is unavailing. The statute requires a defendant to cause physical contact with another person in a way that can cause great bodily harm, disfigurement, or death. *See Kansas v. Ultreras*, 295 P.3d 1020, 1034-1036 (Kan. 2013). That cannot be done without using, attempting to use, or threatening to use physical force. After all, "it is impossible to cause bodily injury without using force 'capable of' producing that result." *Castleman*, 572

U.S. at 174 (Scalia, J. concurring in part and concurring in the judgment).

Adams's reliance (Br.34) on *Torres v. Madrid*, 141 S. Ct. 989 (2021) also is misplaced. The Supreme Court's parsing of common-law seizures by control versus seizures by force, *see id.* at 1001-1002, does not inform what U.S.S.G. § 4B1.2(a)(1) means by "force." And it certainly did not silently overrule *Johnson I*'s definition of physical force, which includes any "force capable of causing physical pain or injury." *Johnson I*, 559 U.S. at 140; *see also Castleman*, 572 U.S. at 170-171.

Williams correctly reaffirmed *Treto-Martinez*'s conclusion that "the need to intentionally cause physical contact with another person in a way that could cause great bodily harm, disfigurement, or death . . . . involve[s] the use or threatened use of physical force." *Williams*, 893 F.3d at 703 (describing this Court's holding in *Treto-Martinez*). This Court's decisions, which have repeatedly rejected Adams's element-of-force argument were correctly decided. *Borden*, which only addressed *mens rea*, did not affect this Court's element-of-force precedents. At the very least, the District Court did not plainly err by following *Williams*

and *Treto-Martinez*, even in light of *Borden*. *See United States v. Finnesy*, 953 F.3d 675, 684 (10th Cir. 2020) (stating that an error is plain if it is "clear or obvious under current law," which requires that "either the Supreme Court or this court must have addressed *the issue*" (emphasis added)).

3. Adams's Kansas aggravated battery conviction has as an element the use, attempted use, or threatened use of violent force.

Finally, Adams argues that Kansas's aggravated battery statute does not have as an element the use, attempted use, or threatened use of *violent* force. Br.42-43. Adams seems to acknowledge that this argument is separate and apart from his argument that a causation-of-harm provision cannot satisfy the element-of-force requirement in U.S.S.G. § 4B1.2(a)(1). *See* Br.42 (arguing that even "[i]f this Court is unwilling to return to *Perez-Vargas*'s causation-does-not-equal-force holding, Kansas's aggravated battery statute still does not qualify as a crime of violence" because "it is possible to cause bodily injury without applying" violent force). All of the arguments Adams makes on appeal on this point were available to him below, he was given ample opportunity to make them, but he did not. *See generally* 1.R.21-33;

2.R.26-30; 3.R.44-46.[16] Just the opposite, he conceded that binding Circuit precedent required the District Court to conclude that his prior conviction for Kansas aggravated battery was a crime of violence under U.S.S.G. § 4B1.2(a)(1). *See* 1.R.24; 2.R.29-30; 3.R.45.

On appeal, Adams does not argue that the precedents that bound the District Court are no longer binding, as he did in the section of his brief arguing that causation of harm does not equal force under *Borden*. *Compare* Br. § D.1 *and* § D.2 *with* § D.3. Instead, he argues that Kan. Stat. Ann. § 21-5413(b)(1)(C) "reaches conduct that does not involve violent force" based on (1) *Perez-Vargas*, which is no longer good law under *Ontiveros*, and (2) a 1996 Kansas Court of Appeals decision

[16] Adams's second objection to the PSR states: "With this objection, we preserve for further review the argument that the causation element in Kan. Stat. Ann. § 21-5413(b)(1)(C) (causing physical contact) is not an element of violent force." 2.R.30. Although Adams's objection refers to "violent force," his objection does not separately address the *violent* component of violent force under U.S.S.G. § 4B1.2(a)(1). Instead, his objection focused exclusively on the argument that "'the use of force and the causation of injury are not equivalent elements.'" *See* 2.R.29-30 (quoting *Perez-Vargas*, 414 F.3d at 1285). When a party "fail[s] to adequately alert the district court" to an alleged error, the argument is considered forfeited. *See Finnesy*, 953 F.3d at 689. And this Court typically does not consider forfeited arguments where the appellant fails to argue that plain-error review applies. *See Richison*, 634 F.3d at 1130-1131. Adams opening brief does not argue plain error. *See* Br.42-43.

interpreting a materially identical prior version of the statute. *See* Br.57 (quoting *Kansas v. Esher*, 922 P.2d 1123 (Kan. Ct. App. 1996)). Because Adams's concession below "intentionally relinquished or abandoned" this argument, this Court should "deem it waived and refuse to consider it." *Richison*, 634 F.3d at 1127; *accord Hardwell*, 80 F.3d at 1487. Even if Adams merely forfeited, and did not waive, this argument, he has failed to argue that he can satisfy the elements of plain error review. *See* Br.42-43.

In addition, this argument is foreclosed by *Williams* and *Treto-Martinez*, and Adams's concession below that both were controlling. *See* 2.R.29-30; *Williams*, 893 F.3d at 703-704; *Treto-Martinez*, 421 F.3d at 1160. And in any event, Adams's argument fails on the merits. *Johnson I* explains that in the context of a crime of violence "the phrase 'physical force' means violent force—that is, force capable of causing physical pain or injury to another person." 559 U.S. at 140. Adams's statute of conviction prohibits "knowingly causing physical contact with another person when done in a rude, insulting or angry manner with a deadly weapon, or in any manner whereby great bodily harm, disfigurement or death can be inflicted." Kan. Stat. Ann. § 21-

5413(b)(1)(C). 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." *Ultreras*, 295 P.3d at 1036 (internal quotation marks omitted) (interpreting a materially identical prior version of the Kansas aggravated battery statute); *see also Treto-Martinez*, 421 F.3d at 1160. And "great bodily harm" means harm that is more than "slick, trivial, minor, or moderate, and does not include mere bruising, which is likely to be sustained by simple battery." *Ultreras*, 295 P.3d at 1034 (compiling cases) (internal quotation marks omitted); *see also id.* at 1035 (noting that great bodily harm includes "'bodily injury that creates a substantial risk of death or causes serious, permanent disfigurement or protracted loss or impairment of the function of any body part or organ'" (quoting Black's Law Dictionary 802 (8th ed. 2004) (serious bodily injury)) (emphasis omitted)).

Adams cites *Kansas v. Esher*, 922 P.2d 1123 (Kan. Ct. App. 1996), to assert (Br.43) that "the term 'physical contact' 'more closely parallels' the amount of force necessary to commit a common-law battery (*i.e.*, the 'unlawful touching or application of force to the person of another, when done in a rude, insolent, or angry manner')." His reliance on *Esher* is

unavailing for two reasons. First, the relevant question in *Esher* was only whether aggravated battery was a specific intent crime, and not the degree of force required to commit it. *See id.* at 1126-1127. *Esher* also did not consider the aggravated battery provision as a whole; specifically, it did not address the meaning of "deadly weapon" in the first clause and "great bodily harm" in the second clause. *See id.* Second, the Kansas Supreme Court's more recent and more thorough consideration of the Kansas aggravated battery statute in *Ultreras* supersedes the Kansas Court of Appeals' earlier and more cursory consideration of the statute. *See Ultreras*, 295 P.3d at 1034.

Under *Ultreras*, it is clear that Kan. Stat. Ann. § 21-5413(b)(1)(C) has a violent force element. Knowingly causing physical contact with another person with an instrument used in such a way that it is calculated or likely to produce death or serious bodily injury necessarily requires the use, attempted use, or threatened use of force capable of causing physical pain or injury to another person. *See Treto-Martinez*, 421 F.3d at 1159-1160. Likewise, knowingly causing physical contact with another in any manner that can cause great bodily harm, disfigurement or death necessarily requires the use, attempted use, or

threatened use of force capable of causing physical pain or injury to another person. *See id.* at 1160.

CONCLUSION

The government respectfully requests that the Court affirm Adams's sentence.

STATEMENT REGARDING ORAL ARGUMENT

The government agrees that oral argument will assist the Court in addressing the legal arguments presented in this appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 12,853 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 10th Cir. R. 32(B), as calculated by the word-counting function of Microsoft Word 2013.

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I hereby certify that on the 22nd day of October,2021, I caused the foregoing to be electronically filed with the Clerk of the Tenth Circuit Court of Appeals using the Court's CM/ECF system. I certify that I caused seven hard copies to be delivered to the Clerk's Office by Federal Express within five business days of Clerk's notice to submit paper copies. Because Defendant's counsel, Daniel T. Hansmeier, is a

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October 22, 2021 s/ Bryan C. Clark

Case No. 21-3043

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

BRIAR CLAYTON EUGENE ADAMS,
Defendant-Appellant.

On Appeal from the United States District Court
For the District of Kansas (Topeka)
The Honorable Judge Toby Crouse
Case No. 5:20-cr-40015-TC-1

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ARGUMENT

I. Because Kansas's aggravated-battery statute covers batteries against the unborn, it is not a crime of violence.

A. The government does not meaningfully engage the issue raised in this appeal.

We've explained that USSG § 4B1.2(a)(1) covers crimes committed "against the person of another," and that this phrase does not include crimes that can be committed against the unborn. Br. 13-26. Because Kansas's aggravated-battery statute includes crimes committed against the unborn, the statute categorically covers more conduct than § 4B1.2(a)(1), and, thus, convictions under the statute are not crimes of violence. *Id.*

Below, the government disagreed under a "generic-definition" approach, pointing to state laws enacted after § 4B1.2's enactment as proof that "generic battery" includes batteries against the unborn. *See* Br. 5-6. We've already explained why this claim has no merit (and how its reasoning actually supports us). Br. 20-21. The government does not press the claim on appeal. Thus, the claim is "abandoned," and this Court need not consider it. *Sawyers v. Norton*, 962 F.3d 1270, 1286 (10th Cir. 2020).

The only other argument the government pressed below was an absurdity argument. *See* Br. 21-22. We've already explained why this claim lacks merit. Br. 22. The government presses on, but it does so in unsupported conclusory fashion, Gov't Br. 28, in "one paragraph devoid of any specific facts or analysis," *United States v. Banks*, 884 F.3d 998, 1026 (10th Cir. 2018). The claim is waived as inadequately briefed. *Id.*; *Frasier v. Evans*, 992 F.3d 1003, 1033 (10th Cir. 2021) (appellee waived argument via inadequate briefing).

If not waived, although the government argues that it would be absurd if a Kansas murder conviction (a conviction not even at issue here) does not count as a crime of

violence under § 4B1.2(a)(**1**), the government does not argue that such a conviction could not count as a crime of violence under § 4B1.2(a)(**2**). Gov't Br. 28. Without such an argument, this could not possibly be one of those "extreme circumstances" that requires application of the absurdity doctrine. *See* Br. 22; *see*, *e.g.*, *Nielsen v. Preap*, 139 S.Ct. 954, 969 (2019) (a statute should not "needlessly be given an interpretation that causes it to duplicate another provision"). A prior conviction need only satisfy "either prong of § 4B1.2(a)" to qualify as a crime of violence. *United States v. Mendez*, 924 F.3d 1122, 1124 (10th Cir. 2019). It is not absurd if a prior conviction satisfies one, but not both, prongs. Nor does the government cite any authority invoking the absurdity doctrine to include within the reach of a recidivist sentencing provision a conviction that falls outside of the provision's plain terms. *See*, *e.g.*, *Cochise Consultancy v. United States ex rel. Hunt*, 139 S.Ct. 1507, 1513 (2019) ("a result that 'may seem odd is not absurd'") (ellipsis omitted). The absurdity doctrine is inapplicable.

The government's only other response to the arguments raised on appeal is found within a footnote. *See* Gov't Br. 23 n.8. In this footnote, the government summarily claims that there are five "flaws" in our argument. *Id.* Because the government has raised these arguments "in a perfunctory manner" "in a footnote," this Court should decline to consider them. *United States v. Hardman*, 297 F.3d 1116, 1131 (10th Cir. 2002) (en banc); *Stender v. Archstone-Smith Operating Tr.*, 910 F.3d 1107, 1117 (10th Cir. 2018) (same).

If considered, this Court should reject them. The government first summarily notes that "the phrase at issue in U.S.S.G. § 4B1.2(a)(1) is 'the person of another.'" Gov't Br. 23 n.8. That's correct. But so what? This "single-sentence briefing is inadequate." *Peterson v. Nelnet Diversified Sols.*, 15 F.4th 1033, 1042 n.8 (10th Cir. 2021); *Nelson v. Albuquerque*, 921 F.3d 925,

931 (10th Cir. 2019) (similar). It is also out of place. We haven't ignored the phrase "person of another." We've framed the issue in those terms, and our argument is consistently tethered to that phrase, Br. 2, 8, 13, 16-19, 21, 24. If this argument is "flawed," the government's conclusory sentence doesn't explain how.

Second, the government summarily notes that "the Guidelines do not define the term 'person.'" Gov't Br. 23 n.8. For the same reasons just discussed, this Court should also not consider this one-sentence summary "argument." Regardless, we have recognized that "the guidelines do not define the term 'person.'" Br. 8. And we've offered a definition of that term. Br. 14-20. The government's conclusory sentence doesn't explain the supposed "flaw" in this argument either.

Third, the government notes that 1 U.S.C. § 1, a provision that we have not cited, defines "person" to "include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." Gov't Br. 23 n.8. The government then notes that 1 U.S.C. § 8, a provision that we rely on, uses the word "include" when it defines a "person" as someone who is "born alive." *Id.* According to the government, "[t]he term 'include' does not limit what the term 'person' means." *Id.* As we understand it, the government's argument is essentially that the term "person" in § 4B1.2(a)(1) has no discernable limits. *Id.*

These arguments lack merit. Section 1 applies only to an "Act of Congress, unless context indicates otherwise." Section 4B1.2(a)(1) is not an "Act of Congress." And even if we assume it is, context plainly indicates that § 4B1.2(a)(1) was not meant to include crimes against "corporations" (etc.). The requirement that force be directed "against the person of

another" "demands that the perpetrator direct his action at, or target, another *individual*." *Borden v. United States*, 141 S.Ct. 1817, 1825 (2021) (emphasis added). The government's own "theory" in *Borden* acknowledged that the provision applies only to "people." *Id.* at 1827. The government doesn't cite any precedent that would support extending this provision to crimes against, *inter alia*, "joint stock companies." This unsupported argument is meritless.

The government's novel interpretation of § 8 is also meritless. Section 8's definition of "person" is plainly limited to those who are "born alive." 1 U.S.C. § 8. "Under a literal reading of the statute, the term 'person' does not include fetuses." *United States v. Montgomery*, 635 F.3d 1074, 1086 (8th Cir. 2011); *Gomez-Fernandez v. Barr*, 969 F.3d 1077, 1087 (9th Cir. 2020) (same). This naturally follows from the negative implication canon. *See, e.g.*, *Navajo Nation v. Dalley*, 896 F.3d 1196, 1213 (10th Cir. 2018) ("the enumeration of certain things in a statute suggests that the legislature had no intent of including things not listed or embraced") (quotation omitted). By including only those who are "born alive" in the definition of "person," it is a "sensible inference that the term left out" – the unborn – "must have been meant to be excluded." *NLRB v. SW Gen.*, 137 S.Ct. 929, 940 (2017).

According to the government, however, because Congress used the word "include" within this definition, that definition doesn't have any limits, citing *United States v. Faulkner*, 950 F.3d 670, 679 (10th Cir. 2019). Gov't Br. 23 n.8. The guideline in *Faulkner* "include[d]" a list of examples, and the general rule under those circumstances is that the list is illustrative, not exhaustive. *Wichita Ctr. v. United States*, 917 F.3d 1221, 1224 (10th Cir. 2019). That general rule cannot help the government here for two reasons. First, § 8 does not include a list of illustrative examples when defining the word "person." It just defines "person" to

"include every infant member of the species homo sapiens who is born alive at any stage of development." 1 U.S.C. § 8. Second, even assuming this language is illustrative, by referring solely to those who have been "born alive," the provision does not illustrate that the term includes the unborn. Just the opposite. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 189 (1941) ("The word 'including' does not lend itself to such destructive significance."); *Jennings v. Rodriguez*, 138 S. Ct. 830, 840 (2018) ("when confronted with capacious phrases . . . we have eschewed uncritical literalism leading to results that no sensible person could have intended") (quotations omitted). Because the government's interpretation of § 8 provides "no principled, text-based limit on the definition of" "person," this Court should reject it. *See Bloate v. United States*, 559 U.S. 196, 210 (2010).

Fourth, the government notes that the Model Penal Code defines "person" as "any natural person." Gov't Br. 23 n.8. According to the government, this definition is "circular" because it does not define "what a 'natural person' is." *Id.* If we're following, the government thinks that an unborn child is (or might be) a "natural person" under the Model Penal Code. *Id.* The government cites no authority for this proposition, nor does the proposition make sense when one views the Model Penal Code in its entirety. If this Court were to plug in the phrase "unborn child" wherever the Code uses the word "person," the Code would not make much sense. We've made the same (undisputed) point with respect to the guidelines' use of the term "person." Br. 18-19. This argument lacks merit.

Fifth, the government notes that, although the common law did not recognize an unborn child as a "person" (as we've already explained, Br. 16), the unborn child "was 'regarded as part of the mother.'" Gov't Br. 23 n.8 (quoting *Roe v. Wade*, 410 U.S. 113, 134 (1973)). From

this, the government summarily claims that, "aggravated battery against a fetus would be aggravated battery against the woman carrying the fetus." *Id.* But that conclusion does not follow. In *Roe*, the Court made clear that harm to an unborn child "was not an indictable offense" at common law. 410 U.S. at 133. Thus, there is no basis to conclude that it was in fact an indictable offense (i.e., battery against the pregnant woman). And the government has done nothing to show that at common law (or at any other time before § 4B1.2's enactment), individuals who harmed unborn children were ever indicted for harming pregnant women. Without any support, this conclusory, unsupported statement at the end of a footnote has no merit and should not be considered. In any event, even if the common law's treatment of unborn children was unclear (it's not), the meaning of "person" in § 4B1.2(a)(1) is not. Br. 13-26.

In the end, the government has made no serious effort to show that the term "person" in § 4B1.2(a)(1) reaches the unborn. Nor has the government made any effort to defend the district court's erroneous reasoning. *See* Br. 22-26. Because KSA § 21-5413(b)(1)(C) covers batteries against the unborn, it reaches conduct not covered by § 4B1.2(a)(1). For that reason alone, Adams's prior Kansas aggravated battery conviction is not a crime of violence. *Id.*

B. The government's alternate arguments are waived and otherwise unpersuasive.

The government offers three new alternate grounds to affirm. Gov't Br. 13, 23. As litigated here, the government has waived these arguments. If not waived, the arguments have no merit.

1. The government has waived its alternate grounds to affirm.

The government is generally correct that this Court may affirm on alternate grounds not reached by the district court. Gov't Br. 23. This Court does not affirm on any ground as a matter of course, however, but only "when it is fair to do so." *Cox v. Wilson*, 971 F.3d 1159, 1174 (10th Cir. 2020) (affirming on a ground that was "properly invoked . . . in the district court"). This Court employs a three-pronged test to determine whether the affirm-on-any-ground doctrine should apply. *See*, *e.g.*, *United States v. Rodriguez*, 945 F.3d 1245, 1250 (10th Cir. 2019). The government has not even mentioned this test, let alone attempted to satisfy it. *See* Gov't Br. 23-24. "Because [the government] does not cite the relevant standard, [it] makes no attempt to show how [it] meets it." *United States v. Glaub*, 910 F.3d 1334, 1340 (10th Cir. 2018). "Accordingly, the issue is waived." *Id.*; *Frasier*, 992 F.3d at 1033 (appellee's inadequately briefed argument is waived); *Banks*, 884 F.3d at 1024 ("We aren't required to fill in the blanks of a litigant's inadequate brief.").

Even if it had tried, the government could not have met this Court's three-pronged test. That test considers "'whether the ground was fully briefed and argued here and below, whether the parties have had a fair opportunity to develop the factual record, and whether, in light of factual findings to which we defer or uncontested facts, [our] decision would involve only questions of law.'" *Rodriguez*, 945 F.3d at 1250. None of the three alternate grounds were "fully briefed . . . below." Gov't Br. 23 (conceding the point). Because the government did not raise these alternate grounds below, the parties did not have "a fair opportunity to develop the factual record." And, although crime-of-violence issues are issues of law, the sweeping nature of the government's claims arguably raise fact-bound issues

about the record in this case, as well as the nature and scope of Kansas law. *See* Gov't Br. 24-38 (asking this Court to decide what statute underlies Adams's prior conviction, as well as how that statute was violated); *Lucio-Rayos v. Sessions*, 875 F.3d 573, 583 (10th Cir. 2017) (divisibility issues involve "question[s] of fact or at least [] question[s] of law and fact").

Importantly, it was (and still is) the government's burden to prove that Adams's prior conviction qualifies as a crime of violence. Gov't Br. 20 (conceding the point). Although the government is the appellee, that's only because the district court rejected Adams's argument under flawed reasoning that even the government does not defend. *See* Br. 22-26. As the party with the burden of proof, the government is now before this Court claiming that it can meet its burden via arguments never presented below. It is using this Court as "a 'second-shot' forum, a forum where secondary, back-up theories may be mounted for the first time." *United States v. Hernandez*, 847 F.3d 1257, 1269 (10th Cir. 2017). This Court did not permit the government-as-appellee to do this in *Hernandez*. Nor has it permitted it to do so in other government-as-appellee appeals. *See*, *e.g.*, *United States v. Dewitt*, 946 F.2d 1497, 1499 (10th Cir. 1991); *United States v. Barrett*, 985 F.3d 1203, 1231 n.16 (10th Cir. 2021); *United States v. DeRusse*, 859 F.3d 1232, 1240 n.3 (10th Cir. 2017). Indeed, this Court recently refused to permit the government to argue that a statute was divisible because the government did not make that claim below. *United States v. Hall*, 798 Fed. Appx. 215, 221 (10th Cir. 2019). This Court should decline to entertain the government's arguments here as well. *See Rimbert v. Eli Lilly & Co.*, 647 F.3d 1247, 1256 (10th Cir. 2011) ("Although this court may affirm on any ground apparent in the record, affirming on legal grounds not considered by the trial court is disfavored.").

Nor does the one case cited by the government help it. In *United States v. Mobley*, 971 F.3d 1187, 1198 (10th Cir. 2020), this Court was tasked with interpreting a federal statute as "an issue antecedent to" the issue raised on appeal. In such circumstances, this Court must address the meaning of the underlying federal statute in order to resolve the appeal. *Id.* The same is not true here. *See*, *e.g.*, *United States v. Bowen*, 936 F.3d 1091, 1102 n.5 (10th Cir. 2019) (assuming without deciding that a statute is indivisible). Indeed, it is Adams who has asked this Court to interpret a federal provision (USSG § 4B1.2(a)(1)) as an issue antecedent to the ultimate issue on appeal (whether a Kansas state statute falls under that federal provision). Br. 13-26. It is the government who asks this Court to do something entirely different (i.e., decide what Adams was actually convicted of, and whether the state statute is divisible). Gov't Br. 23-38. *Mobley* does not support the government's affirm-on-any-ground request. This Court should not consider the government's newfound alternate grounds.

2. The alternate grounds have no merit.

If this Court considers the alternate grounds, it should reject them.

a. KSA § 21-5419 does not set forth a separate, independent crime.

The government claims that § 21-5419 creates a separate crime. Gov't Br. 24-25. For two reasons, we disagree.

First, by its plain terms, § 21-5419 is a definitional statute; it does not establish a criminal offense. It defines the terms "Abortion" and "unborn child," KSA § 21-5419(a), expands the definition of "person" and "human being" in certain enumerated statutes to include the unborn, KSA § 21-5419(c), provides that the provision "shall not apply" in certain circumstances, KSA § 21-5419(b), and provides that the provision "shall be known as

Alexa's law," KSA § 21-5419(d). None of these subsections prohibit conduct, set forth elements of a criminal offense, or provide penalties for any offense. *See* KSA § 21-5102 (defining a "crime" under Kansas law). This statute certainly does not prohibit aggravated batteries (§ 21-5413 does that). The government does not provide any examples of any charges brought solely under this provision (and we are unaware of any). A defendant could not be charged with violating § 21-5419 because § 21-5419 is a definitional statute, not a stand-alone criminal offense.

The title of the statute confirms the point. The statute is entitled "Application of certain crimes to an unborn child." Again, the statute does not set forth a crime; it provides definitions to apply to other enumerated crimes. KSA § 21-5419(a), (c). A defendant may be charged with and convicted of those other crimes (like Adams was here). But a defendant cannot be charged with and convicted of § 21-5419 alone.

It is true that the legislature limited the statute's reach in three circumstances. KSA § 21-5419(b). But the government cites no precedent to support the proposition that any definitional provision with express limitations creates a substantive offense. That § 21-5419's definitions do no work in some circumstances does not mean that § 21-5419 is a stand-alone crime. It just means that those definitions don't apply in some circumstances. *See*, *e.g.*, 18 U.S.C. § 921(a)(20) (excepting certain offenses from the definition of a "crime punishable by imprisonment for a term exceeding one year"). And we fail to see the significance in the fact that Alexa's law was enacted at a different time than § 21-5413. The government notes the fact, but fails to explain why it matters. Gov't Br. 24-25. It can't be true that definitional statutes create substantive offenses when they're enacted at times different than substantive

offenses. A definitional statute is a definitional statute, regardless when the legislature enacts it.

Second, Kansas case law does not support the government's position. Contrary to the government's position, *State v. Seba*, 380 P.3d 209 (Kan. 2016), does not state that § 21-5419 "was intended to create a separate crime." Gov't Br. 25. The phrase "separate crime" cannot even be found within *Seba*. Rather, *Seba* recognizes that § 21-5419 expands the definition of "person" to include an unborn child. 380 P.3d at 220. In doing so, *Seba* acknowledges the obvious: "Through Alexa's law, the legislature expressed an intent to allow two units of criminal prosecution if one act—such as shooting one bullet—kills both a woman and her 'unborn child.'" *Id.* That a defendant who harms two people (whether by murdering them, battering them, or something else) can be charged with two crimes is not a controversial claim. *See*, *e.g.*, *United States v. Rentz*, 777 F3d 1105, 1109 (10th Cir. 2015) (en banc) ("if a law's verb says it's a crime to kill someone, we usually think a defendant must kill more than one person to be found guilty of more than one offense"). That a defendant is subject to a second charge under one statute (i.e., that a defendant is charged with two batteries instead of one) via the expanded definition in § 21-5419 does not mean that the defendant is charged with a § 21-5419 offense. Rather, the defendant is charged with two § 21-5413 battery offenses (for instance).

In the end, § 21-5419's plain text demonstrates that it is a definitional statute, and the government has not come forward with any real-world evidence to prove the contrary. After all, the defendant in *Seba* was found guilty of "two first-degree premeditated murder convictions," not one first-degree premeditated murder conviction and one conviction solely

under Alexa's law. *See* 380 P.3d at 191, 198, 202. Section 21-5419(c)'s definition of "person" to include an "unborn child" merely provides another means of violating § 21-5413. Br. 12. The government has not met its burden to prove § 21-5419 is a separate crime.[1]

b. KSA § 21-5413(b)(1)(C)'s "person" element is not divisible.

The government also claims that § 21-5419, when read together with § 21-5413(b)(1)(C), creates "separate, divisible crimes." Gov't Br. 26. According to the government, the Kansas legislature has enacted "two aggravated battery offenses," one that doesn't apply to batteries against an unborn child and one that does. Gov't Br. 32-33.

There are multiple problems with this argument. First, the government ignores the burden of proof. It is the government's burden to prove **with certainty** that a statute is divisible. *United States v. Degeare*, 884 F.3d 1241, 1258 (10th Cir. 2018); *see also Pereida v. Wilkinson*, 141 S.Ct. 754, 766 n.7 (2021) (the violent-crimes "categorical approach demands certainty from the government"). Unless this Court is "certain that a statute's alternatives are elements rather than means, the statute isn't divisible." *Degeare*, 884 F.3d at 1258. This is a demanding test, and the government often falls short in its attempt to meet it. *See id.* at 1258; *Mathis v. United States*, 136 S.Ct. 2243, 2256-2257 (2016); *United States v. Johnson*, 911 F.3d 1062, 1068 (10th Cir. 2018); *United States v. Hamilton*, 889 F.3d 688, 693 (10th Cir. 2018);

[1] The government also cites statements made in newspaper articles and law reviews in support of its argument. Gov't Br. 25 n.11. These things are not proper tools of statutory construction. *See Meese v. Keene*, 481 U.S. 465, 484-485 (1987) ("As judges it is our duty to construe legislation as it is written, not as it might be read by a layman"). Moreover, that someone might colloquially refer to an additional offense against an unborn child as a "separate crime" is nothing more than the realization that the defendant has been charged with more than one crime (rather than the belief that the defendant has been charged with one crime that falls solely under § 21-5419).

Jimenez v. Sessions, 893 F.3d 704, 716 (10th Cir. 2018). Because the government makes no attempt to meet this heightened standard, it cannot meet its burden under this standard. *Glaub*, 910 F.3d at 1340.

Second, a divisibility analysis focuses solely on the "elements of the offense." *United States v. Titties*, 852 F.3d 1257, 1266 (10th Cir. 2017). A statute is divisible only if it "contains alternative elements." *Jimenez*, 893 F.3d at 712. "To determine whether a statute is divisible, it is essential to distinguish between elements and means." *United States v. Cantu*, 964 F.3d 924, 927 (10th Cir. 2020). We've already touched on this (albeit briefly because nobody disputed our claim below that the statute was indivisible). Br. 12. The government has not identified what it thinks are the "elements" (as opposed to the "means") of its aggravated-battery offenses. *See generally* Gov't Br. 18-38. Because the government has not even attempted to identify the elements (as opposed to the means) of the offense(s), it cannot meet its burden to prove divisibility with certainty. *Glaub*, 910 F.3d at 1340.

Third, under a proper divisibility analysis, the government has not come close to proving with certainty that KSA § 21-5413's "person" element is divisible based on the characteristics of the "person" battered. To determine whether a statute is divisible, this Court considers "the statute itself, the punishments for different offenses under the statute, and state case law." *Johnson v. Barr*, 967 F.3d 1103, 1107 (10th Cir. 2020). If these sources "fail 'to provide clear answers,'" this Court can also look to the "actual record of conviction." *Id.* Ultimately, however, "jury unanimity [is] the touchstone of the means-or-elements inquiry." *Degeare*, 884 F.3d at 1251. An element is one that the jury must find "unanimously and beyond a reasonable doubt." *Descamps v. United States*, 570 U.S. 254, 273

(2013). If none of these sources "definitively show" that the statute is divisible, "the statute must be treated as indivisible." *Johnson*, 911 F.3d at 1067-1068; *see also Pereida*, 141 S.Ct. at 764-765 ("any lingering ambiguity about [these sources] can mean the government will fail to carry its burden of proof in a criminal case").

The statute, the punishments for the statute, state case law, and jury-unanimity principles all suggest that § 21-5413 is an indivisible statute with one overarching "person" element: although the State is required to prove that the defendant caused injury to a "person," the State is not required to prove anything more than that. Br. 12. Any additional facts are just the "means" of the offense – they "merely describe '[h]ow a given defendant actually perpetrated the crime.'" *Johnson*, 967 F.3d at 1107.

Start with the statute itself. Section 21-5413(b)(1)(C) includes a mens rea element ("knowingly"), and a results element ("causing physical contact with another person" in two specified ways). This results element is triggered only if the defendant causes contact "with another person." KSA § 21-5413(b)(1)(C). It would not be enough, for instance, if the defendant harmed an animal. He must harm "a person" (other than himself).

Kansas generally defines "person" as "an individual, public or private corporation, government, partnership, or unincorporated association." KSA § 21-5111(t). But this definition does not apply "when a particular context clearly requires a different meaning." KSA § 21-5111. We agree with the government that the "particular context" of § 21-5413 makes clear that the provision only applies to "an individual." Gov't Br. 31. Moreover, under § 21-5419(c), a "person" under certain enumerated statutes, including § 21-5413(b), "also mean[s] an unborn child." This is classic definitional language, as the government admits.

Gov't Br. 27, 29. Thus, there are two ways, or "means," to violate § 21-5413(b)(1)(C)'s "person" element – by causing the requisite contact with an individual, or by causing the requisite contact with an unborn child.

As we've already explained, because § 21-5419(c) sets forth a definition, it is not an element under Kansas law. Br. 12 (quoting *State v. Brown*, 284 P.3d 977, 991 (Kan. 2012)). In *Brown*, the Kansas Supreme Court explained that the statutory "phrase 'either the child or the offender, or both'" did not set forth alternative elements, but instead "outline[d] options with a means." 284 P.3d at 993. The same is true with a definition of "person" that includes an "individual" and an "unborn child." That definition "outlines options within a means"; it does not set forth alternative elements. *See also Hamilton*, 889 F.3d at 696 (explaining that the use of an "umbrella term" can indicate that "alternatives constitute means rather than elements"). Moreover, aggravated batteries against the unborn are punished no differently than other aggravated batteries, *see* generally KSA § 21-5413(g), which further suggests that any facts underlying the characteristics of the "person" battered are means, not elements. *Mathis*, 136 S.Ct. at 2256; *Cantu*, 964 F.3d at 931-932.

The government's text-based claims do not prove the contrary to a certainty. The government again notes that § 21-5419 was enacted at a different time than § 21-5413, but it does not explain the significance of this fact, and it does not cite a case that finds this type of temporal difference relevant (nor have we). Gov't Br. 28-29. The government also again relies on the exceptions found within § 21-5419(b), and it claims that these exceptions are elements of an aggravated-battery offense if that offense involves an unborn child. Gov't Br. 29-30. But it doesn't cite any precedent (or anything else) that supports that proposition. The

exceptions in § 21-5419(b) look much more like affirmative defenses than elements of the offense. It seems highly unlikely that a Kansas prosecutor must affirmatively prove, and the jury must find beyond a reasonable doubt, in each case that the defendant is not the "mother of the child" (for instance). KSA § 21-5419(b). At least the government hasn't met its burden to prove this point with certainty. *See* Gov't Br. 30 (conceding that "there's no way to know . . . whether § 21-5419 even applied in a particular case"). The government doesn't cite any case law at all that interprets § 21-5419(b).

With respect to state law, the government does not argue that, in every § 21-5413(b)(1)(C) offense, the State must prove anything more than that a "person" (whether born or unborn) was battered. The only case the government relies on (*Seba*) undermines its position. *Seba* involved two murder charges, one involving an individual and the other an unborn child. 380 P.3d at 213.[2] In discussing Alexa's law, the Kansas Supreme Court did not state that the law created additional elements, but instead stated, consistent with our position, that the law merely "defines murder to include the killing of an 'unborn child.'" *Id.* The Court further stated that Kansas "defin[es] the crime as 'the killing of a human being' *without limitation to a specific victim*." *Id.* at 218 (emphasis added). The Court ultimately concluded that "evidence of a defendant's intent to kill a particular person can prove intent to kill a human being even if a person other than the intended victim is murdered at the defendant's hands." *Id.* at 220. This reasoning is consistent with our position. Br. 12.

[2] That *Seba* involved murder, not aggravated battery, is irrelevant because § 21-5419(c) defines "person" and "human being" to include the unborn in both statutes.

The government ignores this language and instead focuses on the Court's discussion of "units of prosecution." Gov't Br. 31-32. Because one act that kills two people (one living, the other unborn) can be charged as two crimes, the government surmises that the "person" element is divisible. *Id.* This argument impermissibly equates a "unit of prosecution" analysis with an "elements" analysis. "The two can easily be confused but are conceptually distinct." *Rentz*, 777 F.3d at 1117 (Matheson, J., concurring). "The elements of an offense define what must be proved to convict a defendant of a crime." *Id.* "By contrast, the unit of prosecution defines how many offenses the defendant has committed. It determines 'whether conduct constitutes one or several violations of a single statutory provision.'" *Id.* That *Seba* found that the "unit of prosecution" was the number of victims, rather than the number of times the defendant acted, says nothing about the elements the government had to prove to convict for each crime. *Id.*

Beyond all of this, the government makes no effort to show that a Kansas jury tasked with convicting a defendant of aggravated battery must unanimously determine in any case whether the "person" was an individual or an unborn child. After all, "jury unanimity [is] the touchstone of the means-or-elements inquiry." *Degeare*, 884 F.3d at 1251. It is implausible to think that a defendant could argue to the jury that he should be acquitted because the "person" he battered was an individual and not an unborn child (or vice versa). That debate is irrelevant. The defendant need only batter a "person," and, under Kansas law, a "person" is both of those things. "A jury could convict even if half believed the ["person" the defendant battered was an individual] and the other half thought [the "person" the

defendant battered was an unborn child], so long as there was unanimity on the relevant *element*—namely, that he [battered a "person"]." *See Cantu*, 964 F.3d at 928.

The government has not come close to proving with certainty that § 21-5413's "person" element is divisible.[3] The statute is thus indivisible, precluding any application of the modified categorical approach. *Johnson*, 911 F.3d at 1068. Because the statute reaches conduct not covered by § 4B1.2(a)(1) (batteries of the unborn), Adams's prior conviction is not a crime of violence.

c. Based on Kansas's statutory scheme, and the government's own real-world examples, it is not "legal imagination" that Kansas would prosecute an individual for aggravated battery of an unborn child.

The government lastly claims that, because "it is difficult to imagine" how a defendant could batter an unborn child without battering the mother, a § 21-5413 offense must be a crime of violence. Gov't Br. 35-38. This argument misunderstands the law as well.

The "legal imagination" or "realistic probability" test relied on by the government developed in the enumerated-offenses context, not the element-of-force context. *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). The test is meant to avoid situations where a party claims that some "special" concept could apply to take the crime outside the context of its generic definition. *Id.* at 191-193. To avoid such "legal imagination," the Court required a "realistic possibility, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime." *Id.* at 193.

[3] The government does not look to the "record of conviction,", likely because it did not make a divisibility argument below and, thus, waived its opportunity to develop such a record. Because the government doesn't address this factor, we don't either.

This concept is an odd fit in the **element**-of-force context. After all, a statute either has the requisite "elements," or it does not. In this context, this Court has used the "legal imagination" test, but only after determining that a statute has the requisite **element** of force, and then only to determine whether a state would realistically prosecute a defendant under that statute if the defendant used something less than "violent force." *See*, *e.g.*, *United States v. Harris*, 844 F.3d 1260, 1270 (10th Cir. 2017).

This is not the context at issue here. The issue here is whether Adams's prior conviction is a crime of violence because it can be committed against something other than "the person of another." In this context, this Court has already held that the "legal imagination" test has no application. *United States v. O'Connor*, 874 F.3d 1147, 1154 (10th Cir. 2017). In *O'Connor*, this Court held that federal robbery was not a crime of violence because it reached conduct directed at property, not a person, and it did so "because the statute sa[id] so." *Id.* So too here. Section 21-5413(b)(1)(C) expressly reaches conduct directed at an unborn child, and it does so "because the statute says so." *O'Connor*, 874 F.3d at 1154. Because an unborn child is not a "person" under § 4B1.2(a)(1), § 21-5413(b)(1)(C) reaches more conduct than § 4B1.2(a)(1). Br. 13-26. As in *O'Connor*, this Court "cannot ignore the statutory text and construct a narrower statute than the plain language supports." 874 F.3d at 1154.

Even if the "legal imagination" test were in play, it's satisfied here. The government has given us real-world examples of Kansas prosecutions for harming unborn children as "persons." Gov't Br. 36-37. Thus, the government has shown a "realistic probability" that Kansas would prosecute such crimes.

The government's actual argument is something different than a "legal imagination" argument. The government claims that, because "it is difficult to imagine" how someone could batter an unborn child without battering the pregnant woman, that all aggravated batteries must be crimes of violence "against the person of another." Gov't Br. 35-36. This argument is without any precedential support, and it conflicts with at least three well-established legal propositions.

First, under the categorical approach, courts look only to the "the elements" of the prior conviction (not to any facts). *Descamps*, 570 U.S. at 261. "The key . . . is elements, not facts." *Id.* Even if "conduct fits within the generic offense, the mismatch of elements saves the defendant." *Mathis*, 136 S.Ct. at 2251. The government's argument is rooted in facts, not elements. It has no place in a categorical-approach analysis.

Second, it is "state law [that] defines the substantive elements of the crime of conviction." *Harris*, 844 F.3d at 1264. And the State of Kansas has defined the "person" element in this context to include the unborn. KSA § 21-5419(c). As the government demonstrates, Kansas permits multiple prosecutions when an unborn child and a pregnant woman are injured. Gov't Br. 31-32, 36-37. Thus, whether "it is difficult to imagine" a situation where the unborn child is battered, but the pregnant woman is not, is irrelevant. Under Kansas state law, a defendant can be convicted of the former, without any proof (or jury finding) of the latter. And that is all that matters under the categorical approach. *See Descamps*, 570 U.S. at 261; *Degeare*, 884 F.3d at 1251.

Third, the question under § 4B1.2(a)(1) is not whether "aggravated battery against an unborn child *requires* the use, attempted use, or threatened use of physical force against *the*

woman carrying the unborn child," Gov't Br. 37 (emphasis added), but is instead whether aggravated battery against an unborn child "*has as an element*" the use, attempted use, or threatened use of physical force "*against the person of another*." USSG § 4B1.2(a)(1) (emphasis added). The government cannot rewrite the guideline to win this appeal. *See United States v. Williams*, 10 F.4th 965, 975 (10th Cir. 2021) (noting the differences between a statute that uses the phrase "has as an element" and a statute that uses the phrase "involves as an element").

One final point. Again, it is the government's burden to prove that Adams's conviction qualifies as a crime of violence under § 4B1.2(a)(1). And here, the government has merely alleged that it is "difficult to imagine" a situation where an unborn child could be battered without also battering the pregnant woman. Gov't Br. 35. Thus, the government has not even alleged, let alone met its burden to prove, that an individual could not batter an unborn child without battering the pregnant woman. Even assuming the government's novel argument has any place in the law, the government hasn't met its burden under that novel standard. And that is no surprise, considering that the government never made this argument below (which is where it would have presumably offered the requisite proof).

Adams's prior aggravated-battery conviction is not a crime of violence. This Court should vacate the sentence and remand for resentencing.

II. Kansas aggravated battery is not a crime of violence because it has a causation element and not an element of force.

This Court need not reach this claim if it agrees with us on the first issue. But if this Court reaches the claim, it is fully preserved, and the government's counterarguments are unpersuasive.

A. We have not waived or forfeited our arguments.

The government claims that we have waived several of our arguments. First, the government claims that we waived our argument that **this Court** should overrule *United States v. Treto-Martinez*, 421 F.3d 1156 (10th Cir. 2006), because we conceded below that **the district court** was bound by *Treto-Martinez*. Gov't Br. 42-43. The government calls this invited error. Gov't Br. 42.

We forcefully disagree. Waiver is "the intentional relinquishment of a known right." *Vreeland v. Zupan*, 906 F.3d 866, 876 (10th Cir. 2018). Adams did not intentionally relinquish his right to ask this Court to overrule *Treto-Martinez*. He did just the opposite – he expressly reserved the right to do just that. R2.29-30. He "alerted" the district court to his "appellate argument, which sufficed for preservation." *Harris v. Sharp*, 941 F.3d 962, 980 (10th Cir. 2019). He did precisely what he was supposed to do to preserve a foreclosed argument for further review in a higher court. *Titties*, 852 F.3d at 1264, 1264 n.5 (a litigant does not invite error/waive issue "when he correctly inform[s] the district court" of the applicable law, then argues on appeal that the law should be overruled based on intervening precedent).

As *Titties* explains, this is not invited error because the district court did not commit an error. *Id.* The district court was bound by *Treto-Martinez*. *Colby v. J.C. Penney Co., Inc.*, 811 F.3d 1119, 1123 (7th Cir. 1987) ("the decisions of a superior court in a unitary system bind the inferior courts"). By conceding that *Treto-Martinez* foreclosed his argument below, and preserving the right to ask this Court to overrule *Treto-Martinez*, R2.28-29, Adams did not "induce[] an erroneous ruling" or "induce[] the district court to do [some]thing it would not

otherwise have done." *Tesone v. Empire Mktg. Strategies*, 942 F.3d 979, 992 n.10 (10th Cir. 2019).

Moreover, Adams's argument is, and always has been, that **this Court** should overrule *Treto-Martinez*. Br. 40-42. He could not have raised that claim in the district court, other than to preserve it for review here, which is exactly what he did. R2.28-29; *see Olano v. United State*s, 507 U.S. 725, 731 (1993) (claim forfeited "by the failure to make timely assertion of the right before *a tribunal having jurisdiction to determine it*") (emphasis added).

The government's position – which would require more than raising the foreclosed claim to preserve it – does nothing but waste judicial resources. *See Henderson v. United States*, 568 U.S. 266, 285 (2013) (Scalia, J., dissenting) (where circuit law is against the defendant, "counsel's raising the point would be futile and wasteful rather than sparing of judicial resources"). An objection any more detailed than the one Adams made below would "disserve efficiency and . . . result in counsel's inevitably making a long and virtually useless laundry list of objections." *Id.* at 284. As this Court has done in the past, *Titties*, 852 F.3d at 1264, 1264 n.5, it should reject the government's position.

The government further claims that this Court should not consider whether to overrule *Treto-Martinez* because we have not argued that *Borden* undermines *Treto-Martinez*. Gov't Br. 43-44. That's true, but beside the point. Because *Treto-Martinez* was decided before *United States v. Castleman*, 572 U.S. 157 (2014), it did not make the same mistake this Court made in *United States v. Ontiveros*, 875 F.3d 533 (10th Cir. 2017). *See* Br. 36-40. But there are other reasons (including other intervening Supreme Court precedents) why this Court should

overrule *Treto-Martinez*. Br. 40-42. As just explained, we preserved the right to make these claims on appeal. R2.29-30.

The government also claims that plain-error review applies to our claim that *United States v. Williams*, 893 F.3d 696 (10th Cir. 2018), should be overruled in light of *Borden*. Gov't Br. 44. The government concedes that *Borden* was decided after Adams was sentenced, but apparently thinks that we should have somehow relied on *Borden* below. *Id.* But we can't rely on a case that doesn't exist. As intervening precedent, *Borden* applies. *Henderson*, 568 U.S. at 271. And, unlike the defendant in *United States v. Trujillo*, 960 F.3d 1196, 1201 (10th Cir. 2020), who did not raise the underlying claim below, Gov't Br. 44, Adams has raised the identical claim on appeal that he raised below. R2.29 ("This offense of conviction is not a crime of violence as the term is defined in USSG § 4B1.2(a) because 'knowingly causing physical contact' under either of these scenarios does not qualify as an element of violent force."). The fact that intervening Supreme Court precedent now supports that preserved claim is not a reason to consider the claim forfeited; it's a reason to find that the preserved claim has merit.*See also Schulenberg v. BNSF Ry. Co.*, 911 F.3d 1276, 1286 (10th Cir. 2018) (no waiver/forfeiture where party "simply offer[ed] new legal authority for the position that he advanced before the district court").

B. Stare decisis principles control: a causation element is not an element of force.

We've asked this Court to "revert back" to its since-overruled decision in *United States v. Perez-Vargas*, 414 F.3d 1282 (10th Cir. 2005), and to overrule a line of post-*Perez-Vargas* precedent because that line of precedent is contradicted by the reasoning of intervening

Supreme Court precedent. Br. 36-42. In doing so, we've explained why § 21-5413(b)(1)(C), on its face, does not have an "element" of force. Br. 26-35.

The government disagrees. But its arguments misunderstand the law, as well as our arguments. This Court should reject them.

1. The government confuses § 4B1.2(a)(1)'s "element"-of-force requirement with the additional requirement that any such element must punish conduct that constitutes "violent force."

By its plain terms, § 4B1.2(a)(1) requires that a prior conviction have a formal "element" of force to qualify as a crime of violence. The provision does not ask whether the conviction "involve[s]" force, "relate[s] to" force, or even "involves as an element" force. *See*, *e.g.*, 18 U.S.C. § 924(e)(2)(A)(ii) (defining "serious drug offense" as "involving" certain drug-related activities); 18 U.S.C. § 2252A(b)(2) (enhancing sentence based on prior conviction "relating to aggravated sexual abuse"); 18 U.S.C. § 3663A(a)(2) (extending restitution to an "offense that involves as an element a scheme, conspiracy, or pattern of criminal activity"). The inquiry is much narrower: "[a]ll that counts . . . are 'the elements of the statute of conviction.'" *Mathis*, 136 S.Ct. at 2251. And we've explained how § 21-5413(b)(1)(C) simply does not have "an element" of force. Br. 26-35.

The government has not offered a direct response to this argument. The government does not explain how § 21-5413(b)(1)(C) has an "element" of force. It does not even allege that a jury in an aggravated-battery trial "must find beyond a reasonable doubt" that the defendant used, attempted to use, or threatened to use force "to convict the defendant at trial." *See Mathis*, 136 S.Ct. at 2248. Nor does it dispute our point that Kansas's pattern jury instructions make plain that juries are not instructed that they must find force to convict a

defendant of aggravated battery, Br. 27, or our point that Kansas's aggravated-battery statute used to have an element of force, Br. 32.

Instead, the government summarily claims that "it is impossible to cause bodily injury without using force 'capable of' producing that result." Gov't Br. 58 (quoting Justice Scalia's concurrence in *Castleman*, 572 U.S. at 174). We've already explained why *Castleman* has no purchase in the violent-crimes context, Br. 38, and that, in other contexts, the Supreme Court does not use injury as a proxy for force, Br. 33-34. Regardless, the government's argument turns to conduct, not the elements of the underlying statute. It's wrong for that reason alone. *Mathis*, 136 S.Ct. at 2251.

The government also confuses § 4B1.2(a)(1)'s formal "element" requirement with the additional requirement that, even if a statute has a formal "element" of force, it still does not qualify as a crime of violence unless the statute can only be violated via the use of "violent" force. Gov't Br. 53-61. The Supreme Court gleaned this further textual requirement in *Johnson v. United States*, 559 U.S. 133, 138-143 (2010). *Johnson* did not involve a formal "element" inquiry, but rather the meaning of the term "physical force." *Id.* at 138. In *Johnson*, the defendant did not argue that the state statute at issue lacked a formal force "element," but instead argued that the *amount* of force necessary to violate the statute ("any unwanted physical touching") did not "constitute[] 'physical force'" under federal law. *Id.* at 138. In defining the term "physical force" to mean "violent force," the Court agreed and limited the reach of element-of-force provisions like the one at issue here. *See id.* at 138-144.

Because *Johnson* involved a different issue than the formal "element" issue presented here, the government's reliance on that case is unpersuasive. As is its suggestion that this

Court overruled *Perez-Vargas* based on *Johnson*. Gov't Br. 53. That's untrue. This Court did not overrule *Perez-Vargas* until after the Supreme Court decided *Castleman*. That is plain for two reasons. First, this Court cited *Perez-Vargas* as good law after *Johnson* was decided, but before *Castleman* was decided. *See*, *e.g.*, *United States v. Duran*, 696 F.3d 1089, 1095 (10th Cir. 2012). And when this Court overruled *Perez-Vargas*, this is what is said: "*Perez-Vargas*'s logic on this point is no longer good law in light of *Castleman*." *United States v. Ontiveros*, 875 F.3d 533, 536 (10th Cir. 2017).

It is also implausible to think that a defendant-friendly Supreme Court case that added an additional requirement to establish a crime of violence could somehow have overruled *Perez-Vargas*. That *Johnson* defined "violent" force under federal law as "force capable of causing pain or injury to another," Gov't Br. 56, says nothing about whether the State of Kansas's aggravated-battery statute has an "element" of force, *Johnson*, 559 U.S. at 138 (while federal law defines "physical force," state law defines the elements of the statute). Moreover, to the extent this Court has conflated *Johnson*'s reasoning with *Castleman*'s reasoning in prior cases, we've already explained why that was error. Br. 38.

The government also cites a string of precedent involving whether prior convictions qualify under *Johnson*'s "violent force" inquiry. Gov't Br. 53, 56. Like *Johnson* itself, however, those cases all assumed that the statute at issue had an "element" of force; the question in each case was whether the statute could be violated by conduct that amounted to something less than "violent force." *See* cases cited at *id.* Again, that's not our issue. Our issue is all about elements, and nothing about the conduct underlying those elements. Br. 26-35.

There is a second misconception that stems from this "violent force" precedent – the government's belief that our argument has something to do with direct v. indirect force. *See* Gov't Br. 53-57. It does not. Again, we're not concerned with conduct; we're concerned with elements. There are multiple Kansas statutes that have force elements. Br. 31-32. And we have no doubt that a jury could convict under these statutes whether the force employed was direct or indirect. But KSA § 21-5413(b)(1)(C) doesn't have a force "element" at all. Br. 27-28. Thus, a jury isn't even asked, let alone required, to find force. And because a jury doesn't have to find force, any debate between direct and indirect force is irrelevant. *Id.*

For these reasons, the government has not met its burden to show that § 21-5413(b)(1)(C) has an "element" of force. In the words of the Kansas Supreme Court, § 21-5413(b)(1)(C) has a "causation element." *State v. Ultreras,* 295 P.3d 1020, 1034 (Kan. 2013). It does not have "an element the use, attempted use, or threatened use of physical force against the person of another." USSG § 4B1.2(a)(1).

2. The government misunderstands stare decisis principles.

The government claims that *Borden* could not have overruled *Williams* and *Ontiveros* because *Borden*'s *holding* involved reckless offenses. Gov't Br. 45-50, 55, 59. That's untrue in this Circuit. As *Ontiveros* itself demonstrates, this Court doesn't look to the Supreme Court decision's *holding*, but rather to its *reasoning*, to determine whether it overrules this Court's precedent. 875 F.3d at 536. As we've explained, *Borden*'s reasoning requires this Court to "revert back" to *Perez-Vargas*. Br. 36-40.

The government also summarily claims that *Treto-Martinez* is still good law. Gov't Br. 44. We've explained that *Treto-Martinez*'s reasoning can't possibly survive *Mathis*. Br. 40-42. The government hasn't explained how that's wrong.

Finally, in a footnote, the government summarily claims that the *Brooks* line of precedent "did not apply stare decisis principles to revive overturned precedents." Gov't Br. 45-46 n.13. That's obviously untrue. Br. 40. In *Brooks*, this Court "revert[ed] back to [] prior precedent on this point." *United States v. Brooks*, 751 F.3d 1204, 1211 (10th Cir. 2014). The government's conclusory claim to the contrary is wrong.

The *Ontiveros* panel should have never overruled *Perez-Vargas*. Br. 36-40. In light of, *inter alia*, *Borden* and *Mathis*, this Court should correct this mistake and revert back to the earlier precedent. Br. 40.

III. Section 21-5413(b)(1)(C) can be committed without the use of "violent" force.

Finally, we've argued that, even if § 21-5413(b)(1)(C) has "an element" of force, the statute reaches conduct that is not "violent" force. Br. 42-43. The government claims that we've waived this argument as well. Gov't Br. 60-61. For all of the reasons stated above, we disagree. We argued below that the statute does not have "an element of *violent* force." R2.29 (emphasis added). But we acknowledged that this Court had held otherwise, that the district court was bound by those decisions, and that we preserved the issue for review in this Court. R2.29-30. The government does not argue that the district court was not bound by the decisions we cited below. It argues the opposite. Gov't Br. 62. Without wasting judicial resources, we properly preserved this claim by raising it in the district court for review in this Court.

On the merits, if we assume that § 21-5413(b)(1)(C) has an "element" of force, under *State v. Esher*, 922 P.2d 1123, 1127 (Kan. Ct. App. 1996), this element can be established by the amount of force necessary to commit common-law battery. Br. 43. The government claims that *Ultreras*, 295 P.3d at 1034, "supersedes" *Esher*, but *Ultreras* doesn't even mention *Esher*, so we don't see how it could possibly supersede it. Moreover, *Ultreras*'s discussion of "great bodily harm" was made in relation to a subsection of the aggravated-battery statute that punished "causing great bodily harm." 295 P.3d at 1034. *Ultreras* doesn't say a word about § 21-5413(b)(1)(C), which punishes "causing physical contact with another person," and not "causing great bodily harm." *Esher* is good law on this point. Because § 21-5413(b)(1)(C) can be established by the amount of force necessary to commit common-law battery, the statute does not require the use of "violent force." *Johnson*, 559 U.S. at 139.

CONCLUSION

For the foregoing reasons, and those stated in the opening brief, this Court should vacate Adams's sentence and remand for resentencing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

The undersigned certifies that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(5) & (7)(B) in that it contains 8,900 words, as permitted by this Court's November 10, 2021 Order, in a proportionally spaced typeface (13-point Garamond; as allowed by 10th Circuit Rule 32(a)), as shown by Microsoft Word 2016, which was used to prepare this brief.

s/ Daniel T. Hansmeier
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Dated: November 15, 2021

CERTIFICATE OF SERVICE

Undersigned counsel certifies that on November 15, 2021, he electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the CM/ECF system. Because opposing counsel are registered CM/ECF user, they will also be served by the CM/ECF system. 10th Cir. R. 31.5. Pursuant to 10th Circuit Rule 31.5, 7 hard copies will be mailed to the Clerk of the Court at:

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A copy of the brief will also be mailed to Adams.

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