No. 12-1371

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES ALVIN CASTLEMAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 922(g)(9) of Title 18, United States Code, makes it a crime for any person convicted of a "misdemeanor crime of domestic violence" to possess a firearm. The phrase "misdemeanor crime of domestic violence" is defined to include any federal, state, or tribal misdemeanor offense, committed by a person with a specified domestic relationship to the victim, that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon." 18 U.S.C. 921(a)(33)(A). The question presented is:

Whether respondent's Tennessee conviction for misdemeanor domestic assault by intentionally or knowingly causing bodily injury to the mother of his child qualifies as a conviction for a "misdemeanor crime of domestic violence."

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The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-33a) is reported at 695 F.3d 582. The order of the district court (App., *infra*, 49a-50a) adopting the report and recommendation of the magistrate judge denying respondent's motion to dismiss (App., *infra*, 51a-71a) is unreported, but is available at 2010 WL 711179. The orders of the district court granting respondent's motion to dismiss (App., *infra*, 34a-42a) and denying the government's motion for reconsideration (App., *infra*, 43a-48a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 2012. A petition for rehearing was denied on December 19, 2012 (App., *infra*, 72a-73a). On March 11, 2013, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including April 18, 2013. On April 5, 2013, Justice Kagan further extended the time to May 18, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reprinted in an appendix to this petition. App., *infra*, 74a-82a.

STATEMENT

Respondent was indicted on two counts of possession of a firearm by a person convicted of a misdemeanor crime of domestic violence, in violation of 18 U.S.C. 922(g)(9), and three counts of making false or fictitious statements to a federally licensed firearms dealer in order to purchase firearms, in violation of 18 U.S.C. 922(a)(6). Concluding that respondent's prior Tennessee conviction for misdemeanor domestic assault on the mother of his child was not a conviction for a "misdemeanor crime of domestic violence," the district court dismissed those counts of the indictment. The court of appeals affirmed. App., *infra*, 1a-33a, 54a-55a.

1. Under 18 U.S.C. 922(g)(9), it is unlawful for any person "who has been convicted in any court of a misdemeanor crime of domestic violence * * * [to] possess in or affecting commerce, any firearm or ammunition." Section 921(a)(33)(A) defines "misdemeanor crime of domestic violence" as a misdemeanor under federal, state, or tribal law, committed by a person with a speci-

fied domestic relationship with the victim, including "shar[ing] a child in common," that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon." 18 U.S.C. 921(a)(33)(A)(ii); see *United States* v. *Hayes*, 555 U.S. 415, 420-421 (2009). A person who knowingly violates that provision may be fined, imprisoned for not more than ten years, or both. 18 U.S.C. 924(a)(2).

2. In 2001, respondent was charged in Tennessee state court with misdemeanor domestic assault in violation of Tennessee Code Annotated § 39-13-111(b) (West 2001),[1] which punishes any person "who commits an assault as defined in § 39-13-101 against a person who is that person's family or household member." A "family or household member" includes "a person who has a child * * * in common with that person." *Id.* § 39-13-111(a). Section 39-13-101(a)(1), in turn, provides that a person commits assault by "[i]ntentionally, knowingly or recklessly caus[ing] bodily injury to another." *Id.* § 39-13-101(a)(1). And "bodily injury" is defined as "a cut, abrasion, bruise, burn or disfigurement; physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty." *Id.* § 39-11-106(a)(2). A first conviction for domestic assault under Section 39-13-111(b) is punishable as a Class A misdemeanor. See *id.* §§ 39-13-111(c), 39-13-101(b); see

[1] Unless otherwise noted, citations to the Tennessee Code Annotated are to the 2001 version. The current version of the relevant Tennessee statutory provisions similarly punish any person "who commits an assault as defined in § 39-13-101 against a domestic abuse victim," and "domestic abuse victim" includes adults "who have or had a sexual relationship." Tenn. Code Ann. § 39-13-111(a)(3) and (b) (West Supp. 2012).

also *id.* § 40-35-111(e)(1) (authorizing a term of imprisonment not greater than 11 months and 29 days).

The state indictment alleged that respondent "did intentionally or knowingly cause bodily injury to [the victim], WHO HAS A CHILD WITH HIM, thereby committing the offense of DOMESTIC ASSAULT, in violation of T.C.A. 39-13-111(b)." Indictment, No. 01CR1672 (May 7, 2001). Respondent pleaded guilty pursuant to a plea agreement, and he was sentenced to supervised probation for 11 months and 29 days. App., *infra*, 53a-54a.

3. In 2008, law enforcement agents discovered that respondent and his wife were buying firearms from dealers and selling them on the black market. In August 2009, respondent was charged in a superseding indictment on two counts of possession of a firearm by a person convicted of a misdemeanor crime of domestic violence, in violation of 18 U.S.C. 922(g)(9) (Counts 4 and 5), and three counts of making false or fictitious statements to a federally licensed firearms dealer in order to purchase firearms on three separate occasions, in violation of 18 U.S.C. 922(a)(6) (Counts 1, 2, and 3). See App., *infra*, 2a, 54a-55a.

Respondent moved to dismiss the indictment arguing, *inter alia*, that his Tennessee domestic assault offense is not a "misdemeanor crime of domestic violence" because it does not "ha[ve], as an element, the use * * * of physical force." 18 U.S.C. 921(a)(33)(A)(ii). The district court granted the motion and dismissed the two Section 922(g)(9) counts. App., *infra*, 34a-50a.[2] The court concluded that "[a]n assault statute that requires the mere

[2] The district court had initially adopted the report and recommendation of the magistrate judge and denied respondent's motion to dismiss based on a theory of judicial estoppel. App., *infra*, 49a-71a.

causation of bodily injury does not necessarily require the 'use of physical force' for [Section] 922(g)(9) purposes, at least where the statute may be violated through coercion or deception rather than through violent contact with the victim." *Id.* at 40a. The court explained that because a person could violate the Tennessee statute by "caus[ing] a victim to suffer bodily injury by deceiving him into drinking a poisoned beverage, without making contact of any kind, let alone violent contact, with the victim," or by "coerc[ing] the victim into taking the drink," respondent's 2001 conviction "cannot serve as a qualifying misdemeanor crime of domestic violence under [Section] 922(g)(9)." *Id.* at 41a (citing *United States* v. *Villegas-Hernandez*, 468 F.3d 874, 879 (5th Cir. 2006), cert. denied, 549 U.S. 1245 (2007)). The court acknowledged that its decision conflicted with decisions from the First, Eighth, and Eleventh Circuits, but it chose to follow "the teaching of the Fifth, Second, Tenth, Seventh, and Ninth Circuits." *Id.* at 39a-40a.

The district court denied the government's motion for reconsideration. App., *infra*, 43a-48a.

4. The United States appealed and a divided panel of the court of appeals affirmed in three separate opinions. App., *infra*, 1a-33a.

a. The court of appeals first considered "the degree of force necessary for a misdemeanor domestic battery offense to qualify as a misdemeanor crime of domestic violence." App., *infra*, 5a. The court explained that because the definition of "misdemeanor crime of domestic violence" largely "tracks" the "crime of violence" definition in 18 U.S.C. 16(a), and the "violent felony" definition in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(i), Congress presumably "intended them to capture offenses criminalizing identi-

cal degrees of force." App., *infra*, 6a-7a. Tracking the reasoning in *United States* v. *White*, 606 F.3d 144 (4th Cir. 2010), the court then looked to this Court's decision in *Johnson* v. *United States*, 130 S. Ct. 1265 (2010). The court of appeals explained that, in *Johnson*, this Court had interpreted the "physical force" requirement in Section 924(e)(2)(B)(i) to require "'*violent* force . . . capable of causing physical pain or injury to another person' and 'strong physical force.'" App., *infra*, 8a-9a (quoting *Johnson*, 130 S. Ct. at 1271). After acknowledging that the circuits are split on the issue, the court concluded that "the degree of force *Johnson* requires for a conviction under [Section] 924(e)(2)(B)(i) is [also] required of a misdemeanor crime of domestic violence." *Id.* at 9a-10a & n.2.

In so holding, the court of appeals rejected the government's argument that *Johnson* did not control. App., *infra*, 12a-13a & n.3. The court recognized that, in *Johnson*, this Court had emphasized the operative phrase "*violent* felony," whereas Section 921(a)(33)(A) defines a "*misdemeanor* crime of domestic violence." *Id.* at 13a n.3 (emphases added). But the court understood "the relevant portion of *Johnson* [to] suggest[] that the misdemeanor-felony distinction is not a viable framework for determining the level of violence an offense must require to qualify as a violent felony." *Id.* at 14a. The court therefore concluded that the phrase "'[m]isdemeanor crime of domestic violence' is most naturally interpreted to mean any crime requiring strong and violent physical force, which happens to be a misdemeanor." *Id.* at 12a.

The court of appeals next considered whether respondent's Tennessee domestic assault conviction categorically qualifies as a "misdemeanor crime of domestic

violence," so defined. App., *infra*, 15a-17a. Relying on circuit precedent interpreting the "'use of physical force' clause of [Section] 924(e)(2)(B)(i)," the court concluded that violation of a statute that makes it a crime to cause "bodily injury" "does not require the use of violent force." *Id.* at 16a. Distinguishing the Tennessee statute from a statute that criminalized aggravated assault by causing "serious physical harm," which the court had previously held "necessarily requires proof that the defendant used 'force capable of causing physical pain or injury,'" *United States* v. *Anderson*, 695 F.3d 390, 400 (6th Cir. 2012), the court of appeals reasoned that, under the Tennessee statute, respondent "could have caused a slight, nonserious physical injury with conduct that cannot be described as violent," such as "a paper cut or a stubbed toe." App., *infra*, 16a-17a. Accordingly, the court concluded that respondent's conviction did not qualify as a misdemeanor crime of domestic violence and that the district court correctly dismissed the Section 922(g)(9) counts of the indictment.[3]

b. Judge Moore concurred in a separate opinion. App., *infra*, 21a-23a. She agreed that "the force requirement for a misdemeanor crime of domestic violence is identical to that specified under the crime-of-violence statute and the ACCA." *Id.* at 21a. Under *Johnson*, she explained, "it is not enough to look only at the *result* of the defendant's conduct; instead, the focus must be on

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[3] The court of appeals also concluded that respondent's conviction did not qualify as a misdemeanor crime of domestic violence under a modified categorical approach. App., *infra*, 18a-20a. Although the court acknowledged that respondent's state indictment charged him with "intentionally or knowingly" causing bodily injury, the indictment did "not specify the type or severity of injury he caused." *Id.* at 18a.

the nature of the force proscribed by the statute and whether the *conduct itself* necessarily involves violent force." *Id.* at 22a. Because the Tennessee statute also "criminalizes reckless conduct," Judge Moore applied a modified categorical approach and concluded that respondent's conviction does not fall "within the confines of a misdemeanor crime of domestic violence." *Id.* at 21a, 23a.

c. Judge McKeague dissented. App., *infra*, 23a-33a. He argued that the majority erroneously applied *Johnson*'s "violent felony" standard to a "misdemeanor crime of domestic violence." *Id.* at 24a-26a. *Johnson*, he explained, "rejected the argument that the misdemeanor standard should control the felony definition" and, for the same reason, "the felony standard should not control the misdemeanor." *Id.* at 26a. Judge McKeague also concluded that respondent's conviction qualifies as a misdemeanor crime of domestic violence even under "the heightened *Johnson* standard," because "violent physical force is a necessary element to intentionally or knowingly inflicting bodily injury." *Id.* at 27a. He explained that the majority's holding to the contrary "has the effect of making the 'misdemeanor crime of domestic violence' provision * * * a dead letter in Tennessee, as well as any other state using the Model Penal Code's definition of assault to punish domestic abusers." *Id.* at 31a.

5. The United States sought rehearing en banc, but the court declined to reconsider its decision. App., *infra*, 72a-73a.

REASONS FOR GRANTING THE PETITION

The Sixth Circuit has concluded that a person convicted of misdemeanor domestic assault by intentionally or knowingly causing bodily injury to a family member

has not been convicted of a "misdemeanor crime of domestic violence" under 18 U.S.C. 922(g)(9). The court of appeals' decision is incorrect for two reasons: (i) "violent" force is not required for a crime to qualify as a "misdemeanor crime of domestic violence" under Section 922(g)(9), and (ii) domestic assault by intentionally or knowingly causing bodily injury has, as an element, the use of "physical force." The Sixth Circuit's erroneous decision implicates two distinct, but related, conflicts among the courts of appeals—conflicts that have deepened since this Court's decision in *Johnson* v. *United States*, 130 S. Ct. 1265 (2010). If allowed to stand, the court of appeals' decision (and those like it) will impede the effective and uniform enforcement of Section 922(g)(9). Domestic abusers are routinely prosecuted under assault and battery statutes that punish offensive physical contact (which is not "violent" under *Johnson*), or the causation of bodily injury (which does not satisfy the use-of-force element in several circuits), or both. This Court's review is therefore warranted.

A. The Decision Below Incorrectly Constricts The Scope Of Section 922(g)(9)

In Section 922(g)(9), Congress extended the longstanding federal prohibition on firearm possession by any person convicted of a felony, 18 U.S.C. 922(g)(1), to persons convicted of "misdemeanor crime[s] of domestic violence." See *United States* v. *Hayes*, 555 U.S. 415, 418 (2009). Congress defined the term "misdemeanor crime of domestic violence" to mean an offense that is a misdemeanor under state, federal, or tribal law, that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by" a person with a specified domestic relationship

with the victim. 18 U.S.C. 921(a)(33)(A); see *Hayes*, 555 U.S. at 426.

The court of appeals in this case concluded that the federal prohibition on firearm ownership by persons convicted of misdemeanor crimes of domestic violence has no application to an individual convicted of assaulting the mother of his child by intentionally or knowingly causing her bodily injury.[4] The court's analysis proceeded in two steps. First, the court held that the term "physical force" bears the same meaning in the context of defining a "misdemeanor crime of domestic violence" as it does in the context of defining a "violent felony"—a question expressly left open in *Johnson*. Second, the court held that domestic assault by intentionally or knowingly causing bodily injury to a family member does not have, as an element, the requisite degree of "violent" force. Both conclusions are flawed.

1. Section 921(a)(33)(A)(ii) does not require "violent" force for a crime to qualify as a "misdemeanor crime of domestic violence"

The court of appeals held that the use-of-force element in the definition of a "misdemeanor crime of domestic violence" requires "'*violent* force . . . capable of causing physical pain or injury to another person' and 'strong physical force.'" App., *infra*, 8a-9a (quoting *Johnson*, 130 S. Ct. at 1271). The court of appeals' decision is incorrect and its reliance on *Johnson* is misplaced.

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[4] Although Tennessee Code Annotated § 39-13-101(a)(1) also punishes any individual who "recklessly" causes bodily injury to another, respondent was specifically charged with the intentional or knowing causation of bodily injury. See App., *infra*, 18a; *id.* at 21a (Moore, J., concurring).

a. In *Johnson*, this Court considered whether the Florida felony offense of recidivist battery, defined in part as intentionally touching or striking another person against her will, qualified as a "violent felony" under the provision of the ACCA that covered crimes having "as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. 924(e)(2)(B)(i). The Court acknowledged that, at common law, the "force" element of battery was "satisfied by even the slightest offensive touching." *Johnson*, 130 S. Ct. at 1270. The Court also acknowledged that "a common-law term of art should [ordinarily] be given its established common-law meaning." *Ibid.* (citing *United States* v. *Turley*, 352 U.S. 407, 411 (1957)). The Court nevertheless concluded that the common-law meaning of the term "force" was not controlling because that meaning "does not fit" in the context of the ACCA's definition of the term "violent felony." *Ibid.* The Court reasoned that the term "violent," particularly when "attached to the noun 'felony,'" connotes "violent force," *i.e.*, "force capable of causing physical pain or injury to another person." *Id.* at 1271. The Court also considered it "unlikely" that Congress would employ the common-law definition of battery—a crime punishable as a misdemeanor at common law and generally punishable as a misdemeanor today—in defining the term "violent *felony*." *Id.* at 1271-1272 (emphasis added).

The Court, however, expressly reserved the question whether the phrase "physical force" has the same meaning in the context of Section 922(g)(9)'s definition of "misdemeanor crime of domestic violence." The government had argued that "interpreting 18 U.S.C. § 924(e)(2)(B)(i) to require violent force will undermine its ability to enforce the firearm disability in [Section]

922(g)(9)," but the Court found that prediction "unfounded." *Johnson*, 130 S. Ct. at 1273. The Court explained that it had "interpreted the phrase 'physical force' only in the context of a statutory definition of 'violent felony.'" *Ibid.* It did "not decide that the phrase has the same meaning in the context of defining a *misdemeanor* crime of domestic violence." *Ibid.* Because that separate question was not presented, the Court did "not decide it." *Ibid.*

b. The court of appeals erred in importing *Johnson*'s definition of the phrase "physical force" from the context of defining a "violent *felony*" under Section 924(e)(2)(B)(i) into the very different context of defining a "*misdemeanor* crime of domestic violence" under Section 922(g)(9). See App., *infra*, 10a (holding that "the degree of force *Johnson* requires for a conviction under [Section] 924(e)(2)(B)(i) is [also] required of a misdemeanor crime of domestic violence").

The statutory definition of a "misdemeanor crime of domestic violence" tracks the common-law definition of battery, *i.e.*, "the intentional application of unlawful force against the person of another." *Johnson*, 130 S. Ct. at 1270. At common law, that phrase was understood to reach conduct resulting in either "a bodily injury or an offensive touching." 2 Wayne R. LaFave, *Substantive Criminal Law* § 16.2, at 553 (2d ed. 2003) (LaFave); see *Johnson*, 130 S. Ct. at 1271. And, unless context indicates otherwise, the Court ordinarily concludes that "a common-law term of art should be given its established common-law meaning." *Id.* at 1270.

Although the Court in *Johnson* thought it unreasonable to read "force" as having its common-law meaning in the context of the ACCA's definition of "violent *felony*," nothing is incongruous about that

reading in the context of a statute defining "*misdemeanor* crime of domestic violence." Cf. *Johnson*, 130 S. Ct. at 1271-1272 (emphasizing Congress's use of the term "felony" in the ACCA). That is particularly so because the domestic abusers targeted by Section 922(g)(9) are "routinely prosecuted under generally applicable assault or battery laws." *Hayes*, 555 U.S. at 427. It stands to reason that Congress would have deliberately employed the common-law definition of battery with the intention of actually reaching individuals convicted of that crime, *i.e.*, individuals who engaged in conduct resulting in either bodily injury or offensive touching.[5]

c. Practical considerations also favor that reading. This Court previously rejected an interpretation of Section 921(a)(33)(A) that would leave the domestic-violence gun prohibition without application to domestic-violence convictions entered in nearly two-thirds of the States at the time Section 922(g)(9) was enacted. See *Hayes*, 555 U.S. at 427. Similar considerations weigh heavily against the court of appeals' interpretation here. Much as in *Hayes*, the court of appeals' interpretation could undermine enforcement of Section 922(g)(9) in much of the country. See *Johnson*, 130 S. Ct. at 1278 (Alito, J., dissenting) (applying the Court's interpretation of the phrase "physical force" in the ACCA provision to Section 922(g)(9) would allow "a great many

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[5] *Johnson* itself contemplated that the essentially identical language at issue could bear two different meanings because of the surrounding statutory context. 130 S. Ct. at 1273. And the Court has often made clear that the very same phrase—even if used in the very same statute—may mean different things depending on the context. See *Barber* v. *Thomas*, 130 S. Ct. 2499, 2506-2507 (2010); *Environmental Def.* v. *Duke Energy Corp.*, 549 U.S. 561, 574 (2007).

persons convicted for serious spousal or child abuse" to possess firearms). That is because the generic assault and battery laws of about half of the States do not draw distinctions between different degrees of force. See U.S. Br. at 40, App. B, *Johnson*, *supra*. If the court of appeals' conclusion that a heightened degree of force is required for purposes of the firearms disability provision stands—a conclusion shared by at least three other circuits, see Part B, *infra*—then a substantial number of domestic-violence convictions would not qualify as "misdemeanor crime[s] of domestic violence" under Section 922(g)(9).[6]

2. A domestic assault that intentionally or knowingly results in bodily injury necessarily has, as an element, the use of "physical force"

A domestic assault that intentionally or knowingly results in bodily injury necessarily has, as an element, the use of "physical force." The court of appeals did not dispute that basic proposition, *i.e.*, that domestic assault by causing bodily injury necessarily involves the use of

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[6] Although a modified categorical approach may theoretically remain available, in most cases (like this one) state and local records will not specify the type of injury or degree of forced used. See *Johnson*, 130 S. Ct. at 1273-1274 (acknowledging that this "may well be true," but finding it "implausible" that such a concern "caused Congress to import a term of art that is a comical misfit with the defined term '*violent* felony'") (emphasis added); *id.* at 1278 (Alito, J., dissenting) (agreeing that it will "often be impossible" for the government "to produce documents that * * * conclusively show that the offender's conduct involved the use of violent force" because "charging documents frequently simply track the language of the statute, and jury instructions often do not require juries to draw distinctions based on the type of force that the defendant employed").

some force.[7] Instead, the court held that respondent's bodily-injury domestic assault conviction under Tennessee law does not constitute a "misdemeanor crime of domestic violence" because the crime does not have, as an element, the use of "violent" force. See App., *infra*, 15a-17a. Because "violent" force is not required (see Part A.1, *supra*), and because bodily-injury assault contains the necessary use-of-force element, that decision is incorrect. But even if a heightened degree of force were required, respondent's conviction would still constitute a "misdemeanor crime of domestic violence" under Section 922(g)(9).

a. As a matter of ordinary usage, the defendant's "use" of "physical force" is an "element" of the offense of domestic assault by causing bodily injury because physical force is the means by which injury is necessarily produced. As the First Circuit reasoned in *United States* v. *Nason*, 269 F.3d 10 (2001), "to cause *physical* injury, force necessarily must be *physical* in nature." *Id.* at 20. A person who intentionally or knowingly causes injury to another must "use," or actively employ, physical force to achieve that result. See *Leocal* v. *Ashcroft*, 543 U.S. 1, 9 (2004) (explaining that the word "use" in the context of the definition of "crime of violence" in 18 U.S.C. 16(a) means "active employment") (citing *Bailey* v. *United States*, 516 U.S. 137, 144 (1995)). To

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[7] Indeed, in another case, *United States* v. *Anderson*, 695 F.3d 390, 400 (2012), the Sixth Circuit held that aggravated assault by causing "serious physical harm" qualified as a "violent felony" under Section 924(e)(2)(B)(i), because it "necessarily requires proof that the defendant used 'force capable of causing physical pain or injury.' " The court below distinguished *Anderson* solely on the basis that the Tennessee statute does not require proof of "serious" physical injury. See App., *infra*, 16a-17a.

convict a defendant of bodily-injury assault, the prosecution must therefore prove that the defendant used physical force against the victim.

A person plainly employs physical force against another when he causes bodily injury by making direct physical contact with his victim. But the same is true in the unusual cases imagined by the district court, and other courts of appeals, in which the assailant causes physical harm without making direct physical contact with his victim. See, *e.g.*, App., *infra*, 41a; *United States* v. *Villegas-Hernandez*, 468 F.3d 874, 878-883 (5th Cir. 2006), cert. denied, 549 U.S. 1245 (2007); *United States* v. *Perez-Vargas*, 414 F.3d 1282, 1285-1287 (10th Cir. 2005). "If someone lures a poor swimmer into waters with a strong undertow in order that he drown, or tricks a victim into walking toward a high precipice so that he might fall," for example, the offender "has at least attempted to make use of physical force against the person of the target, either through the action of water to cause asphyxiation or by impact of earth on flesh and bone." *United States* v. *Calderon-Pena*, 383 F.3d 254, 270 (5th Cir. 2004) (en banc) (Smith, J., dissenting), cert. denied, 543 U.S. 1076 (2005). "However remote these forces may be in time or distance from the defendant, they were still directed to work according to his will, as surely as was a swung fist or a fired bullet." *Ibid.* (Smith, J., dissenting); cf., *e.g.*, *United States* v. *De La Fuente*, 353 F.3d 766, 770-771 (9th Cir. 2003) (concluding that a threat of anthrax poisoning qualifies as a "threatened use of physical force" under Section 16(a), and explaining that "the bacteria's physical effect on the body is no less violently forceful than the effect of a kick or blow").

That is consistent with the common-law understanding of the term "force." As explained above, battery is defined, in language that tracks the definition of "misdemeanor crime of domestic violence" in Section 921(a)(33)(A), as "the intentional application of unlawful force against the person of another." *Johnson*, 130 S. Ct. at 1270. And, at common law, battery was understood to reach indirect as well as direct uses of force against the body of the victim. See 2 LaFave § 16.2, at 554; see also 2 Joel Prentiss Bishop, *Bishop on Criminal Law* § 72 *a*, at 48-49 (John M. Zane & Carl Zollman eds., 9th ed. 1923) (discussing cases). A person thus committed a battery when, for example, he "administer[ed] a poison" or "[told] a blind man walking toward a precipice that all is clear ahead." 2 LaFave § 16.2, at 554-555; see *e.g.*, *State* v. *Monroe*, 28 S.E. 547, 548 (N.C. 1897) (druggist who sold candy laced with sufficient croton oil to cause injury, knowing that the candy would be administered to another as a trick, was guilty of assault and battery); *Commonwealth* v. *Stratton*, 114 Mass. 303, 303-304 (1874) (defendant, who offered the victim figs that had been drugged without the victim's knowledge, was guilty of assault and battery); Rollin M. Perkins, *Non-Homicide Offenses Against the Person*, 26 B.U. L. Rev. 119, 122 (1946) (explaining that battery, "an application of force to the person of another," may be committed by, *inter alia*, "threatening sudden violence and thereby causing another to jump from a window or a moving vehicle or other place") (footnote omitted). For the reasons discussed above, Congress intended the term "force" in Section 921(a)(33)(A)(ii) to bear that common-law meaning.

b. The court of appeals (unlike the district court) did not dispute that Tennessee's bodily-injury domestic

assault offense has, as an element, the use of *some* force. Instead, the court held that it did not have, as an element, the use of "violent" force. App., *infra*, 15a-17a. Even if violent force were required (and it is not, see Part A.1, *supra*), the court of appeals' analysis does not withstand scrutiny.

In *Johnson*, this Court explained that force is "violent" in nature if it is "capable of causing physical pain or injury to another person." 130 S. Ct. at 1271. Respondent was convicted because he "intentionally or knowingly" caused "bodily injury," *i.e.*, "a cut, abrasion, bruise, burn or disfigurement; physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty." Tenn. Code Ann. §§ 39-13-101(a)(1), 39-11-106(a)(2). A defendant can knowingly cause such bodily injury only by knowingly using force capable of causing physical pain or injury. The court of appeals distinguished between "serious" physical injury and the sort of "bodily injury" required by the Tennessee statute, hypothesizing that respondent could have been convicted for causing "a slight, non-serious physical injury," "such as a paper cut or a stubbed toe." App., *infra*, 17a. This Court in *Johnson*, however, did not require a degree of force capable of causing "serious" physical pain or "serious" injury to another person.

In any event, the court of appeals identified no evidence that anyone has been prosecuted under Tennessee Code Annotated § 39-13-101(a)(1) for causing a paper cut or a stubbed toe.[8] In *Gonzales* v. *Duenas-Alvarez*,

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[8] A sampling of Tennessee cases demonstrates that domestic assault prosecutions typically involve more serious injuries that resulted from the use of physical force. See *State* v. *Young*, No. E2012-726, 2012 WL 2465156, at *2 (Tenn. Crim. App. June 28, 2012) (defendant

549 U.S. 183 (2007), this Court made clear that "to find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute's language"; it requires a "realistic probability," and not just a "theoretical possibility," that the state statute would be applied in a "nongeneric" way. *Id.* at 193; see *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1684-1685 (2013) (explaining that the "focus on the minimum conduct criminalized by the state statute is not an invitation to apply 'legal imagination' to the state offense"). To establish the requisite probability, this Court instructed that an offender "must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues." *Duenas-Alvarez*, 549 U.S. at 193. The same reasoning applies here. Cf. *Taylor* v. *United States*, 495 U.S. 575, 599 (1990) (explaining that a state crime counts as an enumerated offense if it has "all the *elements* of" the enumerated crime's generic definition) (emphasis added); *id.* at 598 (identifying the elements of generic "burglary" for purposes of the ACCA, 18 U.S.C. 924(e)(2)(B)(ii)). Purely hypothetical nonviolent applications of Tennessee's bodily-injury domestic assault statute are insufficient to demonstrate that respondent's

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grabbed victim by hair and pulled her to the side of dance floor, where her head hit a pole); *State* v. *Hammon*, No. M2009-723, 2010 WL 3448105, at *1-*2 (Tenn. Crim. App. Sept. 2, 2010) (defendant punched victim with closed fist and threw her to the ground); *State* v. *Murphy*, No. M2007-2416, 2009 WL 1643442, at *1-*2 (Tenn. Crim. App. June 12, 2009) (defendant slung victim by hair into a door jamb and kicked her when she fell to the floor); *State* v. *Terrell*, No. M2006-1688, 2008 WL 271866, at *2 (Tenn. Crim. App. June 30, 2008) (defendant lunged at victim and grabbed her by the throat).

conviction does not qualify as a "misdemeanor crime of domestic violence" under Section 922(g)(9).

B. The Decision Below Conflicts With The Decisions Of Other Courts Of Appeals

The Sixth Circuit's holding that misdemeanor domestic assault by intentionally or knowingly causing bodily injury is not a misdemeanor crime of domestic violence squarely implicates two distinct, but related, conflicts among the courts of appeals. The circuits are divided on whether an element of "violent" force is required for an offense to qualify as a "misdemeanor crime of domestic violence" under Section 922(g)(9). The courts of appeals are also divided on whether misdemeanor assault by causing bodily injury has, as an element, the use of physical force. Both conflicts warrant this Court's review.

1. The courts of appeals are divided on the degree of force necessary to conclude that a crime has, as an element, the use of "physical force" for purposes of qualifying as a "misdemeanor crime of domestic violence" under Section 922(g)(9). Before this Court's decision in *Johnson*, a circuit split already existed. The First, Eighth, and Eleventh Circuits held that Section 922(g)(9) covers "crimes characterized by the application of *any* physical force." *Nason*, 269 F.3d at 18 (1st Cir.); see *United States* v. *Smith*, 171 F.3d 617, 621 & n.2 (8th Cir. 1999); *United States* v. *Griffith*, 455 F.3d 1339, 1343-1345 (11th Cir. 2006), cert. denied, 549 U.S. 1343 (2007). The Ninth and Tenth Circuits, on the other hand, held that Section 922(g)(9) only covers crimes that involve "the violent use of force against the body of another individual." *United States* v. *Belless*, 338 F.3d 1063, 1068 (9th Cir. 2003); see *United States* v. *Hays*, 526 F.3d 674, 677-681 (10th Cir. 2008); cf. *Flores* v. *Ash-*

croft, 350 F.3d 666, 670-672 (7th Cir. 2003) (holding that force must "be violent in nature" in the context of defining a "crime[] of domestic violence" under 8 U.S.C. 1227(a)(2)(E)).

That same conflict was invoked in the petition for a writ of certiorari in *Johnson*. See Pet. at 18-21, *Johnson*, *supra*. And, as the government explained, the "interpretive question" presented in *Johnson* had arisen "primarily in cases" involving the "misdemeanor crime of domestic violence" definition. U.S. Br. at 10, 37, *Johnson*, *supra*. The Court, however, declined to resolve that issue—and the conflict remains. See *Johnson*, 130 S. Ct. at 1273 ("We do not decide that the phrase [has "as an element, the use or attempted use of physical force"] has the same meaning in the context of defining a *misdemeanor* crime of domestic violence" because that "issue is not before us.").

After the Court's decision in *Johnson*, the conflict among the courts of appeals has deepened. In *United States* v. *White*, 606 F.3d 144 (2010), the Fourth Circuit, aligning itself with the Ninth and Tenth Circuits, concluded that "the same meaning of 'physical force' adopted" in *Johnson*, *i.e.*, "*violent* force—that is, force capable of causing physical pain or injury to another person," applies to the definition of "misdemeanor crime of domestic violence" under Section 922(g)(9). *Id.* at 153 (quoting *Johnson*, 130 S. Ct. at 1271). In this case, the Sixth Circuit agreed with the Fourth Circuit. See App., *infra*, 8a-10a. The government sought en banc review in both cases, but the courts declined to reconsider their position. And the First Circuit recently reaffirmed its conflicting decision in *Nason*. See *United States* v. *Armstrong*, 706 F.3d 1, 5-6 (1st Cir. 2013), petition for cert. pending, No. 12-10209 (filed May 6, 2013); cf. *Unit-*

ed States v. *Booker*, 644 F.3d 12, 17-18 (1st Cir. 2011) (rejecting argument that *Nason* is no longer good law after *Johnson*), cert. denied, 132 S. Ct. 1538 (2012). Accordingly, at least seven circuits have now weighed in on this precise issue and they have reached different conclusions. That division of authority is unlikely to be resolved without this Court's intervention.

2. The courts of appeals are also divided on whether bodily-injury assault satisfies the use-of-force element in Section 921(a)(33)(A)(ii). The First and Eighth Circuits have held that bodily-injury assault necessarily involves the use of physical force within the meaning of Section 921(a)(33)(A)(ii). See *Nason*, 269 F.3d at 12, 20; *Smith*, 171 F.3d at 620-621. The Sixth Circuit in this case disagreed, joining the Fifth Circuit in holding that assault by causing bodily injury does not necessarily involve the use of physical force and, thus, does not categorically qualify as a misdemeanor crime of domestic violence. See App., *infra*, 15a-17a; *United States* v. *Hagen*, 349 Fed. Appx. 896 (5th Cir. 2009), cert. denied, 131 S. Ct. 457 (2010). The government sought en banc review in both cases, but the courts declined to reconsider their position.

Other courts of appeals have considered the same issue in the context of other statutes that require a use-of-force element and they too have reached different conclusions. For example, the Seventh Circuit recently reaffirmed prior circuit precedent, holding that a "domestic-battery conviction for causing bodily harm to a family member" constitutes a "crime of violence" under 18 U.S.C. 16(a) because it necessarily "entails physical force." *De Leon Castellanos* v. *Holder*, 652 F.3d 762, 764-767 (7th Cir. 2011); see *Hill* v. *Werlinger*, 695 F.3d 644, 649-650 (7th Cir. 2012) (holding the same

with respect to the "violent felony" definition under 18 U.S.C. 924(e)(2)(B)(i), and citing cases). Several other courts of appeals have held that assault or battery by intentionally causing bodily injury to another "does not necessarily involve the use of force" because a defendant could be convicted "for injury caused not by physical force, but by guile, deception, or even deliberate omission." *Chrzanoski* v. *Ashcroft*, 327 F.3d 188, 194-196 (2d Cir. 2003) ("crime of violence" definition under 18 U.S.C. 16(a)); see *Villegas-Hernandez*, 468 F.3d at 878-883 (5th Cir.) (same); *Perez-Vargas*, 414 F.3d at 1285-1287 (10th Cir.) ("crime of violence" definition under Sentencing Guidelines § 2L1.2, comment. (1(B)(iii))). Accordingly, at least seven courts of appeals have weighed in on this issue as well, and they too have reached different conclusions. This Court's intervention is also needed to resolve that distinct, but related, issue.[9]

C. The Question Presented Is Of Recurring Importance

Review is warranted because both conflicts raise issues of recurring importance in federal prosecutions and in the administration of a significant federal law.

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[9] In 2010, the United States filed a petition for a writ of certiorari raising this same question and the Court denied review. See *United States* v. *Hagen*, 131 S. Ct. 457 (2010). This case presents a stronger candidate for several reasons. The *Hagen* petition did not present the question left open in *Johnson* (*i.e.*, whether the phrase "physical force" has the same meaning in the context of Section 922(g)(9)'s definition of "misdemeanor crime of domestic violence"). See Pet. at 12 n.4, *Hagen*, *supra*; Reply Br. at 9 n.2, *Hagen*, *supra*. That distinct (but related) question is squarely presented here and it is one on which the courts of appeals remain divided. Moreover, the Sixth Circuit's decision in this case deepens the preexisting circuit conflict. And whereas *Hagen* was decided in a brief, unpublished per curiam opinion, the Sixth Circuit's decision here is published, detailed, and fractured.

1. Congress enacted Section 922(g)(9) to provide a nationwide solution to what it regarded as a nationwide problem: the possession of firearms by those convicted of violent crimes against their families. *Hayes*, 555 U.S. at 426. When Congress enacted Section 922(g)(9) in 1996, "domestic abusers were (and are) routinely prosecuted under generally applicable assault or battery laws." *Id.* at 427. Many States, following the Model Penal Code's approach, define the crime of assault as the unlawful causation of bodily injury. See Model Penal Code § 211.1(1) (1985), 10A U.L.A. 387 (2001); see also, *e.g.*, Conn. Gen. Stat. Ann. § 53a-61(a) (West 2012); Del. Code Ann. tit. 11, § 611 (2007). And many more States, following the common-law approach, define assault or battery as involving either the causation of bodily injury or offensive physical contact. See, *e.g.*, Fla. Stat. Ann. § 784.03(1)(a) (West 2007); 720 Ill. Comp. Stat. Ann. 5/12-3(a) (West Supp. 2013). As a consequence, in much of the country, offensive physical contact, the causation of bodily injury, or both, without more, is punishable as simple assault or battery.

If, as the court of appeals held, an element of "violent" force is required for a conviction to qualify as a "misdemeanor crime of domestic violence," then Section 922(g)(9) likely will have no application to many persons convicted under such offensive physical contact statutes. And if, as the court of appeals also held, bodily-injury assault does not have the requisite use-of-force element, then Section 922(g)(9) will be largely inapplicable to many persons convicted under such injury-focused statutes. Because most assault or battery statutes require *either* offensive touching *or* some form of bodily injury, Section 922(g)(9) would be rendered largely inoperative.

Congress could not have intended that result. See *Hayes*, 555 U.S. at 426-427 (rejecting an interpretation of Section 921(a)(33)(A) that would have rendered Section 922(g)(9) "'a dead letter' in some two-thirds of the States from the very moment of its enactment") (citation omitted); see also *Nijhawan* v. *Holder*, 557 U.S. 29, 40 (2009) (rejecting a reading of 8 U.S.C. 1101(a)(43)(M)(i) that would leave the provision with little application, doubting "Congress would have intended (M)(i) to apply in so limited and so haphazard a manner"); *Taylor*, 495 U.S. at 594 (declining to construe the ACCA's reference to "burglary" as meaning "common-law burglary," explaining that such a construction "would come close to nullifying that term's effect in the statute, because few of the crimes now generally recognized as burglaries would fall within the common-law definition"). This Court's review is warranted to forestall that dramatic curtailment of the statute.

2. The conflicts among the circuits are likely to be a source of confusion for law enforcement and defendants alike. Defendants with convictions like respondent's may not be subject to federal prosecution for possession of firearms when they live in the jurisdictions of the Fifth and Sixth Circuits, and possibly the Second and Tenth Circuits, but they can be prosecuted if they later move to a State within the jurisdictions of the First or Eighth Circuits. And if they move somewhere else, they will be uncertain about their status.

The conflicts will also have an adverse impact on officials reviewing the lawfulness of certain firearms purchases by out-of-state buyers. See 18 U.S.C. 922(s) and (t).[10] Officials will have to consider not only whether the

[10] According to the National Instant Criminal Background Check System (NICS), Section 922(g)(9) has historically been the second

transaction complies with the law of the State in which the transaction occurs, but also whether buyers are permitted to possess firearms under the interpretation of Section 921(a)(33)(A) prevailing in their State of residence—an interpretation that may or may not be consistent with the interpretation prevailing in the State in which the transaction occurs. See 18 U.S.C. 922(a)(3) and (b)(3).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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most common reason for denying firearms to a prospective purchaser. FBI, *Federal Denials* (Nov. 30, 1998-Apr. 30, 2013), http://www.fbi.gov/about-us/cjis/nics/reports/federal-denials-033113.pdf.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 10-5912

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

JAMES ALVIN CASTLEMAN, DEFENDANT-APPELLEE

Filed: Sept. 19, 2012

OPINION

Before: MOORE, CLAY, and MCKEAGUE, Circuit Judges.

CLAY, Circuit Judge.

The government appeals orders granting Defendant James Castleman's motion to dismiss two counts of his indictment, which charged Castleman with possession of a firearm after conviction for a misdemeanor crime of domestic violence in violation of 18 U.S.C. § 922(g)(9), and denying the government's motion for reconsideration. Because the district court correctly interpreted § 922(g)(9), we **AFFIRM** the district court's judgment.

BACKGROUND

In 2001, Castleman pleaded guilty to one count of misdemeanor domestic assault in violation of Tennes-

see Code § 39-13-111(b). That statute makes a defendant liable for a misdemeanor if he "commits an assault as defined in § 39-13-111 against a domestic abuse victim." Tenn. Code Ann. § 39-13-111(b). Under § 39-13-101, a person is guilty of assault if he:

(1) Intentionally, knowingly or recklessly causes bodily injury to another;

(2) Intentionally or knowingly causes another to reasonably fear imminent bodily injury; or

(3) Intentionally or knowingly causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative.

Tenn. Code Ann. § 39-13-101. Castleman's 2001 indictment asserted that he "did intentionally or knowingly cause bodily injury to [the mother of his child]" in violation of § 39-13-111(b), to which he pleaded guilty on July 16, 2001.

Seven years later, federal agents discovered that Castleman and his wife were buying firearms from dealers and selling them on the black market. Under the Castlemans' scheme, Castleman's wife purchased firearms, allegedly lied on federal firearms paperwork by stating that she was the actual buyer of the firearms, and turned the firearms over to her husband, who was legally prohibited from purchasing firearms because of his domestic assault conviction. One of the firearms Castleman's wife allegedly purchased was recovered in a homicide investigation in Chicago, Illinois. An investigation by the Bureau of Alcohol, To-

bacco, Firearms & Explosives led agents to the Castlemans.

A grand jury indicted Castleman on two counts of possession of a firearm after being "convicted . . . of a misdemeanor crime of domestic violence," in violation of 18 U.S.C. § 922(g)(9). Section 922(g)(9) states that:

> It shall be unlawful for any person . . . who has been convicted in any court of a *misdemeanor crime of domestic violence* . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(g)(9) (emphasis added). Section 921(a)(33)(A) of Title 18 defines a "misdemeanor crime of domestic violence" to include any offense that:

> (i) is a misdemeanor under Federal, State, or Tribal law; and
>
> (ii) has, *as an element, the use or attempted use of physical force*, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim[.]

18 U.S.C. § 921(a)(33)(A) (emphasis added).

On April 30, 2010, the district court dismissed the § 922(g)(9) counts in Castleman's indictment, reasoning that Castleman's misdemeanor domestic assault conviction did not qualify as a domestic violence crime requiring the "use or attempted use of physical force" as defined in 18 U.S.C. § 921(a)(33)(A)(ii). Drawing upon cases from some of our sister circuits, the district court read § 921(a)(33)(A)(ii) to require "force in the sense of violent contact" instead of merely "force as a scientific concept relating to the movement of matter." (Order 5, R. 108.) In adopting that construction of § 922(g)(9), the district court rejected the construction adopted by other circuits and urged by the government, under which a domestic assault conviction resulting from "subtle and indirect uses of physical force" would permit liability under § 922(g)(9). (Gov't Br. 18.) Reasoning that Tennessee Code § 39-13-111(b)(1) would permit a conviction for assaultive conduct not involving physical contact, the court concluded that Castleman's conviction did not qualify as a predicate offense for purposes of § 922(g)(9). The government moved for reconsideration, which the district court denied, and then timely appealed.

DISCUSSION

I. Legal Framework

We review *de novo* a district court's decision of whether a prior conviction qualifies as a predicate offense under 18 U.S.C. § 922(g)(9). *See United States v. Gross*, 662 F.3d 393, 406 (6th Cir. 2011). In order to determine whether a conviction qualifies as a § 922(g)(9) predicate offense, we apply the "categorical

approach" from *Taylor v. United States*, 495 U.S. 575, 600, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (1990), in which we "look[ ] to the statutory definition of the offense and not the particular facts underlying the conviction." *United States v. Gibbs*, 626 F.3d 344, 352 (6th Cir. 2010); *see United States v. Hays*, 526 F.3d 674, 679 (10th Cir. 2008). If a defendant can violate the statute in a manner that involves the use or attempted use of physical force and in a manner that does not, we "may consider the indictment, guilty plea, or similar documents to determine whether they necessarily establish the nature of the prior conviction." *Id.* (citing *Shepard v. United States*, 544 U.S. 13, 26, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005)).

II. Construction of 18 U.S.C. §§ 921(a)(33)(A) and 922(g)(9)

Like other federal appellate courts that have applied § 922(g)(9) to prior state convictions, we must determine the degree of force necessary for a misdemeanor domestic battery offense to qualify as a misdemeanor crime of domestic violence. *See, e.g., Hays*, 526 F.3d at 677-79; *United States v. Nason*, 269 F.3d 10, 13-18 (1st Cir. 2001). The government argues that the district court incorrectly minimized the word "misdemeanor" in deciding whether Castleman's domestic assault conviction was "a misdemeanor crime of domestic violence" under § 922(g)(9). The touchstone of the government's argument is that § 922(g)(9)'s reference to misdemeanor domestic violence crimes triggers § 922(g)(9) liability for a defendant convicted of any generic, common-law assault and battery offense

that involves no more than slight physical touching. By the government's reckoning, Congress intended § 922(g)(9) to reach the typical common law assault or battery offense, which generally permits liability for causing bodily injury "by subtle and indirect uses of physical force." (Gov't Br. 18.)

The government's argument is one of statutory interpretation. In construing § 922(g)(9), we seek Congress' intent and refer first to the statute's plain language. *Chrysler Corp. v. C.I.R.*, 436 F.3d 644, 654 (6th Cir. 2006); *Herman v. Fabri-Centers of Amer., Inc.*, 308 F.3d 580, 585 (6th Cir. 2002). We look to the statute's plain language with "the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 549 (6th Cir. 2012) (quoting *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194, 105 S. Ct. 658, 83 L. Ed. 2d 582 (1985)). We presume every word or phrase in the statute has independent effect. *See, e.g.*, *United States v. Perry*, 360 F.3d 519, 537 (6th Cir. 2004). If the statute is clear as written, the plain language is both our starting and ending point, making it unnecessary to delve into the statute's legislative history. *United States v. Douglas*, 634 F.3d 852, 858 (6th Cir. 2011).

The government's argument is unpersuasive. It overlooks the nearly identical language of § 921(a)(33)(A) and 18 U.S.C. §§ 16(a) and 924(e)(2)(B)(i). Section 921(a)(33)(A)(ii) defines a "misdemeanor crime of domestic violence" as a crime

that "has, as an element, the use or attempted use of physical force," against a victim with whom the defendant shares a domestic relationship.[1] Like § 921(a)(33)(A)(ii), §§ 16(a) and 924(e)(2)(B)(i) use the phrase "physical force" to define "crime of violence" and "violent felony," respectively. Section 16(a) defines a "crime of violence" in part as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." For its part, § 924(e)(2)(B)(i) defines a "violent felony" in part as a crime "that has as an element the use, attempted use, or threatened use of physical force." By defining a "misdemeanor crime of domestic violence" to require "the use or attempted use of physical force," § 921(a)(33)(A)(ii) drops the reference to "threatened use" from §§ 16(a) and 924(e)(2)(B)(i) but otherwise tracks the language of §§ 16(a) and 924(e)(2)(B)(i). The provisions' similarity supports the inference that Congress intended them to capture offenses criminalizing identical degrees of force.

That inference gains strength in light of the order in which Congress adopted the statutes. Congress adopted §§ 921(a)(33)(A)(ii) and 922(g)(9) over a dec-

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[1] Unlike § 924(e)(2)(B), § 921(a)(33)(A)(ii) does not contain a clause listing particular common law violent felonies ("burglary, arson, or extortion") or a residual clause ("otherwise involves conduct that presents a serious potential risk of physical injury to another"). Therefore, cases construing the residual clause in § 924(e)(2)(B)(ii) do not inform this appeal. *See Sykes v. United States*, —U.S.—, 131 S. Ct. 2267, 180 L. Ed. 2d 60 (2011); *United States v. Vanhook*, 640 F.3d 706 (6th Cir. 2011).

ade after it codified the "use of physical force" provisions in §§ 16(a) and 924(e)(2)(B)(i), and, as we explained above, Congress used nearly identical language. *See* Pub. L. No. 104-208, § 101(f), 110 Stat. 3009-369, 3009-372 (1996); Pub. L. No. 99-308, § 102, 100 Stat. 451 (1986); Pub. L. No. 98-473, § 1001(a), 98 Stat. 2136 (1984). We consider a statute with language modeled on that of an earlier statute to function as a legislative interpretation of the statute in question, and give the earlier statute "great weight in resolving any ambiguities and doubts" in the later one. *Beckert v. Our Lady of Angels Apartments, Inc.*, 192 F.3d 601, 606 (6th Cir. 1999) (quoting *United States v. Stewart*, 311 U.S. 60, 64-65, 61 S. Ct. 102, 85 L. Ed. 40 (1940)).

The Fourth Circuit recently came to the same conclusion in *United States v. White*, 606 F.3d 144, 153 (4th Cir. 2010). In *White*, the Fourth Circuit held that a Virginia domestic assault and battery statute is not a "misdemeanor crime of domestic violence" for purposes of § 921(a)(33)(A)(ii). *See id.* As a basis for its decision, the court relied on *Johnson v. United States*, —U.S.—, 130 S. Ct. 1265, 176 L. Ed. 2d 1 (2010). In *Johnson*, the Supreme Court held that a Florida battery statute that criminalized intentional striking, touching, and causing of bodily harm to another person was not a "violent felony" for purposes of § 924(e)(2)(B)(i). *Johnson*, 130 S. Ct. at 1269, 1273-74. In so holding, the Court interpreted the "physical force" requirement in that statute as "*violent* force . . . capable of causing physical pain or injury to

another person" and "strong physical force." *Id.* at 1271.

The *White* court found *Johnson's* reasoning in regard to § 924(e)(2)(B)(i) "compelling if not overwhelming" in its application to § 921(a)(33)(A)(ii). *White*, 606 F.3d at 153. The court explained that it saw "little, if any, distinction between the 'physical force' element in a 'crime of violence' in § 16 under *Leocal* [*v. Ashcroft*, 543 U.S. 1, 9, 125 S. Ct. 377, 160 L. Ed. 2d 271 (2004)], a 'violent felony' under § 924(e) in *Johnson* and a 'misdemeanor crime of domestic violence' in § 922(g)(9)." *Id.* In the court's opinion, there was "no principled basis upon which to say a 'crime of domestic *violence*' would include *nonviolent* force such as offensive touching in a common law battery." *Id.* *White* is consistent with cases from other circuits concluding that a common-law, offensive-touching battery statute does not require sufficient force to be a misdemeanor crime of domestic violence. *See Hays*, 526 F.3d at 679 (holding that a Wyoming domestic battery statute that criminalized unlawful touching "in a rude, insolent, or angry manner" requires insufficient force to constitute a misdemeanor crime of domestic violence); *United States v. Belless*, 338 F.3d 1063, 1068 (9th Cir. 2003) (holding the same regarding the same Wyoming statute). We agree with these courts that the "physical force" provision of § 921(a)(33)(A)(ii) is identical to § 924(e)(2)(B)(i) in the degree of force it requires in a qualifying predicate

offense.[2] And as a result, we conclude that the degree of force *Johnson* requires for a conviction under § 924(e)(2)(B)(i) is required of a misdemeanor crime of domestic violence.

The dissent finds fault in our decision to construe §§ 921(a)(33)(A)(ii) and 922(g)(9) in light of §§ 16(a) and 924(e)(2)(B)(i), and *Johnson*'s gloss on the latter statutes, because *Johnson* postdated the adoption of all the statutes in question. But this line of reason is hardly novel. For example, the Supreme Court used the identical line of argument in *Smith v. City of Jackson*, 544 U.S. 228, 234-38, 125 S. Ct. 1536, 161 L. Ed. 2d 410 (2005) (plurality opinion), in which the Court held that disparate-impact claims are available under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623, based in part on its previous interpretation of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2. Congress adopted Title VII in 1964, and it adopted the ADEA in 1967. *See Smith*, 544 U.S. at 233, 125 S. Ct. 1536. Four years after Congress adopted the ADEA, the Supreme Court held in *Griggs v. Duke Power Company*, 401 U.S. 424, 433-34, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971), that Title VII authorizes claims of employment discrimination based on race even when a plaintiff cannot show that the defendant employer acted with a discriminatory

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[2] We also note that other federal courts have come to the opposite conclusion and held that an offense requiring only slight touching can qualify as a misdemeanor crime of domestic violence. *See United States v. Griffith*, 455 F.3d 1339, 1342 (11th Cir. 2006); *Nason*, 269 F.3d at 20.

intent. A majority of the Court explained that *Griggs* was "a precedent of compelling importance" when the Court considered the same issue with respect to the ADEA in 2005. *Smith*, 544 U.S. at 234, 125 S. Ct. 1536 (plurality opinion); *see id.* at 243, 125 S. Ct. 1536 (Scalia, J., concurring opinion) (expressing agreement with "all of the Court's reasoning" but finding the issue better left for agency interpretation). The Court's reasoning was consistent with its reading of Title VII and the ADEA in other cases. *See Smith*, 544 U.S. at 234 n.4, 125 S. Ct. 1536 (citing *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756, 99 S. Ct. 2066, 60 L. Ed. 2d 609 (1979), *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 416, 105 S. Ct. 2743, 86 L. Ed. 2d 321 (1985), and *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121, 105 S. Ct. 613, 83 L. Ed. 2d 523 (1985)).

As *Smith* makes clear, the Supreme Court (or other federal courts) need not have answered a particular question about a statute's meaning for the court to conclude that a construction of an earlier-adopted statute is "a precedent of compelling importance" to the interpretation of an identical, later-adopted statute. *Id.* at 234, 125 S. Ct. 1536. Therefore, our argument is obviously not that Congress knew about *Johnson* when it adopted § 922(g)(9). Rather, the governing principle holds that Congress' decision to use identical language in writing the two statutes demonstrates its belief that the statutes share a similar meaning and, therefore, should be interpreted similarly. As we explained, that principle is not foreign to this Court. *See, e.g., United States v. Mc-*

Auliffe, 490 F.3d 526, 532 n. 3 (6th Cir. 2007); *Beckert*, 192 F.3d at 606.

The government resists this conclusion by emphasizing § 922(g)(9)'s reference to "misdemeanor" offenses, but the government asks us to put more weight on the term "misdemeanor" than Congress meant the term to bear. Had Congress intended the word "misdemeanor" to have the effect suggested by the government, then Congress would have had no need to modify "misdemeanor" with the phrase "crime of violence." Congress could simply have prohibited any person convicted of a "misdemeanor domestic assault or battery offense" from possessing a firearm. It chose not to do so.

Additionally, as the Supreme Court has explained in a different doctrinal context, the term "misdemeanor" "meant very different things in different common-law contexts" and was not defined in reference to the degree of force a misdemeanor offense required. *Atwater v. Lago Vista*, 532 U.S. 318, 328 n.2, 121 S. Ct. 1536, 149 L. Ed. 2d 549 (2001). "Misdemeanor" has an independent meaning in the statute, but it has a different meaning than the government suggests. *See Perry*, 360 F.3d at 537. "Misdemeanor crime of domestic violence" is most naturally interpreted to mean any crime requiring strong and violent physical force, which happens to be a misdemeanor. Under this formulation, a misdemeanor crime of domestic violence is part of a subset of misdemeanor offenses which does not include all assault and battery offenses, but rather only those assault and battery offenses in which violent

physical force is involved. The most natural inference from this reading is that Congress aimed to extend § 922(g)(9) to reach individuals who committed violent domestic conduct but who were charged only with a misdemeanor, perhaps as a result of a plea agreement.[3]

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[3] In *Johnson*, the Supreme Court concluded that a battery offense was not a "violent felony," in part because the Court found it "unlikely that Congress would select a term of art defining 'violent felony' a phrase that the common law gave peculiar meaning only in its definition of a misdemeanor." 130 S. Ct. at 1271-72. According to government, this statement implies that the Court understands § 922(g)(9), with its limitation to "misdemeanor" offenses, to encompass all misdemeanor offenses attaching criminal liability to an offensive touching. The government reads the Court's statement to establish a broader proposition than it was intended. The Court's reference to the word "misdemeanor" was not aimed to demonstrate that a misdemeanor offense requiring less than violent force would trigger § 922(g)(9). Rather, the reference was aimed strictly to demonstrate why Congress would not use the word "felony" if it intended to cast liability to include an offense traditionally categorized as a misdemeanor. We do not read the Court's statement as an intended construction of § 922(g)(9).

Insofar as the Court's statement does bear on § 922(g)(9), it supports a proposition that we have applied here. At bottom, *Johnson's* discussion of the common-law heritage of battery offenses reflected the established practice of presuming that Congress intended to incorporate the common-law meaning of a term absent evidence to the contrary. *See Info-Hold v. Sound Merchandising, Inc.*, 538 F.3d 448, 455-56 (6th Cir. 2008). Nothing about our decision transgresses that practice. The government asks us to do more than give due respect to the common-law history of "misdemeanor"; it asks us to read "misdemeanor" to swallow the remainder of § 922(g) and ignore the statute's remaining terms. We decline, because doing so would read the remaining language out of the statute.

The dissent reads our opinion as having underemphasized "the distinction between misdemeanors and felonies in the ACCA" and therefore as unnecessarily applying *Johnson's* degree-of-force requirement to § 922(g)(9). The dissent seems to suggest that our application of *Johnson* to § 922(g)(9) flows from the belief that the distinction between misdemeanor and felony crimes is "insignificant." But the chain of reasoning flows in the opposite direction: any salient distinction between misdemeanors and felonies was, in our view, sufficiently insignificant to Congress that it wrote the statutes identically; thus, it is the similarity of the statutes that prohibits a domestic violence offense's status as a misdemeanor from controlling the question of whether the offense qualifies as a misdemeanor crime of domestic violence.

Nor did *Johnson* treat the misdemeanor-felony distinction in the manner the dissents says it did. Though the Court in *Johnson* declined to use terms associated with misdemeanor offenses to define "violent felony," it does not follow that the passage in question indicates a practice by the Court of incorporating the misdemeanor felony distinction directly into the ACCA and § 922(g)(9). Instead, the relevant portion of *Johnson* suggests that the misdemeanor-felony distinction is not a viable framework for determining the level of violence an offense must require to qualify as a violent felony. *See Johnson*, 130 S. Ct. at 1271 ("[T]he dividing line between misdemeanors and felonies has shifted over time"). The ACCA and § 922(g)(9), by contrast, is concerned with punishing defendants previously convicted of offenses characterized by a high

degree of physical violence. And, as the Fourth Circuit explained in *White*, § 922(g)(9)'s reference to misdemeanor offenses "describes the punishment status of the predicate offense and has no bearing on the statutory mandate of a crime of violence." *White*, 606 F.3d at 153.

III. Categorical Analysis

Having determined the degree of force required in a misdemeanor crime of domestic violence, we turn to the question of whether Tennessee Code § 39-13-111(b) categorically qualifies as a misdemeanor crime of domestic violence. *See Gibbs*, 626 F.3d at 352. Our decision in *United States v. McMurray*, 653 F.3d 367 (6th Cir. 2011), requires us to conclude that it does not.

In *McMurray*, we held that a Tennessee aggravated assault conviction did not qualify as a predicate offense for purposes of 18 U.S.C. § 924(e)(2)(B)(i), because the statute criminalizes reckless conduct. 653 F.3d at 376. The *McMurray* defendant had been convicted of violating Tennessee's aggravated assault statute, which incorporates § 39-13-101. *Id.* at 372. We limited our inquiry to whether a conviction under "the serious-bodily-injury prong" of the aggravated assault statute satisfied the "use of physical force" provision in § 924(e)(2)(B)(i). *Id.* at 373. We relied on *Johnson*, 130 S. Ct. at 1270, *Leocal*, 543 U.S. at 9, 125 S. Ct. 377, and *United States v. Portela*, 469 F.3d 496 (6th Cir. 2006), in support of the proposition that a state offense making a defendant liable for "reckless" conduct could not qualify as a predicate offense. *Id.* at 374. Since the Tennessee aggravated assault statute pro-

hibits "recklessly . . . caus[ing] bodily injury to another," we reasoned that the defendant's aggravated assault conviction did not qualify as a violent felony under the "use of physical force" clause of § 924(e)(2)(B)(i). *Id.* at 372, 376; *see also United States v. Anderson*, 695 F.3d 390 (6th Cir. 2012) (concluding that an aggravated assault conviction qualified as a violent felony under § 924(e)(2)(B) where the statute required the defendant to knowingly cause serious physical harm to a victim).

Castleman pleaded guilty to an offense less severe than did the defendant in *McMurray*. Castleman pleaded guilty to misdemeanor domestic assault, for which a defendant is liable if he "commits an assault as defined in § 39-13-101 against a domestic abuse victim." Tenn. Code Ann. § 39-13-111(b). *McMurray* held that the violation of a statute that builds on § 39-13-101 and makes it a crime to cause "serious bodily injury" does not require the use of violent force. It stands to reason, then, that the violation of a statute that also builds on § 39-13-101 but makes it a crime only to cause "bodily injury," serious or not, also does not require the use of violent force. Therefore, a defendant could violate Tennessee Code § 39-13-111(b) both in a manner that constitutes a "misdemeanor crime of domestic violence" and in a manner that does not.

This reasoning is consistent with *United States v. Anderson*, 695 F.3d 390 (6th Cir. 2012), in which we recently decided that a defendant's aggravated assault conviction qualified as a violent felony under

§ 924(e)(2)(B) because the underlying Ohio statute required the defendant to knowingly cause "serious physical harm to another." *Id.* at ¶ 31-32 (quoting Ohio Rev. Code Ann. § 2903.12(A)). Undertaking a categorical analysis of the Ohio statute, we concluded that "only by knowingly using force capable of causing physical pain or injury, *i.e.*, violent physical force," can a defendant cause serious physical injury to a victim. *Id.* at ¶ 32. And reasoning that "[t]he degree of injury has a 'logical relation to the use of physical force,'" our ruling was grounded in the fact that proof of a "serious" physical injury was required to obtain a conviction and, in turn, to qualify the conviction as a violent felony. *Id.* at ¶ 34 (quoting *De Leon Castellanos v. Holder*, 652 F.3d 762, 766 (7th Cir. 2011)).

In this case, by contrast, the statute does not require proof of a serious physical injury. Rather, it requires proof of just some physical injury, regardless of how slight. Castleman could have caused a slight, nonserious physical injury with conduct that cannot be described as violent. Castleman may have been convicted for causing a minor injury such as a paper cut or a stubbed toe, in which he knowingly acted in a manner that caused a domestic relations bodily harm but did so using less than strong physical force. Therefore, Castleman's conviction under Tennessee Code § 39-11-111(b), in which he caused an unspecified bodily injury, is not a misdemeanor crime of domestic violence.

IV. Modified Categorical Analysis

Having concluded that Tennessee Code § 39-13-111(b) is not categorically a misdemeanor crime of domestic violence, we now consider whether Castleman's conviction qualifies as such given the proof of his conduct available to us. *Gibbs*, 626 F.3d at 352. Among the *Shepard* documents we are able to consider in making this inquiry is the indictment to which Castleman pleaded guilty. *Id.* (citing *Shepard*, 544 U.S. at 26, 125 S. Ct. 1254). Castleman's indictment states tersely that he "did intentionally or knowingly cause bodily injury" to a woman with whom he had a domestic relationship in violation of § 39-13-111(b). The indictment does not specify the type of injury Castleman caused or its severity. The logic applicable to the categorical analysis of Castleman's conviction applies here as well, because Castleman's indictment adopts the language of the statute and does not specify the type or severity of injury he caused.

The government argues that it was impossible for Castleman to cause his victim any bodily injury without using the degree of force required under § 921(a)(33)(A)(ii). That argument is unpersuasive inasmuch as an individual can cause an unspecified bodily injury with nonviolent physical force. Tennessee law supports this proposition. Tennessee law defines "bodily injury" to include "a cut, abrasion, bruise, burn or disfigurement, physical pain or temporary illness or impairment of the function of a bodily member, organ or mental faculty." Tenn. Code Ann.

§ 39-11-106(a)(2). A defendant himself need not necessarily use "*violent*" and "strong physical force" to cause a cut, an abrasion, or a bruise. *Johnson*, 130 S. Ct. at 1270. Rather, a defendant can cause one of these injuries with nonviolent force that either causes a slight injury or exposes the victim to bodily injury. As we explained, Castleman may have been convicted for causing a minor, nonserious physical injury, in which he caused the individual with whom he had a domestic relationship bodily harm, but did so using less than strong physical force. Therefore, Castleman's indictment does not provide a basis from which we can conclude that his domestic assault conviction entailed violent physical force.

Our decision is consistent with *United States v. Alexander*, 543 F.3d 819 (6th Cir. 2008), which the government incorrectly argues is in conflict with our conclusion regarding Castleman's domestic assault conviction. In *Alexander*, we held that a defendant's Michigan conviction for assaulting a police officer was a crime of violence for purposes of USSG § 4B1.2(a), in part because the statute required proof that the defendant caused the officer bodily injury. *Id.* at 823; *see McMurray*, 653 F.3d at 371 n.1 (explaining that USSG § 4B1.2(a) and § 924(e)(2)(B) are applied in conjunction with one another).

The government overlooks three important distinctions between *Alexander* and this case. First, we decided *Alexander* before the Supreme Court decided *Johnson*, so we must look to *Johnson* in deciding whether an offense requires the use or attempted use

of physical force. Second, the Michigan statute at issue in *Alexander* required the government to prove that the defendant caused an officer a bodily injury "requiring medical attention or medical care." *Id.* (quoting M.C.L.A. § 750.81d(2)). Indeed, our conclusion that the defendant's crime was a violent felony was largely grounded on the fact that the conviction "require[d] causing an *actual* physical injury sufficiently severe to require medical care." *Id.* By contrast, Castleman may have pleaded guilty for doing no more than swatting or scratching the victim, *see State v. Wachtel*, No. M2003-00505-CCA-R3-CD, 2004 WL 784865, at *12 (Tenn. Ct. Crim. App. Apr. 13, 2004), and causing no more than a cut, abrasion, or bruise, none of which would have required medical care. Tenn. Code Ann. § 39-11-106(a)(2). Third, in *Alexander* we considered the defendant's conviction on plain error review and could have only reversed the district court's judgment upon a finding of an obvious error that adversely affected both the defendant's substantial rights and the reputation and integrity of the judiciary. *See id.* at 822 (quoting *United States v. Koeberlein*, 161 F.3d 946, 949 (6th Cir. 1998)). Here, by contrast, we undertake *de novo* review and agree with the district court's judgment. Therefore, even after *Johnson*, our decision is consistent with *Alexander*.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the district court's judgment.

KAREN NELSON MOORE, Circuit Judge, concurring.

Although I agree with the majority's construction of 18 U.S.C. §§ 921(a)(33)(A) and 922(g)(9), and the decision to affirm the district court's judgment, I write separately to address the application of the modified-categorical-analysis. I agree that the force requirement for a misdemeanor crime of domestic violence is identical to that specified under the crime-of-violence statute and the ACCA. In light of that conclusion, I believe this case presents a straightforward application of the Supreme Court's opinion in *Johnson v. United States*, —U.S.—, 130 S. Ct. 1265, 176 L. Ed. 2d 1 (2010), and of our subsequent decision in *United States v. McMurray*, 653 F.3d 367 (6th Cir. 2011). In my view, this application also eschews drawing unnecessary comparisons between the seriousness of certain domestic-violence offenses and injuries.

At bottom, *McMurray* involved the same assault statute underlying the domestic-violence offense at issue here, which prohibits "[i]ntentionally, knowingly or recklessly caus[ing] bodily injury to another." Tenn. Code Ann. § 39-13-111; *see also McMurray*, 653 F.3d at 372. Because that statute criminalizes reckless conduct, it is not subject to the categorical approach. *McMurray*, 653 F.3d at 375. Thus, the question is whether Castleman, whose guilty plea was confined to "intentionally or knowingly caus[ing] bodily injury" to the mother of his child, R. 109-1 (State Ct.

Indictment), meets the "use or attempted use of physical force" requirement for a misdemeanor crime of domestic violence under the modified-categorical approach. *See* 18 U.S.C. 921(a)(33)(A).

Although some Sixth Circuit cases, such as *United States v. Alexander*, 543 F.3d 819, 823 (6th Cir. 2008), suggest that a bodily-injury requirement alone could be enough to qualify a statute as a crime of violence, this results-oriented approach does not square with the Supreme Court's analytical approach to the physical-force requirement for a violent felony. In *Johnson*, the Court rejected the notion that "*any* intentional physical contact, no matter how slight" could qualify as a violent felony. 130 S. Ct. at 1270 (internal quotation marks omitted). Instead, the Supreme Court defined 'physical force' as "*violent* force—that is, force *capable of causing* physical pain or injury to another person." *Id.* at 1271 (second emphasis added). It further noted that the term "'violent' . . . connotes a substantial degree of force." *Id.* Following this analysis, it is not enough to look only at the *result* of the defendant's conduct; instead, the focus must be on the nature of the force proscribed by the statute and whether the *conduct itself* necessarily involves violent force.

Applying this standard to the Tennessee assault statute, we have questioned whether an element specifying that a defendant "'cause[ ] serious bodily injury' necessarily requires the 'use of physical force'" for purposes of the ACCA. *McMurray*, 653 F.3d at 374 n.6 (internal citations omitted). Indeed, as we recog-

nized in *McMurray*, the Tennessee assault statute "does not define 'serious bodily injury' to require any particular degree of contact." *Id.* Thus, "[a]lthough we might expect that someone who causes serious bodily injury to another did so with a strong physical force, the statute does not require it." *Id.* (alteration in original); *cf. United States v. Villegas-Hernandez*, 468 F.3d 874, 879 (5th Cir. 2006) (evaluating a comparable bodily-injury requirement, which encompassed causing pain, illness, or physical impairment, and concluding that such injuries "could result from any of a number of acts [performed] without use of 'destructive or violent force'"), *cert. denied*, 549 U.S. 1245, 127 S. Ct. 1351, 167 L. Ed. 2d 144 (2007). By extension, the requisite force under Tennessee's domestic-violence statute is similarly unspecified, and thus, even the modified-categorical approach does not bring Castleman's conviction within the confines of a misdemeanor crime of domestic violence.

MCKEAGUE, Circuit Judge, dissenting.

The majority relies upon *United States v. McMurray*, 653 F.3d 367 (6th Cir. 2011) to determine that Tennessee's assault statute does not have use or attempted use of physical force as an element. I dissented in *McMurray* because it was contrary to binding precedent. Likewise, I disagree with the outcome today for the reasons outlined in my *McMurray* dissent and established further below. I am bound to follow *McMurray* insofar as it is controlling. However, unlike the majority, I do not believe that *McMurray* controls the outcome in this case and I dissent

insofar as the majority attempts to extend *McMurray's* reach.

I.

The majority finds the distinction between misdemeanors and felonies in the ACCA insignificant. In doing so, the majority ignores the fact that the Supreme Court's violent felony exception to the normal common law interpretation of "physical force" in *Johnson v. United States*, —U.S.—, 130 S. Ct. 1265, 176 L. Ed. 2d 1 (2010), was based on precisely that distinction.

In *Johnson*, the Supreme Court determined that the physical force element of the "violent felony" definition in the ACCA was not satisfied by mere offensive touching. Instead the Court interpreted the statute to require violent physical force. Here, the majority takes *Johnson's* "violent felony" standard and applies it to the ACCA's "misdemeanor crime of domestic violence" found at 18 U.S.C. § 921(a)(33)(A). In so doing, the majority misinterprets *Johnson*.

The *Johnson* Court held that "although a common-law term of art should be given its established common-law meaning," *Johnson*, 130 S. Ct. at 1270, the common law definition of "physical force" does not apply to violent felonies. This is because "context determines meaning and we do not force term-of-art definitions into contexts where they plainly do not fit and produce nonsense. Here we are interpreting the phrase 'physical force' as used in defining not the crime of battery, but rather the statutory category of 'violent felon[ies]'" *Id.* (internal citations omitted).

However, the Court specifically stated that its holding did not apply to § 921(a)(33)(A): "We have interpreted the phrase 'physical force' only in the context of a statutory definition of "violent felony." We do not decide that the phrase has the same meaning in the context of defining a *misdemeanor* crime of domestic violence." *Id.* at 1273 (emphasis in original).

Just as using the mere touching misdemeanor standard of physical force to define violent felonies is misplaced and produces nonsense, so too does using the felony exception to define a misdemeanor. This creates an exception that swallows the rule. Several of our sister circuits have already recognized this. *See United States v. Griffit*h, 455 F.3d 1339, 1345 (11th Cir. 2006) ("we do not feel compelled to reach a result at war with common sense"); *United States v. Booker*, 644 F.3d 12, 20-21 (1st Cir. 2011) *cert. denied*, —U.S.—, 132 S. Ct. 1538, 182 L. Ed. 2d 175 (2012) ("There are sound reasons to decline to interpret the two statutes in tandem . . . the statutes address significantly different threats. Whereas the ACCA seeks to protect society at large from a diffuse risk of injury or fatality at the hands of armed, recidivist felons, § 922(g)(9) addresses an acute risk to an identifiable class of victims—those in a relationship with a perpetrator of domestic violence."). Although, as the majority points out, there are circuits which have adopted the *Johnson* felony standard for the misdemeanor provision, they err for the same reasons the majority errs today.

The majority supports its application of *Johnson* by noting that the ACCA's misdemeanor language at § 921(a)(33)(A) mirrors its violent felony language. However, the *Johnson* exception was not clarified until after both statutes were adopted. Despite its extended explanation, the majority thus pretends that Congress acted with full knowledge of the *Johnson* felony exception instead of with the common law understanding when writing § 921(a)(33)(A). Given the chronology of events, this cannot be the case.

In sum, *Johnson* rejected the argument that the misdemeanor standard should control the felony definition. By extension, the felony standard should not control the misdemeanor. Simply applying the narrow felony exception to the broader class of misdemeanor domestic assaults ignores the distinction central to *Johnson*.

II.

In determining that Tennessee's assault statute categorically lacks an element of "the use or attempted use of physical force," the majority relies exclusively on *McMurray*. As I explained in my dissent there, *McMurray* is out of step with binding precedent in this circuit. And "when a later decision of this court conflicts with one of our prior published decisions, we are still bound by the holding of the earlier case." *Darrah v. City of Oak Park*, 255 F.3d 301, 310 (6th Cir. 2001). I concur with the majority's categorical analysis out of respect for the panel rule. *United States v. Moody*, 206 F.3d 609, 615 (6th Cir. 2000).

Nevertheless, under a modified categorical analysis Castleman's prior domestic assault conviction satisfies the heightened *Johnson* standard and does not run afoul of *McMurray*. Castleman was convicted under Tenn. Code Ann. § 39-13-111 after he pled guilty to "intentionally or knowingly" causing bodily injury to the mother of his child. This Court's holding in *McMurray* "rest[ed] on the Tennessee statute's inclusion of *reckless* conduct," *McMurray*, 653 F.3d at 375 n.6 (emphasis added), and did not address intentionally or knowingly inflicting bodily injury. Today's decision extends *McMurray* from reckless infliction of bodily injury to intentional infliction of bodily injury. This outcome is contrary to our precedent, which holds that violent physical force is a necessary element to intentionally or knowingly inflicting bodily injury. *See United States v. Alexander*, 543 F.3d 819, 823 (6th Cir. 2008).[4]

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[4] *Alexander* involved Michigan's statute regarding assaulting an officer:

> Looking exclusively at the statutory definition of the offense, the plain language of this provision indicates that "causing bodily injury" is an element of the crime as defined by M.C.L.A. § 750.81 d(2). Violating this statute would therefore entail committing a crime of violence because the element of "causing bodily injury" involves both the "use of physical force against the person of another" (U.S.S.G. § 4B1.2(a)(1)) and "conduct that presents a serious potential risk of physical injury to another" (U.S.S.G. § 4B1.2(a)(2)). Indeed, a conviction under M.C.L.A. § 750.81d(2) requires more than simply a "risk" of physical injury; a conviction requires causing an *actual* physical injury sufficiently severe to require medical care. If Alexander was in fact convicted under

The majority distinguishes *Alexander* because the Michigan statute necessitated injury "requiring medical attention or medical care." However, that is not the minimum standard in *Johnson*, which required only "force capable of causing physical pain or injury to another person." *Johnson*, 130 S. Ct. at 1271. Tennessee defines bodily injury as "include[ing] a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty." Tenn. Code Ann. § 39-11-106. This by definition meets the *Johnson* standard of "physical pain or injury".

This Court's decision in *United States v. Gloss*, 661 F.3d 317, 318-19 (6th Cir. 2011) *cert. denied*, —U.S.—, 132 S. Ct. 1777, 182 L. Ed. 2d 555 (2012), decided after both *McMurray* and *Johnson*, is also instructive. There this Circuit held that the ACCA standard for violent felony was satisfied by Tennessee's facilitation of armed robbery statute because:

> Any robbery . . . that causes serious bodily injury, falls under the first clause of the definition of violent felony, as it necessarily involves "the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). It makes no difference that the defendant was not the person who committed the

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that statute, he would have necessarily committed a crime of violence.

Alexander, 543 F.3d at 823 (emphasis in original).

> aggravated robbery. *See, e.g., United States v. Brown,* 550 F.3d 724, 729 (8th Cir. 2008). All that matters is that *someone* did so, and that the defendant knowingly provided substantial assistance to that person.

Id. at 319 (emphasis in original) The rule in this Circuit after today's decision is that while the mere facilitation of another's crime resulting in serious bodily injury is necessarily a crime involving physical force, directly causing such bodily injury is not. Under this rule assaulting one's girlfriend does not trigger the ACCA—but providing assistance to a third party who robs one's girlfriend, during which she gets assaulted, does. This defies common sense.

Much of the confusion results from the rewording of common law elements in the Model Penal Code.[5] As the First Circuit observed, the apparent disconnect between the ACCA's focus on the act and the state statute's (like Tennessee's) focus on the result can be rectified once their differing perspectives are taken into account. *See United States v. Nason*, 269 F.3d 10, 19-20 (1st Cir. 2001). Recognizing that Congress's

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[5] Tennessee's assault statute follows the Model Penal Code, which defines simple assault in part as "attempt[ing] to cause or purposely, knowingly or recklessly causes[ing] bodily injury to another." Model Penal Code § 211.1. Prior to codification Tennessee's common law definition of assault, similar to the ACCA, focused on the act rather than the result. "An assault is an attempt or offer to do a personal violence to another. It is an inchoate violence, with the present means of carrying the intent into effect." *Richels v. State*, 33 Tenn. 606, 608 (1854).

use of common law and the state's adoption of the Model Penal Code both address the same crime makes the ACCA easier to interpret.[6]

The solution is to hold that knowingly or intentionally causing bodily injury necessitates use of physical force. That would solve the apparent contradiction between *Alexander and Gloss*, which addressed intentional or knowing infliction of bodily injury, and *McMurray*, which was limited to reckless infliction of bodily injury. Other circuits have already adopted this rule. The First Circuit, for example, in evaluating Maine's assault statute (which is almost identical to Tennessee's) has found physical force a necessary element: "Common sense supplies the missing piece of

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[6] "Violent felonies" under the ACCA and "crimes of violence" under the sentencing guidelines are analyzed the same way. *United States v. Gibbs*, 626 F.3d 344, 352 n.6 (6th Cir. 2010); also recognized in *McMurray*, 653 F.3d at 371 n.1. With regard to the sentencing guidelines: "the offense for which the defendant was convicted must fall within the generic definition of that crime, which is found by surveying how the crime is described across jurisdictions, as well as consulting sources such as the Model Penal Code . . . . We have recognized the Model Penal Code definition of aggravated assault as the generic definition for the purpose of deciding whether a crime with that label is a crime of violence, at least in states which have merged the crimes of assault and battery." *United States v. Rede-Mendez*, 680 F.3d 552, 556-57 (6th Cir. 2012) (internal citations omitted). That the Model Penal Code's definition of "aggravated assault" (reflected in Tennessee's statute) is a "violent crime" for purposes of the sentencing guidelines but not—as a result of *McMurray*—a "violent felony" for the ACCA further shows that *McMurray* is out of step with this Circuit's larger precedent.

the puzzle: to cause *physical* injury, force necessarily must be *physical* in nature. Accordingly, physical force is a formal element of assault under the bodily injury branch of the Maine statute." *United States v. Nason*, 269 F.3d 10, 20 (1st Cir. 2001) (emphasis in original). This conclusion survived *Johnson*. *United States v. Booker*, 644 F.3d 12, 21 (1st Cir.2011) *cert. denied*, —U.S.—, 132 S. Ct. 1538, 182 L. Ed. 2d 175 (2012). Likewise, the Eighth Circuit found that bodily injury is predicated on physical acts. "Smith was charged . . . for committing an act intended to cause pain, injury, or offensive or insulting physical contact . . . . As such, Smith was charged, and pleaded guilty to, an offense with an element of physical force within the meaning of 18 U.S.C.A. § 921(a)(33)(A)(ii)." *United States v. Smith*, 171 F.3d 617, 621 (8th Cir. 1999).

Today's decision separates the Model Penal Code's element of intentionally or knowingly causing bodily injury from the ACCA's element of physical force. This extension of *McMurray* has the effect of making the "misdemeanor crime of domestic violence" provision of the ACCA a dead letter in Tennessee, as well as any other state using the Model Penal Code's definition of assault to punish domestic abusers.

The Supreme Court has already rejected an interpretation of § 921(a)(33)(A) that would make the ACCA a "'dead letter' in some two-thirds of the States from the very beginning." *United States v. Hayes*, 555 U.S. 415, 427, 129 S. Ct. 1079, 172 L. Ed. 2d 816 (2009). In a different context, the Court noted:

> Practical considerations strongly support our reading of § 921(a)(33)(A)'s language. Existing felon-in-possession laws, Congress recognized, were not keeping firearms out of the hands of domestic abusers, because "many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies." 142 Cong. Rec. 22985 (1996) (statement of Sen. Lautenberg). By extending the federal firearm prohibition to persons convicted of "misdemeanor crime[s] of domestic violence," proponents of § 922(g)(9) sought to "close this dangerous loophole."

Id. at 22986.

> Construing § 922(g)(9) to exclude the domestic abuser convicted under a generic use-of-force statute (one that does not designate a domestic relationship as an element of the offense) would frustrate Congress' manifest purpose.

Id. at 426-27, 129 S. Ct. 1079. In *Hayes*, the Court started from the premise that "domestic abusers were (and are) routinely prosecuted under generally applicable assault or battery laws," *Id.* at 427, 129 S. Ct. 1079, and sought to interpret § 921(a)(33)(A) in keeping with that custom. The majority fails to take into account this "manifest purpose" of Congress and reopens a dangerous loophole for domestic offenders. The result—that those convicted of intentional domestic assault in Tennessee may still possess firearms—frustrates Congress's manifest purpose in adopting § 921(a)(33)(A).

For these reasons I disagree with the reasoning of the majority today and dissent from the majority's attempt to extend *McMurray's* reach.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. 2:08-cr-20420-JPM-cgc

UNITED STATES OF AMERICA, PLAINTIFF

v.

LEISHIA DAWN CASTLEMAN & JAMES ALVIN CASTLEMAN, DEFENDANTS

Filed: Apr. 30, 2010

ORDER DISMISSING COUNTS 4 AND 5 OF THE SUPERSEDING INDICTMENT AGAINST JAMES ALVIN CASTLEMAN

This matter is before the Court on Defendant James Alvin Castleman's ("Defendant") Second Motion to Dismiss (Docket Entry ("D.E.") 102), filed April 7, 2010. The United States responded in opposition on April 14, 2010. (D.E. 106.) Defendant filed a reply on April 21, 2010. (D.E. 107.)

Defendant's Second Motion to Dismiss has led the Court to reconsider its ruling on Defendant's Motion to

Dismiss Indictment Pursuant to Rule 12(b). For the reasons set forth below, the Court VACATES in part its Order Adopting Report and Recommendation, and GRANTS Defendant's Motion to Dismiss Indictment Pursuant to Rule 12(b). Counts 4 and 5 of the superseding indictment are DISMISSED. Defendant's Second Motion to Dismiss is DENIED as moot.

I. Background

In 2001, Defendant pled guilty to violating Tennessee's domestic assault statute. (United States' Resp. to Def.'s Second Mot. to Dismiss the Indictment Ex. A, Judgment; Ex. B, Guilty Plea.) He is now charged in a five-count indictment with several firearms-related offenses. Counts 4 and 5 of the superseding indictment charge Defendant with possessing a firearm after having been convicted of a misdemeanor crime of domestic violence in violation of 18 U.S.C. § 922(g)(9).[1] Defendant moved to dismiss those counts on September 8, 2009. (D.E. 52.) The Court referred that motion to the Magistrate Judge for report and recommendation on September 8, 2009. (D.E. 54.) On February 4, 2010, The Magistrate Judge recommended denying Defendant's motion. (D.E. 88.) No objections were filed, and the Court adopted the Report and Recommendation on February 22, 2010. (D.E. 90.)

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[1] The other three counts charge Defendant and his wife with making false statements in relation to the purchase of firearms in violation of 18 U.S.C. § 922(a)(6) and 18 U.S.C. § 2.

II. Reconsideration of the Order Adopting Report and Recommendation

"In both civil and criminal cases, a trial court is empowered to revisit any of its previous non-final rulings." *United States v. Reid*, 357 F.3d 574, 580 (6th Cir. 2004). In the Report and Recommendation, the Magistrate Judge recommended applying judicial estoppel against Defendant's argument with regard to whether his 2001 conviction may serve as a § 922(g)(9) predicate offense. After Defendant was indicted in this Court, he brought a successful state collateral challenge to his 2001 conviction. (Def.'s Mot. to Dismiss Indictment Pursuant to Rule 12(b) Ex. A, Carroll County Circuit Court Order.) The Magistrate Judge concluded that Defendant essentially argued to the state court that his 2001 conviction was a § 922(g)(9) predicate offense, and that he should be estopped from arguing the contrary position here.

Upon further review, the Court has determined not to apply the doctrine of judicial estoppel here for several reasons. First, "[t]here is considerable authority that judicial estoppel does not apply in favor of one who was not a party to the prior proceeding in which the inconsistent position was taken." *Nichols v. Scott*, 69 F.3d 1255, 1273 (5th Cir. 1995) (citing numerous authorities). Defendant's prior case was against the State of Tennessee, not the United States. Second, the Court declines to apply the equitable doctrine of judicial estoppel so that a defendant is barred from asserting a dispositive defense to criminal offenses with which he is charged. The Court will consider Defendant's argument that his prior conviction is not a qualifying offense under § 922(g)(9).

III. Standard of Review

The Court must dismiss an indictment where as a matter of law the government cannot prove an element of the offense. *United States v. Ali*, 557 F.3d 715, 719 (6th Cir. 2009) (*citing United States v. Levin*, 973 F.2d 463, 470 (6th Cir. 1992)).

IV. Analysis

18 U.S.C. § 922(g)(9) "prohibits a person previously convicted of 'a misdemeanor crime of domestic violence' from possessing a firearm." *United States v. Beavers*, 206 F.3d 706, 707 (6th Cir. 2000). A misdemeanor crime of domestic violence is defined in relevant part as "an offense that . . . is a misdemeanor under Federal, State or Tribal law[,] and has, as an element, the use or attempted use of physical force"[2] against a victim with whom the offender shares a domestic relationship. 18 U.S.C. § 921(a)(33)(A).

"To determine whether a prior conviction" requires the "use of physical force," the Court "must apply the categorical approach expressed in *Taylor v. United States*, 495 U.S. 575 (1990), and expanded to convictions based on guilty pleas in *Shepard v. United State*s, 544 U.S. 13 (2005)." *United States v. Wynn*, 579 F.3d 567, 571 (6th Cir. 2009). Under the categorical approach, the Court "must look only to the fact of conviction and the statutory definition—not the facts underlying the offense—to determine whether that definition supports a conclusion that the conviction was for a crime of vio-

[2] The Court will refer to this requirement as the "use of physical force."

lence." *United States v. Bartee*, 529 F.3d 357, 359 (6th Cir. 2008) (*citing* United *States v. Armstead*, 467 F.3d 943, 947 (6th Cir. 2006)).

a. The "Use of Physical Force" Requirement

There is considerable debate in the courts with regard to when a statute requires the "use of physical force." *See, e.g.*, *United States v. Hays*, 526 F.3d 674, 684 n.5 (10th Cir. 2008) (Ebel, J., dissenting) (describing a purported "three-way circuit split" on the issue). The debate largely centers on the meaning of "physical force" in this context.

Several circuits have recognized a distinction between force in the sense of violent contact and force as a scientific concept relating to the movement of matter. *See Hay*s, 526 F.3d at 679 (holding that de minimis touching does not require the "use of physical force," even though such touching involves force as a scientific concept); *Flores v. Ashcroft*, 350 F.3d 666, 672 (7th Cir. 2003) (similar); *United States v. Belless*, 338 F.3d 1063, 1067-68 (9th Cir. 2003) (similar).

Relatedly, the Fifth and Second Circuits have reasoned that an offense does not require the "use of physical force" where the injury may be inflicted by deception rather than through violent contact with the victim. *See United States v. Villegas-Hernandez*, 468 F.3d 874, 878-79 (5th Cir. 2006) (noting that one could violate a Texas assault statute similar to Tennessee's by deceiving the victim into drinking poison); *Chrzanoski v. Ashcroft*, 327 F.3d 188, 195-96 (2d Cir. 2003).

Together these cases stand for the principle that an assault statute does not require the "use of physical force" solely because force in the scientific sense is involved in the offense. The Sixth Circuit has implicitly recognized this principle. That court has repeatedly held that certain sexual assault statutes do not require the "use of physical force," despite the fact that force in the scientific sense is involved in unlawful sexual contact, because the statutes may be violated through coercion or deception.[3] *See United States v. Wynn*, 579 F.3d 567, 572-73 (6th Cir. 2009) (*citing United States v. Mack*, 8 F.3d 1109, 1112 (6th Cir. 1993)); *Arnold*, 58 F.3d at 1121-22.[4]

The United States urges the Court to follow decisions from the Eleventh, First, and Eighth Circuits, holding that various assault statutes have the use "of physical force" element because they require bodily injury or

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[3] The Court declines to draw a distinction between the injuries such as "abrasions" punished by Tennessee's assault statute and the harm a victim of sexual assault suffers.

[4] Neither the United States nor Defendant has addressed *United States v. Alexander*, 543 F.3d 819 (6th Cir. 2008). In that case the court considered a Michigan statute that had an element of "causing a bodily injury requiring medical attention or medical care." 543 F.3d at 823. The *Alexander* opinion briefly and without articulating its reasoning noted that "the element of 'causing bodily injury' involves . . . 'the use of physical force against the person of another' (U.S.S.G. § 4B1.2(a)(1)) . . . . " *Id.* The Court does not read *Alexander* as establishing a general rule that the causation of bodily injury requires the use of physical force in light of both the controversial nature of that question and the Sixth Circuit's sexual assault cases discussed *infra*.

contact with the victim. *See United States v. Griffith*, 455 F.3d 1339, 1342 (11th Cir. 2006); *United States v. Nason*, 269 F.3d 10, 20 (1st Cir. 2001); *United States v. Smith*, 171 F.3d 617, 621 (8th Cir. 1999). The Court finds these decisions unpersuasive. *Nason* and *Smith* contain little analysis on the question of whether the causation of bodily injury necessarily requires the "use of physical force," and the statute in *Griffith* is materially different from Tennessee's assault statute. Further, all three cases are in tension with Sixth Circuit case law.

The Court follows the teaching of the Fifth, Second, Tenth, Seventh, and Ninth Circuits, and the implications of the Sixth Circuit's sexual assault cases discussed *infra*. An assault statute that requires the mere causation of bodily injury does not necessarily require the "use of physical force" for § 922(g)(9) purposes, at least where the statute may be violated through coercion or deception rather than through violent contact with the victim.

b. Defendant's Prior Conviction

On May 7, 2001 Defendant was indicted in Carroll County Circuit Court with intentionally or knowingly causing bodily injury to the mother of his child in violation of Tennessee Code Annotated § 39-13-111(b). (United States' Resp. to Def.'s Mot. to Dismiss the Indictment Ex. A, 2001 Indictment.) Defendant pled guilty to violating § 39-13-111(b) on July 16, 2001. (United States' Resp. to Def.'s Second Mot. to Dismiss the Indictment Ex. A, Judgment; Ex. B, Guilty Plea.) Section 39-13-111(b) punishes assault, as defined in Tennessee Code Annotated § 39-13-101, where the victim is one with whom the offender shares a domestic relationship. *See*

§ 39-13-111(b). Section 39-13-101(a)(1) forbids "[i]ntentionally, knowingly or recklessly caus[ing] bodily injury to another."[5] The indictment, guilty plea, and judgment indicate that Defendant was convicted of an intentional or knowing violation of that section.

The text of § 39-13-101(a)(1) indicates that one may violate the statute without the "use of physical force." For instance, one could cause a victim to suffer bodily injury by deceiving him into drinking a poisoned beverage, without making contact of any kind, let alone violent contact, with the victim.[6] *See Villegas-Hernandez*, 468 F.3d at 879. Alternatively, one could coerce the victim into taking the drink. *See Wynn*, 579 F.3d at 573. Defendant's 2001 conviction for intentionally or knowingly violating § 39-13-101(a)(1) cannot serve as a qualifying misdemeanor crime of domestic violence under § 922(g)(9).

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[5] The Sixth Circuit explained in a footnote in U*nited States v. Arnold*, 58 F.3d 1117 (6th Cir. 1995) that § 39-13-101 "includes elements that do not necessarily require the use of force." 58 F.3d at 1122 n.4. The Court is unable to determine whether the footnote refers to intentional or knowing violations of § 39-13-101(a)(1).

[6] Citing *James v. United States*, 550 U.S. 192 (2007), the United States argues that the Court should consider how one might typically violate § 39-13-101(a)(1), rather than the statutory definition of the offense. This argument ignores the requirement that the offense have *as an element* the "use of physical force." *See* § 921(a)(33)(A)(ii). Further, *James* is inapposite because that decision concerned the proper application of the categorical approach with regard to the "residual provision" or "otherwise clause" of 18 U.S.C. § 924(e)(2)(B)(ii). This provision does not apply to offenses under 18 U.S.C. § 922(g)(9). *See* 18 U.S.C. § 924(e)(2)(B)(ii).

V. Conclusion

For the foregoing reasons, Defendant's Motion to Dismiss Indictment Pursuant to Rule 12(b) is GRANTED.[7] Counts 4 and 5 of the indictment are DISMISSED. Defendant's Second Motion to Dismiss is DENIED as moot.

IT IS SO ORDERED this 30th day of Apr., 2010.

/s/ JON P. McCALLA
JON P. MCCALLA
CHIEF U.S. DISTRICT JUDGE

[7] The Court declines to consider Defendant's remaining arguments as to his 922(g)(9) charges.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

NO. 2:08-cr-20420-JPM-cgc

UNITED STATES OF AMERICA, PLAINTIFF

v.

LEISHIA DAWN CASTLEMAN & JAMES ALVIN CASTLEMAN, DEFENDANTS

Filed: July 6, 2010

ORDER DENYING UNITED STATES' MOTION TO SET ASIDE ORDER

This matter is before the Court on the United States' Motion for Reconsideration, Clarification, and/or Additional Findings (Docket Entry ("D.E.") 109), filed May 4, 2010. Defendant James Alvin Castleman responded in opposition on May 11, 2010. (D.E. 110.) For the following reasons, the Court DENIES the United States' motion to set aside its April 30, 2010 Order Dismissing Counts 4 and 5 of the Superseding Indictment Against James Alvin Castleman (D.E. 108).

I. Background

On August 18, 2009 Defendant James Alvin Castleman was charged in a superseding indictment with, *inter alia*, two counts of violating 18 U.S.C. § 922(g)(9). The Court dismissed those counts on April 30, 2010 because Defendant's prior conviction under Tennessee Code Annotated § 39-13-111(b) and § 39-13-101(a)(1) is not a qualifying misdemeanor crime of domestic violence under 18 U.S.C. § 922(g)(9). The United States now urges the Court to reverse that order on the basis of an additional argument. This argument was not articulated in the United States' initial briefing on Defendant's motion to dismiss counts 4 and 5 of the indictment, but it was presented orally to the magistrate judge who heard that motion on an order of reference.

II. Analysis

The United States' additional argument turns on one of Tennessee's criminal procedure statutes. Title 40 of the Tennessee Code Annotated, entitled "Criminal Procedure," contains the following provision in the chapter entitled "Rights of Defendants":

> Before the court accepts the guilty plea of a defendant charged with a domestic violence offense, it shall inform the defendant that it is a federal offense for a person convicted of a domestic violence offense to possess or purchase a firearm . . . . After so informing the defendant, the court may accept the plea of guilty if the defendant clearly states on the record that the defendant is aware of the consequences of a conviction for a domestic violence offense and still wishes to enter a plea of guilty.

Tenn. Code Ann. § 40-14-109(b). This section defines a "domestic violence offense" as an offense that is classified as a misdemeanor under Tennessee law, committed by one with whom the victim shares a domestic status, and "[h]as as an element the use or attempted use of physical force." Tenn. Code Ann. § 40-14-109(a). Under § 40-14-109, a Tennessee court must, when accepting a guilty plea to a misdemeanor offense committed against a domestic victim that has as an element the use or attempted use of physical force, give the defendant notice of the consequences of such a conviction under federal law. *See* 18 U.S.C. § 922(g)(9) (prohibiting individuals convicted of such crimes from possessing firearms).

The United States argues that the existence of § 40-14-109 shows that Tennessee Code Annotated § 39-13-101(a)(1)[1] has as an element the use or attempted use of physical force (the "force element"). The Court is able to discern from the United States' submissions two ways in which § 40-14-109 could have this effect. First, the United States argues that § 40-14-109 amended § 39-13-101(a)(1) to include the force element. Second, the United States makes the alternative argument that § 40-14-109 reflects the Tennessee General Assembly's sense that § 39-13-101(a)(1) has the force

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[1] Under § 39-13-101(a)(1), "[a] person commits assault who . . . intentionally, knowingly or recklessly causes bodily injury to another."

element as a matter of federal law.[2] The Court will consider each proposed reading of § 40-14-109 in turn.

The argument that § 40-14-109 amended § 39-13-101(a)(1) is unpersuasive. This reading of § 40-14-109 would mean that the General Assembly modified a substantive criminal offense by including the modification not in the text of the offense, or even in the title containing the offense, but in the state's criminal procedure title and within the chapter entitled "Rights of Defendants." This is at least an oblique way of establishing a criminal offense, and the Court declines to interpret § 40-14-109 as having such an effect.

The United States' second proposed reading of § 40-14-109 is that it reflects the General Assembly's sense that § 39-13-101(a)(1) has the force element as a matter of federal law. This too is a doubtful interpretation of § 40-14-109. Even assuming that it is accurate, the Court finds § 40-14-109's purported interpretation of § 39-13-101(a)(1) unconvincing for two reasons. First, § 40-14-109 does not contain any discussion of why § 39-13-101(a)(1) has the force element. As reflected in the Court's April 30, 2010 order and the categorical approach case law generally, the question of whether a criminal offense has the force element often is a complicated and subtle one. A conclusion with no articulated reasoning to support it is not persuasive under these circumstances. Second, the Court disagrees with this purported conclusion for the reasons articulated in the

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[2] Under the categorical approach, whether a state offense has an element required by § 922(g)(9) is a matter of federal law. *See United States v. Anglin*, 601 F.3d 523, 527 (6th Cir. 2010).

April 30, 2010 order. The United States' second proposed reading of § 40-14-109 is rejected.

The Court also rejects the United States' argument that § 40-14-109 lacks any meaning if it does not mean that § 39-13-101(a)(1) contains the force element. That § 40-14-109 does not have a meaning that the United States urges does not prove that the statute has no other meaning.

The Court's analysis is not changed by the fact that Defendant argued to the state collateral review court that § 40-14-109 applies to § 39-13-101(a)(1). As noted in the April 10, 2010 order, the Court declines to apply the doctrine of judicial estoppel with regard to that argument. Further, the state court's discussion of § 40-14-109's interaction with § 39-13-101(a)(1) and § 922(g)(9) is ambiguous, and the Court declines to follow its reasoning.

Nor does *United States v. Jenkins*, No. 1:05-CR-135, 2007 WL 542899 (E.D. Tenn. Feb. 16 2007) alter the Court's analysis. That court noted in passing that the defendant received the notice required by § 40-14-109, but a close read of the opinion shows that the question of § 40-14-109's effect was not at issue. *See* 2007 WL 542899, at *1. *Jenkins* is unhelpful on the question of § 40-14-109's meaning.

The Court finds that the existence of § 40-14-109 does not establish that § 39-13-101(a)(1) has the force element as matter of federal law. The outcome of the Court's April 10, 2010 order is unchanged. Section 39-13-101(a)(1) is not a qualifying offense under 18 U.S.C. § 922(g)(9).

III. Conclusion

For the foregoing reasons, the Court DENIES the United States' motion to set aside its Order Dismissing Counts 4 and 5 of the Superseding Indictment Against James Alvin Castleman.

IT IS SO ORDERED this 6th day of July, 2010.

/s/ JON P. MCCALLA
JON P. MCCALLA
CHIEF U.S. DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. 08-20420-ML

UNITED STATES OF AMERICA, PLAINTIFF

v.

JAMES ALVIN CASTLEMAN, DEFENDANT

Filed: Feb. 22, 2010

ORDER ADOPTING REPORT AND RECOMMENDATION

Before the Court is Defendants' Motion to Dismiss Indictment Pursuant to Rule 12(b) (DE# 52) and Motion to Dismiss Indictment for Want of Venue, and/or in the Alternative, Motion to Transfer Case form the Western Division to the Eastern Division of the WDTN (DE #53) filed on September 8, 2009.

The Court referred both motions to Magistrate Judge Charmaine G. Claxton for a Report and Recommendation on September 8, 2009. Magistrate Judge Claxton held a hearing on both motions on December 10, 2009. On

February 4, 2010, Magistrate Judge Claxton entered a Report and Recommendation recommending denying both motions. Objections to the Magistrate Judge's order were due by February 18, 2010.

The time period for objections to the Report and Recommendation having expired, and no objections having been filed, it is therefore ORDERED, ADJUDGED, AND DECREED that the Report and Recommendation of the Magistrate Judge is ADOPTED and the Court hereby DENIES both the Defendants' Motion to Dismiss Indictment Pursuant to Rule 12(b) (DE# 52) and Motion to Dismiss Indictment for Want of Venue, and/or in the Alternative, Motion to Transfer Case form the Western Division to the Eastern Division of the WDTN (DE #53).

/s/ JON PHIPPS MCCALLA
JON PHIPPS MCCALLA
UNITED STATES DISTRICT JUDGE
Date: Feb. 22, 2010

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. 2:08-cr-20420-JPM-cgc

UNITED STATES OF AMERICA, PLAINTIFF

v.

JAMES ALVIN CASTLEMAN, DEFENDANT

Filed: Feb. 4, 2010

REPORT AND RECOMMENDATION ON DEFENDANT'S FED. R. CRIM. P. 12(b) MOTION TO DISMISS INDICTMENT, AND MOTION TO DISMISS FOR WANT OF VENUE OR TO TRANSFER

Before the Court on Order of Reference for Report and Recommendation (D.E. #54) are Defendant James Alvin Castleman's ("Defendant") Motion to Dismiss Indictment Pursuant to Rule 12(b) (D.E. #52) and Defendant's Motion to Dismiss the Indictment for Want of Venue or, In the Alternative, Motion to Transfer Case from the Western Division to the Eastern Division of the Western District of Tennessee (D.E. #53). On December 18, 2009, Defendant filed a

motion to hold his previously filed Motion to Dismiss Indictment Pursuant to Rule 12(b) in abeyance and to continue this case until the conclusion of proceedings involving Defendant in state court.[1] (D.E. #82.) Upon consideration of Defendant's motions, the responses of the Government in opposition, the supporting memoranda and exhibits, and the arguments of counsel at a hearing in the matter held on December 10, 2009, the Court **DENIES** Defendant's request to hold his previously filed motion to dismiss under Rule 12(b) in abeyance and recommends that both of Defendant's motions to dismiss be **DENIED**.

I. Relevant Facts

On July 16, 2001, Defendant entered a guilty plea in the Circuit Court for Carroll County (Tennessee) to one count of misdemeanor domestic assault in violation of Tenn. Code Ann. § 39-13-111(b) (2001). (Ex. 2 to Gov't Resp. to Def.'s Mot. to Dismiss the Indictment: Judgment in Carroll County Circuit Court Case No. 01CR1672.) Under Tenn. Code Ann. § 39-13-111(b), a defendant is guilty of the crime of domestic assault when he commits an assault as defined by Tennessee's general assault statute, Tenn. Code Ann. § 39-13-101, and the victim falls within one of the statutorily de-

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[1] The full title of this third motion is "Motion to Hold Defendant's Previously Filed Motion to Dismiss Indictment Pursuant to Rule 12(b) in Abeyance and that the Case be Continued Generally until Such Time as the Case of the State of Tennessee v. Castleman, Carroll County Circuit Court #01CR1672 / Court of Criminal Appeals #W2009-01661-CCA-R3-CD, is Brought to a Conclusion."

fined categories of persons deemed by the law to have a domestic relationship with the defendant.[2] An assault in violation of Tenn. Code Ann. § 39-13-101 occurs when a person

> (1) [i]ntentionally, knowingly or recklessly causes bodily injury to another;
>
> (2) [i]ntentionally or knowingly causes another to reasonably fear imminent bodily injury; or
>
> (3) [i]ntentionally or knowingly causes physical contact with another and a reasonable person would

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[2] The six categories of "domestic abuse victims" established by Tenn. Code Ann. § 39-13-111(a) currently are as follows:

> (1) Adults or minors who are current or former spouses; (2) Adults or minors who live together or who have lived together; (3) Adults or minors who are dating or who have dated or who have or had a sexual relationship, but does not include fraternization between two (2) individuals in a business or social context; (4) Adults or minors related by blood or adoption; (5) Adults or minors who are related or were formerly related by marriage; or (6) Adult or minor children of a person in a relationship that is described in subdivisions (a)(1)-(5).

Tenn. Code Ann. § 39-13-111(a)(1)-(6) (2009). At the time of Defendant's offense and conviction in 2001, however, the categories of protected persons were a "spouse, former spouse, person related by blood or marriage, or person who currently resides or in the past has resided with that person as if a family, or a person who has a child or children in common with that person regardless of whether they have been married or resided together at any time." Tenn. Code Ann. 39-13-111(a) (2001). The state court indictment of Defendant in 2001 charged that Defendant had a child by the victim. (Ex. 1 to Gov't Resp. to Def.'s Mot. to Dismiss: Indictment in Carroll County Circuit Court Case No. 01CR1672.)

> regard the contact as extremely offensive or provocative.

Tenn. Code Ann. 39-13-101(a)(1)-(3) (2001).[3]

The Circuit Court imposed a sentence of 11 months and 29 days to be served on supervised probation pursuant to a negotiated plea agreement. (Ex. 1 to Def.'s Mot. to Dismiss Indictment Pursuant to Rule 12(b): July 16, 2009 Order of Carroll County Circuit Court ("Circuit Court Order") 1.) Defendant thereafter successfully completed probation. (*Id.*)

On December 17, 2008, a federal grand jury in the Western District of Tennessee returned a five-count indictment against Defendant and his wife, Leishia Dawn Castleman. Counts One, Two, and Three charged Mrs. Castleman with making false or fictitious statements to a federally licensed firearms dealer in order to purchase firearms on three separate occasions —March 18, 2005, March 30, 2005, and April 7, 2005— in violation of 18 U.S.C. § 922(a)(6). Counts Four and Five charged Defendant with violating 18 U.S.C. § 922(g)(9) by possessing firearms roughly between March 18, 2005 and February 7, 2006 and again on April 19, 2006 after having previously been convicted of a misdemeanor crime of domestic violence. On August 18, 2009, the grand jury returned a superseding indictment against Defendant and Mrs. Castleman. Counts Four and Five of the superseding indictment

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[3] Assault under Tenn. Code Ann. § 39-13-101(a) currently possesses the same definition that it did in 2001. *See* Tenn. Code Ann. § 39-14-101(a) (2009).

charge the same offenses as Counts Four and Five of the original indictment, though the date of the alleged offense charged in Count Four is slightly modified. Counts One through Three of the superseding indictment are otherwise the same as Counts One through Three of the original indictment except that the superseding indictment charges Defendant—in addition to his wife—with violating 18 U.S.C. § 922(a)(6) and adds an aiding and abetting theory under 18 U.S.C. § 2.

Pursuant to 18 U.S.C. § 922(g)(9), it is a violation of federal law for any person who "has been convicted in any court of a misdemeanor crime of domestic violence" to possess a firearm. 18 U.S.C. § 922(g)(9) (2005 & 2006).[4] As used in § 922(g)(9),

> the term "misdemeanor crime of domestic violence" means an offense that—
>
> (i) is a misdemeanor under Federal, State, or Tribal law; and
>
> (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent,

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[4] The Court will cite to the 2005 and 2006 versions of the U.S. Code throughout this order, as Defendant's alleged violations of federal law occurred in those years. The relevant portions of the U.S. Code read in 2006 as they had in 2005.

> or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

18 U.S.C. § 921(33)(A) (2005 & 2006).[5] If, however, the conviction has been set aside, federal law does not deem the person to have been convicted of a misdemeanor crime of domestic violence. 18 U.S.C. § 921(33)(B)(ii) (2005 & 2006).

On March 13, 2009, Defendant filed a motion with the Circuit Court for Carroll County to set aside his prior conviction on the grounds that he was not advised before his plea that his conviction would deprive him of the ability to lawfully possess a firearm. (Circuit Court Order 1-2.) Defendant amended his original filing on May 7, 2009 and asserted four specific bases for relief. (*Id.* at 2.) First, Defendant moved for relief under Rule 32(f) of the Tennessee Rules of Criminal Procedure, but the Circuit Court rejected this basis because Defendant filed his motion more than thirty days after judgment became final. (*Id.* at 4.) Second, Defendant moved for relief under Tennessee's Post Conviction Relief Act, Tenn. Code Ann. § 40-30-101 *et seq.*, but the Circuit Court rejected this argument because Defendant's claim was barred by the Act's one-year statute of limitations, *see* Tenn. Code Ann. § 40-30-102. (*Id.* at 4-5.) Next, Defendant contended that he was entitled to habeas corpus relief pursuant to Tenn. Code Ann. § 29-21-107. (*Id.* at 5.) The Circuit Court rejected Defendant's peti-

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[5] The term "misdemeanor crime of domestic violence" has remained unchanged since the date of Defendant's alleged offenses. *See* 18 U.S.C. § 921(a)(33)(A) (2009).

tion for habeas relief because it found that the judgment in his case was not facially invalid and thus void—a prerequisite for habeas relief under Tennessee law—and because Defendant did not satisfy certain other technical requirements imposed by state statute for habeas relief. (*Id.* at 5-6.) Finally, Defendant argued for relief pursuant to Tenn. Code Ann. § 40-26-105 by petitioning for a writ of error coram nobis.[6] (*Id.* at 6.) The Circuit Court found that Defendant was entitled to have his conviction set aside through a writ of error coram nobis. (*Id.* at 8.)

In granting Defendant's petition, the Circuit Court reasoned that a writ of error coram nobis could only be used to set aside a guilty plea if the petitioner shows that his plea was not voluntarily and knowingly entered. (*Id.* at 6.) The Circuit Court found that although Defendant's plea was voluntary, it was not knowing or intelligent because Defendant was not advised prior to his plea that a conviction for the offense to which he was pleading guilty would have collateral consequences on his right to possess a firearm. (*Id.* at 7.) Tennessee law specifically provides that "[b]efore the court accepts the guilty plea of a de-

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[6] Tennessee Code Annotated § 40-26-105(b) provides for the writ of error coram nobis as follows: "Upon a showing by the defendant that the defendant was without fault in failing to present certain evidence at the proper time, a writ of error coram nobis will lie for subsequently or newly discovered evidence relating to matters which were litigated at the trial if the judge determines that such evidence may have resulted in a different judgment, had it been presented at the trial." Tenn. Code Ann. § 40-26-105(b) (2009).

fendant charged with a domestic violence offense, it shall inform the defendant that it is a federal offense for a person convicted of a domestic violence offense to possess or purchase a firearm and that from the moment of conviction for a domestic violence offense the defendant will never again be able to lawfully possess or buy a firearm of any kind." Tenn. Code Ann. § 40-14-109(b) (2001).[7] After an evidentiary hearing, the Circuit Court found that the presiding judge who accepted Defendant's guilty plea never advised him of the consequences his plea would have on his right to possess a firearm. (*Id.* at 3.) Accordingly, the court concluded that the requirements of Tenn. Code Ann. § 40-14-109(b) had not been satisfied, and Defendant's plea and conviction were set aside. (*Id.* at 8.) The Circuit Court's order was signed and filed July 16, 2009. The State of Tennessee has appealed the Circuit Court's ruling to the Tennessee Court of Criminal Appeals, which has yet to issue its decision regarding the State's appeal.

II. Legal Standard

A. Legal Standard for Motion to Dismiss under Fed. R. Crim. P. 12(b)(3)(B)

Rule 12(b)(3)(B) of the Federal Rules of Criminal Procedure provides that a defendant must challenge "a defect in the indictment or information" prior to trial but that "at any time while the case is pending, the court may hear a claim that the indictment or infor-

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[7] Section 40-14-109(b) reads the same now as it did in 2001. *See* Tenn. Code Ann. § 40-14-109(b) (2009).

mation fails to invoke the court's jurisdiction or to state an offense." Fed. R. Crim. P. 12(b)(3)(B). This rule enables the court to address dispositive questions of law, rather than of fact, prior to trial. *United States v. Ali*, 557 F.3d 715, 719 (6th Cir. 2009); *see United States v. Titterington*, 374 F.3d 453, 457 (6th Cir. 2004) ("[A] pretrial motion alleging a 'defect in the indictment' under the Federal Rules, *see* Fed. R. Crim. P. 12(b)(3)(B), represents the modern equivalent of a 'demurrer' because both pleadings serve to attack the facial validity of the indictment."). In ruling upon a motion to dismiss under Rule 12, however, the court "may make preliminary findings of fact necessary to decide questions of law presented by pretrial motions so long as the trial court's conclusions do not invade the province of the ultimate finder of fact." *Ali*, 557 F.3d at 719 (quoting *United States v. Levin*, 973 F.2d 463, 467 (6th Cir. 1992)).

B. Legal Standard for Motion to Transfer Venue

Generally, "the government must prosecute an offense in a district where the offense was committed . . . [and] . . . [t]he court must set the place of trial within the district with due regard for the convenience of the defendant, any victim, and the witnesses, and the prompt administration of justice." Fed. R. Crim. P. 18; *see* U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . . "); *cf.* Fed. R. Crim. P. 21

(providing for transfer of venue to another judicial district). No rule, however, entitles a defendant to a trial in any particular division within the forum district. *United States v. Davis*, 27 F. App'x 592, 597 (6th Cir. 2001); *United States v. Erwin*, 155 F.3d 818, 824 (6th Cir. 1999); *see United States v. Traficant*, 209 F. Supp. 2d 764, 778 (N.D. Ohio 2002) ("A defendant in a criminal case has no right to jurors drawn from the entire district, no right to jurors drawn from a particular division, and no right to a trial held in a particular division."). The location of a criminal trial within a district, as well as the decision whether to transfer a case to a different division, is a matter committed to the sound discretion of the trial court. *See, e.g., United States v. Lewis*, 504 F.2d 92, 98 (6th Cir. 1974).

III. Analysis

A. The setting aside of the state court conviction after the date of the actions alleged in the indictment does not invalidate the indictment.

Defendant stands accused of violating 18 U.S.C. § 922(g)(9), which makes it unlawful for any person "who has been convicted in any court of a misdemeanor crime of domestic violence[] to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." 18 U.S.C. § 922(g)(9) (2005 & 2006). Defendant argues that the setting aside of his prior misdemeanor conviction by the Carroll County Circuit

Court precludes a conviction under § 922(g)(9). The Court disagrees.

The fact that Defendant's state court conviction for domestic violence was set aside in 2009 does not affect the instant charges against Defendant for allegedly violating § 922(g)(9) in 2005 and 2006. A person whose underlying conviction had been set aside *at the time of his possession* may not be convicted under § 922(g), *see* 18 U.S.C. § 921(a)(33)(B)(ii), but a setting aside of the predicate offense after the date of the defendant's illegal possession of a firearm is irrelevant to a § 922(g) prosecution initiated before the conviction was set aside. *See United States v. Muir*, No. 1:03-CR-162-DAK, 2006 WL 288419, *2 (D. Utah Feb. 6, 2006) (citing *Lewis v. United States*, 445 U.S. 55, 62-64 (1980) and *United States v. Mayfield*, 810 F.2d 943, 944 (10th Cir. 1987)); *see also United States v. Epps*, 240 F. App'x 247, 248 (9th Cir. 2007) (citing *United States v. Padilla*, 387 F.3d 1087, 1092 (9th Cir. 2004)). Thus, "[i]t is the status of the defendant on the date he possessed the firearm as alleged in the indictment that controls whether or not he has violated the statute, not his later status after his civil rights have been restored." *United States v. Morgan*, 216 F.3d 557, 565-66 (6th Cir. 2000).[8]

Moreover, the fact that the conviction for the predicate offense was unlawfully obtained will not prevent

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[8] Likewise, Castleman's conviction is not subject to the exception contained in § 921(a)(33)(B)(i)(II)(bb) as the adjucation that the plea was not knowing was not made until after the date of the incidents alleged in the indictment.

a defendant from being found guilty of possessing a firearm in violation of federal law. In *Lewis v. United States*, the Supreme Court considered now-repealed 18 U.S.C. App. § 1202(a)(1), which contained language similar to the language in § 922(g) prohibiting the possession of a firearm by a felon. 445 U.S. 55 (1980). The Court held that a defendant previously convicted of a felony may be convicted for subsequently possessing a firearm, even if the original conviction was obtained in violation of the defendant's constitutional rights. *Id.* at 65 ("We therefore hold that § 1202(a)(1) prohibits a felon from possessing a firearm despite the fact that the predicate felony may be subject to collateral attack on constitutional grounds."). Courts have continued to adhere to this rule in interpreting § 922(g), and thus a defendant must have removed any legal impediments to his possession of a firearm prior to possession. *United States v. Coleman*, 458 F.3d 453, 456 (6th Cir. 2006) ("The Supreme Court has long since held that weapons disability statutes such as § 922(g) require felons to clear their legal status prior to obtaining a firearm."). Therefore, the subsequent setting aside of Defendant's conviction in state court for violating Tenn. Code Ann. § 39-13-111(b) does not affect the pending federal indictment, notwithstanding the state court's finding that the conviction should be vacated.

Similarly, there is no valid basis for holding Defendant's motion in abeyance pending resolution of the State of Tennessee's appeal to the Court of Criminal Appeals. The Government may prosecute Defendant for violating § 922(g)(9) irrespective of whether the

State of Tennessee prevails on its appeal because it is Defendant's status at the time of the alleged offense that determines whether Defendant could lawfully possess a firearm.[9]

B. The defendant is judicially estopped from asserting that the misdemeanor to which he plead guilty is not a "crime of domestic violence" as defined in 18 U.S.C. § 922(g)(9).

Defendant also argues that even if his prior domestic assault conviction is to be considered, it does not constitute a misdemeanor crime of domestic violence for purposes of 18 U.S.C. § 922(g)(9). Defendant seeks to have the Court declare that Tenn. Code Ann. § 39-13-111 does not necessarily contain "physical force" as an element of the offense and thus his guilty plea to domestic violence would not qualify as a predicate offense for a 18 U.S.C. § 922(g)(9) prosecution. In this case, however, Defendant himself has already resolved this argument in favor of the Government.

In his efforts to set aside his domestic violence conviction, Defendant argued successfully that his guilty

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[9] Defendant's motion of December 12, 2009 requesting that consideration of his motion to dismiss be held in abeyance also requests that his case be continued generally until the Tennessee Court of Criminal Appeals issues its decision and the case in state court is finally resolved. Although the question of whether Defendant's case should be continued has not been formally referred and it is not a matter a magistrate judge may determine, it is recommended that the District Court **DENY** Defendant's request that this case be continued until conclusion of all proceedings in state court.

plea was not knowing and intelligent. The state court considering Defendant's petition for a writ of error coram nobis found that Defendant had not been warned prior to tendering his guilty plea that he would lose his right to possess a firearm once his plea was accepted and he was adjudged guilty of violating Tenn. Code Ann. § 39-13-111(b). By so doing, the state court relied on the dictates of Tenn. Code Ann. § 40-14-109(b), which requires that a defendant be warned that he will lose his right to possess a firearm upon conviction for a "domestic violence offense" as defined by Tenn. Code Ann. § 40-14-109(a). The definition of "domestic violence offense" in Tenn. Code Ann. § 40-14-109(a) tracks the definition of "misdemeanor crime of domestic violence" contained in 18 U.S.C. § 921(a)(33). Specifically, Tenn. Code Ann. § 40-14-109(a)(2) requires a "domestic violence offense" to have "as an element of the offense the use or attempted use of physical force or the threatened use of a deadly weapon." This language is identical to that contained in the federal statute defining a "misdemeanor crime of domestic violence" for purposes of § 922(g)(9). 18 U.S.C. § 921(a)(33)(A)(ii) (2005 & 2006) ("[T]he term 'misdemeanor crime of domestic violence' means an offense that . . . has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon . . . . ").

"[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has

acquiesced in the position formerly taken by him." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (quotations and citation omitted). "This rule, known as judicial estoppel, 'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.'" *Id.* (quoting *Pegram v. Herdrich*, 530 U.S. 211, 227 n.8 (2000)). Thus, judicial estoppel forbids a party from taking a position inconsistent with one "successfully and unequivocally asserted by that same party in an earlier proceeding." *Warda v. C.I.R.*, 15 F.3d 533, 538 (6th Cir. 1994) (citations omitted). Judicial estoppel "preserves the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposite to suit an exigency of the moment." *Teledyne Indus. v. Nat'l Labor Relations Bd.*, 911 F.2d 1214, 1218 (6th Cir. 1990); *see Reynolds v. C.I.R.*, 861 F.2d 469, 472 (6th Cir. 1988); *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 (6th Cir. 1982). The Sixth Circuit has stated that there is no fixed formula for application of judicial estoppel,[10] but that there exist several considerations:

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[10] Often, though not invariably, the Sixth Circuit has stated in dicta that the contradictory assertion must have been made under oath. *See, e.g., Browning v. Levy*, 283 F.3d 761, 775 (6th Cir. 2002) ("The doctrine of judicial estoppel bars a party from (1) asserting a position that is contrary to one that the party has asserted under oath in a prior proceeding, where (2) the prior court adopted the contrary position either as a preliminary matter or as part of a final disposition.") (citation and internal quotation marks omitted). The

> First, a party's later position must be clearly inconsistent with its earlier position. Second, a court should review whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled. Finally, the court should evaluate whether the party advancing an inconsistent position would gain an unfair advantage if allowed to proceed with the argument.

In re Commonwealth Institutional Secs., Inc., 394 F.3d 401, 406 (6th Cir. 2005) (quoting *New Hampshire*, 532 U.S. at 750) (internal citations and quotation marks omitted). "[I]t is well-established that at a minimum, 'a party's later position must be 'clearly inconsistent' with its earlier position[ ]' for judicial estoppel to apply[.]" *Lorillard Tobacco Co. v. Chester, Willcox & Saxbe*, 546 F.3d 752, 757 (6th Cir. 2008) (quoting *New Hampshire*, 532 U.S. at 750).

Sixth Circuit, however, has also applied the doctrine of judicial estoppel without ever finding that the prior position was asserted under oath. *Reynolds v. C.I.R.*, 861 F.2d 469, 473-74 (6th Cir. 1988). Furthermore, the Supreme Court's opinion in *New Hampshire v. Maine*, 532 U.S. 742 (2001), which applied judicial estoppel against the State of New Hampshire in a dispute with the State of Maine, articulates no such requirement for the application of judicial estoppel, and in interpreting that decision, the Sixth Circuit has stated that "[t]here is no set formula for assessing when judicial estoppel should apply," *In re Commonwealth Institutional Secs., Inc.*, 394 F.3d 401, 406 (6th Cir. 2005) (citing *New Hampshire*, 532 U.S. at 750).

In the instant case, Defendant's guilty plea was set aside because he did not receive the warning mandated by Tenn. Code Ann. § 40-14-109(b)—a warning that is only required when a defendant pleads guilty to a "domestic violence offense" which has "as an element of the offense the use or attempted use of physical force or the threatened use of a deadly weapon." That is, only if the offense contains the use or attempted use of physical force (or the threatened use of a deadly weapon) would Defendant have been required to receive the warning mandated by Tenn. Code Ann. § 40-14-109(b). Although the state court order granting Defendant coram nobis relief asserts that the court assumed without deciding that Defendant's conviction qualified as an offense which would affect Defendant's right to possess a firearm (*see* Circuit Court Order 2), the relief the court granted necessarily required a finding that Defendant's offense possessed use or attempted use physical force (or the threatened use of a deadly weapon) as an element. Otherwise, Defendant could not have obtained the coram nobis relief he received.

Thus, Defendant's current argument is directly contrary to the theory upon which he sought and obtained coram nobis relief in state court. To permit Defendant to advance one argument in state court and then argue its opposite upon entering a federal forum would allow the type of intolerable gamesmanship that judicial estoppel is meant to prevent. Because the state court accepted Defendant's argument that he should have received the warning required by Tenn. Code Ann. § 40-14-109(b) due to the effects the con-

viction would have on his right to possess a firearm, Defendant cannot now argue to the contrary that he was convicted of an offense which did not affect his firearm rights.[11] Therefore, as Defendant prevailed in state court by arguing that his prior conviction was a misdemeanor crime of domestic violence for which he needed to be warned that he would lose his right to possess a firearm, Defendant is estopped from claiming that the misdemeanor to which he pled guilty was not a crime of domestic violence which includes "as an element of the offense the use or attempted use of physical force or the threatened use of a deadly weapon."

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[11] Defendant's brief filed in the Court of Criminal Appeals—which Defendant attached as an exhibit to a motion recently filed in this Court to continue a report date—likewise asserts that Defendant should have been advised under Tenn. Code Ann. § 40-14-109(b) that a conviction for the offense to which he pled guilty would affect his right to possess a firearm. (*See* Ex. 1 to Def.'s Mot. to Continue Report Date: Brief of the Appellee, James Alvin Castleman, in the Court of Criminal Appeals.) Defendant further contends that if he had been properly informed, he would not have pled guilty. Again, Defendant can only avail himself of § 40-14-109(b) if the offense to which he pled guilty contained "as an element of the offense the use or attempted use of physical force or the threatened use of a deadly weapon." *See* Tenn. Code Ann. § 40-14-109(b) (2001). And, if the offense contained the use or attempted use of physical force as an element, then according to 18 U.S.C. § 921(a)(33)(A)(ii) it qualifies as a predicate offense for a prosecution under 18 U.S.C. § 922(g)(9).

C. The circumstances do not warrant transfer of this matter from the Western Division to the Eastern Division of the Western District of Tennessee.

Defendant also seeks dismissal of the superseding indictment for want of venue. Rule 18 of the Federal Rules of Criminal Procedure only requires that the Government "prosecute an offense in a *district* where the offense was committed[.]" Fed. R. Crim. P. 18 (emphasis added). The superseding indictment, like the original indictment, alleges that Defendant committed certain federal offenses in the Western District of Tennessee, and Defendant does not contest the assertion that the alleged criminal acts occurred in the Western District of Tennessee. Because the Government is prosecuting this case in the judicial district of the alleged offenses, there exists no defect in the venue of this action.

Alternatively, Defendant seeks to transfer this case from the Western Division of the Western District of Tennessee to the Eastern Division at Jackson on the grounds that it will be inconvenient for him, his attorney, and his witnesses if the matter is tried in Memphis rather than Jackson. Defendant was first indicted on December 17, 2008, and he did not file a motion challenging venue until September 8, 2009, almost nine months later. In this nine-month period, there have been report dates and other proceedings for which Defendant received permission not to attend. The hearing on the instant motions created the first opportunity for Defendant's counsel to appear person-

ally in Memphis. Furthermore, although Defendant resides closer to Jackson than Memphis and Defendant represents that his witnesses are located in the Eastern Division, the Government indicates that its witnesses are located in Memphis.

The decision to transfer a case within the district is discretionary, and a defendant has no right to have his case heard in a particular division. The Court recommends that Defendant's motion to transfer be **DENIED** because Defendant has not articulated a reason sufficiently compelling to warrant a transfer of this matter after a delay of nearly nine months.

IV. Conclusion and Recommendation

For the foregoing reasons, Defendant's request to hold consideration of his motion to dismiss under Rule 12(b) in abeyance pending resolution of proceedings against Defendant in state court is **DENIED**, and it is recommended that Defendant's Motion to Dismiss under Rule 12(b) of the Federal Rules of Criminal Procedure be **DENIED**. It is further recommended that Defendant's Motion to Dismiss for want of venue or, in the alternative, to transfer the matter to the Eastern Division also be **DENIED**.

IT IS SO ORDERED this 4th day of Feb., 2010.

/s/ CHARMIANE G. CLAXTON
CHARMIANE G. CLAXTON
UNITED STATES MAGISTRATE JUDGE

ANY OBJECTIONS OR EXCEPTIONS TO THIS REPORT MUST BE FILED WITHIN FOURTEEN (14) DAYS AFTER BEING SERVED WITH A COPY OF THE REPORT. 28 U.S.C. § 636(b)(1)(C). FAILURE TO FILE SAID OBJECTIONS OR EXCEPTIONS WITHIN FOURTEEN (14) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND ANY FURTHER APPEAL.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 10-5912

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

JAMES ALVIN CASTLEMAN, DEFENDANT-APPELLEE

[Filed: Dec. 19, 2012]

ORDER

Before: MOORE, CLAY, and MCKEAGUE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the

petition is denied. Judge McKeague would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/ DEBORAH S. HUNT
DEBORAH S. HUNT, Clerk

APPENDIX G

1. 18 U.S.C. 921 provides in pertinent part:

Definitions

(a) As used in this chapter—

* * * * *

(33)(A) Except as provided in subparagraph (C)[2], the term "misdemeanor crime of domestic violence" means an offense that—

(i) is a misdemeanor under Federal, State, or Tribal[3] law; and

(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

* * * * *

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[2] So in original. No subparagraph (C) has been enacted.

[3] So in original. Probably should not be capitalized

2. 18 U.S.C. 922 provides in pertinent part:

Unlawful Acts

(g) It shall be unlawful for any person—

* * * * *

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or tranport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

* * * * *

3. Tennessee Code Ann. § 39-13-101 (2001) provides:

Assault.—

(a) A person commits assault who:

(1) Intentionally, knowingly or recklessly causes bodily injury to another;

(2) Intentionally or knowingly causes another to reasonably fear imminent bodily injury; or

(3) Intentionally or knowingly causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative.

(b) Assault is a Class A misdemeanor unless the offense is committed under subdivision (a)(3), in which event assault is a Class B misdemeanor

4. Tennessee Code Ann. § 39-11-106 (2001) provides in pertinent part:

(a) As used in this title, unless the context requires otherwise:

* * * * *

(2) "Bodily injury" includes a cut, abrasion, bruise, burn or disfigurement; and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty;

5. Tennessee Code Ann. § 39-13-111 (2001) provides:

(a) As used in this section, "family or household member" means spouse, former spouse, person related by blood or marriage, or person who currently resides or in the past has resided with that person as if a family, or a person who has a child or children in common with that person regardless of whether they have been married or resided together at any time.

(b) A person who commits domestic assault who commits an assault as defined in § 39-13-101 against a person who is that person's family or household member.

(c) Domestic assault is punishable the same as assault in § 39-13-101.

6. Tennessee Code Ann. § 39-13-111 (Supp. 2012) provides:

Domestic assault.

(a) As used in this section, "domestic abuse victim" means any person who falls within the following categories:

(1) Adults or minors who are current or former spouses;

(2) Adults or minors who live together or who have lived together;

(3) Adults or minors who are dating or who have dated or who have or had a sexual relationship, but does not include fraternization between two (2) individuals in a business or social context;

(4) Adults or minors related by blood or adoption;

(5) Adults or minors who are related or were formerly related by marriage; or

(6) Adult or minor children of a person in a relationship that is described in subdivisions (a)(1)-(5).

(b) A person commits domestic assault who commits an assault as defined in § 39-13-101 against a domestic abuse victim.

(c)(1) A first conviction for domestic assault and a second or subsequent conviction for domestic assault committed in a manner prohibited by § 39-13-101(a)(2) and (a)(3) is punishable the same as assault under § 39-13-101, and additionally, as provided in subdivisions (c)(2) and (c)(3) and subsection (d) of this section.

(2) A second conviction for domestic assault committed in a manner prohibited by § 39-13-101(a)(1) is punishable by a fine of not less than three hundred fifty dollars ($350) nor more than three thousand five hundred dollars ($3,500), and by confinement in the county jail or workhouse for not less than thirty (30) days, nor more than eleven (11) months and twenty-nine (29) days.

(3) A third or subsequent conviction for domestic assault committed in a manner prohibited by § 39-13-101(a)(1), is punishable by a fine of not less than one thousand one hundred dollars ($1,100) nor more than five thousand dollars ($5,000), and by confinement in the county jail or workhouse for not less than ninety (90) days, nor more than eleven (11) months and twenty-nine (29) days.

(4) For purposes of this section, a person who is convicted of a violation of § 39-13-111 committed in a manner prohibited by § 39-13-101(a)(1), shall not be subject to the enhanced penalties prescribed in this subsection (c), if ten (10) or more years have elapsed between the date of the present violation and the date of any immediately preceding violation of § 39-13-111, committed in a manner prohibited by

§ 39-13-101(a)(1), that resulted in a conviction for such offense.

(5) In addition to any other punishment that may be imposed for a violation of this section, if, as determined by the court, the defendant possesses the ability to pay a fine in an amount not in excess of two hundred twenty-five dollars ($225), then the court shall impose a fine at the level of the defendant's ability to pay, but not in excess of two hundred twenty-five dollars ($225). The additional fine shall be paid to the clerk of the court imposing sentence, who shall transfer it to the state treasurer, who shall credit the fine to the general fund. All fines so credited to the general fund shall be subject to appropriation by the general assembly for the exclusive purpose of funding family violence shelters and shelter services. This appropriation shall be in addition to any amount appropriated pursuant to § 67-4-411.

(6) A person convicted of a violation of this section shall be required to terminate, upon conviction, possession of all firearms that the person possesses as required by § 36-3-625.

(d) As part of a defendant's alternative sentencing for a violation of this section, the sentencing judge may direct the defendant to complete a drug or alcohol treatment program or available counseling programs that address violence and control issues including, but not limited to, a batterer's intervention program that has been certified by the domestic violence state coordinating council. Completion of a noncertified batter-

er's intervention program shall only be ordered if no certified program is available in the sentencing county. No batterer's intervention program, certified or non-certified, shall be deemed complete until the full term of the program is complete, and a judge may not require a defendant to attend less than the full term of a program as part of a plea agreement or otherwise. The defendant's knowing failure to complete such an intervention program shall be considered a violation of the defendant's alternative sentence program and the sentencing judge may revoke the defendant's participation in such program and order execution of sentence.

7. Connecticut Gen. Stat. Ann. § 53a-61 (West 2012) provides in pertinent part:

Assault in the third degree: Class A misdemeanor

(a) A person is guilty of assault in the third degree when:

(1) With intent to cause physical injury to another person, he causes such injury to such person or to a third person; or

(2) he recklessly causes serious physical injury to another person; or

(3) with criminal negligence, he causes physical injury to another person by means of a deadly weapon, a dangerous instrument or an electronic defense weapon.

* * * * *

8. Delaware Code Ann. tit 11, § 611 (Michie 2007) provides:

Assault in the third degree; class A misdemeanor.

A person is guilty of assault in the third degree when:

(1) The person intentionally or recklessly causes physical injury to another person; or

(2) With criminal negligence the person causes physical injury to another person by means of a deadly weapon or a dangerous instrument.

Assault in the third degree is a class A misdemeanor.

9. Florida Stat. Ann. § 784.03 (West 2007) provides in pertinent part:

Battery; felony battery

(1)(a) The offense of battery occurs when a person:

1. Actually and intentionally touches or strikes another person against the will of the other; or

2. Intentionally causes bodily harm to another person.

* * * * *

10. 720 Ill. Comp. Stat. Ann. 5/12-3 (West Supp. 2012) provides in pertinent part:

Battery

Battery. (a) A person commits battery if he inentionally or knowingly without legal and justification by any means (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual.

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