Misdemeanor odds and ends

UMPA 2013

Some new technology

Draeger DrugTest® 5000 – Oral Fluid
Drug Detection

Draeger DrugTest® 5000 – Oral Fluid
Drug Detection

Draeger DrugTest® 5000 – Oral Fluid
Drug Detection

Draeger DrugTest® 5000 – Oral Fluid
Drug Detection

Amphetamines

Benzodiazepines

Delta-9-tetrahydrocannabinol (THC)

Cocaine

Methamphetamine

Opiates

Methadone

Intelligent Fingerprinting, Ltd. (U.K.)

Intelligent Fingerprinting, Ltd. (U.K.)

Intelligent Fingerprinting, Ltd. (U.K.)

Benzoylecgonine (cocaine metabolite)

Ethylamine Diethyl Diphenylpyrrolidine (methadone metabolite)

Methadone

Morphine (heroin metabolite)

Tetrahydrocannabinol (THC)

DUI-related decisions/items

State v. Adamson, 2013 UT App 22.

Waiting outside bar
Two moving violations
First contact, no odor of alcohol, only odor of minty smell
Trooper does not notice **either way** if interlock in car
Driver gives trooper ID card not DL
Trooper realizes that back at his patrol car
ID check shows interlock restricted driver and two prior DUIs

State v. Adamson, 2013 UT App 22.

Trainer says go ask driver to get out of vehicle and ask about interlock
Trooper goes back and first asked if driver had interlock.
"Oh yeah, it's hanging right here."
Then trooper smells alcohol, and away we go into a DUI investigation.

State v. Adamson, 2013 UT App 22.

"If an officer were precluded from following up on such information altogether, the permissible computer check for licensing restrictions would be meaningless."

State v. Adamson, 2013 UT App 22.

Since "an officer may conduct a computer check…to verify continuing driving privileges, it naturally follows that the officer may conduct a brief inquiry to confirm compliance with a licensing restriction."

"Such a brief inquiry…was within the scope of the initial detention."

Insurite/other applications?

State v. Beckstrom, 2013 UT App 104.

Where reasonable suspicion existed for DUI and defendant did not have adequate clothing for existing harsh snowy weather conditions, transporting her in police car two blocks to police station garage for SFSTs did not impermissibly extend the scope of the traffic stop for investigative detention for DUI.

Defendant consented and was told explicitly she was not under arrest.

Administration of SFSTs – deviation from NHTSA manual

Johnson v. State, 1997 WL 256828, 1997 Ark. App. LEXIS 360 (Ark. App.) (unpub.).

Still admissible at trial – question of weight not admissibility.

See also, State v. Thomas, 420 N.W.2d 747 (N.D. 1988) (question is weight not admissibility).

Utah's closest decision is *Rosengreen v. State Dept. of Public Safety*, 2003 UT App 183 (unpublished) (inferential support for substantial compliance is sufficient).

Administration of SFSTs

State v. Homan, 732 N.E.2d 952 (Ohio 2000) (stating minority view that the SFSTs must be administered in strict compliance with the NHTSA manual or they are inadmissible).

Ohio Rev. Stat. 4511.19(D)(4)(a), (b).

IF ANY ONE OF THE STANDARDIZED FIELD SOBRIETY TEST ELEMENTS IS CHANGED, THE VALIDITY IS COMPROMISED.

2006 NHTSA SFST Manual, Session VIII-19.

Salt Lake City v. Garcia,
912 P.2d 997 (Utah App. 1996).

In the trial court's words, **Officer Warner could testify that he's "observed a strong correlation between people who he has concluded otherwise were under the influence of alcohol and the presence of that, of those indicia.** And you [defense counsel] can do all the cross examination you want…."

OKN drum demonstration

Travis v. State, 724 S.E.2d 15 (Ga. App. 2012), affirmed a trial court's decision "permitting the jury to view a law enforcement training videotape about the HGN sobriety test[,]" *id.* at 23, "hold[ing] that the trial court did not abuse its discretion in allowing the HGN test training video to be played to the jury[,]" *id.*, "given its purpose of illustrating the state trooper's testimony[.]" *Id.* In so holding, the court stated that when "the trial court has exercised its discretion to admit materials for the purpose of illustrating testimony, it will only rarely be found in error[.]" *Id.* (brackets in original omitted).

Hartsock v. State, 322 S.W.3d 775 (Tex. App. 2010), affirmed a trial court's decision to admit "for demonstrative purposes only–a DVD featuring videos of an individual's eyes with and without nystagmus." *Id.* at 778.

See also Edward J. Imwinkelried, Evidentiary Foundations § 4.07 (8th ed. 2012) ("The only limits on the use of demonstrative evidence are the trial judge's discretion and the trial attorney's imagination.").

OKN drum availability info

www.richmondproducts.com

sales@richmondproducts.com

genek@good-lite.com Tel: 847 841 1145

$195.00 plus shipping

Baker 15-minute rule

State v. Relyea, 2012 Utah App 55.

Implied consent – non-English speakers

State v. Cabanilla, 273 P.3d 125 (Or. 2012) (state not required to prove defendant, a **native Spanish speaker** with limited English-speaking skills, understood oral notice of consequences and rights).

State v. Garcia, 756 N.W.2d 216 (Iowa 2008) (adopted **reasonableness standard** of communication for implied consent law).

Implied consent – non-English speakers

Warner v. Comm'r, 498 N.W.2d 285 (Minn. App. 1993) (construing implied consent law held state's failure to provide **deaf motorist** with interpreter and telecommunications equipment did not require DL reinstatement).

Yokoyama v. Comm'r, 356 N.W.2d 830 (Minn. App. 1984) (**Japanese language speaker who did not understand English** did not have statutory right to have implied consent advisory read in Japanese prior to chemical test).

Tongue piercings - decision

Guy v. State, 823 N.W.2d 274 (Ind. 2005), decided "the question whether a tongue stud inserted in [defendant's] mouth more than twenty minutes before the test renders the results of the test inadmissible" *id.* at 275, and "conclude[d] that it does not, and affirm[ed]" the trial court's decision.

Tongue piercings - study

Barry K. Logan & Rodney G. Gulberg, *Lack of Effect of Tongue Piercing on an Evidentiary Breath Alcohol Test*, 43 J. Forensic Sci. (2004). Two female subjects with piercings, two without. Listerine (28% alcohol) rinse 30 seconds. "Each subject had readings of less than BAC 0.002 [on a Datamaster breath testing instrument] by 15 min. [after rinsing] illustrating both the effectiveness of the waiting period, and the absence of any additional effect from piercing."

Defense counsel routinely subpoena UHP alcohol techs to trial?

Chain of custody in blood draw DUIs

State v. Boyer, 805 N.W.2d 736 (Wis. App. 2011).

Officer witnessed blood draw by phlebotomist Regina Poh.

Actually analyzed by Kathryn Betz (finding BAC .227).

Findings certified by Thomas Eckhert.

Officer Vanderwerff and analyst Kathryn Betz testified at trial (lab report admitted through her).

Phlebotomist Poh and certifying analyst Eckert did not.

State v. Boyer, 805 N.W.2d 736 (Wis. App. 2011).

Boyer claimed confrontation violation because no opportunity to cross examine Poh and whether she was qualified to draw blood.

Thus, no confrontation violation.

See also, Deeds v. State, 27 So.3d 1135 (Miss. 2009) (no confrontation clause violation under *Melendez-Diaz* analysis even where state could not even identify blood drawing nurse and nurse did not appear at trial) (post-*Melendez-Diaz*, pre-*Bullcoming*).

Contrary decisions: *State v. Sorensen*, 814 N.W.2d 371 (Neb. 2012); *State v. Herauf*, 819 N.W.2d 546 (N.D. 2012), *reversing State v. Gietzen*, 789 N.W.2d 1 (N.D. 2012).

Boyer and *Deeds* consistent with all post-*Crawford* SCOTUS confrontation analysis.

Elements witnesses v. non-elements witnesses.

Motion to quash subpoena for phlebotomist available from me.

Blood draw kits/I-cups

Demonstrative exhibits/educational

Training video showing blood draw available

Soon PowerPoint available with images of tox lab check-in procedures

Both are to show seamlessness of process and no contamination/tampering possible

Tox lab issues?

or is it,

Tox lab issues!

Missouri v. McNeely, 133 S.Ct. 1552 (2013).

Is metabolic dissipation of blood alcohol evidence an exigent circumstance?

"[W]e hold…that the exigency in this context must be determined case by case based on the totality of circumstances."

Missouri v. McNeely, 133 S.Ct. 1552 (2013).

"In those drunken-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so."

Missouri v. McNeely, 133 S.Ct. 1552 (2013).

"We do not doubt that some circumstances will make obtaining a warrant impractical such that the dissipation of alcohol…will support an exigency justifying a properly conducted warrantless blood test [sic]."

"That…is a reason to decide each case on its facts, as we did in *Schmerber*…."

Did D forfeit confrontation by absconding and evading prosecution for four years?

State v. Weaver, 733 N.W.2d 793 (Minn. App. 2007).

State destroyed lab results and underlying data after two years.

For defendant to waive confrontation by absconding state must show defendant **knew** his/her conduct would result in destruction of evidence (e.g., witness dying if terminally ill).

See also, State v. Alvarez-Lopez, 98 P.3d 699 (N.M. 2004), *cert. denied*, 543 U.S. 1177 (2005) (no confrontation waiver under *Crawford* by absconding from state/remaining fugitive for five years).

Drugged/alcohol driving statistics – California survey

Survey "showed more drivers tested positive for drugs that may impair driving (14 percent) than did for alcohol (7.3 percent). Of the drugs, marijuana was most prevalent, at 7.4 percent, slightly more than alcohol."

Survey of California Drivers Shows Fourteen Percent Testing Positive for Drugs, Press Release, California Office of Traffic Safety, Nov. 19, 2012.

Spice and bath salts update/testing availability

www.nmslab.com

Challenge to DUI metabolite statute – § 41-6a-517

DUI advocacy in refusals

Refusal breath/blood test

Reyes "firmly convinced" jury instruction (2 people already firmly convinced defendant was DUI, now you jurors can be too).

Refusal SFSTs

Orem City v. Longoria, 186 P.3d 958 (Utah App. 2008).

Motion to dismiss at close of prosecution's case – sufficiency of evidence

Standard: evidence is not **"so [ ] inconclusive or inherently improbable that reasonable minds must [have] reasonable doubt."** *State v. Puerto,* 2002 UT App 112 (unpublished).

Strong odor of alcohol

Slurred speech

Glassy eyes

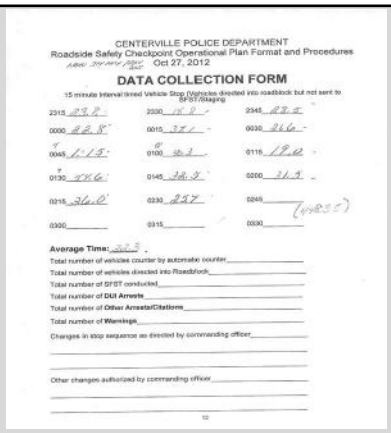
Strange conduct/impaired judgment (looking in billfold for registration; talking to child D did not know).

State v. Van Dyke, 2009 UT App 369.

DUI checkpoints effectiveness meta-study

"[P]roportion of all crashes involving alcohol declined an average of 28% in four communities that used publicized sobriety checkpoints compared with a 17% decline in communities that used only publicized roving patrols (or saturation patrols)."

http://onlinepubs.trb.org/onlinepubs/circulars/ec072.pdf



CENTERVILLE POLICE DEPARTMENT
Roadside Safety Checkpoint Operational Plan Format and Procedures
Oct 27, 2012

DATA COLLECTION FORM

15 minute interval timed Vehicle Stop (Vehicles directed into roadblock but not sent to SFST/Staging

2315 23.2	2330 15.2	2345 23.5
0000 22.5	0015 37.1	0030 24.6
0045 1:13	0100 30.2	0115 19.40
0130 27.6	0145 38.9	0200 31.5
0215 36.0	0230 25.7	0245 (WARS)
0300	0315	0330

Average Time: 26.5

Total number of vehicles counter by automatic counter
Total number of vehicles directed into Roadblock
Total number of SFST conducted
Total number of **DUI Arrests**
Total number of **Other Arrests/Citations**
Total number of **Warnings**
Changes in stop sequence as directed by commanding officer

Other changes authorized by commanding officer

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NTSB recommendation .05 BAC update

Discussion of current DUI issue(s)

Domestic violence related decisions/items

Hardy v. Cross, 132 S.Ct. 490 (2011).

Hardy v. Cross
(held state's efforts sufficient)

Good language

"[A] witness is not 'unavailable'…unless the prosecut[ion]…has made a good faith effort to obtain [their] presence at trial." *Barber v. Page*, 88 S.Ct. 1318 (1968).

Prosecution made no effort to secure witnesses presence apart for determining he was serving a sentence in federal prison in *Barber*.

Hardy v. Cross

"The **lengths to which the prosecution must go** to produce a witness…is a **question of reasonableness**." *Ohio v. Roberts*, 100 S.Ct. 2531 (1980).

Prosecution had spoken to the witness' mother, who reported that she had no knowledge of her whereabouts and knew of no way to reach her even in an emergency.

State had served five subpoenas in the witness' name to her parents' residence over a 4-month period prior to trial.
held state's efforts sufficient

Hardy v. Cross
held state's efforts sufficient

But, victim had expressed fear before first trial, but had nevertheless appeared in court and testified.

"We have **never held that the prosecution must have issued a subpoena** if it wishes to prove that a witness who goes into hiding is unavailable for Confrontation Clause purposes."

"[T]he Sixth Amendment **does not require the prosecution to exhaust every avenue of inquiry**, no matter how unpromising."

Hardy v. Cross

So, lots of good language, but…

Recording domestic violence convictions for federal firearms disqualification

United States v. Hays, 526 F.3d 674 (10th Cir. 2008).

State law definitions of **domestic violence** and **cohabitant** don't matter for disqualified/restricted person determinations

Convictions must involve **"use or attempted use of physical force"**…

against a federally defined **"intimate partner."**

"Intimate partner"

"…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 cohabitating 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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Utah's assault statute – Utah Code § 76-5-102

(1) Assault is:

(a) an attempt, with unlawful force or violence, to do bodily injury to another;

(b) a threat, accompanied by a show of immediate force or violence, to do bodily injury to another; or

(c) an act, committed with unlawful force or violence, that causes bodily injury to another or creates a substantial risk of bodily injury to another.

59

Dockets **must be** specific as to the subsection

76-5-102
or,
76-5-102(1)

Docket **must be**:

76-5-102(1)(a)
or,
76-5-102(1)(c)

60

Must be a "force element" on the record

Actual conduct (e.g., punch).

Intimate partner status **must be** indicated

Example

"John Smith is adjudicated guilty of assault Utah Code § 76-5-102(1)(a) [or (1)(c)] because he attempted to [or did] strike Jane Smith on the mouth using physical force with the intent of causing her bodily injury. The court finds Jane Smith is the spouse of John Smith and their relationship meets the federal definition of intimate partner."

Authority: FBI LRAT letter; *United States v. Hays*, 526 F.3d 674 (10th Cir. 2008) (both are in the materials).

Jail Release Agreements – update/discussion

(2) Upon arrest for domestic violence, a person may not be released…unless…person…agrees in writing [to]:

(a)have no personal contact with the alleged victim;

(b) not threaten or harass the alleged victim; and

(c) not knowingly enter onto the premises of the alleged victim's residence or any premises temporarily occupied by the alleged victim.

Forfeiture by wrongdoing

Discussion of current domestic violence issues

Remaining odds and ends

Orem City v. Santos, 2013 UT App 155.

Retail theft suspect sought suppression of store employees' interrogation.

Gonged because (1) government did not know of, or acquiesce in, interrogation; (2) retailer's intent and purpose was not solely to promote criminal prosecution (other interests: protect assets, protect from civil liability, record keeping, training).

Layton City v. Stevenson, 2013 UT App 67.

Language in PIA agreement "that [d]efendant "was to commit no violations of law except for minor traffic offenses," does not require a conviction to support a violation of the agreement."

Remanded for evidentiary hearing to determine whether D committed violation of law prior to PIA completion.

PIAs ("masking") for CDL holders

"The state must not mask, defer imposition of judgment, or allow an individual to enter into a diversion program that would prevent [the CDL driver's] conviction for any violation…from appearing on [their driving] record" [regardless of licensure state.] 49 CFR 384.226

State could lose MCSAP grant funds and federal-aid highway funds.

CDL holders only have one license.

Possible 2014 legislation

Sex offender registry amendment – legal fiction needed for where offender moves and does not re-register (§ 77-41-105).

No PIAs in impaired driving (§ 41-6a-502.5) and DUI metabolite (§ 41-6a-517).

Any other amendments needed?

Reminder re Insurite – "NO INSURANCE"
"INSURANCE NOT FOUND"

Snedeker v. Rolfe, 2007 UT App 395 (computerized check indicating vehicle registered to a business and not insured is reasonable suspicion for stop, *even where driver of vehicle actually has personal insurance covering vehicle*).

See also, *State v. Biggs*, 2007 UT App 261.

The (merciful) end

eberkovich@utah.gov

801 350 1303

U.S. Department of Justice

Federal Bureau of Investigation

Clarksburg, WV 26306

October 30, 2012

Lawrence Tyler
Brady Supervisor
Utah Bureau of Criminal Investigation
3888 West 5400 South
Taylorsville, UT 84129

RE: Request for Guidance Regarding Interpretation of Title 18, United States Code (U.S.C.), Section 922(g)(9)

Dear Mr. Tyler:

Thank you for your patience while awaiting our response to your request for guidance regarding the application of 18 U.S.C. § 922(g)(9) to Utah offenses. The Legal Research and Analysis Team (LRAT) of the FBI Criminal Justice Information Services (CJIS) Division's National Instant Criminal Background Check System (NICS) Section met with M. Drew Crislip, Assistant General Counsel, FBI Office of the General Counsel, regarding your request. At the conclusion of the meeting, the LRAT and Mr. Crislip came to the consensus that your request regarding the application of the physical force element is not an issue on which the FBI is able to give a formal opinion. We are, however, able to provide limited guidance on the methodology the NICS Section uses in order to determine whether the ". . . use or attempted use of physical force or threatened use of a deadly weapon" element of Section 922(g)(9) has been met.

When making a determination regarding Section 922(g)(9), the NICS Section is guided by the definition of "misdemeanor crime of domestic violence" (MCDV) found in Title 27, Code of Federal Regulations (C.F.R.), Section 478.11. Per regulation, one of the required elements of an MCDV is ". . . the use or attempted use of physical force or threatened use of a deadly weapon" (hereinafter "force element"). In many instances, whether the force element is met is a complex question that has yet to be addressed by legislatures, courts, or other administrative entities which provide decisions relative to topics such as this. For instance, the LRAT and Mr. Crislip were unable to locate in legislation or in court opinion the definitions of key terms as applicable to Utah statutes.

As you know, the lack of clarity on this issue does not change the fact that the NICS Section and NICS Point-of-Contact (POC) states, such as Utah, are presented with countless cases involving statutes and convictions each day which could reveal a potential purchaser is prohibited under Section 922(g)(9). As I am sure you are aware, the LRAT maintains a chart available to all law enforcement agencies which subscribe to ‹www.leo.gov› through the NICS Special Interest Group (SIG) under "State-Specific Reference Information." The LRAT seeks to provide assistance through this chart by addressing which statutes meet, do not meet, and are possible for the force element of Section 922(g)(9); it covers the most common offenses

for all state, territorial, federal, and military jurisdictions. In addition to the chart, the LRAT is available through e-mail at ‹statutes@leo.gov› to provide assistance with force element questions as they apply to a specific conviction. In applying the force element to these statutes and convictions, the LRAT strives to come to the correct conclusion as it applies to each case. There is, however, no one methodology utilized in order to discern whether a particular offense meets this element. The LRAT instead uses a combination of sources including the court documentation from the conviction, state and federal statutes, and courts' opinions to conclude that a conviction meets, does not meet, or remains possible for the force element.

Because you specifically requested guidance with the Utah assault statute, we will use that statute in the example enclosed. This analysis can be applied to each statute and conviction to determine Section 922(g)(9) applicability.

Additionally, I have also enclosed a State of Connecticut Superior Court Form JD-CR-155, "Report of Misdemeanor Crimes of Domestic Violence Federal Firearms Disqualification." This is a form that Connecticut courts have drafted and implemented with guidance from the LRAT and FBI Office of the General Counsel. Connecticut's goal was to provide clarity as to whether the force and relationship elements of Section 922(g)(9) have been met. I have enclosed this form with the permission of Connecticut as an example of what another state is doing to address similar concerns as you have expressed in your request. The LRAT would be willing to work with the state of Utah should it be interested in implementing a similar solution to this problem.

Again, thank you for your patience on this issue. I sincerely hope this guidance will provide the assistance you need in applying Utah statutes to Section 922(g)(9). Should you have any questions concerning this communication, please contact John Francis Keough, Legal Administrative Specialist, at 304-625-7461.

Sincerely yours,

Paul Wysopal

Paul Wysopal
Section Chief
NICS Section
CJIS Division

Enclosures (2)

The following guidance covers the Legal Research and Analysis Team (LRAT) of the FBI Criminal Justice Information Services (CJIS) Division's National Instant Criminal Background Check System (NICS) Section application of the force element when reviewing 2011 Utah assault statute. This guidance covers the way this element is currently applied by the NICS Section. Please be aware that court decisions, statute revisions, or changes in legal opinion could change the way the NICS Section interprets and applies this element. As used below, statutory language is in bold black, the LRAT analysis is in red.

U.C.A. 1953 § 76-5-102

Assault

"(1) Assault is:

(a) an attempt, with unlawful force or violence, to do bodily injury to another;

Subsection (a) is POSSIBLE for the force element of Section 922(g)(9) because the terms "unlawful force" and "violence" have not been defined by the Utah legislature or Supreme Court. A plain language review of these terms would include definitions within and without the definition of "physical force" as used in Section 922(g)(9).

A conviction for this offense would remain possible for the force element until court documentation is provided to explain the actual conduct supporting the conviction.

- Please note that this may not be the same conduct alleged or reported by the prosecutor, police agency, etc.

As an example, this documentation might contain such language as the following:

> "John Smith is adjudicated guilty of assault 1953 § 76-5-102 (a) because he attempted to strike Jane Smith on the mouth with the intent of causing her bodily injury."

In this case, the conviction would MEET the force element because an attempted strike falls within the federal definition of physical force as it is used in Section 922(g)(9).

Another court documentation example:

> "John Smith is adjudicated guilty of assault 1953 § 76-5-102 (a) because he yelled loudly at Jane Smith knowing that it would startle her while driving and potentially causing her bodily injury."

In this example, the act of yelling would not meet the federal definition of physical force as it is used in Section 922(g)(9).

(b) a threat, accompanied by a show of immediate force or violence, to do bodily injury to another; or

Because a "show" of force or violence is not "the use or attempted use of physical force" and independently, because the "threat" is not the "threatened use of a deadly weapon," this subsection DOES NOT MEET Section 922(g)(9) force element.

(c) an act, committed with unlawful force or violence, that causes bodily injury to another or creates a substantial risk of bodily injury to another . . . "

As in our above analysis with sub-section (a), this subsection will be POSSIBLE for the force element of Section 922(g)(9).

REPORT OF MISDEMEANOR CRIMES OF DOMESTIC VIOLENCE FEDERAL FIREARMS DISQUALIFICATION

JD-CR-155 Rev. 9-10
C.G.S. § 29-36*l*, 18 U.S.C. § 922(g)(9), Pub. L. 110-180

State of Connecticut
Superior Court
www.jud.ct.gov

The information below is being collected and reported to state and federal firearms regulatory authorities in support of Connecticut General Statutes § 29-36*l*, 18 U.S.C. § 922(g)(9), and Pub. L. 110-180, if applicable.

Offender's last name	Offender's first name	Offender's middle name	Court location	Docket number

By a judgment of the court, the offender was convicted of the misdemeanor crime(s) below, in a proceeding in which the offender was represented by counsel, or knowingly and intelligently waived the right to counsel, through a jury trial, or if the offender knowingly and intelligently waived the right to a jury trial, through a non-jury trial, or a plea of guilty or nolo contendere.

A. Conviction date

☐	§ 53a-61	Assault in the third degree.
☐	§ 53a-61a	Assault of an elderly, blind, disabled, pregnant or mentally retarded person in the third degree.
☐	§ 53a-64cc	Strangulation in the third degree.

B1. *Specify the subsection where applicable and whether the court found that an element of the offense includes the use or attempted use of physical force, or threatened use of a deadly weapon.* Conviction date

☐	§ 53-37b	Deprivation of a person's equal rights or privileges by force or threat.	*(Note: this offense is a felony if bodily injury or death results)*
☐	§ 53a-73a	Sexual assault in the fourth degree.	Specify subsection: *(Note: this offense is a felony if the victim is under sixteen years of age)*
☐	§ 53a-96	Unlawful restraint in the second degree.	
☐	§ 53a-183b	Interfering with an emergency call.	
☐	§ 53a-181	Breach of the peace in the second degree.	Specify subsection: ☐ (a)(1) ☐ (a)(2)
☐	§ 53a-182	Disorderly Conduct	☐ (a)(1)

B2.

☐ Yes ☐ No An element of the offense includes the use or attempted use of physical force, or threatened use of a deadly weapon.

C. Offender's current or former relationship to the victim:

- ☐ Spouse of the victim.
- ☐ Child in common with the victim.
- ☐ Cohabitation with the victim as a spouse or a person similarly situated to a spouse, or intimate cohabitation with the victim.
- ☐ Parent, stepparent, or guardian of the victim.
- ☐ Cohabitation with the victim as a parent or guardian, or a person similarly situated to a parent or guardian.
- ☐ Other *(specify)*: _____

By the Court — Name of Judge	Date
Name of Clerk	Signature of Clerk

Instructions to Clerk:
Keep this form with the documents from the file that are sent to the Records Center, and fax this form to the Superior Court Operations Division at (860) 610-0480.

526 F.3d 674
(Cite as: 526 F.3d 674)

United States Court of Appeals,
Tenth Circuit.
UNITED STATES of America, Plaintiff–Appellee,
v.
Steven Daniel HAYS, Defendant–Appellant.

No. 07–8039.
May 20, 2008.

Background: Defendant was convicted pursuant to his conditional guilty plea before the United States District Court for the District of Wyoming, Clarence A. Brimmer, Jr., Senior District Judge, of possession of a firearm after having been convicted of a misdemeanor crime of domestic violence. Defendant appealed.

Holding: The Court of Appeals, Seymour, Circuit Judge, held that underlying misdemeanor conviction under Wyoming battery statute prohibiting "unlawfully touching another in a rude, insolent, or angry manner" did not require physical force and thus was not a crime of domestic violence.

Reversed.

Ebel, Circuit Judge, filed dissenting opinion.

West Headnotes

[1] **Statutes 361 1072**

361 Statutes
361III Construction
361III(A) In General
361k1071 Intent
361k1072 k. In general. Most Cited Cases
(Formerly 361k181(1))

Primary task of court in interpreting statutes is to determine congressional intent using traditional tools of statutory interpretation.

[2] **Sentencing and Punishment 350H 300**

350H Sentencing and Punishment
350HII Sentencing Proceedings in General
350HII(E) Presentence Report
350Hk300 k. Use and effect of report. Most Cited Cases
(Formerly 406k4)

Weapons 406 180(3)

406 Weapons
406IV Offenses
406IV(C) Possession, Use, Carrying, or Personal Transport
406k173 Possession After Conviction of Crime
406k180 Particular Offenses
406k180(3) k. Domestic violence. Most Cited Cases
(Formerly 406k4)

Court could not consult presentence report in applying categorical approach to determine whether defendant's underlying state battery conviction was a misdemeanor crime of violence, as required for subsequent conviction of federal crime of possession of firearm after having been convicted of misdemeanor crime of domestic violence. 18 U.S.C.A. §§ 921(a)(33)(A), 922(g)(9); West's Wyo.Stat.Ann. § 6–2–501(b).

[3] **Assault and Battery 37 ⚷48**

37 Assault and Battery
37II Criminal Responsibility
37II(A) Offenses
37k47 Nature and Elements of Criminal Assault
37k48 k. In general. Most Cited Cases

Portion of Wyoming statute defining battery as "unlawfully touching another in a rude, insolent, or angry manner" follows common-law rule of battery, under which any contact, however slight, may constitute battery. Wyo.Stat.Ann. § 6–2–501(b).

[4] Weapons 406 ⚷180(3)

406 Weapons
406IV Offenses
406IV(C) Possession, Use, Carrying, or Personal Transport
406k173 Possession After Conviction of Crime
406k180 Particular Offenses
406k180(3) k. Domestic violence. Most Cited Cases
(Formerly 406k4)

Prior conviction under Wyoming statute, which defined battery to include "unlawfully touching another in a rude, insolent, or angry manner," embraced conduct that did not include the use or attempted use of "physical force" and thus did not categorically satisfy the definition of "misdemeanor crime of domestic violence" under federal statute prohibiting possession of a firearm by one who has prior misdemeanor conviction for domestic violence. 18 U S C A §§ 921(a)(33)(A), 922(g)(9); West's Wyo.Stat.Ann. § 6–2–501(b).

[5] Weapons 406 ⚷180(3)

406 Weapons
406IV Offenses
406IV(C) Possession, Use, Carrying, or Personal Transport
406k173 Possession After Conviction of Crime
406k180 Particular Offenses
406k180(3) k. Domestic violence. Most Cited Cases
(Formerly 406k4)

Defendant's prior conviction of battery under Wyoming statute that defined battery as "unlawfully touching another in a rude, insolent, or angry manner, or intentionally, knowingly, or recklessly causing bodily injury to another," was not a misdemeanor crime of domestic violence, for purposes of subsequent conviction of possession of firearm after having been convicted of a domestic crime of violence; first prong of Wyoming statute did not involve requisite physical force to meet definition, and it could not be determined under which prong of statute defendant was convicted 18 U S C A §§ 921(a)(33)(A), 922(g)(9); West's Wyo.Stat.Ann. § 6–2–501(b).

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David A. Kubichek, Assistant United States Attorney (John R. Green, Acting United States Attorney, District of Wyoming, with him on the briefs), Casper, WY, for Plaintiff–Appellee.

Before McCONNELL, SEYMOUR, and EBEL, Circuit Judges.

SEYMOUR, Circuit Judge.

On September 22, 2006, Steven Daniel Hays was indicted under 18 U.S.C. §§ 922(g)(9) and 924(a)(2) for possession of a firearm after having been convicted of a misdemeanor crime of domestic violence. His prosecution was predicated on a prior conviction under Wyoming's "simple assault; battery" statute. WYO. STAT. ANN.. § 6–2–501(b). Mr. Hays filed a motion to dismiss the indictment, contending that the underlying conviction was not a crime of domestic violence as defined by federal law. When the district court denied the motion, Mr. Hays conditionally pled guilty, reserving his right to appeal. He was sentenced to 18 months in prison and 3 years of supervised release. On appeal, he contends the district court erred in denying his motion. We agree and reverse.

I.

On March 27, 2003, Mr. Hays was issued a misdemeanor citation for violating Wyoming law. The citation stated, in part, that "[t]he defendant did unlawfully commit the following offenses against the peace and dignity of the State of Wyoming, County of Fremont[:] Battery—Under Domestic Violence Act in violation of W.S. 6–2–501." Rec., vol. I, doc. 15 at Def. Exh. A. Neither the citation nor the subsequent judgment in the case described the factual circumstances that led to this conviction. *Id.* at Def. Exh. B.

On September 22, 2006, Mr. Hays was federally indicted under §§ 922(g)(9) and 924(a)(2) for possession of a firearm after having been previously convicted of a misdemeanor crime of domestic violence. A "misdemeanor crime of domestic violence" is defined as an offense 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). Under the Wyoming statute at issue here, however, a person may be convicted of simple battery "if he unlawfully touches another in a rude, insolent or angry manner or intentionally, knowingly or recklessly causes bodily injury to another." WYO. STAT. ANN.. § 6–2–501(b). Mr. Hays contends that mere touching is not the type of "physical force" contemplated by the federal statute, and that his predicate conviction is therefore inadequate to support the charge in the indictment.

The district court denied Mr. Hays' motion to dismiss the indictment, concluding that

> *676 a person cannot make physical contact of a 'rude, angry, or insolent' nature without some level of physical force. Therefore, under the plain meaning rule, the 'unlawful [ ] touch[ing] of another in a rude, insolent or angry manner' made illegal by the Wyoming battery statute satisfies the 'physical force' requirement of § 921(a)(33)(A)(ii), which is to be applied to § 922(g)(9).

Rec., vol. I, doc. 22, at 10 (citation omitted). Mr. Hays appeals this determination [FN1]

> FN1. Relying on our decision in *United States v. Perez–Vargas*, 414 F.3d 1282 (10th Cir.2005), Mr. Hays also contends the district court committed plain error in failing to find *sua sponte* that the second prong of the Wyoming battery statute does not meet the "physical force" requirement of 18 U.S.C. § 922(g)(9). Because we conclude that the first prong of the Wyoming battery statute does not satisfy the federal definition of a "crime of domestic violence" and that we cannot determine under which prong the defendant was convicted, we do not need to reach this issue.

II.

We must decide whether Wyoming's battery statute satisfies the "use of physical force" element required by § 921(a)(33)(A)(ii)'s definition of a mis-

demeanor crime of domestic violence. We review this question of statutory interpretation *de novo* *United States v. Vigil*, 334 F.3d 1215, 1218 (10th Cir.2003).

In cases like this one, where the relevant federal statute refers to the "elements" of the underlying state conviction, we apply a "categorical approach" when assessing the nature of the prior conviction. *See* *United States v. Romero–Hernandez*, 505 F.3d 1082, 1085 (10th Cir.2007); *United States v. Martinez–Hernandez*, 422 F.3d 1084, 1086–87 (10th Cir.2005). Under the categorical approach, we "are limited to examining the statutory elements of the [prior] crime...." *United States v. Zamora*, 222 F.3d 756, 764 (10th Cir.2000) (internal quotations and citations omitted)

> Even the categorical approach, however, permits courts to look beyond the statute of conviction under certain circumstances. When the underlying statute reaches a broad range of conduct, some of which merits an enhancement and some of which does not, courts resolve the resulting ambiguity by consulting reliable judicial records, such as the charging document, plea agreement, or plea colloquy.

Martinez–Hernandez, 422 F.3d at 1086. *See also* *Romero–Hernandez*, 505 F.3d at 1086; *United States v. Perez–Vargas*, 414 F.3d 1282, 1284 (10th Cir.2005). Such review does not involve a subjective inquiry into the facts of the case, but rather its purpose is to determine "which part of the statute was charged against the defendant and, thus, which portion of the statute to examine on its face." *United States v. Sanchez–Garcia*, 501 F.3d 1208, 1211 (10th Cir.2007) (internal quotation and citation omitted).

In applying the categorical approach to this case, we begin by looking at the text of the federal statute. *Leocal v. Ashcroft*, 543 U.S. 1, 8, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004) ("Our analysis begins with the language of the statute."); *Sanchez–Garcia*, 501 F.3d at 1212 ("To answer this question, we start with the plain language of § 16(b)...."), *McGraw v. Barnhart*, 450 F.3d 493, 498 (10th Cir.2006) (same). Mr. Hays was convicted under 18 U.S.C. § 922(g)(9) which states:

> "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 *677 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."

Id. (emphasis added). Section 921(a)(33)(A), in turn, states that 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, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim[.]

Id. (emphasis added). This appeal turns on the interpretation of the term "physical force."

[1] Our "primary task" in interpreting statutes "is to determine congressional intent using traditional tools of statutory interpretation." *N.M. Cattle Growers Ass'n v. U.S. Fish and Wildlife Serv.*, 248 F.3d 1277, 1281 (10th Cir.2001) (internal quotations and citations omitted) Because neither § 922(g)(9) nor §

921(a)(33)(A) defines the term "physical force," "we look to the 'ordinary, contemporary, and common' meanings of the words used" *Romero–Hernandez*, 505 F.3d at 1087 (quoting *Perrin v. United States*, 444 U.S. 37, 42, 100 S.Ct. 311, 62 L.Ed.2d 199 (1979)).

Black's Law Dictionary defines "force" as "[p]ower, violence, or pressure directed against a person or thing," and "physical force" as "[f]orce consisting in a physical act, esp. a violent act directed against a robbery victim." BLACK'S LAW DICTIONARY (8th Ed.2004). Consistent with these definitions, the Supreme Court and both this circuit and others have suggested that "physical force" means more than mere physical contact; that some degree of power or violence must be present in that contact to constitute "physical force."

In *Leocal*, for example, the Supreme Court was charged with determining whether a prior conviction under Florida law for "driving under the influence of alcohol (DUI) and causing serious bodily injury" constituted a "crime of violence" within the meaning of 18 U.S.C. § 16. 543 U.S. 1, 4, 125 S.Ct. 377, 160 L.Ed.2d 271. Section 16 defines "crime of violence" to mean:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

The Court commented that "[i]n construing both parts of § 16, we cannot forget that we ultimately are determining the meaning of a 'crime of violence.' " *Id.* at 11, 125 S.Ct. 377. Significantly for our purpose, the Court then said, "[t]he ordinary meaning of this term, combined with § 16's emphasis on the use of physical force against another person (or the risk of having to use such force in committing a crime), suggests a category of *violent, active crimes* that cannot be said naturally to include DUI offenses." *Id.* (emphasis added).

Similarly, in *Flores v. Ashcroft*, 350 F.3d 666 (7th Cir.2003), the Seventh Circuit, *678 interpreting the term "physical force" in 18 U.S.C. § 16(a), observed:

> Every battery entails a touch, and it is impossible to touch someone without applying *some* force, if only a smidgeon. Does it follow that every battery comes within § 16(a)? No, it does not. Every battery involves 'force' in the sense of physics or engineering, where 'force' means the acceleration of mass. A dyne is the amount of force needed to accelerate one gram of mass by one centimeter per second per second. That's a tiny amount; a paper airplane conveys more. (A newton, the amount of force needed to accelerate a kilogram by one meter per second per second, is 100,000 dynes, and a good punch packs a passel of newtons.) Perhaps one could read the word 'force' in § 16(a) to mean one dyne or more, but that would make hash of the effort to distinguish ordinary crimes from violent ones.... To avoid collapsing the distinction between violent and non-violent offenses, we must treat the word 'force' as having a meaning in the legal community that differs from its meaning in the physics community. The way to do this is to insist that the force be violent in nature—the sort that is intended to cause bodily injury, or at a minimum likely to do so.

350 F.3d at 672. In *United States v. Belless*, 338 F.3d 1063, 1067–68 (9th Cir.2003), the Ninth Circuit construed § 921(a)(3), the statute we are concerned with here, to require more than mere touching:

> Any touching constitutes 'physical force' in the sense of Newtonian mechanics. Mass is accelerated, and atoms are displaced. Our purpose in this

> statutory construction exercise, though, is to assign criminal responsibility, not to do physics. As a matter of law, we hold that the physical force to which the federal statute refers is not *de minimis*.

In our own interpretation of § 16(b) in *Sanchez–Garcia*, 501 F.3d at 1212, we noted "[w]e also have provided that the term 'force' refers to 'destructive or violent force.' " (quoting *United States v. Venegas–Ornelas*, 348 F.3d 1273, 1275 (10th Cir.2003)) In dicta in *United States v. Treto–Martinez*, 421 F.3d 1156, 1159 (10th Cir.2005), we suggested that "not all physical contact performed in a rude, insulting or angry manner would rise to the level of physical force."

[2] The Wyoming statute under which Mr. Hays was convicted states that "[a] person is guilty of battery if he *unlawfully touches another in a rude, insolent or angry manner* or intentionally, knowingly or recklessly causes bodily injury to another." WYO. STAT. ANN.. § 6–2–501(b) (emphasis added). The record does not indicate which prong of the statute Mr. Hays violated: the "unlawfully touching" prong or the "recklessly causes bodily injury prong." Indeed, the only document in the record containing any information about the circumstances of Mr. Hays' underlying conviction is the presentence report in the present case, which is not one of the documents that this court may examine to resolve this ambiguity *See Shepard v. United States*, 544 U.S. 13, 26, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005). Thus, either *both* prongs of the Wyoming statute must satisfy the federal definition of a "crime of domestic violence," including its "physical force" component, or Mr. Hays' conviction under the Wyoming statute cannot support the charge in his federal indictment. We begin by analyzing the first prong.

[3] The first prong of the Wyoming statute, forbidding "rude, insolent or angry" touching, follows the common-law rule *See Flores*, 350 F.3d at 669 (recognizing that a similar Indiana statute followed the common-law rule of battery); ***679***State v. Rand*, 156 Me. 81, 161 A.2d 852, 853 (Me.1960) (finding that a Maine statute forbidding "attempts to strike, hit, touch or do any violence to another however small, in a wanton, willful, angry or insulting manner ...." was "declaratory of the common law"), *State v. Mater*, 13 N.J. 235, 99 A.2d 21, 24 (N.J.1953) (quoting 1 Hawkins, Pleas of the Crown, 134 as stating, "It seems that any injury whatsoever, be it never so small, being actually done to the person of a man, in an angry, or revengeful, or rude, or insolent manner, as by spitting in his face, or any way touching him in anger, or violently justling him out of the way, are batteries in the eye of the law."). Under this common law approach to battery, "any contact, however slight, may constitute battery." *Flores*, 350 F.3d at 669 Indeed, as one court has observed, the type of offenses that can "fall within the ambit of [the common law] crime vary widely and may include kissing without consent, touching or tapping, jostling, and throwing water ... or at the other of the end of the spectrum may include a fatal shooting or stabbing of the victim." *Epps v. State*, 333 Md. 121, 634 A.2d 20, 23 (Md.1993).[FN2]

> FN2 More recently, many states have moved away from the broad common law definition. "The modern approach, as reflected in the Model Penal Code, is to limit battery to instances of physical injury.... This is the prevailing view in those jurisdictions with new criminal codes, as reflected in the use of such statutory terms as ... 'force or violence upon the person.' " 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 16.2(a) (2d ed.2007). *See, e.g.*, UTAH CODE ANN. § 76–5–102(1)(c) ("an act, committed with unlawful force or violence, that causes bodily injury to another or creates a substantial risk of bodily injury to another").

[4] Accordingly, we conclude that the first prong

of the Wyoming battery statute does not categorically satisfy the definition of "misdemeanor crime of domestic violence" found in § 921(a)(33)(A) because it "embraces conduct that does not include 'use or attempted use of physical force.' " *Belless*, 338 F.3d at 1067. Indeed, one can think of any number of "touchings" that might be considered "rude" or "insolent" in a domestic setting but would not rise to the level of physical force discussed above. For example, in the midst of an argument, a wife might angrily point her finger at her husband and he, in response, might swat it away with his hand. This touch might very well be considered "rude" or "insolent" in the context of a vehement verbal argument, but it does not entail "use of physical force" in anything other than an exceedingly technical and scientific way. Similarly, "indirect" contact such as throwing "a snowball, spitball, or paper airplane," or water at one's spouse or domestic partner, without causing harm or injury, could be considered rude or insolent touching under the Wyoming statute.[FN3] *See Flores*, 350 F.3d at 669. We doubt this kind of contact was the type of crime of "domestic violence" that Congress had in mind when it passed § 922(g)(9).

> FN3. Contrary to what the dissent claims, our view is not that "physical force only occurs when some sort of injury or harm arises." Dissent at 1. Instead, we conclude only that WYO. STAT. ANN., § 6–2–501(b) encompasses *de minimis* physical touches that do not necessarily involve the level of "physical force" contemplated by Congress when it passed § 922(g)(9). *See* section C., *infra*.

Indeed, during the debate of the bill that later became 18 U.S.C. § 922(g)(9), one of the sponsoring senators referred repeatedly to "wife beaters" and "child abusers," and also to "people who engage in *serious* spousal or child abuse," "those who commit family *violence*," and "people who show they cannot control themselves *and are prone to fits of violent rage*," suggesting that the concern was with violent individuals rather than those who have merely *680 touched their spouse or child in a rude manner. 142 Cong. Rec. S8831–06 (1996) (emphasis added); *see also* 142 Cong. Rec. S11226–01; 142 Cong. Rec. S9458–03.

Additionally, the legislative history as a whole reveals *why* Congress added § 922(g)(9) to the overall statute. In a speech on the Senate Floor, Senator Lautenberg explained:

> Under current Federal law, it is illegal for persons convicted of felonies to possess firearms. Yet many people who engage in serious spousal or child abuse ultimately are not charged with or convicted with felonies. At the end of the day, due to outdated thinking, or perhaps after a plea bargain, they are—at most—convicted of a misdemeanor. In fact ... most of those who commit family violence are never even prosecuted. When they are, one-third of the cases that would be considered felonies if committed by strangers are, instead, filed as misdemeanors. The fact is, in many places today, domestic violence is not taken as seriously as other forms of criminal behavior. Often, acts of serious spouse abuse are not even considered felonies.

142 Cong. Rec. S8831–06 (1996). Later in that speech, Senator Lautenberg stated:

> 2,000 American children are killed each year from abuse inflicted by a parent or a caretaker. Yet, as I said before, many of these abusers and batterers are prosecuted only for misdemeanors, and under Federal law they are still free to possess firearms. *This amendment closes this dangerous loophole and keeps guns away from violent individuals who threaten their own families,* people who show they cannot control themselves and are prone to fits of violent rage, directed, unbelievably enough, against their own loved ones.

Id. (emphasis added); *see also* 142 Cong. Rec. S11872–03, 11877 (giving the example of a man who "beat his wife brutally and was prosecuted, but like most wife beaters, he pleaded down to a misdemeanor and got away with a slap on the wrist"). These comments make clear that Congress broadened the scope of § 922(g) to encompass misdemeanor crimes of domestic violence not out of a hope to keep guns out of the hands of individuals who may have inflicted *de minimis* touches on their spouses or children, but to keep guns out of the hands of domestic abusers who previously fell outside the bounds of the statute because they were convicted of misdemeanors rather than felonies due to "outdated thinking" or plea bargains.

The only other circuit to consider the identical Wyoming statute has reached the same conclusion. In *Belless*, 338 F.3d at 1063, the Ninth Circuit held:

> [T]he Wyoming law against rude touchings does not meet the requirements for the federal statute that defines the predicate offense for a felony firearm conviction: 'the use or attempted use of physical force, or the threatened use of a deadly weapon.' That category does not include mere impolite behavior. More inclusive battery statutes such as Wyoming's may be drafted to embrace conduct that too often leads to the more serious violence necessary as a predicate for the federal statute, but they are not limited to it, so cannot supply the necessary predicate. The phrase 'physical force' in the federal definition of 18 U.S.C. § 921(a)(33)(A)(ii) means the violent use of force against the body of another individual.

Id. at 1068. The court explained its reasoning as follows:

> The traditional doctrine of *noscitur a sociis,* that "the meaning of doubtful words may be determined by reference *681 to associated words and phrases," guides us in our inquiry. In the federal definition, the associated phrase is "threatened use of a deadly weapon." That is a gravely serious threat to apply to physical force. By contrast, the Wyoming statute criminalizes conduct that is minimally forcible, though ungentlemanly.... It may well be Wyoming's purpose to enable police to arrest people in such confrontations in order to avoid the risk that rude touchings will escalate into violence.

Id. at 1068–69.

The Eleventh Circuit reached a different conclusion upon consideration of Georgia's battery statute. In *United States v. Griffith*, 455 F.3d 1339, 1342 (11th Cir.2006), the court concluded that "under the plain meaning rule, the 'physical contact of an insulting or provoking nature' made illegal by the Georgia battery statute satisfied the 'physical force' requirement of § 921(a)(33)(A)(ii), which is defined in § 921(g)(9) " The court explained that "[a] person cannot make physical contact—particularly of an insulting or provoking nature—with another without exerting some level of physical force." *Id.* The First and Eighth Circuits have reached similar conclusions. *See United States v. Nason*, 269 F.3d 10, 20 (1st Cir.2001) ("[Offensive physical contacts] invariably emanate from the application of some quantum of physical force, that is, physical pressure against a victim."); *United States v. Smith*, 171 F.3d 617, 621, n. 2 (8th Cir.1999) ("[Insulting or offensive contact], by necessity, requires physical force to complete."). While these circuits may be correct from a scientific perspective, we agree with the Seventh Circuit that such a conception of physical force "collaps[es] the distinction between violent and non-violent offenses." *Flores*, 350 F.3d at 672. As the Court in *Leocal* and our cases discussed above have indicated, "physical force" in a "crime of violence," must, from a legal perspective, entail more than mere contact. Otherwise, *de minimis* touchings could give federal statutes, like § 922(g)(9), an overly broad scope and impact. *See id.*

[5] Accordingly, we hold that in the context presented here Wyoming's battery statute, WYO. STAT. ANN.. § 6–2–501(b), does not satisfy the "use of physical force" element of § 921(a)(33)(A)(ii)'s definition of a misdemeanor crime of domestic violence. As such, Mr. Hays' underlying conviction pursuant to the Wyoming statute did not support his conviction.

REVERSED.

EBEL, Circuit Judge, Dissenting.

Simply put, this case calls on us to consider whether an individual has necessarily been deemed to have used or attempted to use "physical force" for purposes of 18 U.S.C. § 921(a)(33)(A) when he has been convicted of a misdemeanor crime of domestic violence for "touch[ing] another in a rude, insolent or angry manner." [FN1] Apparently based on the premise that physical force only occurs when some sort of injury or harm arises, the majority concludes that *682 a rude, insolent, or angry touch does not necessarily involve physical force. I disagree and therefore respectfully dissent. In my opinion, the majority's conclusion is not supported by the plain language of the statute, is not supported by the overall statutory scheme, and is not supported by wise policy.

FN1. Mr. Hays failed to raise below the argument that the second prong of Wyo. Stat. § 6–2–501(b) (criminalizing "intentionally, knowingly or recklessly caus[ing] bodily injury to another") does not necessarily involve the use of physical force. As such, we may only review this argument for plain error; I do not believe that Mr. Hays has met his burden under the plain error standard First, the case that Mr. Hays relies on in making his plain error argument, *United States v. Perez–Vargas*, 414 F.3d 1282 (10th Cir.2005), neither involved Wyoming law nor section 921(a)(33)(A). Second, Mr. Hays failed to establish that his conviction did *not* involve the use of force (in fact the PSR suggests otherwise), and therefore failed to meet his burden in establishing a miscarriage of justice.

I. Plain Language

"When interpreting the language of a statute, the starting point is always the language of the statute itself. If the language is clear and unambiguous, the plain meaning of the statute controls." *McGraw v. Barnhart*, 450 F.3d 493, 498 (10th Cir.2006) (quotations omitted). Black's Law Dictionary defines "force" as "[p]ower, violence, or pressure directed against a person or thing." BLACK'S LAW DICTIONARY (8th ed.2004). The term "physical" is not defined in Black's, but is defined elsewhere as "[o]f or relating to the body as distinguished from the mind or spirit." AMERICAN HERITAGE DICTIONARY (4th ed.2006). Thus, the term "physical force," may be understood to involve the infliction of power, violence, or pressure against a person's body.

We compare that definition to the Wyoming misdemeanor domestic violence statute that criminalizes touching that is rude, insolent, or angry. The term "touch," by itself, could include any incidental contact between two persons. The American Heritage Dictionary defines "touch" as "[t]o cause or permit a part of the body, especially the hand or fingers, to come in contact with so as to feel." *Id.* However, Wyoming does not use the word "touch" by itself. It criminalizes as a misdemeanor domestic violence offense only touching that is "rude, insolent or angry." Those kinds of touches are not incidental, but are deliberate and aggressive—the very kind of physical force that Congress intended to cover in section 921(a)(33)(A).

While the majority appears to agree that the foregoing is correct from a "scientific perspective," it nevertheless believes that something more is required from a "legal perspective." To this end, the majority relies on *Leocal v. Ashcroft*, 543 U.S. 1, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004). I believe the majority's

reliance is misplaced.

In *Leocal*, the defendant had been previously convicted under a Florida statute that made "it a third-degree felony for a person to operate a vehicle while under the influence and, 'by reason of such operation, caus [e] ... [s]erious bodily injury to another.' " 543 U.S. at 7, 125 S.Ct. 377 (quoting Florida Stat. § 316.193(3)(c)(2)) (alterations in original). The Court was asked to consider whether the defendant's conviction in this regard was a "crime of violence" for purposes of 18 U.S.C. § 16, and therefore an aggravated felony for purposes of removability under the Immigration and Nationality Act (INA). 18 U.S.C. § 16 defines a crime of violence as:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

In concluding that the defendant's Florida conviction did not fall within the ambit of this statutory language, the Court relied in large part on the notion that the Florida statute lacked a mens rea requirement, while the term "use" in 18 U.S.C. § 16(a) "suggest[ed] a higher degree of intent than negligent or merely accidental conduct." *Leocal*, 543 U.S. at 9, 125 S.Ct. 377.

*683 Wyo. Stat. Ann. § 6–2–501(b) does have a mens rea requirement, however, making *Leocal* inapposite to the case at hand. In *Streitmatter v. State*, 981 P.2d 921, 924 (Wyo.1999), the Wyoming Supreme Court indicated that "[i]t is clear that Wyo. Stat. Ann. §§ 6–2–501 and 6–2–502 ..., simple assault and battery and aggravated assault and battery, are the statutory equivalents of a crime at common law." As such, the court had no hesitancy in concluding that "Wyo. Stat. Ann. § 6–2–502(a)(iii) [FN2] is a *general intent crime* " and would no doubt reach the same conclusion in relation to § 6–2–501. *Id.* at 924 (footnote and emphasis added). Importantly, general intent crimes require "the *intentional doing* of the prohibited act itself " *Id.* (emphasis added) (quoting 22 C.J.S. Criminal Law, § 30, p. 105). Thus, an individual may not violate § 6–2–501 by engaging in the type of "negligent or merely accidental conduct" that was at issue in *Leocal*.

> FN2. Wyo. Stat. Ann. § 6–2–502(a)(iii) provides that
>
> > (a) A person is guilty of aggravated assault and battery if he:
> >
> > ...
> >
> > (iii) Threatens to use a drawn deadly weapon on another unless reasonably necessary in defense of his person, property or abode or to prevent serious bodily injury to another....

The majority also appears to place great weight on the Court's statement in *Leocal* that it could not "forget that [it was] ultimately ... determining the meaning of the term 'crime of violence.' " 543 U.S. at 11, 125 S.Ct. 377. In this regard, the majority asserts that it is significant for our purposes that the *Leocal* Court went on to assert, "[t]he ordinary meaning of this term, combined with § 16's emphasis on the use of physical force against another person ... suggests a category of *violent, active crimes* that cannot be said naturally to include DUI offenses." *Id.* (emphasis added).

This language, however, is not on point for purposes of the case at hand. Unlike the *Leocal* Court, we are not being asked to ultimately consider the

meaning of the term "crime of violence." Instead, we are being asked ultimately to consider the meaning of the term "*misdemeanor* crime of domestic violence." The majority gives no weight to the *misdemeanor* qualifier that is central to this case. A misdemeanor crime will undoubtedly involve less violence than a felony; that is why it is a misdemeanor. We must also remain mindful that Congress' concern was "domestic" violence, where a victim may often be disproportionately vulnerable and where the range of force that may be used could take an almost infinite number of forms.

Finally, it is critical to remember that Wyo. Stat. Ann. § 6–2–501(b) criminalizes only rude, insolent, and angry touching, not mere touching. Such conduct is by no means de minimis, but instead, is the type that may readily lead to an escalation of violence.[FN3]

> FN3. One must keep in mind that section 18 U.S.C. § 922(g)(9) may only be invoked if there has been a previous *conviction* for misdemeanor domestic violence. The requirement of a prior conviction should be an adequate safeguard to ensure section 922(g)(9) is not invoked frivolously, as only incidents that were sufficiently severe to require police intervention and ultimately support a criminal prosecution and conviction will give rise to the enhancement.

It is presumably for these reasons that Congress used the broad phrase "physical force" unadorned or restricted by limiting qualifiers such as "violent" or "substantial" or "likely to cause injury" or "having the potential to cause injury" or "offensive" or any of the other myriad qualifiers that may now come into play as a result of the *684 majority's divergence from the simple statutory language. In plain English, a rude, insolent, or angry touch in a domestic context necessarily involves a "use of physical force." Congress did not choose to limit the phrase "physical force," and accordingly, neither should we.

II. Overall Statutory Scheme

As explained in the previous section, the plain language of section 921(a)(33)(A) does not require any sort of injury to occur before a predicate offense may arise. This point is bolstered by an examination of the overall statutory scheme. 18 U.S.C. § 922(g)(8)(C)(ii) criminalizes the possession of firearms by individuals who are subject to certain court orders. Specifically, section 922(g)(8)(C)(ii) applies to an individual who is subject to a court order that "by its terms explicitly prohibits the use, attempted use, or threatened use of *physical force* against such intimate partner or child *that would reasonably be expected to cause bodily injury* " (Emphasis added.) Thus, section 922(g)(8)(C)(ii) is explicitly limited to "physical force" "that would be reasonably expected to cause bodily injury." Section 921(a)(33)(A), of course, carries no such qualifier. Nevertheless, the majority concludes that it ought to judicially add such a restriction to section 921(a)(33)(A). This is unwarranted.

"It is well settled that where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" *Duncan v. Walker*, 533 U.S. 167, 173, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001) (alteration, quotations omitted). The majority offers no explanation for Congress' failure to limit "physical force" as used in section 921(a)(33)(A) to acts "that would reasonably be expected to cause bodily injury." Instead, the majority's opinion essentially serves to graft this language onto section 921(a)(33)(A) itself, and thereby does substantial harm to the presumption that Congress intentionally and purposely sought to do otherwise. This is imprudent, as section 922(g)(8)(C)(ii) clearly establishes that Congress had the wherewithal to add an "expected to cause bodily injury" qualifier had it wished to do so.

III. Policy

As a final matter, it seems to me that the majority's opinion is unwise from a policy perspective. It imposes an amorphous legal standard to determine whether conduct involving "physical force" rises to the level of a predicate offense for purposes of section 922(g)(9). The majority apparently requires that physical force result in some sort of "harm or injury." But, how much and of what kind? Is a scratch sufficient? What if glasses are knocked off the victim's face and broken, but the victim sustains no physical marks from the assault? How about an emotional injury? Once we start down the slippery slope left open by the majority opinion of qualifying what constitutes "physical force," our work will never be done.[FN4]

FN4. Indeed, although the majority cites several other circuits' precedent as support for its opinion, it appears there is now a three-way circuit split with respect to the general issue presented by this case. The opinions of the First, Eighth, and Eleventh circuits are in accord with my view that the plain language of the statute ought to control. *See United States v. Griffith*, 455 F.3d 1339, 1342 (11th Cir.2006) (asserting that "[a] person cannot make physical contact-particularly of an insulting or provoking nature-with another without exerting some level of physical force"), *cert. denied*, 549 U.S. 1343, 127 S.Ct. 2028, 167 L.Ed.2d 771 (2007); *United States v. Nason*, 269 F.3d 10, 20 (1st Cir.2001) (asserting that "offensive physical contacts with another person's body categorically involve the use of physical force (and, hence, qualify as misdemeanor crimes of domestic violence under section 922(g)(9) if perpetrated against domestic partners)"); *United States v. Smith*, 171 F.3d 617, 621 n. 2 (8th Cir.1999) (asserting that "insulting or offensive" ... "physical contact, by necessity, requires physical force to complete."). Meanwhile, the Seventh and Ninth circuits have adopted standards under which physical force must be "violent." See *United States v. Belless*, 338 F.3d 1063, 1068 (9th Cir.2003) (asserting "[t]he phrase 'physical force' in the federal definition at 18 U.S.C. § 921(a)(33)(A)(ii) means the *violent* use of force against the body of another individual" (emphasis added)), *Flores v. Ashcroft*, 350 F.3d 666, 669, 672 (7th Cir.2003) (although not precisely on point, asserting that a conviction for "touching in a rude, insolent, or angry manner" was not a crime of domestic violence for purposes of removability under the INA because it did not require "violent" force). Finally, as a third alternative, the majority evidently adopts the standard that "physical force" only arises when it causes "harm or injury." This suggests a need for the Supreme Court to intervene to resolve this split.

***685** I expect that Congress itself appreciated these difficulties, and therefore adopted the simple, more easily applied standard that is reflected in the statute's plain language. Based on section 921(a)(33)(A), an enhancement under section 922(g)(9) is appropriate whenever (1) in a domestic context, (2) the defendant has used physical force against another, (3) resulting in a conviction of a state misdemeanor for domestic violence. Unlike the amorphous standard engrafted onto the statute by the majority, the standard chosen by Congress can be easily applied. And of course, in the unlikely event that in a particularly unusual case the straightforward congressional standard is inequitable and represents a departure from the heartland context of section 922(g)(9), the sentencing court is always free to consider a variance. Thus, I believe the effort of the majority to improve upon the statute as drafted is neither necessary nor beneficial.

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vehicle can have on their CDLs. CDL holders do not deserve multiple chances to break the law. Commercial motor vehicles may be hauling hazardous materials, multiple trailers, or even numerous passengers. These drivers are operating huge vehicles at significant speeds and they, therefore, have an increased duty to the public with whom they share the roads.

MASKING

When prosecutors or judges treat CDL holders differently, allowing their convictions to be deferred, dismissed, or to go unreported, this may be considered masking which is prohibited by the FMCSRs and some state statutes. The federal government recognizes the vital role that state and local authorities play in safe-guarding the nation's roads and has even passed legislation intended to guarantee that every jurisdiction fulfills that duty equally. This legislation is intended to support CDLIS and the accuracy of its records. To help maintain that accuracy, effective September 30, 2002,[102] CDL holders were no longer eligible for deferral of moving violations under the federal statutory structure. The code forbids any masking of convictions by state authorities (court systems, licensing authorities, etc.). The code is explicit in the prohibition and 49 CFR 384.226 states:

> The State must not mask, defer imposition of judgment, or allow an individual to enter into a diversion program that would prevent a CDL driver's conviction for any violation, in any type of motor vehicle, of a State or local traffic control law (except a parking violation) from appearing on the CDLIS driver's record, whether the driver was convicted for an offense committed in the State where the driver is licensed or in another State.

This prohibition carries penalties that can be assigned to states failing to abide by the no masking rule. The Motor Carrier Safety Improvement Act of 1999[103] required the agency to withhold Motor Carrier Safety Assistance Program grant funds from the states if they did not comply with the regulations.[104] Further, the Act allows federal authorities to withhold certain portions of a state's federal-aid highway funds, potentially amounting to millions of dollars, for non-compliance. Additionally, the federal government retains the right to prohibit states falling out of compliance with federal safety regulations from issuing valid CDLs. It is the in every state's best interest to follow all federal mandates relating to CDLs. Some states have gone so far as to adopt the anti-masking language exactly or very closely in their own state codes.[105]

While the prohibition is clear, the complexity of some cases makes it difficult for prosecutors to know whether or not a potential disposition would be considered masking. To that end prosecutors

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[102] 49 CFR 384.226 (2010).

[103] Motor Carrier Safety Improvement Act of 1999, Pub. L. No.106-159, 49 U.S.C. §113. The stated purposes of the Act was to (1) establish a Federal Motor Carrier Safety Administration and (2) reduce the number and severity of large-truck involved crashes through more CMV and driver inspections and carrier compliance reviews, stronger enforcement, expedited completion of rules, sound research, and effective CDL testing, record keeping, and sanctions.

[104] 49 CFR 384.401 (2010): First year of non-compliance: 5% of the federal-aid highway funds; second year of non-compliance: up to 10% of federal-aid highway funds

[105] Minnesota (MINN.STAT..ANN. § 171.163); Colorado (COLO.REV. STAT.ANN. § 42-4-1719); Kansas (KAN.STAT.ANN. §8-2, 150).

DRIVER CHARGES	PROSECUTOR ACTIONS	COURT ACTIONS	MASKING?
Failure to Yield	NONE	Court convicts but allows Traffic School in lieu of reported conviction	YES
DUI	Dismisses case	NONE	NO
Reckless Driving	NONE	Court accepts defendant's plea of 'no contest', removes the case from the docket for 6 months and then dismisses citation based on driver's clean history.	YES
Speeding 20 mph over the limit while in a CMV	Driver agrees to pay speeding fine and costs.	Court collects fines then dismisses case and does not report as a conviction to the state licensing authority	YES
Driving while Suspended	Driver pleads to charge	Allows withdrawal of Guilty plea	NO

struggle with what they can and cannot do when dealing with persons that hold commercial drivers' licenses. Masking, at its core, is allowing a conviction that will affect a CDL holder's (or a driver of a CMV who should have held a CDL at the time of his offense) driving history to be deferred or diverted so as not to be reported.

Generally, masking as contemplated by 49 CFR 384.226, requires adjudication or, at least, factual finding of guilt followed by some action that intends to avoid the record or mandated consequences of conviction. The anti-masking provision does not prevent plea bargaining or dismissal of charges. Prosecutors should consider carefully the purpose of entering into a plea agreement or allowing any type of diversion. Prosecutorial discretion may always be exercised in support of due process or constitutional rights. Sometimes, the state's case is factually or practically weak on some point. Reducing CDL violations for the sole reason of avoiding potential impact on a driver's license, however, acts to contravene the intent and function of state and federal safety regulations. The purpose of the anti-masking federal and state rule is to ensure that licensing authorities have an accurate picture of a CDL holder's driving history. The increased penalties for multiple violations work to disqualify unsafe drivers. The only tool courts and prosecutors have to determine how serious a driver's pattern of traffic violations has been is the official driver's history. If that history is artificially preserved one time, or over and over again, the next prosecutor or judge has no way to know.

When confronted with defense counsel arguing against the imposition of penalties or the reporting of convictions, prosecutors should keep in mind the anti-masking prohibition is not an arbitrary rule. This legislation was passed strictly as a safety measure intended to keep the most dangerous offenders off the roads. A 2007 study assessed which

factors played a role in CMV crashes.[106] Up to 87% of the studied attributable factors in fatal crashes were driver related. Most involved failure to correctly assess the situation or poor driving decisions. The most common associated factors recorded included driver-based factors such as legal drug use, traveling too fast for conditions, lack of familiarity with the roadway, inadequate surveillance, fatigue, and feeling under pressure from motor carriers. The propensity to commit traffic violations has been shown as a good predictor of which drivers will cause crashes. A 2005 study by the American Transportation Research Institute found that violations from speeding (more than 15mph over) to reckless driving correlate to an increased chance of future crash involvement. The chance of future crash involvement increases significantly for traffic violators and can go up by as much as 56% to 325%.[107] The research clearly shows that enforcement of CDL violations is critical to identifying and removing the drivers who pose the most potential danger from the road.

If a defense attorney raises any type of equal protection argument by asserting that the imposition of harsher penalties on CDL holders is constitutionally prohibited, a prosecutor can rely on multiple cases addressing that argument. The most frequent appeals based on this equal protection argument have come from states that treat CDLs differently than a non-commercial license when the holder is convicted of impaired driving. These states permit a restricted or probationary license for a non-CDL but do not extend the same privilege to a driver's CDL. Multiple courts have examined and upheld these different standards for commercial vs. non-commercial drivers. Virginia's appellate court (*Russell Lee Lockett v. Commonwealth of Virginia*, 438 S.E.2d 497(Va. App. Ct. 1993) upheld a state's authority to refuse to issue a restricted CDL to an offender convicted of DUI, even if a non-commercial driver could get a restricted license. The California Court of Appeals (*Peretto v. Dep't of Motor Vehicles*, 235 Cal. App. 3d 449 (App. Ct. 1991)) upheld differing periods of license suspension for CDL vs. non-CDL holders

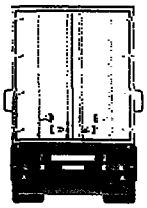
Essentially, these courts are finding no equal protection violation in differences of penalties for commercial vs. non-commercial drivers as long as there is a rational basis for the discrepancy. That rationale can logically be extended to differences in CDL driver qualifications, hours-of service requirements and testing. Because of the greater size, weight and potential danger of their vehicles as well the CMVs more complicated operating systems, these drivers can be legitimately held to higher standards.

REPORTING

Consistently reporting convictions serves many purposes. Drivers may be affected by multiple sources of pressure and influence to move faster and perhaps cut-corners in terms of equipment or operational safety. If law enforcement does not enforce regulations and the court systems do not hold drivers responsible for violating them, then the entire framework of state and federal safety

[106] The Large Truck Crash Causation Study (LTCCS) was based on a three-year data collection project conducted by the Federal Motor Carrier Safety Administration (FMCSA) and the National Highway Traffic Safety Administration (NHTSA) of the U.S. Department of Transportation (DOT). LTCCS was the first-ever national study to attempt to determine the critical events and associated factors that contribute to serious large truck crashes allowing DOT and others to implement effective countermeasures to reduce the occurrence and severity of these crashes.

[107] RONALD R. KNIPLING, PHD., SAFETY FOR THE LONG HAUL: LARGE TRUCK CRASH RISK, CAUSATION & PREVENTION 105 (2009).



regulations is ineffective. Conversely, strong enforcement can serve as the balancing influence that provides the incentive for CDL drivers to operate within the bounds of the law.

Prosecutors who avoid masking and always report CDL convictions are supporting other prosecutors and law enforcement officers across the country who may deal with the same offender in the future. It is important to report all relevant convictions including drug trafficking or any felony committed in any vehicle if the defendant holds or should have held a CDL. Without a clear picture of a driver's history, a prosecutor, judge, or even a perspective employer will be unable to determine the threat posed by that driver and what remedial actions should be taken to correct his poor driving. Drivers' histories are also used by traffic prosecutors who handle impaired driving cases as well as the serious or fatal crashes caused by impaired or reckless driving. Those prosecutors may rely on a driver's history at a bond or sentencing hearing.

The bottom line for prosecutors is that allowing convicted traffic offenders to "modify" a conviction or keep it off their record in an attempt to circumvent driver license action is masking. While there may be very good reasons to amend or plea bargain to a lesser charge, all prosecutors are subject to an ethical obligation to follow the law and avoid any perception of a failure to do so. Moreover, it is impossible to predict with 100% accuracy which offender may go on to commit a more serious offense or guess which traffic violations will receive scrutiny from higher authorities or media interest. In such cases, a prosecutor who has documented his reasons for any reduction, deferral, or dismissal of a CDL-related violation will be in the best position to explain his decision.