

Committee on the Impact of Domestic Violence and the Courts

Tuesday, September 13, 2016 – 10:00 a.m.

Arizona State Courts Building, 1501 W. Washington – Conference Room 119 A/B

Conference Call: 602-452-3288 Access Code: 6235#

[WebEx Link](#) [CIDVC Home Page](#)

Time*	AGENDA	Presenter
10:00 a.m.	Call to Order/Welcome and Introductions	<i>Judge Wendy Million Tucson City Court</i>
* Pg. 3	Approval of Minutes – February 9, 2016 <input type="checkbox"/> Formal Action/Request	
10:05 a.m. * Pg. 9	The Link Between Animal Cruelty and Human Violence	<i>Joan Bundy, Esq. Alison Ferrante, Gilbert City Prosecutor</i>
11:35 a.m. * Pg. 11	Protective Order Petition <input type="checkbox"/> Formal Action/Request	<i>Judge George T. Anagnost Presiding Judge, Peoria Municipal Court</i>
Noon	LUNCH	
12:30 p.m. * Pg. 15	Proposed Amendments to ACJA § 5-207: Orders of Protection and Injunctions Against Harassment <input type="checkbox"/> Formal Action/Request	<i>Kay Radwanski, AOC</i>
12:40 p.m. * Pg. 17	Workgroup Reports #1-Judicial Education #2-Orders, Enforcement and Access #3-Training and Education <input type="checkbox"/> Formal Action/Request	<i>Workgroup Chairs</i>
1:10 p.m. * Pg. 21	Report: Visit with Nepal Judiciary Representatives	<i>Judge Million</i>
1:20 p.m. * Pg. 25	Full Faith and Credit and “Registration” of Orders of Protection	<i>Kay Radwanski, AOC</i>
1:30 p.m. * Pg. 27	ARPOP Rule Petitions (R-15-0035, R-16-0026)	<i>Kay Radwanski, AOC</i>

1:40 p.m. Case Law Update-- *Kay Radwanski, AOC*
* Pg. 35 State v. Haskie (Ariz. Ct. App. Div. 1, 2016)
Voisine v. United States (136 S.Ct. 2272, 2016)

1:50 p.m. Announcements/Call to the Public *Judge Million*
Adjournment *Judge Million*

Next Meeting

Friday, November 1, 2016; 10 a.m.
Arizona State Courts Building
Conference Room 119 A/B

2017 Meeting Dates

February 14
May 9
September 12
November 14

Committee on the Impact of Domestic Violence and the Courts

Draft Minutes

Tuesday, February 9, 2016

10:00 a.m. to 12:00 p.m.

Conference Room 119A/B

1501 W. Washington Street, Phoenix, AZ 85007

Present: Judge Wendy Million (chair), Judge Keith D. Barth, Judge Marianne T. Bayardi, Judge Carol Scott Berry, Carla F. Boatner, Deborah Fresquez, Gloria E. Full, Patricia George, Esq., Judge Statia D. Hendrix, Rosalie Hernandez (proxy for Dana Martinez), Patricia Madsen, Captain Jeffrey Newnum, Judge Wyatt J. Palmer, Deputy Chief Andrew R. Reinhardt, Shannon Rich, Mary Roberts (proxy for Assistant Chief Sandra Renteria), Amy Jo Robinson, Tracey J. Wilkinson

Telephonic: Ellen R. Brown, Diane L. Culin, Dolores Lawrie-Higgins, Sarah Jimenez-Valdez (proxy for Anna Harper-Guerrero), John R. Raeder III

Absent/Excused: Lynn Fazz, Dorothy Hastings, Rebecca Strickland, Judge Patricia A. Trebesch

Presenters/Guests: Judge Karen Adam (Ret.), Shelley Clemens (AUSA), Aleshia Fessel, Betty McEntire, Judge Ron Reinstein (Ret.), Sharon Sexton (AUSA), Jovana Uzarraga-Figueroa (U.S. Attorney's Office-District of Arizona); and Jennifer Albright, Theresa Barrett, Denise Lundin, Jennifer Mesquita, Kathy Sekardi (Administrative Office of the Courts)

AOC Staff: Kay Radwanski, Julie Graber

I. REGULAR BUSINESS

A. Welcome and Opening Remarks

The February 9, 2016, meeting of the Committee on the Impact of Domestic Violence and the Courts (CIDVC) was called to order at 10:01 a.m. by Judge Wendy Million, Chair. Judge Million welcome members and introduced new members, Dolores Lawrie-Higgins, public member; John R. Raeder, III, Governor's Office for Children, Youth and Families; and Amy Jo Robinson, Maricopa Association of Governments.

B. Approval of Minutes

The draft minutes from the November 17, 2015, meeting of the CIDVC were presented for approval.

Motion: To approve the November 17, 2015, meeting minutes, as presented. **Action:** Approve, **Moved by** Judge Keith Barth, **Seconded by** Judge Carol Scott Berry. Motion passed unanimously.

II. BUSINESS ITEMS AND POTENTIAL ACTION ITEMS

A. Domestic Violence and the Federal System

Shelley Clemens and Sharon Sexton, Assistant United States Attorneys with the U.S. Attorney's Office-District of Arizona, reviewed federal domestic violence laws and statutes that are available for prosecuting defendants in domestic violence cases and discussed the challenges and issues of domestic violence cases.

- 18 U.S.C. § 922(g) governs the unlawful possession of firearms or ammunition. Prosecution for unlawful possession is not limited to firearms and includes possession of ammunition.
 - § 922(g)(1) – Unlawful possession of a firearm or ammunition by a convicted felon is the most commonly charged and applies to a person convicted in federal and state jurisdictions with felony offenses punishable by imprisonment exceeding one year. In order to prosecute, official court documents of conviction are needed, but the suspect does not need to have served more than one year.
 - § 922(g)(3) – Unlawful possession by a drug user or addict is not commonly charged because it is difficult to prove.
 - § 922(g)(5) – Unlawful possession by an alien is used for a person unlawfully present in the United States whose alien status is confirmed through immigration records after deportation. The defendant's statements can be used.
 - § 922(g)(8) – Unlawful possession while under a restraining order requires a domestic violence relationship and specific language in the court order, including a finding that the defendant is a credible threat to the partner's safety or qualifying language that prohibits the use, attempted use, or threatened use of force against the partner. This language is not always met in standard restraining orders.
 - § 922(g)(9) – Unlawful possession of a firearm with a prior domestic violence conviction does not apply to all domestic violence convictions and requires an element of force.
- Prosecutors can accept a § 922(g) case only if they can establish that it impacts interstate or foreign commerce, also called the "nexus" element. The Bureau of Alcohol, Tobacco, and Firearms will most often establish and confirm the nexus by tracing the weapons in a case to firearms or ammunition manufactured outside of Arizona and provide the required nexus statement to prosecutors.

Ms. Clemens discussed issues in unlawful possession cases and with qualifying prior convictions in tribal courts, prior misdemeanor crime of violence, domestic violence relationship, and adjudicated as mentally defective.

- A common "defense" is that the defendant did not know it was unlawful to possess ammunition. The prosecutor does not need to prove that the defendant knew it was

unlawful because strict liability applies and it is the defendant's responsibility to know what is prohibited. How does a prosecutor prove knowledge, exclusive use, or possession when a firearm is found in a vehicle or in a home with multiple occupants? The prosecutor can show knowledge, physical control, intention, and ability to control with other evidence, such as firearm accessories, receipts, and gun shop footage.

- There are issues with qualifying prior convictions in tribal courts because of inconsistency in the law. In *U.S. v. First*, misdemeanor convictions in tribal court qualified as prior offenses for misdemeanor firearms possession so long as they received all rights available under the Indian Civil Rights Act; however, *U.S. v. Bryant* held that prior misdemeanor convictions in tribal court could not be used to support a felony charge of domestic assault if the defendant was not provided a 6th Amendment Right to Counsel.
- A prosecutor should narrow down the factual basis to reflect the intentional use of physical force, rather than recklessness, for a prior misdemeanor crime of violence.

The presenters described the writ process from tribal to federal custody. While some tribes have a formal process, others do not. Prosecutors are constantly working with the tribes individually if there is a federal issue.

- The presenters confirmed that the federal definition of co-habiting is more narrow than the state's and must include an intimate partner relationship.

Jovana Uzarraga-Figueroa, Victim Witness Specialist, U.S. Attorney's Office-District of Arizona, discussed issues with victim rights, how victims are helped through the federal justice system, and the resources available. She noted that there are 21 federally recognized tribes in Arizona. She identified challenges for tribal victims with limited resources, transportation, safety planning, extended law enforcement response time, communication, and cultural and language issues.

B. Accounting for Domestic Violence in Custody Decisions

Judge Karen Adam (Ret.) provided background information regarding the [National Child Custody Project](#), which was developed by The Battered Women's Justice Project, National Council of Juvenile and Family Court Judges and the Association of Family and Conciliation Courts. The project was designed as a set of guidelines and curriculum to assist family court practitioners gather, synthesize and analyze information about the context and implications of domestic violence and account for the impact of domestic violence in actions and decisions. The module on taking informed action by accounting for abuse provides direction for judges on the nature, context and implications of abuse; connects domestic violence with parenting skills and best interest factors; and addresses relationships, remediation plans and safety. The training can be done online or as part of a day-long session. Judge Adam is talking with the AOC's Education Services and Court Services Division about providing a training session at the family law bench conference.

C. Implementation of Amendment to ARS § 13-3967 Re: DV Risk and Lethality Assessments

Judge Ron Reinstein (Ret.), chair of the Commission on Victims in the Courts (COVIC), discussed risk and lethality assessments in domestic violence cases and raised concerns about the lack of uniformity and training for law enforcement and judicial officers in implementing amendments to ARS § 13-3967. Judge Reinstein suggested creating a joint workgroup consisting of COVIC and CIDVC members to address these implementation issues and promote training, uniformity, confidentiality and standardized lethality assessments. He invited members to attend the next COVIC meeting on February 26, 2016, at 10:00 a.m.

The committee consensus was to partner with COVIC in a joint COVIC/CIDVC workgroup to discuss risk and lethality assessments. Patricia George, Anna Harper-Guerrero, Judge Wyatt Palmer, John Raeder, Deputy Chief Reinhardt, Shannon Rich, Amy Robinson, Judge Patricia Trebesch, and Tracey Wilkinson volunteered for the workgroup. Denise Lundin and Kay Radwanski will coordinate the workgroup.

D. Workgroup Report: Judicial Education Workgroup

Judge Marianne Bayardi reported that Dr. Neil Websdale, professor at Northern Arizona University, will be presenting two domestic violence topics at the Judicial Conference in June regarding lethality assessments in family law cases and the benefits and limitations of lethality assessments. Judge Million and Kay will be presenting on the revised ARPOP rules.

Judge Million reported that Bench Briefing 7—What’s New with ARPOP and Bench Briefing 8—Modifying and Dismissing Protective Orders have been revised to incorporate the new ARPOP rules.

E. ARPOP Rule Petitions (R-15-0035, R-16-0026)

Kay Radwanski reported on rule petitions that have been filed in the current rule cycle that affect the ARPOP rules. Members were asked to consider whether CIDVC should file formal comments to any of the petitions.

- R-15-0035 – The petitioner noted that the language clarifying that Orders of Protection must allege each specific act that will be relied on at the hearing was not included for Injunctions Against Harassment and Injunctions Against Workplace Harassment. Members agreed that the language should be consistent.

Motion: To file a comment to petition R-15-0035 stating that the language should be consistent. **Action:** Approve, **Moved by** Judge Bayardi, **Seconded by** Judge Palmer. CIDVC members also authorized Judge Million to file the comment to R-15-0035. Motion passed unanimously.

- R-16-0026 – The purpose of the rule petition is to expedite service of Orders of Protection by clarifying that courts are permitted to transmit orders electronically to cooperating law enforcement agencies. The benefits include saving time for plaintiffs and instant communication between courts and law enforcement. Ms. Radwanski explained why a commitment is needed from courts and law enforcement agencies (or private process servers). The deadline for comments is April 20, 2016.

Motion: To file a comment to petition R-16-0026 stating that CIDVC supports the proposed amendments. **Action:** Approve, **Moved by** Judge Palmer, **Seconded by** Deputy Chief Reinhardt. CIDVC members also authorized Judge Million to file the comment to R-16-0026. Motion passed unanimously.

- R-16-0008 – This petition, filed by the Committee on Time Periods for Electronic Display of Superior Court Case Records, would amend Rule 123, Rules of the Supreme Court, regarding access to court records by requiring courts to remove records from public access websites in accordance with the applicable records retention schedule; and to publish a prominent disclaimer describing the limitations on the case information displayed for courts that maintain public access websites. In superior court, Orders of Protection are retained with the court for 50 years and destroyed after the retention period; they are available on court public access websites for 50 years. In limited jurisdiction courts, OP cases are retained for only three years. The deadline for initial comments is April 20, 2016. The plan is for the amended Rule 123 and the records retention schedule to take effect on January 1, 2017. The committee consensus was not to file a comment.

III. OTHER BUSINESS

A. Good of the Order/Call to the Public

Call to the Public: Morgan Cottrell requested information about domestic violence training for judges.

B. Next Committee Meeting Date

Tuesday, May 10, 2016
10:00 a.m. to 3:00 p.m.
State Courts Building, Room 119
1501 W. Washington Street
Phoenix, AZ 85007

The meeting adjourned at 11:59 a.m.

COMMITTEE ON THE IMPACT OF DOMESTIC VIOLENCE AND THE COURTS

Meeting Date: September 13, 2016	Type of Action Requested: <input type="checkbox"/> Formal Action/Request <input checked="" type="checkbox"/> Information Only <input type="checkbox"/> Other	Subject: The Link Between Animal Cruelty and Human Violence
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From:

Presenter: Alison Ferrante and Joan Bundy

Description of Presentation: This presentation is entitled "The Link Between Animal Cruelty and Human Violence" and will discuss animal abuse and its relation to domestic violence. There will be a discussion of the animal cruelty statutes and prosecution of animal cruelty cases. The presentation will also include the use of orders of protection to protect animal and human victims of domestic violence as well as including an allegation of domestic violence in certain animal cruelty cases. There will also be an examination of the link between animal cruelty and domestic violence and the manner in which abusers use animals to exert power and control over the human victims (to include statistics). Case studies will also be presented that will demonstrate the connection between animal abuse/neglect and human abuse/neglect. Pet custody agreements will also be discussed.

Recommended Motion: Information only.

COMMITTEE ON THE IMPACT OF DOMESTIC VIOLENCE AND THE COURTS

Meeting Date: September 13, 2016	Type of Action Requested: <input checked="" type="checkbox"/> Formal Action/Request <input type="checkbox"/> Information Only <input type="checkbox"/> Other	Subject: Proposed Pilot for Protective Order Petition Form
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From: Hon. George T. Anagnost

Presenter: Hon. George T. Anagnost, Peoria Municipal Court

Description of Presentation: Peoria will present a proposed Protective Order Petition form and request it be basis of pilot project as a potential improvement of existing form. It is being submitted after informal discussions with AOC and that it might be a more readable and usable form for both petitioners and defendants. This same form was presented at LJC and LJC passed a motion supporting a possible CIDVC decision to use the form as a pilot in one or two of Arizona's limited jurisdiction courts. There was one vote in opposition that any change would be inconsistent with the uniformity of project "Passport".

1. This proposed form is universal and meets the margins for both Superior Courts and all Limited Courts.
2. It uses the same text, with minor changes, and the same sequence of paragraph numbers. In essence, it double spaces the caption and opens up the paragraphs. It does replace the "black box" with a more explanatory phrase. This is worth trying.
3. This is still a one-page document.
4. This proposed form is fully consistent with the Task Force objectives to improve readability and understanding for pro per litigants. It also comports with suggested format under the Americans with Disabilities Act.
5. The actual Protective Order remains completely the same and totally unaffected. All data captured is the same.

Recommended Motion: Approve a pilot project to use this Petition for Protective Order form and report back to the Committee.

COURT NAME AZ Number Court Number Street Address City, Zip (Tel) _____ (Fax) _____	<p style="text-align: center;">Case No. _____</p> <p style="text-align: center;">PETITION FOR PROTECTIVE ORDER</p>
Plaintiff Name: _____ Birth Date: _____ <input type="checkbox"/> Check here if Workplace Injunction Employer Name: _____ (Plaintiff signs as "Agent")	<p style="text-align: center;">THIS IS NOT A COURT ORDER NOTICE TO DEFENDANT AND LAW ENFORCEMENT: This petition contains Plaintiff's allegations and requests. The order or injunction issued by the court, not what is written in this petition, sets forth the actual terms and legal conditions.</p> Defendant Name (first, middle initial, last): _____ Defendant Mailing Address: _____ _____ Zip _____ Defendant Daytime Phone: _____

DIRECTIONS: Please PRINT all information. Read the Plaintiff's Guide Sheet before starting this form. The defendant will receive a copy of this petition when the order is served.

- 1. Party Relationship (Please check the one that most applies):**
- Married (past or present) Living together (past or present)
 One of us pregnant by other Parent of a child in common
 Romantic or sexual (past or present) Dating (not romantic or sexual)
 Related as parent, sister, brother, in-law, grandparent, grandchild
 Other: _____
- 2. If checked, there is a pending maternity, paternity, annulment, legal separation, dissolution, custody, parenting, or child support case, between plaintiff and defendant, in _____ Superior Court.**
- 3. Have you or Defendant been charged or arrested for domestic violence or requested a protective order?**
 Yes No Not sure
If "Yes" or "Not Sure", explain: _____

4. Basis for requesting this order. This is what happened and approximately when. (Do not write on back or in the margin. Attach additional papers if necessary.)

Approx. Date	Description

5. These additional persons should also be on this protective order. Defendant should stay away from them because Defendant is also a danger to them:

_____ Birth Date _____
 _____ Birth Date _____

6. Defendant should be ordered to stay away from these locations at all times, even when Plaintiff or any protected persons are not actually present there:

Home: _____
Workplace: _____
School / Other: _____

7. If checked, order Defendant to take domestic violence counseling or other classes. (This can be ordered by the court only after a hearing of which Defendant had notice and an opportunity to participate.)

8. If checked, because of risk of increased harm, Defendant should not be allowed to possess firearms or ammunition while this order is in effect.

9. Other Requests: _____

Under penalty of perjury, I swear or affirm that the above statements are true and correct to the best of my knowledge, information, or belief. I ask for a protective order granting relief as allowed by law.

Plaintiff: _____

Attest: _____
 Judicial Clerk/Notary

Date: _____

COMMITTEE ON THE IMPACT OF DOMESTIC VIOLENCE AND THE COURTS

Meeting Date: September 13, 2016	Type of Action Requested: <input checked="" type="checkbox"/> Formal Action/Request <input type="checkbox"/> Information Only <input type="checkbox"/> Other	Subject: Proposed Amendments to ACJA § 5-207: Orders of Protection and Injunctions Against Harassment
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From: Kay Radwanski, AOC; CIDVC Forms Workgroup

Presenter: Kay Radwanski, AOC

Description of Presentation: ACJA § 5-207 authorizes the AOC administrative director to approve changes to the mandated protective order forms that are used statewide. In its current form, ACJA § 5-207 contains a hyperlink that is no longer functional. The Forms Workgroup proposes that the link be removed and general directions to the forms be provided to the courts and the public. Also, the code refers to two court identification numbers that must appear at the top of each form; however, the templates for the Plaintiff's Guide Sheet and the Defendant's Guide Sheet do not indicate where these numbers should appear. As these forms are for the parties' use and are not part of the official case record, it is proposed that exceptions should be made for them. Other minor changes are proposed to improve clarity and readability. See the attached draft for all proposed changes.

Recommended Motion: Recommend that CIDVC staff move forward with filing a petition to amend ACJA § 5-207 as proposed.

ARIZONA CODE OF JUDICIAL ADMINISTRATION
Part 5: Court Operations
Chapter 2: Programs and Standards
Section 5-207: Orders of Protection and Injunctions Against Harassment

~~The attached forms are adopted for mandatory use by all Arizona courts for matters concerning orders of protection and injunctions against harassment in domestic violence cases.~~

All Arizona courts must use only those forms approved by the administrative director in matters concerning domestic violence orders of protection and injunctions against harassment. Individual court identification information (name, address, and two assigned court identification numbers) shall **must** appear at the top of each form, **except for the plaintiff's guide sheet and the defendant's guide sheet**. Courts may make technical formatting changes (for example, number of pages, line and margin spacing, and font size), use multi-part, carbonless paper, and develop non-English translations. Any other proposed alterations to or deviations from the approved forms, including any text changes, shall **must** be submitted to the administrative director for approval prior to use. The supreme court authorizes the administrative director to approve or modify the forms in response to changes in state or federal laws or procedures and make other necessary administrative amendments or corrections.

The ~~current~~ **approved** forms are available at:
~~<http://www.supreme.state.az.us/cidvc/Files/POforms.pdf>~~ **on the Judiciary Branch website and the AJINweb network.**

Adopted by Administrative Order 2001-86, effective August 9, 2001.

Amended by Administrative Order 2016-__, effective _____.

COMMITTEE ON THE IMPACT OF DOMESTIC VIOLENCE AND THE COURTS

Meeting Date: September 13, 2016	Type of Action Requested: <input checked="" type="checkbox"/> Formal Action/Request <input type="checkbox"/> Information Only <input type="checkbox"/> Other	Subject: Workgroup Reports
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From: Kay Radwanski, AOC

Presenter: Judge Carol Scott Berry, Phoenix Municipal Court

Description of Presentation: The Orders, Enforcement and Access Workgroup has developed a guide for advocates, courts, and law enforcement that wish to establish procedures for remote ex parte protective order hearings. The workgroup is seeking CIDVC approval of the guide.

Reports also will be presented by the Judicial Education and Training and Education workgroups.

Recommended Motion: Adopt the guide for remote ex parte protective order hearings.

Remote Petition Process for Order of Protection *Ex Parte* Hearing



1 Advocate

- Plaintiff fills out petition and Plaintiff's Guide Sheet.
- Contact court to request ex parte hearing; notify if interpreter needed; transmit petition and guide sheet to court.



2 Court

- Judicial Officer reviews the petition; sends it back to Advocate if more information is needed.
- Court schedules time for hearing and, if requested, interpreter.



3 Advocate

- At hearing time, activate video link, with Plaintiff in front of camera and with copy of petition



4 Court

- Judicial Officer or Clerk swears in Plaintiff.



5 Advocate

- Plaintiff signs petition after being sworn; Advocate transmits copy of signed petition to Court.



6 Court

- Judicial Officer conducts ex parte hearing; makes ruling.



7 Advocate

- Terminate video link when the hearing ends.

Remote Petition Process...



8 Court

- If order is granted, transmit to the Advocate the order and packet of documents for service on Defendant.
 - If possible, electronically transmit the order to Law Enforcement for immediate service on Defendant.
 - If Defendant is in the sheriff's custody, fax order to the Sheriff's Office for service by deputy sheriffs.
- If the order is denied, transmit hearing order to Advocate.
- If set for pre-issuance hearing, transmit hearing order and hearing notice to Advocate.



9 Advocate

- Provide copies to Plaintiff.
- If order has been granted, assist Plaintiff with service.
 - If possible, contact local law enforcement protective order coordinator electronically to notify of court-issued order.
 - If possible, personally contact or visit the local law enforcement agency OP coordinator to ensure service.



10 Law Enforcement

- Receive Order of Protection and other documents for service on Defendant.
- Within seven business days, transmit proof of service to the Court that issued the order.
- Establish a protective order coordinator or contact person to assist advocates and courts in service of orders.
- Establish electronic communication with advocates and courts to insure expedited service of court-issued orders.



11 Court

- Send protective order and proof of service to the county sheriff (holder of record).

COMMITTEE ON THE IMPACT OF DOMESTIC VIOLENCE AND THE COURTS

Meeting Date: September 13, 2016	Type of Action Requested: <input type="checkbox"/> Formal Action/Request <input checked="" type="checkbox"/> Information Only <input type="checkbox"/> Other	Subject: Report: Visit with Nepal Judiciary Representatives
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From: Kay Radwanski, AOC

Presenter: Judge Wendy Million

Description of Presentation: Judge Million will report on a recent opportunity she had to meet with a delegation of Nepal Judiciary representatives. The Nepalese delegation had specifically requested a meeting with Judge Million to discuss the issue of domestic violence. Please see the attached news release for more information about the delegation's visit.

Recommended Motion: Information only.

Contact: Heather Murphy
Telephone: (602) 452-3656
Cell: (602) 448-8412
hmurphy@courts.az.gov

June 9, 2016

Delegation from Nepal's Justice System Return to Arizona Supreme Court

PHOENIX – The United Nations Development Program (UNDP) recently sponsored a second visit to the Arizona Supreme Court with members of Nepal's judiciary. After a 2015 visit with the Arizona Supreme Court, the Nepal Supreme Court established an access to justice commission modeled on what they learned in the United States, including the example of the Arizona Supreme Court's own Access to Justice Commission.

Earlier this year, the Honorable Ms. Sushila Karki became the first female Chief Justice of Nepal's Supreme Court.

As part of the UNDP project entitled *Access to Justice Commission (A2JC) Study Visit in Nepal*, the Nepalese judges met with Chief Justice Scott Bales and local subject matter experts to discuss such topics as: strengthening access to justice, addressing domestic violence cases, increasing representation of women in the judiciary, and meeting the justice needs of minority communities. The day-long program included the following speakers;

- Mr. Dave Byers, Director, Arizona Supreme Court
- Honorable Scott Bales, Chief Justice, Arizona Supreme Court
- Honorable Maurice Portley, Judge, Court of Appeals, Chair of Commission on Minorities
- Professor Paul Bennett, University of Arizona James E. Rogers College of Law
- Mr. Michael Liburdi, Chief Counsel to Governor Doug Ducey
- Honorable Larry Winthrop, Judge, Court of Appeals, Chair of Commission on Access to Justice
- Honorable Wendy Million, Judge, Tucson City Court, Chair, Committee on the Impact of Domestic Violence and the Courts
- Mr. Marcus Reinkensmeyer, Court Services Division Director Case Management

“Nepal’s judicial leaders have embraced the goals of expanding access to justice and better addressing the needs of minorities, women, and victims,” Chief Justice Scott Bales said. “We shared with them how Arizona works to provide equal justice for all through court innovations and the work of our advisory committees, which are comprised of volunteers representing a wide range of perspectives.”

The representatives from Nepal included:

- Honorable Justice Govinda Kumar Upadhya, Nepal Supreme Court
- Honorable Justice Jagadish Sharma Poudel, Nepal Supreme Court
- Honorable Additional District Judge Surya Prasad Parajuli, Kathmandu District Court
- Mr. Shree Kanta Paudel, Registrar, Nepal Supreme Court
- Mr. Kumar Innam, Member, Access to Justice Commission
- Mr. Raju Dhungana, Section Officer, Nepal Supreme Court
- Ms. Khem Kumari Basnet, Section Officer, Nepal Supreme Court

To learn more about the Arizona Commission on Access to Justice please go to <http://www.azcourts.gov/cscommittees/Arizona-Commission-on-Access-to-Justice>. The next committee meeting is scheduled for August 17, 2016.

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COMMITTEE ON THE IMPACT OF DOMESTIC VIOLENCE AND THE COURTS

Meeting Date: September 13, 2016	Type of Action Requested: <input type="checkbox"/> Formal Action/Request <input type="checkbox"/> Information Only <input checked="" type="checkbox"/> Other	Subject: Full Faith and Credit and "Registration" of Orders of Protection
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From: Kay Radwanski, AOC

Presenter: Kay Radwanski, AOC

Description of Presentation: The purpose of this agenda item is to begin a discussion regarding full faith and credit and protective orders.

ARS § 13-3602(S) provides full faith and credit to protective orders issued by other states. This statute directs Arizona law enforcement to enforce an out-of-state protective order as if it were issued by an Arizona court, as long as the order is still effective in the issuing state. The statute (at ARS 13-3602(S)(4)) also provides law enforcement with immunity if, in fact, the order is no longer valid in the issuing state.

Despite this statutory provision, some law enforcement agencies believe that out-of-state plaintiffs must first register their orders in Arizona superior courts before law enforcement can intervene and protect the plaintiff from the defendant. Arizona superior courts do not have a procedure to "register" foreign protective orders, which results in confusion, with a plaintiff being sent back and forth between a police department and a court.

ARS § 13-3602. Order of protection; procedure; contents; arrest for violation; penalty; protection order from another jurisdiction

S. A valid protection order that is related to domestic or family violence and that is issued by a court in another state, a court of a United States territory or a tribal court shall be accorded full faith and credit and shall be enforced as if it were issued in this state for as long as the order is effective in the issuing jurisdiction. For the purposes of this subsection:

1. A protection order includes any injunction or other order that is issued for the purpose of preventing violent or threatening acts or harassment against, contact or communication with or physical proximity to another person. A protection order includes temporary and final orders other than support or child custody orders that are issued by civil and criminal courts if the order is obtained by the filing of an independent action or is a pendente lite order in another proceeding. The civil order shall be issued in response to a complaint, petition or motion that was filed by or on behalf of a person seeking protection.

2. A protection order is valid if the issuing court had jurisdiction over the parties and the matter under the laws of the issuing state, a United States territory or an Indian tribe and the person against whom the order was issued had reasonable notice and an opportunity to be heard. If the order is issued ex parte, the notice and opportunity to be heard shall be provided within the time required by the laws of the issuing state, a United States territory or an Indian tribe and within a reasonable time after the order was issued.

3. A mutual protection order that is issued against both the party who filed a petition or a complaint or otherwise filed a written pleading for protection against abuse and the person against whom the filing was made is not entitled to full faith and credit if either:

(a) The person against whom an initial order was sought has not filed a cross or counter petition or other written pleading seeking a protection order.

(b) The issuing court failed to make specific findings supporting the entitlement of both parties to be granted a protection order.

4. A peace officer may presume the validity of and rely on a copy of a protection order that is issued by another state, a United States territory or an Indian tribe if the order was given to the officer by any source. A peace officer may also rely on the statement of any person who is protected by the order that the order remains in effect. A peace officer who acts in good faith reliance on a protection order is not civilly or criminally liable for enforcing the protection order pursuant to this section.

Recommended Motion: Discussion.

COMMITTEE ON THE IMPACT OF DOMESTIC VIOLENCE AND THE COURTS

Meeting Date: September 13, 2016	Type of Action Requested: <input type="checkbox"/> Formal Action/Request <input checked="" type="checkbox"/> Information Only <input type="checkbox"/> Other	Subject: Rule 28 Petitions--2016 Rules Cycle
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From: Kay Radwanski

Presenter: Kay Radwanski

Description of Presentation: Two petitions to amend the Arizona Rules of Protective Order Procedure--R-15-0035 and R-16-0026--were filed in the 2016 rules cycle. The Supreme Court justices met on August 29, 2016, to make decisions regarding all petitions that were filed in the current cycle. Ms. Radwanski will report on the decisions made regarding these two petitions.

R-15-0035 requested amendment of ARPOP 25(b) and 26(b), the rules affecting the contents of petitions for Injunctions Against Harassment and Injunctions Against Workplace Harassment. CIDVC supported this petition but proposed alternate rule language.

CIDVC also supported R-16-0026, filed by AOC Administrative Director Dave Byers. The proposal would authorize a court, at a plaintiff's request, to transmit a protective order for service on a defendant to a cooperating law enforcement agency or a private process server under contract with the court).

Recommended Motion: Information only.

SUPREME COURT OF ARIZONA

In the Matter of) Arizona Supreme Court
) No. R-15-0035
RULES 25(b) and 26(b),)
ARIZONA RULES OF PROTECTIVE ORDER)
PROCEDURE)
)
) **FILED 9/2/2016**
)
_____)

ORDER
AMENDING RULES 25(b) and 26(b),
ARIZONA RULES OF PROTECTIVE ORDER PROCEDURE

A petition having been filed proposing to amend Rules 25(b) and 26(b), Arizona Rules of Protective Order Procedure, and comments having been received, upon consideration,

IT IS ORDERED that Rules 25(b) and 26(b), Arizona Rules of Protective Order Procedure, be amended in accordance with the attachment hereto, effective January 1, 2017.

DATED this 2nd day of September, 2016.

_____/s/_____
SCOTT BALES
Chief Justice

TO:
Rule 28 Distribution
Mike Palmer
Hon. Antonio F Riojas Jr.
Hon. Wendy Million

ATTACHMENT¹

Arizona Rules of Protective Order Procedure

Rule 25. Injunction Against Harassment

- (a) [No change in text.]
- (b) **Contents of Petition.** In ~~T~~the petition, the plaintiff must allege a series of specific acts of harassment, including and the dates of occurrence, that will be relied on at hearing. A series of acts means at least two events. *See* A.R.S. § 12-1809(C) and (S).
- (c) - (h) [No change in text.]

Rule 26. Injunction Against Workplace Harassment

- (a) [No change in text.]
- (b) **Contents of Petition.** In ~~T~~the petition, the plaintiff must allege at least one specific act of harassment, including and the dates of occurrence, that will be relied on at hearing. *See* A.R.S. § 12-1810(C)(3).
- (c) - (g) [No change in text.]

¹ Changes or additions in rule text are indicated by underscoring and deletions from text are indicated by strikeouts.

SUPREME COURT OF ARIZONA

In the Matter of) Arizona Supreme Court
) No. R-16-0026
RULE 31, ARIZONA RULES OF)
PROTECTIVE ORDER PROCEDURE)
)
) **FILED 9/2/2016**
_____)

**ORDER
AMENDING RULE 31, ARIZONA RULES OF PROTECTIVE ORDER PROCEDURE**

A petition having been filed proposing to amend Rule 31, Arizona Rules of Protective Order Procedure, and comments having been received, upon consideration,

IT IS ORDERED that Rule 31, Arizona Rules of Protective Order Procedure, be amended in accordance with the attachment hereto, effective January 1, 2017.

DATED this 2nd day of September, 2016.

_____/s/_____
SCOTT BALES
Chief Justice

TO:
Rule 28 Distribution
David K Byers
Kay Radwanski
Hon Wendy A Million
John A Furlong

ATTACHMENT¹

Arizona Rules of Protective Order Procedure

Rule 31. Service of protective orders

(a) Who Can Effect Service. A protective order can be served only by a person authorized by Rule 4(d), *Arizona Rules of Civil Procedure*, A.R.S. §§ 13-3602(R), 12-1809(R), or 12-1810(R) or as otherwise provided in this rule.

(b) Expiration of an Unserved Order. A protective order expires if it is not served on the defendant, together with a copy of the petition, within one year from the date the judicial officer signs the protective order. *See* A.R.S. §§ 13-3602(K), 12-1809(J) and 12-1810(I).

(c) Transmission of an Order of Protection or an Injunction Against Harassment. Upon issuance of an Order of Protection or an Injunction Against Harassment based on a dating relationship, and with the approval of the plaintiff, a court may transmit the documents for service to a cooperating law enforcement agency or a private process server under contract with the court.

~~(e)~~ **(d) Certification Not Required.** There is no requirement that the copy of the order served on the defendant be certified.

~~(d)~~ **(e) Service of a Modified Order.** The service and registration requirements applicable to the original protective order also apply to a modified protective order.

~~(e)~~ **(f) Acceptance of Service.** A defendant may sign an acceptance of service form, which has the same effect as service. If the defendant refuses to sign an acceptance of service form, the judicial officer may have the defendant served in open court. In superior court, the minute entry must reflect the method of service that was used.

~~(f)~~ **(g) Service in Court.** If the defendant is present in court and refuses to sign an acceptance of service form, the judicial officer must have the defendant served in open court by a person specially appointed by the court. A judicial appointment to effectuate service may be granted freely, is valid only for the service of the protective order or modification entered in the cause, and does not constitute an appointment as a registered private process server. A specially appointed person directed to serve such process must be a court employee who is at least 21 years old and cannot be a party, an attorney, or the employee of an attorney in the action whose process is being served. If such an appointment is entered on the record, a signed order is not required provided a minute entry reflects the special appointment and the nature of service.

¹ Changes or additions in rule text are indicated by underscoring and deletions from text are indicated by strikeouts.

~~(g)~~ **(h) Service at the Scene.** If a defendant is physically present with the plaintiff and has not yet been served, a peace officer may be summoned to the scene and may use the plaintiff's copy of the protective order to effect service on the defendant.

~~(h)~~ **(i) Filing the Proof of Service.** The original proof of service must be promptly filed with the clerk of the issuing court. If mailed, proof of service must be postmarked no later than the end of the seventh court business day after the date of service. Proof of service may be submitted by facsimile, provided the original proof of service is promptly filed with the court. *See* A.R.S. §§ 13-3602(M), 12-1809(L) and 12-1810(K).

~~(i)~~ **(j) Effective Date.** An initial protective order takes effect when the defendant is served with a copy of the order and the petition, and it expires one year from the date it is served. A modified order takes effect upon service but expires one year after service of the initial order.

COMMENT

The defendant must be personally served because 1) personal service on the defendant satisfies the criminal notice requirement if a violation of the protective order is prosecuted under criminal statutes, and 2) unless the affidavit of service, acceptance of service, or return of service shows personal service on the defendant, many sheriffs' offices, which are the holders of record, will not accept a protective order for entry into protective order databases.

COMMITTEE ON THE IMPACT OF DOMESTIC VIOLENCE AND THE COURTS

Meeting Date: September 13, 2016	Type of Action Requested: <input type="checkbox"/> Formal Action/Request <input checked="" type="checkbox"/> Information Only <input type="checkbox"/> Other	Subject: Case Law Update
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From: Kay Radwanski, AOC

Presenter: Kay Radwanski, AOC

Description of Presentation: State v. Haskie is a sequel to State v. Ketchner (236 Ariz. 262, 2014) in that the same expert testified in each of these cases. In Ketchner, she testified about lethality factors and the typical behavior of domestic violence abusers in a Mohave County case. The Arizona Supreme Court, in 2014, said her testimony was inadmissible profile evidence and was not harmless error. In Haskie, a Coconino County case, she testified as a “cold expert” on the counterintuitive behaviors of domestic violence *victims* and why a victim might recant. The Court of Appeals found that her testimony was not offender profiling or impermissible vouching of the victim’s credibility.

Voisine v. United States ties up a loose end that the U.S. Supreme Court left hanging in U.S. v. Castleman, a 2014 decision. Voisine affirms that a “reckless” domestic assault qualifies as “misdemeanor crime of domestic violence” under Lautenberg. In Castleman, the Supreme Court held that a knowing or intentional assault qualifies but did not address a “reckless” assault.

Recommended Motion: Information only.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA,
Appellee,

v.

MARK HASKIE, JR.,
Appellant.

No. 1 CA-CR 15-0251
FILED 7-19-2016

Appeal from the Superior Court in Coconino County
No. S0300CR201401006
The Honorable Jacqueline Hatch, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Robert A. Walsh
Counsel for Appellee

Coconino County Public Defender's Office, Flagstaff
By Brad Bransky
Counsel for Appellant

OPINION

Judge Patricia A. Orozco delivered the opinion of the Court, in which Presiding Judge Diane M. Johnsen and Judge Kenton D. Jones joined.

O R O Z C O, Judge:

¶1 Mark Haskie, Jr. (Defendant) appeals his convictions and sentences for two counts of aggravated assault – domestic violence, five counts of aggravated domestic violence, two counts of influencing a witness, and one count of kidnapping. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY¹

¶2 Officer Jordheim of the Flagstaff Police Department responded to a 911 call regarding domestic violence at a motel. At the motel, Officer Jordheim met a female, P.J., whose “eyes were swollen, pretty well bruised [with] various bruises and abrasions on her body and neck.” P.J. told Officer Jordheim that Defendant caused her injuries after going through her cell phone and threatening “I told you I would kill you if you cheated on me.”

¶3 That same day, P.J. hand-wrote a statement at Officer Jordheim’s invitation, explaining

[Defendant] . . . beat me so bad in the face and other places in my body. He strangled me with a belt and also my [d]uffle bag [strap]. . . . He hit me so hard he loosen[ed] my front tooth. . . . When I was being strangled I couldn’t breath[e] at all. . . . And this time I thought I was going to die and he kept saying why don’t you just die.

Police also collected physical evidence from the motel room where P.J. and Defendant had been staying, including a belt, luggage strap, bloodied pillows and items belonging to Defendant.

¹ “We view the evidence in the light most favorable to affirming the jury’s verdicts.” *State v. Ortiz*, 238 Ariz. 329, 333, ¶ 2 (App. 2015).

¶4 Defendant was arrested nearly a year later. Shortly after the arrest, P.J. wrote two letters to the prosecutor recanting her earlier statement to police. In those letters, P.J. explained that she was drinking heavily at the time and suggested that her injuries occurred in a bar fight that she could not remember. She said she lied to police and took “full responsibility for [her] actions against [Defendant.]” She further stated that Defendant was innocent, and she would not testify against him because the charges were false.

¶5 Before trial, the State filed a motion in limine asking the court to admit testimony by Dr. Ferraro, its expert witness on domestic violence. The State intended to call Dr. Ferraro as a “cold” expert on domestic violence to help the jury understand why “[P.J. had] continued her relationship with the defendant, [had] given conflicting statements while the case has been pending, and [was] reluctant to testify[.]” Defendant objected to Dr. Ferraro’s testimony, arguing it would constitute improper profile evidence and vouching. In reply, the State agreed to limit Dr. Ferraro’s testimony to only “the victim’s behaviors and the common reactions and coping strategies victims use in response to a violent incident” that might be misunderstood by a jury. The State also proposed a list of questions it intended to ask Dr. Ferraro at trial. Following a hearing, the trial court permitted Dr. Ferraro’s testimony, but limited the examination to the State’s proposed questions.

¶6 During its opening statement at trial, the State mentioned Dr. Ferraro’s testimony, stating “you’re going to hear from Dr. Kathleen Ferraro, who is an expert in domestic violence . . . [and she’ll] tell you that it’s not unusual for a victim to later change their story or to even help make a case go away.”

¶7 At trial, Officer Jordheim testified about responding to the 911 call, and the State presented photos of the motel room, items found in the motel room and P.J.’s injuries. The State also presented recorded phone calls Defendant made from jail, including to P.J. before she recanted. In these conversations, Defendant dictated to P.J. an exculpatory story, and asked P.J. and other family members to write statements corroborating the story. Defendant also apologized to P.J., told her she was the only person that could get him out of jail and promised to marry her when he was released. Defendant suggested that if P.J. did not cooperate with police, the charges against him would be dropped. During one call, P.J. said, “well maybe you shouldn’t have tried to kill me. . . . You know exactly what you did.”

¶8 Dr. Ferraro testified that she was a “cold or blind” expert, meaning she had not reviewed any of the police reports in the case and was not going to testify about any of the particulars of the events in the case. The prosecutor asked a series of questions regarding characteristics of domestic violence victims. When asked, “is it unusual for someone who has been hurt by an intimate partner to return to that relationship[,]” Dr. Ferraro responded, “[i]t’s not unusual. It is very common.” She continued, “[t]here are many reasons [why,] and they vary by the individual, of course, and the type of relationship.” Dr. Ferraro explained that some victims of domestic violence return to their abusers out of fear, retaliation, or threats. Other victims do not leave their abusers because of pressure from extended family or the victim’s own shame. Dr. Ferraro further testified that chemical dependency and alcohol abuse complicate the decision about staying in an abusive relationship.

¶9 The prosecutor then asked “do victims ever tend to blame themselves for what happened?” Dr. Ferraro responded:

Yes. That’s a very common response of victims of domestic violence.

...

[P]art of it has to do with the manipulation of an abusive partner themselves because that’s a very common dynamic of domestic violence, is the abusive partner will turn the violence around and say that if you hadn’t done this or you had done that as I told you to do, this never would have happened, so it’s your fault. And if you would just behave or comply with my wishes and my commands, then this wouldn’t happen.

¶10 The prosecutor asked “[i]s it unusual for victims to later change their story?” Dr. Ferraro answered, “[n]o that is very typical[,]” adding that occurs for many of the same reasons that a victim would be reluctant to leave the relationship. In addition, she explained, the victim may be afraid of violent repercussions, pressure from the abuser, friends and extended family, intimidation to discontinue prosecution, and emotional and psychological manipulation.

¶11 Then the following exchange took place:

Q. ... Are there occasions when someone may initially tell or give a report that isn’t true?

A. Yes.

Q. . . . [I]s this incredibly common, more rare?

A. In my own research and experience, it's very rare. But I have seen it happen. I know that it happens. What's much more common is for victims to minimize and deny that it has happened. That I see in almost every case. But the fabrication of events I have seen that happen, but it's unusual in the range of cases.

Q. . . . [H]ave you ever seen efforts made to assist their partner in terms of getting them out of trouble or trying to make something go away, avoid accountability?

A. Yes, often.

Q. . . . Are those factors the same in terms of why women do that?

A. They are very often the same. I've actually seen women go to jail and take the responsibility for a crime that their abusive partner has committed. And in part that is related to the psychological manipulation . . . where the abusive person will have them convinced that they'll get a much lighter sentence, that they maybe won't get a sentence at all.

¶12 P.J. was the State's next witness. She testified that she was still in a relationship with Defendant at the time of trial, she loved him and wanted to marry him. P.J explained that she did not remember who beat her up because she had been drinking at the time. P.J. testified that she initially blamed Defendant for her injuries because she was jealous, but that she in fact had cheated on him.

¶13 Before the jury began deliberations, the trial court instructed the jurors that they were not bound by any expert opinion and should give an opinion only the weight they believed it deserved. During closing arguments, the prosecutor never mentioned Dr. Ferraro, nor compared any aspect of her testimony to P.J. or Defendant.

¶14 The jury found Defendant guilty of two counts of aggravated assault – domestic violence, five counts of aggravated domestic violence, two counts of influencing a witness, and one count of kidnapping.

Defendant timely appealed and we have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes (A.R.S.) sections 12-120.21.A.1, 13-4031, and -4033.A.1 (West 2016).²

DISCUSSION

¶15 Defendant contends that Dr. Ferraro’s testimony constituted impermissible offender profiling and vouching. After objecting to the State’s motion in limine to allow Dr. Ferraro to testify, Defendant did not object to Dr. Ferraro’s testimony at trial. “[W]here a motion in limine is made and ruled upon, the objection raised in that motion is preserved for appeal, despite the absence of a specific objection at trial.” *State v. Burton*, 144 Ariz. 248, 250 (1985). Accordingly, Defendant’s objection was preserved for appeal, and we review the trial court’s decision to permit Dr. Ferraro’s testimony for abuse of discretion. *See State v. Ketchner*, 236 Ariz. 262, 264, ¶ 13 (2014).

¶16 “[A]n expert witness may testify about the general characteristics and behavior of [a defendant] and victim[] if the information imparted is not likely to be within the knowledge of most lay persons.” *State v. Tucker*, 165 Ariz. 340, 346 (App. 1990). Dr. Ferraro only offered general testimony to help the jury understand the evidence. She was unfamiliar with the facts of the case and did not offer an opinion regarding this case. *See State v. Salazar-Mercado*, 234 Ariz. 590, 591, ¶¶ 2, 6 (2014).

I. Offender Profiling

¶17 Defendant argues that Dr. Ferraro’s testimony constituted impermissible offender profiling. “Profile evidence tends to show that a defendant possesses one or more of an “informal compilation of characteristics” or an “abstract of characteristics” typically displayed by persons engaged in a particular kind of activity.” *Ketchner*, 236 Ariz. at 264, ¶ 15 (quoting *State v. Lee*, 191 Ariz. 542, 544-45, ¶ 10 (1998)). Profile evidence cannot be “used as substantive proof of guilt because of the ‘risk that a defendant will be convicted not for what he did but for what others are doing.’” *Id.* at 264-65, ¶ 15 (quoting *Lee*, 191 Ariz. at 545, ¶¶ 11-12).

¶18 Dr. Ferraro’s testimony did not constitute impermissible profile evidence. The Arizona Supreme Court addressed the issue of profile evidence in the context of domestic violence for the first time in *Ketchner*,

² We cite the current version of applicable statutes when no revisions material to this decision have since occurred.

236 Ariz. at 264, ¶ 13. In *Ketchner*, an expert witness³ testified about “characteristics common to domestic violence victims and their abusers[.]” *Id.* at 264, ¶ 14. Specifically, the expert testified regarding “separation assault” and “described risk factors for ‘lethality’ in an abusive relationship.” *Id.* The Arizona Supreme Court held that the testimony was inadmissible profile evidence because it went beyond “explain[ing] behavior by [the victim] that otherwise might be misunderstood by a jury.” *Id.* at 265, ¶ 19. Rather, the testimony “predicted an abuser’s reaction to loss of control in a relationship.” *Id.* The Court found “[t]here was no reason to elicit this testimony except to invite the jury to find that Ketchner’s character matched that of a domestic abuser who intended to kill or otherwise harm his partner in reaction to a loss of control over the relationship.” *Id.*

¶19 Dr. Ferraro’s testimony in this case is distinguishable from *Ketchner* because here, the testimony did not tend to show that Defendant possessed one or more of an informal compilation of characteristics typically displayed by domestic violence abusers. Instead, her testimony was confined to the general counterintuitive behaviors of victims, and the factors that cause such behaviors. In particular, Dr. Ferraro testified about victims returning to an abusive relationship, and victims taking responsibility for their abuse.

¶20 First, Dr. Ferraro testified that “[i]t’s not unusual” for someone who has been hurt by an intimate partner to return to that relationship. Dr. Ferraro opined “[t]here are many reasons [why,] and they vary by the individual, of course, and the type of relationship.” She further opined as to some of the factors that cause such behavior, such as fear, retaliation, threats, pressure from extended family, alcohol abuse and the victim’s own shame. Far from creating an informal compilation of characteristics of *abusers*, Dr. Ferraro’s testimony helped explain counterintuitive behavior of *victims* that the jury may have misunderstood. This was especially helpful for the jury here because the nature of P.J.’s relationship with Defendant was squarely in question. *Cf. Ketchner*, 236 Ariz. at 265, ¶ 19 (noting that expert testimony was not helpful to the jury because the nature of the abusive relationship was not in question).

¶21 Second, Dr. Ferraro testified that domestic violence victims tend to blame themselves, take responsibility for the abuse, or help their abusive partner avoid accountability. She opined that these behaviors are

³ Dr. Ferraro was also the expert who testified in *Ketchner*. See 236 Ariz. at 264, ¶ 13.

a result of manipulation by the abuser. Defendant argues that this testimony “epitomizes the domestic violence offender profiling . . . absolutely prohibited in *Ketchner*,” particularly because evidence in this case matched Dr. Ferraro’s testimony about how abusers manipulate victims.

¶22 Defendant highlights that some evidence the State offered matched Dr. Ferraro’s testimony. Indeed, evidence showed that Defendant manipulated P.J. by “turning the violence around” and convincing P.J. to help him get acquitted. Before the attack, Defendant went through P.J.’s phone and threatened to kill her if she ever cheated on him. Later, P.J. blamed herself for the attack, asserting that she, not Defendant, was the cheater. In phone calls from jail after his arrest, Defendant told P.J. that she was the only person that could get him released and that he needed P.J. to write a statement corroborating his exculpatory story. Then, in her letters to the prosecutor, P.J. changed her story and took “full responsibility” for the violence and her injuries. P.J. also blamed herself at trial.

¶23 The purpose of expert testimony such as Dr. Ferraro’s is to explain counterintuitive behaviors commonly seen in a victim of domestic violence. For that reason, it is not surprising – indeed it is expected – that the jury will hear evidence that the victim has behaved to a greater or lesser extent in accord with the testimony of a “cold” and “blind” expert such as Dr. Ferraro. Even though this evidence echoed some of Dr. Ferraro’s testimony, her testimony did not tend to show that Defendant possessed “one or more of an informal compilation of characteristics” typically displayed by domestic violence abusers. *See Ketchner*, 236 Ariz. at 264, ¶ 15. Nor did the testimony “implicitly invite[] the jury to infer criminal conduct based on the described” conduct. *Id.* at 265, ¶ 17 (citing with approval *Ryan v. State*, 988 P.2d 46, 56-57 (Wyo. 1999)). Rather, Dr. Ferraro’s testimony properly described general behaviors that were not likely to be within the knowledge of most lay persons. *See Tucker*, 165 Ariz. at 346. Accordingly, Dr. Ferraro’s testimony did not constitute impermissible profile evidence.

II. Vouching

¶24 Defendant also argues that Dr. Ferraro’s testimony impermissibly vouched for P.J.’s credibility. Evidence that explains “why recantation is not necessarily inconsistent with the crime having occurred” helps the jury evaluate a victim’s credibility. *State v. Moran*, 151 Ariz. 378, 384 (1986). But an “expert may neither quantify nor express an opinion about the veracity of a particular witness or type of witness.” *Tucker*, 165 Ariz. at 346; *see also State v. Lindsey*, 149 Ariz. 472, 474 (1986) (noting that an

expert should not be “allowed to go beyond the description of general principles of social or behavioral science which might assist the jury in their own determination of credibility”).⁴ “Nor may the expert’s opinion as to credibility be adduced indirectly by allowing the expert to quantify the percentage of victims who are truthful in their initial reports despite subsequent recantation.” *Moran*, 151 Ariz. at 382.

¶25 The majority of Dr. Ferraro’s testimony discussed only the social and behavioral factors bearing on a domestic violence victim’s recantation, which does not constitute impermissible vouching. However, citing *Lindsey*, Defendant argues that Dr. Ferraro quantified P.J.’s credibility and “in no uncertain terms, told the jury that P.J.’s original accusatory report was true and her recantation false.” But Dr. Ferraro did not testify that P.J.’s original report was true. She only testified in general terms that she “often” sees domestic violence victims assist their partners in avoiding accountability, and that it “is very typical” for victims to later change their stories.

¶26 *Moran* recognized that expert testimony “explaining why recantation is not necessarily inconsistent with the crime having occurred aid[s] the jury in evaluating the victim’s credibility.” 151 Ariz. at 384. In that case, a child sex abuse victim recanted after reporting numerous times that abuse was occurring. *Id.* at 380. An expert witness properly explained factors that could lead a child sex abuse victim to recant. *Id.* at 383-84. However, the expert impermissibly testified that the child’s statements were truthful and her “behavior, including recantation, was typical of molested children.” *Id.* at 379.

¶27 In *Lindsey*, an expert impermissibly testified about a victim’s credibility, stating “most people in the field feel that it’s a very small proportion [of incest victims] that lie.” 149 Ariz. at 474. The expert opined that “the likelihood [of abuse] is very strong . . . I feel there’s a preponderance of the evidence here.” *Id.* The effect of this testimony was to “tell the jury who [was] correct or incorrect” and to opine on the question of guilt. *Id.* at 475 (internal quotation omitted). Thus, the testimony was improper. *Id.*

¶28 Although *Moran* and *Lindsey* involve child victims of sexual abuse rather than adult victims of domestic violence, those cases are

⁴ “[O]pinions about witness credibility are nothing more than advice to jurors on how to decide the case.” *State v. Boggs*, 218 Ariz. 325, 335 (2008) (internal quotation marks omitted).

instructive here. The State concedes that Dr. Ferraro's testimony went beyond that permitted by *Moran*, and ventured into that prohibited by *Lindsey*, when she opined that "it's very rare" for a victim to give a false initial report, but that it is "much more common . . . for victims to minimize and deny that it has happened. That I see in almost every case." That statement by Dr. Ferraro did not just explain why a victim's recantation was not necessarily inconsistent with abuse having occurred; instead, it commented directly on a victim's credibility. Accordingly, we find this portion of Dr. Ferraro's testimony constituted impermissible vouching.

¶29 On the other hand, to the extent Dr. Ferraro testified in general terms about domestic violence victims, we find that testimony was admissible. In contrast to *Lindsey*, Dr. Ferraro's testimony stated general information in relative terms that the jury could use to determine credibility. See *Lindsey*, 149 Ariz. at 474 (quoting *State v. Chapple*, 135 Ariz. 281, 292 (1983) ("We believe that the 'generality' of the testimony is a factor which favors admission.") (overturned on other grounds by statute)). Dr. Ferraro did not tell the jury who was correct or incorrect, nor did she opine as to Defendant's guilt. Cf. *Lindsey*, 149 Ariz. at 474. Furthermore, Dr. Ferraro did not give specific opinions regarding P.J.'s credibility, or opine as to whether P.J.'s behavior was consistent with abuse having occurred. In fact, Dr. Ferraro testified that she had no knowledge of this case, and therefore could not testify about P.J. specifically. See *State v. Herrera*, 232 Ariz. 536, 551, ¶ 36 (App. 2013) (permitting expert testimony and distinguishing *Lindsey* in part because expert "testified she had no knowledge of the particular facts and circumstances of the case").⁵

⁵ The State urges us to apply fundamental error review to Dr. Ferraro's testimony concerning whether domestic victims tend to lie, citing *State v. Lichon*, 163 Ariz. 186, 189 (App. 1989), because Defendant did not object at trial. In *Lichon*, a pretrial motion in limine did not preserve the issue on appeal because the motion was perfunctory, summarily ruled upon, and the judge who tried the case was different from the judge who ruled on the motion. See *id.* Here, the State's motion in limine was thoroughly briefed and argued, the judge made a substantive ruling, and the judge who ruled on the motion also tried the case. The cited testimony was not among the subject matters that the trial court ruled in limine that the State could inquire into at trial. Thus, Defendant's failure to object to Dr. Ferraro's testimony at trial did not "deprive[] the court of a meaningful opportunity to consider the issue he now raises." *Id.*

III. Harmless Error

¶30 To the extent Dr. Ferraro’s testimony was improper, we will not reverse Defendant’s convictions and sentences if the error was harmless. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 18 (2005). “Harmless error review places the burden on the [S]tate to prove beyond a reasonable doubt that the error did not contribute to or affect the verdict or sentence.” *Id.*

¶31 Although a small portion of Dr. Ferraro’s testimony vouched for the credibility of domestic violence victims, her testimony did not invite the jury to conclude that Defendant was a domestic violence abuser. *Cf. Ketchner*, 236 Ariz. at 266, ¶ 19. At no point during trial did the prosecutor compare Dr. Ferraro’s testimony to Defendant or P.J. Nor did the prosecutor implicitly ask the jurors to find that Defendant or P.J. acted in conformity with Dr. Ferraro’s testimony. The only time the prosecutor mentioned Dr. Ferraro’s testimony was during her opening statement, when she said Dr. Ferraro would testify “it’s not unusual for a victim to later change their story or to even help make a case go away.” However, the prosecutor did not emphasize this testimony.

¶32 Furthermore, Dr. Ferraro’s “testimony was not the only information upon which the jury could rely to assess [P.J.’s] credibility.” *Herrera*, 232 Ariz. at 552, ¶ 47. Indeed, overwhelming evidence established Defendant’s guilt. *See State v. Anthony*, 218 Ariz. 439, 446, ¶ 41 (2008) (“We can find error harmless when the evidence against a defendant is so overwhelming that any reasonable jury could only have reached one conclusion.”). *Cf. Moran*, 151 Ariz. at 386 (holding that improper testimony was prejudicial because “[n]either physical evidence or any other direct evidence showed that [defendant] committed the crime. The only evidence was the out-of-court statements, later recanted at trial”).

¶33 Numerous witnesses testified during three days of trial in this case. P.J. identified Defendant as her attacker on the 911 recording and in her initial statement. The jury saw photos of P.J.’s injuries and her motel room. Witnesses testified about physical evidence found in the motel room corroborating P.J.’s initial statement, including DNA evidence. The jury heard phone conversations between Defendant and P.J., and in one recording P.J. stated “well maybe you shouldn’t have tried to kill me. . . . You know exactly what you did.” Finally, the trial court instructed the jury regarding expert witnesses, and we presume the jury followed that

instruction. See *State v. LeBlanc*, 186 Ariz. 437, 439 (1996). We conclude beyond a reasonable doubt that the jury would have convicted Defendant absent Dr. Ferraro's testimony. See *State v. Crane*, 166 Ariz. 3, 7 (App. 1990).

CONCLUSION

¶34 For the foregoing reasons, we affirm Defendant's convictions and sentences.



Ruth A. Willingham · Clerk of the Court
FILED : AA

136 S.Ct. 2272
Supreme Court of the United States

Stephen L. Voisine and William E. Armstrong, III,
Petitioners

v.
UNITED STATES.

No. 14–10154.

Argued Feb. 29, 2016.

Decided June 27, 2016.

Synopsis

Background: Following denial of his motion to dismiss, 2011 WL 1458666, defendant entered a conditional guilty plea in the United States District Court for the District of Maine, [John A. Woodcock, J.](#), to possession of firearm after having been convicted of misdemeanor crime of domestic violence. Defendant appealed. The Court of Appeals, 495 Fed.Appx. 101, affirmed. In separate case, another defendant entered a conditional guilty plea in the United States District Court for the District of Maine, [John A. Woodcock, J.](#), to possessing firearms and ammunition after having been convicted of misdemeanor crime of domestic violence. Defendant appealed. The Court of Appeals, 706 F.3d 1, affirmed. Certiorari was granted, and the Supreme Court vacated and remanded for further consideration. On remand, the Court of Appeals, [Lynch](#), Chief Judge, 778 F.3d 176, affirmed. Certiorari was granted.

[Holding:] The Supreme Court, Justice [Kagan](#), held that reckless domestic assault qualifies as a “misdemeanor crime of domestic violence” under statute prohibiting possession of a firearm by person convicted of a misdemeanor crime of domestic violence, abrogating [United States v. Nobriga](#), 474 F.3d 561.

Affirmed.

Justice [Thomas](#) filed dissenting opinion in which Justice [Sotomayor](#) joined in part.

West Headnotes (9)

[1] **Weapons**
Domestic violence

For a conviction under a general assault statute to

serve as the predicate offense for possession of firearm by person convicted of a misdemeanor crime of domestic violence, the Government must prove in the gun possession case that the perpetrator and the victim of the assault had one of the domestic relationships specified in statute defining “misdemeanor crime of domestic violence.” 18 U.S.C.A. §§ 921(a)(33)(A), 922(g)(9).

[Cases that cite this headnote](#)

[2] **Weapons**
Domestic violence

A reckless domestic assault qualifies as a “misdemeanor crime of domestic violence” under statute prohibiting possession of a firearm by person convicted of a misdemeanor crime of domestic violence; abrogating [United States v. Nobriga](#), 474 F.3d 561. 18 U.S.C.A. §§ 921(a)(33)(A), 922(g)(9).

[Cases that cite this headnote](#)

[3] **Weapons**
Domestic violence

Under statute defining “misdemeanor crime of domestic violence” to include any misdemeanor committed against a domestic relation that necessarily involved the “use” of physical force, for purposes of offense of possessing firearm after a conviction for misdemeanor crime of domestic violence, the force involved in a qualifying assault must be volitional; an involuntary motion, even a powerful one, is not naturally described as an active employment of force. 18 U.S.C.A. §§ 921(a)(33)(A), 922(g)(9).

[Cases that cite this headnote](#)

[4] **Weapons**
Domestic violence

Under statute defining “misdemeanor crime of domestic violence” to include any misdemeanor committed against a domestic relation that necessarily involved the “use” of physical force, for purposes of offense of possessing firearm after conviction for a misdemeanor crime of

domestic violence, the word “use” does not demand that the person applying force have the purpose or practical certainty that it will cause harm, as compared with the understanding that it is substantially likely to do so; or, otherwise said, that word is indifferent as to whether the actor has the mental state of intention, knowledge, or recklessness with respect to the harmful consequences of his volitional conduct. 18 U.S.C.A. §§ 921(a)(33)(A), 922(g)(9).

[Cases that cite this headnote](#)

[5] **Weapons**
🔑 Domestic violence

Under statute defining “misdemeanor crime of domestic violence” to include any misdemeanor committed against a domestic relation that necessarily involved the “use” of physical force, for purposes of offense of possessing firearm after a conviction for misdemeanor crime of domestic violence, the word “use” does not exclude from the firearm statute’s compass an act of force carried out in conscious disregard of its substantial risk of causing harm. 18 U.S.C.A. §§ 921(a)(33)(A), 922(g)(9).

[1 Cases that cite this headnote](#)

[6] **Weapons**
🔑 Domestic violence

Congress’s definition of a “misdemeanor crime of domestic violence,” for purposes of offense of possessing firearm after a conviction for misdemeanor crime of domestic violence, contains no exclusion for convictions based on reckless behavior; a person who assaults another recklessly “uses” force, no less than one who carries out that same action knowingly or intentionally. 18 U.S.C.A. §§ 921(a)(33)(A), 922(g)(9).

[1 Cases that cite this headnote](#)

[7] **Weapons**
🔑 Purpose

Congress enacted the statute making it an offense for person convicted of a “misdemeanor crime of domestic violence” to possess a firearm in order

to bar those domestic abusers convicted of garden-variety assault or battery misdemeanors, just like those convicted of felonies, from owning guns. 18 U.S.C.A. § 922(g)(9).

[Cases that cite this headnote](#)

[8] **Weapons**
🔑 Domestic violence

In determining whether the phrase “misdemeanor crime of domestic violence” included convictions based on reckless behavior, for purposes of offense of possessing firearm after a conviction for misdemeanor crime of domestic violence, the Supreme Court would consider the states’ assault and battery laws in effect at the time Congress enacted the statute setting forth the firearms offense, rather than the common law predating the state statutes, given that a majority of state legislatures had abandoned the common law’s approach to mens rea in drafting and interpreting their assault and battery statutes. 18 U.S.C.A. §§ 921(a)(33)(A), 922(g)(9).

[1 Cases that cite this headnote](#)

[9] **Weapons**
🔑 Domestic violence

Neither the doctrine of constitutional doubt nor the rule of lenity applied when determining whether the statutory phrase “misdemeanor crime of domestic violence” included convictions based on reckless behavior, for purposes of offense of possessing firearm after a conviction for misdemeanor crime of domestic violence; neither of those doctrines applied if the statute was clear, and the statutory phrase “misdemeanor crime of domestic violence” plainly encompassed reckless assaults. 18 U.S.C.A. §§ 921(a)(33)(A), 922(g)(9).

[Cases that cite this headnote](#)

2274 Syllabus

In an effort to “close [a] dangerous loophole” in the gun control laws, *United States v. Castleman*, 572 U.S. —, —, 134 S.Ct. 1405, 1409, 188 L.Ed.2d 426, Congress extended the federal prohibition on firearms possession by convicted felons to persons convicted of a “misdemeanor crime of domestic violence,” 18 U.S.C. § 922(g)(9).

Section 921(a)(33)(A) defines that phrase to include a misdemeanor under federal, state, or tribal law, committed against a domestic relation that necessarily involves the “use ... of physical force.” In *Castleman*, this Court held that a knowing or intentional assault qualifies as such a crime, but left open whether the same was true of a reckless assault.

Petitioner Stephen Voisine pleaded guilty to assaulting his girlfriend in violation of § 207 of the Maine Criminal Code, which makes it a misdemeanor to “intentionally, knowingly or recklessly cause[] bodily injury” to another. When law enforcement officials later investigated Voisine for killing a bald eagle, they learned that he owned a rifle. After a background check turned up Voisine’s prior conviction under § 207, the Government charged him with violating § 922(g)(9). Petitioner William Armstrong pleaded guilty to assaulting *2275 his wife in violation of a Maine domestic violence law making it a misdemeanor to commit an assault prohibited by § 207 against a family or household member. While searching Armstrong’s home as part of a narcotics investigation a few years later, law enforcement officers discovered six guns and a large quantity of ammunition. Armstrong was also charged under § 922(g)(9). Both men argued that they were not subject to § 922(g)(9)’s prohibition because their prior convictions could have been based on reckless, rather than knowing or intentional, conduct and thus did not qualify as misdemeanor crimes of domestic violence. The District Court rejected those claims, and each petitioner pleaded guilty. The First Circuit affirmed, holding that “an offense with a *mens rea* of recklessness may qualify as a ‘misdemeanor crime of violence’ under § 922(g)(9).” Voisine and Armstrong filed a joint petition for certiorari, and their case was remanded for further consideration in light of *Castleman*. The First Circuit again upheld the convictions on the same ground.

Held : A reckless domestic assault qualifies as a “misdemeanor crime of domestic violence” under § 922(g)(9). Pp. 2278 – 2282.

(a) That conclusion follows from the statutory text. Nothing in the phrase “use ... of physical force” indicates that § 922(g)(9) distinguishes between domestic assaults committed knowingly or intentionally and those committed recklessly. Dictionaries consistently define the word “use” to mean the “act of employing” something. Accordingly, the force involved in a qualifying assault must be volitional; an involuntary motion, even a powerful one, is not naturally described as an active employment of force. See *Castleman*, 572 U.S., at —, 134 S.Ct., at 1415. But nothing about the definition of “use” demands that the person applying force have the purpose or practical

certainty that it will cause harm, as compared with the understanding that it is substantially likely to do so. Nor does *Leocal v. Ashcroft*, 543 U.S. 1, 125 S.Ct. 377, 160 L.Ed.2d 271, which held that the “use” of force excludes accidents. Reckless conduct, which requires the conscious disregard of a known risk, is not an accident: It involves a deliberate decision to endanger another. The relevant text thus supports prohibiting petitioners, and others with similar criminal records, from possessing firearms. Pp. 2278 – 2280.

(b) So too does the relevant history. Congress enacted § 922(g)(9) in 1996 to bar those domestic abusers convicted of garden-variety assault or battery misdemeanors—just like those convicted of felonies—from owning guns. Then, as now, a significant majority of jurisdictions—34 States plus the District of Columbia—defined such misdemeanor offenses to include the reckless infliction of bodily harm. In targeting those laws, Congress thus must have known it was sweeping in some persons who had engaged in reckless conduct. See, e.g., *United States v. Bailey*, 9 Pet. 238, 256, 9 L.Ed. 113. Indeed, that was part of the point: to apply the federal firearms restriction to those abusers, along with all others, covered by the States’ ordinary misdemeanor assault laws.

Petitioners’ reading risks rendering § 922(g)(9) broadly inoperative in the 35 jurisdictions with assault laws extending to recklessness. Consider Maine’s law, which criminalizes “intentionally, knowingly or recklessly” injuring another. Assuming that statute defines a single crime, petitioners’ view that § 921(a)(33)(A) requires at least a knowing *mens rea* would mean that *no* conviction obtained under that law could qualify as a “misdemeanor crime of domestic violence.” *2276 *Descamps v. United States*, 570 U.S. —, —, 133 S.Ct. 2276, 2283, 186 L.Ed.2d 438. In *Castleman*, the Court declined to construe § 921(a)(33)(A) so as to render § 922(g)(9) ineffective in 10 States. All the more so here, where petitioners’ view would jeopardize § 922(g)(9)’s force in several times that many. Pp. 2280 – 2282.

778 F.3d 176, affirmed.

KAGAN, J., delivered the opinion of the Court, in which ROBERTS, C.J., and KENNEDY, GINSBURG, BREYER, and ALITO, JJ., joined. THOMAS, J., filed a dissenting opinion, in which SOTOMAYOR, J., joined as to Parts I and II.

Attorneys and Law Firms

Virginia G. Villa, appointed by the Court, St. Croix Falls, WI, for Petitioners.

Iana H. Eisenstein, Washington, DC, for Respondent.

Sarah M. Konsky, Brenna Woodley, Steven J. Horowitz, Jason G. Marsico, Sidley Austin LLP, Chicago, IL, Jeffrey T. Green, Sarah O'Rourke Schrup, Chicago, IL, Virginia G. Villa, St. Croix Falls, WI, for Petitioners.

Donald B. Verrilli, Jr., Solicitor General, Leslie R. Caldwell, Assistant Attorney General, Michael R. Dreeben, Deputy Solicitor General, Iana H. Eisenstein, Assistant to the Solicitor General, Joseph C. Wyderko, Finnuala K. Tessier, Attorneys, Department of Justice, Washington, DC, for Respondent.

Opinion

Justice KAGAN delivered the opinion of the Court.

Federal law prohibits any person convicted of a “misdemeanor crime of domestic violence” from possessing a firearm. 18 U.S.C. § 922(g)(9). That phrase is defined to include any misdemeanor committed against a domestic relation that necessarily involves the “use ... of physical force.” § 921(a)(33)(A). The question presented here is whether misdemeanor assault convictions for reckless (as contrasted to knowing or intentional) conduct trigger the statutory firearms ban. We hold that they do.

I

Congress enacted § 922(g)(9) some 20 years ago to “close [a] dangerous loophole” in the gun control laws. *United States v. Castleman*, 572 U.S. —, —, 134 S.Ct. 1405, 1409, 188 L.Ed.2d 426 (2014) (quoting *United States v. Hayes*, 555 U.S. 415, 426, 129 S.Ct. 1079, 172 L.Ed.2d 816 (2009)). An existing provision already barred convicted felons from possessing firearms. See § 922(g)(1) (1994 ed.). But many perpetrators of domestic violence are charged with misdemeanors rather than felonies, notwithstanding the harmfulness of their conduct. See *Castleman*, 572 U.S., at —, 134 S.Ct., at 1408–1409. And “[f]irearms and domestic strife are a potentially deadly combination.” *Hayes*, 555 U.S., at 427, 129 S.Ct. 1079. Accordingly, Congress added § 922(g)(9) to prohibit any person convicted of a “misdemeanor crime of domestic violence” from possessing any gun or ammunition with a connection to interstate commerce. And it defined that phrase, in § 921(a)(33)(A), to include a misdemeanor under federal, state, or tribal law, committed by a person with a specified domestic relationship with the victim, that “has, as an element, the use or attempted use of physical force.”

Two Terms ago, this Court considered the scope of that definition in a case involving a conviction for a knowing or

intentional assault. See *2277 *Castleman*, 572 U.S., at — — —, 134 S.Ct., at 1409–1415. In *Castleman*, we initially held that the word “force” in § 921(a)(33)(A) bears its common-law meaning, and so is broad enough to include offensive touching. See *id.*, at —, 134 S.Ct., at 1409–1410. We then determined that “the knowing or intentional application of [such] force is a ‘use’ of force.” *Id.*, at —, 134 S.Ct., at 1415. But we expressly left open whether a reckless assault also qualifies as a “use” of force—so that a misdemeanor conviction for such conduct would trigger § 922(g)(9)’s firearms ban. See *id.*, at —, n. 8, 134 S.Ct., at 1413–1414, n. 8. The two cases before us now raise that issue.

^[1] Petitioner Stephen Voisine pleaded guilty in 2004 to assaulting his girlfriend in violation of § 207 of the Maine Criminal Code, which makes it a misdemeanor to “intentionally, knowingly or recklessly cause[] bodily injury or offensive physical contact to another person.” *Me. Rev. Stat. Ann., Tit. 17–A, § 207(1)(A)*. Several years later, Voisine again found himself in legal trouble, this time for killing a bald eagle. See 16 U.S.C. § 668(a). While investigating that crime, law enforcement officers learned that Voisine owned a rifle. When a background check turned up his prior misdemeanor conviction, the Government charged him with violating 18 U.S.C. § 922(g)(9).¹

Petitioner William Armstrong pleaded guilty in 2008 to assaulting his wife in violation of a Maine domestic violence law making it a misdemeanor to commit an assault prohibited by § 207 (the general statute under which Voisine was convicted) against a family or household member. See *Me. Rev. Stat. Ann., Tit. 17–A, § 207–A(1)(A)*. A few years later, law enforcement officers searched Armstrong’s home as part of a narcotics investigation. They discovered six guns, plus a large quantity of ammunition. Like Voisine, Armstrong was charged under § 922(g)(9) for unlawfully possessing firearms.

Both men argued that they were not subject to § 922(g)(9)’s prohibition because their prior convictions (as the Government conceded) could have been based on reckless, rather than knowing or intentional, conduct. The District Court rejected those claims. Each petitioner then entered a guilty plea conditioned on the right to appeal the District Court’s ruling.

The Court of Appeals for the First Circuit affirmed the two convictions, holding that “an offense with a *mens rea* of recklessness may qualify as a ‘misdemeanor crime of violence’ under § 922(g)(9).” *United States v. Armstrong*, 706 F.3d 1, 4 (2013); see *United States v. Voisine*, 495

Fed.Appx. 101, 102 (2013) (*per curiam*). Voisine and Armstrong filed a joint petition for certiorari, and shortly after issuing *Castleman*, this Court (without opinion) vacated the First Circuit’s judgments and remanded the cases for further consideration in light of that decision. See *Armstrong v. United States*, 572 U.S. —, 134 S.Ct. 1759, 188 L.Ed.2d 590 (2014). On remand, the Court of Appeals again upheld the convictions, on the same ground. See 778 F.3d 176, 177 (2015).

We granted certiorari, 577 U.S. —, 136 S.Ct. 386, 193 L.Ed.2d 309 (2015), to resolve a Circuit split over whether a misdemeanor *2278 conviction for recklessly assaulting a domestic relation disqualifies an individual from possessing a gun under § 922(g)(9).² We now affirm.

II

The issue before us is whether § 922(g)(9) applies to reckless assaults, as it does to knowing or intentional ones. To commit an assault recklessly is to take that action with a certain state of mind (or *mens rea*)—in the dominant formulation, to “consciously disregard[]” a substantial risk that the conduct will cause harm to another. ALI, *Model Penal Code* § 2.02(2)(c) (1962); *Me. Rev. Stat. Ann., Tit. 17–A, § 35(3)* (Supp. 2015) (adopting that definition); see *Farmer v. Brennan*, 511 U.S. 825, 836–837, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994) (noting that a person acts recklessly only when he disregards a substantial risk of harm “of which he is aware”). For purposes of comparison, to commit an assault knowingly or intentionally (the latter, to add yet another adverb, sometimes called “purposefully”) is to act with another state of mind respecting that act’s consequences—in the first case, to be “aware that [harm] is practically certain” and, in the second, to have that result as a “conscious object.” *Model Penal Code* §§ 2.02(2)(a)–(b); *Me. Rev. Stat. Ann., Tit. 17–A, §§ 35(1)–(2)*.

^[2] Statutory text and background alike lead us to conclude that a reckless domestic assault qualifies as a “misdemeanor crime of domestic violence” under § 922(g)(9). Congress defined that phrase to include crimes that necessarily involve the “use ... of physical force.” § 921(a)(33)(A). Reckless assaults, no less than the knowing or intentional ones we addressed in *Castleman*, satisfy that definition. Further, Congress enacted § 922(g)(9) in order to prohibit domestic abusers convicted under run-of-the-mill misdemeanor assault and battery laws from possessing guns. Because fully two-thirds of such state laws extend to recklessness, construing § 922(g)(9) to exclude crimes committed with that state of mind would substantially undermine the provision’s design.

A

^[3] ^[4] Nothing in the word “use”—which is the only statutory language either party thinks relevant—indicates that § 922(g)(9) applies exclusively to knowing or intentional domestic assaults. Recall that under § 921(a)(33)(A), an offense counts as a “misdemeanor crime of domestic violence” only if it has, as an element, the “use” of force. Dictionaries consistently define the noun “use” to mean the “act of employing” something. Webster’s New International Dictionary 2806 (2d ed. 1954) (“[a]ct of employing anything”); Random House Dictionary of the English Language 2097 (2d ed. 1987) (“act of employing, using, or putting into service”); Black’s Law Dictionary 1541 (6th ed. 1990) (“[a]ct of employing,” “application”).³ On that common understanding, the force involved *2279 in a qualifying assault must be volitional; an involuntary motion, even a powerful one, is not naturally described as an active employment of force. See *Castleman*, 572 U.S., at —, 134 S.Ct., at 1415 (“[T]he word ‘use’ conveys the idea that the thing used (here, ‘physical force’) has been made the user’s instrument” (some internal quotation marks omitted)). But the word “use” does not demand that the person applying force have the purpose or practical certainty that it will cause harm, as compared with the understanding that it is substantially likely to do so. Or, otherwise said, that word is indifferent as to whether the actor has the mental state of intention, knowledge, or recklessness with respect to the harmful consequences of his volitional conduct.

^[5] Consider a couple of examples to see the ordinary meaning of the word “use” in this context. If a person with soapy hands loses his grip on a plate, which then shatters and cuts his wife, the person has not “use[d]” physical force in common parlance. But now suppose a person throws a plate in anger against the wall near where his wife is standing. That hurl counts as a “use” of force even if the husband did not know for certain (or have as an object), but only recognized a substantial risk, that a shard from the plate would ricochet and injure his wife. Similarly, to spin out a scenario discussed at oral argument, if a person lets slip a door that he is trying to hold open for his girlfriend, he has not actively employed (“used”) force even though the result is to hurt her. But if he slams the door shut with his girlfriend following close behind, then he has done so—regardless of whether he thinks it absolutely sure or only quite likely that he will catch her fingers in the jamb. See Tr. of Oral Arg. 10–11 (counsel for petitioners acknowledging that this example involves “the use of physical force”). Once again, the word “use” does not exclude from § 922(g)(9)’s compass an act of force carried out in conscious disregard of its substantial risk of causing harm.

And contrary to petitioners' view, nothing in *Leocal v. Ashcroft*, 543 U.S. 1, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004), suggests a different conclusion—*i.e.*, that “use” marks a dividing line between reckless and knowing conduct. See Brief for Petitioners 18–22. In that decision, this Court addressed a statutory definition similar to § 921(a)(33)(A): there, “the use ... of physical force against the person or property of another.” 18 U.S.C. § 16. That provision excludes “merely accidental” conduct, *Leocal* held, because “it is [not] natural to say that a person actively employs physical force against another person by accident.” 543 U.S., at 9, 125 S.Ct. 377. For example, the Court stated, one “would not ordinarily say a person ‘use[s] ... physical force against’ another by stumbling and falling into him.” *Ibid.* That reasoning fully accords with our analysis here. Conduct like stumbling (or in our hypothetical, dropping a plate) is a true accident, and so too the injury arising from it; hence the difficulty of describing that conduct as the “active employment” of force. *Ibid.* But the same is not true of reckless behavior—acts undertaken with awareness of their substantial risk of causing injury (in our contrasting hypo, hurling the plate). The harm such conduct causes is the result of a deliberate decision to endanger another—no more an “accident” than if the “substantial risk” were “practically certain.” See *supra*, at 2278 (comparing reckless and knowing acts). And indeed, *Leocal* itself recognized the distinction between accidents and recklessness, specifically reserving the issue whether the definition in § 16 embraces reckless conduct, *2280 see 543 U.S., at 13, 125 S.Ct. 377—as we now hold § 921(a)(33)(A) does.⁴

^[6] In sum, Congress’s definition of a “misdemeanor crime of violence” contains no exclusion for convictions based on reckless behavior. A person who assaults another recklessly “use[s]” force, no less than one who carries out that same action knowingly or intentionally. The relevant text thus supports prohibiting petitioners, and others with similar criminal records, from possessing firearms.

B

^[7] So too does the relevant history. As explained earlier, Congress enacted § 922(g)(9) in 1996 to bar those domestic abusers convicted of garden-variety assault or battery misdemeanors—just like those convicted of felonies—from owning guns. See *supra*, at 2276 – 2277; *Castleman*, 572 U.S., at —, —, 134 S.Ct., at 1408–1409, 1411; *Hayes*, 555 U.S., at 426–427, 129 S.Ct. 1079. Then, as now, a significant majority of jurisdictions—34 States plus the District of Columbia—defined such misdemeanor offenses to include the reckless infliction of bodily harm. See Brief for United States 7a–19a (collecting statutes). That agreement was no coincidence. Several decades earlier, the Model Penal Code had taken the position that a

mens rea of recklessness should generally suffice to establish criminal liability, including for assault. See § 2.02(3), Comments 4–5, at 243–244 (“purpose, knowledge, and recklessness are properly the basis for” such liability); § 211.1 (defining assault to include “purposely, knowingly, or recklessly caus[ing] bodily injury”). States quickly incorporated that view into their misdemeanor assault and battery statutes. So in linking § 922(g)(9) to those laws, Congress must have known it was sweeping in some persons who had engaged in reckless conduct. See, *e.g.*, *United States v. Bailey*, 9 Pet. 238, 256, 9 L.Ed. 113 (1835) (Story, J.) (“Congress must be presumed to have legislated under this known state of the laws”). And indeed, that was part of the point: to apply firearms restrictions to those abusers, along with all others, whom the States’ ordinary misdemeanor assault laws covered.

What is more, petitioners’ reading risks rendering § 922(g)(9) broadly inoperative in the 35 jurisdictions with assault laws extending to recklessness—that is, inapplicable even to persons who commit that crime knowingly or intentionally. Consider Maine’s statute, which (in typical fashion) makes it a misdemeanor to “intentionally, knowingly or recklessly” injure another. *Me. Rev. Stat. Ann., Tit. 17–A, § 207(1)(A)*. Assuming that provision defines a single crime (which happens to list alternative mental states)—and accepting petitioners’ view that § 921(a)(33)(A) requires at least a knowing *mens rea*—then, under *Descamps v. United States*, 570 U.S. —, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013), *no* conviction obtained under Maine’s statute could qualify as a “misdemeanor crime of domestic violence.” See *id.*, at —, 133 S.Ct., at 2283 (If a state *2281 crime “sweeps more broadly” than the federally defined one, a conviction for the state offense “cannot count” as a predicate, no matter what *mens rea* the defendant actually had). So in the 35 jurisdictions like Maine, petitioners’ reading risks allowing domestic abusers of all mental states to evade § 922(g)(9)’s firearms ban. In *Castleman*, we declined to construe § 921(a)(33)(A) so as to render § 922(g)(9) ineffective in 10 States. See 572 U.S., at —, 134 S.Ct., at 1412–1413. All the more so here, where petitioners’ view would jeopardize § 922(g)(9)’s force in several times that many.

^[8] Petitioners respond that we should ignore the assault and battery laws actually on the books when Congress enacted § 922(g)(9). In construing the statute, they urge, we should look instead to how the common law defined those crimes in an earlier age. See Brief for Petitioners 13–15. And that approach, petitioners claim, would necessitate reversing their convictions because the common law “required a *mens rea* greater than recklessness.” *Id.*, at 17.

But we see no reason to wind the clock back so far. Once again: Congress passed § 922(g)(9) to take guns out of the hands of abusers convicted under the misdemeanor assault laws then in general use in the States. See *supra*, at 2276 – 2277, 2280. And by that time, a substantial majority of jurisdictions, following the Model Penal Code’s lead, had abandoned the common law’s approach to *mens rea* in drafting and interpreting their assault and battery statutes. Indeed, most had gone down that road decades before. That was the backdrop against which Congress was legislating. Nothing suggests that, in enacting § 922(g)(9), Congress wished to look beyond that real world to a common-law precursor that had largely expired. To the contrary, such an approach would have undermined Congress’s aim by tying the ban on firearms possession not to the laws under which abusers are prosecuted but instead to a legal anachronism.⁵

^[9] And anyway, we would not know how to resolve whether recklessness sufficed for a battery conviction at common law. Recklessness was not a word in the common law’s standard lexicon, nor an idea in its conceptual framework; only in the mid- to late-1800’s did courts begin to address reckless behavior in those terms. See Hall, Assault and Battery by the Reckless Motorist, 31 J. Crim. L. & C. 133, 138–139 (1940). The common law traditionally used a variety of overlapping and, frankly, confusing phrases to describe culpable mental states—among them, specific intent, general intent, presumed intent, willfulness, and malice. See, e.g., *Morissette v. United States*, 342 U.S. 246, 252, 72 S.Ct. 240, 96 L.Ed. 288 (1952); Model Penal Code § 2.02, Comment 1, at 230. Whether and where conduct that we would today describe as reckless fits into that obscure scheme is anyone’s guess: Neither petitioners’ citations, nor the Government’s *2282 competing ones, have succeeded in resolving that counterfactual question. And that indeterminacy confirms our conclusion that Congress had no thought of incorporating the common law’s treatment of *mens rea* into § 921(a)(33)(A). That provision instead corresponds to the ordinary misdemeanor assault and battery laws used to prosecute domestic abuse, regardless of how their mental state requirements might—or, then again, might not—conform to the common law’s.⁶

III

The federal ban on firearms possession applies to any person with a prior misdemeanor conviction for the “use ... of physical force” against a domestic relation. § 921(a)(33)(A). That language, naturally read, encompasses acts of force undertaken recklessly—*i.e.*, with conscious disregard of a substantial risk of harm. And the state-law backdrop to that provision, which included misdemeanor assault statutes covering reckless conduct in a significant majority of jurisdictions, indicates that Congress meant just

what it said. Each petitioner’s possession of a gun, following a conviction under Maine law for abusing a domestic partner, therefore violates § 922(g)(9). We accordingly affirm the judgment of the Court of Appeals.

It is so ordered.

Justice THOMAS, with whom Justice SOTOMAYOR joins as to Parts I and II, dissenting.

Federal law makes it a crime for anyone previously convicted of a “misdemeanor crime of domestic violence” to possess a firearm “in or affecting commerce.” 18 U.S.C. § 922(g)(9). A “misdemeanor crime of domestic violence” includes “an offense that ... has, as an element, the use or attempted use of physical force ... committed by [certain close family members] of the victim.” § 921(a)(33)(A)(ii). In this case, petitioners were convicted under § 922(g)(9) because they possessed firearms and had prior convictions for assault under Maine’s statute prohibiting “intentionally, knowingly or recklessly caus[ing] bodily injury or offensive physical contact to another person.” Me. Rev. Stat. Ann., Tit. 17–A, § 207(1)(A) (2006). The question presented is whether a prior conviction under § 207 has, as an element, the “use of physical force,” such that the conviction can strip someone of his right to possess a firearm. In my view, § 207 does not qualify as such an offense, and the majority errs in holding otherwise. I respectfully dissent.

I

To qualify as a “ ‘misdemeanor crime of domestic violence,’ ” the Maine assault statute must have as an element the “use of physical force.” § 921(a)(33)(A)(ii). Because *2283 mere recklessness is sufficient to sustain a conviction under § 207, a conviction does not necessarily involve the “use” of physical force, and thus, does not trigger § 922(g)(9)’s prohibition on firearm possession.

A

Three features of § 921(a)(33)(A)(ii) establish that the “use of physical force” requires intentional conduct. First, the word “use” in that provision is best read to require intentional conduct. As the majority recognizes, the noun “use” means “the ‘act of employing’ something.” *Ante*, at 2278 (quoting dictionaries). A “use” is “[t]he act of employing a thing for any ... purpose.” 19 Oxford English Dictionary 350 (2d ed. 1989). To “use” something, in other words, is to employ the thing for its instrumental value, *i.e.*, to employ the thing to accomplish a further goal. See *United States v. Castleman*, 572 U.S. —, —, 134 S.Ct. 1405, 1414–1415, 188 L.Ed.2d 426 (2014). A “use,” therefore, is an inherently intentional act—that is, an act

done for the purpose of causing certain consequences or at least with knowledge that those consequences will ensue. See [Restatement \(Second\) of Torts § 8A, p. 15 \(1965\)](#) (defining intentional acts).

We have routinely defined “use” in ways that make clear that the conduct must be intentional. In [Bailey v. United States](#), 516 U.S. 137, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995), for example, we held that the phrase “[use of] a firearm” required “active employment” of the firearm, such as “brandishing, displaying, bartering, striking with, and, most obviously, firing or attempting to fire a firearm.” *Id.*, at 143, 148, 116 S.Ct. 501 (emphasis deleted). We have similarly held that the use of force requires more than “negligent or merely accidental conduct.” [Leocal v. Ashcroft](#), 543 U.S. 1, 9, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004). We concluded that “[w]hile one may, in theory, actively employ *something* in an accidental manner, it is much less natural to say that a person actively employs physical force against another person by accident.” *Ibid.* Thus, shooting a gun would be using a firearm in relation to a crime. [Bailey, supra](#), at 148, 116 S.Ct. 501. Recklessly leaving a loaded gun in one’s trunk, which then discharges after being jostled during the car ride, would not. The person who placed that gun in the trunk might have acted recklessly or negligently, but he did not actively employ the gun in a crime.

Second, especially in a legal context, “force” generally connotes the use of violence against another. Black’s Law Dictionary, for example, defines “force” to mean “[p]ower, violence, or pressure directed against a person or thing.” Black’s Law Dictionary 656 (7th ed. 1999). Other dictionaries offer similar definitions. *E.g.*, Random House Dictionary of the English Language 748 (def. 5) (2d ed. 1987) (“force,” when used in law, means “unlawful violence threatened or committed against persons or property”); 6 Oxford English Dictionary 34 (def. I(5)(c)) (“Unlawful violence offered to persons or things”). And “violence,” when used in a legal context, also implies an intentional act. See Black’s Law Dictionary 1564 (“violence” is the “[u]njust or unwarranted use of force, usu. accompanied by fury, vehemence, or outrage; physical force unlawfully exercised with the intent to harm”).¹

***2284** When a person talks about “using force” against another, one thinks of intentional acts—punching, kicking, shoving, or using a weapon. Conversely, one would not naturally call a car accident a “use of force,” even if people were injured by the force of the accident. As Justice Holmes observed, “[E]ven a dog distinguishes between being stumbled over and being kicked.” O. Holmes, *The Common Law* 3 (1881).

Third, context confirms that “use of physical force”

connotes an intentional act. [Section 921\(a\)\(33\)\(A\)\(ii\)](#)’s prohibitions also include “the threatened use of a deadly weapon.” In that neighboring prohibition, “use” most naturally means active employment of the weapon. And it would be odd to say that “use” in that provision refers to active employment (an intentional act) when threatening someone with a weapon, but “use” here is satisfied by merely reckless conduct. See [Sorenson v. Secretary of Treasury](#), 475 U.S. 851, 860, 106 S.Ct. 1600, 89 L.Ed.2d 855 (1986) (the same words in a statute presumptively have the same meaning). Thus, the “use of physical force” against a family member refers to intentional acts of violence against a family member.

B

On this interpretation, Maine’s assault statute likely does not qualify as a “misdemeanor crime of domestic violence” and thus does not trigger the prohibition on possessing firearms, [§ 922\(g\)\(9\)](#). The Maine statute appears to lack, as a required element, the “use or attempted use of physical force.” Maine’s statute punishes at least some conduct that does not involve the “use of physical force.” [Section 207](#) criminalizes “recklessly caus[ing] bodily injury or offensive physical contact to another person.” By criminalizing all reckless conduct, the Maine statute captures conduct such as recklessly injuring a passenger by texting while driving resulting in a crash. Petitioners’ charging documents generically recited the statutory language; they did not charge intentional, knowing, and reckless harm as alternative counts. Accordingly, Maine’s statute appears to treat “intentionally, knowingly, or recklessly” causing bodily injury or an offensive touching as a single, indivisible offense that is satisfied by recklessness. See [Mathis v. United States](#), — U.S. —, 136 S.Ct. 2243, — — —, — L.Ed.2d —, 2016 WL 3434400 (2016). So petitioners’ prior assault convictions do not necessarily have as an element the use of physical force against a family member. These prior convictions, therefore, do not qualify as a misdemeanor crime involving domestic violence under federal law, and petitioners’ convictions accordingly should be reversed. At the very least, to the extent there remains uncertainty over whether Maine’s assault statute is divisible, the Court should vacate and remand for the First Circuit to determine that statutory interpretation question in the first instance.

II

To illustrate where I part ways with the majority, consider different mental states with which a person could create and apply force.² First, a person can create force ***2285** intentionally or recklessly.³ For example, a person can intentionally throw a punch or a person can crash his car by driving recklessly. Second, a person can intentionally or

recklessly harm a particular person or object as a result of that force. For example, a person could throw a punch at a particular person (thereby intentionally applying force to that person) or a person could swing a baseball bat too close to someone (thereby recklessly applying force to that person).

These different mental states give rise to three relevant categories of conduct. A person might intentionally create force and intentionally apply that force against an object (*e.g.*, punching a punching bag). A person might also intentionally create force but recklessly apply that force against an object (*e.g.*, practicing a kick in the air, but recklessly hitting a piece of furniture). Or a person could recklessly create force that results in damage, such as the car crash example.

The question before us is what mental state suffices for a “use of physical force” against a family member. In my view, a “use of physical force” most naturally refers to cases where a person intentionally creates force and intentionally applies that force against a family member. It also includes (at least some) cases where a person intentionally creates force but recklessly applies it to a family member. But I part ways with the majority’s conclusion that purely reckless conduct—meaning, where a person recklessly creates force—constitutes a “use of physical force.” In my view, it does not, and therefore, the “use of physical force” is narrower than most state assault statutes, which punish anyone who recklessly causes physical injury.

A

To identify the scope of the “use of physical force,” consider three different types of intentional and reckless force resulting in physical injury.

1

The paradigmatic case of battery: A person intentionally unleashes force and intends that the force will harm a particular person. This might include, for example, punching or kicking someone. Both the majority and I agree that these cases constitute a “use of physical force” under § 921(a)(33)(A)(ii).

This first category includes all cases where a person intentionally creates force and desires or knows with a practical certainty that that force will cause harm. This is because the law traditionally treats conduct as intended in two circumstances. First, conduct is intentional when the actor desires to produce a specific result. 1 W. LaFare, *Substantive Criminal Law* § 5.2(a), pp. 340–342 (2d ed. 2003). But conduct is also traditionally deemed intentional

when a person acts “knowingly”: that is, he knows with practical certainty that a result will follow from his conduct. *Ibid.*; see also [Restatement \(Second\) of Torts § 8A](#), Comment *b*, at 15 (“If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result”).

To illustrate, suppose a person strikes his friend for the purpose of demonstrating *2286 a karate move. The person has no desire to injure his friend, but he knows that the move is so dangerous that he is practically certain his friend will be injured. Under the common law, the person intended to injure his friend, even though he acted only with knowledge that his friend would be injured rather than the desire to harm him. Thus, even when a person acts knowingly rather than purposefully, this type of conduct is still a “use of physical force.”

2

The second category involves a person who intentionally unleashes force that recklessly causes injury. The majority gives two examples:

1. The Angry Plate Thrower: “[A] person throws a plate in anger against the wall near where his wife is standing.” *Ante*, at 2279. The plate shatters, and a shard injures her. *Ibid.*
2. The Door Slammer: “[A person] slams the door shut with his girlfriend following close behind” with the effect of “catch[ing] her fingers in the jamb.” *Ibid.*

The Angry Plate Thrower and the Door Slammer both intentionally unleashed physical force, but they did not intend to direct that force at those whom they harmed. Thus, they *intentionally* employed force, but *recklessly* caused physical injury with that force. The majority believes that these cases also constitute a “use of physical force,” and I agree. The Angry Plate Thrower has used force against the plate, and the Door Slammer has used force against the door.

The more difficult question is whether this “use of physical force” comes within § 921(a)(33)(A)(ii), which requires that the “use of physical force” be committed by someone having a familial relationship with the victim. The natural reading of that provision is that the use of physical force must be against a family member. In some cases, the law readily transfers the intent to use force from the object to the actual victim. Take the Angry Plate Thrower: If a husband throws a plate at the wall near his wife to scare her, that is assault. If the plate breaks and cuts her, it becomes a battery, regardless of whether he intended the

plate to make contact with her person. See W. Keeton, D. Dobbs, R. Keeton, & D. Owens, Prosser and Keeton on Law of Torts § 9, pp. 39–42 (5th ed. 1984) (Prosser and Keeton). Similarly, “if one person intends to harm a second person but instead unintentionally harms a third, the first person’s criminal or tortious intent toward the second applies to the third as well.” Black’s Law Dictionary 1504 (defining transferred-intent doctrine); see also 1 LaFave, *supra*, § 5.2(c)(4), at 349–350. Thus, where a person acts in a violent and patently unjustified manner, the law will often impute that the actor intended to cause the injury resulting from his conduct, even if he actually intended to direct his use of force elsewhere. Because we presume that Congress legislates against the backdrop of the common law, see *Astoria Fed. Sav. & Loan Assn. v. Solimino*, 501 U.S. 104, 108, 111 S.Ct. 2166, 115 L.Ed.2d 96 (1991), these cases would qualify as the “use of physical force” against a family member.⁴

*2287 3

Finally, and most problematic for the majority’s approach, a person could recklessly unleash force that recklessly causes injury. Consider two examples:

1. The Text–Messaging Dad: Knowing that he should not be texting and driving, a father sends a text message to his wife. The distraction causes the father to rear end the car in front of him. His son, who is a passenger, is injured.

2. The Reckless Policeman: A police officer speeds to a crime scene without activating his emergency lights and siren and careens into another car in an intersection. That accident causes the police officer’s car to strike another police officer, who was standing at the intersection. See *Seaton v. State*, 385 S.W.3d 85, 88 (Tex.App.2012).

In these cases, both the unleashing of the “force” (the car crash) and the resulting harm (the physical injury) were reckless. Under the majority’s reading of § 921(a)(33)(A)(ii), the husband “use[d] ... physical force” against his son, and the police officer “use[d] ... physical force” against the other officer.

But this category is where the majority and I part company. These examples do not involve the “use of physical force” under any conventional understanding of “use” because they do not involve an active employment of something for a particular purpose. See *supra*, at 2283 – 2284. In the second category, the actors intentionally use violence against property; this is why the majority can plausibly argue that they have “used” force, even though that force was not intended to harm their family members. See *supra*, at 2286 – 2287 (discussing transferred intent). But when an

individual does not engage in any violence against persons or property—that is, when physical injuries result from purely reckless conduct—there is no “use” of physical force.

* * *

The “use of physical force” against a family member includes cases where a person intentionally commits a violent act against a family member. And the term includes at least some cases where a person engages in a violent act that results in an unintended injury to a family member. But the term does not include nonviolent, reckless acts that cause physical injury or an offensive touching. Accordingly, the majority’s definition is overbroad.

B

In reaching its contrary conclusion, the majority confuses various concepts. First, and as discussed, the majority decides that a person who acts recklessly has used physical force against another. *Ante*, at 2285 – 2286. But that fails to appreciate the distinction between intentional and reckless conduct. A “use” of physical force requires the intent to cause harm, and the law will impute that intent where the actor knows with a practical certainty that it will cause harm. But the law will not impute that intent from merely reckless conduct. Second, and perhaps to rein in its overly broad conception of a use of force, the majority concludes that only “volitional” acts constitute uses of force, *ante*, at 2285, and that mere “accident[s]” do not, *ante*, at 2285. These portions of the majority’s analysis conflate “volitional” conduct with “intentional” *mens rea* and misapprehends the relevant meaning of an “accident.”

1

The majority blurs the distinction between recklessness and intentional wrongdoing by overlooking the difference between the *mens rea* for force and the *mens rea* for causing harm with that force. The majority says that “‘use’ does not demand *2288 that the person applying force have the purpose or practical certainty that it will cause harm” (namely, knowledge), “as compared with the understanding that it is [a substantial and unjustifiable risk that it will] do so” (the standard for recklessness).⁵ *Ante*, at 2285. Put in the language of *mens rea*, the majority is saying that purposeful, knowing, and reckless applications of force are all equally “uses” of force.

But the majority fails to explain why mere recklessness in creating force—as opposed to recklessness in causing harm with intentional force—is sufficient. The majority gives the Angry Plate Thrower and the Door Slammer as examples of reckless conduct that are “uses” of physical force, but those examples involve persons who *intentionally* use

force that *recklessly* causes injuries. *Ibid.* Reckless assault, however, extends well beyond intentional force that recklessly causes injury. In States where the Model Penal Code has influence, reckless assault includes any recklessly caused physical injury. See ALI, [Model Penal Code § 211.1\(1\)\(a\)](#) (1980). This means that the Reckless Policeman and the Text-Messaging Dad are as guilty of assault as the Angry Plate Thrower. See, e.g., [Seaton](#), 385 S.W.3d, at 89–90; see also [People v. Grenier](#), 250 App.Div.2d 874, 874–875, 672 N.Y.S.2d 499, 500–501 (1998) (upholding an assault conviction where a drunk driver injured his passengers in a car accident).

The majority’s examples are only those in which a person has intentionally used force, meaning that the person acts with purpose or knowledge that force is involved. *Ante*, at 2285. As a result, the majority overlooks the critical distinction between conduct that is intended to cause harm and conduct that is not intended to cause harm. Violently throwing a plate against a wall is a use of force. Speeding on a roadway is not. That reflects the fundamental difference between intentional and reckless wrongdoing. An intentional wrong is designed to inflict harm. See [Restatement \(Second\) of Torts § 8A](#), at 15. A reckless wrong is not: “While an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which results from it.” *Id.*, § 500, Comment *f*, at 590.

All that remains of the majority’s analysis is its unsupported conclusion that recklessness looks enough like knowledge, so that the former suffices for a use of force just as the latter does. *Ante*, at 2285. That overlooks a crucial distinction between a “practical certainty” and a substantial risk. When a person acts with practical certainty, he intentionally produces a result. As explained above, *supra*, at 2285, when a person acts with knowledge that certain consequences will result, the law imputes to that person the intent to cause those consequences. And the requirement of a “practical” certainty reflects that, in ordinary life, people rarely have perfect certitude of the facts that they “know.” But as the probability decreases, “the actor’s conduct loses the character of intent, and becomes mere recklessness.” [Restatement \(Second\) of Torts § 8A](#), Comment *b*, at 15. And the *2289 distinction between intentional and reckless conduct is key for defining “use.” When a person acts with a practical certainty that he will employ force, he intends to cause harm; he has actively employed force for an instrumental purpose, and that is why we can fairly say he “uses” force. In the case of reckless wrongdoing, however, the injury the actor has caused is just an accidental byproduct of inappropriately risky behavior; he has not actively employed force.

In sum, “use” requires the intent to employ the thing being used. And in law, that intent will be imputed when a person acts with practical certainty that he will actively employ that thing. Merely disregarding a risk that a harm will result, however, does not supply the requisite intent.

2

To limit its definition of “use,” the majority adds two additional requirements. The conduct must be “volitional,” and it cannot be merely “accident[al].” *Ante*, at 2284 – 2286. These additional requirements will cause confusion, and neither will limit the breadth of the majority’s adopted understanding of a “use of physical force.”

First, the majority requires that the use of force must be “volitional,” so that “an involuntary motion, even a powerful one, is not naturally described as an active employment of force.” *Ante*, at 2284 – 2285. The majority provides two examples:

1. The Soapy-Handed Husband: “[A] person with soapy hands loses his grip on a plate, which then shatters and cuts his wife.” *Ante*, at 2279.
2. The Chivalrous Door Holder: “[A] person lets slip a door that he is trying to hold open for his girlfriend.” *Ibid.*

In the majority’s view, a husband who loses his grip on a plate or a boyfriend who lets the door slip has not engaged in a volitional act creating force. *Ibid.* The majority distinguishes this “volitional” act requirement from the “mental state of intention, knowledge, or recklessness with respect to the harmful consequences of his volitional conduct.” *Ibid.* The Angry Plate Thrower—unlike the Soapy-Handed Husband or Chivalrous Door Holder—has engaged in a volitional act, even if he did not intend to hurl the plate at his wife. *Ibid.*

The majority’s use of “volitional” is inconsistent with its traditional legal definition. The husband who drops a dish on his wife’s foot and the boyfriend who loses his grip while holding the door have acted volitionally. “[A]n ‘act,’ as that term is ordinarily used, is a voluntary contraction of the muscles, and nothing more.” Prosser and Keeton § 8, at 34; see also [Model Penal Code § 2.01](#) (defining the voluntary act requirement). For the plate and door examples not to be volitional acts, they would need to be unwilling muscular movements, such as a person who drops the plate because of a seizure.

In calling the force in these cases nonvolitional, the majority has confounded the minimum *mens rea* generally necessary to trigger criminal liability (recklessness) with

the requirement that a person perform a volitional act. Although all involuntary actions are blameless, not all blameless conduct is involuntary.

What the majority means to say is that the men did not *intentionally* employ force, a requirement materially different from a volitional act. And this requirement poses a dilemma for the majority. Recklessly unleashing a force that recklessly causes physical injury—for example, a police officer speeding through the intersection without triggering his lights and siren—is an assault in States that follow the Model Penal Code. See *supra*, at 2287. If the majority’s rule is to include *all* *2290 reckless assault, then the majority must accept that the Text-Messaging Dad is as guilty of using force against his son as the husband who angrily throws a plate toward his wife—an implausible result. Alternatively, the majority must acknowledge that its “volitional” act requirement is actually a requirement that the use of force be intentional, even if that intentional act of violence results in a recklessly caused, but unintended, injury. The majority, of course, refuses to do so because that approach would remove many assault convictions, especially in the many States that have adopted the Model Penal Code, from the sweep of the federal statute. Thus, the majority is left misapplying basic principles of criminal law to rationalize why all “assault” under the Model Penal Code constitutes the “use of physical force” under § 921(a)(33)(A)(ii).

Second and relatedly, the majority asserts that a use of force cannot be merely accidental. But this gloss on what constitutes a use of force provides no further clarity. The majority’s attempt to distinguish “recklessness” from an “accident,” *ante*, at 2285, is an equivocation on the meaning of “accident.” An accident can mean that someone was blameless—for example, a driver who accidentally strikes a deer that darts into a roadway. But an accident can also refer to the fact that the result was unintended: A car accident is no less an “accident” just because a driver acted negligently or recklessly. Neither labeling an act “volitional” nor labeling it a mere “accident” will rein in the majority’s overly broad understanding of a “use of physical force.”

* * *

If Congress wanted to sweep in all reckless conduct, it could have written § 921(a)(33)(A)(ii) in different language. Congress might have prohibited the possession of firearms by anyone convicted under a state law prohibiting assault or battery. Congress could also have used language tracking the Model Penal Code by saying that a conviction must have, as an element, “the intentional, knowing, or reckless causation of physical injury.” But Congress instead defined a “misdemeanor crime of

domestic violence” by requiring that the offense have “the use of physical force.” And a “use of physical force” has a well-understood meaning applying only to intentional acts designed to cause harm.

III

Even assuming any doubt remains over the reading of “use of physical force,” the majority errs by reading the statute in a way that creates serious constitutional problems. The doctrine of constitutional avoidance “command[s] courts, when faced with two plausible constructions of a statute—one constitutional and the other unconstitutional—to choose the constitutional reading.” *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. 193, 213, 129 S.Ct. 2504, 174 L.Ed.2d 140 (2009) (THOMAS, J., concurring in judgment in part and dissenting in part) (internal quotation marks omitted). Section 922(g)(9) is already very broad. It imposes a lifetime ban on gun ownership for a single intentional nonconsensual touching of a family member. A mother who slaps her 18-year-old son for talking back to her—an intentional use of force—could lose her right to bear arms forever if she is cited by the police under a local ordinance. The majority seeks to expand that already broad rule to any reckless physical injury or nonconsensual touch. I would not extend the statute into that constitutionally problematic territory.

The Second Amendment protects “the right of the people to keep and bear Arms.” In *2291 *District of Columbia v. Heller*, 554 U.S. 570, 624, 627, 635, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008), the Court held that the Amendment protects the right of all law-abiding citizens to keep and bear arms that are in common use for traditionally lawful purposes, including self-defense. And in *McDonald v. Chicago*, 561 U.S. 742, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010), the Court held that the right to keep and bear arms is a fundamental right. See *id.*, at 767–778, 130 S.Ct. 3020; *id.*, at 806, 130 S.Ct. 3020 (THOMAS, J., concurring in part and concurring in judgment).

The protections enumerated in the Second Amendment, no less than those enumerated in the First, are not absolute prohibitions against government regulation. *Heller*, 554 U.S., at 595, 626–627, 128 S.Ct. 2783. Traditionally, States have imposed narrow limitations on an individual’s exercise of his right to keep and bear arms, such as prohibiting the carrying of weapons in a concealed manner or in sensitive locations, such as government buildings. *Id.*, at 626–627, 128 S.Ct. 2783; see, e.g., *State v. Kerner*, 181 N.C. 574, 578–579, 107 S.E. 222, 225 (1921). But these narrow restrictions neither prohibit nor broadly frustrate any individual from generally exercising his right to bear arms.

Some laws, however, broadly divest an individual of his Second Amendment rights. *Heller* approved, in dicta, laws that prohibit dangerous persons, including felons and the mentally ill, from having arms. 554 U.S., at 626, 128 S.Ct. 2783. These laws are not narrow restrictions on the right because they prohibit certain individuals from exercising their Second Amendment rights at all times and in all places. To be constitutional, therefore, a law that broadly frustrates an individual’s right to keep and bear arms must target individuals who are beyond the scope of the “People” protected by the Second Amendment.

Section 922(g)(9) does far more than “close [a] dangerous loophole” by prohibiting individuals who had committed felony domestic violence from possessing guns simply because they pleaded guilty to misdemeanors. *Ante*, at 2282 (internal quotation marks omitted). It imposes a lifetime ban on possessing a gun for *all* nonfelony domestic offenses, including so-called infractions or summary offenses. §§ 921(a)(33)(A)(ii), 922(g)(9); 27 CFR § 478.11 (2015) (defining a misdemeanor crime of domestic violence to include crimes punishable only by a fine). These infractions, like traffic tickets, are so minor that individuals do not have a right to trial by jury. See *Lewis v. United States*, 518 U.S. 322, 325–326, 116 S.Ct. 2163, 135 L.Ed.2d 590 (1996).

Today the majority expands § 922(g)(9)’s sweep into patently unconstitutional territory. Under the majority’s reading, a single conviction under a state assault statute for recklessly causing an injury to a family member—such as by texting while driving—can now trigger a lifetime ban on gun ownership. And while it may be true that such incidents are rarely prosecuted, this decision leaves the right to keep and bear arms up to the discretion of federal, state, and local prosecutors.

We treat no other constitutional right so cavalierly. At oral argument the Government could not identify any other fundamental constitutional right that a person could lose forever by a single conviction for an infraction punishable only by a fine. Tr. of Oral Arg. 36–40. Compare the First Amendment. Plenty of States still criminalize libel. See, e.g., Ala. Code. § 13A–11–160 (2015); Fla. Stat. § 836.01

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

¹ In *United States v. Hayes*, 555 U.S. 415, 418, 129 S.Ct. 1079, 172 L.Ed.2d 816 (2009), this Court held that a conviction under a general assault statute like § 207 (no less than one under a law targeting only domestic assault) can serve as the predicate offense for a § 922(g)(9) prosecution. When that is so, the Government must prove in the later, gun possession case that the perpetrator and the victim of the assault had one of the domestic relationships specified in § 921(a)(33)(A). See *id.*, at 426, 129 S.Ct. 1079.

(2015); La. Rev. Stat. Ann. § 14:47 (West 2016); Mass. Gen. Laws, ch. 94, § 98C (2014); Minn. Stat. § 609.765 (2014); N.H. Rev. Stat. Ann. § 644:11 (2007); *2292 Va. Code Ann. § 18.2–209 (2014); Wis. Stat. § 942.01 (2005). I have little doubt that the majority would strike down an absolute ban on publishing by a person previously convicted of misdemeanor libel. In construing the statute before us expansively so that causing a single minor reckless injury or offensive touching can lead someone to lose his right to bear arms forever, the Court continues to “relegat[e] the Second Amendment to a second-class right.” *Friedman v. Highland Park*, 577 U.S. —, —, 136 S.Ct. 447, 450, 193 L.Ed.2d 483 (2015) (THOMAS, J., dissenting from denial of certiorari).

* * *

In enacting § 922(g)(9), Congress was not worried about a husband dropping a plate on his wife’s foot or a parent injuring her child by texting while driving. Congress was worried that family members were abusing other family members through acts of violence and keeping their guns by pleading down to misdemeanors. Prohibiting those convicted of intentional and knowing batteries from possessing guns—but not those convicted of reckless batteries—amply carries out Congress’ objective.

Instead, under the majority’s approach, a parent who has a car accident because he sent a text message while driving can lose his right to bear arms forever if his wife or child suffers the slightest injury from the crash. This is obviously not the correct reading of § 922(g)(9). The “use of physical force” does not include crimes involving purely reckless conduct. Because Maine’s statute punishes such conduct, it sweeps more broadly than the “use of physical force.” I respectfully dissent.

All Citations

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- 2 Compare [778 F.3d 176 \(C.A.1 2015\)](#) (case below) with [United States v. Nobriga, 474 F.3d 561 \(C.A.9 2006\)](#) (*per curiam*) (holding that a conviction for a reckless domestic assault does not trigger § 922(g)(9)'s ban).
- 3 In cases stretching back over a century, this Court has followed suit, although usually discussing the verb form of the word. See, e.g., [Bailey v. United States, 516 U.S. 137, 145, 116 S.Ct. 501, 133 L.Ed.2d 472 \(1995\)](#) (to use means “ ‘[t]o convert to one’s service,’ ‘to employ,’ [or] ‘to avail oneself of’ ”); [Smith v. United States, 508 U.S. 223, 229, 113 S.Ct. 2050, 124 L.Ed.2d 138 \(1993\)](#) (to use means “ ‘[t]o convert to one’s service’ or ‘to employ’ ”); [Astor v. Merritt, 111 U.S. 202, 213, 4 S.Ct. 413, 28 L.Ed. 401 \(1884\)](#) (to use means “to employ [or] to derive service from”).
- 4 Like *Leocal*, our decision today concerning § 921(a)(33)(A)'s scope does not resolve whether § 16 includes reckless behavior. Courts have sometimes given those two statutory definitions divergent readings in light of differences in their contexts and purposes, and we do not foreclose that possibility with respect to their required mental states. Cf. [United States v. Castleman, 572 U.S. —, —, n. 4, 134 S.Ct. 1405, 1411, n. 6, 188 L.Ed.2d 426 \(2014\)](#) (interpreting “force” in § 921(a)(33)(A) to encompass any offensive touching, while acknowledging that federal appeals courts have usually read the same term in § 16 to reach only “violent force”). All we say here is that *Leocal*'s exclusion of accidental conduct from a definition hinging on the “use” of force is in no way inconsistent with our inclusion of reckless conduct in a similarly worded provision.
- 5 As petitioners observe, this Court looked to the common law in *Castleman* to define the term “force” in § 921(a)(33)(A). See [572 U.S., at —, —, 134 S.Ct., at 1409–1410](#); Brief for Petitioners 13–15. But we did so for reasons not present here. “Force,” we explained, was “a common-law term of art” with an “established common-law meaning.” [572 U.S., at —, 134 S.Ct., at 1410](#) (internal quotation marks omitted). And we thought that Congress meant to adhere to that meaning given its “perfect[]” fit with § 922(g)(9)'s goal. *Ibid.* By contrast, neither party pretends that the statutory term “use”—the only one identified as potentially relevant here—has any particular common-law definition. And as explained above, the watershed change in how state legislatures thought of *mens rea* after the Model Penal Code makes the common law a bad match for the ordinary misdemeanor assault and battery statutes in Congress's sightline.
- 6 Petitioners make two last arguments for reading § 921(a)(33)(A) their way, but they do not persuade us. First, petitioners contend that we should adopt their construction to avoid creating a question about whether the Second Amendment permits imposing a lifetime firearms ban on a person convicted of a misdemeanor involving reckless conduct. See Brief for Petitioners 32–36. And second, petitioners assert that the rule of lenity requires accepting their view. See *id.*, at 31–32. But neither of those arguments can succeed if the statute is clear. See [Pennsylvania Dept. of Corrections v. Yeskey, 524 U.S. 206, 212, 118 S.Ct. 1952, 141 L.Ed.2d 215 \(1998\)](#) (noting that “the doctrine of constitutional doubt ... enters in only where a statute is susceptible of two constructions” (internal quotation marks omitted)); [Abramski v. United States, 573 U.S. —, —, n. 10, 134 S.Ct. 2259, 2272, n. 10, 189 L.Ed.2d 262 \(2014\)](#) (stating that the rule of lenity applies only in cases of genuine ambiguity). And as we have shown, § 921(a)(33)(A) plainly encompasses reckless assaults.
- 1 Some of our cases have distinguished “violent force”—force capable of causing physical injury—and common-law force, which included all nonconsensual touching, see [Johnson v. United States, 559 U.S. 133, 140–141, 130 S.Ct. 1265, 176 L.Ed.2d 1 \(2010\)](#), but others have not, see [United States v. Castleman, 572 U.S. —, —, 134 S.Ct. 1405, 1410, 188 L.Ed.2d 426 \(2014\)](#). The common law did not draw this distinction because the common law considered nonconsensual touching as a form of violence against the person. 3 W. Blackstone, Commentaries *120 (“[T]he law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it”). The Court should assume that, absent a contrary textual indication, Congress legislated against this common-law backdrop. See [Castleman, supra, at 2250, 134 S.Ct., at 1409–1410](#). Consequently, I treat nonconsensual touching as a type of violence.
- 2 Although “force” generally has a narrower legal connotation of intentional acts designed to cause harm, see *supra*, at 2283 – 2284, I will use “force” in this Part in its broadest sense to mean “strength or power exerted upon an object.” Random House Dictionary of the English Language 748 (def. 2) (2d ed. 1987).
- 3 To simplify, I am using only those mental states relevant to the Court's resolution of this case. A person could also create a force negligently or blamelessly.
- 4 The Door Slammer might also fit within the “use of physical force,” although that is a harder question. The Door Slammer has used force against the door, which has then caused injury to his girlfriend. But traditional principles of law would not generally transfer the actor's intent to use force against the door to the girlfriend because, unlike placing someone in fear of bodily injury, slamming a door is not inherently wrongful and illegal conduct.
- 5 The majority's equation of recklessness with “the understanding” that one's actions are “substantially likely” to cause harm, *ante*, at 2285, misstates the standard for recklessness in States that follow the Model Penal Code. Recklessness

only requires a “substantial and unjustifiable risk.” ALI, [Model Penal Code § 2.02\(2\)\(c\)](#) (1980). A “substantial” risk can include very small risks when there is no justification for taking the risk. See *id.*, [§ 2.02](#), Comment 1, at 237, n. 14. Thus, it would be reckless to play Russian roulette with a revolver having 1,000 chambers, even though there is a 99.9% chance that no one will be injured.

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