

No. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES

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October Term, 2024

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MICHAEL BLAKE DeFRANCE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

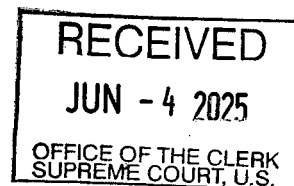
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**APPENDIX A  
TO THE PETITION FOR WRIT OF  
CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT**

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SUBMITTED: May 16, 2025



## TABLE OF APPENDIX A

### Appendix A:

|                                                                                                                                                                        |       |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------|
| Opinion (Doc. 45) (December 30, 2024),<br>CA No. 23-2409, United States Court of Appeals<br>for the Ninth Circuit.....                                                 | 1-24  |
| Memorandum Disposition (Doc. 46) (December 30, 2024),<br>CA No. 23-2409, United States Court of Appeals<br>for the Ninth Circuit.....                                  | 25-27 |
| Order Denying Rehearing and Rehearing <i>En Banc</i> (Doc. 50)<br>(February 24, 2025),<br>CA No. 23-2409, United States Court of Appeals<br>for the Ninth Circuit..... | 28    |
| Order List 598 U.S. denying Petition for Writ of Certiorari<br>(April 3, 2023),<br>No. 22-6956, Supreme Court of the United States .....                               | 29    |
| Order Dismissing Interlocutory Appeal (Doc. 16) (February 15, 2023),<br>CA No. 22-30131, United States Court of Appeals<br>for the Ninth Circuit .....                 | 30    |

**FOR PUBLICATION**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

*Plaintiff - Appellee,*

v.

MICHAEL BLAKE DEFRANCE,

*Defendant - Appellant.*

No. 23-2409

D.C. No.  
9:21-cr-00029-  
DLC-1

OPINION

Appeal from the United States District Court  
for the District of Montana  
Dana L. Christensen, District Judge, Presiding

Argued and Submitted September 12, 2024  
Seattle, Washington

Filed December 30, 2024

Before: Morgan B. Christen and Jennifer Sung, Circuit  
Judges, and Jed S. Rakoff, District Judge.\*

Opinion by Judge Christen;  
Concurrence by Judge Christen;  
Concurrence by Judge Rakoff

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\* The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

## **SUMMARY\*\***

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### **Criminal Law**

The panel reversed Michael Blake DeFrance's conviction for violating 18 U.S.C. § 922(g)(9), which forbids the possession of firearms by anyone convicted of a "misdemeanor crime of domestic violence"; vacated his sentence; and remanded.

The predicate offense for DeFrance's § 922(g)(9) indictment was his prior conviction for assaulting his girlfriend in violation of Montana Code Annotated section 45-5-206(1)(a), a misdemeanor.

Applying the categorical approach, the panel held that because section 45-206(1)(a) can be violated by inflicting emotional distress rather than physical injury, it does not "ha[ve], as an element, the use or attempted use of physical force," 18 U.S.C. § 922(a)(3)(A)(ii). Accordingly, a conviction for violating section 45-206(1)(a) does not qualify as a "misdemeanor crime of violence" under § 922(g)(9).

The panel addressed other issues in a concurrently filed memorandum disposition.

Concurring, Judge Christen wrote that there is little doubt that when Congress enacted § 922(g)(9), it intended to keep firearms out of the hands of misdemeanor domestic

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\*\* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.



abusers, but that the result in this case is dictated by faithful application of controlling precedent.

Concurring, District Judge Rakoff wrote that he continues to be troubled by the so-called “categorical approach,” whose counter-intuitive results Congress never intended. He joined the growing number of lower-court judges and Supreme Court justices who have called into question its propriety.

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### COUNSEL

Tim A. Tatarka (argued) and Timothy J. Racicot, Assistant United States Attorneys, United States Department of Justice, Office of the United States Attorney, Billings, Montana; Jennifer S. Clark, Assistant United States Attorney; Jesse A. Laslovich, United States Attorney; United States Department of Justice, Office of the United States Attorney, Missoula, Montana; for Plaintiff-Appellee.

Michael Donahoe (argued), Assistant Federal Public Defender; Rachel Julagay, Federal Defender, District of Montana; Federal Defenders of Montana, Helena, Montana; for Defendant-Appellant.

## OPINION

CHRISTEN, Circuit Judge:

We address whether a conviction for partner or family member assault (PFMA) under Montana Code Annotated section 45-5-206(1)(a) qualifies as a “misdemeanor crime of domestic violence” for purposes of 18 U.S.C. § 922(g)(9). Because Montana’s PFMA statute can be violated by inflicting emotional rather than physical injury, we conclude that it does not “ha[ve], as an element, the use or attempted use of physical force.” 18 U.S.C. § 921(a)(33)(A)(ii). Accordingly, a conviction for violating this statute does not qualify as a “misdemeanor crime of domestic violence,” and Appellant’s § 922(g)(9) conviction must be reversed.

### I.

In 2013, Appellant Michael Blake DeFrance pleaded guilty to assaulting Jermain Charlo, his girlfriend, in violation of Montana Code Annotated section 45-5-206(1)(a), a misdemeanor.<sup>1</sup> Under section 45-5-206(1)(a), “[a] person commits the offense of partner or family member assault if the person . . . purposely or knowingly causes bodily injury to a partner or family member.” Mont. Code Ann. § 45-5-206(1)(a). “‘Bodily injury’ means physical pain, illness, or an impairment of physical condition and

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<sup>1</sup> The district court concluded that section 45-5-206 is divisible and that DeFrance was convicted under section 45-5-206(1)(a). *See United States v. DeFrance*, 577 F. Supp. 3d 1085, 1095 n.2 (D. Mont. 2021). Neither party challenges that conclusion on appeal or contends that section 45-5-206(1)(a) is divisible in any respect relevant to our analysis. We therefore do not apply the modified categorical approach to DeFrance’s section 45-5-206(1)(a) conviction. *See Descamps v. United States*, 570 U.S. 254, 278 (2013).

includes mental illness or impairment.” *Id.* § 45-2-101(5). The language of these two provisions is the same today as it was in 2013, when DeFrance assaulted Charlo.

In 2018, law enforcement officers found DeFrance in possession of three firearms. A federal grand jury subsequently indicted DeFrance on one count of violating 18 U.S.C. § 922(g)(9), which forbids the possession of firearms by anyone convicted of a “misdemeanor crime of domestic violence.” 18 U.S.C. § 922(g)(9).<sup>2</sup> Section 921(a)(33)(A), in turn, defines “misdemeanor crime of domestic violence” as “an offense that . . . has, as an element, the use or attempted use of physical force.” *Id.* § 921(a)(33)(A).<sup>3</sup>

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<sup>2</sup> Section 922(g) states:

It shall be unlawful for any person . . . (9) who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(g).

<sup>3</sup> Section 921(a)(33)(A) states:

Except as provided in subparagraphs (B) and (C), the term “misdemeanor crime of domestic violence” means an offense that—

(i) is a misdemeanor under Federal, State, Tribal, or local law; and

(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with

DeFrance moved to dismiss the indictment, arguing that section 45-5-206(1)(a) “can be committed without the use or attempted use of physical force” and, therefore, a conviction under this statute does not qualify as a “misdemeanor crime of domestic violence” for purposes of § 922(g)(9). The district court denied the motion. *See DeFrance*, 577 F. Supp. 3d at 1093–98; *see also United States v. DeFrance*, 2023 WL 4531828, at \*9 (D. Mont. July 13, 2023) (denying DeFrance’s motion for a new trial). Following his conviction, DeFrance timely appealed. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we review *de novo* DeFrance’s argument that “the use or attempted use of physical force” is not an element of section 45-5-206(1)(a). *See United States v. Campbell*, 42 F.3d 1199, 1203 (9th Cir. 1994) (“We review legal questions *de novo*.”).

## II.

To determine whether a conviction under section 45-5-206(1)(a) qualifies as a “misdemeanor crime of domestic violence” for purposes of §§ 921(a)(33)(A) and 922(g)(9), we apply the categorical approach. *See United States v. Castleman*, 572 U.S. 157, 168 (2014) (citing *Taylor v.*

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whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, by a person similarly situated to a spouse, parent, or guardian of the victim, or by a person who has a current or recent former dating relationship with the victim.

18 U.S.C. § 921(a)(33)(A). Congress added “a person who has a current or recent former dating relationship with the victim” in 2022, after DeFrance’s 2013 domestic violence conviction, *see Bipartisan Safer Communities Act*, Pub. L. No. 117-159, § 12005, 136 Stat. 1313, 1332 (2022), but that change is not material to the question at issue in this opinion.

*United States*, 495 U.S. 575 (1990), and *Shepard v. United States*, 544 U.S. 13 (2005)). “This requires, for better or worse, that we ignore what actually occurred during the defendant’s prior [offense]; instead, we consider only whether the prior [offense’s] elements cover conduct that ‘sweeps more broadly than the conduct covered by § [921(a)(33)(A)’s misdemeanor crime of domestic violence] definition[.]’” *United States v. Castro*, 71 F.4th 735, 738 (9th Cir. 2023) (quoting *United States v. Prigan*, 8 F.4th 1115, 1119 (9th Cir. 2021)). Specifically, we consider whether DeFrance’s conviction “necessarily ‘ha[d], as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon.’” *Castleman*, 572 U.S. at 168 (quoting 18 U.S.C. § 921(a)(33)(A)).

While no Montana court has squarely addressed whether section 45-5-206(1)(a) requires the use of physical force, both Ninth Circuit case law construing this statute and Montana Supreme Court decisions construing related assault statutes support DeFrance’s contention that section 45-5-206(1)(a) does not “ha[ve], as an element, the use or attempted use of physical force.” 18 U.S.C. § 921(a)(33)(A)(ii).

We recognized in *Castro* that a person can violate section 45-5-206(1)(a) by verbal conduct alone—e.g., by “subjecting someone to a public tirade of insults or emotional abuse.” 71 F.4th at 739 (quoting *United States v. Ross*, 2017 WL 1288425, at \*4 (D. Mont. Apr. 6, 2017)). *Castro* relied on *Ross*, which in turn relied in part on the Montana Supreme Court’s decision in *State v. Sherer*, 60 P.3d 1010 (Mont. 2002). There, the defendant was charged with aggravated assault, which requires that the defendant “purposefully or knowingly cause[] serious bodily injury to another.” *Id.* at 1012 (quoting Mont. Code Ann. § 45-5-

202(1)). Posing as a doctor, the defendant in *Sherer* telephoned a woman and convinced her to cut off her nipple. *Id.* at 1011. The Montana Supreme Court held that the defendant's conduct, which was entirely verbal, was sufficient to sustain a conviction because Montana's assault statutes "do not require that the defendant personally direct force toward the victim, but specifically contemplate that any form of communication, itself, may be sufficient conduct." *Id.* at 1013.

*Sherer* establishes that the use of words or other forms of communication can constitute the indirect use of physical force under Montana law, but we also consider whether the "bodily injury" required to violate the Montana statute *necessarily* requires the use of physical force. See *Castleman*, 572 U.S. at 169–71; *Castro*, 71 F.4th at 737, 742–44. *Castro* held that a person can violate section 45-5-206(1)(a) by inflicting emotional, rather than physical, injury on the victim. 71 F.4th at 737, 742–44. Unlike most battery statutes, which require physical injury,<sup>4</sup> Montana defines "bodily injury" to include "mental illness or impairment." Mont. Code Ann. § 45-2-101(5). And "Montana courts have concluded that one can cause 'bodily injury' solely through the infliction of mental anguish." *Castro*, 71 F.4th at 737; see, e.g., *State v. Cooney*, 963 P.2d 1272, 1274 (Mont. 1998) (holding that "emotional anguish" qualifies as "serious bodily injury" under section 46-14-301(3)(a) and former section 45-2-101(64)(b), now codified

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<sup>4</sup> See 2 Wayne R. LaFare, *Substantive Criminal Law* § 16.2(a) (3d ed. 2023) ("The modern approach, as reflected in the Model Penal Code, is to limit battery to instances of physical injury . . . ." (footnote omitted)); Francis X. Shen, *Mind, Body, and the Criminal Law*, 97 Minn. L. Rev. 2036, 2112 (2013) ("Conventional wisdom is that . . . bodily injury . . . does not include pure 'mental' injury.").

at 45-2-101(66)(b)); *State v. Cooney*, 1 P.3d 956, 958 (Mont. 2000) (holding that emotional trauma qualifies as “serious bodily injury” under section 46-14-302(6)(b) and former section 45-2-101(65), now codified at 45-2-101(66)); *State v. Shen*, No. DC 20-1260, slip op. at 5 (Mont. Dist. Ct. Yellowstone Cnty. May 27, 2021) (holding that “considerable emotional anguish” qualifies as “bodily injury” under sections 45-5-502 and 45-2-101(5)).

Taken together, these authorities show that a person can violate section 45-5-206(1)(a) through any form of communication that inflicts bodily injury in the form of emotional anguish. The infliction of emotional anguish does not require the use of physical force as that term is defined by federal law. *See Johnson v. United States*, 559 U.S. 133, 138 (2010) (holding that physical force “refers to force exerted by and through concrete bodies—distinguishing physical force from, for example, intellectual force or emotional force”).<sup>5</sup> We recognize that the Supreme Court held in *Castleman* that a “misdemeanor crime of domestic violence” requires only the force necessary to commit common law battery, and that this is significantly less force than *Johnson* required for the violent felony standard at issue in *Castro*. *See* 572 U.S. at 163. Nevertheless, we are bound by our precedent in *Castro*, which observed that Montana’s PFMA statute “explicitly defines [bodily injury] more broadly than the generic definition.” 71 F.4th at 741–42 (reasoning subsection (1)(a) “deviates from the generic

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<sup>5</sup> Although our case law holds that it is impossible to intentionally or knowingly cause bodily injury without the use of physical force, *see United States v. Calvillo-Palacios*, 860 F.3d 1285, 1290–91 (9th Cir. 2017), we have not addressed a state law that defines “bodily injury” so broadly that it includes mere emotional injury, as Montana’s PFMA statute does.

crime of battery by allowing the harm to be mental rather than physical”). Thus, we are compelled to conclude that section 45-5-206(1)(a) does not “ha[ve], as an element, the use or attempted use of physical force” within the meaning of § 921(a)(33)(A)(ii).<sup>6</sup>

### III.

The government points to case law suggesting that DeFrance is required to show “a realistic probability, not a theoretical possibility,” that Montana would apply section 45-5-206(1)(a) in a case that does not involve the use of physical force. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007).<sup>7</sup> Assuming this principle applies here,

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<sup>6</sup> At oral argument, the government argued that Montana Criminal Law Commission commentary demonstrates that Montana assault requires the use of physical force. *See* Mont. Code Ann. § 45-5-201 Criminal Law Commission’s comment (noting that “‘battery,’ i.e., actual bodily injury or contact of some kind, is an essential element of the offense of assault in all instances except those” in which the offender causes a reasonable apprehension of bodily injury). We disagree. Because the commentary uses the disjunctive “actual bodily injury *or* contact of some kind,” and Montana defines bodily injury to include mental illness or impairment, the commentary does not establish that physical force is required.

<sup>7</sup> In *Duenas-Alvarez*, the Supreme Court held that an offender asserting that a state offense is broader than its federal counterpart must demonstrate “a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.” 549 U.S. at 193. To make that showing, an offender “must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues.” *Id.*; accord *Moncrieffe v. Holder*, 569 U.S. 184, 191, 205–06 (2013). But recently, in *United States v. Taylor*, 596 U.S. 845, 857–58 (2022), the Court suggested that the realistic



DeFrance can make the required showing in either of two ways. First, “if ‘a state statute explicitly defines a crime more broadly than the generic definition, no legal imagination is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of the crime.’” *Chavez-Solis v. Lynch*, 803 F.3d 1004, 1009–10 (9th Cir. 2015) (quoting *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (en banc), *abrogated on other grounds by United States v. Stitt*, 586 U.S. 27 (2018)). “[W]hen a ‘state statute’s greater breadth is evident from its text,’ a petitioner need not point

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probability standard may have no application in a case, such as this one, in which the inquiry posed by federal law is whether a state law has the use of force as an element. The Court stated that the government’s invocation of the realistic probability standard could not

be squared with the statute’s terms. To determine whether a federal felony qualifies as a crime of violence, § 924(c)(3)(A) doesn’t ask whether the crime is *sometimes* or even *usually* associated with communicated threats of force (or, for that matter, with the actual or attempted use of force). It asks whether the government must prove, as an *element* of its case, the use, attempted use, or threatened use of force.

*Id.* The “crime of violence” provision at issue in *Taylor*, 18 U.S.C. § 924(c)(3)(A), is similar to the provision at issue here. *Compare* 18 U.S.C. § 924(c)(3)(A) (“For purposes of this subsection the term ‘crime of violence’ means an offense that is a felony and . . . has as an element the use, attempted use, or threatened use of physical force against the person or property of another . . .”), *with id.* § 921(a)(33)(A) (“[T]he term ‘misdemeanor crime of domestic violence’ means an offense that . . . is a misdemeanor under Federal, State, Tribal, or local law; and . . . has, as an element, the use or attempted use of physical force . . .”). After *Taylor*, it is not clear what remains of the realistic probability standard.

to an actual case applying the statute of conviction in a nongeneric manner.” *Id.* at 1010 (quoting *Grisel*, 488 F.3d at 850). Alternatively, where a statute’s overbreadth is not evident from its text, a defendant “can show the requisite ‘realistic probability’ of prosecution for conduct that falls outside the generic definition” by “point[ing] to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues.” *Id.* at 1009 (quoting *Duenas-Alvarez*, 549 U.S. at 193). DeFrance relies exclusively on the first theory rather than the second. Accordingly, we address only whether it is “evident from its text” that the Montana PFMA statute does not require the use of physical force.

The government maintains that “it cannot be ‘evident from its text’ that [Montana’s PFMA statute] is overbroad, because the text is indistinguishable from the statutory text upheld in *Castleman*.” Answering Brief of the United States at 31. We disagree.

In *Castleman*, the Supreme Court considered whether a Tennessee domestic violence statute had as an element the use or attempted use of physical force. 572 U.S. at 168. The Tennessee statute made it unlawful to “intentionally or knowingly cause[] bodily injury” to a domestic partner, *id.* at 169, and it defined “bodily injury” to include “a cut, abrasion, bruise, burn or disfigurement; physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty,” *id.* at 170 (quoting Tenn. Code Ann. § 39-11-106(a)(2) (1997)). The Court concluded that the statute required the use of physical force because “these forms of injury do necessitate force in the common-

law sense.” *Id.*<sup>8</sup> Accordingly, the Court held that a conviction under the Tennessee statute “qualifies as a ‘misdemeanor crime of domestic violence.’” *Id.* at 171.

As the government points out, the Tennessee statute’s language is similar to section 45-5-206(1)(a)’s language. The Tennessee statute makes it unlawful to “intentionally or knowingly cause[] bodily injury” to a domestic partner, *id.* at 169; the Montana statute makes it unlawful to “purposefully or knowingly cause[] bodily injury to a partner or family member,” Mont. Code Ann. § 45-5-206(1)(a). The Tennessee statute defines bodily injury to include “a cut, abrasion, bruise, burn or disfigurement; physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty,” *Castleman*, 572 U.S. at 170 (quoting Tenn. Code Ann. § 39-11-106(a)(2) (1997)); the Montana statute defines bodily injury as “physical pain, illness, or an impairment of physical condition and includes mental illness or impairment,” Mont. Code Ann. § 45-2-101(5). The language of the two statutes is not identical, and

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<sup>8</sup> Criminal battery requires “either a bodily injury or an offensive touching.” 2 Wayne R. LaFare, *Substantive Criminal Law* § 16.2 (3d ed. 2023). “The force used need not be applied directly to the body of the victim, as in the usual case where one shoots at another or strikes him with knife, club or fist.” *Id.* § 16.2(b). “It may also be indirectly applied to the victim, as where one whips the horse on which the victim is riding, causing the horse to bolt and throw his rider, where one drives an automobile into the vehicle occupied by the victim, or where one compels another to touch him in a way offensive to the other.” *Id.* (footnotes omitted). “So too a battery may be committed by administering a poison or by infecting with a disease, or even by resort to some intangible substance.” *Id.* (footnotes omitted). “[A]t common law, the element of force in the crime of battery was ‘satisfied by even the slightest offensive touching.’” *Castleman*, 572 U.S. at 163 (quoting *Johnson*, 559 U.S. at 139).

“impairment of the function of a . . . mental faculty,” and “mental illness or impairment” could have different meanings. But even if the language of the Tennessee and Montana statutes were identical, that would not end our inquiry, because we do not consider the statutory language in isolation.

To determine whether it is “evident from its text” that a state statute is broader than its federal counterpart, we also employ ordinary tools of statutory interpretation, including state case law interpreting the statutes in question.<sup>9</sup> As we explained in *Castro*, in “analyzing the state statute’s text, . . . we may also consider state court interpretations of the statute.” 71 F.4th at 738 (citing *United States v. Baldon*, 956 F.3d 1115, 1123 (9th Cir. 2020)); see also *Olea-Serefina v. Garland*, 34 F.4th 856, 863 (9th Cir. 2022) (“[I]n applying the categorical approach to a state offense, we are bound by the state courts’ ‘interpretation of state law, including [their] determination of the elements’ of an offense.” (alteration in original) (quoting *Johnson*, 559 U.S. at 138)); accord *Taylor*, 596 U.S. at 859 (“Appreciating the respect due state courts as the final arbiters of state law in our federal system, . . . it ma[kes] sense to consult how a state court would interpret its own State’s laws.”).

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<sup>9</sup> On occasion, we have found the statutory language conclusive without consulting case law. *E.g.*, *United States v. Bautista*, 989 F.3d 698, 704–05 (9th Cir. 2021) (holding that an Arizona drug statute was broader than the federal definition of a “controlled substance offense” based solely on a comparison of the two statutes’ language; whereas the federal statute excluded hemp, the Arizona statute did not); *United States v. Laurico-Yeno*, 590 F.3d 818, 821–22 (9th Cir. 2010) (declining to consider case law where a California statute on its face fell within the federal definition of a “crime of violence”).

In *Grisel*, 488 F.3d at 850–51, for example, our en banc court concluded that a statute’s overbreadth was evident from its text based not only on statutory language but also on state case law interpreting and applying the statute. In doing so, we recognized that relying on the statutory language alone may be misleading because the state courts may have narrowed the statute’s application through judicial interpretation. *Id.* at 850 (citing *James v. United States*, 550 U.S. 192, 202 (2007), *overruled on other grounds by Johnson v. United States*, 576 U.S. 591 (2015)). We followed the same analytical steps in *United States v. Vidal*, 504 F.3d 1072, 1080–86 (9th Cir. 2007) (en banc), *abrogation on other grounds recognized by United States v. Bautista*, 989 F.3d 698, 704 (9th Cir. 2021), where we similarly concluded that a statute’s overbreadth was evident from its text based not only on the statutory language but also on state case law, model jury instructions, legislative history, other statutes, and state canons of statutory interpretation. Here, our conclusion that section 45-5-206(1)(a)’s overbreadth is evident from its text considers the statute’s language as well as Montana case law. Because Montana’s courts have the final say in construing Montana assault statutes, the similarities between the words of the Tennessee and Montana statutes do not foreclose our conclusion that the Montana statute is materially broader. Indeed, as interpreted by *Castro*, Montana case law compels the conclusion that the use of physical force is not an element of 45-5-206(1)(a), because the statute may be violated by inflicting only emotional injury.

The government’s reliance on *Castleman* is also misplaced because *Castleman*’s brief analysis of the Tennessee statute did not address whether the Tennessee statute is as expansive as the Montana statute. Although the

Court held that it was impossible to violate the Tennessee statute without the use of physical force, the Court did not consider whether the Tennessee statute could be violated by words alone or whether emotional injury, without more, qualifies as bodily injury under Tennessee law. *Castleman*'s conclusion that the Tennessee statute requires the use of physical force does not resolve whether the Montana statute does as well.

#### IV.

We recognize that it may be unlikely that Montana would actually apply section 45-5-206(1)(a) in a case involving only verbal conduct and emotional injury. During a hearing on DeFrance's motions to dismiss the indictment, the district court asked government counsel whether she was "aware of any partner family member assault or [other] assault convictions in the Montana courts that relied on proof of bodily injury caused solely . . . by verbal or other non-physical conduct by a defendant." Government counsel suggested that such cases would be brought under Montana Code Annotated section 45-5-206(1)(c), which makes it unlawful to "purposely or knowingly cause[] reasonable apprehension of bodily injury in a partner or family member," rather than section 45-5-206(1)(a), the statute at issue here. Neither DeFrance nor the government could point to a single case in which Montana applied section 45-5-206(1)(a) in the absence of the use of physical force. But under our case law, a "realistic probability" of overbroad application is conclusively established wherever, as here, a statute's overbreadth is "evident from its text." *See Chavez-Solis*, 803 F.3d at 1009–10. When the statute's text makes its overbreadth evident, no further inquiry into a "realistic probability" of overbroad application is required and a defendant "need not point to an actual case applying the

statute of conviction in a nongeneric manner.” *Id.* at 1010. “As long as the application of the statute’s express text in the nongeneric manner is not a logical impossibility, the relative likelihood of application to nongeneric conduct is immaterial.” *Lopez-Aguilar v. Barr*, 948 F.3d 1143, 1147 (9th Cir. 2020).

As interpreted by *Castro*, Montana case law makes evident that Montana Code Annotated section 45-5-206(1)(a) does not “ha[ve], as an element, the use or attempted use of physical force.” *See* 18 U.S.C. § 921(a)(33)(A)(ii). Thus, DeFrance’s conviction under section 45-5-206(1)(a) does not qualify as a “misdemeanor crime of domestic violence.” We therefore reverse DeFrance’s § 922(g)(9) conviction, vacate his sentence, and remand for resentencing or other proceedings consistent with this opinion.<sup>10</sup>

\* \* \*

For the reasons stated here and in a concurrently filed memorandum disposition, DeFrance’s convictions are **AFFIRMED IN PART** and **REVERSED IN PART**, the sentence is **VACATED**, and the case is **REMANDED** for resentencing or for other proceedings consistent with the judgment of this court.<sup>11</sup>

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<sup>10</sup> Our holding that section 45-5-206(1)(a) does not qualify as a “misdemeanor crime of domestic violence” makes it unnecessary to reach DeFrance’s remaining challenges to his § 922(g)(9) conviction.

<sup>11</sup> The conclusion that DeFrance’s conviction under section 45-5-206(1)(a) does not qualify as a “misdemeanor crime of domestic violence” may call into question DeFrance’s convictions under § 922(a)(6). DeFrance has not challenged his § 922(a)(6) convictions on this ground and we express no opinion as to whether this issue is properly preserved.

DeFrance's motion for judicial notice, Docket No. 43, is **GRANTED**.

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CHRISTEN, Circuit Judge, concurring:

I do not lightly reach the conclusion that Montana's PFMA statute cannot serve as a predicate for 18 U.S.C. § 922(g)(9) convictions. There is little doubt that when Congress enacted § 922(g)(9), it intended to keep firearms out of the hands of misdemeanor domestic abusers. *Id.* ("It shall be unlawful for any person . . . who has been convicted in any court of a misdemeanor crime of domestic violence . . . to . . . possess . . . any firearm . . ."); *United States v. Hayes*, 555 U.S. 415, 427 (2009) ("Firearms and domestic strife are a potentially deadly combination nationwide."). Yet after today's decision, misdemeanor domestic abusers convicted under Montana Code Annotated section 45-5-206(1)(a) will not be subject to § 922(g)(9)'s prohibition on the possession of firearms. This cannot be what Congress intended, but I conclude that it is the result dictated by faithful application of controlling precedent.

Congress defined "misdemeanor crime of domestic violence" to include a state offense that "has, as an *element*, the use or attempted use of physical force." 18 U.S.C. § 921(a)(33)(A)(ii) (emphasis added). In determining the elements of a state offense, we consider not only the statutory language but also state court interpretations of the statute. *See United States v. Taylor*, 596 U.S. 845, 859 (2022) (observing that, when applying the categorical approach: "Appreciating the respect due state courts as the final arbiters of state law in our federal system, . . . it ma[kes] sense to consult how a state court would interpret its own



State’s laws.”); *Johnson v. United States*, 559 U.S. 133, 138 (2010) (“We are . . . bound by the [state] Supreme Court’s interpretation of state law, including its determination of the elements of [that law].”); *United States v. Castro*, 71 F.4th 735, 738 (9th Cir. 2023) (“We begin by analyzing the state statute’s text, and we may also consider state court interpretations of the statute.”); *United States v. Grisel*, 488 F.3d 844, 850–51 (9th Cir. 2007) (en banc) (considering state court interpretations of state law when applying the categorical approach, in part because a state’s courts may have narrowed the scope of the statutory language), *abrogated on other grounds by United States v. Stitt*, 586 U.S. 27 (2018).

The Montana Supreme Court has interpreted the state’s assault statutes broadly. It has held that assault may be committed through words alone, *State v. Sherer*, 60 P.3d 1010, 1013 (Mont. 2002), and that “bodily injury” may consist of nothing more than nonphysical, emotional injury, *State v. Cooney*, 963 P.2d 1272, 1274 (Mont. 1998). Neither purely verbal conduct nor purely emotional injury requires the use of physical force as that term is defined by federal law. *See Johnson*, 559 U.S. at 138 (holding that physical force “refers to force exerted by and through concrete bodies—distinguishing physical force from, for example, intellectual force or emotional force”). Accordingly, the Montana statute under which DeFrance was convicted, Mont. Code Ann. § 45-5-206(1)(a), does not “ha[ve], as an element, the use or attempted use of physical force,” 18 U.S.C. § 921(a)(33)(A)(ii), and a conviction under Montana’s PFMA statute does not qualify as a “misdemeanor crime of domestic violence” for purposes of § 922(g)(9).

The district court reasonably concluded that Montana would not actually apply its statute in a case that does not involve the use of physical force; neither party could identify an instance in which it has. But as the Supreme Court has recently explained, § 921(a)(33)(A) “doesn’t ask whether the crime is *sometimes* or even *usually* associated with . . . the actual or attempted use of force[]”. It asks whether the government must prove, as an *element* of its case, the use [or] attempted use . . . of force.” *See Taylor*, 596 U.S. at 857–58.<sup>1</sup> And our circuit has held that, “[a]s long as the application of the statute’s express text in the nongeneric manner is not a logical impossibility, the relative likelihood of application to nongeneric conduct is immaterial.” *Lopez-Aguilar v. Barr*, 948 F.3d 1143, 1147 (9th Cir. 2020). What matters for purposes of the categorical approach is that the Montana statute does not have the use of physical force as an element, not whether Montana is likely to apply its statute in an overbroad manner.

Ironically, the result in this case would be different if Montana’s laws were less protective of domestic violence victims. It is only because Montana defines assault broadly—as encompassing purely verbal conduct and purely emotional injury—that the Montana offense at issue here

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<sup>1</sup> *Taylor* involved the federal definition of “crime of violence” under the elements clause of § 924(c). That provision is similar, but not identical, to the provision at issue here. *Compare* 18 U.S.C. § 924(c)(3)(A) (“For purposes of this subsection the term ‘crime of violence’ means an offense that is a felony and . . . has as an element the use, attempted use, or threatened use of physical force against the person or property of another . . .”), *with id.* § 921(a)(33)(A) (“[T]he term ‘misdemeanor crime of domestic violence’ means an offense that . . . is a misdemeanor under Federal, State, Tribal, or local law; and . . . has, as an element, the use or attempted use of physical force . . .”).

sweeps more broadly than the federal definition of “misdemeanor crime of domestic violence.”

The counterintuitive result in this case is not carved in stone. First, the opinion issued today relies on the Montana Supreme Court’s interpretation of Montana assault statutes generally, not the PFMA statute specifically. If our court misunderstands the scope of the phrase “bodily injury” in the PFMA statute, the outcome of this categorical analysis could change. Second, Congress has the power to amend the federal definition of “misdemeanor crime of domestic violence” to address the anomalous result in this case and others like it. For example, the outcome of this case likely would be different if the definition of “misdemeanor crime of domestic violence” in 18 U.S.C. § 921(a)(33)(A)(ii) turned on an offender’s actual conduct rather than the elements of the crime of conviction. Alternatively, Congress could focus the § 921(a)(33)(A) inquiry on a statute’s practical scope rather than its formal elements—asking whether there is a meaningful likelihood that the statute would be applied in an overbroad manner. In *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007), and *Moncrieffe v. Holder*, 569 U.S. 184, 191, 205–06 (2013), for example, the Court noted that “there must be ‘a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.’” *Moncrieffe*, 569 U.S. at 191 (quoting *Duenas-Alvarez*, 549 U.S. at 193). This rule has been applied inconsistently, and our current circuit precedent does not require this showing where it is evident from a statute’s text that the state offense is broader than its federal counterpart. See *Chavez-Solis v. Lynch*, 803 F.3d 1004, 1009–10 (9th Cir. 2015). Congress is free to codify the standard set out in *Duenas-Alvarez*, or otherwise to adopt a definition of

“misdemeanor crime of domestic violence” that would require offenders to show something more than a theoretical possibility of overbroad application in order to negate § 922(g)(9)’s important domestic violence protections.

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RAKOFF, District Judge, concurring:

While I am obliged by precedent to join in the Court’s opinion, I continue to be deeply troubled by the so-called “categorical approach,” first adopted by the Supreme Court in *Taylor v. United States*, 495 U.S. 575 (1990), and still binding on all lower courts. As we stated in *Castro*, this approach “requires, for better or worse, that we ignore what actually occurred during the defendant’s prior felony.” *United States v. Castro*, 71 F.4th 735, 738 (9th Cir. 2023). It seems to me that case after case, including this one, have demonstrated that the categorical approach is “for worse,” leading to bizarre results.

I agree with Judge Christen that Congress should fix this problem, not least because it is hard to believe that Congress intended these results when it enacted § 922(g)(9). *See United States v. Castleman*, 572 U.S. 157, 160 (2014) (“Congress enacted § 922(g)(9) . . . to “close [a] dangerous loophole” in the gun control laws: While felons had long been barred from possessing guns, many perpetrators of domestic violence are convicted only of misdemeanors.”). But I have not given up hope that the Supreme Court might still fix the problem or at least take a more realistic view of how to interpret the categorical approach.

Indeed, if one were writing on a blank slate, one might reach a different conclusion than did the Supreme Court in

*Taylor*. In that case, the Supreme Court adopted the categorical approach for three reasons, none of which is compelling. First, the Court stated that the statutory language “generally supports the inference that Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions.” *Taylor*, 495 U.S. at 600. But any language as equivocal as “generally supports the inference” invites reconsideration in light of experience. Indeed, the precise statutory text that the Court was asked to interpret did not even include the “element” language often cited to justify the necessity of the categorical approach. Second, the Court stated that the legislative history “shows that Congress *generally* took a categorical approach.” *Id.* at 601 (emphasis added). But this very language illustrates that the legislative history was mixed. Third, and seemingly most important to the Court in *Taylor*, the Court stated that “the practical difficulties and potential unfairness of a factual approach are daunting.” *Id.* But as the instant case demonstrates, ascertaining the relevant underlying facts has not proved difficult in most cases, where the relevant facts have been fully established by allocutions-on-the-record and the like. And, in any event, such alleged difficulties are, in my view, no excuse for ignoring the actual facts of a case in favor of hypothetical guesses at how broadly the underlying statute might be construed.

In short, it seems to me that Congress never remotely intended the counter-intuitive results that the categorical approach has engendered. Although the Supreme Court has thus far declined the opportunity to reconsider whether Congress really intended the categorical approach, I join the growing number of lower-court judges and Supreme Court

justices who have called into question the propriety of this approach. *See, e.g., United States v. Taylor*, 596 U.S. 845, 861 (2022) (Thomas, J., dissenting) (“This holding exemplifies just how this Court’s ‘categorical approach’ has led the Federal Judiciary on a ‘journey Through the Looking Glass,’ during which we have found many ‘strange things.’ Rather than continue this 30-year excursion into the absurd, I would hold Taylor accountable for what he actually did and uphold his conviction.”) (citation omitted); *Mathis v. United States*, 579 U.S. 500, 541 (2016) (Alito, J., dissenting) (“A real-world approach would avoid the mess that today’s decision will produce. Allow a sentencing court to take a look at the record in the earlier case to see if the place that was burglarized was a building or something else.”); *United States v. Burris*, 912 F.3d 386, 407 (6th Cir. 2019) (en banc) (Thapar, J., concurring) (“A casual reader of today’s decision might struggle to understand why we are even debating if ramming a vehicle into a police officer is a crime of violence. The reader’s struggle would be understandable. The time has come to dispose of the long-baffling categorical approach.”); *United States v. Faust*, 853 F.3d 39, 61 (1st Cir. 2017) (Lynch, J., concurring) (“My concern is that use of these tests can lead courts to reach counterintuitive results, and ones which are not what Congress intended.”).

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

DEC 30 2024

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MICHAEL BLAKE DEFRANCE,

Defendant - Appellant.

No. 23-2409

D.C. No.

9:21-cr-00029-DLC-1

MEMORANDUM\*

Appeal from the United States District Court  
for the District of Montana  
Dana L. Christensen, District Judge, Presiding

Argued and Submitted September 12, 2024  
Seattle, Washington

Before: CHRISTEN and SUNG, Circuit Judges, and RAKOFF, District Judge.\*\*

Michael Blake DeFrance appeals his convictions for one count of being a prohibited person in possession of firearms and ammunition, 18 U.S.C. § 922(g)(9), and three counts of making a false statement during a firearms

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\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

\*\* The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

transaction, *id.* § 922(a)(6), as well as his 21-month prison sentence. For the reasons stated here and in a concurrently filed opinion, we affirm in part, reverse in part, vacate in part, and remand.

1. Reviewing de novo, *see United States v. Kent*, 649 F.3d 906, 912 (9th Cir. 2011) (“[W]here our vindictive prosecution inquiry turns upon a district court’s proper application of the law, our review is de novo.”), we reject DeFrance’s contention that the government sought the § 922(a)(6) “charges solely to punish [him] for exercising a constitutional or statutory right.” *United States v. Gamez-Orduno*, 235 F.3d 453, 462 (9th Cir. 2000). It is undisputed that the government was unaware of DeFrance’s false statements on the Firearms Transaction Records until DeFrance submitted them to the district court, and the Supreme Court has made clear that “[t]here is good reason to be cautious before adopting an inflexible presumption of prosecutorial vindictiveness in a pretrial setting” because, “[i]n the course of preparing a case for trial, the prosecutor may uncover additional information that suggests a basis for further prosecution.” *United States v. Goodwin*, 457 U.S. 368, 381 (1982). DeFrance failed to show that the circumstances established a “reasonable likelihood of vindictiveness.” *Kent*, 649 F.3d at 912–13 (quoting *Goodwin*, 457 U.S. at 373).

2. DeFrance’s argument that the district court should have decreased his offense level under U.S. Sentencing Guidelines Manual (U.S.S.G.) § 2K2.1(b)(2)



fails. This provision applies where the defendant “possessed all ammunition and firearms *solely* for lawful sporting purposes or collection.” U.S.S.G. § 2K2.1(b)(2) (emphasis added). DeFrance acknowledged in a letter to the probation office that his pistol “was for protection at home.” Thus, the district court’s finding that DeFrance did not possess the weapons solely for lawful sporting purposes or collection was not clearly erroneous. *See United States v. Scheu*, 83 F.4th 1124, 1126 (9th Cir. 2023) (“A court’s application of the Guidelines to the facts of a case is reviewed for an abuse of discretion and its factual findings for clear error.”).

DeFrance’s argument that § 2K2.1(b)(2) should be read broadly to encompass all lawful purposes, including self-defense, is foreclosed by precedent. *See United States v. Lam*, 20 F.3d 999, 1002 (9th Cir. 1994); *United States v. Uzelac*, 921 F.2d 204, 206 (9th Cir. 1990). The district court therefore properly rejected this argument. *See Scheu*, 83 F.4th at 1126 (“We review de novo the district court’s legal interpretation of the Guidelines.”).

For the reasons stated here and in a concurrently filed opinion, DeFrance’s convictions are **AFFIRMED IN PART** and **REVERSED IN PART**, the sentence is **VACATED**, and the case is **REMANDED** for resentencing or for other proceedings consistent with the judgment of this court.

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

**FILED**

FEB 24 2025

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MICHAEL BLAKE DEFRANCE,

Defendant - Appellant.

No. 23-2409

D.C. No.

9:21-cr-00029-DLC-1

District of Montana,  
Missoula

ORDER

Before: CHRISTEN and SUNG, Circuit Judges, and RAKOFF, District Judge.\*

The panel has voted to deny the petition for panel rehearing. Judges Christen and Sung have voted to deny the petition for rehearing en banc, and Judge Rakoff has so recommended.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 40.

The petition for panel rehearing and the petition for rehearing en banc are denied.

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\* The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

**(ORDER LIST: 598 U.S.)**

**MONDAY, APRIL 3, 2023**

**...**

**CERTIORARI DENIED**

**...**

**22-6956      DeFRANCE, MICHAEL B. V. UNITED STATES**

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

**FILED**

FEB 15 2023

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL BLAKE DEFRANCE,

Defendant-Appellant.

No. 22-30131

D.C. No. 9:21-cr-00029-DLC-1  
District of Montana,  
Missoula

ORDER

Before: FERNANDEZ, FRIEDLAND, and H.A. THOMAS, Circuit Judges.

Appellee's motion to dismiss this appeal for lack of jurisdiction (Docket Entry No. 13), is granted because the district court orders from which appellant appeals are not final judgments or immediately appealable collateral orders. *See* 28 U.S.C. § 1291; *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798-99 (1989) (describing collateral order doctrine).

Appellant asks this court to treat his appeal, in the alternative, as a petition for a writ of mandamus. The petition is denied because appellant has not shown that he "will be damaged or prejudiced in a way not correctable on appeal," or otherwise demonstrated that this case warrants the extraordinary remedy of mandamus. *Bauman v. U.S. Dist. Court*, 557 F.2d 650, 654 (9th Cir. 1977).

**DISMISSED.**

No. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES

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October Term, 2024

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MICHAEL BLAKE DeFRANCE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

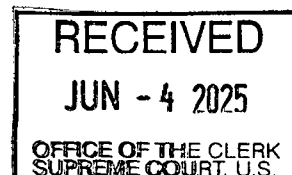
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**APPENDIX B**  
**TO THE PETITION FOR WRIT OF**  
**CERTIORARI TO THE UNITED STATES**  
**COURT OF APPEALS FOR THE NINTH CIRCUIT**

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SUBMITTED: May 16, 2025



## TABLE OF APPENDIX B

### Appendix B:

Order Granting Petitioner's Motion to File Additional Pretrial Motions  
and Request for Response on Renewing Pretrial Motions (Doc. 64)  
(November 22, 2021),

Cause No. CR 21-29-M-DLC, United States District Court,  
District of Montana, Missoula Division ..... 31-32

Order Denying Motion to Dismiss Indictment for Lack of Specificity  
and Failure to State an Offense (Doc. 14); Motion to Dismiss Indictment  
Because PFMA is Indivisible and Third Motion to Dismiss Superseding  
Indictment (Doc. 16); and Third Motion to Dismiss Superseding Indictment  
(Doc. 43) (Doc. 71) (December 29, 2021),

Cause No. CR 21-29-M-DLC, United States District Court,  
District of Montana, Missoula Division ..... 33-74

Order Denying Motion to Dismiss the Second Superseding  
Indictment (Doc. 91) (April 15, 2022),

Cause No. CR 21-29-M-DLC, United States District Court,  
District of Montana, Missoula Division ..... 75-91

Order Denying Motion for Reconsideration (Doc. 111)  
(July 26, 2022),

Cause No. CR 21-29-M-DLC, United States District Court,  
District of Montana, Missoula Division ..... 92-95

Findings of Fact, Conclusions of Law and Order (Doc. 182)  
(May 1, 2023),

Cause No. CR 21-29-M-DLC, United States District Court,  
District of Montana, Missoula Division ..... 96-140

Order Denying Motion for Acquittal, to Arrest Judgment,  
and for a New Trial (Doc. 198) (July 13, 2023),

Cause No. CR 21-29-M-DLC, United States District Court,  
District of Montana, Missoula Division ..... 141-166

///

Judgment (Doc. 211) (September 21, 2023),  
Cause No. CR 21-29-M-DLC, United States District Court,  
District of Montana, Missoula Division ..... 167-173

Pretrial Order published at 577 F.Supp.3d 1085 (D. Mont. 2021),  
Cause No. CR 21-29-M-DLC, United States District Court,  
District of Montana, Missoula Division ..... 174-192

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
MISSOULA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MICHAEL BLAKE DEFANCE,

Defendant.

CR 21-29-M-DLC

ORDER

Before the Court is Defendant Michael Blake DeFrance's Unopposed Motion to File Additional Pretrial Motions. (Doc. 62.) The Motion requests that the Court enter an order permitting Mr. DeFrance to file additional pretrial motions addressing various issues by December 20, 2021. (*Id.* at 3-7.) The United States does not oppose the Motion. (*Id.* at 7.)

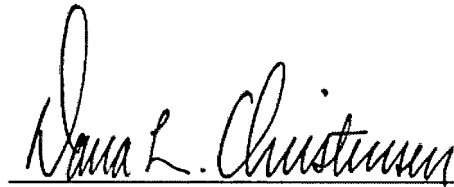
Accordingly, IT IS ORDERED that the Motion (Doc. 62) is GRANTED. Mr. DeFrance may file any pretrial motions on or before December 20, 2021. Any response or reply briefs shall be filed in the time specified in Paragraph 7 of the Court's Scheduling Order (Doc. 18).

IT IS FURTHER ORDERED that Mr. DeFrance shall file a response to this Order indicating whether he intends to renew his motions to dismiss the Superseding Indictment (Docs. 14, 16, 43) on or before November 29, 2021.



IT IS FURTHER ORDERED that all time from September 15, 2021 to the disposition of the currently pending and anticipated pretrial motions is hereby excluded from any Speedy Trial Act calculations in the above-captioned matter pursuant to 18 U.S.C. § 3161(h)(1)(D). (*See* Doc. 42.)

DATED this 22nd day of November, 2021.

A handwritten signature in black ink, reading "Dana L. Christensen". The signature is written in a cursive style with a large initial "D".

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Dana L. Christensen, District Judge  
United States District Court

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
MISSOULA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MICHAEL BLAKE DEFRANCE,

Defendant.

CR 21-29-M-DLC

ORDER

Before the Court are Defendant Michael Blake DeFrance's Motion to Dismiss Indictment for Lack of Specificity and Failure to State an Offense (Doc. 14), Motion to Dismiss Indictment Because Montana PFMA (§ 45-5-206 (2011)) is Indivisible and an Unconstitutional Noncategorical Version of 18 U.S.C. § 921(a)(33)(A)(ii) (Doc. 16), and Third Motion to Dismiss Superseding Indictment (Doc. 43). The Court will deny each of these motions to dismiss.<sup>1</sup>

**BACKGROUND**

On July 28, 2021, the United States charged Mr. DeFrance with one count of prohibited person in possession of firearms and ammunition, in violation of 18

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<sup>1</sup> Mr. DeFrance has filed a Motion to Dismiss the Second Superseding Indictment (Doc. 69), which is not yet fully briefed and which this Order does not address. The Court's Order excluding all time from September 15, 2021 to the disposition of all pretrial motions from any Speedy Trial Act calculations in this matter pursuant to 18 U.S.C. § 3161(h)(1)(D) remains in full force and effect. (Doc. 64.)

U.S.C. § 922(g)(9). (Doc. 2.) Specifically, the Indictment alleged:

That on or about June 27, 2018 and October 2, 2018, at Missoula, in Missoula County, in the State and District of Montana, the defendant, MICHAEL BLAKE DEFRANCE, knowing he had been convicted on or about May 6, 2013, of a misdemeanor crime of violence under the laws of the State of Montana, knowingly possessed, in and affecting interstate commerce, firearms and ammunition, in violation of 18 U.S.C. § 922(g)(9).

(*Id.* at 1–2.)

On August 13, 2021, Mr. DeFrance moved to dismiss the indictment under Rule 12(b)(3)(B)(iii) and (v) of the Federal Rules of Criminal Procedure for lack of specificity and failure to state an offense. (Doc. 14.) On August 18, 2021, Mr. DeFrance filed a second motion to dismiss the indictment on the grounds that Montana’s Partner and Family Member Assault statute (Mont. Code Ann. § 45-5-206) is indivisible and an unconstitutional noncategorical version of 18 U.S.C. § 921(a)(33)(A)(ii). (Doc. 16.)

On August 26, 2021, the United States filed a Superseding Indictment, which charged Mr. DeFrance with one count of prohibited person in possession of firearms and ammunition, in violation of 18 U.S.C. § 922(g)(9). (Doc. 21.) The Superseding Indictment alleged:

That on or about June 27, 2018, and October 2, 2018, at Missoula, in Missoula County, in the State and District of Montana, the defendant, MICHAEL BLAKE DEFRANCE, knowing he had been convicted on or about May 6, 2013, of a misdemeanor crime of domestic violence under the laws of the State of Montana, which meets the definition of a misdemeanor crime of domestic violence under 18 U.S.C.

§ 921(a)(33)(A)(i) and (ii), knowingly possessed, in and affecting interstate commerce, firearms and ammunition, in violation of 18 U.S.C. § 922(g)(9).

(*Id.* at 1–2.)

The Court held a hearing on the first and second motions to dismiss on September 13, 2021. (Doc. 39.) On September 17, 2021, Mr. DeFrance filed a third motion to dismiss the indictment on the grounds that the elements of the offense are too vague to provide sufficient definiteness that ordinary people can understand what is prohibited and fail to provide adequate standards for those who apply the law. (Doc. 43 at 3.)

On October 21, 2021, the United States filed a Second Superseding Indictment. (Doc. 55.) The Second Superseding Indictment charged the prohibited person in possession of firearms and ammunition offense as Count I and alleged:

That on or about and between October 3, 2016, and October 2, 2018, at Missoula, in Missoula County, in the State and District of Montana, the defendant, MICHAEL BLAKE DEFRANCE, knowing he had been convicted on or about May 6, 2013, of a misdemeanor crime of domestic violence under the laws of the State of Montana, which meets the definition of a misdemeanor crime of domestic violence under 18 U.S.C. § 921(a)(33)(A)(i) and (ii), knowingly possessed, in and affecting interstate commerce, firearms and ammunition, in violation of 18 U.S.C. § 922(g)(9).

(*Id.* at 2.) Aside from setting forth an earlier date for the start of the alleged offense, the allegations are substantively identical to those in the Superseding

Indictment. The Second Superseding Indictment further charges three counts of false statement during a firearms transaction, in violation of 18 U.S.C. § 922(a)(6), as Counts II–IV. (*Id.* at 2–4.) Counts II–IV allege that on three separate occasions in 2018, Mr. DeFrance knowingly made a false or fictitious written statement that he had not been convicted in any court of a misdemeanor crime of domestic violence in connection with his acquisition and attempted acquisition of a firearm. (*Id.*) On November 24, 2021, Mr. DeFrance renewed his first, second, and third motions to dismiss so that the Court would consider them applicable to the Second Superseding Indictment. (Doc. 65.)

#### ANALYSIS

### **I. Motion to Dismiss for Lack of Specificity and Failure to State an Offense**

#### **A. Legal Standards**

Rule 12 of the Federal Rules of Criminal Procedure authorizes a defendant to move to dismiss an indictment for lack of specificity and for failure to state an offense. Fed. R. Crim. P. 12(b)(3)(B)(iii), (v).

A motion to dismiss for lack of specificity requires a court to review an indictment “in its entirety, construed according to common sense, and interpreted to include facts which are necessarily implied.” *United States v. Berger*, 473 F.3d 1080, 1103 (9th Cir. 2007) (quoting *United States v. King*, 200 F.3d 1207, 1217

(9th Cir. 1999)). The test is not “whether [the indictment] could have been framed in a more satisfactory manner, but whether it conforms to the minimal constitutional standards.” *United States v. Awad*, 551 F.3d 930, 935 (9th Cir. 2009) (quoting *United States v. Hinton*, 222 F.3d 664, 672 (9th Cir. 2000)). An indictment meets constitutional and procedural muster if it “state[s] the elements of the offense charged with sufficient clarity to apprise a defendant of the charge against which he must defend and enable him to plead double jeopardy.” *Hinton*, 222 F.3d at 672.

Furthermore, as long as the applicable statute clearly sets out the crime’s essential elements, “[t]he use of a ‘bare bones’ information—that is one employing the statutory language alone—is quite common and entirely permissible” in the Ninth Circuit. *United States v. Woodruff*, 50 F.3d 673, 676 (9th Cir. 1995) (quoting *United States v. Crow*, 824 F.2d 761, 762 (9th Cir. 1987)). Consequently, “the language of the statute may be used in the general description of an offence,” as long as it is “accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence . . . with which he is charged.” *Hamling v. United States*, 418 U.S. 87, 117–18 (1974).

On a motion to dismiss for failure to state an offense, “the district court is bound by the four corners of the indictment.” *United States v. Boren*, 278 F.3d 911, 914 (9th Cir. 2002). Distinguished from pre-trial motions to dismiss premised

on other grounds—where the court may take evidence and make factual determinations—the court considering a motion for failure to state an offense “must accept the truth of the allegations in the indictment[.]” *Id.* “The indictment either states an offense or it doesn’t.” *Id.* To ensure that “the respective provinces of the judge and jury are respected,” a Rule 12(b)(3)(B)(v) motion to dismiss “cannot be used as a device for a summary trial of evidence.” *Id.* (quoting *United States v. Jensen*, 93 F.3d 667, 669 (9th Cir. 1996)). To that end, “[t]he Court should not consider evidence not appearing on the face of the indictment.” *Id.* (quoting *Jensen*, 93 F.3d at 669).

## **B. Discussion**

Mr. DeFrance’s motion (Doc. 14), which was filed before the Superseding Indictment was filed, contends that (1) the Indictment “fails to specify in any detail whatsoever the domestic relationship element required to be alleged in a § 922(g)(9) prosecution[.]” and (2) the Indictment “does not include the status allegations required by *Rehaif v. United States*, 139 S. Ct. 2191 (2019).” (Doc. 14 at 3.)

After the Superseding Indictment was filed, the United States responded to Mr. DeFrance’s motion by arguing (1) the motion to dismiss for lack of specificity regarding the relationship element of § 922(g)(9) was mooted by the Superseding Indictment, and (2) both the Indictment and Superseding Indictment allege that Mr.

DeFrance knew he had been convicted of a misdemeanor crime of domestic violence and knowingly possessed a firearm. (Doc. 25 at 6–8.)

In reply, Mr. DeFrance argued that the Superseding Indictment does not allege any facts to support the allegation that his state conviction meets the definition of a misdemeanor crime of domestic violence under 18 U.S.C. § 921(a)(33)(A), particularly because the relationship elements of Montana’s PFMA and 18 U.S.C. § 921(a)(33)(A) are not identical. (Doc. 31 at 2–6.) These purportedly missing facts are key, Mr. DeFrance asserts, because the government must prove he knew he was “covered by the relevant category of relationship under the federal statute.” (*Id.* at 4.)

As discussed above, Count I of the Second Superseding Indictment is substantively identical to the Superseding Indictment except to the extent that it alleges an earlier beginning date for the start of the offense. The Second Superseding Indictment states the elements of the § 922(g)(9) offense with sufficient particularity to apprise Mr. DeFrance of the charge against which he must defend. *Hinton*, 222 F.3d at 672. The statute makes it a crime “for any person . . . who has been convicted in any court of a misdemeanor crime of domestic violence” to possess any firearm or ammunition in or affecting interstate or foreign commerce. 18 U.S.C. § 922(g)(9). The statute defines a “misdemeanor crime of domestic violence” as “an offense that . . . is a misdemeanor under



Federal, State, or Tribal law” and “has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.” 18 U.S.C. § 921(a)(33)(A).

The Second Superseding Indictment alleges that Mr. DeFrance knew “he had been convicted on or about May 6, 2013, of a misdemeanor crime of domestic violence under the laws of the State of Montana, which meets the definition of a misdemeanor crime of domestic violence under 18 U.S.C. § 921(a)(33)(A).” (Doc. 55 at 2.) It further alleges that, knowing this fact, he “knowingly possessed, in and affecting interstate commerce, firearms and ammunition, in violation of 18 U.S.C. § 922(g)(9)” on or about and between “October 3, 2016, and October 2, 2018[.]” (*Id.*) The Second Superseding Indictment provides a sufficient factual basis for Mr. DeFrance to ascertain the predicate conviction and related facts that the United States alleges satisfy § 921(a)(33)(A), including the relationship element.

The Court rejects Mr. DeFrance’s assertion that the Second Superseding Indictment must have alleged additional facts showing that the domestic relationship underlying the predicate conviction fell within the categories of domestic relationships listed in the federal statute. This Court’s decision in *United*

*States v. Meech*, 487 F. Supp. 3d 946 (D. Mont. 2020), is instructive. There, the defendant moved to dismiss an indictment charging a violation of 18 U.S.C. § 922(a)(6), which makes it a crime for any person, in connection with the acquisition or attempted acquisition of a firearm from a licensed firearm dealer, to knowingly make any false written or oral statement intended or likely to deceive the dealer with respect to any fact material to the lawfulness of the firearm sale. *Id.* at 950. The indictment alleged that the defendant falsely responded to Question “11(h) on ATF Form 4463” by stating that he was not subject to a court restraining order, and it stated the location and date of the charged activity. *Id.* The Court rejected the defendant’s assertion that the indictment was defective because it did not contain any reference to any particular restraining order, concluding that “the indictment tracks the language of the statute and is accompanied by sufficiently specific facts” to inform the defendant of the crime charged, enable him to prepare a defense, and allow him to plead double jeopardy in the future. *Id.* at 950–51. This was true even though the United States would bear the burden at trial of proving that he was subject to a restraining order. *Id.* at 953. Likewise, here, the United States must prove at trial that Mr. DeFrance was convicted of a misdemeanor crime of domestic violence as defined by § 921(a)(33)(A), including that the offense was committed against a person who was in one of the specified relationships with the defendant. *United States v. Hayes*, 555 U.S. 415, 426

(2009). The Second Superseding Indictment here is *more* specific than the indictment found sufficient in *Meech* because it specifies the date of the predicate conviction on which the United States relies and therefore provides sufficient information for Mr. DeFrance to prepare a defense, including any defense that the predicate conviction or the relationship underlying it does not meet the definition of § 921(a)(33)(A). Mr. DeFrance’s motion to dismiss for lack of specificity under Rule 12(b)(3)(B)(iii) is therefore denied.

Furthermore, the Second Superseding Indictment states an offense. “[I]n a prosecution under 18 U.S.C. § 922(g) . . . , the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm.” *Rehaif v. United States*, 139 S. Ct. 2191, 2200 (2019). The United States need not prove, and accordingly the indictment need not allege, that Mr. DeFrance “knew his . . . status prohibited firearm ownership or possession.” *United States v. Singh*, 979 F.3d 697, 727 (9th Cir. 2020), *cert. denied sub nom. Matsura v. United States*, 141 S. Ct. 2671 (2021).

As discussed above, the Second Superseding Indictment sufficiently alleges that Mr. DeFrance knew he had been convicted of a misdemeanor crime of domestic violence under the laws of the State of Montana, which the United States alleges places him in the relevant category of persons barred from possessing a

firearm under § 922(g)(9), and it alleges that he knowingly possessed, in and affecting interstate commerce, firearms and ammunition. (Doc. 55 at 2.)

Accordingly, Mr. DeFrance's motion to dismiss for failure to state an offense under Rule 12(b)(3)(B)(v) is denied.

**II. Motion to Dismiss Because Montana's PFMA is Indivisible and Unconstitutional Noncategorical Version of 18 U.S.C.**

**§ 922(a)(33)(A)(ii)**

Mr. DeFrance argues that the relevant 2011 version of Montana's PFMA cannot serve as a predicate conviction to support a § 922(g)(9) prosecution because (1) it can be committed without the use, threatened use, or attempted use of force because the statutory term "bodily injury" is indivisible and includes both mental and emotional harm, which can be inflicted without the use of force; and (2) the relationship element of the PFMA is indivisible and overbroad relative to the federal relationship element defined by § 921(a)(33)(A). (Doc. 16 at 2.) The brief in support of his motion further argues that the 2011 statute, under which Mr. DeFrance was convicted, denies equal protection on the basis of sex and sexual orientation because the statute defined partners as "spouses, former spouses, persons who have a child in common, and persons who have been or are currently in a dating or ongoing intimate relationship with a person of the opposite sex." (Doc. 17 at 9–11.) The statute was amended effective April 18, 2013—four days

after Mr. DeFrance committed the offense at issue here (Doc. 17-1 at 37)—and the only statutory revision relevant for the purposes of this Order was the removal of the language “with a person of the opposite sex” from subsection (2)(b). 2013 Mont. Laws 804.

The United States responds that the PFMA statute is materially indistinguishable from the Tennessee statute the Supreme Court analyzed in *United States v. Castleman*, 572 U.S. 157 (2014), which the Court held required the use of force within the meaning of § 921(a)(33)(A). (Doc. 29 at 5–12.) The United States further argues that Mr. DeFrance’s argument that the PFMA’s relationship element is categorically overbroad is foreclosed by Ninth Circuit precedent, in which the court of appeals considered and rejected a substantively identical argument concerning a Hawaii domestic abuse statute. (*Id.* at 12–15.) Concerning Mr. DeFrance’s equal protection argument, the United States asserts that dismissal of this indictment on that basis is not appropriate because this prosecution does not open the predicate conviction to a collateral attack. (*Id.* at 5 n.2.)

Mr. DeFrance argues in his reply that *Castleman* is distinguishable because the parties to that case did not dispute that the Tennessee statute was divisible, while he contends that Montana’s definition of “bodily injury” is indivisible. (Doc. 32 at 2–3.) He further argues that the Court must apply a categorical analysis to the relationship elements of each statute because permitting the United

States to prove at trial that the relationship underlying the predicate conviction satisfies the federal definition would permit the government to impeach the state court record and relitigate the state offense in violation of the Fifth and Tenth Amendments. (*Id.* at 3–5.) In closing, he argues that his equal protection argument is not a collateral attack, but rather an attack on an element of the PFMA statute “that the government is presently trying to enforce,” and, “[c]onsidering that all non-heterosexual couples were immune from prosecution for Montana PFMA until 2013, the government cannot show why this prosecution should go forward based on an *unconstitutional*, narrower element.” (*Id.* at 5–6.)

#### **A. Legal Standards**

Rule 12(b)(1) of the Federal Rules of Criminal Procedure provides that “[a] party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits.” A pretrial motion is proper when “it involves questions of law rather than fact.” *United States v. Shortt Accountancy Corp.*, 785 F.2d 1448, 1452 (9th Cir. 1986). The Court concludes that each of the issues Mr. DeFrance raises in this motion (Doc. 16) involves questions of law that may be resolved before trial.

#### **B. Discussion**

##### **1. Force Element**

To qualify as a “misdemeanor crime of domestic violence,” the predicate

conviction underlying a § 922(g)(9) charge must have as an element “the use or attempted use of physical force, or the threatened use of a deadly weapon[.]” 18 U.S.C. § 921(a)(33)(A). The Court must begin with the categorical approach and “look to the statute of [Mr. DeFrance’s] conviction to determine whether that conviction necessarily ‘ha[d], as an element, the use or attempted use of physical force[.]’” *Castleman*, 572 U.S. at 168 (quoting 18 U.S.C. § 921(a)(33)(A)).

Montana’s PFMA provides that:

(1) A person commits the offense of partner or family member assault if the person:

- (a) purposely or knowingly causes bodily injury to a partner or family member;
- (b) negligently causes bodily injury to a partner or family member with a weapon; or
- (c) purposely or knowingly causes reasonable apprehension of bodily injury in a partner or family member.

Mont. Code Ann. § 45-5-206(1).<sup>2</sup> The statute focuses on the result of the

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<sup>2</sup> Neither party contests that the statute is divisible as to this particular subsection, which “sets out one or more elements of the offense in the alternative[.]” *Descamps v. United States*, 570 U.S. 254, 257 (2013). The Court therefore may apply the modified categorical approach and consult the documents approved by *Shepard v. United States*, 544 U.S. 13 (2005)—the terms of the charging document, the terms of the plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information, *id.* at 26—“to determine whether his conviction did entail the elements necessary to constitute the generic federal offense.” *Castleman*, 572 U.S. at 169.

Mr. DeFrance was charged with violating the PFMA, and the state court document entering his plea of guilty states: “I AM PLEADING GUILTY TO THIS CHARGE BECAUSE I DID THE FOLLOWING: On 4-4-2013 in Sanders County I caused bodily injury to my girlfriend.” (Doc. 17-1 at 30–36.) The Court concludes that this document is a comparable judicial record to a transcript of a plea colloquy, *see Shepard*, 544 U.S. at 26, and further concludes that Mr. DeFrance was convicted of violating Montana Code § 45-5-206(1)(a). The Court therefore shall not consider whether subsections (b) or (c) necessarily require the use or

defendant's conduct—bodily injury—rather than the conduct itself, and the Court therefore must consult the statutory definition of bodily injury in its categorical analysis. *See United States v. Mann*, No. CR 09-75-GF-BMM, 2017 WL 1906606, at \*6 (D. Mont. May 9, 2017). The Montana Code's general definition of "bodily injury" for Title 45, which is identical to the definition applicable at the time of Mr. DeFrance's conviction, is "physical pain, illness, or an impairment of physical condition and includes mental illness or impairment." Mont. Code Ann. § 45-2-101(5). Unlike subsection (1) of the PFMA, this definition does not set forth multiple, alternative versions of a crime, and it therefore is not divisible.<sup>3</sup> *Descamps*, 570 U.S. at 262. This term is used or incorporated by reference in several of Montana's misdemeanor assault statutes in addition to the PFMA. *E.g.*, Mont. Code Ann. §§ 45-5-201, 45-5-211. The Court is therefore cognizant of the fact that its determination whether Montana's definition of bodily injury as incorporated by subsection (1)(a) of the PFMA categorically requires the use of physical force will implicate the validity of past, present, and future prosecutions for violations of 18 U.S.C. § 922(g)(9) predicated on assault offenses beyond the

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attempted use of physical force or the threatened use of a deadly weapon.

<sup>3</sup> The legislature could revise this definition in a manner that would make it divisible and thus potentially avoid categorical approach pitfalls while preserving the broad scope of Montana's assault laws; for example, the definition could be structured similarly to Montana Code § 45-5-206(1): "(5) 'Bodily injury' means (a) physical pain, illness or an impairment of physical condition; or (b) mental illness or impairment."



PFMA.

Courts within this District previously have analyzed whether Montana’s statutory definition of “bodily injury” necessarily requires the use of physical force, and in thorough and well-reasoned opinions, they have reached differing conclusions. *United States v. Goerndt*, No. CR 20-125-BLG-SPW, 2021 WL 1720907, at \*1–4 (D. Mont. Apr. 30, 2021) (concluding that subsection (1)(a) of Montana’s PFMA requires use of physical force as defined by 18 U.S.C. § 921(a)(33)); *United States v. Tymes*, No. CR 20-117-BLG-SPW, 2021 WL 1720906, at \*1–4 (D. Mont. Apr. 30, 2021) (same); *Mann*, 2017 WL 1906606, at \*5–7 (concluding that Montana’s aggravated assault statute incorporating similar definition of “serious bodily injury” does not require use of force as defined by 18 U.S.C. § 924(e)(2)(B)(i)); *United States v. Ross*, No. CR 13-29-BLG-BMM, 2017 WL 1288425, at \*2–4 (D. Mont. Apr. 6, 2017) (concluding that subsection (1)(a) of Montana’s PFMA does not require use of physical force as defined by 18 U.S.C. § 924(e)(2)(B)(i)). Although the decisions answering in the negative assessed the definition of bodily injury under the Armed Career Criminal Act, whose elements clause requires the use of “*violent* force—that is, force capable of causing physical pain or injury to another person[,]” *Johnson v. United States*, 559 U.S. 133, 140 (2010), the court’s reasoning that “subjecting someone to a public tirade of insults or emotional abuse also could cause mental illness or impairment” suggests that no

physical force whatsoever might be required to sustain a conviction under subsection (1)(a) of Montana’s PFMA. *Ross*, 2017 WL 1288425, at \*4.

As these divergent opinions illustrate, the issue before the Court presents a close question that could lead reasonable jurists to opposite answers. The Court concludes, however, that it is bound by the Supreme Court’s decision in *Castleman* that, within the context of a 18 U.S.C. § 922(g)(9) prosecution, “a ‘bodily injury’ must result from ‘physical force[,]’” even where the statute at issue defines bodily injury to include “‘temporary illness or impairment of the function of a . . . mental faculty.’” 572 U.S. at 170 (quoting Tenn. Code Ann. § 39-11-106(a)(2) (1997)). The Court agrees with the *Goerndt* court’s conclusion that the divergence in the relevant language of Montana’s definition of bodily injury compared to Tennessee’s—“mental illness or impairment” versus “temporary illness or impairment of the function of a . . . mental faculty”—is “a distinction without a difference.” *Goerndt*, 2021 WL 1720907, at \*3–4. The Court likewise agrees with the *Goerndt* court that this conclusion is consistent with the Supreme Court’s recent reminder that it has “repeatedly declined to construe” a federal statute requiring a predicate state conviction, including § 922(g)(9), “in a way that would render it inapplicable in many States.” *Stokeling v. United States*, 139 S. Ct. 544, 552 (2019). A holding that subsection (1)(a) of Montana’s PFMA categorically is not a misdemeanor crime of domestic violence based on Montana’s definition of

“bodily injury” would disqualify several Montana assault offenses from serving as predicate misdemeanor crimes of domestic violence for a § 922(g)(9) offense, which would frustrate Congress’ intent in enacting the statute. *Castleman*, 572 U.S. at 167–68.

In his reply brief, Mr. DeFrance attempts to distinguish *Castleman* because the parties before the Court in that case conceded divisibility of the Tennessee statute, while he argues that Montana’s PFMA is indivisible. (Doc. 32 at 2.) However, the parties’ respective positions are materially identical here. Neither party here argues that subsection (1) of the PFMA is indivisible. (*E.g.*, Doc. 16 at 2 (arguing instead that the term “bodily injury” and the relationship element are indivisible).) Likewise, the parties in *Castleman* did not contest that Tennessee’s assault statute was divisible, and the Court easily concluded by reference to the *Shepard* documents that *Castleman*—like Mr. DeFrance—“pleaded guilty to having ‘intentionally or knowingly cause[d] bodily injury’” to the victim. 572 U.S. at 169. The Court did not need to address the divisibility of Tennessee’s definition of bodily injury because it concluded that all of “th[o]se forms of injury do necessitate force in the common-law sense.” 572 U.S. at 170.

Admittedly, no party before the *Castleman* court raised the precise argument that some mental impairments could be caused without the use or attempted use of physical force. But even if *Castleman* could be distinguished on that basis, under

the categorical approach, there must be “a realistic probability, not a theoretical possibility” that Montana would apply the PFMA (or other assault statutes using the definition of “bodily injury” at issue) in cases that did not involve the use or attempted use of physical force, or the threatened use of a deadly weapon. *United States v. Perez*, 932 F.3d 782, 789 (9th Cir. 2019) (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). Mr. DeFrance’s counsel conceded at oral argument on this motion that he could provide no examples of PFMA convictions based on conduct that did not involve the use or attempted use of physical force, and the Court could find none. The *Ross* court likewise “found no Montana decision directly on point” but identified some cases supporting its conclusion that Montana’s PFMA categorically did not require violent physical force within the meaning of the ACCA. *Ross*, 2017 WL 1288425, at \*4. This Court, however, concludes that those cases do not support a conclusion that there is a realistic probability that Montana would apply the PFMA or other assault statutes in cases that did not involve the use or attempted use of physical force within the meaning of § 921(a)(33)(A).

First, the *Ross* court concluded that in *State v. Cooney*, 963 P.2d 1272 (Mont. 1998), and 1 P.3d 956 (Mont. 2000), “the Montana Supreme Court held that the continuing detention of a defendant convicted of, and committed for, stalking was justified, because his release was likely to cause serious mental

consequences to his victim” and the State therefore proved that his release presented a substantial risk of serious bodily injury or an immediate threat of physical injury without having to prove that the defendant likely would have any physical contact with the victim. *Ross*, 2017 WL 1288325, at \*4. But the commitment proceeding at issue was not a criminal prosecution, but rather a civil proceeding in which the State bore the burden of proof by clear and convincing evidence, *see Cooney*, 963 P.2d at 1273, and the evidence in that case of the victim’s mental distress “related to fears of her own and her family’s safety[,]” *id.* at 1274—fears that stemmed from apprehension of *physical* injury if she did not respond to the defendant’s stalking, according to her trial testimony, *State v. Cooney*, 894 P.2d 303, 305, 307 (Mont. 1995). This Court concludes that the *Cooney* civil commitment decisions do not show a reasonable probability that Montana would criminally prosecute a defendant under its PFMA or assault statutes for conduct that does not involve the use or attempted use of physical force.

Second, the *Ross* court concluded that in *State v. Sherer*, 60 P.3d 1010 (Mont. 2002), the Montana Supreme Court “explain[ed] that the aggravated assault statute did not require the State to prove the defendant used force” because the state court “reasoned that ‘any form of communication, itself, may be sufficient conduct’ for a defendant to cause serious bodily injury under Montana law.” 2017

WL 1288425, at \*4 (quoting *Sherer*, 60 P.3d at 1013). But in the context of § 921(a)(33)(A), the Supreme Court made clear in several ways that a narrow focus on the defendant's conduct, to the exclusion of evidence of intent or resulting harm, is not dispositive in determining whether an offense involved physical force: "physical force is simply force exerted by and through concrete bodies," and "[t]he force used in battery need not be applied directly to the body of the victim" and could include administering a poison, infecting with a disease, or resort to an intangible substance. 572 U.S. at 170 (internal quotation marks omitted). In the example of indirect force like the use of poison, the "use of force is not the act of sprinkling the poison; it is the act of employing poison knowingly as a device to cause physical harm." *Id.* at 171 (internal quotation marks omitted). The *Sherer* court's decision is consistent with *Castleman*; in the same sentence quoted by the *Ross* court, the Montana Supreme Court explained that the assault statutes at issue "do not require that the defendant personally direct force toward the victim[.]" *Sherer*, 60 P.3d at 1013. The facts of *Sherer* are illustrative: the defendant was convicted of aggravated assault despite the fact that his conduct was limited to placing phone calls, impersonating a doctor, and instructing women to physically harm themselves, because he did so with the intent that his conduct would cause his victims to injure themselves, and one did so by cutting off her nipple in accordance with his instructions. *Id.* at 1013–14. The use of force in his case was

not the mere act of communication; it was “the act of employing” that communication “knowingly as a device to cause physical harm” in the same way another wrongdoer might employ poison. *Castleman*, 572 U.S. at 171; *see also United States v. Villavicencio-Burruel*, 608 F.3d 556, 563 n.6 (9th Cir. 2010) (holding that statute prohibiting threats to kill or injure a person indirectly through destruction of property was categorically a crime of violence “because the force threatened need not be force administered directly by the hands of the perpetrator”). Although Sherer’s conduct may not have qualified as “violent force” within the meaning of ACCA, it qualifies as the use of physical force under § 921(a)(33)(A) for the reasons explained in *Castleman*.

Finally, the *Ross* court concluded that in *State v. Mason*, 82 P.3d 903 (Mont. 2003), *overruled on other grounds by State v. Herman*, 188 P.3d 978 (Mont. 2008), “the Montana Supreme Court agreed that a defendant may be a ‘violent felony offender’ if he ‘causes serious bodily injury to another’ in the form of ‘a serious mental health condition,’ although under the circumstances of the case it found no evidence that the defendant caused the victim to develop such a condition.” 2017 WL 1288425, at \*4. The Montana Supreme Court held in that case that the trial court erred by designating the defendant as a violent felony offender at sentencing because there was no evidence that the defendant’s physical assaults of a minor *caused* the minor’s Post-Traumatic Stress Disorder, which was diagnosed after the

minor's removal from the defendant's residence. *Mason*, 82 P.3d at 909–10. In this Court's view, this case does not support an inference that there is a reasonable probability that Montana would enforce its PFMA or assault statutes in the absence of physical force; to the contrary, it provides an example of how Montana's definition of bodily injury encompassing mental injury can be applied in a case that indisputably involved the use of physical force.

In sum, even if the Court did not consider *Castleman* dispositive on this issue, there is not "a realistic probability" that Montana would enforce the PFMA or other assault statutes using the definition of "bodily injury" at issue in cases that did not involve the use or attempted use of physical force. *Perez*, 932 F.3d at 789.

The Court concludes that subsection (1)(a) of Montana's PFMA, Mont. Code Ann. § 45-5-206(1)(a), categorically requires the use or attempted use of physical force within the meaning of 18 U.S.C. § 921(a)(33)(A).

## **2. Relationship Element**

The Supreme Court held in *United States v. Hayes*, 555 U.S. 415 (2009), that "the domestic relationship [defined by 18 U.S.C. § 921(a)(33)(A)], although it must be established beyond a reasonable doubt in a § 922(g)(9) firearms possession prosecution, need not be a defining element of the predicate offense." *Id.* at 418. Mr. DeFrance acknowledges that this holding would appear to foreclose his argument that the Court should conduct a categorical approach



comparison of the relationship elements of Montana’s PFMA and § 921(a)(33)(A), but he argues that *Hayes*’s holding is not relevant to statutes like Montana’s PFMA that *do* contain a relationship element. (Doc. 17 at 3.) He argues that the only definition that could apply to his offense under Montana’s PFMA—“persons who have been or are currently in a dating or ongoing intimate relationship with a person of the opposite sex[,]” Mont. Code Ann. §45-5-206(2)(b) (2011)—is over-inclusive relative to the federal statute’s relationship categories—“a current or former spouse, parent, or guardian of the victim, . . . a person with whom the victim shares a child in common, . . . a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or . . . a person similarly situated to a spouse, parent, or guardian of the victim[,]” 18 U.S.C. § 921(a)(33)(A)(ii). (Doc. 17 at 3–6.) He further argues that “re-litigation of the domestic relationship issue” would violate the Double Jeopardy Clause, his Sixth Amendment rights as protected by the categorical approach, and the Tenth Amendment’s prohibition on commandeering. (*Id.* at 6–7.)

The United States responds that Mr. DeFrance’s argument is foreclosed by Ninth Circuit precedent, and that the practical effect of his interpretation of the statute would frustrate the purpose of § 922(g)(9) by allowing ordinary assault, but in some cases not domestic assault, to serve as a predicate misdemeanor crime of domestic violence. (Doc. 29 at 12–15.)

The United States is correct that the Ninth Circuit has held that, because “the domestic relationship element . . . is an element of the *federal* offense under § 922(g)(9), to be proven at trial[,]” any “mismatch between the [state] and federal domestic violence statutes is not a basis for invalidating indictment.” *United States v. Nobriga*, 474 F.3d 561, 563–64 (9th Cir. 2006), *abrogated on other grounds by Voisine v. United States*, 136 S. Ct. 2272 (2016); *see also Hayes*, 555 U.S. at 418. There is no basis in the text of the statute or legislative history and intent for a conclusion that the federal offense should have differing sets of elements based on whether the predicate offense includes a relationship element. To the contrary, Mr. DeFrance’s argument would have the counterintuitive result, contrary to Congressional intent, that violent offenses containing no relationship element could qualify as predicate offenses for a § 922(g)(9) prosecution, but offenses expressly proscribing violence against a domestic relation would be excluded from the federal statute’s coverage if they apply to siblings, extended family who cohabit with the victim, roommates, or others beyond the scope of the federal statute, even if the actual offense at issue had been committed by a parent, guardian, spouse, or someone similarly situated to the victim. *See Hayes*, 555 U.S. at 426–29 (explaining how the Court’s interpretation of § 921(a)(33)(A)(ii) was consistent with Congress’ intent in enacting § 922(g)(9) to close a “dangerous loophole” permitting domestic abusers to keep firearms). The Court concludes that

*Nobriga* and *Hayes* foreclose Mr. DeFrance’s argument that the Court should engage in a categorical approach comparison of the relationship elements of his predicate offense and § 921(a)(33)(A)(ii) because the federal statute’s definition of qualifying relationships is an element of the § 922(g)(9) offense, which the United States must prove beyond a reasonable doubt at trial. *Hayes*, 555 U.S. at 418; *Nobriga*, 474 F.3d at 563–64.

Mr. DeFrance’s constitutional arguments against “re-litigation of the relationship element” or “impeach[ing] the state court record” fall short for the same reason. (Docs. 17 at 6, 32 at 5.) Mr. DeFrance’s categorical approach argument hinges on his acknowledgement that the relationship elements of Montana’s PFMA and § 921(a)(33)(A)(ii) are different from each other, which forecloses any argument that “the issue was necessarily decided in the prior case” as required for his Double Jeopardy collateral estoppel argument, *United States v. Bernhardt*, 840 F.2d 1441, 1448 (9th Cir. 1988),<sup>4</sup> or that this Court would be forced to “adjudicate state offenses” in a manner he alleges would violate the

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<sup>4</sup> Additionally, the Court doubts that a defendant can invoke a prior *conviction* as opposed to a prior acquittal in support of a Double Jeopardy collateral estoppel argument. *United States v. James*, 109 F.3d 597, 601 (9th Cir. 1997) (“Constitutional collateral estoppel exists where a fact necessarily determined *in the defendant’s favor by his earlier acquittal* [makes] his conviction on the challenged second trial . . . impossible unless the fact could be relitigated and determined adversely to the defendant.” (emphasis added) (quoting *Pettaway v. Plummer*, 943 F.2d 1041, 1046 (9th Cir. 1991), *overruled on other grounds by Santamaria v. Horsley*, 133 F.3d 1242 (9th Cir. 1998))).

Tenth Amendment (Doc. 17 at 6–7). As it concerns the relationship element, the ultimate issue determined by his plea of guilty to the PFMA offense was that he purposely or knowingly caused bodily injury to a person with whom he “ha[d] been or [was] currently in a dating or ongoing intimate relationship.” Mont. Code Ann. §45-5-206(2)(b) (2011). The ultimate issue to be determined in this § 922(g)(9) prosecution is whether he was convicted of a misdemeanor crime of domestic violence that he committed as “a person similarly situated to a spouse . . . of the victim” or as a member of the other categories listed in 18 U.S.C. § 921(a)(33)(A)(ii). This is not a case in which “[t]he single rationally conceivable issue in dispute” in a prosecution—*e.g.*, the identity of a robber—has already been determined by a final judgment. *Ashe v. Swenson*, 397 U.S. 436, 445 (1970). Had Mr. DeFrance been tried before a jury for both PFMA and a lesser-included offense of assault with no relationship element, and had he been acquitted of PFMA but convicted of assault, Mr. DeFrance’s Double Jeopardy argument may have presented a closer question. *See id.* at 444. But on these facts, the Double Jeopardy Clause does not prohibit this § 922(g)(9) prosecution merely because the facts concerning Mr. DeFrance’s relationship with the victim of his PFMA offense are relevant to both his prior conviction and the present charge. *See United States v. Arlt*, 252 F.3d 1032, 1039 (9th Cir. 2001) (en banc) (rejecting Double Jeopardy argument “even when the same conduct forms the basis for two charges”).

Likewise, the difference between the statutes' relationship elements means that this case does not require re-litigation of the underlying offense or adjudication of a state offense, and Mr. DeFrance does not explain how the anti-commandeering principles of the Tenth Amendment apply to his indictment, so there is no jurisdictional defect or Tenth Amendment concern requiring dismissal of the indictment.

### **3. Equal Protection**

The Court need not determine whether the version of Montana's PFMA under which Mr. DeFrance was convicted, which limited its definition of "dating or ongoing intimate relationship" partners to couples "of the opposite sex[.]" Mont. Code Ann. § 45-5-206(2)(b) (2011), violated the Equal Protection Clause. The Supreme Court has held that a "firearms prosecution does not open the predicate conviction to a new form of collateral attack[.]" and this holding forecloses Mr. DeFrance's Equal Protection argument. *Lewis v. United States*, 445 U.S. 55, 67 (1980). Mr. DeFrance argues that the United States "is presently trying to enforce" the allegedly unconstitutional relationship element of the prior PFMA statute (Doc. 32 at 5), but as explained above, the federal statute's relationship element is the element that must be proven in this case and need not be a categorical match for a relationship element of the predicate offense, *Nobriga*, 474 F.3d at 564, and as acknowledged by Mr. DeFrance in his other arguments, the federal element is

different from the PFMA's relationship element (Doc. 17 at 3–5). “The federal gun laws . . . focus . . . on the mere fact of conviction, or even indictment, in order to keep firearms away from potentially dangerous persons.” *Lewis*, 445 U.S. at 67. The constitutionality of Mr. DeFrance's conviction may be challenged in other proceedings, but not here. *Id.*

For the foregoing reasons, the Motion to Dismiss Because Montana PFMA (§ 45-5-206 (2011)) is Indivisible and an Unconstitutional Noncategorical Version of 18 U.S.C. § 921(a)(33)(A) (Doc. 16) will be denied.

**III. Motion to Dismiss Because 18 U.S.C. § 921(a)(33)(A) is  
Unconstitutionally Vague**

Mr. DeFrance argues that 18 U.S.C. § 921(a)(33)(A) is unconstitutionally vague. First, he argues that the statute does not provide fair warning to ordinary citizens because an individual would have to determine first whether the misdemeanor crime of which he or she was convicted had the required force element, and second whether the relationships set forth in the federal statute match any of the relationships set forth in the state statute under which the individual was convicted. (Doc. 44 at 3.) He argues that laypersons could not determine whether Montana's PFMA contains a force element under the categorical approach. (*Id.* at 3–10.)

Second, he argues that the statute fails to provide minimal standards to

govern law enforcement and the courts because the qualifying relationships are so broadly defined that the entirety of a relationship between a domestic violence misdemeanor and the victim could be relevant in a prosecution under 18 U.S.C. § 922(g)(9), and there is no definition for the qualifying relationship of “similarly situated” to a spouse. (*Id.* at 10–17.)

The United States responds that several courts have rejected similar arguments, persons of ordinary intelligence can determine whether the victim of his or her prior misdemeanor crime of domestic violence was similarly situated to a spouse, and the term “force or threat of force” carries its common law meaning and is readily understandable. (Doc. 50 at 3–7.) The United States also recites facts relating to Mr. DeFrance’s relationship with the victim of his PFMA offense, and it argues that the title of the statute under which he was convicted—Partner or Family Member Assault—put him on notice. (*Id.* at 8.) The United States further argues that the statute is distinct from unconstitutionally vague statutes that permit subjective or arbitrary enforcement, such as loitering statutes, because 18 U.S.C. § 921(a)(33)(A) defines the predicate offense conduct and required relationship status, and all case law confirms that the relationship element concerns the relationship at the time of the domestic violence offense. (*Id.* at 9–10.) The United States disagrees with Mr. DeFrance’s argument that a prosecution under § 922(g)(9) requires relitigating the predicate PFMA conviction because the

statutes require proof of distinct elements. (*Id.* at 11.)

Mr. DeFrance argues in his reply brief that it is unclear after the Supreme Court's decisions in *Hayes* and *Castleman* how the relationship element of a § 922(g)(9) offense should be resolved in a case in which the predicate offense contains a relationship element and argues that the categorical approach should apply to both the force and relationship elements of the offense. (Doc. 53 at 2–3.) He argues that no layperson could determine on his own under the categorical approach whether a Montana PFMA offense triggers application of § 922(g)(9), particularly in light of the divergent opinions within this District concerning whether the PFMA requires the use of force, and the statute therefore does not provide fair notice of the conduct it prohibits. (*Id.* at 2–5.) Mr. DeFrance further argues that the government's brief's description of his relationship with the victim of his PFMA offense demonstrates the government's intent to “effectively re-litigate the relationship” element of that offense. (*Id.* at 5–7.) In closing, Mr. DeFrance argues that supplemental discovery disclosed that the victim of his PFMA offense was 17 years old at the time of the offense and questions whether a person can be similarly situated to a spouse when, under Montana law, a 17-year-old can only be married with parental consent or judicial approval. (*Id.* at 7–8.)

#### **A. Legal Standards**

As discussed previously, Rule 12(b)(1) of the Federal Rules of Criminal



Procedure provides that “[a] party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits.” A pretrial motion is proper when “it involves questions of law rather than fact.” *Shortt Accountancy Corp.*, 785 F.2d at 1452.

“[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Mr. DeFrance raises both a facial challenge and an as-applied challenge to the statute. (Doc. 44 at 16–17.) “Where the statute or regulation does not implicate constitutionally protected conduct, a facial challenge will succeed ‘only if the enactment is impermissibly vague in all of its applications.’” *United States v. Doremus*, 888 F.2d 630, 634 (9th Cir. 1989) (quoting *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494–95 (1982)).<sup>5</sup> An as-applied challenge, by contrast, assumes the truth of the allegations in the indictment and asks whether a person of average intelligence would understand that his conduct is proscribed under the statute. *United States v. Bohonus*, 628 F.2d 1167, 1173–75

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<sup>5</sup> Mr. DeFrance does not argue that the statute implicates constitutionally protected conduct, but he would face an uphill battle in doing so. *United States v. Chovan*, 735 F.3d 1127, 1139–42 (9th Cir. 2013) (holding that 18 U.S.C. § 922(g)(9) was constitutional facially and as applied under the Second Amendment).

(9th Cir. 1980).

## **B. Analysis**

### **1. Force Element**

Mr. DeFrance’s fair warning argument focuses heavily on the language of Montana’s PFMA and how ordinary people may struggle to apply the categorical approach to determine whether a PFMA offense qualifies as a predicate offense under 18 U.S.C. § 922(g)(9). (Doc. 44 at 3–10.) But Mr. DeFrance cites no authority—and the Court could find none—for the proposition that the proper standard for a vagueness challenge is that an ordinary person must be able to determine as a matter of law whether a past offense categorically qualifies as a predicate offense for a federal firearms prohibition. The lack of precedent is perhaps unsurprising.

The classic example of a facially unconstitutionally vague statute is the anti-loitering statute that fails to give any notice to ordinary people what conduct is prohibited; the only surefire way to avoid potential criminal penalties would be to cease going out into public. *See Kolender*, 461 U.S. at 358. In the context of the federal firearms statutes, the “residual clauses” that stumped ordinary people and experienced jurists alike in determining whether an offense “in the ordinary case” “involves conduct that presents a serious potential risk of physical injury to another” were held intolerably vague. *E.g., Johnson v. United States*, 576 U.S.

591, 596–97 (2015). Key to those holdings was the fact that the residual clause “ties the judicial assessment of risk to a judicially imagined ‘ordinary case’ of a crime, not to real-world facts or *statutory elements*.” *Id.* at 597 (emphasis added). This distinction between a residual clause and an elements clause of a firearms statute does not mean that the statutory interpretation required for elements-clause analysis is simple enough for an ordinary person to understand or conduct on his or her own. But this distinction *does* take the elements clauses like 18 U.S.C. § 921(a)(33)(A) comfortably out of the unconstitutionally vague realm.

The fair warning prong of the vagueness inquiry does not invalidate every statute whose application or interpretation is complex. “That close questions may arise in interpreting the language of a statute or regulation does not, without more, render the enactment vague.” *United States v. Hogue*, 752 F.2d 1503, 1504 (9th Cir. 1985). Rather, the “touchstone” of the “fair warning requirement” is “whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant’s conduct was criminal.” *United States v. Lanier*, 520 U.S. 259, 266–67 (1997). Sections 922(g)(9) and 921(a)(33)(A) meet that requirement on their faces and on the alleged facts of this case. A person of ordinary intelligence can comprehend from that statutory language that a prior conviction for an offense with an element of the use or attempted use of force, committed against a spouse, child, or similarly situated person, will disqualify him

or her from possessing firearms or ammunition. *United States v. Meade*, 175 F.3d 215, 222 (1st Cir. 1999) (“Here, the statute *sub judice* contains no ambiguity either as to the persons to whom the prohibitions apply or as to what conduct is proscribed.”); *United States v. Smith*, 171 F.3d 617, 623 (8th Cir. 1999) (“We would be hard pressed to find an individual of common, or even not so common, intelligence who could not determine whether he was in one of the enumerated relationships when he committed a misdemeanor crime including an element of physical force.”). And here, the United States has alleged that Mr. DeFrance knowingly possessed firearms and ammunition and knew he had been convicted of a misdemeanor crime of domestic violence under Montana law, which meets the definition of 18 U.S.C. § 921(a)(33)(A). (Doc. 55 at 2.) Mr. DeFrance has conceded in his briefing and submitted state court documents reflecting his admission that he pleaded guilty to his predicate offense because he “caused bodily injury to his girlfriend.” (Doc. 17-1 at 36; Doc. 53 at 5.) Mr. DeFrance had ample notice that his alleged conduct in knowingly possessing a firearm and ammunition while knowing of his PFMA conviction would be criminal.

To be sure, application of the categorical approach may *exempt* some people from criminal liability or enhanced criminal penalties who otherwise would fall under within the common sense understanding of categories like a “person who has been convicted . . . of a misdemeanor crime of domestic violence[.]” 18 U.S.C.

§ 922(g)(9), or a person who has been convicted of a “violent felony[.]” 18 U.S.C. § 924(e). But the legal nuances of the categorical approach—including *mens rea*, divisibility, and the proper use of *Shepard* documents—do not render the statutory language or its construction by courts so unclear that a “person of ordinary intelligence” is deprived of “a reasonable opportunity to know what is prohibited, so that he may act accordingly.” *Grayned v. Rockford*, 408 U.S. 104, 108 (1972). The statute provides ample warning that certain domestic violence offenders face criminal penalties for possessing a firearm. It is not unconstitutionally vague.

## **2. Relationship Element**

Mr. DeFrance raises a dual challenge to the relationship element of § 921(a)(33)(A), arguing that it is unconstitutionally vague because it fails to provide both fair notice to ordinary people and minimal guidelines to govern law enforcement.

One argument in support of his fair notice challenge can be rejected outright. As discussed above, the federal statute’s relationship element does not have to be a categorical match for the relationship element of a state predicate offense statute because the state statute need not have a relationship element at all. *Hayes*, 555 U.S. at 418.

Mr. DeFrance’s argument that the statute is vague because it is unclear whether the relationship element “is confined to the relationship as it existed” at

the time of the PFMA conviction or “whether it extends to the entire relationship history . . . up to and including the time of the federal § 922(g)(9) trial” is untenable under the language of the statute. (Doc. 44 at 11.) Section 921(a)(33)(A)(ii) requires that the predicate offense was “*committed* by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.” 18 U.S.C. § 921(a)(33)(A)(ii) (emphasis added). The plain language of the statute ties the relationship element to the time the offense was committed; as the Supreme Court explained in *Hayes*, “[t]o obtain a conviction in a § 922(g)(9) prosecution, the Government must prove beyond a reasonable doubt that the victim of the predicate offense *was* the defendant’s current or former spouse or *was* related to the defendant in another specified way.” 555 U.S. at 426 (emphases added). This is not to say that evidence post-dating the offense could never be relevant to proving or disproving the relationship element in a § 922(g)(9) prosecution; for example, a marriage certificate between the defendant and victim dated after the offense would be relevant evidence to show that they were not each other’s current spouses at the time of the offense. Such evidentiary questions are properly reserved for evidentiary motions and trial; for the purposes of this motion to dismiss, it suffices

to hold that the relationship element of the § 922(g)(9) offense is confined by the plain text of the statute to the relationship as it existed at the time of the predicate domestic violence offense. 18 U.S.C. § 921(a)(33)(A)(ii).

Mr. DeFrance next argues that the ordinary person cannot determine whether he or she is “similarly situated to a spouse” within the meaning of § 921(a)(33)(A)(ii), and the statute invites arbitrary and discriminatory enforcement. The phrase “similarly situated” “add[s] some imprecision” to the element, but it “provide[s] an ascertainable, qualitative standard akin to others found in the law” and therefore “is not unconstitutionally vague.” *United States v. Lucero*, 989 F.3d 1088, 1103 (9th Cir. 2021); *see also Johnson*, 576 U.S. at 603–04 (“As a general matter, we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as “substantial risk” to real-world conduct; ‘the law is full of instances where a man’s fate depends on his estimating rightly . . . some matter of degree[.]’” (quoting *Nash v. United States*, 229 U.S. 373, 377 (1913))). The United States District Court for the Northern District of Georgia provided a thorough analysis of the “similarly situated to a spouse” relationship in *United States v. Cary*, No. 1:07-CV-074-WSD, 2008 WL 879433, at \*2–4 (N.D. Ga. Mar. 29, 2008), in which the court acknowledged that the statute does not provide a precise definition of this term but collected numerous cases elaborating the contours of this relationship definition and facts relevant to

determining whether it is satisfied, including whether the parties engaged in an intimate relationship, stayed at each other's residences, or shared expenses, household responsibilities, and social activities. An ordinary person can differentiate between spouse-like relationships and numerous relationships—platonic friendships, college roommates, or one-time coffee dates—that would not satisfy this element absent evidence of an intimate or guardian-like relationship. The statute is not unconstitutionally vague for failure to give fair warning of what is prohibited.

Likewise, the statute does not invite arbitrary or discriminatory enforcement. The fatal flaw of the anti-loitering statute at issue in *Kolender* was that it “vest[ed] virtually complete discretion in the hands of the police” and permitted freedom of public movement “only at the whim of any police officer who happens to stop that individual under” the statute. 461 U.S. at 358. There was *no* standard for law enforcement officers to determine whether the person they stopped had provided sufficiently “credible and reliable” identification to end his detention. *Id.* at 359–61. Here, by contrast, Section 922(g)(9) is not a blank check to law enforcement to detain random individuals indefinitely at the slightest suspicion. Rather, it specifically proscribes a narrow class of conduct—possession of a firearm or ammunition—by a discrete class of people. Because the statute’s prohibition requires (1) a past conviction, (2) for an offense which must have a force element,



and (3) which must have been committed against a person in a specified relationship with the defendant, 18 U.S.C. § 921(a)(33)(A), its enforcement necessarily requires some background knowledge of the individual defendant's criminal history. Section 922(g)(9) simply does not have the same potential for arbitrary or discriminatory detention or enforcement as a standardless anti-loitering statute that criminalizes existing in public. *Kolender*, 461 U.S. at 358–61.

To the extent a particular defendant contends that his relationship with the victim of his predicate offense lies at the outer margins of a relationship “substantially similar” to a spouse, parent, or guardian, he may present supporting evidence or argue that the government has not met its burden of proving that element to a jury. However, the Court cannot say as a matter of law that the relationship element unconstitutionally permits arbitrary enforcement or that such arbitrariness is evident here, where the record establishes that Mr. DeFrance acknowledged he had a boyfriend-girlfriend relationship with the victim of his PFMA offense. (Doc. 17-1 at 36; Doc. 53 at 5.)

One example of such an argument Mr. DeFrance could make to the jury is raised for the first time in his reply brief: The victim of Mr. DeFrance's PFMA offense should not be considered “similarly situated to a spouse” because she was seventeen years old at the time of the offense, and a person under the age of eighteen cannot be married in Montana without parental consent or judicial

approval. (Doc. 53 at 7–8 (citing Mont. Code Ann. § 40-1-213).) The Court typically declines to consider arguments raised for the first time in a reply brief. *Mont. Fair Hous., Inc. v. City of Bozeman*, 854 F. Supp. 2d 832, 846 (D. Mont. 2012). Regardless, this argument does not support Mr. DeFrance’s contention that the statute is unconstitutionally vague and is not a legal basis for dismissing the indictment. The Court cannot say as a matter of law that a victim’s age of seventeen renders totally irrelevant the facts discussed above, like the existence of an intimate relationship and shared responsibilities, that could establish that the predicate offense was committed by a person similarly situated to a spouse of that victim, particularly because Montana law provides a process for minors sixteen and older to obtain some rights of adults, including the right to live independently. *See* Mont. Code Ann. §§ 41-1-501–503.

In sum, Sections 921(a)(33)(A) and 922(g)(9) are not unconstitutionally vague on their face or as applied because they provide sufficient notice to ordinary persons of what conduct is prohibited and provide minimal guidelines to govern law enforcement. *See Kolender*, 461 U.S. at 357–58; *Bohonus*, 628 F.2d at 1173–75.

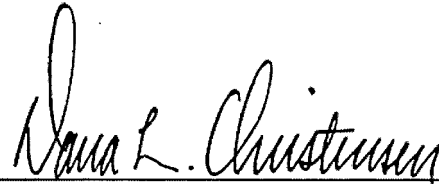
#### CONCLUSION

IT IS ORDERED that the Motion to Dismiss Indictment for Lack of Specificity and Failure to State an Offense (Doc. 14) is DENIED.

IT IS FURTHER ORDERED that the Motion to Dismiss Indictment Because Montana PFMA (§ 45-5-206 (2011)) is Indivisible and an Unconstitutional Noncategorical Version of 18 U.S.C. § 921(a)(33)(A)(ii) (Doc. 16) is DENIED.

IT IS FURTHER ORDERED that the Third Motion to Dismiss the Superseding Indictment (Doc. 43) is DENIED.

DATED this 29th day of December, 2021.

A handwritten signature in black ink, reading "Dana L. Christensen". The signature is written in a cursive style with a large, looped initial "D".

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Dana L. Christensen, District Judge  
United States District Court

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
MISSOULA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MICHAEL BLAKE DEFRANCE,

Defendant.

CR 21-29-M-DLC

ORDER

Before the Court are Defendant Michael Blake DeFrance's Motion to Dismiss Second Superseding Indictment (Doc. 69), the United States' Motion in Limine for Pretrial Determination of Admissibility of Certain Evidence (Doc. 34), and the United States' Motion in Limine to Preclude Defenses of Public Authority, Entrapment by Estoppel, and Innocent Intent (Doc. 36). The Court held a hearing on these motions on February 23, 2022. (Doc. 82.) The parties are familiar with the history of this case, which is recounted in the Court's previous order on Mr. DeFrance's motions to dismiss (Doc. 71), and the Court does not repeat it here.

**I. Motion to Dismiss Second Superseding Indictment (Doc. 69)**

Mr. DeFrance raises four grounds for dismissing the operative indictment. First, he argues that the indictment should be dismissed in its entirety, or alternatively that Counts II, III, and IV should be dismissed, with prejudice as a

sanction against the United States for an alleged *Brady* violation in failing to disclose evidence concerning NICS investigations relating to Mr. DeFrance's ATF 4473 forms. (Doc. 69 at 4.) Second, he argues for dismissal of all charges because he was not afforded administrative procedural due process rights to contest his alleged prohibited status. (*Id.* at 5.) Third, he argues that collateral estoppel bars the United States from alleging that he is a prohibited person. (*Id.*) Fourth, he argues that the operative indictment is a vindictive prosecution because it brought additional counts against him after he provided notice of his defenses and without disclosing material he contends is exculpatory. (*Id.*)

#### **A. *Brady* Violation**

A *Brady* claim must satisfy three elements: (1) the government must have suppressed evidence; (2) the evidence is favorable to the defendant; and (3) the suppression caused prejudice. *Brady v. Maryland*, 373 U.S. 83, 87–88 (1963); *see also Skinner v. Switzer*, 562 U.S. 521, 536 (2011). “*Brady* evidence is, by definition, always favorable to the defendant and material to his guilt or punishment.” *Skinner*, 526 U.S. at 536. To show prejudice, the defendant must show that “there is a reasonable probability that the result of the [proceeding] would have been different” if the evidence had been disclosed. *Strickler v. Greene*, 527 U.S. 263, 289 (1999).

Mr. DeFrance argues that the materials filed under seal as Doc. 63, which relate to Mr. DeFrance's firearms transactions, were belatedly disclosed in November of 2021 despite the United States possessing those materials since September of 2021. (Doc. 70 at 3–5.) The government argues that Mr. DeFrance could have discovered some of the evidence in question through due diligence, and he suffered no prejudice because the documents were disclosed with enough time to use them. (Doc. 72 at 11–13.)

While it is true that Mr. DeFrance supplied the 4473 forms in the first instance (Doc. 28), some of the documents filed in Doc. 63 concerning the underlying records were uniquely in the government's control. However, they were disclosed when no trial date was set in this case because of several pending motions. Although Mr. DeFrance argues that the materials "would have been woven into" his briefing concerning the motion in limine to exclude his affirmative defenses, he has not demonstrated prejudice on that basis: first, in response to this argument, the Court provided the opportunity for supplemental briefing on the motion in limine (Doc. 76), and second, given that the Court will deny the United States' motion to preclude his affirmative defenses before trial for the reasons discussed below, the possibility of additional arguments against the motion is a moot issue.

Mr. DeFrance argues in his supplemental briefing on the motion in limine

that the government should have corrected its briefing on the motion in limine regarding his defenses once it learned that he was “proceeded” to transact in firearms in at least two of the transactions (Doc. 78 at 4–5), but it is not clear how the government’s arguments opposing his defenses—which primarily concern whether Mr. DeFrance established that he had a sufficiently close relationship with a governmental official to reasonably rely on that official’s authority, whether he had made an authorized governmental official aware of all relevant facts, and whether jury instructions on the defenses would result in confusion (Doc. 37) — would be affected by the fact that he was proceeded. And in any event, the government’s motion will be denied at this stage for the reasons discussed below. He has not demonstrated prejudice on this basis.

Mr. DeFrance further argues that he could have raised an as-applied Second Amendment challenge to the prosecution if the documents had been disclosed (Doc. 78 at 8–9), but he did not file such a motion raising that challenge when the Court granted his motion to file additional pretrial motions and set a new deadline for all further motions after the documents were disclosed (Doc. 64 (dated Nov. 22, 2021)). Moreover, the Ninth Circuit has expressed strong skepticism of such arguments in the context of firearm possession prosecutions. *See United States v. Chovan*, 735 F.3d 1127, 1141–42 (9th Cir. 2013) (observing that Congress did not enact § 922(g)(9) with a limited duration or a good behavior clause, but rather only

excepted individuals whose convictions were expunged, pardoned, or set aside or whose civil rights were restored). Although he argued at the hearing that he would have raised an as-applied vagueness challenge (Doc. 85 at 59–60), the Court considered and rejected as-applied versions of his vagueness arguments in its order denying the third motion to dismiss (Doc. 71 at 32 (recognizing that Mr. DeFrance raised both facial and as-applied challenges), 34–35 (holding that statutes satisfied fair warning requirement “on their faces and on the alleged facts of this case”), 40 (holding that relationship definition did not invite arbitrary enforcement on the alleged facts of this case).) He has not demonstrated prejudice on this basis.

Mr. DeFrance further argues that he was prejudiced because a plea offer remained open to him while the government possessed the emails but had not disclosed them while urging him to plead guilty, preventing him from pursuing two defense strategies: (1) lobbying the government to include the evidence in the grand jury presentation for the Second Superseding Indictment in accordance with the United States Attorney’s Manual, or (2) DeFrance requesting to testify himself before the grand jury if the government refused to include the evidence. (Doc. 74 at 8.) The Court is skeptical that *Brady* prejudice can be shown based on the potential outcome of evidence presented during grand jury proceedings, which in the majority of cases will pre-date any obligation to produce evidence to a yet-to-be-charged defendant. *See Skinner*, 526 U.S. at 536 (“*Brady* evidence is, by



definition, always favorable to the defendant and material to his *guilt or punishment*.” (emphasis added)). Even assuming that *Brady* prejudice may be shown by a reasonable probability of a different outcome at the indictment stage, the potential impact of either of Mr. DeFrance’s proposed strategies on the grand jury’s finding of probable cause has not been explained and appears to be speculative. *See Downs v. Hoyt*, 232 F.3d 1031, 1037 (9th Cir. 2000) (rejecting *Brady* claim where defendant’s arguments were “speculative and fail[ed] to point out . . . how production of these materials would have created a reasonable probability of a different result”). Accordingly, Mr. DeFrance has not shown that he was prejudiced by the timing of the disclosure of the documents at issue. Because he has not satisfied this element of a *Brady* claim, the Court need not address whether the materials were suppressed despite their disclosure well before trial or whether the materials are favorable to Mr. DeFrance. *United States v. Olsen*, 704 F.3d 1172, 1181 (9th Cir. 2013).

To the extent Mr. DeFrance raises a Due Process claim concerning the automatic purging of NICS records, the government correctly argues that he cannot demonstrate bad faith in the destruction of evidence because such destruction was required by law. *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988); 28 C.F.R. § 25.9.

#### **B. Administrative Due Process**

Mr. DeFrance argues that the documents filed as Doc. 63 constitute “a *nunc*

*pro tunc* denial by ATF of Mr. DeFrance’s right to possess a firearm” that qualifies him to pursue an administrative appeal, which the government has “leapfrog[ged] . . . in favor of this criminal prosecution.” (Doc. 70 at 6–7.) Mr. DeFrance erroneously conflates the NICS check process and the administrative process for correcting NICS records to avoid erroneous denials with a legal determination that a person is or is not prohibited from possessing a firearm. *See* 28 C.F.R. § 25.10 (setting forth processes for verifying or correcting NICS records and appealing erroneous denials).

There is no constitutional or statutory requirement that the government must permit a person to exhaust administrative remedies to determine his prohibited person status before bringing criminal charges for unlawful possession of a firearm or related charges. *See United States v. Seibert*, 403 F. Supp. 2d 904, 921 (S.D. Iowa 2005). Such a requirement would be pointless in cases where a defendant obtains a firearm via means that do not include an NICS check (e.g., theft or purchases from a non-licensed seller), and it would require unrealistic bureaucratic perfection despite potential dishonesty on a Form 4473 or incomplete records where a defendant obtains a firearm through a licensed dealer. To the extent that Mr. DeFrance’s acquisition of the firearms created a reliance interest or belief that he was not prohibited, as he argues in his reply brief (Doc. 74 at 11–12), that reliance is an issue of fact concerning his state of mind that is appropriately

resolved at trial, not on a pretrial motion to dismiss.

### **C. Collateral Estoppel**

For similar reasons, the Court rejects Mr. DeFrance's collateral estoppel argument. Mr. DeFrance argues that the government should not be permitted to argue that he is a prohibited person under 18 U.S.C. § 922(g)(9) when it acknowledges that he ultimately may have been "proceeded" in all of his transactions based on the absence of records that he was denied. (Doc. 70 at 7–10.)

An NICS check provides to a licensed importer, manufacturer, or dealer of firearms "information as to whether the transfer of a firearm . . . would be in violation of Federal or state law." 28 C.F.R. § 25.1. It does not offer a binding determination of a potential purchaser's status as a prohibited or non-prohibited person under 18 U.S.C. § 922, particularly in light of the fact that the implementing regulations make clear that "a limited number of" state and local law enforcement agencies would contribute records to the database on a voluntary basis, 28 C.F.R. § 25.4, and thus recognize that the database is not comprehensive. The purpose of the background check system is to enable *sellers* to "keep guns out of the hands of criminals and others who should not have them," *Abramski v. United States*, 573 U.S. 169, 180 (2014), not to provide confirmation of prohibited or non-prohibited status to *purchasers*. Accordingly, even if Mr. DeFrance was

“proceeded” in all five firearms transactions, those NICS check results do not create a binding position of the government concerning his prohibited or non-prohibited status.

#### **D. Vindictive Prosecution**

Mr. DeFrance argues that the government brought the three additional charges in the Second Superseding Indictment vindictively after he provided notice of his affirmative defenses and opposed the government’s motion to preclude those defenses; in particular, he argues that the false statement charges “cast Mr. DeFrance as a prevaricator” to undermine his defenses related to his successful firearms transactions. (Doc. 70 at 10–17.)

It is well-established in the Ninth Circuit that “[a] prosecutor violates due process when he seeks additional charges solely to punish a defendant for exercising a constitutional or statutory right[,]” but at the pretrial stage, vindictiveness is not presumed from the fact that a more severe charge followed or even resulted from the defendant’s exercise of a right. *United States v. Gamez-Orduno*, 235 F.3d 453, 462 (9th Cir. 2000). Ninth Circuit precedent and cases from other jurisdictions indicate that vindictive prosecution claims cannot prevail if the defendant’s exposure to punishment is not increased. *See United States v. Motley*, 655 F.2d 186, 190–91 (9th Cir. 1981) (rejecting vindictive prosecution argument where new indictment brought different charges that “increase[d] the

chance of conviction” but did not increase possible prison term); *United States v. Snell*, 592 F.2d 1083, 1087 (9th Cir. 1979) (focusing severity inquiry on maximum potential punishment); *see also United States v. Santiago-Rodriguez*, 990 F. Supp. 2d 129, 132 & n.5 (D.P.R. 2013) (rejecting vindictive prosecution argument in part because additional count would be grouped and thus did not increase sentencing exposure); *cf. United States v. Thomas*, 410 F.3d 1235, 1247 (10th Cir. 2005) (rejecting vindictive prosecution argument in part because prosecutor sincerely but erroneously believed that additional charge would not increase defendant’s punishment). The government is correct that U.S.S.G. § 3D1.2 provides for grouping the counts in the Second Superseding Indictment if Mr. DeFrance is convicted of the possession charge and one or more of the false statement charges, and he thus is not subjected to a more severe punishment under the Second Superseding Indictment. Accordingly, the burden does not shift to the government to demonstrate that any increase in the severity of charges was not motivated by a vindictive motive. *See Snell*, 592 F.3d at 1086–87.

Although Mr. DeFrance argues that the false statement charges were intended to weaken his defense (Doc. 70 at 10–17; Doc. 85 at 12–13), the parties’ consent to a bench trial weakens any concerns about unfair prejudice to Mr. DeFrance’s defenses to the possession charge stemming from the allegation of falsehoods in the false statement charges.

## **II. Motions in Limine**

A motion in limine is a “procedural mechanism” through which questions regarding the admissibility of “testimony or evidence in a particular area” may be resolved before trial. *United States v. Heller*, 551 F.3d 1108, 1111 (9th Cir. 2009). Such in limine rulings are preliminary, and the Court “may always change [its] mind during the course of a trial.” *Ohler v. United States*, 529 U.S. 753, 758 n.3 (2000). Motions in limine may be superfluous in bench trials, as this case now is (Doc. 90), where “asking the judge to rule in advance on prejudicial evidence” would be “so that the judge would not hear the evidence.” *Heller*, 551 F.3d at 1112. However, “pretrial evidentiary motions may be appropriate” in a bench trial for “logistical and other reasons.” *Id.* With these standards in mind, the Court will turn its attention to the merits of the underlying motions.

### **A. Motion in Limine Concerning Admissibility of Certain Evidence (Doc. 34)**

The United States has moved for an in limine ruling on the admissibility of certain evidence: (1) Mr. DeFrance’s consent to search his truck on June 27, 2018, which resulted in the observation of three firearms; (2) the execution of a search warrant at Mr. DeFrance’s residence on October 2, 2018, which resulted in the seizure of two firearms; and (3) the unavailability of the victim of Mr. DeFrance’s PFMA conviction in 2013 to testify about the nature of their relationship in

satisfaction of the relationship element of 18 U.S.C. § 922(g)(9). (Doc. 34 at 2.)

### **1. The Investigation and Searches**

The United States argues that the existence of an investigation, consent obtained from Mr. DeFrance for a search of his vehicle, and the execution of a search warrant are inextricably intertwined with the charges in this case. (Doc. 35 at 3–4.) Mr. DeFrance argues that the evidence of the vehicle search and search warrant are unnecessary because he can (and will) stipulate that he possessed firearms because he maintains that he possessed them lawfully. (Doc. 45 at 2; Doc. 85 at 66.)

Under Ninth Circuit case law, “other act” evidence need not meet the requirements of Rule 404(b) if admission is necessary “to permit the prosecutor to offer a coherent and comprehensible story regarding the commission of the crime; it is obviously necessary in certain cases for the government to explain either the circumstances under which particular evidence was obtained or the events surrounding the commission of the crime.” *United States v. Loftis*, 843 F.3d 1173, 1178 (9th Cir. 2016) (internal quotation omitted). “This exception to Rule 404(b) is most often invoked in cases in which the defendant is charged with being a felon in possession of a firearm.” *United States v. Vizcarra-Martinez*, 66 F.3d 1006, 1013 (9th Cir. 1995). For example, in *United States v. Daly*, 974 F.2d 1215, 1216–17 (9th Cir. 1992), the court held that evidence that the defendant engaged in a

shoot-out with police was relevant and necessary to put the defendant's felon-in-possession charge into context and to rebut his claims of self-defense.

However, in those cases, the defendant apparently did not stipulate to possessing the firearms in question. The government here argues that the consent search and search warrant are "necessary to inform the jury of the basis for law enforcement's intrusion into the defendant's property." (Doc. 35 at 4.) But now that the parties have agreed to a bench trial (Doc. 90), and Mr. DeFrance has agreed to stipulate to the fact of his possession of the firearms (Doc. 45 at 2; Doc. 85 at 66), the probative value of this evidence has decreased significantly, making it more difficult for the Court to issue a pretrial ruling balancing the relevance and potential prejudice of this evidence outside the context in which it may be introduced at trial.

On the merits, the evidence concerning the consent search and residence search is inextricably intertwined under the Ninth Circuit precedent described above. However, the existence of the State of Montana's investigation of Mr. DeFrance is more attenuated from the firearms possession offense than the searches, and the government has conceded that evidence of the *nature* of the investigation is not necessary (Doc. 35 at 4). "There must be a sufficient contextual or substantive connection between the proffered evidence and the alleged crime to justify exempting the evidence from the strictures of Rule 404(b)."



*Vizcarra-Martinez*, 66 F.3d at 1013. If the government “would encounter little difficulty in presenting the evidence relevant to its case against the defendant” without introducing the “other acts” evidence, it is not “so inextricably intertwined with the crime as to fall outside the scope of Rule 404(b).” *Id.* The government likely would encounter substantial difficulty if forced to introduce evidence of the searches that revealed the firearms without explaining that those searches occurred within the context of an investigation, and the existence of the investigation thus is inextricably intertwined. On the other hand, the nature of the investigation has *extraordinarily* prejudicial potential, and the parties and witnesses alike may struggle to walk any evidentiary tightrope established by pretrial rulings concerning the investigation. Fortunately, both of these concerns have been alleviated by the parties’ agreement to a bench trial; the Court is already familiar with the circumstances of the searches based on the parties’ pretrial motions, and it is duty-bound to carefully guard its decisions against prejudicial or irrelevant concerns. Thus, establishing clear guardrails permitting or prohibiting the introduction of this evidence for particular purposes before trial is unnecessary. Accordingly, the Court will reserve ruling on this evidence’s admissibility until trial.

## **2. The PFMA Victim’s Unavailability**

The United States argues that it wishes to introduce evidence of the PFMA

victim's unavailability to prevent the jury from drawing incorrect inferences about missing evidence concerning her. (Doc. 35 at 5–7.) The parties' consent to a bench trial has mooted the government's concerns. (Doc. 90; *see also* Doc. 85 at 67–68 (conceding that jury instruction would moot issue).) Accordingly, the government's motion concerning this evidence will be denied as moot. To the extent either party wishes to introduce evidence of the PFMA victim's unavailability at trial for any other purpose, the Court will rule on the admissibility of that evidence at trial.

**B. Motion in Limine Concerning Mr. DeFrance's Defenses (Doc. 36)**

The United States has moved for an in limine ruling precluding DeFrance from relying on the defenses of public authority, entrapment by estoppel, and innocent intent. (Doc. 36.) In response to the government's motion, DeFrance argues that irrespective of what the defense is called, he is entitled to introduce evidence that he was cleared to transact in firearms on several occasions because the government must prove that he knew his status as a prohibited person. (Doc. 45 at 4–5.)

The Court will deny this motion because the Court's ultimate decision whether to consider the applicability of any of these defenses will hinge on what evidence is actually presented and relied upon at trial. *United States v. Bear*, 439 F.3d 565, 568 (9th Cir. 2006). The parties' consent to a bench trial moots the

government's concerns about jury confusion based on these defenses. (Doc. 37 at 5–6.) Mr. DeFrance is correct that the government bears the burden of proving all elements of the offense beyond a reasonable doubt, including his *mens rea*.

Although the government has asserted that evidence of the NICS determinations is not admissible (Doc. 85 at 41), the Court will be best positioned to rule on its admissibility within the context in which that evidence is presented at trial and will consider any objections at that time.

#### CONCLUSION

IT IS ORDERED that Mr. DeFrance's Motion to Dismiss the Second Superseding Indictment (Doc. 69) is DENIED.

IT IS FURTHER ORDERED that the United States' Motion in Limine for Pretrial Determination of Admissibility of Certain Evidence (Doc. 34) is DENIED AS MOOT as to the PFMA victim's unavailability, and the Court will RESERVE RULING as to the evidence relating to the underlying investigation and searches.

IT IS FURTHER ORDERED that the United States' Motion in Limine to Preclude Defenses of Public Authority, Entrapment by Estoppel, and Innocent Intent (Doc. 36) is DENIED.

IT IS FURTHER ORDERED that the trial in this matter is RESET for June 6, 2022 in the Russell Smith Federal Courthouse in Missoula, Montana. The plea agreement deadline is May 26, 2022. The trial briefs deadline is May 31, 2022.

The Court's previous Scheduling Order (Doc. 18) otherwise remains in full force and effect.

DATED this 15th day of April, 2022.

A handwritten signature in black ink, reading "Dana L. Christensen". The signature is written in a cursive style with a large initial "D".

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Dana L. Christensen, District Judge  
United States District Court

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
MISSOULA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MICHAEL BLAKE DEFRANCE,

Defendant.

CR 21-29-M-DLC

ORDER

Before the Court is Defendant Michael Blake DeFrance's Motion for Leave to File Motion for Reconsideration. (Doc. 105.) Although the motion states that the United States opposes the motion, no response was filed. (*Id.* at 10.)

Mr. DeFrance first contends that Congress's recent amendment of 18 U.S.C. § 921(a)(33)(i) to include "a person who has a current or recent former dating relationship with the victim" demonstrates that "it is clear that Mr. DeFrance was never intended to be a prohibited person as a result of his 2013 Montana PFMA conviction." (Doc. 105 at 2-8.) However, whether Mr. DeFrance's relationship with the victim of the 2013 PFMA offense was "similarly situated to a spouse," as included in the prior version of § 921(a)(33)(i), or a "dating relationship," as included in the latest version of the statute, is an issue of fact that must be resolved based on evidence presented at trial. Accordingly, the Court will defer ruling on

this issue until after trial.

Second, Mr. DeFrance contends that the amendment to § 921(a)(33)(i) warrants reconsideration of the Court's prior ruling that the statute was not unconstitutionally vague on its face or as applied, because the amendment (1) renders the relationship elements of the current federal statute and Montana's 2011 PFMA statute a categorical match, and (2) "proves reasonable that Mr. DeFrance's interpretation that he was not a prohibited person should be afforded deference under the rule of lenity." (Doc. 105 at 8–9.) The Court is not persuaded that Congress's amendment to the federal statute requires reconsideration of the Court's holding that the prior version of the statute is not so unconstitutionally vague that dismissal of the indictment is required as a matter of law for the reasons stated in the Court's order on Mr. DeFrance's motions to dismiss. (Doc. 71 at 36–41.) As the Court previously concluded, "[t]o the extent a particular defendant contends that his relationship with the victim of his predicate offense lies at the outer margins of a relationship 'substantially similar' to a spouse, parent, or guardian, he may present supporting evidence or argue that the government has not met its burden of proving that element to a jury. However, the Court cannot say as a matter of law that the relationship element unconstitutionally permits arbitrary enforcement or that such arbitrariness is evident here, where the record establishes that Mr. DeFrance acknowledged he had a boyfriend-girlfriend relationship with

the victim of his PFMA offense.” (*Id.* at 40.) Accordingly, the Court will defer ruling on this issue until after trial.

Third and finally, Mr. DeFrance argues that the Court should consider the Supreme Court’s recent decision in *New York Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), in which the Court held that the Second Amendment protects the right to bear arms both inside and outside the home and that means-end scrutiny does not apply in the Second Amendment context, in assessing the import of Congress’s amendment to § 922(a)(33)(i) and in deciding whether to apply the categorical approach in Mr. DeFrance’s case. (Doc. 105 at 10.) The Court concludes that the Supreme Court’s holding in *Bruen* does not undermine the binding Supreme Court and Ninth Circuit precedent on which the Court relied in holding that any mismatch between the relationship definitions of the federal statute and the state statute setting forth the defendant’s predicate offense is not a basis for invalidating the indictment. (Doc. 71 at 25–28.) The precedents on which this Court relied involved statutory interpretation of § 922(a)(33)(i) and § 922(g)(9), while *Bruen* concerned the constitutionality of restrictions on carrying firearms in public.

Accordingly, IT IS ORDERED that the motion (Doc. 105) is DENIED insofar as it seeks pretrial briefing, argument, or other relief, and the Court will RESERVE RULING as to the legal issues raised in the motion.

DATED this 26th day of July, 2022.

A handwritten signature in black ink, reading "Dana L. Christensen". The signature is written in a cursive style with a large initial "D".

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Dana L. Christensen, District Judge  
United States District Court



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
MISSOULA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MICHAEL BLAKE DEFRANCE,

Defendant.

CR 21-29-M-DLC

FINDINGS OF FACT,  
CONCLUSIONS OF LAW, and  
ORDER

On October 21, 2021, a Grand Jury returned a Second Superseding Indictment (“Indictment”) charging Defendant Michael Blake DeFrance with one count of prohibited person in possession of firearms and ammunition, in violation of 18 U.S.C. § 922(g)(9), and three counts of false statement during a firearms transaction, in violation of 18 U.S.C. § 922(a)(6). (Doc. 55.) DeFrance waived his right to a jury trial on March 8, 2022. (Doc. 87.) Consequently, the Court conducted a bench trial on April 26 and April 27, 2023, pursuant to its jurisdiction under 18 U.S.C. § 3231. For the following reasons, the Court finds DeFrance guilty on all counts in the Indictment.

**FINDINGS OF FACT**

The following findings of fact are based upon the testimony of witnesses and exhibits admitted at trial.

The Court provisionally admitted Exhibits 19 and 20, which were YouTube “blogs” created by Jermain Charlo in September 2013. The Court finds that this evidence was not probative and does not rely upon this evidence, or any witness testimony relating to the blogs, in any way in reaching its verdict. DeFrance’s objection to this evidence is sustained.

1. Jermain Charlo was born on April 23, 1995.
2. In 2010, Charlo lived in Dixon, Montana with her great grandfather, Elmer “Sunny” Morigeau, at 309 Frank McClure/Pename Street.
3. Until the summer of 2009, Charlo’s friend, Jocelyn Stevens, lived at 509 Frank McClure/Pename. Stevens testified that they were close friends. Stevens testified that she dated a boy named Antone Luty when she was in sixth to seventh grade, and Charlo dated him afterward. Stevens testified that Charlo got pregnant by Luty, but the pregnancy was not brought to term. No other witnesses testified that they were aware of Luty or that Charlo may have dated him.
4. In February 2010, Defendant DeFrance moved to Dixon, Montana with his parents (Shawn and Jennifer DeFrance) and siblings and resided at 509 Frank McClure.
5. Charlo and DeFrance became friends and were described as inseparable. Together, they fished, walked along the river, and hung out at DeFrance’s house. Charlo’s brother occasionally joined them to go fishing and hiking.

6. Charlo's brother, Nathan Morigeau, estimated that Charlo and DeFrance began seeing each other about a month after the DeFrance family moved to Dixon.
7. Charlo's mother, Jennifer Morigeau, testified that when Charlo was 14, she skipped school, and Jennifer Morigeau frequently found her at DeFrance's parents' house. Jennifer Morigeau testified that she had to call an officer to force Charlo to go home because the DeFrances would not force her to leave.
8. Shawn DeFrance testified that he did not recall any time the police were summoned to remove Charlo from his house. Jennifer DeFrance testified that there was never a time when police were summoned to remove Charlo from the house and that she never had words with Jennifer Morigeau about the amount of time Charlo was spending at the DeFrances' house. The Court does not find any of Jennifer DeFrance's testimony credible as further explained herein.
9. Jennifer Morigeau testified that from the time Charlo was 14 to 18, she spent the majority of her time with DeFrance.
10. When Charlo was 14 or 15, her aunt, Valenda Morigeau, discovered on Charlo's phone a nude photograph of Charlo that she had sent to DeFrance.
11. Stevens testified that Charlo told her that she had been physically intimate with DeFrance during this time period.
12. Charlo attended Two Eagle River School in Pablo, Montana during the 2010–2011 school year until September 23, 2010.

13. In the fall of 2010, Charlo moved to Dulce, New Mexico to live with her grandmother, Vicki Morigeau, and Vicki's husband, David Velarde, because Charlo was pregnant and Charlo's mother wanted her to stay in school rather than "running off with her boyfriend[,]” DeFrance.

14. Charlo told her mother, Valenda, Danielle Matt, and others that DeFrance was the father.

15. Jennifer and Shawn DeFrance testified that they did not believe that DeFrance fathered the child.

16. Jennifer Morigeau testified that Charlo wanted to try to keep the pregnancy, but she was "really sick.”

17. Charlo's pregnancy was terminated.

18. Danielle Matt, Charlo's aunt, overheard Charlo crying in a bathroom after the termination. Danielle picked the lock to the bathroom and discovered that Charlo had received text messages from a contact she identified as DeFrance accusing Charlo of killing "our baby.”

19. In October 2010, Charlo enrolled at Dulce High School in New Mexico.

20. Charlo visited Dixon, Montana with Colton Monarco in 2011. She was dating Monarco at the time. While they were in Dixon, DeFrance drove by Charlo and Monarco. Charlo then left Monarco with her family to spend time with DeFrance. Charlo and Monarco returned to New Mexico after a few days.

21. Monarco testified that his relationship with Charlo was physically intimate, but he did not consider the relationship serious because he did not believe they would end up together.

22. Christian Woody testified that Monarco later told him that he was heartbroken about the end of the relationship with Charlo.

23. Charlo moved back to Montana in 2012. She spent some time at Sunny's residence in Dixon and some time at her mother's residence, which by 2013 was in Polson.

24. When Charlo moved back to Montana, she resumed her romantic relationship with DeFrance.

25. At the beginning of the 2012–2013 school year, Charlo enrolled at Two Eagle River School and attended for the full year. She had numerous unexcused absences during this school year.

26. DeFrance had a camper on his family's property, which his father had purchased from Sunny in 2012.

27. Valenda testified that Charlo spent the night with DeFrance "about 80 percent of the time," kept a lot of her clothing and all of her personal hygiene items there, and had unfettered access to DeFrance's camper; Nathan testified that Charlo had about half of her clothes at DeFrance's. Valenda testified that they had a few animals together; Danielle testified that they had lizards, guinea pigs, and a

pig at one point; and Nathan testified that Charlo had a lizard and a rabbit at DeFrance's. Valenda testified that Charlo would skip school to be with DeFrance. Valenda testified that Charlo took trips with DeFrance's family, and Charlo and DeFrance also went skiing together, went to the fair together, took trips to Missoula or Kalispell together, and ate meals together.

28. Danielle testified that in the weeks before Charlo turned 18, she would tell her mother that she was staying at Sunny's, but she would instead be staying in the camper with DeFrance. Nathan testified that Charlo lived in the camper before she turned 18.

29. Shawn DeFrance denied that Charlo kept any items at his house except for art supplies, and he denied that Charlo spent the night in the camper or that she was living in it. The Court finds that this testimony is not credible based on the witness's manner while testifying, other evidence contradicting the witness's testimony, and the reasonableness of the witness's testimony in light of all of the evidence.

30. Jennifer DeFrance denied that Charlo lived in the DeFrances' house any time in 2012, denied that Charlo spent time at the camper with DeFrance, and denied recalling that she even occasionally visited him at the camper. This testimony, which is contradicted by voluminous evidence, including her husband's testimony and her *own* testimony on cross-examination, has no credibility in the

Court's view. Additional factors detracting from Jennifer DeFrance's credibility are the opportunity for her to see or hear or know the things she testified to, her manner while testifying, and the reasonableness of her testimony in light of all of the evidence.

31. On the night of April 13, 2013, Deputy Robyn Largent of the Sanders County Sheriff's Office received a call from dispatch to the agency outside of Dixon, Montana.

32. Deputy Largent was dispatched to 309 Frank McClure/Pename Street, and he arrived shortly after midnight on April 14, 2013.

33. Deputy Largent recorded an interview with Charlo.

34. Charlo stated she lived on Keeler River Lane in Polson, Montana, where her mother lived.

35. Charlo stated she had been in Dixon since Friday evening. She stated that on Saturday, she was supposed to meet with DeFrance in town, but she instead went home, and DeFrance was mad that she "made them sit there at China Buffet and Walmart for over an hour."

36. Charlo stated she told DeFrance she wanted him to calm down and that she was going to go to her grandpa's home. She stated she gathered the rest of her belongings because she "didn't want them broken," and she grabbed a couple of pairs of flip flops, threw them in DeFrance's camper, and walked away.

37. Charlo said that as she walked away, DeFrance “came storming out of the door yelling at me about something,” and when she tried to walk away, he shoved her into his family’s white van, held her down, punched her in the ear, temple, and cheekbone, threw her onto the ground, spit in her face, told her how horrible she was, and walked off. Charlo called the police.

38. Charlo told the 911 dispatcher that she did not live with DeFrance and she was spending the weekend with him.

39. Charlo stated that “months ago” she had been “called in” about “beating on him after finding another girl’s underwear.”

40. Charlo said her relationship with DeFrance was “boyfriend/girlfriend” and that they’d been together since June of 2012, for about nine months.

41. Charlo stated that DeFrance had previously said things like, “If I can’t have you, nobody can.”

42. Deputy Largent requested officer assistance in removing Charlo’s guinea pig from DeFrance’s camper and returning it to her.

43. Shawn DeFrance testified at trial that Charlo did not have a guinea pig in the camper, and that the guinea pig belonged to his daughter. The Court does not find Shawn DeFrance’s testimony that Charlo did not have a guinea pig in the camper credible because it is contradicted by contemporaneously recorded evidence produced by third parties in the record.



44. Deputy Largent issued a citation to DeFrance, charging him with violating Montana Code § 45-5-206, Partner Family Member Assault (“PFMA”), a misdemeanor.

45. On April 15, 2013, DeFrance made his initial appearance before Justice of the Peace Donald Strine in Sanders County Justice Court. He was appointed a public defender and released on his own recognizance, subject to conditions. The Initial Appearance form states: “A conviction for certain offenses may result in the loss of various rights regarding firearms under state and federal laws.” DeFrance signed and dated the form under a line stating “I understand my rights as advised above[.]”

46. On April 23, 2013, Charlo turned 18 years old. The same day, she moved out of her mother’s house in Polson and moved in with DeFrance.

47. Jennifer Morigeau testified that Stevens helped Charlo remove her belongings from Jennifer Morigeau’s house. Stevens testified that she did not help Charlo move, but she would give Charlo a ride whenever she asked.

48. Jennifer DeFrance testified that Charlo and DeFrance were “apart” for about a month after the PFMA. For the reasons explained above, the Court finds that the entirety of Jennifer DeFrance’s testimony lacks credibility.

49. On May 6, 2013, Justice Strine approved a plea agreement between the State of Montana and DeFrance, which required DeFrance to plead guilty to the PFMA

charge, serve a mandatory sentence of 24 hours in jail with credit for time served, pay a fine, pay for and complete a counseling assessment with a focus on violence, controlling behavior, and dangerousness, and complete all recommendations pursuant to Montana Code § 45-5-206(4).

50. When DeFrance entered his plea of guilty on May 6, 2013, Justice Strine reviewed with DeFrance the information contained in Exhibit 5, which included a checkmark next to a statement that “I understand that other possible consequences of a guilty plea are: **loss of firearms rights[.]**”<sup>1</sup> The form also stated: “I am pleading guilty to this charge because I did the following: **On 4-14-2013 in Sanders County I caused bodily injury to my girlfriend[.]**” DeFrance signed and dated the form.

51. Justice Strine testified that any admonition he may have given DeFrance concerning his firearms rights would have been under Montana law, not federal law.

52. DeFrance’s court-appointed attorney for the PFMA case testified that he did not tell DeFrance whether he categorically did or did not lose his firearms rights as a result of the conviction. He testified that he felt his representation was ineffective because of that fact.

53. Danielle testified that after the PFMA, Charlo would see DeFrance despite a

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<sup>1</sup> The bolded typeface indicates where Justice Strine added handwritten remarks.

no-contact order and would take him to his anger management program, and Charlo wanted the relationship to work.

54. On July 11, 2014, Charlo gave birth to her first child with DeFrance. They later had another child.

55. In June 2018, Charlo was reported missing. As of the date of this order, she has not been located, and her disappearance is considered an open case.

56. Charlo was unavailable to testify at trial.

57. Cash 1 Pawn, Inc., in Missoula, Montana (“Cash 1 Pawn”) is a federally licensed firearms dealer.

58. A customer attempting to purchase or redeem a firearm at Cash 1 Pawn must fill out a 4473 form, which is transmitted to the NICS operation center.

59. Joel Christensen, a manager at Cash 1 Pawn, testified that if a person answered “yes” to question 11(a) and “no” to questions 11(b) through (i) on the 4473 form, Cash 1 Pawn would proceed with the NICS background check process. If a person did not provide those answers, the transaction would be stopped.

60. When a NICS background check is run, three databases are accessed: the Interstate Identification Index, the National Crime Information Center, and the NICS indices.

61. The information in these databases is provided by local law enforcement agencies.

62. If the background check results in information that the person attempting to acquire a firearm is potentially prohibited from possessing a firearm under federal law, the transaction may be delayed to allow for additional research. The additional research may require reaching out to external contacts, such as courts or law enforcement agencies, for additional information or documentation.

63. Steven Feuerstein testified that NICS handled more than 300 million background checks for firearms purchases last year, and investigators may fail to resume or complete an investigation before the NICS is purged from the system after 88 days.

64. DeFrance completed a 4473 form at Cash 1 Pawn on February 24, 2018 to redeem a Stevens Arms 200 rifle. In response to Question 11.i, “Have you ever been convicted in any court of a misdemeanor crime of domestic violence? (*See Instructions for Question 11.i.*)”, DeFrance checked “No.” NICS gave a response of “Delay” on February 24, 2018, and later gave a “Proceed” response on March 1, 2018. DeFrance picked up the gun on March 2, 2018.

65. DeFrance completed a 4473 form at Cash 1 Pawn on March 2, 2018 to purchase a Smith & Wesson 60 Lady Smith revolver. In response to Question 11.i, “Have you ever been convicted in any court of a misdemeanor crime of domestic violence? (*See Instructions for Question 11.i.*)”, DeFrance checked “No.” NICS gave a response of “Delay” on March 3, 2018, and no further response was

provided within three business days. DeFrance picked up the gun on March 10, 2018.

66. DeFrance completed a 4473 form at Cash 1 Pawn on August 25, 2018 to redeem a Remington 770 rifle (.243). In response to Question 11.i, "Have you ever been convicted in any court of a misdemeanor crime of domestic violence? (*See Instructions for Question 11.i.*)", DeFrance checked "No." NICS gave a response of "Delay" on August 25, 2018, and later gave a "Proceed" response on August 30, 2018. DeFrance picked up the gun on September 1, 2018.

67. If a 4473 form submitted to NICS results in a "Deny," the NICS Transaction Number ("NTN") is recorded in a system within the Denial Enforcement and NICS Intelligence Branch of the United States Bureau of Alcohol, Tobacco, and Firearms. The NTN's associated with DeFrance's 4473 forms were not in this database, which means that none of his transactions were denied.

68. On October 2, 2018, Detective Guy Baker and the Missoula Police Department executed a search warrant at DeFrance's home to locate a Smith & Wesson .357 revolver. The police seized the .357 revolver, which was fully loaded, a .243 caliber Remington rifle that was found next to DeFrance's bed, and a .22 Keystone Arms rifle.

69. DeFrance told Detective Baker that the .357 was his and stated that the .243 was his father's gun, but he acknowledged that the .243 was next to his bed.

70. Detective Baker asked DeFrance, “And you know you’re not supposed to have guns, right?” DeFrance stated, “I was never clear on that.”

71. The Smith & Wesson Lady Smith .357 revolver is a firearm as defined by federal law. It was manufactured by Smith & Wesson in Massachusetts.

72. The Remington model 770 .243 caliber rifle is a firearm as defined by federal law. It was manufactured by Remington in Kentucky.

73. The Keystone Arms rifle .22 long rifle caliber is a firearm as defined by federal law. It was manufactured by Keystone in Pennsylvania.

#### **CONCLUSIONS OF LAW**

74. The Court concludes that a defendant commits the offense of prohibited person in possession of firearms and ammunition, in violation of 18 U.S.C.

§ 922(g)(9), if the government proves the following elements beyond a reasonable doubt: (1) the defendant knowingly possessed firearms and ammunition; (2) the firearms and ammunition had been transported from one state to another; (3) at the time the defendant possessed the firearms and ammunition, the defendant had been convicted of a misdemeanor crime of domestic violence; and (4) at the time the defendant possessed the firearms and ammunition, the defendant knew that he had been convicted of a misdemeanor crime of domestic violence. Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit No. 14.15, Firearms—Unlawful Possession (18 U.S.C. § 922(g)) (2022 ed., updated 12/2022).

75. At the time DeFrance allegedly possessed the firearms and ammunition in question, and at the time the Second Superseding Indictment was filed, federal law defined “misdemeanor crime of domestic violence” as “an offense that—(i) is a misdemeanor under Federal, State, or Tribal law; and (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.” 18 U.S.C. § 921(a)(33)(A) (amended 2022).<sup>2</sup>

76. Here, then, as to Count I, the government bears the burden to prove beyond a reasonable doubt that: (1) DeFrance knowingly possessed firearms and ammunition; (2) the firearms and ammunition had been transported from another state to Montana; (3) at the time DeFrance possessed firearms and ammunition, he had been convicted of a misdemeanor crime of domestic violence; and (4) at the time DeFrance possessed firearms and ammunition, he knew he had been

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<sup>2</sup> In 2022, Congress amended § 921(a)(33)(A)(ii) to add another qualifying relationship status: “a person who has a current or recent former dating relationship with the victim.” Congress defined “dating relationship” as “a relationship between individuals who have or have recently had a continuing serious relationship of a romantic or intimate nature” and provided several factors to consider, including the length of the relationship, the nature of the relationship, and the frequency and type of interactions between the individuals involved in the relationship. 18 U.S.C. § 921(a)(37).

convicted of a misdemeanor crime of domestic violence.

77. The Court concludes that a defendant commits the offense of false statement in connection with the acquisition of a firearm, in violation of 18 U.S.C.

§ 922(a)(6), if the government proves the following elements beyond a reasonable doubt: (1) the seller was a licensed firearms dealer; (2) in connection with acquiring a firearm from the seller, the defendant made a false statement; (3) the defendant knew the statement was false; and (4) the false statement was material—that is, the false statement had a natural tendency to influence or was capable of influencing the seller into believing the firearm could be lawfully sold to the defendant. Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit No. 14.8, Firearms—False Statement or Identification in Acquisition or Attempted Acquisition (18 U.S.C. § 922(a)(6)) (2022 ed., updated 12/2022).

78. Here, then, as to Count II, the government bears the burden to prove beyond a reasonable doubt that: (1) Cash 1 Pawn was a licensed firearms dealer; (2) in connection with acquiring a Stevens Arms 200 rifle from Cash 1 Pawn, DeFrance made a false statement; (3) DeFrance knew the statement was false; and (4) the false statement was material—that is, the false statement had a natural tendency to influence or was capable of influencing Cash 1 Pawn into believing the Stevens Arms 200 rifle could be lawfully sold to DeFrance.



79. As to Count III, the government bears the burden to prove beyond a reasonable doubt that: (1) Cash 1 Pawn was a licensed firearms dealer; (2) in connection with acquiring a Smith & Wesson 60 Lady Smith revolver from Cash 1 Pawn, DeFrance made a false statement; (3) DeFrance knew the statement was false; and (4) the false statement was material—that is, the false statement had a natural tendency to influence or was capable of influencing Cash 1 Pawn into believing the Smith & Wesson 60 Lady Smith revolver could be lawfully sold to DeFrance.

80. As to Count IV, the government bears the burden to prove beyond a reasonable doubt that: (1) Cash 1 Pawn was a licensed firearms dealer; (2) in connection with acquiring a Remington 770 rifle from Cash 1 Pawn, DeFrance made a false statement; (3) DeFrance knew the statement was false; and (4) the false statement was material—that is, the false statement had a natural tendency to influence or was capable of influencing Cash 1 Pawn into believing the Remington 770 rifle could be lawfully sold to DeFrance.

**I. Prohibited Person in Possession of Firearms and Ammunition (18 U.S.C. § 922(g)(9)) (Count I)**

**A. Knowing Possession of Firearms and Ammunition**

81. A person has possession of something if the person knows of its presence and has physical control of it or knows of its presence and has the power and intention to control it. Manual of Model Criminal Jury Instructions for the District

Courts of the Ninth Circuit No. 6.15, Possession—Defined (2022 ed., updated 12/2022).

82. An act is done knowingly if the defendant is aware of the act and does not act through ignorance, mistake, or accident. A finder of fact may consider evidence of the defendant's words, acts, or omissions, along with all the other evidence, in deciding whether the defendant acted knowingly. Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit No. 4.8, Knowingly (2022 ed., updated 12/2022).

83. DeFrance admitted to Detective Baker that the Smith & Wesson revolver, which was fully loaded at the time it was seized, belonged to him.

84. The Remington .243 rifle was next to DeFrance's bed when the search warrant was conducted, and DeFrance acknowledged to Detective Baker that the rifle was next to his bed.

85. Because DeFrance admitted ownership of the fully loaded Smith & Wesson revolver, and because DeFrance acknowledged the presence of the Remington rifle next to his bed, which proves that he had physical control of it, the Court concludes that DeFrance knowingly possessed the Smith & Wesson revolver, the ammunition inside the Smith & Wesson revolver, and the Remington rifle on October 2, 2018.

**B. Firearms or Ammunition Affecting Interstate Commerce**

86. The parties stipulated that the Smith & Wesson revolver was manufactured

in Massachusetts. (Doc. 169.)

87. The parties stipulated that the Remington rifle was manufactured in Kentucky. (Doc. 169.)

88. The parties stipulated that the Keystone Arms rifle was manufactured in Pennsylvania. (Doc. 169.)

89. The parties stipulated that the firearms seized during the October 2, 2018 search, including the Smith & Wesson revolver and the Remington rifle, were not manufactured in the State of Montana and thus traveled in or affected interstate and/or foreign commerce to arrive in Montana. (Doc. 169.)

90. Because all three firearms seized in Montana during the October 2, 2018 search were not manufactured in the State of Montana, the Court concludes that those firearms traveled in interstate commerce to arrive in Montana.

### **C. Prohibited Status**

91. 18 U.S.C. § 922(g)(9) prohibits firearm possession by any person who “has been convicted in any court of a misdemeanor crime of domestic violence[.]”

92. At the time DeFrance allegedly possessed the firearms and ammunition in question, and at the time the Second Superseding Indictment was filed, federal law defined “misdemeanor crime of domestic violence” as “an offense that—(i) is a misdemeanor under Federal, State, or Tribal law; and (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon,

committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.” 18 U.S.C. § 921(a)(33)(A) (amended 2022).

93. DeFrance was convicted of violating Montana Code § 45-5-206, Partner Family Member Assault, on May 6, 2013.

94. The Court reiterates its previous conclusion that DeFrance was convicted of violating Section (1)(a) of the PFMA statute, which provides that a person commits the offense of PFMA if the person “purposely or knowingly causes bodily injury to a partner or family member.” *United States v. DeFrance*, 577 F. Supp. 3d 1085, 1095 n.2 (D. Mont. 2021).

95. There is no evidence in the record that DeFrance had any prior convictions for PFMA.

96. An offender convicted of PFMA must “be imprisoned in the county jail for a term not to exceed 1 year or not less than 24 hours for a first offense.” Mont. Code Ann. § 45-5-206(3)(a)(i). The Court concludes that a PFMA first offense is a misdemeanor under State law.

97. The Court reiterates its previous conclusion that subsection (1)(a) of Montana’s PFMA statute has, as an element, the use or attempted use of physical

force within the meaning of 18 U.S.C. § 921(a)(33)(A)(ii). *DeFrance*, 577 F. Supp. 3d at 1094–98.

98. The Court reiterates its previous conclusion that the relationship element of a § 922(g)(9) offense is confined by the plain text of the statute to the relationship as it existed at the time of the predicate domestic violence offense. *Id.* at 1104–05.

99. Neither party contended or presented evidence that, at the time of the PFMA on April 13–14, 2013, DeFrance was Charlo’s spouse or former spouse, cohabiting or had cohabited with her as a spouse, or shared a child in common with her. Accordingly, the Court concludes that it must determine whether the PFMA was “committed by . . . a person similarly situated to a spouse . . . of the victim.” 18 U.S.C. § 921(a)(33)(A)(ii).

100. Although neither the Supreme Court of the United States nor the United States Court of Appeals for the Ninth Circuit has issued a precedential opinion setting forth factors a factfinder must consider when determining whether an offender was similarly situated to a spouse of the victim, the Ninth Circuit held in an unpublished and non-precedential opinion that there was sufficient evidence to find this element satisfied where the evidence included the defendant’s admission that he was convicted of a domestic violence crime, the victim of the crime was his girlfriend, he was required to enroll in a 52-week domestic violence batterers program as a result of his conviction, and the arresting agency’s policy required

that, to be arrested under the statute of conviction, the suspect and victim had to be spouses, co-parents, or currently cohabiting. *United States v. Slaughter*, 124 F. App'x 542, 543 (9th Cir. 2005). The Court concludes that this case provides persuasive authority.

101. The Fifth and Eighth Circuits have held that cohabitation with a romantic partner is sufficient to establish that a relationship partner is similarly situated to a spouse, and other courts have cited cohabitating romantic relationships as sufficient. *Buster v. United States*, 447 F.3d 1130, 1133 (8th Cir. 2006); *United States v. Shelton*, 325 F.3d 553, 562 (5th Cir. 2003) (concluding that “live-in” girlfriend of two months “indicates living together with the implication that the two were having sexual relations”); *see also United States v. Denis*, 297 F.3d 25, 31 (1st Cir. 2002) (rejecting vagueness challenge to § 922(g)(9) indictment where defendant knew he was convicted of misdemeanor offense after assaulting live-in girlfriend). The Court concludes that these cases provide persuasive authority.

102. The Federal Circuit held that the following evidence was “more than sufficient” to prove by a preponderance of the evidence that a relationship was one of cohabiting as a spouse or similarly situated to a spouse: the couple lived together continuously from August 1998 to June 1999, and thereafter maintained an intermittent relationship in which they stayed together up to five nights a week although maintaining separate residences; and the relationship included

expectations of fidelity and monogamy, shared expenses, shared household responsibilities, social activities in common, and discussions about having children. *White v. Dep't of Just.*, 328 F.3d 1361, 1369–70 (Fed. Cir. 2003). The Court concludes that this case provides persuasive authority regarding relevant factors to consider in assessing whether a relationship was similarly situated to a spousal relationship.

103. The Court concludes that the textual analysis of § 921(a)(33)(A) contained within the court's opinion in *United States v. Heckenliable*, No. 2:04CR00697PGC, 2005 WL 856389, at \*4 (D. Utah Apr. 13, 2005), is persuasive: “In dropping the word ‘cohabiting’ from the final clause, Congress apparently intended to sweep into the statute relationships that did not involve cohabitation.”

104. Consistent with this conclusion, other courts have held that previous or current cohabitation is not required to satisfy the “similarly situated to a spouse” element. *E.g., Eibler v. Dep't of Treasury, Bureau of Alcohol, Tobacco & Firearms*, 311 F. Supp. 2d 618, 622 (N.D. Ohio 2004) (collecting cases and concluding that “girlfriend with whom [plaintiff] had a long-time close and personal relationship” satisfied element under preponderance of the evidence standard). The Court concludes that these cases provide persuasive authority for the proposition that past or present cohabitation is not required to find that a defendant was “similarly situated to a spouse” of the victim.

105. The Court is not persuaded by DeFrance's argument that, as a matter of law, he could not be similarly situated to a spouse of Charlo because she was 17 years old at the time of the PFMA and thus could not legally enter into a spousal relationship with him under Montana law. *DeFrance*, 577 F. Supp. 3d at 1106.

106. With these legal conclusions in mind, the Court concludes that the evidence presented at trial proved beyond a reasonable doubt that on April 13–14, 2013, DeFrance was similarly situated to a spouse of Charlo.

107. The Court bases this conclusion on the following findings of fact pre-dating the PFMA: Charlo and DeFrance were in a romantic relationship that was physically intimate that began shortly after DeFrance moved to Dixon in February 2010, and ended when Charlo moved to New Mexico in the fall of 2010; Charlo was pregnant when she moved to New Mexico, she told others that DeFrance was the father, and witness testimony indicated that DeFrance suspected or acknowledged paternity; Charlo was briefly in a relationship with a young man in New Mexico, but the relationship ended shortly after she encountered DeFrance on a visit home and left the young man with her family so that she could spend time with DeFrance; Charlo and DeFrance resumed their relationship when she moved back to Montana in 2012; in the time frame of June 2012 to April 13–14, 2013, Charlo spent the night with DeFrance up to 80 percent of the time, she kept much of her clothing and personal hygiene items in his camper, Charlo had unfettered



access to the camper, and they had pets together that they kept in the camper; and Charlo and DeFrance's relationship at this time included fishing, hiking, walking, skiing, eating meals, and taking trips to other cities together.

108. The Court also bases this conclusion on the following findings of fact relating to the date the PFMA occurred: Charlo was spending the weekend with DeFrance; Charlo had planned to spend time with him and his family in town that day; she removed some of her belongings from the camper and returned some belongings to DeFrance; Charlo told Deputy Largent that her relationship with DeFrance was "boyfriend/girlfriend," and they had been together for nine months; in the midst of denying that DeFrance had previously committed or exhibited many other indicators of being a controlling or abusive partner, Charlo told Deputy Largent that DeFrance had previously said things like, "If I can't have you, nobody can"; and Charlo had a guinea pig in the camper, and Deputy Largent called for assistance in removing it and returning it to Charlo.

109. These facts lead the Court to conclude that, at the time of the PFMA, DeFrance and Charlo were in a serious, committed, and long-term romantic relationship that included physical intimacy and frequent overnights together; their family and friends were aware of the relationship; their relationship history included a prior stint of a romantic relationship including physical intimacy for several months, which resulted in a pregnancy, and they resumed the relationship

shortly after Charlo returned to Montana; Charlo kept many of her personal belongings, including at least one pet that she considered hers, on DeFrance's property; and their relationship included various recreational and social activities together.

110. The Court finds additional facts, circumstances, and inferences relevant to, but not independently dispositive of, the relationship status on the date of the PFMA. Months before the PFMA occurred, Charlo "beat on" DeFrance after finding another girl's underwear. The fact that the relationship continued after physical violence and suspected infidelity indicates that DeFrance and Charlo wanted the relationship to continue despite incidents that might cause a person to end even a serious, long-term romantic relationship. Charlo moved out of her mother's house and moved in with DeFrance ten days after the PFMA occurred, despite the significant violence DeFrance inflicted on Charlo that night. Again, the continuation (and intensification) of this relationship after an incident that likely would cause many reasonable people to seriously consider ending a relationship—even a marriage—indicates that DeFrance and Charlo were deeply committed to each other and their romantic relationship. This inference is further supported by Charlo's statements to Danielle after the PFMA that she continued to see DeFrance despite a no-contact order, that she took him to his court-ordered anger management program, and that she wanted the relationship to work. And this

inference is further supported by the fact that less than one year after the PFMA occurred, Charlo gave birth to her first child with DeFrance. Although many of these facts occurred after the PFMA, the Court finds they offer insight into DeFrance's and Charlo's attitudes toward the relationship on the night the PFMA occurred. In short, the Court finds it incredibly unlikely that the relationship would have continued in the manner it did almost immediately after DeFrance's violence if, at the time the PFMA occurred, the relationship was merely casual, convenient, and non-committal.

111. The Court acknowledges that there is conflicting record evidence regarding whether DeFrance and Charlo were cohabitating or practically cohabitating at the time of the PFMA, including Charlo's statement to the 911 dispatcher on the night of the PFMA that she did not live with DeFrance. However, as discussed above, cohabitation is not required as a matter of law to find that a defendant is "similarly situated to a spouse" of a victim, and the Court finds that external factors, such as parental disapproval and her minor age, may have motivated Charlo to downplay the seriousness of their relationship to the authorities.

112. The Court further acknowledges that Charlo was 17 at the time of the PFMA, but the Court concludes that this fact does not weigh heavily against finding that DeFrance was similarly situated to a spouse of Charlo for several reasons. First, Charlo turned 18 a mere ten days later; the Court gravely doubts

that she underwent such profound maturation in less than two weeks that the somewhat arbitrary dividing line between minority and majority age is dispositive of the character of their relationship. Second, the facts indicate that her maturity level could cut either way. Charlo had attained a great deal of life experience in her 17 years; for example, she had moved across the country and back and she had dated other people, which could support an inference that she felt capable of entering a committed relationship at that age. Some of her actions, like skipping school to spend time with DeFrance, indicate a degree of immaturity, but that does not necessitate a conclusion that she could not be in a committed relationship; rather, it could support an inference that the relationship was emotionally intense and was a higher priority to her than education at the time, which would support a conclusion that she was seriously committed to the relationship. In sum, the Court finds that Charlo's age of 17 at the time of the PFMA did not render her incapable of entering into a relationship that was similarly situated to a spouse of DeFrance.

113. For all of the foregoing reasons, the Court concludes that on the night the PFMA occurred, DeFrance was similarly situated to a spouse of Charlo.

**D. Knowledge of Belonging to Category of Persons Prohibited from Possessing Firearms**

114. "[I]n a prosecution under 18 U.S.C. § 922(g) . . . the Government must prove both that the defendant knew he possessed a firearm and that he knew he

belonged to the relevant category of persons barred from possessing a firearm.”

*Rehaif v. United States*, 139 S. Ct. 2191, 2200 (2019). Such knowledge may be inferred from circumstantial evidence. *Id.* at 2198.

115. Neither the Supreme Court of the United States nor the United States Court of Appeals has issued a precedential opinion regarding a defendant’s knowledge of having been convicted of a misdemeanor crime of domestic violence. In an unpublished memorandum disposition, however, the Ninth Circuit held that the following evidence was sufficient to prove beyond a reasonable doubt that a defendant had the requisite knowledge of status for a conviction under 18 U.S.C.

§ 922(g)(9): evidence of the defendant’s conviction of a domestic violence misdemeanor under a state law that prohibited the infliction of corporal injury on a cohabitant or co-parent, and evidence that as part of the defendant’s conviction, he enrolled in a 52-week domestic violence program. *United States v. Arnold*, 836 F. App’x 500, 503 (9th Cir. 2020). The Court concludes that this case provides persuasive authority regarding the kinds of evidence from which knowledge of status can be inferred.

116. In a thorough opinion, the First Circuit Court of Appeals held that, to convict a defendant of violating 18 U.S.C. § 922(g)(9), the factfinder must find the defendant knew that, in order for him to be convicted of the underlying domestic violence offense, the State would have had to prove beyond a reasonable doubt that

he used or attempted to use physical force. *United States v. Minor*, 63 F.4th 112, 122 (1st Cir. 2023). The court provided guidance to the parties on remand, instructing them that the district court could instruct the jury that the government must prove that the defendant “knew, at the time he possessed a gun, that: (i) he had previously been convicted of an offense that ‘is a misdemeanor under Federal, State, or Tribal law’; (ii) in order for him to have been convicted of the prior offense at a trial, the government would have had to prove beyond a reasonable doubt that he ‘use[d] or attempted [to] use . . . physical force’; and (iii) the victim of that offense was, at the time of the offense,” within one of the relationship categories enumerated in 18 U.S.C. § 921(a)(33)(A). *Id.* at 124. The Court concludes that this case provides persuasive authority regarding the requisite proof of knowledge of status for a defendant prosecuted under 18 U.S.C. § 922(g)(9).

117. The Court concludes that DeFrance knew, at the time he possessed the Smith & Wesson revolver, ammunition, and Remington rifle, that he had previously been convicted of an offense that is a misdemeanor under State law, that in order to be convicted of that offense at trial, the government would have had to prove beyond a reasonable doubt that he used physical force, and that the victim of the offense was, at the time of the offense, similarly situated to a spouse.

118. DeFrance pleaded guilty to violating Montana’s PFMA statute, and his plea agreement with the State required him to serve 24 hours in jail, pay a fine, and

comply with Montana Code § 45-5-206(4), which requires a person convicted of PFMA to pay for and complete a counseling assessment “with a focus on violence, controlling behavior, dangerousness, and chemical dependency” and complete all recommendations for counseling, referrals, attendance at psychoeducational groups, or treatment made by the counseling provider, including a minimum of 40 hours of counseling, which “must be directed to the violent or controlling conduct of the offender.” Danielle Matt’s testimony that Charlo told her that Charlo took DeFrance to an anger management program after the PFMA occurred indicates that DeFrance complied with these requirements of his guilty plea. The Court concludes that DeFrance’s guilty plea to PFMA, his representation by counsel in the state court proceedings, the plea agreement, his colloquy with Justice Strine documented in Exhibit 5 in which he admitted to causing bodily injury to his girlfriend, and his compliance with the requirements imposed in his sentence together prove beyond a reasonable doubt that DeFrance knew he had been convicted of a misdemeanor under State law and that, if he had gone to trial, the State would have had to prove beyond a reasonable doubt that he used physical force. There is no evidence presented at trial indicating that he had forgotten about this conviction or otherwise was unaware of the elements of the offense of conviction by the time he possessed the firearms five and a half years later.

119. The Court concludes that DeFrance knew at the time he possessed the

firearms that he was similarly situated to a spouse of Charlo at the time he committed the PFMA against her based on the same evidence the Court relies upon to conclude that DeFrance was similarly situated to a spouse of Charlo. There is no evidence in the record indicating that he was unaware of or had forgotten the nature of their relationship at the time of the PFMA in the five and a half years following the offense, particularly given the Court's findings that they remained in a relationship for years afterward, moved in together ten days after the offense, and had their first child together a little over one year after the offense.

120. Although the government need not prove that DeFrance was aware that he was prohibited from possessing firearms, and although the Court would reach the same verdict absent this evidence, the Court finds that its conclusion is further supported by circumstantial evidence that DeFrance knew that he may have been prohibited from possessing firearms as a result of his PFMA conviction. DeFrance affirmed to Justice Strine that he understood that "other possible consequences" of his guilty plea were "loss of firearms rights." The 4473 forms DeFrance filled out to acquire the firearms he possessed all included the question 11.i., "Have you ever been convicted in any court of a misdemeanor crime of domestic violence? (*See Instructions for Question 11.i.*)[,]" the cited instructions included the statutory definition, and DeFrance's signature on the forms certified that he had read and understood the instructions and definitions and that he understood that anyone who



answers “yes” to questions 11.b. through 11.k. is prohibited from purchasing or receiving a firearm. To be sure, his signature also certified that he understood that making a false statement on the form is a crime punishable as a felony under Federal law, which could support an inference that he was aware of potential criminal liability and believed he was telling the truth in answering “no” each time to question 11.i., and that he thus did not know that he was similarly situated to a spouse of Charlo at the time of the PFMA. However, the overwhelming record evidence described above that he and Charlo were in a close, committed, romantic relationship at the time of the PFMA, together with DeFrance’s admission to Detective Baker that he was “never clear” on whether he was allowed to possess firearms, leads the Court to conclude that it is implausible that DeFrance was ignorant of his status or merely negligent in failing to inquire further.

121. Throughout this litigation, DeFrance has contended that he was “on five (5) occasions . . . cleared after a NICS check to lawfully receive a firearm from the Federal Firearms Licensee (FFL) Pawn Shop.” (Doc. 167 at 3.) In a previous order, the Court explained how the NICS process works, concluded based on regulatory language that the database is not expected to be comprehensive, relied upon Supreme Court precedent describing the background check system as intended to “enable *sellers* to keep guns out of the hands of criminals and others who should not have them, . . . not to provide confirmation of prohibited or non-

prohibited status to *purchasers*,” and concluded that the United States was not collaterally estopped from asserting that DeFrance was prohibited from possessing a firearm in this prosecution even if he had been “proceeded” in all of his prior firearms transactions. (Doc. 91 at 8–9 (internal quotation omitted).) Considering the issue anew as a factual matter, the Court is not persuaded that DeFrance lacked the requisite knowledge that he belonged to the category of people convicted of a misdemeanor crime of domestic violence based on the facts that the NICS background check process never resulted in an outright denial and that Cash 1 Pawn allowed him to take possession of the firearms in question. Steven Feuerstein’s trial testimony established that the NICS process is imperfect, analysts are responsible for millions of transactions in a given year, and the law imposes significant time constraints on the external research that may be necessary to confirm whether an individual may possess firearms under federal law. And DeFrance acknowledged to Detective Baker that he was “never clear” on whether he was allowed to possess firearms, belying any assertion that he relied on his past transactions to conclude that he was not in the category of people convicted of a misdemeanor crime of domestic violence. For these same reasons, the Court rejects DeFrance’s “innocent intent” defense. “‘Innocent intent’ is not a defense *per se*, but a defense strategy aimed at negating the *mens rea* for the crime, an essential element of the prosecution’s case.” *United States v. Smith*, 831 F.3d

1207, 1220 (9th Cir. 2016) (internal quotation omitted).

122. At the time he possessed the firearms, DeFrance knew he had been convicted of PFMA committed against Charlo on April 13–14, 2013, and he had attended at least 40 hours of counseling directed toward his violent and controlling conduct as a consequence of his conviction. There is no reasonable doubt that DeFrance knew that he belonged to the category of people convicted of a misdemeanor crime of domestic violence.

123. For all of the foregoing reasons, the Court concludes that the government has proven beyond a reasonable doubt that DeFrance is guilty of violating 18 U.S.C § 922(g)(9) as set forth in Count I of the Indictment.

## **II. False Statement (18 U.S.C. § 922(a)(6)) (Counts II–IV)**

### **D. Seller was Licensed Firearms Dealer**

124. Joel Christensen’s trial testimony that Cash 1 Pawn was a federally licensed firearms dealer was uncontroverted.

125. The Court concludes that Cash 1 Pawn was a federally licensed firearms dealer.

### **B. False Statement**

#### **i. Count II – Steven Arms 200 Rifle**

126. DeFrance completed a 4473 form at Cash 1 Pawn on February 24, 2018 to redeem a Stevens Arms 200 rifle. In response to Question 11.i, “Have you ever

been convicted in any court of a misdemeanor crime of domestic violence? (*See Instructions for Question 11.i.*)”, DeFrance checked “No.”

127. As the Court has already found, DeFrance had been convicted in state court of a misdemeanor crime of domestic violence on May 6, 2013, when he pleaded guilty to committing the offense of Partner Family Member Assault against Charlo.

128. The Court concludes that, in connection with acquiring a Stevens Arms 200 rifle from Cash 1 Pawn, DeFrance made a false statement by checking “No” in response to Question 11.i. on the 4473 form.

**ii. Count III – Smith & Wesson 60 Lady Smith Revolver**

129. DeFrance completed a 4473 form at Cash 1 Pawn on March 2, 2018 to purchase a Smith & Wesson 60 Lady Smith revolver. In response to Question 11.i, “Have you ever been convicted in any court of a misdemeanor crime of domestic violence? (*See Instructions for Question 11.i.*)”, DeFrance checked “No.”

130. As the Court has already found, DeFrance had been convicted in state court of a misdemeanor crime of domestic violence on May 6, 2013, when he pleaded guilty to committing the offense of Partner Family Member Assault against Charlo.

131. The Court concludes that, in connection with acquiring a Smith & Wesson 60 Lady Smith revolver from Cash 1 Pawn, DeFrance made a false statement by checking “No” in response to Question 11.i. on the 4473 form.

**iii. Count IV – Remington 770 Rifle**

132. DeFrance completed a 4473 form at Cash 1 Pawn on August 25, 2018 to redeem a Remington 770 rifle (.243). In response to Question 11.i, “Have you ever been convicted in any court of a misdemeanor crime of domestic violence? (*See Instructions for Question 11.i.*)”, DeFrance checked “No.”

133. As the Court has already found, DeFrance had been convicted in state court of a misdemeanor crime of domestic violence on May 6, 2013, when he pleaded guilty to committing the offense of Partner Family Member Assault against Charlo.

134. The Court concludes that, in connection with acquiring a Remington 770 rifle from Cash 1 Pawn, DeFrance made a false statement by checking “No” in response to Question 11.i. on the 4473 form.

**C. Knowledge of Falsity**

135. As the Court has already found, DeFrance knew at the time he possessed the firearms on October 2, 2018 that he belonged to the category of people who had been convicted of a misdemeanor crime of domestic violence.

136. There is no evidence in the record to suggest that DeFrance did not know that he belonged to the category of people who had been convicted of a misdemeanor crime of domestic violence on the earlier dates on which he completed the 4473 forms in connection with acquiring the Stevens Arms 200 rifle, the Smith & Wesson 60 Lady Smith revolver, or the Remington 770 rifle.

137. The Court concludes that each time DeFrance made the false statements described above, he knew the statements were false.

**D. Materiality of False Statement**

138. Joel Christensen's uncontroverted testimony established that if a Cash 1 Pawn customer checked "Yes" to any of Questions 11.b. through 11.i., "it just stops the transaction because they can't have a firearm and there's no need in dealing with doing the background check at that point."

139. Each of the 4473 forms DeFrance completed in connection with acquiring the Stevens Arms 200 rifle, the Smith & Wesson 60 Lady Smith revolver, and the Remington 770 rifle included his signature under a certification that states, in relevant part, "I understand that a person who answers 'yes' to any of the questions 11.b. through 11.i and/or 12.b. through 12.c. is prohibited from purchasing or receiving a firearm."

140. The Court concludes that the false statement on each of the 4473 forms described above had a natural tendency to influence Cash 1 Pawn into believing the Stevens Arms 200 rifle, the Smith & Wesson 60 Lady Smith revolver, and the Remington 770 rifle could be lawfully sold to DeFrance.

141. For all of the foregoing reasons, the Court concludes that the government has proven beyond a reasonable doubt that DeFrance is guilty of violating 18 U.S.C. § 922(a)(6) as set forth in Counts II, III, and IV of the Indictment.

**AFFIRMATIVE DEFENSES**

**Public Authority**

142. To prove the affirmative defense of public authority or government authorization, the defendant must prove by a preponderance of the evidence that:

(1) the defendant believed he was acting as an authorized government agent to assist in law enforcement activity at the time of the offense charged in the indictment; and (2) the defendant's belief was reasonable. Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit No. 5.13, Public Authority or Government Authorization Defense (2022 ed., updated 12/2022).

143. There is no evidence in the record that DeFrance believed he was acting as an authorized government agent to assist in law enforcement activity at the time he possessed firearms or made false statements in connection with acquiring firearms.

144. The Court concludes that DeFrance has not proven the affirmative defense of public authority.

**Entrapment by Estoppel**

145. To establish the defense of entrapment by estoppel, the defendant has to show by a preponderance of the evidence that: (1) an authorized federal government official or agent of the federal government was empowered to render the claimed erroneous advice; (2) the federal government official or agent of the

federal government had been made aware of all the relevant historical facts; (3) the federal government official or agent of the federal government affirmatively told the defendant the proscribed conduct was permissible; (4) the defendant relied on the false information; and (5) this reliance was reasonable. Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit No. 5.4, Entrapment by Estoppel Defense (2022 ed., updated 12/2022).

146. Although “the United States Government has made licensed firearms dealers federal agents in connection with the gathering and dispensing of information on the purchase of firearms,” *United States v. Tallmadge*, 829 F.2d 767, 774 (9th Cir. 1987), the evidence in this case shows that Cash 1 Pawn was not made aware of all of the relevant historical facts.

147. There is no evidence in the record that DeFrance provided to Cash 1 Pawn or any of its employees any information regarding his PFMA conviction. To the contrary, on each 4473 form he filled out at Cash 1 Pawn, he checked “No” in response to the Question 11.i., “Have you ever been convicted in any court of a misdemeanor crime of domestic violence?”

148. There is no evidence in the record that Cash 1 Pawn, having been made aware of all relevant historical facts—including DeFrance’s PFMA conviction—affirmatively told DeFrance that his possession of a firearm or his false statements made in connection with acquiring firearms were permissible.



149. The Court concludes that DeFrance has not established the defense of entrapment by estoppel.

**Lack of Fair Warning**

150. DeFrance contends that “unforeseeable judicial enlargement of a criminal statute is akin to an ex post facto law and is prohibited by the Due Process Clause.” (Doc. 167 at 9.) The Court concludes that its application of the law to the facts of this case is not an unforeseeable judicial enlargement of a criminal statute of the kind described in *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964), but rather reflects a straightforward application of the plain terms of Sections 922(g)(9) and 922(a)(6) as they were effective at the time DeFrance possessed the firearms and made the false statements at issue.

151. The Court concludes that DeFrance has not established a defense of lack of fair warning.

**18 U.S.C. § 921(a)(33)(B)(i)(I) – Ineffective Assistance of Counsel**

152. The version of 18 U.S.C. § 921(a)(33) in effect at the time DeFrance possessed the firearms in question and at the time the Grand Jury returned the Indictment stated: “A person shall not be considered to have been convicted of [a misdemeanor crime of domestic violence] for purposes of this chapter, unless—  
(I) the person was represented by counsel in the case[.]” 18 U.S.C. § 921(a)(33)(B)(i)(I) (amended 2022).

153. DeFrance contends that inherent in this statutory requirement is the right to representation by competent counsel in the case, and he contends his appointed counsel during the PFMA case was incompetent because counsel failed to advise him with certainty regarding the impact of a conviction on right to possess a firearm under federal law. (Doc. 167 at 9–10.)

154. In *Padilla v. Kentucky*, the Supreme Court held that a defendant’s counsel performed deficiently by providing him false assurances that his conviction would not result in removal from the United States, but “[t]he consequences of Padilla’s plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel’s advice was incorrect.” 559 U.S. 356, 368–69 (2010). The Court simultaneously recognized, however, that “[w]hen the law is not as succinct and straightforward . . . , a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.” *Id.* at 369.

155. The Court concludes that the facts of this case present the latter situation as opposed to the former. Had DeFrance been considering pleading guilty to a felony offense, his attorney may have performed deficiently (and thus not been acting as the counsel guaranteed by the Sixth Amendment) if he affirmatively advised DeFrance that he would not be subjected to the “presumptively mandatory” prohibition on firearm possession by felons contained in 18 U.S.C. § 922(g)(1).

But § 922(g)(9), and the definitions contained within § 921(a)(33)(A), require a more fact-intensive analysis, and the Court cannot say that every reasonable attorney representing a client facing a PFMA charge must interrogate the details of their client's relationship with the victim to advise the client with near certainty whether the offense qualifies as a misdemeanor crime of domestic violence under federal law. DeFrance was informed during his plea colloquy of the possibility that he may face the loss of his firearms rights as a result of his conviction for PFMA, and he affirmed that understanding and proceeded with the plea of guilty. Nothing further was required on the facts of this case.

156. Additionally, it is not at all clear to the Court that firearm possession is similar to deportation in being “uniquely difficult to classify as either a direct or a collateral consequence” of conviction, such that a defendant could base an ineffective assistance of counsel claim on the failure to advise the client accurately regarding the potential impacts of conviction on the right to possess firearms.

*Padilla*, 559 U.S. at 366.

157. For the foregoing reasons, the Court concludes that DeFrance was represented by counsel in his PFMA case within the meaning of 18 U.S.C. § 921(a)(33)(B)(i)(I) (amended 2022).

### **Statute of Limitations**

158. DeFrance contends that the offenses charged in the Indictment are subject to

the five-year statute of limitations set forth in 18 U.S.C. § 3282. (Doc. 167 at 11.) He further argues that the statute of limitations has expired on each count in the Indictment “because the government has been aware of [his] background status since at least February 10, 2015,” when he “filled out what would be the first of five 4473 forms.” (*Id.*)

159. As the Court has already found, DeFrance was a prohibited person in possession of firearms and ammunition in violation of 18 U.S.C. § 922(g)(9) on October 2, 2018, when the firearms at issue were seized from his home. The offense therefore was committed on October 2, 2018, and this case was commenced on July 28, 2021, well within the limitations period.

160. Likewise, the Court has already found that DeFrance made false statements in connection with acquiring firearms when filling out 4473 forms at Cash 1 Pawn on February 24, 2018 (Count II), March 2, 2018 (Count III), and August 25, 2018 (Count IV). The offenses thus were committed on those dates, and this prosecution was commenced on July 28, 2021, well within the limitations period.

161. DeFrance’s construction of the limitations period as beginning to run for § 922 offenses upon the date the United States *could* have learned that a prohibited person was attempting to acquire a firearm would result in the absurdity that prohibited persons could possess and acquire firearms with impunity unless they were prosecuted within five years of their very first false 4473 form. There is no

indication in the statutory language of § 922 that Congress intended to criminalize only the early years of a prohibited person's possession of firearms.

162. The Court concludes that the offenses alleged in the operative Indictment were charged within the statute of limitations period.

**VERDICT**

After considering the facts presented at trial and making the foregoing conclusions of law, the Court finds:

The government proved beyond a reasonable doubt every required element of Count I charged in the Indictment. Accordingly, the defendant, Michael Blake DeFrance, is GUILTY of being a prohibited person in possession of firearms and ammunition, in violation of 18 U.S.C. § 922(g)(9).

The government proved beyond a reasonable doubt every required element of Counts II, III, and IV charged in the Indictment. Accordingly, the defendant, Michael Blake DeFrance, is GUILTY of making a false statement during a firearms transaction, in violation of 18 U.S.C. § 922(a)(6).

DATED this 1st day of May, 2023.

A handwritten signature in black ink, reading "Dana L. Christensen", written over a horizontal line.

Dana L. Christensen, District Judge  
United States District Court

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
MISSOULA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MICHAEL BLAKE DEFRANCE,

Defendant.

CR 21-29-M-DLC

ORDER

Before the Court is Defendant Michael Blake DeFrance's Combined Opposed Motion for Acquittal and Motion to Arrest Judgment Under Rules 29(c) and 34, Fed. R. Crim. P.; and Alternative Motion for a New Trial Under Rule 33(b)(2), Fed. R. Crim. P. (Doc. 189.) For the reasons stated herein, the motion will be denied.

**FACTUAL AND PROCEDURAL BACKGROUND**

This case has a long and complicated procedural history. This Court has ruled on a grand total of four motions to dismiss the indictment, several motions in limine, and a motion for leave to file a motion to reconsider the Court's previous rulings concerning one of the motions to dismiss (Docs. 71<sup>1</sup>, 91, 111.) Following dismissal of Mr. DeFrance's interlocutory appeal of the Court's order denying the

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<sup>1</sup> *United States v. DeFrance*, 577 F. Supp. 3d 1085 (D. Mont. 2021).

reconsideration motion, this matter proceeded to a bench trial on April 26 and 27, 2023. (Docs. 170–71.) Pursuant to Mr. DeFrance’s request for findings of fact and conclusions of law should he be found guilty of any count, the Court issued its Findings of Fact, Conclusions of Law, and Order finding Mr. DeFrance guilty as charged on all counts set forth in the Second Superseding Indictment. (Doc. 182.)<sup>2</sup> Mr. DeFrance timely filed the instant motion. *See* Fed. R. Crim. P. 29(c)(1), 33(b)(2), 34(b).

## LEGAL STANDARDS

### **Motion for Judgment of Acquittal**

Rule 29 provides that a defendant may move for a judgment of acquittal “of any offense for which the evidence is insufficient to sustain a conviction” during the trial or within 14 days after a guilty verdict. Fed. R. Crim. P. 29(a), (c)(1). In ruling on a motion for judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure based on sufficiency of the evidence, the Court must “review the evidence presented against the defendant ‘in the light most favorable to the government to determine whether *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’” *United States v. Freter*, 31 F.3d 783, 785 (9th Cir. 1994) (quoting *United States v. Shirley*, 884 F.2d

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<sup>2</sup> *United States v. DeFrance*, No. CR 21-29-M-DLC, 2023 WL 3172524 (D. Mont. May 1, 2023).

1130, 1134 (9th Cir. 1989)). “[T]he government does not need to rebut all reasonable interpretations of the evidence that would establish the defendant’s innocence, or rule out every hypothesis except that of guilt beyond a reasonable doubt.” *United States v. Katakis*, 800 F.3d 1017, 1023 (9th Cir. 2015) (quoting *United States v. Nevils*, 598 F.3d 1158, 1164 (9th Cir. 2010)). “That said, ‘evidence is insufficient to support a verdict where mere speculation, rather than reasonable inference, supports the government’s case, or where there is a total failure of proof of a requisite element.’” *Id.* (quoting *Nevils*, 800 F.3d at 1167).

### **Motion for New Trial**

Rule 33 provides that a defendant may file a motion for a new trial, and the Court may vacate any judgment and grant a new trial “if the interest of justice so requires.” Fed. R. Crim. P. 33(a). Because this case involved a bench trial, “the court may take additional testimony and enter a new judgment.” *Id.* “A motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 14 days after the verdict or finding of guilty.” Fed. R. Crim. P. 33(b)(2).

“A district court’s power to grant a motion for a new trial is much broader than its power to grant a motion for judgment of acquittal.” *United States v. Alston*, 974 F.2d 1206, 1211 (9th Cir. 1992). The Court need not view the evidence in the light most favorable to the verdict, but rather may weigh the evidence and evaluate



credibility of witnesses itself, and if the Court “concludes that, despite the abstract sufficiency of the evidence to sustain the verdict, the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred, it may set aside the verdict, grant a new trial, and submit the issues for determination by another jury.” *Id.* at 1211–12 (quoting *United States v. Lincoln*, 630 F.2d 1313, 1319 (8th Cir. 1980)).

### **Motion to Arrest Judgment**

Rule 34 provides that the defendant may file a motion to arrest judgment, and “the court must arrest judgment if the court does not have jurisdiction of the charged offense.” Fed. R. Crim. P. 34(a). A Rule 34 motion must be filed within 14 days after the court accepts a verdict or finding of guilty. Fed. R. Crim. P. 34(b). The motion must be decided on “the face of the record,” which excludes evidence adduced at trial. *United States v. Sisson*, 399 U.S. 267, 281–82 (1970).

### **ANALYSIS**

Mr. DeFrance contends that intertwined issues of federal jurisdiction and insufficient evidence in this case require this Court “to grant what is essentially a renewal of Mr. DeFrance’s previous motion to [dismiss] for lack of jurisdiction, lack of fair warning, estoppel and/or the defense of public authority.” (Doc. 190 at 3.) The Court will address each of the grounds set forth in the motion in turn.

#### **I. The enactment of the Bipartisan Safer Communities Act does not alter**

**the Court’s interpretation of the earlier version of the statute, under which Mr. DeFrance has been convicted.**

The Second Superseding Indictment (hereinafter “Indictment”) charged Mr. DeFrance with one count of possessing firearms and ammunition in violation of 18 U.S.C. § 922(g)(9) on or about and between October 3, 2016 and October 2, 2018, and three counts of making a false statement during a firearms transaction in violation of 18 U.S.C § 922(a)(6) when, on three separate occasions in 2018, he denied having been convicted in any court of a misdemeanor crime of domestic violence on an ATF Form 4473. (Doc. 55.) The Indictment was filed October 21, 2021. (*Id.* at 1.) At the time the Indictment was filed, the applicable statutes read in relevant part as follows:

(g) It shall be unlawful for any person— . . .

(9) who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(g)(9) (2021).

[T]he term “misdemeanor crime of domestic violence” means an offense that—

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

parent, or guardian of the victim.

18 U.S.C. § 921(33)(A) (2021).

On June 25, 2022, President Biden signed into law the Bipartisan Safer Communities Act. Bipartisan Safer Communities Act, Pub. L. 117–159, 163 Stat. 1313 (2022). As relevant here, that legislation added a fifth category of qualifying relationships to § 921(33)(A): “a person who has a current or recent former dating relationship with the victim.” Bipartisan Safer Communities Act § 12005(a)(1)(B), 136 Stat. at 1332. The law also added a new subsection to 18 U.S.C. § 921, which defined “dating relationship”:

(37)(A) The term “dating relationship” means a relationship between individuals who have or have recently had a continuing serious relationship of a romantic or intimate nature.

(B) Whether a relationship constitutes a dating relationship under subparagraph (A) shall be determined based on consideration of—

- (i) the length of the relationship;
- (ii) the nature of the relationship; and
- (iii) the frequency and type of interaction between the individuals involved in the relationship.

(C) A casual acquaintanceship or ordinary fraternization in a business or social context does not constitute a dating relationship under subparagraph (A).

*Id.* § 12005(a)(2), 136 Stat. 1332. The law expressly precluded retroactive application of these amendments “to any conviction of a misdemeanor crime of domestic violence entered before the date of enactment of this Act.” *Id.*

§ 12005(b), 136 Stat. 1332. Finally, the law enacted a provision restoring firearm possession rights for persons who have only one conviction for a misdemeanor

crime of domestic violence against an individual in a dating relationship and who have not subsequently been convicted of such an offense “if 5 years have elapsed from the later of the judgment of conviction or the completion of the person’s custodial or supervisory sentence, if any[.]” *Id.* § 12005(c)(2), 136 Stat. 1333.

Mr. DeFrance contends that the 2021 version of the statute, under which he was indicted and convicted, “did not extend to someone convicted of domestic violence against a boyfriend or girlfriend with whom that person did not share a residence or a child.” (Doc. 190 at 4.) Based on the amendments set forth in the Bipartisan Safer Communities Act, Mr. DeFrance argues that “Congress displays by negative implication that, as legislatively crafted initially, § 922(g)(9) does not apply to the relational context of dating.” (Doc. 190 at 5.) He invokes the “accepted canon of statutory construction that where Congress has advertently changed the legislative language the change must be given effect.” (*Id.* (quoting *United States v. Rosser*, 528 F.2d 652, 655 (D.C. Cir. 1976)).)

The first problem with Mr. DeFrance’s argument is that it rests on an assumption that this Court has already rejected, and one that the Court sees no basis to revisit: that a “similarly situated to a spouse” relationship requires cohabitation. (Doc. 182 ¶¶ 99–104.) Although Mr. DeFrance goes to great lengths to distinguish the cases the Court cited in support of this conclusion in its Findings of Fact and Conclusions of Law (Doc. 190 at 7–10), these distinctions do not

overcome the second fundamental flaw in Mr. DeFrance's argument: His reading of the previous version of the statute renders the "similarly situated to a spouse" language superfluous.

"[O]ne of the most basic interpretive canons" is that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . ." *Corley v. United States*, 556 U.S. 303, 314 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)). Mr. DeFrance's interpretation of "similarly situated to a spouse" to require cohabitation would render it superfluous to the preceding category: cohabitating with the victim as a spouse. To be sure, the example Mr. DeFrance provides, a common law spouse, could fall within either of those categories—and also could fall within the definition of spouse, assuming the parties to the relationship satisfy all requirements in a state where common law marriage is recognized. But the Court must give effect to every word of Congress's statutes, if possible, and this statute requires recognizing and giving effect to the broader relationship category of persons who are not spouses, do not have a child in common, and are not cohabitating as spouses, but nevertheless are "similarly situated to a spouse." The Court described all of the factors it considered in determining whether the evidence adduced at trial established beyond a reasonable doubt that Mr. DeFrance and Ms. Charlo were in such a relationship, and found that it did. (Doc. 182 ¶¶ 99–113.)

Finally, the third flaw with Mr. DeFrance's argument is that the Bipartisan Safer Communities Act's amendments established an even broader category of relationships that could establish that a previous conviction was a misdemeanor crime of domestic violence, but it did not eliminate the "similarly situated to a spouse" category, nor did it reflect any Congressional intent to retroactively declare that people who call themselves boyfriends, girlfriends, or dating could not also be categorized as "similarly situated to a spouse." Indeed, a couple labeled as boyfriend and girlfriend could have agreed to refer to each other that way five hours ago or five years ago; the label is not dispositive of the seriousness of the relationship. The Court continues to be persuaded by the United States' illustration of the relationship categories as overlapping circles reflecting the potential courses of a serious relationship: commitment to each other and to building a long-term relationship; cohabitation; children; and marriage. The structure of the pre-amendment statute makes clear that a person can be in a sufficiently serious relationship to call a physically violent incident in that relationship "domestic violence" even if the parties have no history of or plans for cohabitation, children, or marriage. Under the amended statute, the scope of sufficient relationships extends even farther, but that fact does not retroactively alter the meaning of the plain terms of the originally enacted statute, as described above.

**II. It was not legally or factually impossible for Mr. DeFrance to be**

**“similarly situated to a spouse” to Ms. Charlo.**

Mr. DeFrance contends that he and Ms. Charlo could not have been similarly situated to spouses at the time of his PFMA for several reasons. First, he cites the Defense of Marriage Act, 1 U.S.C. § 7, which defined “marriage” and “spouse” as used in any federal law and which was in effect at the time of the PFMA. (Doc. 190 at 6.) This statute, which defined marriage as “only a legal union between one man and one woman as husband and wife,” and spouse as “a person of the opposite sex who is a husband or a wife,” sheds no light on the meaning of “similarly situated to a spouse.” Additionally, the statute was struck down as unconstitutional more than ten years ago. *United States v. Windsor*, 570 U.S. 770–75 (2013).

Second, Mr. DeFrance once again contends that Ms. Charlo could not have been similarly situated to a spouse because she was a minor, and under Montana law, parental consent or court permission is required for a minor to marry, and the evidence adduced at trial established that Ms. Charlo’s mother did not approve of her relationship with Mr. DeFrance (and, by inference, would not have granted consent to marry). The Court has already rejected these arguments as a matter of law and as a matter of fact and will not revisit them yet again. (Doc. 71 at 40–41; Doc. 182 ¶¶ 105, 111–12.)

Mr. DeFrance further contends that monogamy is a key feature of a spousal

relationship, and the trial evidence indicated he was not monogamous because Ms. Charlo found someone else's underwear in Mr. DeFrance's camper. (Doc. 190 at 6–7.) The Court drew a different conclusion from this evidence and is not persuaded to reconsider it. The Court's only direct mention of monogamy in reaching its verdict was noting that another court had concluded that "*expectations of fidelity and monogamy*" were relevant evidence that a relationship was one that was similarly situated to a spouse. (Doc. 182 ¶ 102 (emphasis added).) The Court acknowledged that Ms. Charlo told the 911 dispatcher that she had been "called in" about "beating on" Mr. DeFrance after she found another girl's underwear in his possession and concluded: "The fact that the relationship continued after physical violence and suspected infidelity indicates that DeFrance and Charlo wanted the relationship to continue despite incidents that might cause a person to end even a serious, long-term romantic relationship." (*Id.* ¶¶ 39, 110.) Ms. Charlo's visceral response to suspected infidelity supports rather than undermines an inference that her relationship with Mr. DeFrance included *expectations* of fidelity and monogamy.

None of the arguments advanced in the briefing supports a conclusion of legal or factual impossibility.

**III. The evidence adduced at trial was not insufficient to convict Mr. DeFrance of the charges contained in the Second Superseding Indictment,**



**even considering Mr. DeFrance's proffered defenses.**

In the briefing on the present motion, Mr. DeFrance contends that the evidence was insufficient to convict him of the charged offenses. (Doc. 190 at 7–18.) He first invokes a hybrid defense of lack of fair warning and lack of knowledge that he belonged to the category of persons who had been convicted of a misdemeanor crime of domestic violence. (*Id.* at 7–10.) The Court has previously rejected his argument that the relationship element of 18 U.S.C. § 921(a)(33)(A) (2021) is unconstitutionally vague either for failure to provide fair warning of what conduct is prohibited or for failure to supply minimal guidelines to govern law enforcement, sees no reason to revisit those conclusions, and incorporates its prior reasoning by reference. (Doc. 71 at 36–41.) In the instant briefing, Mr. DeFrance objects to the Court's reliance on virtually every case the Court cited in support of its conclusions relating to Mr. DeFrance's relationship status with Ms. Charlo on the date of the PFMA, arguing that those cases are not binding authority and/or are distinguishable on their facts. The Court repeatedly stated that it relied upon these cases as *persuasive* authority supporting its conclusions regarding relevant factors to consider in determining whether the relationship was “similarly situated to a spouse” and whether Mr. DeFrance knew he belonged to the category of persons convicted of a misdemeanor crime of domestic violence, which includes knowing that he fell within an applicable

relationship category with the victim of his predicate offense. (Doc. 182 ¶¶ 100–13, 115–20.) In so doing, the Court acknowledged that no case was both binding and perfectly on point in light of the unique facts of this case. The Court continues to agree with its previous conclusion regarding the fair notice provided by the statute:

The phrase “similarly situated” “add[s] some imprecision” to the [relationship] element, but it “provide[s] an ascertainable, qualitative standard akin to others found in the law” and therefore “is not unconstitutionally vague.” *United States v. Lucero*, 989 F.3d 1088, 1103 (9th Cir. 2021); *see also Johnson*, 576 U.S. at 603–04 (“As a general matter, we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as “substantial risk” to real-world conduct; ‘the law is full of instances where a man’s fate depends on his estimating rightly . . . some matter of degree[.]’” (quoting *Nash v. United States*, 229 U.S. 373, 377 (1913))).

(Doc. 71 at 38.) Likewise, whether viewing the facts in the light most favorable to the government or de novo, the Court continues to agree with its conclusion that Mr. DeFrance did, in fact, have requisite knowledge of his status (Doc. 182 ¶¶ 115–20) and thus did not lack fair notice on the facts of this case.

Second, Mr. DeFrance again raises “the estoppel claim and the Public Authority” defense, contending that the evidence shows that “on Mr. DeFrance’s NCIC report (Exhibit 522) the PFMA is listed” and that “ATF witness Mr. Feuerstein testified that once the PFMA is known to the government . . . investigation would be conducted into all the circumstances surrounding the predicate PFMA,” including looking at police reports and charging documents, and

thus “the only reasonable inference is that all of the appropriate documents were consulted in Mr. DeFrance’s PFMA record; and the NICS analyst(s) concluded that Mr. DeFrance was not a prohibited person.” (Doc. 190 at 10–11.) He suggests that because the PFMA is on the NCIC report, “the burden should shift to the government [to prove] that the appropriate documents were not consulted.” (*Id.* at 11.)

The Court’s Findings of Fact and Conclusions of Law make clear that the Court disagrees with Mr. DeFrance’s contention that the “only reasonable inference” from the evidence presented in this case was that a government official concluded that Mr. DeFrance was not a prohibited person after consulting “all of the appropriate documents” relating to his PFMA. The Court found that Mr. Feuerstein’s “trial testimony established that the NICS process is imperfect, analysts are responsible for millions of transactions in a given year, and the law imposes significant time constraints on the external research that may be necessary to *confirm* whether an individual may possess firearms under federal law.” (Doc. 182 ¶ 121 (emphasis added).) Whether viewing the evidence in the light most favorable to the United States or *de novo*, the Court continues to agree with its previous conclusions regarding the NICS process and its relationship to Mr. DeFrance’s knowledge that he belonged to the category of persons convicted of a misdemeanor crime of domestic violence as well as its ultimate conclusion that the

government proved beyond a reasonable doubt that Mr. DeFrance had the requisite knowledge of status. (*Id.* ¶¶ 114–22; *see also id.* ¶¶ 142–49; Doc. 91 at 8–9 (concluding that United States was not collaterally estopped from asserting that Mr. DeFrance was prohibited from possessing firearms even if he had been “proceeded” or cleared in all of his prior firearms transactions).)

Mr. DeFrance’s third contention—that neither the judge presiding over Mr. DeFrance’s PFMA case nor his court-appointed counsel in that case provided him actual notice that his PFMA conviction would prohibit him from possessing firearms—requires little discussion. (Doc. 190 at 11–12.) Unlike knowledge that “he belonged to the relevant category of persons barred from possessing a firearm,” knowledge that federal law prohibits him from possessing a firearm is *not* an element of a § 922(g) offense. *Rehaif v. United States*, 139 S. Ct. 2191, 2200 (2019); *United States v. Singh*, 979 F.3d 697, 727–28 (9th Cir. 2020). And as this Court has already concluded, his PFMA counsel’s failure to advise him with certainty about the impact of the PFMA conviction on the right to possess firearms under federal law was not ineffective assistance of counsel. (Doc. 182 ¶¶ 152–57.)

Mr. DeFrance’s new contention that “[g]un rights are now equal to admonishment on topics along the lines of the right to counsel and jury trial which must be discussed with the defendant to make a PFMA plea valid” under recent Supreme Court precedent interpreting the Second Amendment fares no better.

(Doc. 190 at 17–18.) This argument erroneously focuses on the importance of the right lost rather than the key distinctions between direct and collateral consequences of a guilty plea and/or conviction:

A direct consequence is one that “represents a definite, immediate and largely automatic effect on the range of the defendant’s punishment.” *Torrey v. Estelle*, 842 F.2d 234, 236 (9th Cir. 1988) (citation omitted). But “where the consequence is contingent upon action taken by an individual or individuals other [than] the sentencing court—such as another governmental agency or the defendant himself—the consequence is generally ‘collateral.’” *Littlejohn*, 224 F.3d at 965.

*United States v. Hollins*, 70 F.4th 1258, 1262 (9th Cir. 2023). The Supreme Court’s holding in *Padilla v. Kentucky*, 559 U.S. 356 (2010) that defense counsel was ineffective for failure to advise a client about virtually certain deportation as a consequence of conviction, “did not eschew” the distinction between direct and collateral consequences of conviction “across the board,” but rather concluded that the distinction was “ill-suited” to dispose of Padilla’s ineffective assistance claim because of the unique nature of deportation in its severity “and the ‘automatic’ way it follows from conviction.” *Chaidez v. United States*, 568 U.S. 342, 355 (2013). This Court has already explained its conclusion that *Padilla* does not require “every reasonable attorney representing a client facing a PFMA charge [to] interrogate the details of their client’s relationship with the victim to advise the client with near certainty whether the offense qualifies as a misdemeanor crime of domestic violence under federal law.” (Doc. 182 ¶ 155.) Subsequent Ninth Circuit

case law only further confirms this Court’s conclusion that neither Mr. DeFrance’s counsel nor the judge presiding over his PFMA case was required to do more than what they did—advising him that he *may* lose his firearms rights as a result of conviction. *See Hollins*, 70 F.4th at 1263 (“None of the consequences of Hollins’ *federal* conviction imposed under Arizona *state* law can be characterized as definite, immediate, or automatic.”); *id.* at 1263 n.3 (“Though not required under Rule 11, the magistrate judge advised Hollins that he would need to register as a sex offender ‘in accordance with tribal, state, and federal law.’ The district court had no duty to advise him of the minutiae of state law that may apply to him in the future.”).

Fourth and finally, Mr. DeFrance argues that the government has asserted inconsistent positions in this litigation, in violation of his due process rights, based upon an offered plea deal to the amended version of § 922(g)(9), pursuant to which the parties would have agreed “that the defendant’s conviction for the misdemeanor crime of domestic violence was based on the fact he was in a current dating relationship with the victim at the time of the offense.” (Doc. 190 at 13–17; Doc. 190-1 at 4.) Mr. DeFrance contends that the Court should construe the offered plea agreement as a concession by the government “that the fairest resolution of this case was to agree” that he and Ms. Charlo “were simply dating,” and he argues that his conviction under the pre-amendment version of the statute

“violates due process under the Fifth Amendment and the doctrine of preclusion of inconsistent positions.” (Doc. 190 at 13–14.)

“The doctrine of judicial estoppel, sometimes referred to as the doctrine of preclusion of inconsistent positions, is invoked to prevent a party from changing its position over the course of judicial proceedings when such positional changes have an adverse impact on the judicial process.” *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990) (quoting *Religious Tech. Ctr. v. Scott*, 869 F.2d 1306, 1311 (9th Cir. 1989) (Hall, J., dissenting)). “Judicial estoppel is most commonly applied to bar a party from making a factual assertion in a legal proceeding which directly contradicts an earlier assertion made in the same proceeding or a prior one.” *Id.* This doctrine is inapplicable here for multiple reasons.

Most importantly, the government’s position that Mr. DeFrance was similarly situated to a spouse of Ms. Charlo does not “directly contradict” a rejected plea agreement in which both parties would have agreed that they were in a dating relationship. As discussed above, the statute’s enumerated relationship categories, at least as they relate to romantic partners, can overlap significantly; although there may be outliers, such as a married couple who maintain separate homes, or an engaged couple similarly situated to spouses who never “dated” in a traditional sense because their engagement was arranged by their families, in many cases a dating relationship will precede and even occur simultaneously with a

couple becoming similarly situated to spouses. The facts of this case bear this out: Mr. DeFrance and Ms. Charlo began as friends who shared recreational activities, soon became “inseparable,” eventually became physically intimate, broke up when Ms. Charlo moved out of state, and resumed dating when she returned—at which point she was spending the majority of her time with Mr. DeFrance on Mr. DeFrance’s property and keeping many of her personal belongings there in the time leading up to the PFMA. (Doc. 182 ¶¶ 4–30.) To be sure, it could have been easier for the government to prove that Mr. DeFrance and Ms. Charlo were in a dating relationship as defined by the amended statute when Mr. DeFrance committed the PFMA; he has all but conceded as much during this litigation. But the evidence and arguments supporting such a conclusion are consistent, not inconsistent, with the government’s position at trial that they were similarly situated to spouses. The United States nowhere conceded that it could *only* prove that the couple was in a dating relationship, and the Court will not construe the offered plea agreement in that manner. To do so would place the government and defendants alike in the unenviable position of being unable to engage in plea negotiations involving lesser included offenses or a plea to some but not all charged counts, lest they commit themselves to abandoning the operative indictment (and available defenses to the charge or charges set forth in that indictment) should plea negotiations ultimately fail. *Cf.* Fed. R. Evid. 410.



Additionally, even if the offered plea agreement could be construed as the government changing its position regarding the relationship element, the Court finds there has been no adverse impact on the judicial process in this case. The parties and the Court have understood throughout this litigation that the government would seek to prove that Mr. DeFrance and Ms. Charlo were similarly situated to spouses. (Doc. 25 at 3 n.1; Doc. 132 at 5, 7, 23 (transcript of Sept. 13, 2021 hearing on first motions to dismiss).) In light of this fact, Mr. DeFrance cannot claim that he was unfairly surprised by this theory at trial based on the eleventh-hour plea negotiations. Moreover, the Court was entirely unaware of these negotiations—as it should have been—and thus could not have been impacted by them. The case presented to the Court, including Mr. DeFrance’s defense, was based upon the law in effect at the time of Mr. DeFrance’s offense conduct. These circumstances distinguish this case from the cases cited by Mr. DeFrance, where the government’s inconsistent positions had a real impact on the outcome of the proceedings. *Russell*, 893 F.2d at 1038 (“Having persuaded the district court to deny appellant federal review on the ground that he had an ‘adequate and available’ state remedy, the state cannot now be permitted to oppose appellant’s petition for relief on the theory he was actually procedurally barred in state court.”); *Smith v. Goose*, 205 F.3d 1045, 1050–51 (8th Cir. 2000) (prosecution advanced two mutually exclusive theories of murder at separate trials

of co-defendants to secure convictions of as many defendants as possible: one theory that victims were killed before burglary, and one theory that victims were killed after burglary); *id.* at 1050 (describing case in which prosecutorial theories were not inconsistent because identity of shooter did not affect liability of both defendants for felony murder); *Thompson v. Calderon*, 120 F.3d 1045, 1056–59 (9th Cir. 1997) (en banc) (plurality opinion) (prosecution advanced mutually exclusive theories of murder—one theory that two defendants killed victim, and one theory that one defendant alone raped and killed victim—to secure convictions and death sentences), *reversed on other grounds by Calderon v. Thompson*, 523 U.S. 538 (1998); *see also Bradshaw v. Stumpf*, 545 U.S. 175, 187–88 (2005) (remanding for further proceedings on habeas petition because prosecution’s inconsistent theories of which co-defendant shot victim may have been material to decision to impose death sentence).

Finally, the Court declines the parties’ invitations to consider whether either party had potential ulterior motives in engaging in the particular plea negotiations at issue. In any criminal case, the government and defendant alike have significant incentives to avoid trial and reach agreement on appropriate consequences of conviction, all in good faith, and there is no evidence suggesting otherwise here. (See Doc. 195-1 (correspondence regarding plea offer indicating shared goals of bringing case to conclusion without trial and allowing potential reinstatement of

Mr. DeFrance's firearms rights).)

**IV. Binding precedent forecloses Mr. DeFrance's argument that the state predicate offense must contain a relationship element that is a categorical match for the relationship element of an offense under 18 U.S.C. § 922(g)(9), and Mr. DeFrance's invocation of collateral estoppel, issue preclusion, and double jeopardy do not change that analysis.**

Mr. DeFrance once again argues that the categorical or modified categorical approach and double jeopardy clause of the Fifth Amendment prohibit his conviction under 18 U.S.C. § 922(g)(9) because "his original PFMA was premised on a dating relationship." He characterizes the instant case as being "tried and convicted on a Montana PFMA involving a 'spousal' type relationship." (Doc. 190 at 19–20.)

This order marks the fourth time this Court has rejected this argument as foreclosed by Supreme Court and Ninth Circuit precedent. (Doc. 71 at 23–28; Doc. 111 at 3; Doc. 117 at 4.) For the final time: The relationship element of a prosecution under 18 U.S.C. § 922(g)(9), 18 U.S.C. § 921(a)(33)(A), is an element of the federal offense. *United States v. Hayes*, 555 U.S. 415, 418 (2009) ("[T]he domestic relationship [defined by 18 U.S.C. § 921(a)(33)(A)], although it must be established beyond a reasonable doubt in a § 922(g)(9) firearms possession prosecution, need not be a defining element of the predicate offense."); *id.* at 426

(“To obtain a conviction in a § 922(g)(9) prosecution, the Government must prove beyond a reasonable doubt that the victim of the predicate offense was the defendant’s current or former spouse or was related to the defendant in another specified way.”); *United States v. Nobriga*, 474 F.3d 561, 563–64 (9th Cir. 2006) (holding that because “the domestic relationship element . . . is an element of the federal offense under § 922(g)(9), to be proven at trial[,]” any “mismatch between the [state] and federal domestic violence statutes is not a basis for invalidating the indictment”), *abrogated on other grounds by Voisine v. United States*, 136 S. Ct. 2272 (2016). As relevant to this argument, this Court’s role as the factfinder in this trial was to determine whether Mr. DeFrance’s and Ms. Charlo’s relationship fell within one of the enumerated categories in the pre-amendment version of 18 U.S.C. § 921(a)(33)(A). (Doc. 182 ¶¶ 91–113.) The Court did not, and could not, relitigate Mr. DeFrance’s liability for the PFMA offense, including determining whether his relationship with Ms. Charlo fell within the categories enumerated by Montana Code § 45-5-206. (*Id.* ¶ 93.) There is no double jeopardy violation in this case. (*See also* Doc. 71 at 26–28 (conducting full double jeopardy analysis).)

#### **V. Application of Rules 29, 33, and 34**

For all of the foregoing reasons, the Court concludes that Mr. DeFrance’s motion for judgment of acquittal must be denied because, reviewing the evidence presented against the defendant in the light most favorable to the government, a

rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Fed. R. Crim. P. 29; *Freter*, 31 F.3d at 785.

Likewise, for all of the foregoing reasons, the Court concludes that Mr. DeFrance's motion for a new trial must be denied because the Court does not conclude that "the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred[.]" Fed. R. Crim. P. 33; *Alston*, 974 F.2d at 1211.

Finally, for all of the foregoing reasons, Mr. DeFrance's motion to arrest judgment must be denied because he has not demonstrated that the Court lacks jurisdiction over the charged offenses. Fed. R. Crim. P. 34.

#### **VI. The Impact of *United States v. Castro***

Finally, although Mr. DeFrance cited a recent Ninth Circuit case as supplemental authority for his "notice arguments concerning whether a Montana PFMA should have been considered a lawful predicate sufficient to support a § 922(g)(9) offense" (Doc. 197 at 2), the Court does not consider the decision relevant to Mr. DeFrance's relationship-element-focused arguments concerning notice or vagueness. However, the Court feels compelled to briefly address the decision at this juncture, as it likely will become central when this case is appealed.

This Court extensively discussed the force element described in 18 U.S.C. § 921(a)(33)(A) in its order denying Mr. DeFrance's first, second, and third

motions to dismiss. (Doc. 71 at 13–23.) The Court ultimately concluded that the Supreme Court’s decision in *United States v. Castleman*, 572 U.S. 157 (2014), required this Court to conclude that subsection (1)(a) of Montana’s PFMA requires the use of physical force as defined by § 921(a)(33)(A). (*Id.* at 17–18.) However, the Court acknowledged that the issue “presents a close question that could lead reasonable jurists to opposite answers.” (*Id.* at 17.)

In *United States v. Castro*, 71 F.4th 735 (9th Cir. 2023), the Ninth Circuit held that a conviction under subsection (1)(a) of Montana’s PFMA was not a “crime of violence” as defined by the federal Sentencing Guidelines, which requires “force capable of causing physical pain or injury to another person.” *Id.* at 736–37 (quoting *Johnson v. United States*, 559 U.S. 133, 140 (2010)). The court did not address whether a conviction under subsection (1)(a) of Montana’s PFMA would require the lesser physical force required by § 921(a)(33)(A). *Id.* at 739–40 & n.4. However, the court disagreed with this Court’s alternative analysis and conclusion that there was not a realistic probability that Montana would apply subsection (1)(a) of its PFMA statute in cases not involving the use of physical force. *Id.* at 743.

The Court concludes that the Ninth Circuit’s decision in *Castro* does not require reconsideration of its previous conclusion that *Castleman* required the Court to hold that subsection (1)(a) of Montana’s PFMA requires the use of

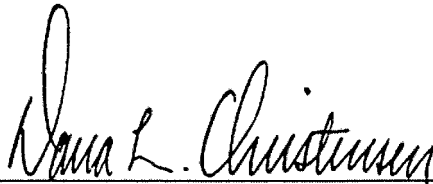
physical force as defined in the context of a prosecution under 18 U.S.C.

§ 922(g)(9), because the *Castro* opinion concerned the use of “violent” force as defined by the Sentencing Guidelines. 71 F.4th at 739. Accordingly, the Court will not enter a judgment of acquittal as a result of *Castro*. However, the Ninth Circuit clearly rejected this Court’s alternative basis for its use-of-force conclusion, and thus the Court observes in closing that this case will squarely present the *Castleman* issue on appeal.

**CONCLUSION**

IT IS ORDERED that the motion (Doc. 189) is DENIED.

DATED this 13th day of July, 2023.

A handwritten signature in black ink, reading "Dana L. Christensen", is written over a horizontal line.

Dana L. Christensen, District Judge  
United States District Court

UNITED STATES DISTRICT COURT  
DISTRICT OF MONTANA MISSOULA DIVISION

UNITED STATES OF AMERICA

v.

MICHAEL BLAKE DEFRANCE

JUDGMENT IN A CRIMINAL CASE

Case Number: CR 21-29-M-DLC-1

USM Number: 58149-509

Michael Donahoe

Defendant's Attorney

THE DEFENDANT:

|                                     |                                                                     |                                          |
|-------------------------------------|---------------------------------------------------------------------|------------------------------------------|
| <input type="checkbox"/>            | pleaded guilty to count(s)                                          |                                          |
| <input type="checkbox"/>            | pleaded nolo contendere to count(s) which was accepted by the court |                                          |
| <input checked="" type="checkbox"/> | was found guilty on count(s) after a plea of not guilty             | 1-4 of the Second Superseding Indictment |

The defendant is adjudicated guilty of these offenses:

Title & Section / Nature of Offense

18 U.S.C. § 922(g)(9) Prohibited Person in Possession of Firearms and Ammunition  
18 U.S.C. § 922(a)(6) False Statement During A Firearms Transaction With Criminal Forfeiture  
18 U.S.C. § 922(a)(6) False Statement During A Firearms Transaction With Criminal Forfeiture  
18 U.S.C. § 922(a)(6) False Statement During A Firearms Transaction With Criminal Forfeiture

Offense Ended

08/28/2018  
08/28/2018  
08/28/2018  
08/28/2018

Count

1  
2  
3  
4

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s)  
☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

September 21, 2023

Date of Imposition of Judgment



Signature of Judge

Dana L. Christensen, District Judge

United States District Court

Name and Title of Judge

September 21, 2023

Date



DEFENDANT: MICHAEL BLAKE DEFRANCE  
CASE NUMBER: CR 21-29-M-DLC-1

### IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: 21 months as to Count 1, Count 2, Count 3, and Count 4; terms to run concurrently.

☐ The court makes the following recommendations to the Bureau of Prisons:

- ☐ The defendant is remanded to the custody of the United States Marshal.  
☐ The defendant shall surrender to the United States Marshal for this district:

☐ at ☐ a.m. ☐ p.m. on

☐ as notified by the United States Marshal.

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

- ☐ before 2 p.m. on  
☒ as notified by the United States Marshal.  
☐ as notified by the Probation or Pretrial Services Office.

### RETURN

I have executed this judgment as follows:

Defendant delivered on \_\_\_\_\_ to

at \_\_\_\_\_, with a certified copy of this judgment.

UNITED STATES MARSHAL

By: \_\_\_\_\_  
DEPUTY UNITED STATES MARSHAL

DEFENDANT: MICHAEL BLAKE DEFRANCE  
CASE NUMBER: CR 21-29-M-DLC-1

### **SUPERVISED RELEASE**

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **3 years as to Count 1, Count 2, Count 3, and Count 4; terms to run concurrently.**

### **MANDATORY CONDITIONS**

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
  - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

DEFENDANT: MICHAEL BLAKE DEFRANCE  
CASE NUMBER: CR 21-29-M-DLC-1

### STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

### U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at <https://www.mtp.uscourts.gov/post-conviction-supervision>.

Defendant's Signature \_\_\_\_\_

Date \_\_\_\_\_

DEFENDANT: MICHAEL BLAKE DEFRANCE  
CASE NUMBER: CR 21-29-M-DLC-1

### **SPECIAL CONDITIONS OF SUPERVISION**

1. You must submit your person, residence, place of employment, vehicles, and papers, to a search, with or without a warrant by any probation officer based on reasonable suspicion of contraband or evidence in violation of a condition of release. Failure to submit to search may be grounds for revocation. You must warn any other occupants that the premises may be subject to searches pursuant to this condition. You must allow seizure of suspected contraband for further examination.
2. You must participate in an outpatient program for mental health treatment as approved by the probation officer. You must remain in the program until you are released by the probation officer in consultation with the treatment provider. You must pay part, or all the costs of this treatment as directed by the probation officer.

DEFENDANT: MICHAEL BLAKE DEFRANCE  
 CASE NUMBER: CR 21-29-M-DLC-1

### CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments.

|               | <u>Assessment</u> | <u>JVTA</u><br><u>Assessment**</u> | <u>AVAA</u><br><u>Assessment*</u> | <u>Fine</u> | <u>Restitution</u> |
|---------------|-------------------|------------------------------------|-----------------------------------|-------------|--------------------|
| <b>TOTALS</b> | \$400.00          | \$ 0.00                            | \$ 0.00                           | \$ .00      | \$ .00             |

- ☐ The determination of restitution is deferred until *An Amended Judgment in a Criminal Case*  
*(AO245C)* will be entered after such determination.  
☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

- ☐ Restitution amount ordered pursuant to plea agreement \$  
☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).  
☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:  
☐ the interest requirement is waived for the ☐ fine ☐ restitution  
☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

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

\*\* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22

\*\*\* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: MICHAEL BLAKE DEFRANCE  
CASE NUMBER: CR 21-29-M-DLC-1

### SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A ☒ Lump sum payments of \$ \$400.00 due immediately  
☐ not later than \_\_\_\_\_, or  
☒ in accordance with ☐ C, ☐ D, ☐ E, or ☒ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal \_\_\_\_\_ (e.g., weekly, monthly, quarterly) installments of \$ \_\_\_\_\_ over a period of \_\_\_\_\_ (e.g., months or years), to commence \_\_\_\_\_ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal 20 (e.g., weekly, monthly, quarterly) installments of \$ \_\_\_\_\_ over a period of \_\_\_\_\_ (e.g., months or years), to commence \_\_\_\_\_ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within \_\_\_\_\_ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☒ Special instructions regarding the payment of criminal monetary penalties:  
**Criminal monetary penalty payments are due during imprisonment at the rate of not less than \$25.00 per quarter, and payment shall be through the Bureau of Prisons' Inmate Financial Responsibility Program. Criminal monetary payments shall be made to the Clerk, United States District Court, P.O. Box 8537, Missoula, MT 59807 or online at <https://www.pay.gov/public/form/start/790999918>. Please see [www.mtd.uscourts.gov/criminal-debt](http://www.mtd.uscourts.gov/criminal-debt) for more information on how to pay online.**

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

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

- ☐ Joint and Several  
See above for Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.
- ☐ Defendant shall receive credit on his restitution obligation for recovery from other defendants who contributed to the same loss that gave rise to defendant's restitution obligation.
- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

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

577 F.Supp.3d 1085  
United States District Court, D. Montana,  
Missoula Division.

UNITED STATES of America, Plaintiff,

v.

Michael Blake DEFRANCE, Defendant.

CR 21-29-M-DLC

|

Signed 12/29/2021

[6] statute prohibiting someone convicted of misdemeanor crime of domestic violence from possessing firearms or ammunition did not invite arbitrary or discriminatory enforcement.

Motions denied.

**Procedural Posture(s):** Preliminary Hearing or Grand Jury Proceeding Motion or Objection.

West Headnotes (22)

### Synopsis

**Background:** Defendant charged with prohibited person in possession of firearms and ammunition moved to dismiss indictment for lack of specificity and failure to state and offense, moved to dismiss indictment because Montana partner or family member assault statute was indivisible and unconstitutional noncategorical version of federal misdemeanor crime of domestic violence statute, and moved to dismiss superseding indictment.

**Holdings:** The District Court, Dana L. Christensen, J., held that:

[1] second superseding indictment provided sufficient factual basis for defendant to ascertain predicate conviction and related facts alleged satisfied statute governing misdemeanor crime of domestic violence;

[2] statute governing partner or family member assault under Montana law categorically required use or attempted use of physical force;

[3] Double Jeopardy did not bar prosecution for prohibited person in possession of firearms and ammunition;

[4] statute prohibiting someone convicted of misdemeanor crime of domestic violence from possessing firearms or ammunition was not unconstitutionally vague based on relationship element of statute;

[5] phrase “similarly situated to spouse” in statute defining misdemeanor crime of domestic violence provided ascertainable, qualitative standard akin to others found in law; and

### [1] Indictments and Charging

**Instruments** ➡ Sufficiency of accusation

A motion to dismiss for lack of specificity requires a court to review an indictment in its entirety, construed according to common sense, and interpreted to include facts which are necessarily implied; the test is not whether the indictment could have been framed in a more satisfactory manner, but whether it conforms to the minimal constitutional standards. Fed. R. Crim. P. 12(b)(3)(B)(iii).

### [2] Indictments and Charging

**Instruments** ➡ Enabling defendant to prepare for trial

**Indictments and Charging**

**Instruments** ➡ Protection against subsequent prosecution

An indictment meets constitutional and procedural muster if it states the elements of the offense charged with sufficient clarity to apprise a defendant of the charge against which he must defend and enable him to plead double jeopardy. U.S. Const. Amend. 5; Fed. R. Crim. P. 12(b)(3)(B)(v).

### [3] Indictments and Charging

**Instruments** ➡ Necessity and sufficiency of using statutory language

As long as applicable statute clearly sets out crime's essential elements, use of “bare bones” information in indictment, that is, one employing

statutory language alone, is quite common and entirely permissible.

evidence not appearing on the face of the indictment. Fed. R. Crim. P. 12(b)(3)(B)(v).

[4] **Indictments and Charging**

**Instruments** ⇌ Informing defendant of nature of charge; notice

**Indictments and Charging**

**Instruments** ⇌ Necessity and sufficiency of using statutory language

Language of statute may be used in general description of offense in indictment, as long as it is accompanied with such statement of facts and circumstances as will inform accused of specific offense with which he is charged.

[8] **Weapons** ⇌ Possession after conviction of crime

Second superseding indictment provided sufficient factual basis for firearm-possession defendant to ascertain predicate conviction for misdemeanor crime of domestic violence; Government alleged in indictment that defendant knew he had been convicted of misdemeanor crime of domestic violence under Montana law, which Government alleged placed defendant in relevant category of persons barred from possessing firearm, and Government alleged that defendant knowingly possessed, in and affecting interstate commerce, firearms and ammunition.

18 U.S.C.A. §§ 921(a)(33)(A), 922(g)(9).

[5] **Indictments and Charging**

**Instruments** ⇌ Matters appearing on face of charging instrument

On motion to dismiss for failure to state offense, district court is bound by four corners of indictment. Fed. R. Crim. P. 12(b)(3)(B)(v).

[9] **Criminal Law** ⇌ Motions

Pretrial motion is proper when it involves questions of law rather than fact.

[6] **Indictments and Charging**

**Instruments** ⇌ Presumptions and burden of proof

Distinguished from pretrial motions to dismiss premised on other grounds, where court may take evidence and make factual determinations, court considering motion for failure to state offense must accept truth of allegations in indictment. Fed. R. Crim. P. 12(b)(3)(B)(v).

[10] **Assault and Battery** ⇌ Domestic Relationships

Statute governing partner or family member assault under Montana law categorically required use or attempted use of physical force within meaning of federal statute governing misdemeanor crime of domestic violence; "bodily injury," in federal statute must have resulted from physical force, even when Montana statute defined bodily injury to include temporary illness or impairment of function of mental faculty. 18 U.S.C.A. § 921(a)(33)(A);

Mont. Code Ann. § 45-5-206(1)(a).

[7] **Indictments and Charging**

**Instruments** ⇌ Matters appearing on face of charging instrument

**Indictments and Charging**

**Instruments** ⇌ Admissibility

To ensure that the respective provinces of the judge and jury are respected, a motion to dismiss for failure to state an offense cannot be used as a device for a summary trial of evidence; to that end, the district court should not consider

[11] **Weapons** ⇌ Domestic violence

Where neither party contests that a statute is divisible as to a particular subsection, the court may apply the modified categorical approach to determine whether prior state conviction served



to make possession of firearm unlawful under federal statute governing misdemeanor crime of domestic violence and consult the terms of the charging document, the terms of the plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information, to determine whether his conviction did entail the elements necessary to constitute the federal offense.

[12] **Weapons** ➡ Domestic violence

District Court was not required to engaged in categorical approach comparison of relationship elements of partner or family member assault under Montana law and federal statute governing misdemeanor crime of domestic violence; federal statute's definition of qualifying relationship was element of federal offense prohibiting someone conviction of misdemeanor crime of domestic violence to possess any firearm or ammunition, which Government would have to prove beyond reasonable doubt at trial. 18 U.S.C.A. §§ 921(a)(33)(A)(ii), 922(g)(9); Mont. Code Ann. § 45-5-206(1)(a).

[13] **Double Jeopardy** ➡ Assault, battery, or armed violence

**Double Jeopardy** ➡ Offenses against United States and a state or territory

Double Jeopardy did not bar prosecution for prohibited person in possession of firearms and ammunition, although defendant had been convicted of partner or family member assault under Montana law; issue of whether relationship elements of state offense and federal statute governing misdemeanor crime of domestic violence were different from each other was not necessarily decided in prior case, guilty plea to state offense determined that defendant purposely or knowingly caused bodily injury to person with whom he had been or was currently in dating or ongoing

intimate relationship, and issue to be determined by federal offense prosecution was whether defendant was convicted of misdemeanor crime of domestic violence that he committed as person similarly situated to spouse of victim. U.S.

Const. Amend. 5; 18 U.S.C.A. §§ 921(a)(33)(A)(ii), 922(g)(9); Mont. Code Ann. § 45-5-206(1)(a).

[14] **Weapons** ➡ Violation of other rights or provisions

**Weapons** ➡ Domestic violence

District Court would not determine whether version of partner or family member assault under Montana law, which defendant charged with prohibited person in possession of firearm and ammunition was convicted of, which limited its definition of dating or ongoing intimate relationship partner to couples of opposite sex, violated Equal Protection Clause; firearms prosecution did not open predicate conviction to new form of collateral attack, and federal statute's relationship element was element that must have be proven in federal prosecution and need not be categorical match for relationship element of predicate offense. U.S. Const.

Amend. 14; 18 U.S.C.A. § 921(a)(33)(A)(ii); Mont. Code Ann. § 45-5-206(2)(b).

[15] **Constitutional Law** ➡ Statutes

The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.

[16] **Constitutional Law** ➡ Vagueness on face or as applied

Where the statute or regulation does not implicate constitutionally protected conduct, a facial challenge will succeed only if the

enactment is impermissibly vague in all of its application.

[17] **Constitutional Law** ⇌ Statutes

An as-applied vagueness challenge to statute assumes truth of allegations in indictment and asks whether person of average intelligence would understand that his conduct is proscribed under statute.

[18] **Assault and Battery** ⇌ Offenses involving domestic or other particular relationships

**Constitutional Law** ⇌ Particular offenses in general

**Constitutional Law** ⇌ Weapons and explosives

**Weapons** ⇌ Violation of other rights or provisions

**Weapons** ⇌ Domestic violence

Statutes defining misdemeanor crime of domestic violence and governing prohibition of someone who had been convicted of misdemeanor crime of domestic violence from possessing firearm or ammunition were not unconstitutionally vague; person of ordinary intelligence could comprehend from statutes that prior conviction for offense with element of use or attempted use of force, committed against spouse, child, or similarly situated person, would disqualify him from possessing firearms or ammunition. 18 U.S.C.A. §§ 921(a)(33)(A), 922(g)(9).

[19] **Constitutional Law** ⇌ Statutes

That close questions may arise in interpreting language of statute or regulation does not, without more, render enactment vague; rather, touchstone of fair warning requirement of void-for-vagueness inquiry is whether statute, either standing alone or as construed, made it reasonably clear at relevant time that defendant's conduct was criminal.

[20] **Constitutional Law** ⇌ Weapons and explosives

**Weapons** ⇌ Violation of other rights or provisions

**Weapons** ⇌ Domestic violence

Statute prohibiting someone convicted of misdemeanor crime of domestic violence from possessing firearms or ammunition was not unconstitutionally vague based on relationship element of statute; relationship element of offense was confined by plain text of statute to relationship as it existed at time of predicate domestic violence offense. 18 U.S.C.A. §§ 921(a)(33)(A)(ii), 922(g)(9).

[21] **Assault and Battery** ⇌ Offenses involving domestic or other particular relationships

**Constitutional Law** ⇌ Particular offenses in general

Phrase "similarly situated to spouse" in statute defining misdemeanor crime of domestic violence provided ascertainable, qualitative standard akin to others found in law, and therefore was not unconstitutionally vague for failure to give fair warning of what was prohibited; ordinary person could differentiate between spouse-like relationship and other types of relationships that would not satisfy relationship element in statute. 18 U.S.C.A. § 921(a)(33)(A)(ii).

[22] **Constitutional Law** ⇌ Weapons and explosives

**Weapons** ⇌ Violation of other rights or provisions

**Weapons** ⇌ Domestic violence

Statute prohibiting someone convicted of misdemeanor crime of domestic violence from possessing firearms or ammunition did not invite arbitrary or discriminatory enforcement, and thus was not unconstitutionally vague; statute specifically proscribed narrow class of conduct, possession of firearm or ammunition, by discrete

class of people, statute required past conviction for offense which had force element and which must have been committed against person in specified relationship with defendant, and statute's enforcement necessarily required some background knowledge of individual defendant's criminal history. 18 U.S.C.A. § 922(g)(9).

about May 6, 2013, of a misdemeanor crime of violence under the laws of the State of Montana, knowingly possessed, in and affecting interstate commerce, firearms and ammunition, in violation of 18 U.S.C. § 922(g)(9).

(*Id.* at 1–2.)

#### Attorneys and Law Firms

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Michael Donahoe, Public Defender, Federal Defenders of Montana, Helena, MT, for Defendant.

#### ORDER

Dana L. Christensen, District Judge

Before the Court are Defendant Michael Blake DeFrance's Motion to Dismiss Indictment for Lack of Specificity and Failure to State an Offense (Doc. 14), Motion to Dismiss Indictment Because Montana PFMA (§ 45-5-206 (2011)) is Indivisible and an Unconstitutional Noncategorical Version of 18 U.S.C. § 921(a)(33)(A)(ii) (Doc. 16), and Third Motion to Dismiss Superseding Indictment (Doc. 43). The Court will deny each of these motions to dismiss.<sup>1</sup>

#### BACKGROUND

On July 28, 2021, the United States charged Mr. DeFrance with one count of prohibited person in possession of firearms and ammunition, in violation of 18 U.S.C. § 922(g)(9). (Doc. 2.) Specifically, the Indictment alleged:

That on or about June 27, 2018 and October 2, 2018, at Missoula, in Missoula County, in the State and District of Montana, the defendant, **MICHAEL BLAKE DEFRANCE**, knowing he had been convicted on or

On August 13, 2021, Mr. DeFrance moved to dismiss the indictment under Rule 12(b)(3)(B)(iii) and (v) of the Federal Rules of Criminal Procedure for lack of specificity and failure to state an offense. (Doc. 14.) On August 18, 2021, Mr. DeFrance filed a second motion to dismiss the indictment on the grounds that Montana's Partner and Family Member Assault statute (Mont. Code Ann. § 45-5-206) is indivisible and an unconstitutional noncategorical \*1090 version of 18 U.S.C. § 921(a)(33)(A)(ii). (Doc. 16.)

On August 26, 2021, the United States filed a Superseding Indictment, which charged Mr. DeFrance with one count of prohibited person in possession of firearms and ammunition, in violation of 18 U.S.C. § 922(g)(9). (Doc. 21.) The Superseding Indictment alleged:

That on or about June 27, 2018, and October 2, 2018, at Missoula, in Missoula County, in the State and District of Montana, the defendant, **MICHAEL BLAKE DEFRANCE**, knowing he had been convicted on or about May 6, 2013, of a misdemeanor crime of domestic violence under the laws of the State of Montana, which meets the definition of a misdemeanor crime of domestic violence under 18 U.S.C. § 921(a)(33)(A)(i) and (ii), knowingly possessed, in and affecting interstate commerce, firearms and ammunition, in violation of 18 U.S.C. § 922(g)(9).

(*Id.* at 1–2.)

The Court held a hearing on the first and second motions to dismiss on September 13, 2021. (Doc. 39.) On September 17, 2021, Mr. DeFrance filed a third motion to dismiss the indictment on the grounds that the elements of the offense are too vague to provide sufficient definiteness that ordinary people can understand what is prohibited and fail to provide adequate standards for those who apply the law. (Doc. 43 at 3.)

On October 21, 2021, the United States filed a Second Superseding Indictment. (Doc. 55.) The Second Superseding Indictment charged the prohibited person in possession of firearms and ammunition offense as Count I and alleged:

That on or about and between October 3, 2016, and October 2, 2018, at Missoula, in Missoula County, in the State and District of Montana, the defendant, MICHAEL BLAKE DEFANCE, knowing he had been convicted on or about May 6, 2013, of a misdemeanor crime of domestic violence under the laws of the State of Montana, which meets the definition of a misdemeanor crime of domestic violence under 18 U.S.C. § 921(a)(33)(A)(i) and (ii), knowingly possessed, in and affecting interstate commerce, firearms and ammunition, in violation of 18 U.S.C. § 922(g) (9).

(*Id.* at 2.) Aside from setting forth an earlier date for the start of the alleged offense, the allegations are substantively identical to those in the Superseding Indictment. The Second Superseding Indictment further charges three counts of false statement during a firearms transaction, in violation of 18 U.S.C. § 922(a)(6), as Counts II–IV. (*Id.* at 2–4.) Counts II–IV allege that on three separate occasions in 2018, Mr. DeFrance knowingly made a false or fictitious written statement that he had not been convicted in any court of a misdemeanor crime of domestic violence in connection with his acquisition and attempted acquisition of a firearm. (*Id.*) On November

24, 2021, Mr. DeFrance renewed his first, second, and third motions to dismiss so that the Court would consider them applicable to the Second Superseding Indictment. (Doc. 65.)

## ANALYSIS

### I. Motion to Dismiss for Lack of Specificity and Failure to State an Offense

#### A. Legal Standards

Rule 12 of the Federal Rules of Criminal Procedure authorizes a defendant to move to dismiss an indictment for lack of specificity and for failure to state an offense. Fed. R. Crim. P. 12(b)(3)(B)(iii), (v).

[1] [2] A motion to dismiss for lack of specificity requires a court to review an indictment “in its entirety, construed according to common sense, and interpreted \*1091 to include facts which are necessarily implied.” *United States v. Berger*, 473 F.3d 1080, 1103 (9th Cir. 2007) (quoting *United States v. King*, 200 F.3d 1207, 1217 (9th Cir. 1999)). The test is not “whether [the indictment] could have been framed in a more satisfactory manner, but whether it conforms to the minimal constitutional standards.” *United States v. Awad*, 551 F.3d 930, 935 (9th Cir. 2009) (quoting *United States v. Hinton*, 222 F.3d 664, 672 (9th Cir. 2000)). An indictment meets constitutional and procedural muster if it “state[s] the elements of the offense charged with sufficient clarity to apprise a defendant of the charge against which he must defend and enable him to plead double jeopardy.” *Hinton*, 222 F.3d at 672.

[3] [4] Furthermore, as long as the applicable statute clearly sets out the crime’s essential elements, “[t]he use of a ‘bare bones’ information—that is one employing the statutory language alone—is quite common and entirely permissible” in the Ninth Circuit. *United States v. Woodruff*, 50 F.3d 673, 676 (9th Cir. 1995) (quoting *United States v. Crow*, 824 F.2d 761, 762 (9th Cir. 1987)). Consequently, “the language of the statute may be used in the general description of an offence,” as long as it is “accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence ... with which he is charged.” *Hamling v. United States*, 418 U.S. 87, 117–18, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974).

[5] [6] [7] On a motion to dismiss for failure to state an offense, “the district court is bound by the four corners of the indictment.” *United States v. Boren*, 278 F.3d 911, 914 (9th Cir. 2002). Distinguished from pre-trial motions to dismiss premised on other grounds—where the court may take evidence and make factual determinations—the court considering a motion for failure to state an offense “must accept the truth of the allegations in the indictment[.]” *Id.* “The indictment either states an offense or it doesn’t.” *Id.* To ensure that “the respective provinces of the judge and jury are respected,” a Rule 12(b)(3)(B)(v) motion to dismiss “cannot be used as a device for a summary trial of evidence.” *Id.* (quoting *United States v. Jensen*, 93 F.3d 667, 669 (9th Cir. 1996)). To that end, “[t]he Court should not consider evidence not appearing on the face of the indictment.” *Id.* (quoting *Jensen*, 93 F.3d at 669).

### B. Discussion

[8] Mr. DeFrance’s motion (Doc. 14), which was filed before the Superseding Indictment was filed, contends that (1) the Indictment “fails to specify in any detail whatsoever the domestic relationship element required to be alleged in a § 922(g)(9) prosecution[.]” and (2) the Indictment “does not include the status allegations required by *Rehaif v. United States*, — U.S. —, 139 S. Ct. 2191, 204 L.Ed.2d 594 (2019).” (Doc. 14 at 3.)

After the Superseding Indictment was filed, the United States responded to Mr. DeFrance’s motion by arguing (1) the motion to dismiss for lack of specificity regarding the relationship element of § 922(g)(9) was mooted by the Superseding Indictment, and (2) both the Indictment and Superseding Indictment allege that Mr. DeFrance knew he had been convicted of a misdemeanor crime of domestic violence and knowingly possessed a firearm. (Doc. 25 at 6–8.)

In reply, Mr. DeFrance argued that the Superseding Indictment does not allege any facts to support the allegation that his state conviction meets the definition of a misdemeanor crime of domestic violence under 18 U.S.C. § 921(a)(33)(A), particularly because the relationship elements of Montana’s PFMA and 18 U.S.C. § 921(a)(33)(A) are not identical. (Doc. 31 \*1092 at 2–6.) These

purportedly missing facts are key, Mr. DeFrance asserts, because the government must prove he knew he was “covered by the relevant category of relationship under the federal statute.” (*Id.* at 4.)

As discussed above, Count I of the Second Superseding Indictment is substantively identical to the Superseding Indictment except to the extent that it alleges an earlier beginning date for the start of the offense. The Second Superseding Indictment states the elements of the § 922(g)(9) offense with sufficient particularity to apprise Mr. DeFrance of the charge against which he must defend. *Hinton*, 222 F.3d at 672. The statute makes it a crime “for any person ... who has been convicted in any court of a misdemeanor crime of domestic violence” to possess any firearm or ammunition in or affecting interstate or foreign commerce. 18 U.S.C. § 922(g)(9). The statute defines a “misdemeanor crime of domestic violence” as “an offense that ... is a misdemeanor under Federal, State, or Tribal law” and “has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.” 18 U.S.C. § 921(a)(33)(A).

The Second Superseding Indictment alleges that Mr. DeFrance knew “he had been convicted on or about May 6, 2013, of a misdemeanor crime of domestic violence under the laws of the State of Montana, which meets the definition of a misdemeanor crime of domestic violence under 18 U.S.C. § 921(a)(33)(A).” (Doc. 55 at 2.) It further alleges that, knowing this fact, he “knowingly possessed, in and affecting interstate commerce, firearms and ammunition, in violation of 18 U.S.C. § 922(g)(9)” on or about and between “October 3, 2016, and October 2, 2018[.]” (*Id.*) The Second Superseding Indictment provides a sufficient factual basis for Mr. DeFrance to ascertain the predicate conviction and related facts that the United States alleges satisfy § 921(a)(33)(A), including the relationship element.

The Court rejects Mr. DeFrance’s assertion that the Second Superseding Indictment must have alleged additional facts showing that the domestic relationship underlying the predicate conviction fell within the categories of domestic

relationships listed in the federal statute. This Court's decision in *United States v. Meech*, 487 F. Supp. 3d 946 (D. Mont. 2020), is instructive. There, the defendant moved to dismiss an indictment charging a violation of 18 U.S.C. § 922(a)(6), which makes it a crime for any person, in connection with the acquisition or attempted acquisition of a firearm from a licensed firearm dealer, to knowingly make any false written or oral statement intended or likely to deceive the dealer with respect to any fact material to the lawfulness of the firearm sale. *Id.* at 950. The indictment alleged that the defendant falsely responded to Question "11(h) on ATF Form 4463" by stating that he was not subject to a court restraining order, and it stated the location and date of the charged activity. *Id.* The Court rejected the defendant's assertion that the indictment was defective because it did not contain any reference to any particular restraining order, concluding that "the indictment tracks the language of the statute and is accompanied by sufficiently specific facts" to inform the defendant of the crime charged, enable him to prepare a defense, and allow him to plead double jeopardy in the future. *Id.* at 950–51. This was true even though the United States would bear the burden at trial of \*1093 proving that he was subject to a restraining order. *Id.* at 953. Likewise, here, the United States must prove at trial that Mr. DeFrance was convicted of a misdemeanor crime of domestic violence as defined by 18 U.S.C. § 921(a)(33)(A), including that the offense was committed against a person who was in one of the specified relationships with the defendant. *United States v. Hayes*, 555 U.S. 415, 426, 129 S.Ct. 1079, 172 L.Ed.2d 816 (2009). The Second Superseding Indictment here is *more* specific than the indictment found sufficient in *Meech* because it specifies the date of the predicate conviction on which the United States relies and therefore provides sufficient information for Mr. DeFrance to prepare a defense, including any defense that the predicate conviction or the relationship underlying it does not meet the definition of 18 U.S.C. § 921(a)(33)(A). Mr. DeFrance's motion to dismiss for lack of specificity under Rule 12(b)(3)(B)(iii) is therefore denied.

Furthermore, the Second Superseding Indictment states an offense. "[I]n a prosecution under 18 U.S.C. § 922(g) ..., the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." *Rehaif v. United States*, — U.S. —, 139 S.Ct. 2191, 2200, 204 L.Ed.2d 594 (2019). The United States need not prove, and accordingly the indictment need not allege,

that Mr. DeFrance "knew his ... status prohibited firearm ownership or possession." *United States v. Singh*, 979 F.3d 697, 727 (9th Cir. 2020), *cert. denied sub nom. Matsura v. United States*, — U.S. —, 141 S.Ct. 2671, 210 L.Ed.2d 833 (2021).

As discussed above, the Second Superseding Indictment sufficiently alleges that Mr. DeFrance knew he had been convicted of a misdemeanor crime of domestic violence under the laws of the State of Montana, which the United States alleges places him in the relevant category of persons barred from possessing a firearm under 18 U.S.C. § 922(g)(9), and it alleges that he knowingly possessed, in and affecting interstate commerce, firearms and ammunition. (Doc. 55 at 2.) Accordingly, Mr. DeFrance's motion to dismiss for failure to state an offense under Rule 12(b)(3)(B)(v) is denied.

## II. Motion to Dismiss Because Montana's PFMA is Indivisible and Unconstitutional Noncategorical

### Version of 18 U.S.C. § 922(a)(33)(A)(ii)

Mr. DeFrance argues that the relevant 2011 version of Montana's PFMA cannot serve as a predicate conviction to support a 18 U.S.C. § 922(g)(9) prosecution because (1) it can be committed without the use, threatened use, or attempted use of force because the statutory term "bodily injury" is indivisible and includes both mental and emotional harm, which can be inflicted without the use of force; and (2) the relationship element of the PFMA is indivisible and overbroad relative to the federal relationship element defined by 18 U.S.C. § 921(a)(33)(A). (Doc. 16 at 2.) The brief in support of his motion further argues that the 2011 statute, under which Mr. DeFrance was convicted, denies equal protection on the basis of sex and sexual orientation because the statute defined partners as "spouses, former spouses, persons who have a child in common, and persons who have been or are currently in a dating or ongoing intimate relationship with a person of the opposite sex." (Doc. 17 at 9–11.) The statute was amended effective April 18, 2013—four days after Mr. DeFrance committed the offense at issue here (Doc. 17-1 at 37)—and the only statutory revision relevant for the purposes of this Order was the removal of the language "with a person of the opposite sex" from subsection (2)(b). 2013 Mont. Laws 804.

\*1094 The United States responds that the PFMA statute is materially indistinguishable from the Tennessee statute the

Supreme Court analyzed in *United States v. Castleman*, 572 U.S. 157, 134 S.Ct. 1405, 188 L.Ed.2d 426 (2014), which the Court held required the use of force within the meaning of § 921(a)(33)(A). (Doc. 29 at 5–12.) The United States further argues that Mr. DeFrance's argument that the PFMA's relationship element is categorically overbroad is foreclosed by Ninth Circuit precedent, in which the court of appeals considered and rejected a substantively identical argument concerning a Hawaii domestic abuse statute. (*Id.* at 12–15.) Concerning Mr. DeFrance's equal protection argument, the United States asserts that dismissal of this indictment on that basis is not appropriate because this prosecution does not open the predicate conviction to a collateral attack. (*Id.* at 5 n.2.)

Mr. DeFrance argues in his reply that *Castleman* is distinguishable because the parties to that case did not dispute that the Tennessee statute was divisible, while he contends that Montana's definition of "bodily injury" is indivisible. (Doc. 32 at 2–3.) He further argues that the Court must apply a categorical analysis to the relationship elements of each statute because permitting the United States to prove at trial that the relationship underlying the predicate conviction satisfies the federal definition would permit the government to impeach the state court record and relitigate the state offense in violation of the Fifth and Tenth Amendments. (*Id.* at 3–5.) In closing, he argues that his equal protection argument is not a collateral attack, but rather an attack on an element of the PFMA statute "that the government is presently trying to enforce," and, "[c]onsidering that all non-heterosexual couples were immune from prosecution for Montana PFMA until 2013, the government cannot show why this prosecution should go forward based on an *unconstitutional*, narrower element." (*Id.* at 5–6.)

### A. Legal Standards

[9] Rule 12(b)(1) of the Federal Rules of Criminal Procedure provides that "[a] party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits." A pretrial motion is proper when "it involves questions of law rather than fact." *United States v. Shortt Accountancy Corp.*, 785 F.2d 1448, 1452 (9th Cir. 1986). The Court concludes that each of the issues Mr. DeFrance raises in this motion (Doc. 16) involves questions of law that may be resolved before trial.

## B. Discussion

### 1. Force Element

[10] To qualify as a "misdemeanor crime of domestic violence," the predicate conviction underlying a § 922(g)(9) charge must have as an element "the use or attempted use of physical force, or the threatened use of a deadly weapon[.]" 18 U.S.C. § 921(a)(33)(A). The Court must begin with the categorical approach and "look to the statute of [Mr. DeFrance's] conviction to determine whether that conviction necessarily 'ha[d], as an element, the use or attempted use of physical force[.]'" *Castleman*, 572 U.S. at 168, 134 S.Ct. 1405 (quoting 18 U.S.C. § 921(a)(33)(A)).

[11] Montana's PFMA provides that:

(1) A person commits the offense of partner or family member assault if the person:

(a) purposely or knowingly causes bodily injury to a partner or family member;

(b) negligently causes bodily injury to a partner or family member with a weapon; or

\*1095 (c) purposely or knowingly causes reasonable apprehension of bodily injury in a partner or family member.

Mont. Code Ann. § 45-5-206(1).<sup>2</sup> The statute focuses on the result of the defendant's conduct—bodily injury—rather than the conduct itself, and the Court therefore must consult the statutory definition of bodily injury in its categorical analysis. See *United States v. Mann*, No. CR 09-75-GF-BMM, 2017 WL 1906606, at \*6 (D. Mont. May 9, 2017). The Montana Code's general definition of "bodily injury" for Title 45, which is identical to the definition applicable at the time of Mr. DeFrance's conviction, is "physical pain, illness, or an impairment of physical condition and includes mental illness or impairment." Mont. Code Ann. § 45-2-101(5). Unlike subsection (1) of the PFMA, this definition does not set forth multiple, alternative versions of a crime, and it therefore is not divisible.<sup>3</sup> *Descamps*, 570 U.S. at 262, 133 S.Ct. 2276. This term is used or incorporated by reference in several of Montana's misdemeanor assault statutes in addition to the

PFMA. *E.g.*, Mont. Code Ann. §§ 45-5-201, 45-5-211. The Court is therefore cognizant of the fact that its determination whether Montana's definition of bodily injury as incorporated by subsection (1)(a) of the PFMA categorically requires the use of physical force will implicate the validity of past, present, and future prosecutions for violations of 18 U.S.C. § 922(g)(9) predicated on assault offenses beyond the PFMA.

Courts within this District previously have analyzed whether Montana's statutory definition of "bodily injury" necessarily requires the use of physical force, and in thorough and well-reasoned opinions, they have reached differing conclusions. *United States v. Goerndt*, No. CR 20-125-BLG-SPW, 2021 WL 1720907, at \*1-4 (D. Mont. Apr. 30, 2021) (concluding that subsection (1)(a) of Montana's PFMA requires use of physical force as defined by 18 U.S.C. § 921(a)(33)); *United States v. Tymes*, No. CR 20-117-BLG-SPW, 2021 WL 1720906, at \*1-4 (D. Mont. Apr. 30, 2021) (same); *Mann*, 2017 WL 1906606, at \*5-7 (concluding that Montana's aggravated assault statute incorporating similar definition of "serious bodily injury" does not require use of force as defined by 18 U.S.C. § 924(e)(2)(B)(i)); *United States v. Ross*, No. CR 13-29-BLG-BMM, 2017 WL 1288425, at \*2-4 (D. Mont. Apr. 6, 2017) (concluding that subsection (1)(a) of Montana's PFMA does not require use of physical force as defined by 18 U.S.C. § 924(e)(2)(B)(i)). Although the decisions answering in the negative assessed the definition of bodily injury under the Armed Career Criminal Act, whose elements clause requires the use of "violent force—that is, force capable of causing physical pain or injury to another person[.]" *Johnson v. United States*, 559 U.S. 133, 140, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010), the court's reasoning that "subjecting someone to a public tirade of insults or emotional abuse also could cause mental illness or impairment" suggests that no physical force whatsoever might be required to sustain a conviction under subsection (1)(a) of Montana's PFMA. *Ross*, 2017 WL 1288425, at \*4.

As these divergent opinions illustrate, the issue before the Court presents a close question that could lead reasonable jurists to opposite answers. The Court concludes, however, that it is bound by the Supreme Court's decision in *Castleman* that, within the context of a 18 U.S.C. § 922(g)(9) prosecution, "a 'bodily injury' must result from 'physical force[.]'" even where the statute at issue

defines bodily injury to include " 'temporary illness or impairment of the function of a ... mental faculty.' " 572 U.S. at 170, 134 S.Ct. 1405 (quoting Tenn. Code Ann. § 39-11-106(a)(2) (1997)). The Court agrees with the *Goerndt* court's conclusion that the divergence in the relevant language of Montana's definition of bodily injury compared to Tennessee's—"mental illness or impairment" versus "temporary illness or impairment of the function of a ... mental faculty"—is "a distinction without a difference." *Goerndt*, 2021 WL 1720907, at \*3-4. The Court likewise agrees with the *Goerndt* court that this conclusion is consistent with the Supreme Court's recent reminder that it has "repeatedly declined to construe" a federal statute requiring a predicate state conviction, including § 922(g)(9), "in a way that would render it inapplicable in many States." *Stokeling v. United States*, — U.S. —, 139 S. Ct. 544, 552, 202 L.Ed.2d 512 (2019). A holding that subsection (1)(a) of Montana's PFMA categorically is not a misdemeanor crime of domestic violence based on Montana's definition of "bodily injury" would disqualify several Montana assault offenses from serving as predicate misdemeanor crimes of domestic violence for a § 922(g)(9) offense, which would frustrate Congress' intent in enacting the statute. *Castleman*, 572 U.S. at 167-68, 134 S.Ct. 1405.

In his reply brief, Mr. DeFrance attempts to distinguish *Castleman* because the parties before the Court in that case conceded divisibility of the Tennessee statute, while he argues that Montana's PFMA is indivisible. (Doc. 32 at 2.) However, the parties' respective positions are materially identical here. Neither party here argues that subsection (1) of the PFMA is indivisible. (*E.g.*, Doc. 16 at 2 (arguing instead that the term "bodily injury" and the relationship element are indivisible).)

Likewise, the parties in *Castleman* did not contest that Tennessee's assault statute was divisible, and the Court easily concluded by reference to the *Shepard* documents that *Castleman*—like Mr. DeFrance—"pleaded guilty to having 'intentionally or knowingly cause[d] bodily injury' " to the victim. 572 U.S. at 169, 134 S.Ct. 1405. The Court did not need to address the divisibility of Tennessee's definition of bodily injury because it concluded that all of "th[ose] forms of injury do necessitate force in the common-law sense." 572 U.S. at 170, 134 S.Ct. 1405.



\*1097 Admittedly, no party before the *Castleman* court raised the precise argument that some mental impairments could be caused without the use or attempted use of physical force. But even if *Castleman* could be distinguished on that basis, under the categorical approach, there must be “a realistic probability, not a theoretical possibility” that Montana would apply the PFMA (or other assault statutes using the definition of “bodily injury” at issue) in cases that did not involve the use or attempted use of physical force, or the threatened use of a deadly weapon. *United States v. Perez*, 932 F.3d 782, 789 (9th Cir. 2019) (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193, 127 S.Ct. 815, 166 L.Ed.2d 683 (2007)). Mr. DeFrance’s counsel conceded at oral argument on this motion that he could provide no examples of PFMA convictions based on conduct that did not involve the use or attempted use of physical force, and the Court could find none. The *Ross* court likewise “found no Montana decision directly on point” but identified some cases supporting its conclusion that Montana’s PFMA categorically did not require violent physical force within the meaning of the ACCA. *Ross*, 2017 WL 1288425, at \*4. This Court, however, concludes that those cases do not support a conclusion that there is a realistic probability that Montana would apply the PFMA or other assault statutes in cases that did not involve the use or attempted use of physical force within the meaning of § 921(a)(33)(A).

First, the *Ross* court concluded that in *State v. Cooney*, 290 Mont. 414, 963 P.2d 1272 (1998), and 300 Mont. 31, 1 P.3d 956 (2000), “the Montana Supreme Court held that the continuing detention of a defendant convicted of, and committed for, stalking was justified, because his release was likely to cause serious mental consequences to his victim” and the State therefore proved that his release presented a substantial risk of serious bodily injury or an immediate threat of physical injury without having to prove that the defendant likely would have any physical contact with the victim. *Ross*, 2017 WL 1288425, at \*4. But the commitment proceeding at issue was not a criminal prosecution, but rather a civil proceeding in which the State bore the burden of proof by clear and convincing evidence, *see Cooney*, 963 P.2d at 1273, and the evidence in that case of the victim’s mental distress “related to fears of her own and her family’s safety[.]” *id.* at 1274—fears that stemmed from apprehension of physical injury if she did not respond to the defendant’s stalking, according to her trial testimony, *State v. Cooney*,

271 Mont. 42, 894 P.2d 303, 305, 307 (1995). This Court concludes that the *Cooney* civil commitment decisions do not show a reasonable probability that Montana would criminally prosecute a defendant under its PFMA or assault statutes for conduct that does not involve the use or attempted use of physical force.

Second, the *Ross* court concluded that in *State v. Sherer*, 313 Mont. 299, 60 P.3d 1010 (2002), the Montana Supreme Court “explain[ed] that the aggravated assault statute did not require the State to prove the defendant used force” because the state court “reasoned that ‘any form of communication, itself, may be sufficient conduct’ for a defendant to cause serious bodily injury under Montana law.” 2017 WL 1288425, at \*4 (quoting *Sherer*, 60 P.3d at 1013). But in the context of § 921(a)(33)(A), the Supreme Court made clear in several ways that a narrow focus on the defendant’s conduct, to the exclusion of evidence of intent or resulting harm, is not dispositive in determining whether an offense involved physical force: “physical force is simply force exerted by and through concrete bodies,” and “[t]he force used in battery need not be applied directly to the body of the victim” and could include administering a poison, infecting \*1098 with a disease, or resort to an intangible substance.

572 U.S. at 170, 134 S.Ct. 1405 (internal quotation marks omitted). In the example of indirect force like the use of poison, the “use of force is not the act of sprinkling the poison; it is the act of employing poison knowingly as a device to cause physical harm.” *Id.* at 171, 134 S.Ct. 1405 (internal quotation marks omitted). The *Sherer* court’s decision is consistent with *Castleman*; in the same sentence quoted by the *Ross* court, the Montana Supreme Court explained that the assault statutes at issue “do not require that the defendant personally direct force toward the victim[.]” *Sherer*, 60 P.3d at 1013. The facts of *Sherer* are illustrative: the defendant was convicted of aggravated assault despite the fact that his conduct was limited to placing phone calls, impersonating a doctor, and instructing women to physically harm themselves, because he did so with the intent that his conduct would cause his victims to injure themselves, and one did so by cutting off her nipple in accordance with his instructions. *Id.* at 1013–14. The use of force in his case was not the mere act of communication; it was “the act of employing” that communication “knowingly as a device to cause physical harm” in the same way another wrongdoer might employ poison. *Castleman*, 572 U.S. at 171, 134 S.Ct. 1405; *see*

also *United States v. Villavicencio-Burrue*, 608 F.3d 556, 563 n.6 (9th Cir. 2010) (holding that statute prohibiting threats to kill or injure a person indirectly through destruction of property was categorically a crime of violence “because the force threatened need not be force administered directly by the hands of the perpetrator”). Although Sherer’s conduct may not have qualified as “violent force” within the meaning of ACCA, it qualifies as the use of physical force under § 921(a)(33)(A) for the reasons explained in *Castleman*.

Finally, the *Ross* court concluded that in *State v. Mason*, 319 Mont. 117, 82 P.3d 903 (2003), *overruled on other grounds by State v. Herman*, 343 Mont. 494, 188 P.3d 978 (2008), “the Montana Supreme Court agreed that a defendant may be a ‘violent felony offender’ if he ‘causes serious bodily injury to another’ in the form of ‘a serious mental health condition,’ although under the circumstances of the case it found no evidence that the defendant caused the victim to develop such a condition.” 2017 WL 1288425, at \*4. The Montana Supreme Court held in that case that the trial court erred by designating the defendant as a violent felony offender at sentencing because there was no evidence that the defendant’s physical assaults of a minor *caused* the minor’s Post-Traumatic Stress Disorder, which was diagnosed after the minor’s removal from the defendant’s residence. *Mason*, 82 P.3d at 909–10. In this Court’s view, this case does not support an inference that there is a reasonable probability that Montana would enforce its PFMA or assault statutes in the absence of physical force; to the contrary, it provides an example of how Montana’s definition of bodily injury encompassing mental injury can be applied in a case that indisputably involved the use of physical force.

In sum, even if the Court did not consider *Castleman* dispositive on this issue, there is not “a realistic probability” that Montana would enforce the PFMA or other assault statutes using the definition of “bodily injury” at issue in cases that did not involve the use or attempted use of physical force. *Perez*, 932 F.3d at 789.

The Court concludes that subsection (1)(a) of Montana’s PFMA, Mont. Code Ann. § 45-5-206(1)(a), categorically requires the use or attempted use of physical force within the meaning of 18 U.S.C. § 921(a)(33)(A).

## 2. Relationship Element

[12] The Supreme Court held in \*1099 *United States v. Hayes*, 555 U.S. 415, 129 S.Ct. 1079, 172 L.Ed.2d 816 (2009), that “the domestic relationship [defined by 18 U.S.C. § 921(a)(33)(A)], although it must be established beyond a reasonable doubt in a § 922(g)(9) firearms possession prosecution, need not be a defining element of the predicate offense.” *Id.* at 418, 129 S.Ct. 1079. Mr. DeFrance acknowledges that this holding would appear to foreclose his argument that the Court should conduct a categorical approach comparison of the relationship elements of Montana’s PFMA and § 921(a)(33)(A), but he argues that *Hayes*’s holding is not relevant to statutes like Montana’s PFMA that *do* contain a relationship element. (Doc. 17 at 3.) He argues that the only definition that could apply to his offense under Montana’s PFMA—“persons who have been or are currently in a dating or ongoing intimate relationship with a person of the opposite sex[.]” Mont. Code Ann. § 45-5-206(2)(b) (2011)—is over-inclusive relative to the federal statute’s relationship categories—“a current or former spouse, parent, or guardian of the victim, ... a person with whom the victim shares a child in common, ... a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or ... a person similarly situated to a spouse, parent, or guardian of the victim[.]” 18 U.S.C. § 921(a)(33)(A)(ii). (Doc. 17 at 3–6.) He further argues that “re-litigation of the domestic relationship issue” would violate the Double Jeopardy Clause, his Sixth Amendment rights as protected by the categorical approach, and the Tenth Amendment’s prohibition on commandeering. (*Id.* at 6–7.)

The United States responds that Mr. DeFrance’s argument is foreclosed by Ninth Circuit precedent, and that the practical effect of his interpretation of the statute would frustrate the purpose of § 922(g)(9) by allowing ordinary assault, but in some cases not domestic assault, to serve as a predicate misdemeanor crime of domestic violence. (Doc. 29 at 12–15.)

The United States is correct that the Ninth Circuit has held that, because “the domestic relationship element ... is an element of the *federal* offense under § 922(g)(9), to be proven at trial[.]” any “mismatch between the

[state] and federal domestic violence statutes is not a basis for invalidating indictment.” *United States v. Nobriga*, 474 F.3d 561, 563–64 (9th Cir. 2006), *abrogated on other grounds by* *Voisine v. United States*, 579 U.S. 686, 136 S. Ct. 2272, 195 L.Ed.2d 736 (2016); *see also* *Hayes*, 555 U.S. at 418, 129 S.Ct. 1079. There is no basis in the text of the statute or legislative history and intent for a conclusion that the federal offense should have differing sets of elements based on whether the predicate offense includes a relationship element. To the contrary, Mr. DeFrance’s argument would have the counterintuitive result, contrary to Congressional intent, that violent offenses containing no relationship element could qualify as predicate offenses for a § 922(g)(9) prosecution, but offenses expressly proscribing violence against a domestic relation would be excluded from the federal statute’s coverage if they apply to siblings, extended family who cohabit with the victim, roommates, or others beyond the scope of the federal statute, even if the actual offense at issue had been committed by a parent, guardian, spouse, or someone similarly situated to the victim. *See Hayes*, 555 U.S. at 426–29, 129 S.Ct. 1079 (explaining how the Court’s interpretation of § 921(a)(33)(A)(ii) was consistent with Congress’ intent in enacting § 922(g)(9) to close a “dangerous loophole” permitting domestic abusers to keep firearms). The Court concludes that *Nobriga* and *Hayes* foreclose Mr. DeFrance’s argument that the Court should engage in a categorical approach comparison of the relationship elements of his predicate offense and § 921(a)(33)(A)(ii) because the federal statute’s definition of qualifying relationships \*1100 is an element of the § 922(g)(9) offense, which the United States must prove beyond a reasonable doubt at trial. *Hayes*, 555 U.S. at 418, 129 S.Ct. 1079; *Nobriga*, 474 F.3d at 563–64.

[13] Mr. DeFrance’s constitutional arguments against “re-litigation of the relationship element” or “impeach[ing] the state court record” fall short for the same reason. (Docs. 17 at 6, 32 at 5.) Mr. DeFrance’s categorical approach argument hinges on his acknowledgement that the relationship elements of Montana’s PFMA and § 921(a)(33)(A)(ii) are different from each other, which forecloses any argument that “the issue was necessarily decided in the prior case” as required for his Double Jeopardy collateral estoppel argument, *United*

*States v. Bernhardt*, 840 F.2d 1441, 1448 (9th Cir. 1988),<sup>4</sup> or that this Court would be forced to “adjudicate state offenses” in a manner he alleges would violate the Tenth Amendment (Doc. 17 at 6–7). As it concerns the relationship element, the ultimate issue determined by his plea of guilty to the PFMA offense was that he purposely or knowingly caused bodily injury to a person with whom he “ha[d] been or [was] currently in a dating or ongoing intimate relationship.”

Mont. Code Ann. § 45-5-206(2)(b) (2011). The ultimate issue to be determined in this § 922(g)(9) prosecution is whether he was convicted of a misdemeanor crime of domestic violence that he committed as “a person similarly situated to a spouse ... of the victim” or as a member of the other categories listed in 18 U.S.C. § 921(a)(33)(A)(ii). This is not a case in which “[t]he single rationally conceivable issue in dispute” in a prosecution—e.g., the identity of a robber—has already been determined by a final judgment.

*Ashe v. Swenson*, 397 U.S. 436, 445, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). Had Mr. DeFrance been tried before a jury for both PFMA and a lesser-included offense of assault with no relationship element, and had he been acquitted of PFMA but convicted of assault, Mr. DeFrance’s Double Jeopardy argument may have presented a closer question.

*See id.* at 444, 90 S.Ct. 1189. But on these facts, the Double Jeopardy Clause does not prohibit this § 922(g)(9) prosecution merely because the facts concerning Mr. DeFrance’s relationship with the victim of his PFMA offense are relevant to both his prior conviction and the present charge. *See United States v. Arlt*, 252 F.3d 1032, 1039 (9th Cir. 2001) (en banc) (rejecting Double Jeopardy argument “even when the same conduct forms the basis for two charges”). Likewise, the difference between the statutes’ relationship elements means that this case does not require re-litigation of the underlying offense or adjudication of a state offense, and Mr. DeFrance does not explain how the anti-commandeering principles of the Tenth Amendment apply to his indictment, so there is no jurisdictional defect or Tenth Amendment concern requiring dismissal of the indictment.

### 3. Equal Protection

[14] The Court need not determine whether the version of Montana’s PFMA under which Mr. DeFrance was convicted, which limited its definition of “dating or ongoing intimate relationship” partners to \*1101 couples “of the opposite

sex[.]" *Mont. Code Ann. § 45-5-206(2)(b)* (2011), violated the Equal Protection Clause. The Supreme Court has held that a "firearms prosecution does not open the predicate conviction to a new form of collateral attack[.]" and this holding forecloses Mr. **DeFrance's** Equal Protection argument. *Lewis v. United States*, 445 U.S. 55, 67, 100 S.Ct. 915, 63 L.Ed.2d 198 (1980). Mr. **DeFrance** argues that the United States "is presently trying to enforce" the allegedly unconstitutional relationship element of the prior PFMA statute (Doc. 32 at 5), but as explained above, the federal statute's relationship element is the element that must be proven in this case and need not be a categorical match for a relationship element of the predicate offense, *Nobriga*, 474 F.3d at 564, and as acknowledged by Mr. **DeFrance** in his other arguments, the federal element is different from the PFMA's relationship element (Doc. 17 at 3–5). "The federal gun laws ... focus ... on the mere fact of conviction, or even indictment, in order to keep firearms away from potentially dangerous persons." *Lewis*, 445 U.S. at 67, 100 S.Ct. 915. The constitutionality of Mr. **DeFrance's** conviction may be challenged in other proceedings, but not here. *Id.*

For the foregoing reasons, the Motion to Dismiss Because Montana PFMA (*Mont. Code Ann. § 45-5-206* (2011)) is Indivisible and an Unconstitutional Noncategorical Version of 18 U.S.C. § 921(a)(33)(A) (Doc. 16) will be denied.

### III. Motion to Dismiss Because 18 U.S.C. § 921(a)(33)(A) is Unconstitutionally Vague

Mr. **DeFrance** argues that 18 U.S.C. § 921(a)(33)(A) is unconstitutionally vague. First, he argues that the statute does not provide fair warning to ordinary citizens because an individual would have to determine first whether the misdemeanor crime of which he or she was convicted had the required force element, and second whether the relationships set forth in the federal statute match any of the relationships set forth in the state statute under which the individual was convicted. (Doc. 44 at 3.) He argues that laypersons could not determine whether Montana's PFMA contains a force element under the categorical approach. (*Id.* at 3–10.)

Second, he argues that the statute fails to provide minimal standards to govern law enforcement and the courts because the qualifying relationships are so broadly defined that the entirety of a relationship between a domestic violence

misdemeanant and the victim could be relevant in a prosecution under 18 U.S.C. § 922(g)(9), and there is no definition for the qualifying relationship of "similarly situated" to a spouse. (*Id.* at 10–17.)

The United States responds that several courts have rejected similar arguments, persons of ordinary intelligence can determine whether the victim of his or her prior misdemeanor crime of domestic violence was similarly situated to a spouse, and the term "force or threat of force" carries its common law meaning and is readily understandable. (Doc. 50 at 3–7.) The United States also recites facts relating to Mr. **DeFrance's** relationship with the victim of his PFMA offense, and it argues that the title of the statute under which he was convicted—Partner or Family Member Assault—put him on notice. (*Id.* at 8.) The United States further argues that the statute is distinct from unconstitutionally vague statutes that permit subjective or arbitrary enforcement, such as loitering statutes, because 18 U.S.C. § 921(a)(33)(A) defines the predicate offense conduct and required relationship status, and all case law confirms that the relationship element concerns the relationship at the time of the domestic violence offense. (*Id.* at 9–10.) The United States disagrees with Mr.

**DeFrance's** \*1102 argument that a prosecution under 18 U.S.C. § 922(g)(9) requires relitigating the predicate PFMA conviction because the statutes require proof of distinct elements. (*Id.* at 11.)

Mr. **DeFrance** argues in his reply brief that it is unclear after the Supreme Court's decisions in *Hayes* and *Castleman* how the relationship element of a 18 U.S.C. § 922(g)(9) offense should be resolved in a case in which the predicate offense contains a relationship element and argues that the categorical approach should apply to both the force and relationship elements of the offense. (Doc. 53 at 2–3.) He argues that no layperson could determine on his own under the categorical approach whether a Montana PFMA offense triggers application of 18 U.S.C. § 922(g)(9), particularly in light of the divergent opinions within this District concerning whether the PFMA requires the use of force, and the statute therefore does not provide fair notice of the conduct it prohibits. (*Id.* at 2–5.) Mr. **DeFrance** further argues that the government's brief's description of his relationship with the victim of his PFMA offense demonstrates the government's intent to "effectively re-litigate the relationship" element of that offense. (*Id.* at 5–7.) In closing, Mr. **DeFrance** argues that supplemental discovery disclosed that the victim of his

PFMA offense was 17 years old at the time of the offense and questions whether a person can be similarly situated to a spouse when, under Montana law, a 17-year-old can only be married with parental consent or judicial approval. (*Id.* at 7–8.)

### A. Legal Standards

As discussed previously, Rule 12(b)(1) of the Federal Rules of Criminal Procedure provides that “[a] party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits.” A pretrial motion is proper when “it involves questions of law rather than fact.” *Shortt Accountancy Corp.*, 785 F.2d at 1452.

[15] [16] [17] “[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983). Mr. DeFrance raises both a facial challenge and an as-applied challenge to the statute. (Doc. 44 at 16–17.) “Where the statute or regulation does not implicate constitutionally protected conduct, a facial challenge will succeed ‘only if the enactment is impermissibly vague in all of its applications.’” *United States v. Doremus*, 888 F.2d 630, 634 (9th Cir. 1989) (quoting *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494–95, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982)).<sup>5</sup> An as-applied challenge, by contrast, assumes the truth of the allegations in the indictment and asks whether a person of average intelligence would understand that his conduct is proscribed under the statute. *United States v. Bohonus*, 628 F.2d 1167, 1173–75 (9th Cir. 1980).

### B. Analysis

#### 1. Force Element

[18] Mr. DeFrance’s fair warning argument focuses heavily on the language of Montana’s PFMA and how ordinary people may struggle to apply the categorical approach \*1103 to determine whether a PFMA offense qualifies as a predicate

offense under 18 U.S.C. § 922(g)(9). (Doc. 44 at 3–10.) But Mr. DeFrance cites no authority—and the Court could find none—for the proposition that the proper standard for a vagueness challenge is that an ordinary person must be able to determine as a matter of law whether a past offense categorically qualifies as a predicate offense for a federal firearms prohibition. The lack of precedent is perhaps unsurprising.

The classic example of a facially unconstitutionally vague statute is the anti-loitering statute that fails to give any notice to ordinary people what conduct is prohibited; the only surefire way to avoid potential criminal penalties would be to cease going out into public. See *Kolender*, 461 U.S. at 358, 103 S.Ct. 1855. In the context of the federal firearms statutes, the “residual clauses” that stumped ordinary people and experienced jurists alike in determining whether an offense “in the ordinary case” “involves conduct that presents a serious potential risk of physical injury to another” were held intolerably vague. *E.g.*, *Johnson v. United States*, 576 U.S. 591, 596–97, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015). Key to those holdings was the fact that the residual clause “ties the judicial assessment of risk to a judicially imagined ‘ordinary case’ of a crime, not to real-world facts or statutory elements.” *Id.* at 597, 135 S.Ct. 2551 (emphasis added). This distinction between a residual clause and an elements clause of a firearms statute does not mean that the statutory interpretation required for elements-clause analysis is simple enough for an ordinary person to understand or conduct on his or her own. But this distinction *does* take the elements clauses like 18 U.S.C. § 921(a)(33)(A) comfortably out of the unconstitutionally vague realm.

[19] The fair warning prong of the vagueness inquiry does not invalidate every statute whose application or interpretation is complex. “That close questions may arise in interpreting the language of a statute or regulation does not, without more, render the enactment vague.” *United States v. Hogue*, 752 F.2d 1503, 1504 (9th Cir. 1985). Rather, the “touchstone” of the “fair warning requirement” is “whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant’s conduct was criminal.” *United States v. Lanier*, 520 U.S. 259, 266–67, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997). Sections 922(g)(9) and 921(a)(33)(A) meet that requirement on their faces and on the alleged facts of

this case. A person of ordinary intelligence can comprehend from that statutory language that a prior conviction for an offense with an element of the use or attempted use of force, committed against a spouse, child, or similarly situated person, will disqualify him or her from possessing firearms or ammunition. *United States v. Meade*, 175 F.3d 215, 222 (1st Cir. 1999) (“Here, the statute *sub judice* contains no ambiguity either as to the persons to whom the prohibitions apply or as to what conduct is proscribed.”); *United States v. Smith*, 171 F.3d 617, 623 (8th Cir. 1999) (“We would be hard pressed to find an individual of common, or even not so common, intelligence who could not determine whether he was in one of the enumerated relationships when he committed a misdemeanor crime including an element of physical force.”). And here, the United States has alleged that Mr. DeFrance knowingly possessed firearms and ammunition and knew he had been convicted of a misdemeanor crime of domestic violence under Montana law, which meets the definition of 18 U.S.C. § 921(a)(33)(A). (Doc. 55 at 2.) Mr. DeFrance has conceded in his briefing and submitted state court documents reflecting his admission that he pleaded guilty to his predicate offense because he “caused bodily \*1104 injury to his girlfriend.” (Doc. 17-1 at 36; Doc. 53 at 5.) Mr. DeFrance had ample notice that his alleged conduct in knowingly possessing a firearm and ammunition while knowing of his PFMA conviction would be criminal.

To be sure, application of the categorical approach may exempt some people from criminal liability or enhanced criminal penalties who otherwise would fall under within the common sense understanding of categories like a “person who has been convicted ... of a misdemeanor crime of domestic violence[.]” 18 U.S.C. § 922(g)(9), or a person who has been convicted of a “violent felony[.]” 18 U.S.C. § 924(e). But the legal nuances of the categorical approach—including *mens rea*, divisibility, and the proper use of *Shepard* documents—do not render the statutory language or its construction by courts so unclear that a “person of ordinary intelligence” is deprived of “a reasonable opportunity to know what is prohibited, so that he may act accordingly.” *Grayned v. Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). The statute provides ample warning that certain domestic violence offenders face criminal penalties for possessing a firearm. It is not unconstitutionally vague.

## 2. Relationship Element

Mr. DeFrance raises a dual challenge to the relationship element of 18 U.S.C. § 921(a)(33)(A), arguing that it is unconstitutionally vague because it fails to provide both fair notice to ordinary people and minimal guidelines to govern law enforcement.

One argument in support of his fair notice challenge can be rejected outright. As discussed above, the federal statute’s relationship element does not have to be a categorical match for the relationship element of a state predicate offense statute because the state statute need not have a relationship element at all. *Hayes*, 555 U.S. at 418, 129 S.Ct. 1079.

[20] Mr. DeFrance’s argument that the statute is vague because it is unclear whether the relationship element “is confined to the relationship as it existed” at the time of the PFMA conviction or “whether it extends to the entire relationship history ... up to and including the time of the federal 18 U.S.C. § 922(g)(9) trial” is untenable under the language of the statute. (Doc. 44 at 11.) Section 921(a)(33)(A)(ii) requires that the predicate offense was “committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.” 18 U.S.C. § 921(a)(33)(A)(ii) (emphasis added). The plain language of the statute ties the relationship element to the time the offense was committed; as the Supreme Court explained in *Hayes*, “[t]o obtain a conviction in a 18 U.S.C. § 922(g)(9) prosecution, the Government must prove beyond a reasonable doubt that the victim of the predicate offense was the defendant’s current or former spouse or was related to the defendant in another specified way.” 555 U.S. at 426, 129 S.Ct. 1079 (emphases added). This is not to say that evidence post-dating the offense could never be relevant to proving or disproving the relationship element in a 18 U.S.C. § 922(g)(9) prosecution; for example, a marriage certificate between the defendant and victim dated after the offense would be relevant evidence to show that they were not each other’s current spouses at the time of the offense. Such evidentiary questions are properly reserved for evidentiary motions and trial; for the purposes of this motion to dismiss, it suffices to hold that the

relationship element of the § 922(g)(9) offense is confined by the plain text of the statute to the relationship as it existed at the time of the predicate domestic violence offense.

18 U.S.C. § 921(a)(33)(A)(ii).

[21] Mr. DeFrance next argues that the ordinary person cannot determine whether he or she is “similarly situated to a spouse” within the meaning of § 921(a)(33)(A)(ii), and the statute invites arbitrary and discriminatory enforcement. The phrase “similarly situated” “add[s] some imprecision” to the element, but it “provide[s] an ascertainable, qualitative standard akin to others found in the law” and therefore “is not unconstitutionally vague.” *United States v. Lucero*, 989 F.3d 1088, 1103 (9th Cir. 2021); see also *Johnson*, 576 U.S. at 603–04, 135 S.Ct. 2551 (“As a general matter, we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as “substantial risk” to real-world conduct; ‘the law is full of instances where a man’s fate depends on his estimating rightly ... some matter of degree[.]’ ” (quoting *Nash v. United States*, 229 U.S. 373, 377, 33 S.Ct. 780, 57 L.Ed. 1232 (1913))). The United States District Court for the Northern District of Georgia provided a thorough analysis of the “similarly situated to a spouse” relationship in *United States v. Cary*, No. 1:07-CV-074-WSD, 2008 WL 879433, at \*2–4 (N.D. Ga. Mar. 29, 2008), in which the court acknowledged that the statute does not provide a precise definition of this term but collected numerous cases elaborating the contours of this relationship definition and facts relevant to determining whether it is satisfied, including whether the parties engaged in an intimate relationship, stayed at each other’s residences, or shared expenses, household responsibilities, and social activities. An ordinary person can differentiate between spouse-like relationships and numerous relationships—platonic friendships, college roommates, or one-time coffee dates—that would not satisfy this element absent evidence of an intimate or guardian-like relationship. The statute is not unconstitutionally vague for failure to give fair warning of what is prohibited.

[22] Likewise, the statute does not invite arbitrary or discriminatory enforcement. The fatal flaw of the anti-loitering statute at issue in *Kolender* was that it “vest[ed] virtually complete discretion in the hands of the police” and permitted freedom of public movement “only at the whim of any police officer who happens to stop that individual under” the statute. 461 U.S. at 358, 103 S.Ct. 1855. There was no

standard for law enforcement officers to determine whether the person they stopped had provided sufficiently “credible and reliable” identification to end his detention. *Id.* at 359–61, 103 S.Ct. 1855. Here, by contrast, Section 922(g)(9) is not a blank check to law enforcement to detain random individuals indefinitely at the slightest suspicion. Rather, it specifically proscribes a narrow class of conduct—possession of a firearm or ammunition—by a discrete class of people. Because the statute’s prohibition requires (1) a past conviction, (2) for an offense which must have a force element, and (3) which must have been committed against a person in a specified relationship with the defendant, 18 U.S.C. § 921(a)(33)(A), its enforcement necessarily requires some background knowledge of the individual defendant’s criminal history. Section 922(g)(9) simply does not have the same potential for arbitrary or discriminatory detention or enforcement as a standardless anti-loitering statute that criminalizes existing in public. *Kolender*, 461 U.S. at 358–61, 103 S.Ct. 1855.

To the extent a particular defendant contends that his relationship with the victim of his predicate offense lies at the outer margins of a relationship “substantially similar” to a spouse, parent, or guardian, he may present supporting evidence or argue that the government has not met its burden of proving that element to a jury. However, the Court cannot say as a matter of law that the relationship element unconstitutionally permits arbitrary enforcement or that such arbitrariness is evident here, where the record establishes that Mr. DeFrance acknowledged he had a boyfriend-girlfriend relationship with the victim of his PFMA offense. (Doc. 17-1 at 36; Doc. 53 at 5.)

One example of such an argument Mr. DeFrance could make to the jury is raised for the first time in his reply brief: The victim of Mr. DeFrance’s PFMA offense should not be considered “similarly situated to a spouse” because she was seventeen years old at the time of the offense, and a person under the age of eighteen cannot be married in Montana without parental consent or judicial approval. (Doc. 53 at 7–8 (citing Mont. Code Ann. § 40-1-213).) The Court typically declines to consider arguments raised for the first time in a reply brief. *Mont. Fair Hous., Inc. v. City of Bozeman*, 854 F. Supp. 2d 832, 846 (D. Mont. 2012). Regardless, this argument does not support Mr. DeFrance’s contention that the statute is unconstitutionally vague and is not a legal basis for dismissing the indictment. The Court cannot say as a

matter of law that a victim's age of seventeen renders totally irrelevant the facts discussed above, like the existence of an intimate relationship and shared responsibilities, that could establish that the predicate offense was committed by a person similarly situated to a spouse of that victim, particularly because Montana law provides a process for minors sixteen and older to obtain some rights of adults, including the right to live independently. *See* Mont. Code Ann. §§ 41-1-501–503.

In sum, §§ 921(a)(33)(A) and § 922(g)(9) are not unconstitutionally vague on their face or as applied because they provide sufficient notice to ordinary persons of what conduct is prohibited and provide minimal guidelines to govern law enforcement. *See* *Kolender*, 461 U.S. at 357–58, 103 S.Ct. 1855; *Bohonus*, 628 F.2d at 1173–75.

## CONCLUSION

IT IS ORDERED that the Motion to Dismiss Indictment for Lack of Specificity and Failure to State an Offense (Doc. 14) is DENIED.

IT IS FURTHER ORDERED that the Motion to Dismiss Indictment Because Montana PFMA (§ 45-5-206 (2011)) is Indivisible and an Unconstitutional Noncategorical Version of 18 U.S.C. § 921(a)(33)(A)(ii) (Doc. 16) is DENIED.

IT IS FURTHER ORDERED that the Third Motion to Dismiss the Superseding Indictment (Doc. 43) is DENIED.

## All Citations

577 F.Supp.3d 1085

## Footnotes

1 Mr. DeFrance has filed a Motion to Dismiss the Second Superseding Indictment (Doc. 69), which is not yet fully briefed and which this Order does not address. The Court's Order excluding all time from September 15, 2021 to the disposition of all pretrial motions from any Speedy Trial Act calculations in this matter pursuant to 18 U.S.C. § 3161(h)(1)(D) remains in full force and effect. (Doc. 64.)

2 Neither party contests that the statute is divisible as to this particular subsection, which “sets out one or more elements of the offense in the alternative[.]” *Descamps v. United States*, 570 U.S. 254, 257, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013). The Court therefore may apply the modified categorical approach and consult the documents approved by *Shepard v. United States*, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005)—the terms of the charging document, the terms of the plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information, *id.* at 26, 125 S.Ct. 1254—“to determine whether his conviction did entail the elements necessary to constitute the generic federal offense.” *Castleman*, 572 U.S. at 169, 134 S.Ct. 1405.

Mr. DeFrance was charged with violating the PFMA, and the state court document entering his plea of guilty states: “I AM PLEADING GUILTY TO THIS CHARGE BECAUSE I DID THE FOLLOWING: On 4-4-2013 in Sanders County I caused bodily injury to my girlfriend.” (Doc. 17-1 at 30–36.) The Court concludes that this document is a comparable judicial record to a transcript of a plea colloquy, *see* *Shepard*, 544 U.S. at 26, 125 S.Ct. 1254, and further concludes that Mr. DeFrance was convicted of violating Montana Code §



- 45-5-206(1)(a). The Court therefore shall not consider whether subsections (b) or (c) necessarily require the use or attempted use of physical force or the threatened use of a deadly weapon.
- 3 The legislature could revise this definition in a manner that would make it divisible and thus potentially avoid categorical approach pitfalls while preserving the broad scope of Montana's assault laws; for example, the definition could be structured similarly to <sup>¶</sup>Montana Code § 45-5-206(1): "(5) 'Bodily injury' means (a) physical pain, illness or an impairment of physical condition; or (b) mental illness or impairment."
- 4 Additionally, the Court doubts that a defendant can invoke a prior *conviction* as opposed to a prior acquittal in support of a Double Jeopardy collateral estoppel argument. <sup>¶</sup>*United States v. James*, 109 F.3d 597, 601 (9th Cir. 1997) ("Constitutional collateral estoppel exists where a fact necessarily determined *in the defendant's favor by his earlier acquittal* [makes] his conviction on the challenged second trial ... impossible unless the fact could be relitigated and determined adversely to the defendant." (emphasis added) (quoting <sup>¶</sup>*Pettaway v. Plummer*, 943 F.2d 1041, 1046 (9th Cir. 1991), *overruled on other grounds by* <sup>¶</sup>*Santamaria v. Horsley*, 133 F.3d 1242 (9th Cir. 1998))).
- 5 Mr. DeFrance does not argue that the statute implicates constitutionally protected conduct, but he would face an uphill battle in doing so. <sup>¶</sup>*United States v. Chovan*, 735 F.3d 1127, 1139–42 (9th Cir. 2013) (holding that <sup>¶</sup>18 U.S.C. § 922(g)(9) was constitutional facially and as applied under the Second Amendment).

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No. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES

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October Term, 2024

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MICHAEL BLAKE DeFRANCE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

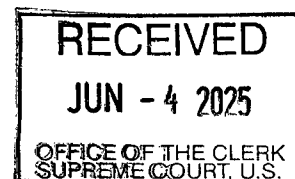
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APPENDIX C  
TO THE PETITION FOR WRIT OF  
CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT

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RACHEL JULAGAY  
Federal Defender  
\*MICHAEL DONAHOE  
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Helena, MT 59601  
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\*Counsel of Record

SUBMITTED: May 16, 2025



## TABLE OF APPENDIX

### **Appendix C:**

#### Case Docket Sheet

Cause No. CR 21-29-M-DLC, United States District Court,  
District of Montana, Missoula Division ..... 193-210

#### Redacted Indictment (Doc. 2) (July 28, 2021),

Cause No. CR 21-29-M-DLC, United States District Court,  
District of Montana, Missoula Division ..... 211-212

#### Superseding Indictment (Doc. 21) (August 26, 2021),

Cause No. CR 21-29-M-DLC, United States District Court,  
District of Montana, Missoula Division ..... 213-214

#### Notice of Public Authority Defense, Estoppel Defense and Innocent Intent Defense (Doc. 27) (September 1, 2021),

Cause No. CR 21-29-M-DLC, United States District Court,  
District of Montana, Missoula Division ..... 215-227

#### Redacted ATF 4473 Forms (Doc. 28) (September 1, 2021),

Cause No. CR 21-29-M-DLC, United States District Court,  
District of Montana, Missoula Division ..... 228-249

#### Second Superseding Indictment (Doc. 55) (October 21, 2021),

Cause No. CR 21-29-M-DLC, United States District Court,  
District of Montana, Missoula Division ..... 250-253

#### Petitioner's Response to Court Order (Doc. 65) (November 24, 2021),

Cause No. CR 21-29-M-DLC, United States District Court,  
District of Montana, Missoula Division ..... 254-256

#### Defense Trial Exhibit 505: Transcript of Audio-Recorded Interview of Jermain Austin Charlo (Doc. 176-3 ) (April 28, 2023),

Cause No. CR 21-29-M-DLC, United States District Court,  
District of Montana, Missoula Division ..... 257-277

|                                                                                                                                                                                                                                                                                                                                                                                         |         |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------|
| Motion for Leave to File Motion for Reconsideration (Doc. 105)<br>and Addendum (Doc. 106) (July 1, 2022),<br>Cause No. CR 21-29-M-DLC, United States District Court,<br>District of Montana, Missoula Division .....                                                                                                                                                                    | 278-319 |
| Government’s Trial Brief (Doc. 166) (April 21, 2023),<br>Cause No. CR 21-29-M-DLC, United States District Court,<br>District of Montana, Missoula Division .....                                                                                                                                                                                                                        | 320-345 |
| Defense Trial Brief (Doc. 167) (April 21, 2023),<br>Cause No. CR 21-29-M-DLC, United States District Court,<br>District of Montana, Missoula Division .....                                                                                                                                                                                                                             | 346-369 |
| Defense Trial Exhibit 502: Jermain Charlo’s 2008-2009 (8 <sup>th</sup> Grade);<br>partial 2010-2011 (10 <sup>th</sup> Grade); 2012-2013 (11 <sup>th</sup> Grade); and<br>2013-2014 (12 <sup>th</sup> Grade) Two Eagle River School Records<br>(Doc. 176-1) (April 28, 2023),<br>Cause No. CR 21-29-M-DLC, United States District Court,<br>District of Montana, Missoula Division ..... | 370-383 |
| Government’s Trial Exhibits 1-5 (Doc. 178-1 – 178-5)<br>(April 28, 2023),<br>Cause No. CR 21-29-M-DLC, United States District Court,<br>District of Montana, Missoula Division .....                                                                                                                                                                                                    | 384-394 |

**U.S. District Court  
District of Montana (Missoula)  
CRIMINAL DOCKET FOR CASE #: 9:21-cr-00029-DLC All Defendants**

Case title: USA v. Defrance

Date Filed: 07/28/2021

Date Terminated: 09/21/2023

---

Assigned to: Judge Dana L.  
Christensen

Appeals court case numbers:  
22-30131 Ninth Circuit, 23-2409  
Ninth Circuit

**Defendant (1)**

**Michael Blake Defrance**  
*TERMINATED: 09/21/2023*

represented by **Michael Donahoe**  
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Email: [michael\\_donahoe@fd.org](mailto:michael_donahoe@fd.org)  
**LEAD ATTORNEY**  
**ATTORNEY TO BE NOTICED**  
*Designation: Public Defender or Community  
Defender Appointment*

**Pending Counts**

18:922G.F UNLAWFUL  
TRANSPORT OF FIREARMS,  
ETC.  
(1ss)

18:922A.F FALSE STATEMENT  
DURING A FIREARMS  
TRANSACTION with criminal  
forfeiture  
(2ss)

18:922A.F FALSE STATEMENT  
DURING A FIREARMS  
TRANSACTION with criminal  
forfeiture  
(3ss)

18:922A.F FALSE STATEMENT  
DURING A FIREARMS  
TRANSACTION with criminal  
forfeiture  
(4ss)

**Disposition**

Defendant sentenced to the custody of the BOP for a term of 21 months on Count 1, Count 2, Count 3, and Count 4; to run concurrently. Supervised release for a term of 3 years on Count 1, Count 2, Count 3, and Count 4; to run concurrently. Standard and special conditions imposed. Special assessment of \$400.

Defendant sentenced to the custody of the BOP for a term of 21 months on Count 1, Count 2, Count 3, and Count 4; to run concurrently. Supervised release for a term of 3 years on Count 1, Count 2, Count 3, and Count 4; to run concurrently. Standard and special conditions imposed. Special assessment of \$400.

Defendant sentenced to the custody of the BOP for a term of 21 months on Count 1, Count 2, Count 3, and Count 4; to run concurrently. Supervised release for a term of 3 years on Count 1, Count 2, Count 3, and Count 4; to run concurrently. Standard and special conditions imposed. Special assessment of \$400.

Defendant sentenced to the custody of the BOP for a term of 21 months on Count 1, Count 2, Count 3, and Count 4; to run concurrently. Supervised release for a term of 3 years on Count 1, Count 2, Count 3, and Count 4; to run concurrently. Standard and special conditions imposed. Special assessment of \$400.

**Highest Offense Level (Opening)**

Felony

**Terminated Counts**

18:922G.F – PROHIBITED  
PERSON IN POSSESSION OF  
FIREARMS AND  
AMMUNITION w/ forfeiture  
allegation  
(1)

**Disposition**

Dismissed with prejudice upon Motion of USA.

18:922G.F – PROHIBITED  
PERSON IN POSSESSION OF  
FIREARMS AND  
AMMUNITION w/ forfeiture  
allegation  
(1s)

Dismissed with prejudice upon Motion of USA.

**Highest Offense Level  
(Terminated)**

Felony

**Complaints**

None

**Disposition****Plaintiff**

USA

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**ATTORNEY TO BE NOTICED**  
*Designation: Retained*

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Email: [tim.racicot2@usdoj.gov](mailto:tim.racicot2@usdoj.gov)  
**ATTORNEY TO BE NOTICED**

| Date Filed | #        | Docket Text                                                                                                                            |
|------------|----------|----------------------------------------------------------------------------------------------------------------------------------------|
| 07/28/2021 | <u>1</u> | SEALED INDICTMENT as to Michael Blake Defrance (1) count(s) 1. (NOS) (Entered: 07/29/2021)                                             |
| 07/28/2021 | <u>2</u> | Redacted Indictment as to Michael Blake Defrance. (NOS) (Entered: 07/29/2021)                                                          |
| 07/28/2021 | <u>3</u> | Criminal Cover Sheet filed by USA regarding the <u>1</u> Indictment (Sealed) as to Michael Blake Defrance. (NOS) (Entered: 07/29/2021) |

|            |           |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
|------------|-----------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 08/02/2021 |           | Set/Reset Hearings as to Michael Blake Defrance. Arraignment set for 8/2/2021 at 01:30 PM in Missoula, MT before Magistrate Judge Kathleen L. DeSoto. Initial Appearance set for 8/2/2021 at 01:30 PM in Missoula, MT before Magistrate Judge Kathleen L. DeSoto. (SMD) (Entered: 08/02/2021)                                                                                                                                                                                                                                                                                                                                                                                                                            |
| 08/02/2021 | <u>5</u>  | Arrest Warrant Returned Executed on 7/30/2021 in case as to Michael Blake Defrance. (MPB) (Entered: 08/02/2021)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| 08/02/2021 | <u>6</u>  | MINUTE ENTRY for proceedings held before Magistrate Judge Kathleen L. DeSoto: Initial Appearance and Arraignment as to Michael Blake Defrance held on 8/2/2021. AUSA Jen Clark appeared for the govt, FD Michael Donahoes appeared w/ defendant; Read charge, penalty, rights w/ defendant understanding the same; Defendant reviewed indictment w/ counsel prior to court and waived reading;Plea entered by by Michael Blake Defrance Not Guilty on counts 1; Parties advised of DPPA. PPTC to be set for 8/11/21 at 10:15am. Defendant released with conditions. Hearing commenced at 1:41 and concluded at 1:50, (Court Reporter FTR Gold) (USPO: M. Henkel), (Hearing held in Missoula) (KJL) (Entered: 08/02/2021) |
| 08/02/2021 | <u>7</u>  | TEXT ORDER – Under Criminal Rule 5(f), the government is ordered to comply with its disclosure obligations under <i>Brady v. Maryland</i> and related cases as set forth in the attachment to this Order. Failure to do so may result in sanctions. As to Michael Blake Defrance. Signed by Magistrate Judge Kathleen L. DeSoto on 8/2/2021. (KJL) (Entered: 08/02/2021)                                                                                                                                                                                                                                                                                                                                                 |
| 08/02/2021 | <u>8</u>  | TEXT Order Setting as to Michael Blake Defrance Preliminary Pretrial Conference set for 8/11/2021 at 10:15 AM before Judge Dana L. Christensen.. Signed by Magistrate Judge Kathleen L. DeSoto on 8/2/2021. (KJL) (Entered: 08/02/2021)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
| 08/02/2021 | <u>9</u>  | ORDER Setting Conditions of Release as to Michael Blake Defrance. Signed by Magistrate Judge Kathleen L. DeSoto on 8/2/2021. (KJL) (Entered: 08/02/2021)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| 08/02/2021 | <u>10</u> | TEXT Order resetting as to Michael Blake Defrance: Pretrial Conference reset for 8/18/2021 at 11:00 AM in Missoula, MT before Judge Dana L. Christensen. Signed by Judge Dana L. Christensen on 8/2/2021. (ASG) (Entered: 08/02/2021)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| 08/02/2021 | <u>11</u> | CJA 23 Financial Affidavit by Michael Blake Defrance (KJL) (Entered: 08/03/2021)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| 08/02/2021 | <u>12</u> | Order Appointing Counsel as to Michael Blake Defrance. Reimbursement information: Defendant is not required to reimburse the Court.. Signed by Magistrate Judge Kathleen L. DeSoto on 8/2/2021. (KJL) (Entered: 08/03/2021)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| 08/13/2021 | <u>14</u> | MOTION to Dismiss <i>Indictment Under Rule 12(b)(3)(B)(iii) and (v) for Lack of Specifity and Failure to State an Offense</i> by Michael Blake Defrance. (Donahoe, Michael) (Entered: 08/13/2021)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| 08/13/2021 | <u>15</u> | BRIEF/MEMORANDUM in Support by Michael Blake Defrance re <u>14</u> MOTION to Dismiss <i>Indictment Under Rule 12(b)(3)(B)(iii) and (v) for Lack of Specifity and Failure to State an Offense</i> (Donahoe, Michael) (Entered: 08/13/2021)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| 08/18/2021 | <u>16</u> | MOTION to Dismiss <i>Indictment Because Montana PFMA is Indivisible and an Unconstitutional Noncategorical Version of 18 USC 921(a)(33)(A)(ii)</i> by Michael Blake Defrance. (Donahoe, Michael) (Entered: 08/18/2021)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| 08/18/2021 | <u>17</u> | BRIEF/MEMORANDUM in Support by Michael Blake Defrance re <u>16</u> MOTION to Dismiss <i>Indictment Because Montana PFMA is Indivisible and an Unconstitutional Noncategorical Version of 18 USC 921(a)(33)(A)(ii)</i> (Attachments: # <u>1</u> Addendum) (Donahoe, Michael) (Entered: 08/18/2021)                                                                                                                                                                                                                                                                                                                                                                                                                        |
| 08/18/2021 | <u>18</u> | SCHEDULING ORDER as to Michael Blake Defrance: Discovery due by 8/23/2021. Motions due by 9/6/2021. Plea Agreement due by 9/23/2021. Jury Trial set for 10/4/2021 at 09:00 AM in Missoula, MT before Judge Dana L. Christensen. Signed by Judge Dana L. Christensen on 8/18/2021. (ASG) (Entered: 08/18/2021)                                                                                                                                                                                                                                                                                                                                                                                                            |
| 08/19/2021 | <u>19</u> | NOTICE OF ERRATA by Michael Blake Defrance re <u>17</u> Brief/Memorandum in Support, (Donahoe, Michael) (Linked to motion.) (NOS) (Entered: 08/19/2021)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
| 08/26/2021 | <u>20</u> | SEALED SUPERSEDING INDICTMENT as to Michael Blake Defrance (1) count(s) 1s. (APP) (Entered: 08/26/2021)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |

|            |           |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
|------------|-----------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 08/26/2021 | <u>21</u> | Redacted Superseding Indictment as to Michael Blake Defrance. (APP) (Entered: 08/26/2021)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| 08/26/2021 | <u>22</u> | Criminal Cover Sheet filed by USA as to Michael Blake Defrance. (APP) (Entered: 08/26/2021)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| 08/26/2021 | <u>23</u> | Summons Issued in case as to Michael Blake Defrance (APP) (Entered: 08/26/2021)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
| 08/26/2021 |           | Set/Reset Hearings as to Michael Blake Defrance: Arraignment set for 9/21/2021 at 01:30 PM in Missoula, MT before Magistrate Judge Kathleen L. DeSoto. (APP) (Entered: 08/26/2021)                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| 08/27/2021 | <u>24</u> | RESPONSE to Motion by USA as to Michael Blake Defrance re <u>14</u> MOTION to Dismiss <i>Indictment Under Rule 12(b)(3)(B)(iii) and (v) for Lack of Specifity and Failure to State an Offense</i> (Attachments: # <u>1</u> Exhibit Exhibit 1) (Clark, Jennifer) (Entered: 08/27/2021)                                                                                                                                                                                                                                                                                                                                       |
| 08/27/2021 | <u>25</u> | AMENDED DOCUMENT by USA – CORRECTED RESPONSE re <u>24</u> RESPONSE to Motion re <u>14</u> MOTION to Dismiss <i>Indictment Under Rule 12(b)(3)(B)(iii) and (v) for Lack of Specifity and Failure to State an Offense</i> . (Attachments: # <u>1</u> Exhibit 1) (Clark, Jennifer) (Text modified.) (NOS) (Entered: 08/27/2021)                                                                                                                                                                                                                                                                                                |
| 09/01/2021 | <u>26</u> | ORDER Setting Hearing on Motions <u>16</u> MOTION to Dismiss <i>Indictment Because Montana PFMA is Indivisible and an Unconstitutional Noncategorical Version of 18 USC 921(a)(33)(A)(ii)</i> , <u>14</u> MOTION to Dismiss <i>Indictment Under Rule 12(b)(3)(B)(iii) and (v) for Lack of Specifity and Failure to State an Offense</i> as to Michael Blake Defrance. Motion Hearing set for 9/13/2021 at 03:00 PM in Missoula, MT before Judge Dana L. Christensen. Signed by Judge Dana L. Christensen on 9/1/2021. (ASG) (Entered: 09/01/2021)                                                                           |
| 09/01/2021 | <u>27</u> | NOTICE OF PUBLIC AUTHORITY DEFENSE, ESTOPPEL DEFENSE AND INNOCENT INTENT DEFENSE UNDER RULE 12.3 Fed. R. Crim. P. by Michael Blake Defrance (Attachments: # <u>1</u> Addendum) (Donahoe, Michael) (Entered: 09/01/2021)                                                                                                                                                                                                                                                                                                                                                                                                     |
| 09/01/2021 | <u>28</u> | Sealed Document Unredacted re: <u>27</u> Notice (Other) by Michael Blake Defrance (Donahoe, Michael) (Entered: 09/01/2021)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
| 09/01/2021 | <u>29</u> | RESPONSE to Motion by USA as to Michael Blake Defrance re <u>16</u> MOTION to Dismiss <i>Indictment Because Montana PFMA is Indivisible and an Unconstitutional Noncategorical Version of 18 USC 921(a)(33)(A)(ii)</i> (Clark, Jennifer) (Entered: 09/01/2021)                                                                                                                                                                                                                                                                                                                                                              |
| 09/02/2021 | <u>30</u> | TEXT ORDER resetting (NO DOCUMENT ATTACHED) Hearing on Motions <u>16</u> MOTION to Dismiss <i>Indictment Because Montana PFMA is Indivisible and an Unconstitutional Noncategorical Version of 18 USC 921(a)(33)(A)(ii)</i> , <u>14</u> MOTION to Dismiss <i>Indictment Under Rule 12(b)(3)(B)(iii) and (v) for Lack of Specifity and Failure to State an Offense</i> as to Michael Blake Defrance. Motion Hearing reset for 9/13/2021 at 01:30 PM in Missoula, MT before Judge Dana L. Christensen. Signed by Judge Dana L. Christensen on 9/2/2021. STACEY BALDWIN – CONTRACT COURT REPORTER. (ASG) (Entered: 09/02/2021) |
| 09/03/2021 | <u>31</u> | REPLY TO RESPONSE to Motion by Michael Blake Defrance re <u>14</u> MOTION to Dismiss <i>Indictment Under Rule 12(b)(3)(B)(iii) and (v) for Lack of Specifity and Failure to State an Offense</i> (Donahoe, Michael) (Entered: 09/03/2021)                                                                                                                                                                                                                                                                                                                                                                                   |
| 09/03/2021 | <u>32</u> | REPLY TO RESPONSE to Motion by Michael Blake Defrance re <u>16</u> MOTION to Dismiss <i>Indictment Because Montana PFMA is Indivisible and an Unconstitutional Noncategorical Version of 18 USC 921(a)(33)(A)(ii)</i> (Donahoe, Michael) (Entered: 09/03/2021)                                                                                                                                                                                                                                                                                                                                                              |
| 09/03/2021 | <u>33</u> | Summons Returned Executed on 9/1/21 as to Michael Blake Defrance. (NOS) (Modified to correct service date.) (NOS) (Entered: 09/03/2021)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
| 09/03/2021 | <u>34</u> | MOTION in Limine for <i>pretrial determination of admissibility of certain evidence</i> by USA as to Michael Blake Defrance. (Clark, Jennifer) (Entered: 09/03/2021)                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| 09/03/2021 | <u>35</u> | BRIEF/MEMORANDUM in Support by USA as to Michael Blake Defrance re <u>34</u> MOTION in Limine for <i>pretrial determination of admissibility of certain evidence</i>                                                                                                                                                                                                                                                                                                                                                                                                                                                        |



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|            |           | (Clark, Jennifer) (Entered: 09/03/2021)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| 09/03/2021 | <u>36</u> | MOTION in Limine <i>to preclude defenses of public authority, entrapment by estoppel, and innocent intent, and Notice of Denial of Public Authority</i> by USA as to Michael Blake Defrance. (Clark, Jennifer) (Entered: 09/03/2021)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
| 09/03/2021 | <u>37</u> | BRIEF/MEMORANDUM in Support by USA as to Michael Blake Defrance re <u>36</u> MOTION in Limine <i>to preclude defenses of public authority, entrapment by estoppel, and innocent intent, and Notice of Denial of Public Authority</i> (Clark, Jennifer) (Entered: 09/03/2021)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
| 09/07/2021 | <u>38</u> | NOTICE OF SUPPLEMENTAL AUTHORITY L.R. CR 47.4 by Michael Blake Defrance re <u>32</u> Reply to Response to Motion, <u>17</u> Brief/Memorandum in Support, <u>16</u> MOTION to Dismiss <i>Indictment Because Montana PFMA is Indivisible and an Unconstitutional Noncategorical Version of 18 USC 921(a)(33)(A)(ii)</i> (Attachments: # <u>1</u> Exhibit A – United States v. Mann) (Donahoe, Michael) (Entered: 09/07/2021)                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| 09/08/2021 |           | Terminate motions deadline as to Michael Blake Defrance. (NOS) (Entered: 09/08/2021)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
| 09/13/2021 | <u>39</u> | MINUTE ENTRY for proceedings held before Judge Dana L. Christensen: Motion Hearing as to Michael Blake Defrance held on 9/13/2021 re <u>16</u> MOTION to Dismiss <i>Indictment Because Montana PFMA is Indivisible and an Unconstitutional Noncategorical Version of 18 USC 921(a)(33)(A)(ii)</i> filed by Michael Blake Defrance, <u>14</u> MOTION to Dismiss <i>Indictment Under Rule 12(b)(3)(B)(iii) and (v) for Lack of Specificity and Failure to State an Offense</i> filed by Michael Blake Defrance. Jen Clark appearing on behalf of USA, Michael Donahoe appearing with and on behalf of released defendant. Argument is made by Counsel Donahoe. AUSA Clark is heard. Matter is deemed submitted. In recess. Hearing commenced at 1:39pm and concluded at 2:16pm. (Court Reporter Stacey Baldwin) (Law Clerk: C. Lawson), (Hearing held in Missoula, MT) (ASG) (Entered: 09/13/2021) |
| 09/15/2021 | <u>40</u> | Unopposed MOTION to Continue <i>Trial and All Attendant Deadlines</i> by Michael Blake Defrance. (Attachments: # <u>1</u> Proposed Order) (Donahoe, Michael) (Entered: 09/15/2021)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
| 09/15/2021 | <u>41</u> | BRIEF/MEMORANDUM in Support by Michael Blake Defrance re <u>40</u> Unopposed MOTION to Continue <i>Trial and All Attendant Deadlines</i> (Donahoe, Michael) (Entered: 09/15/2021)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| 09/15/2021 | <u>42</u> | Order granting <u>40</u> Unopposed MOTION to Continue Trial and All Attendant Deadlines. The jury trial currently scheduled for October 4, 2021 and all associated deadlines <u>18</u> are VACATED, to be reset, if necessary, by future order. Mr. DeFrance must file his anticipated third motion to dismiss on or before September 20, 2021; any response brief must be filed on or before October 4, 2021; and any reply brief must be filed on or before October 12, 2021. Signed by Judge Dana L. Christensen on 9/15/2021. (ASG) (Entered: 09/15/2021)                                                                                                                                                                                                                                                                                                                                    |
| 09/17/2021 | <u>43</u> | Third MOTION to Dismiss <i>Superseding Indictment</i> by Michael Blake Defrance. (Donahoe, Michael) (Entered: 09/17/2021)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| 09/17/2021 | <u>44</u> | BRIEF/MEMORANDUM in Support by Michael Blake Defrance re <u>43</u> Third MOTION to Dismiss <i>Superseding Indictment</i> (Donahoe, Michael) (Entered: 09/17/2021)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| 09/17/2021 | <u>45</u> | RESPONSE to Motion by Michael Blake Defrance re <u>34</u> MOTION in Limine <i>for pretrial determination of admissibility of certain evidence</i> , <u>36</u> MOTION in Limine <i>to preclude defenses of public authority, entrapment by estoppel, and innocent intent, and Notice of Denial of Public Authority</i> (Donahoe, Michael) (Entered: 09/17/2021)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| 09/17/2021 | <u>46</u> | RESPONSE to Motion by Michael Blake Defrance re <u>36</u> MOTION in Limine <i>to preclude defenses of public authority, entrapment by estoppel, and innocent intent, and Notice of Denial of Public Authority</i> (Donahoe, Michael) (Entered: 09/17/2021)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| 09/21/2021 | <u>47</u> | MINUTE ENTRY for proceedings held before Magistrate Judge Kathleen L. DeSoto: Arraignment as to (1) Count 1, is held on 9/21/2021. AUSA Karla Painter appeared for the govt, FD John Rhodes appeared w/ defendant; Read charge, penalty, rights w/ defendant understanding the same; Defendant reviewed superseding indictment w/                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |

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|            |           | counsel prior to court and waived reading;Plea entered by Michael Blake Defrance Not Guilty on counts 1s; Defendant released with previous conditions. Govt advised of DPPA. Hearing commenced at 1:43 and concluded at 1:46 (Court Reporter FTR Gold) (USPO: D. Velasquez), (Hearing held in Missoula) (KJL) (Entered: 09/21/2021)                                                                                                                                                                                                                                                                                                                                                                                                                          |
| 09/21/2021 | <u>48</u> | TEXT ORDER – Under Criminal Rule 5(f), the government is ordered to comply with its disclosure obligations under <i>Brady v. Maryland</i> and related cases as set forth in the attachment to this Order. Failure to do so may result in sanctions. As to Michael Blake Defrance. Signed by Magistrate Judge Kathleen L. DeSoto on 9/21/2021. (KJL) (Entered: 09/21/2021)                                                                                                                                                                                                                                                                                                                                                                                    |
| 10/01/2021 | <u>50</u> | RESPONSE to Motion by USA as to Michael Blake Defrance re <u>43</u> Third MOTION to Dismiss <i>Superseding Indictment</i> (Clark, Jennifer) (Entered: 10/01/2021)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
| 10/05/2021 | <u>51</u> | Summons Returned Executed on 9/21/21 as to Michael Blake Defrance (APP) (Entered: 10/05/2021)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| 10/08/2021 | <u>52</u> | REPLY TO RESPONSE to Motion by Michael Blake Defrance re <u>43</u> Third MOTION to Dismiss <i>Superseding Indictment</i> (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B) (Donahoe, Michael) (Entered: 10/08/2021)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
| 10/08/2021 | <u>53</u> | AMENDED DOCUMENT Amendment to <u>52</u> Reply to Response to Motion to Dismiss <i>Superseding Indictment</i> (Donahoe, Michael) (Entered: 10/08/2021)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| 10/21/2021 | <u>54</u> | SEALED SECOND SUPERSEDING INDICTMENT as to Michael Blake Defrance (1) count(s) 1ss, 2ss–4ss. (APP) (Entered: 10/22/2021)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
| 10/21/2021 | <u>55</u> | Redacted Second Superseding Indictment as to Michael Blake Defrance. (APP) (Entered: 10/22/2021)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
| 10/21/2021 | <u>57</u> | Summons Issued in case as to Michael Blake Defrance: Arraignment set for 11/18/2021 at 02:00 PM in Missoula, MT before Magistrate Judge Kathleen L. DeSoto. (APP) (Entered: 10/22/2021)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| 10/22/2021 | <u>56</u> | Criminal Cover Sheet filed by USA as to Michael Blake Defrance. (APP) (Entered: 10/22/2021)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
| 10/29/2021 | <u>58</u> | Summons Returned Executed on 10/26/21 as to Michael Blake Defrance. (NOS) (Attachment(s): # <u>1</u> Summons returned) (NOS) (Entered: 10/29/2021)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| 11/18/2021 | <u>59</u> | MINUTE ENTRY for proceedings held before Magistrate Judge Kathleen L. DeSoto: Arraignment as to Michael Blake Defrance (1) Count 1ss,2ss–4ss held on 11/18/2021; AUSA Jen Clark appeared for the govt, FD Michael Donahoe appeared w/ released defendant; Read charges, penalty, rights w/ defendant understanding the same; Defendant reviewed superseding indictment w/ counsel prior to court and waived reading; Plea entered by Michael Blake Defrance (1) Not Guilty on counts 1ss,2ss–4ss; No scheduling dates given; The Govt advised of the DPPA; Defendant released with conditions; Hearing commenced at 2:08 p.m. and concluded at 2:14 p.m. (Court Reporter FTR Gold) (USPO: M. Henkel), (Hearing held in Missoula) (APP) (Entered: 11/18/2021) |
| 11/18/2021 | <u>60</u> | TEXT ORDER – Under Criminal Rule 5(f), the government is ordered to comply with its disclosure obligations under <i>Brady v. Maryland</i> and related cases as set forth in the attachment to this Order. Failure to do so may result in sanctions. As to Michael Blake Defrance. Signed by Magistrate Judge Kathleen L. DeSoto on 11/18/2021. (APP) (Entered: 11/18/2021)                                                                                                                                                                                                                                                                                                                                                                                   |
| 11/19/2021 | <u>62</u> | Unopposed MOTION TO FILE ADDITIONAL PRETRIAL MOTIONS AND REQUEST FOR DUE DATE OF DECEMBER 20, 2021 by Michael Blake Defrance. (Donahoe, Michael) (Entered: 11/19/2021)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| 11/19/2021 | <u>63</u> | Sealed Document Unredacted re: <u>62</u> Unopposed MOTION TO FILE ADDITIONAL PRETRIAL MOTIONS AND REQUEST FOR DUE DATE OF DECEMBER 20, 2021 by Michael Blake Defrance (Donahoe, Michael) (Entered: 11/19/2021)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
| 11/22/2021 | <u>64</u> | ORDER granting <u>62</u> Motion as to Michael Blake Defrance (1). Mr. DeFrance may file any pretrial motions on or before December 20, 2021. IT IS FURTHER ORDERED that Mr. DeFrance shall file a response to this Order indicating whether he intends to renew his motions to dismiss the Superseding Indictment (Docs. 14, 16, 43) on or                                                                                                                                                                                                                                                                                                                                                                                                                   |

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|            |           | before November 29, 2021. IT IS FURTHER ORDERED that all time from September 15, 2021 to the disposition of the currently pending and anticipated pretrial motions is hereby excluded from any Speedy Trial Act calculations in the above-captioned matter pursuant to 18 U.S.C. § 3161(h)(1)(D). (See Doc. 42.) Signed by Judge Dana L. Christensen on 11/22/2021. (ASG) (Entered: 11/22/2021)                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| 11/24/2021 | <u>65</u> | BRIEF/RESPONSE TO ORDER by Michael Blake Defrance (Donahoe, Michael) (Entered: 11/24/2021)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| 12/15/2021 | <u>66</u> | TRANSCRIPT ORDER FORM for <i>Initial Appearances on Superseding Indictment and Second Superseding Indictment</i> for proceedings held on 9/21/2021 and 11/18/2021 before Judge Kathleen L. DeSoto. FTR transcript request. Type of transcript: 3-Day Transcript due by 12/18/2021. (Donahoe, Michael) (Entered: 12/15/2021)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
| 12/15/2021 | <u>67</u> | TRANSCRIPT of Arraignment on Superseding Indictment as to Michael Blake Defrance held on 9-21-2021 before Judge Kathleen L. DeSoto. Transcript may be viewed at the court public terminal or purchased through the transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER, the clerk's office, or the transcriber. NOTICE: A NOTICE OF INTENT TO REQUEST REDACTION MUST BE FILED WITHIN 7 DAYS OF THIS FILING. Contact court reporter JoAnn Jett Corson, 406-698-9965, joannjettcorson@gmail.com. For further information, please see the Transcript Redaction Procedure and Schedule on the Court Reporters page of our website. Redaction Request due 1/5/2022. Redacted Transcript Deadline set for 1/18/2022. Release of Transcript Restriction set for 3/15/2022. (JJC) (Entered: 12/15/2021)       |
| 12/15/2021 | <u>68</u> | TRANSCRIPT of Arraignment on Second Superseding Indictment as to Michael Blake Defrance held on 11-18-21 before Judge Kathleen L. DeSoto. Transcript may be viewed at the court public terminal or purchased through the transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER, the clerk's office, or the transcriber. NOTICE: A NOTICE OF INTENT TO REQUEST REDACTION MUST BE FILED WITHIN 7 DAYS OF THIS FILING. Contact court reporter JoAnn Jett Corson, 406-698-9965, joannjettcorson@gmail.com. For further information, please see the Transcript Redaction Procedure and Schedule on the Court Reporters page of our website. Redaction Request due 1/5/2022. Redacted Transcript Deadline set for 1/18/2022. Release of Transcript Restriction set for 3/15/2022. (JJC) (Entered: 12/15/2021) |
| 12/16/2021 |           | Terminate transcript deadlines as to Doc. 66 as filed. (NOS) (Entered: 12/16/2021)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| 12/20/2021 | <u>69</u> | MOTION to Dismiss <i>Second Superseding Indictment</i> by Michael Blake Defrance. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B) (Donahoe, Michael) (Entered: 12/20/2021)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| 12/20/2021 | <u>70</u> | BRIEF/MEMORANDUM in Support by Michael Blake Defrance re <u>69</u> MOTION to Dismiss <i>Second Superseding Indictment</i> (Donahoe, Michael) (Entered: 12/20/2021)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| 12/29/2021 | <u>71</u> | ORDER denying <u>43</u> Motion to Dismiss as to Michael Blake Defrance (1); denying <u>14</u> Motion to Dismiss as to Michael Blake Defrance (1); denying <u>16</u> Motion to Dismiss as to Michael Blake Defrance (1). Signed by Judge Dana L. Christensen on 12/29/2021. (APP) (Entered: 12/29/2021)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| 01/03/2022 | <u>72</u> | RESPONSE to Motion by USA as to Michael Blake Defrance re <u>69</u> MOTION to Dismiss <i>Second Superseding Indictment</i> (Attachments: # <u>1</u> Exhibit Exhibit 1, # <u>2</u> Exhibit Exhibit 2, # <u>3</u> Exhibit Exhibit 3) (Clark, Jennifer) (Entered: 01/03/2022)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| 01/07/2022 | <u>73</u> | Unopposed MOTION TO FILE <i>OVERSIZED REPLY BRIEF</i> by Michael Blake Defrance. (Attachments: # <u>1</u> Proposed Reply Brief, # <u>2</u> Proposed Order) (Donahoe, Michael) (Entered: 01/07/2022)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| 01/10/2022 |           | Terminate Deadlines as to Michael Blake Defrance: Redaction request deadlines terminated. (SGN) (Entered: 01/10/2022)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
| 01/10/2022 | <u>74</u> | REPLY TO RESPONSE to Motion by Michael Blake Defrance re <u>69</u> MOTION to Dismiss <i>Second Superseding Indictment</i> (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B, # <u>3</u> Exhibit C) (Donahoe, Michael) (Entered: 01/10/2022)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |

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| 01/10/2022 | <u>75</u> | MOTION to Withdraw Document <u>73</u> Unopposed MOTION <i>TO FILE OVERSIZED REPLY BRIEF</i> by Michael Blake Defrance. (Donahoe, Michael) (Entered: 01/10/2022)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| 01/11/2022 | <u>76</u> | Order Setting as to Michael Blake Defrance: Motion Hearing set for 2/23/2022 at 01:30 PM in Missoula, MT before Judge Dana L. Christensen. SEE ORDER FOR FURTHER RULINGS/DETAILS. Signed by Judge Dana L. Christensen on 1/11/2022. (ASG) (Entered: 01/11/2022)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| 01/18/2022 | <u>77</u> | BRIEF/RESPONSE TO ORDER by USA as to Michael Blake Defrance (Clark, Jennifer) (Entered: 01/18/2022)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
| 01/19/2022 |           | Terminate Deadlines as to Michael Blake Defrance: Redacted transcript deadlines terminated. (SGN) (Entered: 01/19/2022)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| 01/25/2022 | <u>78</u> | RESPONSE to Motion by Michael Blake Defrance re <u>36</u> MOTION in Limine <i>to preclude defenses of public authority, entrapment by estoppel, and innocent intent, and Notice of Denial of Public Authority – SUPPLEMENTAL</i> (Donahoe, Michael) (Entered: 01/25/2022)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| 01/25/2022 | <u>79</u> | Sealed Document Unredacted <i>Transcript of Recorded Police Interview</i> re: <u>78</u> Response to Motion, by Michael Blake Defrance (Donahoe, Michael) (Entered: 01/25/2022)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| 02/01/2022 | <u>80</u> | BRIEF/RESPONSE TO ORDER by USA as to Michael Blake Defrance (Clark, Jennifer) (Entered: 02/01/2022)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
| 02/22/2022 | <u>81</u> | NOTICE of <i>Supplemental Authority L.R. CR 47.4</i> by Michael Blake Defrance (Attachments: # <u>1</u> United States v. LaDeau) (Donahoe, Michael) (Entered: 02/22/2022)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| 02/23/2022 | <u>82</u> | MINUTE ENTRY for proceedings held before Judge Dana L. Christensen: Motion Hearing as to Michael Blake Defrance held on 2/23/2022 re <u>34</u> MOTION in Limine <i>for pretrial determination of admissibility of certain evidence</i> filed by USA, <u>69</u> MOTION to Dismiss <i>Second Superseding Indictment</i> filed by Michael Blake Defrance, <u>36</u> MOTION in Limine <i>to preclude defenses of public authority, entrapment by estoppel, and innocent intent, and Notice of Denial of Public Authority</i> filed by USA. Michael Donahoe and Tony Gallagher appearing with and on behalf of released Defendant; AUSA Jen Clark appearing on behalf of Government. Pending motions are argued by both sides. Motions are deemed fully submitted by Court. In recess. Hearing commenced at 1:32pm and concluded at 3:37pm (Court Reporter JoAnn Corson) (Government Exhibits Admitted: 1 and 2 (CM/ECF documents 63 and 69-2)), (Law Clerk: C. Lawson), (Hearing held in Missoula, MT) (ASG) (Entered: 02/23/2022) |
| 02/24/2022 | <u>83</u> | TRANSCRIPT ORDER FORM <i>FOR MOTION HEARING</i> for proceedings held on 02/23/2022 before Judge Dana L. Christensen. Court reporter JoAnn Jett Corson. Type of transcript: 30-Day Transcript due by 3/25/2022. (Donahoe, Michael) (Entered: 02/24/2022)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| 03/02/2022 | <u>84</u> | NOTICE OF <i>SUPPLEMENTAL AUTHORITY L.R. CR 47.4</i> by Michael Blake Defrance (Attachments: # <u>1</u> Drake Law Review) (Donahoe, Michael) (Entered: 03/02/2022)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
| 03/04/2022 | <u>85</u> | TRANSCRIPT of Hearing on Motions as to Michael Blake Defrance held on 2-23-2022 before Judge Dana L. Christensen. Transcript may be viewed at the court public terminal or purchased through the court reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER, the clerk's office, or the court reporter. NOTICE: A NOTICE OF INTENT TO REQUEST REDACTION MUST BE FILED WITHIN 7 DAYS OF THIS FILING. Contact court reporter JoAnn Jett Corson, 406-698-9965, joannjettcorson@gmail.com. For further information, please see the Transcript Redaction Procedure and Schedule on the Court Reporters page of our website. Redaction Request due 3/25/2022. Redacted Transcript Deadline set for 4/4/2022. Release of Transcript Restriction set for 6/2/2022. (JJC) (Entered: 03/04/2022)                                                                                                                                                                         |
| 03/08/2022 | <u>86</u> | Unopposed MOTION <i>TO SET A BENCH TRIAL</i> by Michael Blake Defrance. (Attachments: # <u>1</u> Proposed Order) (Donahoe, Michael) (Entered: 03/08/2022)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |

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| 03/08/2022 | <u>87</u>  | WAIVER of Right to Trial by Jury by Michael Blake Defrance (Donahoe, Michael) (Entered: 03/08/2022)                                                                                                                                                                                                                           |
| 03/08/2022 | <u>88</u>  | ORDER as to Michael Blake Defrance: the United States shall file a response to this Order indicating whether it opposes Mr. DeFrance's motion to set a bench trial by 5:00 p.m. on March 9, 2022. Signed by Judge Dana L. Christensen on 3/8/2022. (ASG) (Entered: 03/08/2022)                                                |
| 03/08/2022 | <u>89</u>  | BRIEF/RESPONSE TO ORDER by USA as to Michael Blake Defrance (Clark, Jennifer) (Entered: 03/08/2022)                                                                                                                                                                                                                           |
| 03/08/2022 | <u>90</u>  | ORDER granting <u>86</u> Motion as to Michael Blake Defrance (1). This matter will be set for a bench trial at a date and time to be determined after the Court rules on all pending motions. Signed by Judge Dana L. Christensen on 3/8/2022. (ASG) (Entered: 03/08/2022)                                                    |
| 03/17/2022 |            | Terminate Deadlines as to Michael Blake Defrance: Release of transcript restriction deadlines terminated. (SGN) (Entered: 03/17/2022)                                                                                                                                                                                         |
| 03/30/2022 |            | Terminate Deadlines as to Michael Blake Defrance: Transcript and redaction request deadlines terminated. (SGN) (Entered: 03/30/2022)                                                                                                                                                                                          |
| 04/12/2022 |            | Terminate Deadlines as to Michael Blake Defrance: Redacted transcript deadline terminated. (SGN) (Entered: 04/12/2022)                                                                                                                                                                                                        |
| 04/15/2022 | <u>91</u>  | Order Ruling on Pending Motions and Setting as to Michael Blake Defrance: Plea Agreement due by 5/26/2022. Bench Trial set for 6/6/2022 at 09:00 AM in Missoula, MT before Judge Dana L. Christensen. Signed by Judge Dana L. Christensen on 4/15/2022. (ASG) (Entered: 04/15/2022)                                           |
| 05/13/2022 | <u>92</u>  | (Ex Parte) EXPARTE MOTION <i>FOR ISSUANCE OF SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS IN A CRIMINAL CASE</i> by Michael Blake Defrance. (Attachments: # <u>1</u> Proposed Order, # <u>2</u> Subpoena to Produce Documents, Information, or Objects in a Criminal Case) (Donahoe, Michael) (Entered: 05/13/2022) |
| 05/17/2022 | <u>93</u>  | ORDER granting <u>92</u> Exparte Motion as to Michael Blake Defrance (1). Signed by Judge Dana L. Christensen on 5/17/2022. (Attachments: # <u>1</u> Issued Subpoena) (SGN) (Entered: 05/17/2022)                                                                                                                             |
| 05/26/2022 | <u>94</u>  | (Ex Parte) EXPARTE MOTION <i>for Issuance of Subpoena</i> by Michael Blake Defrance. (Attachments: # <u>1</u> Stephen Feuerstein Subpoena) (Donahoe, Michael) (Entered: 05/26/2022)                                                                                                                                           |
| 05/26/2022 | <u>95</u>  | ORDER granting <u>94</u> Exparte Motion as to Michael Blake Defrance (1). Signed by Judge Dana L. Christensen on 5/26/2022. (Attachments: # <u>1</u> Issued Subpoena) (SGN) (Entered: 05/26/2022)                                                                                                                             |
| 05/27/2022 | <u>96</u>  | Unopposed MOTION to Continue <i>Trial and Trial Brief Deadline and Set Scheduling Conference</i> by Michael Blake Defrance. (Attachments: # <u>1</u> Text of Proposed Order Setting Scheduling Conference) (Donahoe, Michael) (Entered: 05/27/2022)                                                                           |
| 05/27/2022 | <u>97</u>  | BRIEF/MEMORANDUM in Support by Michael Blake Defrance re <u>96</u> Unopposed MOTION to Continue <i>Trial and Trial Brief Deadline and Set Scheduling Conference</i> (Donahoe, Michael) (Entered: 05/27/2022)                                                                                                                  |
| 05/27/2022 | <u>98</u>  | Order Setting as to Michael Blake Defrance: the Court shall hold a Telephonic Conference re: <u>96</u> Motion to Continue on 5/31/2022 at 01:30 PM. See Order for dial-in information. Signed by Judge Dana L. Christensen on 5/27/2022. (SGN) (Entered: 05/27/2022)                                                          |
| 05/31/2022 | <u>99</u>  | MINUTE ENTRY for proceedings held before Judge Dana L. Christensen: Telephone Conference as to Michael Blake Defrance held on 5/31/2022. (Court Reporter JoAnn Corson) (Law Clerk: C. Lawson), (Hearing held in Missoula, MT) (ASG) (Entered: 05/31/2022)                                                                     |
| 05/31/2022 | <u>100</u> | ORDER GRANTING <u>96</u> Unopposed MOTION to Continue <i>Trial and Trial Brief Deadline and Set Scheduling Conference</i> filed by Michael Blake Defrance. The trial scheduled for June 6, 2022 is VACATED and RESET for August 15, 2022 at 09:00                                                                             |

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|            |            | AM in Missoula, MT before Judge Dana L. Christensen. The trial briefs deadline is VACATED and RESET for August 9, 2022. The Court's previous scheduling order Doc. 18 otherwise remains in full force and effect. Signed by Judge Dana L. Christensen on 5/31/2022. (SGN) (Entered: 05/31/2022)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| 05/31/2022 |            | Set/Reset Hearings as to Michael Blake Defrance: Bench Trial set for 8/15/2022 at 09:00 AM in Missoula, MT before Judge Dana L. Christensen. (SGN) (Entered: 05/31/2022)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| 06/01/2022 | <u>101</u> | WAIVER of Speedy Trial by Michael Blake Defrance (Donahoe, Michael) (Entered: 06/01/2022)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
| 06/10/2022 |            | Terminate Deadlines and Hearings as to Michael Blake Defrance: Release of transcript restriction deadline terminated. (SGN) (Entered: 06/10/2022)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| 06/15/2022 | <u>102</u> | (Ex Parte) Ex Parte MOTION FOR GUARDIAN AD LITEM, HEARING, AND/OR ANY OTHER APPROPRIATE RELIEF THE COURT DEEMS NECESSARY by Michael Blake Defrance. (Attachments: # <u>1</u> EXHIBIT A, # <u>2</u> EXHIBIT B, # <u>3</u> EXHIBIT C) (Donahoe, Michael) Modified on 6/17/2022 to make this an ex parte event (APP). (Entered: 06/15/2022)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| 06/15/2022 | <u>103</u> | (Ex Parte) BRIEF/MEMORANDUM in Support by Michael Blake Defrance re <u>102</u> Ex Parte MOTION FOR GUARDIAN AD LITEM, HEARING, AND/OR ANY OTHER APPROPRIATE RELIEF THE COURT DEEMS NECESSARY (Donahoe, Michael) Modified on 6/17/2022 to make this an ex parte entry (APP). (Entered: 06/15/2022)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| 07/01/2022 | <u>105</u> | MOTION for Leave to File MOTION FOR RECONSIDERATION L.R.7.3 by Michael Blake Defrance. (Donahoe, Michael) (Entered: 07/01/2022)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| 07/01/2022 | <u>106</u> | AMENDED DOCUMENT Amendment to <u>105</u> MOTION for Leave to File MOTION FOR RECONSIDERATION L.R.7.3 ADDENDUM (Donahoe, Michael) (Entered: 07/01/2022)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
| 07/06/2022 | <u>107</u> | (Ex Parte) Exparte Response by Michael Blake Defrance – EX PARTE REPLY BRIEF TO MOTION FOR GUARDIAN AD LITEM (Donahoe, Michael) (Entered: 07/06/2022)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| 07/08/2022 | <u>108</u> | ORDER denying <u>102</u> MOTION filed by Michael Blake Defrance. Signed by Judge Dana L. Christensen on 7/8/2022. (ASG) (Entered: 07/08/2022)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| 07/12/2022 | <u>109</u> | NOTICE OF ATTORNEY APPEARANCE Timothy J. Racicot appearing for USA. (co-counsel) (Racicot, Timothy) (Entered: 07/12/2022)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
| 07/21/2022 | <u>110</u> | (Ex Parte) Ex Parte MOTION FOR ISSUANCE OF SUBPOENAS PURSUANT TO RULE 17 FED. R. CRIM. P. WITH INCORPORATED AUTHORITY by Michael Blake Defrance. (Attachments: # <u>1</u> Subpoena for Shane Bartschi, # <u>2</u> Subpoena for Christian Woody, # <u>3</u> Subpoena for Connie Walker, # <u>4</u> Subpoena for Dana Pickles, # <u>5</u> Subpoena for Danielle Matt/Garcia, # <u>6</u> Subpoena for David Velarde Jr., # <u>7</u> Subpoena for Detective Guy Baker, # <u>8</u> Subpoena for Jennifer DeFrance, # <u>9</u> Subpoena for Jennifer Morigeau, # <u>10</u> Subpoena for Robyn Francis Largent, # <u>11</u> Subpoena for Shawn DeFrance, # <u>12</u> Subpoena for Stephen Feuerstein, # <u>13</u> Subpoena for Claudette Bird, # <u>14</u> Subpoena for Valenda Morigeau, # <u>15</u> Subpoena for Vicki Velarde) (Donahoe, Michael) Modified on 7/26/2022 to make entry ex parte (APP). (Entered: 07/21/2022) |
| 07/26/2022 | <u>111</u> | ORDER denying <u>105</u> Motion insofar as it seeks pretrial briefing, argument, or other relief, and the Court will RESERVE RULING as to the legal issues raised in the motion. Signed by Judge Dana L. Christensen on 7/26/2022. (ASG) (Entered: 07/26/2022)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| 07/26/2022 | <u>112</u> | ORDER Granting <u>110</u> Ex Parte MOTION FOR ISSUANCE OF SUBPOENAS PURSUANT TO RULE 17 FED. R. CRIM. P. WITH INCORPORATED AUTHORITY filed by Michael Blake Defrance. Signed by Judge Dana L. Christensen on 7/26/2022. (Attachments: # <u>1</u> Subpoena for Shane Bartschi, # <u>2</u> Subpoena for Christian Woody, # <u>3</u> Subpoena for Connie Walker, # <u>4</u> Subpoena for Dana Pickles, # <u>5</u> Subpoena for Danielle Matt/Garcia, # <u>6</u> Subpoena for David Velarde, Jr., # <u>7</u> Subpoena for Detective Guy Baker, # <u>8</u> Subpoena for Jennifer DeFrance, # <u>9</u> Subpoena for Jennifer Morigeau, # <u>10</u> Subpoena for Robyn Farncis Largent, # <u>11</u> Subpoena for Shawn DeFrance, # <u>12</u>                                                                                                                                                                                   |

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|            |            | Subpoena for Stephen Feuerstein, # <u>13</u> Subpoena for Claudette Bird, # <u>14</u> Subpoena for Valenda Morigeau, # <u>15</u> Subpoena for Vicki Velarde) (SGN) (Entered: 07/26/2022)                                                                                                                                              |
| 07/28/2022 | <u>113</u> | (Ex Parte) EXPARTE MOTION <i>FOR ISSUANCE OF SUBPOENA PURSUANT TO RULE 17 FED. R. CRIM. P. WITH INCORPORATED AUTHORITY</i> by Michael Blake Defrance. (Attachments: # <u>1</u> Subpoena for Colton Monarco) (Donahoe, Michael) (Entered: 07/28/2022)                                                                                  |
| 07/28/2022 | <u>114</u> | ORDER granting <u>113</u> Exparte Motion for Issuance of Subpoena as to Michael Blake Defrance (1). Signed by Judge Dana L. Christensen on 7/28/2022. (Attachments: # <u>1</u> Issued Subpoena for Colton Monarco) (SGN) (Entered: 07/28/2022)                                                                                        |
| 08/02/2022 | <u>115</u> | MOTION to Vacate <i>TRIAL DATE TO ALLOW FOR APPEAL OR IN THE ALTERNATIVE WRIT OF MANDAMUS APPLICATION TO BE FILED IN THE NINTH CIRCUIT</i> by Michael Blake Defrance. (Donahoe, Michael) (Entered: 08/02/2022)                                                                                                                        |
| 08/02/2022 | <u>116</u> | BRIEF/MEMORANDUM in Support by Michael Blake Defrance re <u>115</u> MOTION to Vacate <i>TRIAL DATE TO ALLOW FOR APPEAL OR IN THE ALTERNATIVE WRIT OF MANDAMUS APPLICATION TO BE FILED IN THE NINTH CIRCUIT</i> (Donahoe, Michael) (Entered: 08/02/2022)                                                                               |
| 08/03/2022 | <u>117</u> | ORDER denying <u>115</u> Motion to Vacate as to Michael Blake Defrance. Signed by Judge Dana L. Christensen on 8/3/2022. (ASG) (Entered: 08/03/2022)                                                                                                                                                                                  |
| 08/04/2022 | <u>118</u> | NOTICE OF APPEAL by Michael Blake Defrance re <u>117</u> Order on Motion to Vacate, <u>111</u> Order on Motion for Leave to File Filing fee \$ 505, receipt number FDOM. (Donahoe, Michael) (Entered: 08/04/2022)                                                                                                                     |
| 08/04/2022 | <u>119</u> | USCA Case Number 22-30131 and Time Schedule Order as to Michael Blake Defrance for <u>118</u> Notice of Appeal – Order filed by Michael Blake Defrance. (SGN) (Entered: 08/04/2022)                                                                                                                                                   |
| 08/05/2022 | <u>120</u> | MOTION Maintain Trial Date <i>OPPOSED</i> by USA as to Michael Blake Defrance. (Clark, Jennifer) (Entered: 08/05/2022)                                                                                                                                                                                                                |
| 08/05/2022 | <u>121</u> | BRIEF/MEMORANDUM in Support by USA as to Michael Blake Defrance re <u>120</u> MOTION Maintain Trial Date <i>OPPOSED</i> (Clark, Jennifer) (Entered: 08/05/2022)                                                                                                                                                                       |
| 08/05/2022 | <u>122</u> | NOTICE OF INTENT AND UNOPPOSED REQUEST FOR NO RULING UNTIL RESPONSE IS FILED by Michael Blake Defrance (Donahoe, Michael) (Entered: 08/05/2022)                                                                                                                                                                                       |
| 08/05/2022 | <u>123</u> | TRIAL BRIEF by Michael Blake Defrance (Donahoe, Michael) (Entered: 08/05/2022)                                                                                                                                                                                                                                                        |
| 08/08/2022 | <u>124</u> | (Ex Parte) EXPARTE MOTION <i>to Amend Orders Granting Subpoenas</i> by Michael Blake Defrance. (Attachments: # <u>1</u> Text of Proposed Order Granting Motion for Amended Orders, # <u>2</u> Text of Proposed Order Amending Doc. 112, # <u>3</u> Text of Proposed Order Amending Doc. 114) (Donahoe, Michael) (Entered: 08/08/2022) |
| 08/09/2022 | <u>125</u> | RESPONSE to Motion by Michael Blake Defrance re <u>120</u> MOTION Maintain Trial Date <i>OPPOSED</i> (Donahoe, Michael) (Entered: 08/09/2022)                                                                                                                                                                                         |
| 08/09/2022 | <u>126</u> | Unopposed MOTION <i>for Leave to Allow Trial Witnesses to Appear Via Video</i> by Michael Blake Defrance. (Attachments: # <u>1</u> Text of Proposed Order) (Donahoe, Michael) (Entered: 08/09/2022)                                                                                                                                   |
| 08/09/2022 | <u>127</u> | ORDER granting <u>124</u> Exparte Motion to Amend Orders Granting Subpoenas as to Michael Blake Defrance (1). Signed by Judge Dana L. Christensen on 8/9/2022. (SGN) (Entered: 08/09/2022)                                                                                                                                            |
| 08/09/2022 | <u>128</u> | TRIAL BRIEF by USA as to Michael Blake Defrance (Clark, Jennifer) (Entered: 08/09/2022)                                                                                                                                                                                                                                               |
| 08/10/2022 | <u>129</u> | Order Vacating the trial set for August 15, 2022, and all associated pending deadlines or hearings, to be reset, if necessary, by future order. Signed by Judge Dana L. Christensen on 8/10/2022. (APP) (Entered: 08/10/2022)                                                                                                         |

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| 08/15/2022 | <u>130</u> | TRANSCRIPT ORDER FORM <i>Motion Hearing</i> for proceedings held on 9/13/2021 before Judge Dana L. Christensen. Court reporter Stacy Baldwin. Type of transcript: 30–Day. Transcript due by 9/14/2022. (Donahoe, Michael) (Entered: 08/15/2022)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| 08/29/2022 | <u>131</u> | TRANSCRIPT ORDER FORM <i>Motions Hearing</i> by USA for proceedings held on 9/13/2021 before Judge Christensen. Court reporter Stacy Baldwin. Type of transcript: 30–Day. Transcript due by 9/28/2022. (Clark, Jennifer) (Entered: 08/29/2022)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| 09/14/2022 | <u>132</u> | TRANSCRIPT of Motion Hearing as to Michael Blake Defrance held on 09–13–2021 before Judge Christensen. Transcript may be viewed at the court public terminal or purchased through the court reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER, the clerks office, or the court reporter. NOTICE: A NOTICE OF INTENT TO REQUEST REDACTION MUST BE FILED WITHIN 7 DAYS OF THIS FILING. Contact court reporter Stacy Baldwin, 406–879–8084. For further information, please see the Transcript Redaction Procedure and Schedule on the Court Reporters page of our website. Redaction Request due 10/5/2022. Redacted Transcript Deadline set for 10/17/2022. Release of Transcript Restriction set for 12/13/2022. (YMH) (Entered: 09/14/2022)                                                      |
| 10/18/2022 | <u>133</u> | Unopposed MOTION to <i>Permit Conventional Filing of Recordings and Transcripts Under Seal</i> by Michael Blake Defrance. (Attachments: # <u>1</u> Proposed Order) (Donahoe, Michael) Modified on 10/19/2022 USB with Exhibits uploaded to records drive. USB delivered to chambers.(SGN). (Entered: 10/18/2022)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
| 10/19/2022 | <u>134</u> | ORDER granting <u>133</u> Motion as to Michael Blake Defrance (1). Mr. DeFrance may conventionally file the recordings and transcripts under seal and copies of the same shall be provided to government counsel. Signed by Judge Dana L. Christensen on 10/19/2022. (ASG) (Entered: 10/19/2022)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
| 02/16/2023 | <u>135</u> | NOTICE OF DISPOSITIVE ORDER BY THE NINTH CIRCUIT ON APPEAL AND UNOPPOSED MOTION FOR SCHEDULING CONFERENCE TO SET TRIAL DATE by Michael Blake Defrance (Attachments: # <u>1</u> Ninth Circuit Order Dismissing Appeal, # <u>2</u> Proposed Order Setting Scheduling Confrence) (Donahoe, Michael) (Entered: 02/16/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
| 02/16/2023 | <u>136</u> | Order Setting as to Michael Blake Defrance: Telephonic Scheduling Conference set for 2/22/2023 at 01:30 PM in Missoula, MT before Judge Dana L. Christensen. Signed by Judge Dana L. Christensen on 2/16/2023. (ASG) (Entered: 02/16/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| 02/16/2023 | <u>137</u> | ORDER of USCA as to Michael Blake Defrance re <u>118</u> Notice of Appeal – Dismissed (KJL) (Entered: 02/16/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| 02/22/2023 |            | MINUTE ENTRY for proceedings held before Judge Dana L. Christensen: Telephonic Scheduling Conference as to Michael Blake Defrance held on 2/22/2023. (Court Reporter JoAnn Corson) (Law Clerk: C. Lawson), (Hearing held in Missoula, MT) (ASG) (Entered: 02/22/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| 02/22/2023 | <u>138</u> | Order Setting as to Michael Blake Defrance: Bench Trial set for 4/26/2023 at 09:00 AM in Missoula, MT before Judge Dana L. Christensen. IT IS FURTHER ORDERED that the trial briefs deadline is VACATED and RESET for April 21, 2023.The Court's previous scheduling order <u>18</u> otherwise remains in full force and effect with the exception of paragraphs 13, 14, 1620, and 24, which concern jury trial matters. Signed by Judge Dana L. Christensen on 2/22/2023. (ASG) (Entered: 02/22/2023)                                                                                                                                                                                                                                                                                                                                                               |
| 02/23/2023 | <u>139</u> | WAIVER of Speedy Trial by Michael Blake Defrance (Donahoe, Michael) (Entered: 02/23/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
| 02/24/2023 | <u>140</u> | (Ex Parte) EXPARTE MOTION FOR ISSUANCE OF SUBPOENAS PURSUANT TO RULE 17 FED. R. CRIM. P. WITH INCORPORATED AUTHORITY by Michael Blake Defrance. (Attachments: # <u>1</u> Bartschi Subpoena, # <u>2</u> Bird Supoena, # <u>3</u> Largent Subpoena, # <u>4</u> Brown Subpoena, # <u>5</u> Walker Subpoena, # <u>6</u> Barker Subpoena, # <u>7</u> Feuerstein Subpoena, # <u>8</u> Pickles Subpoena, # <u>9</u> J. Morigeau Subpoena, # <u>10</u> V. Morigeau Subpoena, # <u>11</u> Matt/Garcia Subpoena, # <u>12</u> V. Velarde Subpoena, # <u>13</u> D. Velarde Subpoena, # <u>14</u> Woody Subpoena, # <u>15</u> Monarco Subpoena, # <u>16</u> S. DeFrance Subpoena, # <u>17</u> J. DeFrance Subpoena, # <u>18</u> Baker Subpoena, # <u>19</u> Strine Subpoena, # <u>20</u> Krutilla Subpoena, # <u>21</u> Dryden Subpoena) (Donahoe, Michael) (Entered: 02/24/2023) |



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| 02/27/2023 | <u>141</u> | ORDER granting <u>140</u> Exparte Motion for Issuance of Subpoenas as to Michael Blake DeFrance (1). Signed by Judge Dana L. Christensen on 2/27/2023. (Attachments: # <u>1</u> Subpoena Bartschi, # <u>2</u> Subpoena Bird, # <u>3</u> Subpoena Brown, # <u>4</u> Subpoena Walker, # <u>5</u> Subpoena Largent, # <u>6</u> Subpoena Barker, # <u>7</u> Subpoena Feuerstein, # <u>8</u> Subpoena Pickles, # <u>9</u> Subpoena J. Morigeau, # <u>10</u> Subpoena V. Morigeau, # <u>11</u> Subpoena Matt, # <u>12</u> Subpoena V. Velarde, # <u>13</u> Subpoena D. Velarde, # <u>14</u> Subpoena Woody, # <u>15</u> Subpoena Monarco, # <u>16</u> Subpoena S. DeFrance, # <u>17</u> Subpoena J. DeFrance, # <u>18</u> Subpoena Baker, # <u>19</u> Subpoena Strine, # <u>20</u> Subpoena Krutilla, # <u>21</u> Subpoena Dryden) (SGN) (Entered: 02/27/2023) |
| 03/01/2023 | <u>142</u> | NOTICE OF FILING PETITION FOR WRIT OF CERTIORARI IN THE UNITED STATES SUPREME COURT by Michael Blake DeFrance (Attachments: # <u>1</u> Exhibit A – Petition for Writ of Certiorari, # <u>2</u> Exhibit B – Letter to Solicitor General) (Donahoe, Michael) (Entered: 03/01/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| 03/06/2023 | <u>143</u> | (Ex Parte) EXPARTE MOTION by Michael Blake DeFrance. (Donahoe, Michael) (Entered: 03/06/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
| 03/06/2023 | <u>144</u> | ORDER granting <u>143</u> Exparte Motion as to Michael Blake DeFrance (1). Signed by Judge Dana L. Christensen on 3/6/2023. Copy to USMS. (ASG) (Entered: 03/06/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| 03/07/2023 | <u>145</u> | Unopposed MOTION for Deposition to Preserve Testimony for Trial by USA as to Michael Blake DeFrance. (Attachments: # <u>1</u> Brief in Support of Motion, # <u>2</u> Text of Proposed Order) (Clark, Jennifer) (Entered: 03/07/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
| 03/07/2023 | <u>146</u> | MOTION to Withdraw Document <u>145</u> Unopposed MOTION for Deposition to Preserve Testimony for Trial by USA as to Michael Blake DeFrance. (Clark, Jennifer) (Entered: 03/07/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| 03/07/2023 | <u>147</u> | Unopposed MOTION for Deposition to Preserve Trial Testimony by USA as to Michael Blake DeFrance. (Attachments: # <u>1</u> Brief in Support of Motion, # <u>2</u> Text of Proposed Order) (Clark, Jennifer) (Entered: 03/07/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| 03/07/2023 | <u>148</u> | ORDER granting <u>147</u> United States' Motion for Deposition to Preserve Testimony. Signed by Judge Dana L. Christensen on 3/7/2023. (ASG) (Entered: 03/07/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| 03/08/2023 | <u>149</u> | Document received from U.S. Supreme Court as to Michael Blake DeFrance: The petition for a writ of certiorari in the above entitle case was filed on March 1, 2023 and placed on the docket March 7, 2023 as No. 22–6956. (SGN) (Entered: 03/08/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| 03/17/2023 | <u>150</u> | MANDATE of USCA as to Michael Blake DeFrance re <u>118</u> Notice of Appeal – Order. The judgment of this Court, entered February 15, 2023, takes effect this date. (TAG) (Entered: 03/17/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| 03/17/2023 | <u>151</u> | ORDER of USCA as to Michael Blake DeFrance re <u>118</u> Notice of Appeal – Order. Appellant's unopposed motion to stay issuance of the mandate is denied. (SGN) (Entered: 03/20/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| 03/22/2023 | <u>152</u> | Ex Parte Return of Service of Subpoena in case as to Michael Blake DeFrance (Attachments: # <u>1</u> Bird Proof of Service, # <u>2</u> Brown Proof of Service, # <u>3</u> Feuerstein Proof of Service, # <u>4</u> Krutilla Proof of Service, # <u>5</u> Largent Proof of Service, # <u>6</u> Monarco Proof of Service, # <u>7</u> Pickles Proof of Service, # <u>8</u> Strine Proof of Service, # <u>9</u> Woody Proof of Service)(Donahoe, Michael) (Entered: 03/22/2023)                                                                                                                                                                                                                                                                                                                                                                               |
| 03/23/2023 | <u>153</u> | (Ex Parte) EXPARTE MOTION by Michael Blake DeFrance. (Attachments: # <u>1</u> Attachment) (Donahoe, Michael) (Entered: 03/23/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| 03/23/2023 | <u>154</u> | ORDER granting <u>153</u> Exparte Motion as to Michael Blake DeFrance (1). Signed by Judge Dana L. Christensen on 3/23/2023. (SGN) (Entered: 03/23/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| 03/28/2023 | <u>155</u> | (Ex Parte) EXPARTE MOTION by Michael Blake DeFrance. (Attachments: # <u>1</u> Attachment) (Donahoe, Michael) (Entered: 03/28/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| 03/28/2023 | <u>156</u> | ORDER granting <u>155</u> Exparte Motion as to Michael Blake DeFrance (1). Signed by Judge Dana L. Christensen on 3/28/2023. (ASG) (Entered: 03/28/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| 04/03/2023 | <u>157</u> | Document received from U.S. Supreme Court: The petition for a writ of certiorari is denied as to Michael Blake DeFrance re <u>118</u> Notice of Appeal – Order (SGN) (Entered: 04/03/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |

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| 04/07/2023 | <u>158</u> | (Ex Parte) EXPARTE MOTION by Michael Blake Defrance. (Attachments: # <u>1</u> Proposed Order, # <u>2</u> Subpoena) (Donahoe, Michael) (Entered: 04/07/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| 04/10/2023 | <u>159</u> | NOTICE OF SUPPLEMENTAL AUTHORITY L.R. CR 47.4 by Michael Blake Defrance (Attachments: # <u>1</u> Attachment) (Donahoe, Michael) (Entered: 04/10/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| 04/10/2023 | <u>160</u> | ORDER granting <u>158</u> Exparte Motion as to Michael Blake Defrance (1). Signed by Judge Dana L. Christensen on 4/10/2023. (Attachments: # <u>1</u> Subpoena Stevens) (SGN) (Entered: 04/10/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| 04/14/2023 | <u>161</u> | Ex Parte Return of Service of Subpoena in case as to Michael Blake Defrance (Donahoe, Michael) (Entered: 04/14/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| 04/14/2023 | <u>162</u> | SEALED MOTION TO PERMIT DISCLOSURE OF SENSITIVE AND SEALED MATERIAL TO DEFENSE WITNESSES IN ADVANCE OF TRIAL by Michael Blake Defrance. (Donahoe, Michael) (Entered: 04/14/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| 04/18/2023 | <u>163</u> | ORDER denying <u>162</u> SEALED MOTION TO PERMIT DISCLOSURE OF SENSITIVE AND SEALED MATERIAL TO DEFENSE WITNESSES IN ADVANCE OF TRIAL filed by Michael Blake Defrance. Signed by Judge Dana L. Christensen on 4/18/2023. (ASG) (ASG). Modified on 4/18/2023 to attach order, assign number and regenerate NEF. (ASG). (Entered: 04/18/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| 04/19/2023 | <u>164</u> | Joint MOTION TO ALLOW WITNESSES TO APPEAR BY MICROSOFT TEAMS AT TRIAL by Michael Blake Defrance. (Attachments: # <u>1</u> Proposed Order) (Donahoe, Michael) (Entered: 04/19/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| 04/20/2023 | <u>165</u> | ORDER granting <u>164</u> Motion to Allow Witnesses to Appear by Microsoft Teams at Trial as to Michael Blake Defrance (1). Signed by Judge Dana L. Christensen on 4/20/2023. (ASG) (Entered: 04/20/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
| 04/21/2023 | <u>166</u> | TRIAL BRIEF by USA as to Michael Blake Defrance (Clark, Jennifer) (Entered: 04/21/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| 04/21/2023 | <u>167</u> | TRIAL BRIEF by Michael Blake Defrance (Donahoe, Michael) (Entered: 04/21/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
| 04/23/2023 | <u>168</u> | NOTICE OF SUPPLEMENTAL AUTHORITY L.R. CR 47.4 by Michael Blake Defrance (Donahoe, Michael) (Entered: 04/23/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| 04/26/2023 | <u>169</u> | STIPULATION by USA and Michael Blake Defrance. (ASG) (Entered: 04/26/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| 04/26/2023 | 170        | MINUTE ENTRY for proceedings held before Judge Dana L. Christensen: Bench Trial (Day 1) as to Michael Blake Defrance held on 4/26/2023. Released defendant appearing with FD Michael Donahoe, AUSA Jen Clark and Tim Racicot appearing on behalf of Government. Stipulation has been entered into by parties and will be filed. Rule 615 is invoked by Defense. No openings will be made; trial will begin with testimony. Witnesses sworn and testify for Government. Argument over exhibits 19-21 is heard. Court admits these exhibits provisionally. Government withdraws exhibit 21. Testimony continues. Government rests. Defense witnesses are sworn and testify. In recess until 9am tomorrow. Hearing commenced at 8:35am and concluded at 5:00pm. (Court Reporter JoAnn Corson)(Government Witnesses Sworn and Examined: Robyn Largent, Hon. Donald Strine, Joel Christensen, Guy Baker, Valenda Morgieau, Jennifer Morgieau, Danielle Matt, Nathan Morgieau, Guy Baker.),(Defense Witnesses Sworn and Examined: Claudette Bird, Shane Bartschi, William Brown, Kirk Krutilla, Jocelyn Stevens, Christian Woody, Colton Monarco.),(Exhibits Admitted: 504, 505, 512, 513-516, 1-5, 6-10, 11-17, 18, 19-20 provisionally admitted, 502, 518.),(Law Clerk: C. Lawson), (Hearing held in Missoula, MT) (ASG) (Entered: 04/26/2023) |
| 04/27/2023 | 171        | MINUTE ENTRY for proceedings held before Judge Dana L. Christensen: Bench Trial (Day 2) as to Michael Blake Defrance held on 4/27/2023. Released Defendant appearing with FD Michael Donahoe, AUSAs Jen Clark and Tim Racicot appearing on behalf of Government. Counsel Donahoe makes Rule 29 motion. Motion is denied. Witnesses sworn and testify for Defense. Defense rests. Evidentiary portion of trial is complete. AUSA Clark and FD Donahoe give closing statements. Matter is deemed fully submitted. Court is In recess. Hearing commenced at 8:59am and concluded at 10:49am. (Court Reporter JoAnn Corson) (Defense Witnesses Sworn and Examined: Dana Pickles, Brian Barker, Stephen Feuerstein, Shawn Defrance, Jennifer Defrance.),                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |

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|            |            | (Defense Exhibits Admitted: 509, 520, 521, 522, 524.), (Law Clerk: C. Lawson), (Hearing held in Missoula, MT) (ASG) (Entered: 04/27/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
| 04/27/2023 | <u>172</u> | GOVERNMENT WITNESS LIST as to Michael Blake Defrance. (ASG) (Entered: 04/27/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| 04/27/2023 | <u>173</u> | DEFENSE WITNESS LIST as to Michael Blake Defrance. (ASG) (Entered: 04/27/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| 04/27/2023 | <u>174</u> | GOVERNMENT EXHIBIT LIST. (ASG) (Entered: 04/27/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| 04/27/2023 | <u>175</u> | DEFENSE EXHIBIT LIST. (ASG) (Entered: 04/27/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| 04/28/2023 | <u>176</u> | NOTICE OF FILING EXHIBITS ADMITTED AT TRIAL PURSUANT TO L.R. CR 5.1(b) by Michael Blake Defrance (Attachments: # <u>1</u> Exhibit 502, # <u>2</u> Exhibit 504, # <u>3</u> Exhibit 505, # <u>4</u> Exhibit 512, # <u>5</u> Exhibit 513, # <u>6</u> Exhibit 514, # <u>7</u> Exhibit 515, # <u>8</u> Exhibit 516, # <u>9</u> Exhibit 518, # <u>10</u> Exhibit 520, # <u>11</u> Exhibit 521, # <u>12</u> Exhibit 522, # <u>13</u> Exhibit 524) (Donahoe, Michael) (Entered: 04/28/2023)                                                                                                                                                                                                                                                                                                                                                     |
| 04/28/2023 | <u>177</u> | Sealed Document Unredacted EXHIBIT 509 re: <u>176</u> Notice (Other), by Michael Blake Defrance (Donahoe, Michael) (Entered: 04/28/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| 04/28/2023 | <u>178</u> | NOTICE of Filing Exhibits by USA as to Michael Blake Defrance (Attachments: # <u>1</u> Ex. 1, # <u>2</u> Ex. 2, # <u>3</u> Ex. 3, # <u>4</u> Ex. 4, # <u>5</u> Ex. 5, # <u>6</u> Ex. 6, # <u>7</u> Ex. 7, # <u>8</u> Ex. 8, # <u>9</u> Ex. 9, # <u>10</u> Ex. 10, # <u>11</u> Ex. 11, # <u>12</u> Ex. 12, # <u>13</u> Ex. 13, # <u>14</u> Ex. 14, # <u>15</u> Ex. 15, # <u>16</u> Ex. 16, # <u>17</u> Ex. 17) (Clark, Jennifer) (Entered: 04/28/2023)                                                                                                                                                                                                                                                                                                                                                                                   |
| 04/28/2023 | <u>179</u> | NOTICE OF FILING GRAND JURY TRANSCRIPTS UNDER SEAL PURSUANT TO L.R. CR 49.3(a)(2)(D) by Michael Blake Defrance (Donahoe, Michael) (Entered: 04/28/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| 04/28/2023 | <u>180</u> | Sealed Document Unredacted July 28, 2021 Grand Jury Transcript re: <u>179</u> Notice (Other) by Michael Blake Defrance (Donahoe, Michael) (Entered: 04/28/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| 04/28/2023 | <u>181</u> | Sealed Document Unredacted October 20, 2021 Grand Jury Transcript re: <u>180</u> Sealed Document Unredacted by Michael Blake Defrance (Donahoe, Michael) (Entered: 04/28/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| 05/01/2023 | <u>182</u> | FINDINGS OF FACT, CONCLUSIONS OF LAW, and ORDER as to Michael Blake Defrance (1): Guilty on Counts 1ss, 2ss, 3ss, and 4ss. Signed by Judge Dana L. Christensen on 5/1/2023. (ASG) (Entered: 05/01/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| 05/01/2023 | <u>183</u> | Order Setting as to Michael Blake Defrance: Sentencing set for 9/21/2023 at 09:00 AM in Missoula, MT before Judge Dana L. Christensen. Signed by Judge Dana L. Christensen on 5/1/2023. (ASG) (Entered: 05/01/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
| 05/02/2023 | <u>184</u> | TRANSCRIPT ORDER FORM for proceedings held on 04/26/2023 – 04/27/2023 before Judge Dana L. Christensen. Court reporter JoAnn Jett Corson. Type of transcript: 7–Day. Transcript due by 5/9/2023. (Donahoe, Michael) (Entered: 05/02/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
| 05/03/2023 | <u>185</u> | Ex Parte Return of Service of Subpoena in case as to Michael Blake Defrance (Attachments: # <u>1</u> Shawn DeFrance Proof of Service)(Donahoe, Michael) (Entered: 05/03/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| 05/04/2023 | <u>186</u> | Non–Party TRANSCRIPT ORDER FORM for proceedings held on 4/26/2023–4/27/2023 before Judge Christensen. Court reporter JoAnn Jett Corson. Type of transcript: 30–Day. Transcript due by 6/3/2023. (SGN) (Entered: 05/04/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
| 05/08/2023 | <u>187</u> | TRANSCRIPT of Bench Trial, Vol. 1 of 2, as to Michael Blake DeFrance held on 4–26–2023 before Judge Dana L. Christensen. Transcript may be viewed at the court public terminal or purchased through the court reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER, the clerk's office, or the court reporter. NOTICE: A NOTICE OF INTENT TO REQUEST REDACTION MUST BE FILED WITHIN 7 DAYS OF THIS FILING. Contact court reporter JoAnn Jett Corson, 406–698–9965, joannjettcorson@gmail.com. For further information, please see the Transcript Redaction Procedure and Schedule on the Court Reporters page of our website. Redaction Request due 5/30/2023. Redacted Transcript Deadline set for 6/8/2023. Release of Transcript Restriction set for 8/7/2023. (JJC) |

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|            |            | (Entered: 05/08/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| 05/08/2023 | <u>188</u> | TRANSCRIPT of Bench Trial, Vol. 2 of 2, as to Michael Blake DeFrance held on 4-27-2023 before Judge Dana L. Christensen. Transcript may be viewed at the court public terminal or purchased through the court reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER, the clerk's office, or the court reporter. NOTICE: A NOTICE OF INTENT TO REQUEST REDACTION MUST BE FILED WITHIN 7 DAYS OF THIS FILING. Contact court reporter JoAnn Jett Corson, 406-698-9965, joannjettcorson@gmail.com. For further information, please see the Transcript Redaction Procedure and Schedule on the Court Reporters page of our website. Redaction Request due 5/30/2023. Redacted Transcript Deadline set for 6/8/2023. Release of Transcript Restriction set for 8/7/2023. (JJC) (Entered: 05/08/2023) |
| 05/15/2023 | <u>189</u> | MOTION FOR ACQUITTAL AND MOTION TO ARREST JUDGMENT UNDER RULES 29(c) AND 34, Fed.R.Crim.P.; AND ALTERNATIVE MOTION FOR A NEW TRIAL UNDER RULE 33(b)(2), Fed.R.Crim.P. by Michael Blake DeFrance. (Donahoe, Michael) (Entered: 05/15/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
| 05/15/2023 | <u>190</u> | BRIEF/MEMORANDUM in Support by Michael Blake DeFrance re <u>189</u> MOTION FOR ACQUITTAL AND MOTION TO ARREST JUDGMENT UNDER RULES 29(c) AND 34, Fed.R.Crim.P.; AND ALTERNATIVE MOTION FOR A NEW TRIAL UNDER RULE 33(b)(2), Fed.R.Crim.P. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B) (Donahoe, Michael) (Entered: 05/15/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
| 05/24/2023 | <u>191</u> | TRANSCRIPT ORDER FORM <i>Bench Trial Days 1 and 2</i> by USA for proceedings held on 4/26/2023-4/27/2023 before Judge Christensen. Court reporter JoAnn Jett Corson. Type of transcript: 3-Day. Transcript due by 5/26/2023. (Clark, Jennifer) (Entered: 05/24/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| 05/26/2023 | <u>192</u> | Unopposed MOTION for Extension of Time to File Response/Reply to <i>Defendant's Motion for Acquittal or New Trial</i> by USA as to Michael Blake DeFrance. (Attachments: # <u>1</u> Text of Proposed Order) (Clark, Jennifer) (Entered: 05/26/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| 05/26/2023 | <u>193</u> | BRIEF/MEMORANDUM in Support by USA as to Michael Blake DeFrance re <u>192</u> Unopposed MOTION for Extension of Time to File Response/Reply to <i>Defendant's Motion for Acquittal or New Trial</i> (Clark, Jennifer) (Entered: 05/26/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| 05/30/2023 | <u>194</u> | ORDER granting <u>192</u> Motion for Extension of Time to File Response/Reply as to Michael Blake DeFrance (1). Response due on or before June 12, 2023. Signed by Judge Dana L. Christensen on 5/30/2023. (KJL) (Entered: 05/30/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| 06/09/2023 |            | Terminate Deadlines as to Michael Blake DeFrance: Transcript deadline terminated. (SGN) (Entered: 06/09/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| 06/12/2023 | <u>195</u> | RESPONSE to Motion by USA as to Michael Blake DeFrance re <u>189</u> MOTION FOR ACQUITTAL AND MOTION TO ARREST JUDGMENT UNDER RULES 29(c) AND 34, Fed.R.Crim.P.; AND ALTERNATIVE MOTION FOR A NEW TRIAL UNDER RULE 33(b)(2), Fed.R.Crim.P. (Attachments: # <u>1</u> Exhibit Ex. 1) (Clark, Jennifer) (Entered: 06/12/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| 06/16/2023 | <u>196</u> | REPLY TO RESPONSE to Motion by Michael Blake DeFrance re <u>189</u> MOTION FOR ACQUITTAL AND MOTION TO ARREST JUDGMENT UNDER RULES 29(c) AND 34, Fed.R.Crim.P.; AND ALTERNATIVE MOTION FOR A NEW TRIAL UNDER RULE 33(b)(2), Fed.R.Crim.P. (Donahoe, Michael) (Entered: 06/16/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
| 06/27/2023 | <u>197</u> | NOTICE OF SUPPLEMENTAL AUTHORITY L.R. CR 47.4 by Michael Blake DeFrance (Donahoe, Michael) (Entered: 06/27/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| 07/13/2023 | <u>198</u> | ORDER denying <u>189</u> Motion for Acquittal and Motion to Arrest Judgment Under Rules 29(c) and 34, Fed. R. Crim. P.; and Alternative Motion for a New Trial Under Rule 33(b)(2), Fed. R. Crim. P. as to Michael Blake DeFrance (1). Signed by Judge Dana L. Christensen on 7/13/2023. (ASG) (Entered: 07/13/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| 09/07/2023 | <u>199</u> | SENTENCING MEMORANDUM by Michael Blake DeFrance (Donahoe, Michael) (Entered: 09/07/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |

|            |            |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
|------------|------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 09/07/2023 | <u>200</u> | SENTENCING MEMORANDUM by USA as to Michael Blake Defrance (Clark, Jennifer) (Entered: 09/07/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| 09/11/2023 | <u>201</u> | MOTION for Forfeiture of Property <i>Preliminary</i> by USA as to Michael Blake Defrance. (Attachments: # <u>1</u> Text of Proposed Order) (Clark, Jennifer) (Entered: 09/11/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| 09/11/2023 | <u>202</u> | BRIEF/MEMORANDUM in Support by USA as to Michael Blake Defrance re <u>201</u> MOTION for Forfeiture of Property <i>Preliminary</i> (Clark, Jennifer) (Entered: 09/11/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| 09/14/2023 | <u>203</u> | NOTICE OF FILING SENTENCING LETTERS by Michael Blake Defrance (Attachments: # <u>1</u> Letter from Denean DeFrance, # <u>2</u> Letter from Shawn and Jennifer DeFrance, # <u>3</u> Letter from Xavier DeFrance, # <u>4</u> Letter from Natasha DeFrance, # <u>5</u> Letter from Katarina Burns, # <u>6</u> Letter from Phyllis and Travis Benoist, # <u>7</u> Letter from Lorn and Barb Johnson, # <u>8</u> Letter from Skyler Graver, # <u>9</u> Letter from Joel Richards, # <u>10</u> Letter from Tanya Vollin) (Donahoe, Michael) (Entered: 09/14/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
| 09/14/2023 | <u>204</u> | RESPONSE by Michael Blake Defrance re <u>200</u> Sentencing Memorandum (Donahoe, Michael) (Entered: 09/14/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| 09/14/2023 | <u>205</u> | RESPONSE to Motion by Michael Blake Defrance re <u>201</u> MOTION for Forfeiture of Property <i>Preliminary</i> (Donahoe, Michael) (Entered: 09/14/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| 09/14/2023 | <u>206</u> | NOTICE of Sentencing Witness by USA as to Michael Blake Defrance (Clark, Jennifer) (Entered: 09/14/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| 09/19/2023 | <u>207</u> | REPLY TO RESPONSE to Motion by USA as to Michael Blake Defrance re <u>201</u> MOTION for Forfeiture of Property <i>Preliminary</i> (Clark, Jennifer) (Entered: 09/19/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| 09/19/2023 | <u>208</u> | ORDER granting <u>201</u> Motion for Preliminary Forfeiture of Property as to Michael Blake Defrance (1). Signed by Judge Dana L. Christensen on 9/19/2023. (SGN) (Entered: 09/19/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| 09/21/2023 | <u>209</u> | TRANSCRIPT ORDER FORM ( <i>SENTENCING HEARING</i> ) for proceedings held on 9/21/23 before Judge Dana L. Christensen. Court reporter JoAnn Jett Corson. Type of transcript: 7-Day. Transcript due by 9/28/2023. (Donahoe, Michael) (Entered: 09/21/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| 09/21/2023 | <u>210</u> | MINUTE ENTRY for proceedings held before Judge Dana L. Christensen: Sentencing held on 9/21/2023 for Michael Blake Defrance (1), Count(s) 1ss, 2ss-4ss. AUSA Tim Racicot and Jen Clark appearing on behalf of Govt. FD Michael Donahoe appearing with released Defendant. Govt has no objection to PSR. Defendant argues objections, overruled. Court will rely on PSR. Court summarizes statutory and guideline calculations. Counsel Donahoe allocutes for Defendant. Defendant allocutes. AUSA Clark makes sentence recommendation. Court reviews 3553(a) factors. JUDGMENT: Defendant committed to the custody of the BOP for a term of 21 months on Count 1, Count 2, Count 3, and Count 4; terms to run concurrently. Supervised release for a term of 3 years on Count 1, Count 2, Count 3, and Count 4; terms to run concurrently; standard and special conditions imposed. Defendant waived reading. Fine waived. Special assessment of \$400. Final order of forfeiture issued. No legal objection to sentence. Right to appeal advised. The Court directs the clerk to enter a notice of appeal on Defendant's behalf per his request. Defendant moves for release pending appeal, Govt objects. Denied. Defendant allowed to self-report. Hearing commenced at 9:01 a.m. and concluded at 9:40 a.m. Presentence Report due by 9/28/2023. (Court Reporter JoAnn Corson) (USPO: E. Hansen), (Law Clerk: E. Steinberg), (Hearing held in Missoula) (SGN) (Entered: 09/21/2023) |
| 09/21/2023 | <u>211</u> | JUDGMENT as to Michael Blake Defrance (1), Count(s) 1ss, 2ss-4ss. Defendant sentenced to the custody of the BOP for a term of 21 months on Count 1, Count 2, Count 3, and Count 4; to run concurrently. Supervised release for a term of 3 years on Count 1, Count 2, Count 3, and Count 4; to run concurrently. Standard and special conditions imposed. Special assessment of \$400. Signed by Judge Dana L. Christensen on 9/21/2023. (SGN) (Entered: 09/21/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| 09/21/2023 | <u>212</u> | STATEMENT OF REASONS as to Michael Blake Defrance. Signed by Judge Dana L. Christensen on 9/21/2023. (SGN) (Entered: 09/21/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |

|            |            |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
|------------|------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 09/21/2023 | <u>213</u> | NOTICE OF APPEAL by Michael Blake DeFrance re <u>211</u> Judgment and <u>182</u> FINDINGS OF FACT, CONCLUSIONS OF LAW, and ORDER. (Entered by Clerk of Court on behalf of Defendant in accordance with oral order of the Court.) (SGN) (Main Document 213 replaced on 9/21/2023 to correct case number on Notice, NEF regenerated.) (Entered: 09/21/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| 09/21/2023 | <u>214</u> | PRESENTENCE INVESTIGATION REPORT (Sealed) as to Michael Blake DeFrance (SGN) (Main Document 214 replaced on 3/22/2024 per USPO. This was the PSR that was used during Defrances sentencing and used/referenced by Judge Christensen. The original filing was the older version) (APP). (Entered: 09/21/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| 09/26/2023 | <u>215</u> | USCA Case Number 23–2409 and Time Schedule Order as to Michael Blake DeFrance 23–2409 for <u>213</u> Notice of Appeal – Final Judgment, filed by Michael Blake DeFrance. (SGN) (Entered: 09/26/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| 09/29/2023 | <u>216</u> | TRANSCRIPT of Sentencing as to Michael Blake DeFrance held on 9–21–2023 before Judge Dana L. Christensen. Transcript may be viewed at the court public terminal or purchased through the court reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER, the clerk's office, or the court reporter. NOTICE: A NOTICE OF INTENT TO REQUEST REDACTION MUST BE FILED WITHIN 7 DAYS OF THIS FILING. Contact court reporter JoAnn Jett Corson, 406–698–9965, joannjettcorson@gmail.com. For further information, please see the Transcript Redaction Procedure and Schedule on the Court Reporters page of our website. Redaction Request due 10/20/2023. Redacted Transcript Deadline set for 10/30/2023. Release of Transcript Restriction set for 12/28/2023. (JJC) (Entered: 09/29/2023) |
| 10/19/2023 | <u>217</u> | STATEMENT OF NON–OPPOSITION (APP) (Entered: 10/19/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
| 10/26/2023 | <u>218</u> | AFFIDAVIT/DECLARATION by USA as to Michael Blake DeFrance <u>208</u> Order on Motion for Forfeiture of Property. (Attachments: # <u>1</u> Appendix Attachment 1) (Clark, Jennifer) (Entered: 10/26/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
| 11/02/2023 | <u>219</u> | ORDER of USCA as to Michael Blake DeFrance re <u>213</u> Notice of Appeal – Final Judgment. The matter is remanded to the district court for the limited purpose of permitting the court to continue or modify the conditions of release imposed on August 2, 2021, in any manner it deems appropriate. (SGN) (Entered: 11/02/2023)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| 12/30/2024 | <u>220</u> | OPINION of USCA as to Michael Blake DeFrance re <u>213</u> Notice of Appeal – Final Judgment. For the reasons stated here and in a concurrently filed memorandum disposition, DeFrance's convictions are AFFIRMED IN PART and REVERSED IN PART, the sentence is VACATED, and the case is REMANDED for resentencing or for other proceedings consistent with the judgment of this court. (SGN) (Entered: 12/30/2024)                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| 12/30/2024 | <u>221</u> | MEMORANDUM of USCA as to Michael Blake DeFrance re <u>213</u> Notice of Appeal – Final Judgment. For the reasons stated here and in a concurrently filed opinion, DeFrance's convictions are AFFIRMED IN PART and REVERSED IN PART, the sentence is VACATED, and the case is REMANDED for resentencing or for other proceedings consistent with the judgment of this court. (SGN) (Entered: 12/30/2024)                                                                                                                                                                                                                                                                                                                                                                                                                                             |

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**FILED**

**JUL 28 2021**

Clerk, U.S. Courts  
District Of Montana  
Missoula Division

**ATTORNEY FOR PLAINTIFF  
UNITED STATES OF AMERICA**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
MISSOULA DIVISION**

|                                                                                                                                            |                                                                                                                                                                                                                                                                                                                               |
|--------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>UNITED STATES OF AMERICA,</b><br><br><b>Plaintiff,</b><br><br><b>vs.</b><br><br><b>MICHAEL BLAKE DEFRANCE,</b><br><br><b>Defendant.</b> | <b>CR 21- 29 -M- DLC</b><br><br><b>INDICTMENT</b><br><br><b>PROHIBITED PERSON IN POSSESSION<br/>OF FIREARMS AND AMMUNITION</b><br>Title 18 U.S.C. § 922(g)(9)<br>(Penalty: Ten years imprisonment,<br>\$250,000 fine, and three years of supervised<br>release)<br><br><b>CRIMINAL FORFEITURE</b><br>Title 18 U.S.C. § 924(d) |
|--------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

**THE GRAND JURY CHARGES:**

That on or about June 27, 2018, and October 2, 2018, at Missoula, in  
Missoula County, in the State and District of Montana, the defendant, MICHAEL  
BLAKE DEFRANCE, knowing he had been convicted on or about May 6, 2013, of

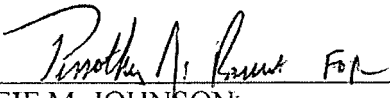
a misdemeanor crime of violence under the laws of the State of Montana,  
knowingly possessed, in and affecting interstate commerce, firearms and  
ammunition, in violation of 18 U.S.C. § 922(g)(9).

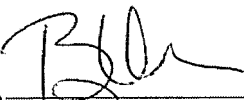
FORFEITURE ALLEGATION

Upon conviction of the offense listed in this indictment, the defendant,  
MICHAEL BLAKE DEFRANCE, shall forfeit, pursuant to 18 U.S.C. § 924(d), any  
firearm and ammunition involved and used in any knowing violation of said  
offense.

A TRUE BILL.

Foreperson signature redacted. Original document filed under  
seal.

  
LEIF M. JOHNSON  
Acting United States Attorney

  
(for) JOSEPH E. THAGGARD  
Criminal Chief Assistant U.S. Attorney

Summons: \_\_\_\_\_

Warrant: ✓



**JENNIFER CLARK**  
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FILED

8/26/21

Clerk, U.S. District Court  
District of Montana  
Missoula Division

**ATTORNEY FOR PLAINTIFF  
UNITED STATES OF AMERICA**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
MISSOULA DIVISION**

|                                  |                                                                                                                               |
|----------------------------------|-------------------------------------------------------------------------------------------------------------------------------|
| <b>UNITED STATES OF AMERICA,</b> | <b>CR 21-29-M-DLC</b>                                                                                                         |
| <b>Plaintiff,</b>                | <b>SUPERSEDING INDICTMENT</b>                                                                                                 |
| <b>vs.</b>                       | <b>PROHIBITED PERSON IN POSSESSION<br/>OF FIREARMS AND AMMUNITION</b>                                                         |
| <b>MICHAEL BLAKE DEFRANCE,</b>   | Title 18 U.S.C. § 922(g)(9)<br>(Penalty: Ten years imprisonment,<br>\$250,000 fine, and three years of supervised<br>release) |
| <b>Defendant.</b>                | <b>CRIMINAL FORFEITURE</b><br>Title 18 U.S.C. § 924(d)                                                                        |

**THE GRAND JURY CHARGES:**

That on or about June 27, 2018, and October 2, 2018, at Missoula, in  
Missoula County, in the State and District of Montana, the defendant, MICHAEL  
BLAKE DEFRANCE, knowing he had been convicted on or about May 6, 2013, of

a misdemeanor crime of domestic violence under the laws of the State of Montana, which meets the definition of a misdemeanor crime of domestic violence under 18 U.S.C. § 921(a)(33)(A)(i) and (ii), knowingly possessed, in and affecting interstate commerce, firearms and ammunition, in violation of 18 U.S.C. § 922(g)(9).

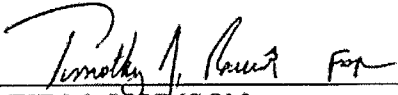
FORFEITURE ALLEGATION

Upon conviction of the offense listed in this indictment, the defendant, MICHAEL BLAKE DEFRANCE, shall forfeit, pursuant to 18 U.S.C. § 924(d), any firearm and ammunition involved and used in any knowing violation of said offense.

A TRUE BILL.

Foreperson signature redacted. Original document filed under seal.

~~FOREPERSON~~ //

  
LEIF M. JOHNSON  
Acting United States Attorney

(for)   
JOSEPH E. THAGGARD  
Criminal Chief Assistant U.S. Attorney

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Attorneys for Defendant

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
MISSOULA DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MICHAEL BLAKE DeFRANCE,

Defendant.

**CR 21-29-M-DLC**

**DEFENDANT DeFRANCE'S  
NOTICE OF PUBLIC  
AUTHORITY DEFENSE,  
ESTOPPEL DEFENSE AND  
INNOCENT INTENT DEFENSE  
UNDER RULE 12.3 Fed. R. Crim. P.**

**INTRODUCTION**

This is a firearms case where the government alleges that Defendant, Mr. DeFrance, was a prohibited person under 18 USC §922(g)(9) for having a misdemeanor conviction for Montana Partner Family Member Assault (PFMA) at the time he allegedly possessed unspecified firearms. (ECF Nos. 2 and 21). Trial is currently set for October 4, 2021, in Missoula.

### **NOTICE OF DEFENSES**

To avoid surprise and comply with our duty under Rule 12.3 Fed. R. Crim. P., the defense hereby gives notice that Mr. DeFrance intends to reply on the defenses listed in the caption to this motion and set forth here anew as follows:

- The defense of Public Authority;
- The defense of Entrapment by Estoppel; and
- The defense of Innocent Intent.

In the cases these defenses bleed into each other and therefore can be difficult to parse with distinction. *See e.g., United States v. Burrows*, 36 F.3d 875, 881 (9<sup>th</sup> Cir. 1994). *Also see* Judge Nelson's informative Memorandum Opinion and Order from the United States District Court for the District of Minnesota, dated January 12, 2017, and attached hereto (Addendum, pages 1-4) for convenience of the Court and Counsel. Moreover, we have also attached hereto the current Ninth Circuit Jury Instructions for the Entrapment by Estoppel Defense (6.2B) (Addendum, pages 5-6) and the Public Authority or Government Authorization Defense (6.11) (Addendum, page 7).

### **FACTUAL SUPPORT FOR THESE DEFENSES**

Under seal we have submitted copies of ATF Form 4473 Transaction Record(s) completed by Mr. DeFrance and processed by a Federal Firearms Licensee (FFL). These documents speak for themselves but essentially show that

no “denial” to transact was ever issued by the NICS system which we will contend reasonably led Mr. DeFrance to believe that was not a prohibited person.

In satisfaction of Rule 12.3(a)(2) the defense states:

- (A) the law enforcement agency is ATF and the FFL (Cash1Pawn);
- (B) Mr. DeFrance acted on the behalf of the ATF and the FFL;  
and
- (C) The perimeter dates Mr. DeFrance acted would have been between February 4, 2015, and August 25, 2018.

### **CONCLUSION**

WHEREFORE, Mr. DeFrance concludes his notice of defenses and awaits the government’s Rule 12.3 response, if any.

RESPECTFULLY SUBMITTED this 1<sup>st</sup> day of September, 2021.

/s/ Michael Donahoe  
MICHAEL DONAHOE  
Assistant Federal Defender  
Counsel for Defendant



**CERTIFICATE OF SERVICE**  
**L.R. 5.2(b)**

I hereby certify that on September 1, 2021, a copy of the foregoing document was served on the following persons by the following means:

1 CM-ECF

2 Mail

1. CLERK, UNITED STATES DISTRICT COURT

1. JENNIFER CLARK  
Assistant United States Attorney  
United States Attorney's Office  
105 E. Pine, 2nd Floor  
P.O. Box 8329  
Missoula, MT 59807  
Counsel for the United States of America

2. MICHAEL BLAKE DeFRANCE  
Defendant

/s/ Michael Donahoe  
FEDERAL DEFENDERS OF MONTANA

# **ADDENDUM**



United States v. Xiong, Not Reported in Fed. Supp. (2017)

2017 WL 123428

Only the Westlaw citation is currently available.

United States District Court, D. Minnesota.

UNITED STATES of America, Plaintiff,

v.

Seng XIONG, Defendant.

Case No. 16-cr-167 (SRN/HB)

Signed 01/12/2017

**Attorneys and Law Firms**

Amber M. Brennan, United States Attorney's Office,  
Minneapolis, MN, for Plaintiff.

Allan H. Caplan, Hilary B. Hujanen, Caplan & Tamburino  
Law Firm, P.A., Katherian D. Roe, Office of the Federal  
Defender, Minneapolis, MN, for Defendant.

**MEMORANDUM OPINION AND ORDER**

SUSAN RICHARD NELSON, United States District Judge

**I. INTRODUCTION**

\*1 This matter comes before the Court on the Government's Motion in Limine [Doc. No. 71] regarding Defendant's anticipated public authority defense, Defendant's Response to that motion [Doc. No. 79], and the Government's Reply [Doc. No. 82]. Having carefully considered the matter, the Court concludes that a hearing is required in order to address the issues raised by these filings.

**II. BACKGROUND**

Defendant Seng Xiong is charged with wire fraud and mail fraud stemming from an alleged scheme to defraud individuals of Hmong descent by falsely representing that he was working closely with the United States government and the United Nations to establish a Hmong country somewhere in Southeast Asia, and then soliciting victims to invest in the future country in order to secure citizenship. (*See generally* Superseding Indictment [Doc. No. 63].) Despite his claims, the Government alleges that Xiong never worked with officials from either the U.S. government or the United Nations in pursuit of a Hmong homeland. (*Id.*) Instead, it contends that Xiong squandered the many hundreds of

thousands of dollars contributed by his supporters on personal expenditures.

On January 3, 2017, the Government filed a motion in limine asking this Court to prohibit Xiong from raising at trial the defense that his actions were in some sense authorized by an official or officials of the United States or the United Nations, unless Xiong first properly disclosed his intention to raise that defense. In particular, the Government called the Court's attention to Federal Rule of Criminal Procedure 12.3, which requires, in relevant part, that "[i]f a defendant intends to assert a defense of actual or believed exercise of public authority on behalf of a law enforcement agency or federal intelligence agency at the time of the alleged offense, the defendant must so notify an attorney for the government in writing and must file a copy of the notice with the clerk within the time provided for filing a pretrial motion, or at any later time the court sets." *See* Fed. R. Crim. P. 12.3(a). Although the Government had requested and received an order from Magistrate Judge Hildy Bowbeer on September 27, 2016 requiring Xiong to disclose any intention to raise a public authority defense, Xiong had not done so by the date of the Government's motion. (*See* Order Granting Mot. for Discovery [Doc. No. 44].) The Government accordingly requested that the Court order Xiong to make the disclosures required by Rule 12.3 no later than the date of the pretrial conference—January 11, 2017.

The Court granted the Government's motion. (*See* Jan. 9, 2017 Order [Doc. No. 76].) Xiong was instructed that if he intended to present any affirmative testimony or evidence at trial claiming that he acted pursuant to public authority, he would have to provide the Court and the Government with a detailed list of expected witnesses and evidence relevant to the defense by the time of the pretrial conference. (*See id.*) At that time, Xiong informed the Court that he did not intend to call any witnesses or introduce any physical evidence in support of a public authority defense. He did indicate, however, that he intended to testify personally to his meetings with various high ranking officials "related to his work in lobbying for human rights and/or advocating for the freedom of Hmong people." (Def.'s Resp.) By way of the disclosure required by the Court, Xiong presented a list of five individuals that he intends to reference at trial, all of whom work or have worked for the United States government. (*See id.*)

\*2 The Government has since filed a reply brief that raises or reiterates a number of issues relating to Xiong's planned testimony. (*See generally* Reply.) Of particular note,

**United States v. Xiong, Not Reported in Fed. Supp. (2017)**

the Government asserts that because a public authority defense is an affirmative defense, “the Court has the authority to preclude all evidence, testimony, argument, and cross-examination questions raised in support of the public authority defense if the Defendant is unable to proffer a *prima facie* basis to assert it.” (See Mot. in Limine at 3 (citing *United States v. Achter*, 52 F.3d 753, 755 (8th Cir. 1995)).) This burden, the Government argues, is one that Xiong will be unable to meet. By its reading of the relevant case law, a *prima facie* showing of public authority requires demonstrating that the government official who allegedly condoned the defendant’s action have *actual* authority to authorize that action. (See Mot. in Limine at 4.) As the Government points out, no government official has actual authority to authorize a private individual to establish a new country and to sell citizenship in that country. (*Id.* at 5.) *Ipsa facto*, Xiong cannot meet the *prima facie* proffer requirement, and must be barred from raising a public authority defense at trial. (See Reply at 2.)

**III. DISCUSSION****A. Defenses Based on Perceived Governmental Authority**

As an initial matter, it is important to recognize that while the Government has characterized Xiong’s anticipated defense as a “public authority defense,” that theory is merely one of a number of possible defenses that may be raised by a defendant who argues that his actions are based on perceived governmental authority. See *United States v. Baptista-Rodriguez*, 17 F.3d 1354, 1368 n.18 (11th Cir. 1994) (observing that “[s]everal defenses may apply when a defendant claims he performed the acts for which he was charged in response to a request from an agency of the government”). Specifically, a public authority defense is “an affirmative defense where the defendant seeks exoneration based on the fact that he reasonably relied on the authority of a governmental official to engage him in covert activity.” *United States v. Achter*, 52 F.3d 753, 755 (8th Cir. 1995). The defense is based on the premise that “actions properly sanctioned by the government are not illegal,” and, therefore, the defendant may legitimately rely on a government official’s authority to authorize the defendant’s conduct. *United States v. Light*, 64 F.3d 660 (4th Cir. 1995). Thus, a key distinguishing feature of a public authority defense is that “the defendant knowingly committed a criminal act but did so in reasonable reliance upon a grant of authority from a government official to engage in illegal activity.” U.S. Dep’t of Justice,

*U.S. Attorneys’ Manual: Criminal Resource Manual* § 2055 (emphasis added).

While it may be the case that Xiong will choose to frame his defense as being one of public authority, two other possible defense theories are relevant and must be considered here. First, a close cousin of the public authority defense is the defense of “entrapment by estoppel.” See *United States v. Baker*, 438 F.3d 749, 753 (7th Cir. 2006) (discussing the similarity of the two defenses). This theory “has been held to apply when an official assures a defendant that certain conduct is legal, and the defendant reasonably relies on that advice and continues or initiates the conduct.” *Achter*, 52 F.3d at 755. What distinguishes the two is that in a public authority defense, the defendant knows that his action is criminal but acts anyway because a government official has authorized him to commit the crime. In contrast, a defendant raising an entrapment defense contends that a government official *mistakenly* informed him that some action was not a crime, and he reasonably relied on that information. See *id.* (“In short, the defense of entrapment by estoppel involves the ‘concept of unintentional entrapment by an official who mistakenly misleads a person into a violation of the law.’”)

(quoting *United States v. Brebner*, 951 F.2d 1017, 1025 (9th Cir. 1991)); see also *United States v. Stallworth*, 656 F.3d 721, 726-27 (7th Cir. 2011) (“The conceptual difference is that with the public authority defense the defendant engages in conduct that the defendant knows to be otherwise illegal but that has been authorized by the government, whereas with entrapment by estoppel the defendant, relying on the government’s statements, believes that his conduct is not prohibited.”)

\*3 Finally, a defendant may assert a defense of “innocent intent.” *Baptista-Rodriguez*, 17 F.3d at 1368 n.18. Strictly speaking, this theory is not an affirmative defense at all, but rather a negation of the *mens rea* element of the crime. *Id.* In effect, the defendant testifies that he lacked criminal intent because he thought he was acting in cooperation with the government. *Id.* Thus, the defendant “do[es] not seek to rely upon an excuse for the commission of a crime, rather [he] assert[s] that [he] committed no crime at all.” *United States v. Smith*, 831 F.3d 1207, 1220 (9th Cir. 2016); see also *Criminal Resource Manual* § 2055 (noting that a defense of innocent intent is “more than an affirmative defense,” and relies on a “‘mistake of fact’ to undermine the government’s proof of criminal intent”).

**United States v. Xiong, Not Reported in Fed. Supp. (2017)**

As can be seen, the distinctions between these three theories of defense are narrow at best. They matter, however, because they affect the nature of the *prima facie* showing that Xiong must make in order to raise one or more of these defenses. If Xiong is raising a defense of entrapment by estoppel, for instance, he must first make a proffer that presents some evidence<sup>1</sup> of the elements of the defense: (1) that his reliance on the government official's statement supposedly authorizing his actions was reasonable; and (2) that the statement misled him into believing his conduct was legal. *See United States v. Benning*, 248 F.3d 772, 775 (8th Cir. 2001). If, however, he intends to assert a defense of public authority, the Government is correct that he must present evidence to show (1) that a government official authorized the defendant to perform an act that would otherwise be a crime; and (2) that the official had the *actual* authority to grant such authorization.<sup>2</sup> *See Baker*, 438 F.3d at 753. Finally, if he intends to argue innocent intent, he need not present any *prima facie* evidence, but his testimony must not stray beyond the bounds of that defense. *Baptista-Rodriguez*, 17 F.3d at 1368 n.18.

**B. Defendant's Required Proffer**

In light of the above, two things are clear: (1) Xiong may present one of a number of different governmental authority defenses; and (2) the Court must have some advance knowledge of what Xiong intends to say in order to prevent the introduction of inadmissible evidence. *See Fed. R. Evid. 103(d)* ("To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means."). In order to properly assess whether

Xiong can make a *prima facie* showing of his affirmative defense, therefore, the Court will hold a hearing in advance of trial at 8:00 AM CST, Tuesday, January 17, 2017. At that hearing, Xiong will be required to (1) inform the Court of which of the above theories of defense he intends to pursue, and (2) present evidence sufficient to satisfy his evidentiary burden as to *each element* of his chosen theory of defense. Should Xiong choose to present his theory as one of "innocent intent" he need not make a *prima facie* showing—nonetheless, he may not subsequently testify in a manner that treads upon the territory covered by either the public authority or the entrapment estoppel defenses.

**IV. ORDER**

\*4 Based on the foregoing, and all the files, records, and proceedings herein, **IT IS HEREBY ORDERED THAT:**

1. The Court will hold a pretrial proffer hearing at 8:00 AM CST, Tuesday, January 17, 2017;
2. At that hearing, Defendant must (1) inform the Court of which theory of defense described in this order he intends to pursue (if any), and (2) proffer evidence sufficient to make a *prima facie* showing as to each element of the defense; and
3. The Court **DEFERS** making any specific admissibility rulings on evidence related to Defendant's chosen theory of defense until after the proffer hearing.

**All Citations**

Not Reported in Fed. Supp., 2017 WL 123428

**Footnotes**

- 1 This Court recently had cause to examine the evidentiary burden imposed on a defendant who is required to make a proffer before raising an affirmative defense at trial. *See United States v. Oz*, No. 13-cr-273 (SRN/FLN), 2017 WL 44941 (D. Minn. Jan. 4, 2017). The standard is not a particularly heavy one—"the Court will accept the proffered facts as true and assess only whether there is a triable issue as to [the defense]." *Id.* at \*5. Nonetheless, the defendant must produce sufficient evidence to allow the jury to infer the fact at issue and rule in the defendant's favor as to *each element* of the defense. *See United States v. Capozzi*, 723 F.3d 720, 725 (6th Cir. 2013).
- 2 The Court notes that a circuit split exists regarding whether the government official must have actual authority, or merely *apparent* authority, to authorize the defendant's actions. *Cf. United States v. Barker*, 546 F.2d 940 (D.C. Cir. 1976) (apparent authority sufficient) with *United States v. Fulcher*, 250 F.3d 244, 253-54

**United States v. Xlong, Not Reported in Fed. Supp. (2017)**

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(4th Cir. 2001) (actual authority required); *United States v. Pitt*, 193 F.3d 751, 758 (3d Cir. 1999) (same); *United States v. Collins*, 61 F.3d 1379, 1385 (9th Cir. 1995) (same); *Baptista-Rodriguez*, 17 F.3d at 1368 n.18 (same); *United States v. Duggan*, 743 F.2d 59, 84 (2d Cir. 1984) (same). The Eighth Circuit has commented on the split, but not yet had cause to choose a side. *See United States v. Evans*, 972 F.2d 355 (8th Cir. 1992). In light of the weight of the case law, the Court concludes that the defendant must show that the government official had actual authority to authorize the crime.

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9/1/2021

6.2B Entrapment by Estoppel Defense

## 6.2B Entrapment by Estoppel Defense

### 6.2B ENTRAPMENT BY ESTOPPEL DEFENSE

The defendant contends that [if] [although] [he] [she] committed the acts charged in the indictment, [he] [she] did so reasonably relying upon the affirmative advice of an authorized [federal government official] [agent of the federal government].

To establish this defense, the defendant has the burden to show by a preponderance of the evidence that:

First, an authorized [federal government official] [agent of the federal government] was empowered to render the claimed erroneous advice;

Second, the [federal government official] [agent of the federal government] had been made aware of all the relevant historical facts;

Third, the [federal government official] [agent of the federal government] affirmatively told the defendant the proscribed conduct was permissible;

Fourth, the defendant relied on the false information; and

Fifth, this reliance was reasonable.

In deciding this, you should consider all of the relevant circumstances, including the identity of the federal government [official] [agent], what the [official] [agent] said to the defendant, and how closely the defendant followed any instructions the [official] [agent] gave.

A preponderance of the evidence means that you must be persuaded that the things the defendant seeks to prove are more probably true than not true. This is a lesser burden of proof than the government's burden to prove beyond a reasonable doubt each element of [specify crime charged].

If you find that the defendant has proved that [he] [she] reasonably relied upon the affirmative advice of the federal government [official] [agent], you must find the defendant not guilty of [specify crime charged].

#### Comment

For applications of this defense, see, e.g., *United States v. Lynch*, 903 F.3d 1061, 1075-78 (9th Cir. 2018) (marijuana dispensary); *United States v. Schafer*, 625 F.3d 629, 637 (9th Cir. 2010) (marijuana manufacturing); *United States v. Batterjee*, 361 F.3d 1210, 1216 (9th Cir.

2004) (firearms offense); *United States v. Ramirez-Valencia*, 202 F.3d 1106, 1109-10 (9th Cir. 2000) (immigration offense).

This defense applies only to advice from federal officials or authorized agents of the federal government, and not state or local officials. See, e.g., *United States v. Mack*, 164 F.3d 467, 474 (9th Cir. 1999) (rejecting entrapment by estoppel defense "because Mack did not rely

on the advice or authority of federal officials or agents"); *United States v. Collins*, 61 F.3d 1379, 1385 (9th Cir. 1995) (noting entrapment by estoppel defense applies only when defendant relies either on "a federal government official empowered to render the claimed erroneous advice, or on an authorized agent of the federal government, who has been granted the authority from the federal government to render such advice.") (citation omitted).

Regarding "authorized agents," the Ninth Circuit has held that "[c]learly, the United States Government has made licensed firearms dealers federal agents in connection with the gathering and dispensing of information on the purchase of firearms. Under these circumstances, we believe that a buyer has the right to rely on the representations of a licensed firearms dealer, who has been made aware of all the relevant historical facts . . ." *United States v. Tallmadge*, 829 F.2d 767, 774 (9th Cir. 1987). See also *United States v. Brebner*, 951 F.2d 1017, 1027 (9th Cir. 1991) (noting defendant may rely on advice of either federal government official, or "an authorized agent of the federal government who, like licensed firearms dealers, has been granted the authority from the federal government to render such advice").

"To establish affirmative authorization, a defendant must do more than show that the government made vague or even contradictory statements. Instead, the defendant must show that the government affirmatively told him the proscribed conduct was permissible." *Lynch*, 903 F.3d at 1076 (citations and internal quotations marks omitted) (rejecting entrapment by estoppel defense when government official advised that legality of marijuana business "was up to the cities and counties to decide how they wanted to handle the matter," because statement was too vague and ambiguous to qualify as affirmative authorization).

Reasonable reliance occurs if "a person sincerely desirous of obeying the law would have accepted the information as true, and would not have been put on notice to make further inquiries." *Lynch*, 903 F.3d at 1077 (citation omitted). See also *Batterjee*, 361 F.3d at 1217 (holding that defendant dealing with complicated intersection of immigration and criminal law, who was told by federal licensee that he was "legally purchasing and possessing a firearm," could reasonably rely on those assurances because he had no reason to believe he needed to inquire any further).

No Ninth Circuit authority clearly sets out the burden that a defendant must satisfy to make out an entrapment by estoppel defense. However, the Ninth Circuit has held that the entrapment by estoppel defense is very similar to the public authority defense, and the preponderance standard applies to the public authority defense. See, e.g., *United States v. Doe*, 705 F.3d 1134,

<https://www.ca9.uscourts.gov/jury-instructions/print/book/export/html/743>

2/3

9/1/2021

6.2B Entrapment by Estoppel Defense

1146 (9th Cir. 2013) (holding that defendant had burden of proving public authority defense by preponderance of the evidence because defense did not serve to negate any elements of charged offenses); *United States v. Burrows*, 36 F.3d 875, 882 (9th Cir. 1994) ("The difference between the entrapment by estoppel defense and the public authority defense is not great."). See also *United States v. Beaty*, 245 F.3d 617, 623 (6th Cir. 2001) (applying preponderance standard); *United States v. Stewart*, 185 F.3d 112, 124 (3rd Cir. 2000) (applying preponderance standard).

Approved 4/2019

**File:**

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9/1/2021

6.11 Public Authority or Government Authorization Defense

## 6.11 Public Authority or Government Authorization Defense

### 6.11 PUBLIC AUTHORITY OR GOVERNMENT AUTHORIZATION DEFENSE

The defendant contends that [[If] [although]] [[he] [she]] committed the acts charged in the indictment, [he] [she] did so at the request of a government agent. Government authorization of the defendant's acts legally excuses the crime charged.

The defendant must prove by a preponderance of the evidence that:

First, the defendant believed [he] [she] was acting as an authorized government agent to assist in law enforcement activity at the time of the offense charged in the indictment; and

Second, the defendant's belief was reasonable.

In deciding this, you should consider all of the relevant circumstances, including the identity of the government official, what the official said to the defendant, and how closely the defendant followed any instructions the official gave.

A preponderance of the evidence means that you must be persuaded that the things the defendant seeks to prove are more probably true than not true. This is a lesser burden of proof than the government's burden to prove beyond a reasonable doubt each element of [specify crime charged].

If you find that the defendant has proved that [he] [she] reasonably believed that [he] [she] was acting as an authorized government agent as provided in this instruction, you must find the defendant not guilty of [specify crime charged].

#### Comment

In *United States v. Doe*, 705 F.3d 1134 (9th Cir. 2013), the Ninth Circuit held that a defendant had the burden of proving the public authority defense by a preponderance of the evidence because the defense did not serve to negate any of the elements of the crimes with which the defendant was charged. *Id.* at 1146. The court quoted the Seventh Circuit in explaining "when a statute is silent on the question of affirmative defenses and when the affirmative defense does not negate an essential element of the offense, we must presume that the common law rule that places the burden of persuasion on the defendant reflects the intent of Congress." *Id.* at 1147 (quoting *United States v. Jumah*, 493 F.3d 868, 873 (7th Cir. 2007)); see *Dixon v. United States*, 548 U.S. 1, 13-14 (2006). However, the *Doe* court cautioned that "[t]his is not to suggest that there is a *per se* rule that the public authority defense must always be proven by the defendant by a preponderance of the evidence. To the contrary, the burden of proof for the public authority defense depends on both the statute at issue and the facts of the specific case." *Id.* "[W]hen confronted with an affirmative defense, the court must always look closely to the statutory language of the specific offense charged and determine (1) whether the public authority defense negates an element of the charged offense that the Government must prove beyond a reasonable doubt and (2) whether Congress intended to alter the common law rules governing the public authority defense [in the statute at issue]." *Id.* (citation omitted).

See Fed. R. Crim. P. 12.3 (Notice of Defense Based Upon Public Authority) regarding giving notice of the defense. The failure to comply with Rule 12.3 allows the court to exclude the testimony of any undisclosed witness except the defendant, regarding the public authority defense. *United States v. Bear*, 439 F.3d 565, 568 n.1 (9th Cir. 2006). The public authority defense was properly used when the defendant reasonably believed that a government agent authorized her to engage in illegal acts. *Id.* at 568. It is plain error for the court not to instruct on the public authority defense sua sponte when the defendant actually presents and relies on that theory of defense. *Id.* at 568-70.

Approved 9/2018

#### File:

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|          |                                                                                                               |
|----------|---------------------------------------------------------------------------------------------------------------|
| SUBJECT: | JOEL CHRISTENSEN, STORE MANAGER, CASH1PAWNS,<br>8720 ROLLERCOASTER RD., MISSOULA, MT 59808; (406)<br>728-2274 |
| CASE:    | MICHAEL DEFRANCE                                                                                              |

Mr. Defrance purchased and redeemed the following firearms –

- 1) Purchased a Taurus Judge in February 2015,
- 2) Redeemed a Remington 770 in September 2016,
- 3) Redeemed a Stevens 200 in March 2018 (and appears to have sold back the Taurus Judge for the money to redeem the Stevens 200)
- 4) Purchased a Smith & Wesson Model 60 Ladysmith in March 2018,
- 5) Redeemed the Remington 770 for the second time in August 2018.

Joel provide the 4473 form for each transaction.



U.S. Department of Justice  
Bureau of Alcohol, Tobacco, Firearms and Explosives

OMB No. 140-0020

## Firearms Transaction Record Part I - Over-the-Counter

**WARNING:** You may not receive a firearm if prohibited by Federal or State law. The information you provide will be used to determine whether you are prohibited under law from receiving a firearm. Certain violations of the Gun Control Act, 18 U.S.C. §§ 921 et. seq., are punishable by up to 10 years imprisonment and/or up to a \$250,000 fine.

Prepare in original only. All entries must be handwritten in ink. Read the Notices, Instructions, and Definitions on this form. "PLEASE PRINT."

Transferor's Transaction  
Serial Number (if any)

CP100004257  
9/1/21

1. Transferee's Full Name  
Last Name

McFarlane

Section A - Must Be Completed Personally By Transferee (Buyer)

First Name

Michael

Middle Name (If no middle name, state "NMN")

Blake

2. Current Residence Address (U.S. Postal abbreviations are acceptable. Cannot be a post office box.)  
Number and Street Address

[Redacted]

City

Dixon

County

Sanders

State

MT

ZIP Code

59831

3. Place of Birth

U.S. City and State

[Redacted]

-OR-

Foreign Country

4. Height

Ft. 5

In. 11

5. Weight

(Lbs.) 140

6. Gender

☒ Male

☐ Female

7. Birth Date

Month [Redacted]

Day [Redacted]

Year 1993

8. Social Security Number (Optional, but will help prevent misidentification)

[Redacted]

9. Unique Personal Identification Number (UPIN) if applicable (See Instructions for Question 9.)

10.a. Ethnicity

☐ Hispanic or Latino

☒ Not Hispanic or Latino

10.b. Race (Check one or more boxes.)

☐ American Indian or Alaska Native

☐ Asian

☐ Black or African American

☐ Native Hawaiian or Other Pacific Islander

☒ White

11. Answer questions 11.a. (see exceptions) through 11.i. and 12 (if applicable) by checking or marking "yes" or "no" in the boxes to the right of the questions.

a. Are you the actual transferee/buyer of the firearm(s) listed on this form? **Warning:** You are not the actual buyer if you are acquiring the firearm(s) on behalf of another person. If you are not the actual buyer, the dealer cannot transfer the firearm(s) to you. (See Instructions for Question 11.a.) Exception: If you are picking up a repaired firearm(s) for another person, you are not required to answer 11.a. and may proceed to question 11.b.

b. Are you under indictment or information in any court for a felony, or any other crime, for which the judge could imprison you for more than one year? (See Instructions for Question 11.b.)

c. Have you ever been convicted in any court of a felony, or any other crime, for which the judge could have imprisoned you for more than one year, even if you received a shorter sentence including probation? (See Instructions for Question 11.c.)

d. Are you a fugitive from justice?

e. Are you an unlawful user of, or addicted to, marijuana or any depressant, stimulant, narcotic drug, or any other controlled substance?

f. Have you ever been adjudicated mentally defective (which includes a determination by a court, board, commission, or other lawful authority that you are a danger to yourself or to others or are incompetent to manage your own affairs) OR have you ever been committed to a mental institution? (See Instructions for Question 11.f.)

g. Have you been discharged from the Armed Forces under dishonorable conditions?

h. Are you subject to a court order restraining you from harassing, stalking, or threatening your child or an intimate partner or child of such partner? (See Instructions for Question 11.h.)

i. Have you ever been convicted in any court of a misdemeanor crime of domestic violence? (See Instructions for Question 11.i.)

j. Have you ever renounced your United States citizenship?

k. Are you an alien illegally in the United States?

l. Are you an alien admitted to the United States under a nonimmigrant visa? (See Instructions for Question 11.l.) If you answered "no" to this question, do NOT respond to question 12 and proceed to question 13.

m. If you are an alien admitted to the United States under a nonimmigrant visa, do you fall within any of the exceptions set forth in the instructions? (If "yes," the licensee must complete question 20c.) (See Instructions for Question 12.) If question 11.l. is answered with a "no" response, then do NOT respond to question 12 and proceed to question 13.

n. What is your State of residence if any? (See Instructions for Question 13.)

o. 14. What is your country of citizenship? (List/check more than one, if applicable. If you are a citizen of the United States, proceed to question 16.) ☒ United States of America

p. 15. If you are not a citizen of the United States, what is your U.S.-issued alien number or admission number?

Previous Editions Are Obsolete

1 of 6

Transferee (Buyer) Continue to Next Page  
STAPLE IF PAGES BECOME SEPARATED

ATF Form 4473 (5300.9) Part I  
Revised April 2012

I certify that my answers to Section A are true, correct, and complete; I have read and understand the Notices, Instructions, and Definitions on ATF Form 4473. I understand that answering "yes" to question 11.a. if I am not the actual buyer is a crime punishable as a felony under Federal law, and may also violate State and/or local law. I understand that a person who answers "yes" to any of the questions 11.b. through 11.k. is prohibited from purchasing or receiving a firearm. I understand that a person who answers "yes" to question 11.l. is prohibited from purchasing or receiving a firearm, unless the person also answers "Yes" to question 12. I also understand that making any false oral or written statement, or exhibiting any false or misrepresented identification with respect to this transaction, is a crime punishable as a felony under Federal law, and may also violate State and/or local law. I further understand that the repetitive purchase of firearms for the purpose of resale for livelihood and profit without a Federal firearms license is a violation of law (See Instructions for Question 16).

16. Transferee's/Buyer's Signature Michael De France 17. Certification Date 2-4-15

## Section B - Must Be Completed By Transferor (Seller)

18. Type of firearm(s) to be transferred (check or mark all that apply):  
☒ Handgun ☐ Long Gun (rifles or shotguns) ☐ Other Firearm (Frame, Receiver, etc. See Instructions for Question 18.)  
 19. If sale at a gun show or other qualifying event.  
 Name of Event \_\_\_\_\_  
 City, State \_\_\_\_\_

20a. Identification (e.g., Virginia Driver's license (VA DL) or other valid government-issued photo identification.) (See Instructions for Question 20.a.)  
 Issuing Authority and Type of Identification MT DL Number on Identification [REDACTED] Expiration Date of Identification (if any)  
 Month [REDACTED] Day [REDACTED] Year 2019

20b. Alternate Documentation (if driver's license or other identification document does not show current residence address) (See Instructions for Question 20.b.)

20c. Aliens Admitted to the United States Under a Nonimmigrant Visa Must Provide: Type of documentation showing an exception to the nonimmigrant visa prohibition. (See Instructions for Question 20.c.)

## Questions 21, 22, or 23 Must Be Completed Prior To The Transfer Of The Firearm(s) (See Instructions for Questions 21, 22 and 23.)

21a. Date the transferee's identifying information in Section A was transmitted to NICS or the appropriate State agency: (Month/Day/Year)  
 Month 02 Day 04 Year 2015  
 21b. The NICS or State transaction number (if provided) was: 2TLN6WG

21c. The response initially provided by NICS or the appropriate State agency was:  
☐ Proceed ☒ Delayed  
☐ Denied ☐ Cancelled  
 (The firearm(s) may be transferred on 2/10/15 (Missing Disposition Information date provided by NICS) if State law permits (optional))  
 21d. If initial NICS or State response was "Delayed," the following response was received from NICS or the appropriate State agency:  
☐ Proceed \_\_\_\_\_ (date)  
☐ Denied \_\_\_\_\_ (date)  
☐ Cancelled \_\_\_\_\_ (date)  
☒ No resolution was provided within 3 business days.

21e. (Complete if applicable) After the firearm was transferred, the following response was received from NICS or the appropriate State agency on: \_\_\_\_\_ (date).  
☐ Proceed ☐ Denied ☐ Cancelled

21f. The name and Brady identification number of the NICS examiner (Optional)  
 \_\_\_\_\_ (name) \_\_\_\_\_ (number)

22. ☐ No NICS check was required because the transfer involved only National Firearms Act firearm(s). (See Instructions for Question 22.)

23. ☐ No NICS check was required because the buyer has a valid permit from the State where the transfer is to take place, which qualifies as an exemption to NICS (See Instructions for Question 23.)

Issuing State and Permit Type \_\_\_\_\_ Date of Issuance (if any) \_\_\_\_\_ Expiration Date (if any) \_\_\_\_\_ Permit Number (if any) \_\_\_\_\_

## Section C - Must Be Completed Personally By Transferee (Buyer)

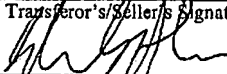
If the transfer of the firearm(s) takes place on a different day from the date that the transferee (buyer) signed Section A, the transferee must complete Section C immediately prior to the transfer of the firearm(s). (See Instructions for Question 24 and 25.)

I certify that my answers to the questions in Section A of this form are still true, correct and complete.

24. Transferee's/Buyer's Signature Michael De France 25. Recertification Date 2-10-15

Transferor (Seller) Continue to Next Page  
 STAPLE IF PAGES BECOME SEPARATED

| Section D - Must Be Completed By Transferor (Seller)                                                               |              |                      |                                                                                                                             |                         |
|--------------------------------------------------------------------------------------------------------------------|--------------|----------------------|-----------------------------------------------------------------------------------------------------------------------------|-------------------------|
| 26.<br>Manufacturer and/or Importer (If the manufacturer and importer are different, the FFL should include both.) | 27.<br>Model | 28.<br>Serial Number | 29.<br>Type (pistol, revolver, rifle, shotgun, receiver, frame, etc.) (See instructions for question 29)                    | 30.<br>Caliber or Gauge |
| Taurus                                                                                                             | The Judge    | ET456209             | Revolver                                                                                                                    | .45LC/.410              |
| X                                                                                                                  | X            | X                    | X                                                                                                                           | X                       |
| 30a. Total Number of Firearms (Please handwrite by printing e.g., one, two, three, etc. Do not use numerals.)      |              |                      |                                                                                                                             |                         |
| One                                                                                                                |              |                      |                                                                                                                             |                         |
| 30c. For Use by FFL (See Instructions for Question 30c.)                                                           |              |                      | 30b. Is any part of this transaction a Pawn Redemption? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No |                         |
| 246-4550 Pistol - 49                                                                                               |              |                      |                                                                                                                             |                         |

| Complete ATF Form 3310.4 For Multiple Purchases of Handguns Within 5 Consecutive Business Days                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |  |                                                                                                                                                                                                                               |  |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|
| 31. Trade/corporate name and address of transferor (seller) (Hand stamp may be used.)<br><br><div style="text-align: center;">  <b>Cash 1 Pawn</b><br/>             8720 Roller Coaster Rd.<br/>             Missoula, MT 59808           </div>                                                                                                                                                                                                                                                                                                                                                                                                                       |  | 32. Federal Firearms License Number (Must contain at least first three and last five digits of FFL Number X-XX-XXXXXX.) (Hand stamp may be used.)<br><br><div style="text-align: center;"> <b>9-81-063-02-6E-01841</b> </div> |  |
| The Person Transferring The Firearm(s) Must Complete Questions 33-36. For Denied/Cancelled Transactions, The Person Who Completed Section B Must Complete Questions 33-35.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |  |                                                                                                                                                                                                                               |  |
| I certify that my answers in Sections B and D are true, correct, and complete. I have read and understand the Notices, Instructions, and Definitions on ATF Form 4473. On the basis of: (1) the statements in Section A (and Section C if the transfer does not occur on the day Section A was completed); (2) my verification of the identification noted in question 20a (and my reverification at the time of transfer if the transfer does not occur on the day Section A was completed); and (3) the information in the current State Laws and Published Ordinances, it is my belief that it is not unlawful for me to sell, deliver, transport, or otherwise dispose of the firearm(s) listed on this form to the person identified in Section A. |  |                                                                                                                                                                                                                               |  |
| 33. Transferor's/Seller's Name (Please print)<br>Stephen Gelman                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |  | 34. Transferor's/Seller's Signature<br>                                                                                                    |  |
| 35. Transferor's/Seller's Title<br>Broker                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |  | 36. Date Transferred<br>2-10-15                                                                                                                                                                                               |  |

## NOTICES, INSTRUCTIONS AND DEFINITIONS

**Purpose of the Form:** The information and certification on this form are designed so that a person licensed under 18 U.S.C. § 923 may determine if he or she may lawfully sell or deliver a firearm to the person identified in Section A, and to alert the buyer of certain restrictions on the receipt and possession of firearms. This form should only be used for sales or transfers where the seller is licensed under 18 U.S.C. § 923. The seller of a firearm must determine the lawfulness of the transaction and maintain proper records of the transaction. Consequently, the seller must be familiar with the provisions of 18 U.S.C. §§ 921-931 and the regulations in 27 CFR Part 478. In determining the lawfulness of the sale or delivery of a long gun (rifle or shotgun) to a resident of another State, the seller is presumed to know the applicable State laws and published ordinances in both the seller's State and the buyer's State.

After the seller has completed the firearms transaction, he or she must make the completed, original ATF Form 4473 (which includes the Notices, General Instructions, and Definitions), and any supporting documents, part of his or her permanent records. Such Forms 4473 must be retained for at least 20 years. Filing may be chronological (by date), alphabetical (by name), or numerical (by transaction serial number), as long as all of the seller's completed Forms 4473 are filed in the same manner. FORMS 4473 FOR DENIED/CANCELLED TRANSFERS MUST BE RETAINED: If the transfer of a firearm is denied/cancelled by NICS, or if for any other reason the transfer is not complete after a NICS check is initiated, the licensee must retain the ATF Form 4473 in his or her records for at least 5 years. Forms 4473 with respect to which a sale, delivery, or transfer did not take place shall be separately retained in alphabetical (by name) or chronological (by date of transferee's certification) order.

If you or the buyer discover that an ATF Form 4473 is incomplete or improperly completed after the firearm has been transferred, and you or the buyer wish to make a record of your discovery, then photocopy the inaccurate form and make any necessary additions or revisions to the photocopy. You only should make changes to Sections B and D. The buyer should only make changes to Sections A and C. Whoever made the changes should initial and date the changes. The corrected photocopy should be attached to the original Form 4473 and retained as part of your permanent records.

**Over-the-Counter Transaction:** The sale or other disposition of a firearm by a seller to a buyer, at the seller's licensed premises. This includes the sale or other disposition of a rifle or shotgun to a nonresident buyer on such premises.

**State Laws and Published Ordinances:** The publication (ATF P 5300.5) of State firearms laws and local ordinances ATF distributes to licensees.

**Exportation of Firearms:** The State or Commerce Departments may require you to obtain a license prior to export.

## Section A

**Question 1. Transferee's Full Name:** The buyer must personally complete Section A of this form and certify (sign) that the answers are true, correct, and complete. However, if the buyer is unable to read and/or write, the answers (other than the signature) may be completed by another person, excluding the seller. Two persons (other than the seller) must then sign as witnesses to the buyer's answers and signature.

When the buyer of a firearm is a corporation, company, association, partnership, or other such business entity, an officer authorized to act on behalf of the

2/9/2015

|                             |                          |
|-----------------------------|--------------------------|
| NTN                         | 2TLN6WG                  |
| Created Date                | 02/04/2015 22:20:15      |
| Expiration Date             | 03/06/2015               |
| Last Name                   | DE FRANCE                |
| First Name                  | MICHAEL                  |
| Middle Name                 | BLAKE                    |
| Cadence (Ex. Jr., Sr., III) | Not Supplied             |
| Gender                      | M                        |
| Height                      | 511                      |
| Weight                      | 140                      |
| Race and/or Ethnicity       | WHITE                    |
| Date of Birth               | 1993                     |
| Place of Birth              |                          |
| Social Security No          |                          |
| UPIN                        | Not Supplied             |
| Miscellaneous No            | Not Supplied             |
| Miscellaneous Field         | Not Supplied             |
| State of Residence          | MONTANA                  |
| Citizenship                 | US Citizen               |
| Countries of Citizenship    | UNITED STATES OF AMERICA |
| Purpose ID                  | Sale of Handgun          |
| Status                      | DELAY                    |
| Submit User                 | SSETHNEY                 |
| Retrieved By                | SSETHNEY                 |
| Status Date                 | 02/09/2015 00:02:19      |
| Retrieved Date              | 02/09/2015 18:46:21      |

Print Page

U.S. Department of Justice  
Bureau of Alcohol, Tobacco, Firearms and Explosives

OMB No. 1140-0020

### Firearms Transaction Record Part I - Over-the-Counter

**WARNING:** You may not receive a firearm if prohibited by Federal or State law. The information you provide will be used to determine whether you are prohibited under law from receiving a firearm. Certain violations of the Gun Control Act, 18 U.S.C. §§ 921 *et seq.*, are punishable by up to 10 years imprisonment and/or up to a \$250,000 fine.

Transferor's Transaction  
Serial Number (if any)

EP100057405

Prepare in original only. All entries must be handwritten in ink. Read the Notices, Instructions, and Definitions on this form. **"PLEASE PRINT."**

Redeem

#### Section A - Must Be Completed Personally By Transferee (Buyer)

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |                 |                                                                                                                                                        |                                                                                                  |                                                                                                               |                                                                     |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------|--------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------|
| 1. Transferee's Full Name                                                                                                                                                                                                                                                                                                                                                                                                                                       |                 | First Name                                                                                                                                             |                                                                                                  | Middle Name (If no middle name, state "NMN")                                                                  |                                                                     |
| Last Name                                                                                                                                                                                                                                                                                                                                                                                                                                                       |                 | MICHAEL                                                                                                                                                |                                                                                                  | BLAKE                                                                                                         |                                                                     |
| 2. Current Residence Address (U.S. Postal abbreviations are acceptable. Cannot be a post office box.)                                                                                                                                                                                                                                                                                                                                                           |                 | City                                                                                                                                                   |                                                                                                  | State                                                                                                         | ZIP Code                                                            |
| Number and Street Address                                                                                                                                                                                                                                                                                                                                                                                                                                       |                 | DIXON                                                                                                                                                  |                                                                                                  | MT                                                                                                            | 59831                                                               |
| 3. Place of Birth                                                                                                                                                                                                                                                                                                                                                                                                                                               | 4. Height       | 5. Weight                                                                                                                                              | 6. Gender                                                                                        | 7. Birth Date                                                                                                 |                                                                     |
| U.S. City and State                                                                                                                                                                                                                                                                                                                                                                                                                                             | Foreign Country | Pt. 5                                                                                                                                                  | (Lbs.)                                                                                           | <input checked="" type="checkbox"/> Male                                                                      | Month Day Year                                                      |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |                 | In. 11                                                                                                                                                 | 135                                                                                              | <input type="checkbox"/> Female                                                                               |                                                                     |
| 8. Social Security Number (Optional, but will help prevent misidentification)                                                                                                                                                                                                                                                                                                                                                                                   |                 |                                                                                                                                                        | 9. Unique Personal Identification Number (UPIN) if applicable (See Instructions for Question 9.) |                                                                                                               |                                                                     |
| 10.a. Ethnicity                                                                                                                                                                                                                                                                                                                                                                                                                                                 |                 |                                                                                                                                                        | 10.b. Race (Check one or more boxes.)                                                            |                                                                                                               |                                                                     |
| <input type="checkbox"/> Hispanic or Latino                                                                                                                                                                                                                                                                                                                                                                                                                     |                 |                                                                                                                                                        | <input type="checkbox"/> American Indian or Alaska Native                                        |                                                                                                               |                                                                     |
| <input checked="" type="checkbox"/> Not Hispanic or Latino                                                                                                                                                                                                                                                                                                                                                                                                      |                 |                                                                                                                                                        | <input type="checkbox"/> Black or African American                                               |                                                                                                               |                                                                     |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |                 |                                                                                                                                                        | <input type="checkbox"/> Asian                                                                   |                                                                                                               |                                                                     |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |                 |                                                                                                                                                        | <input type="checkbox"/> Native Hawaiian or Other Pacific Islander                               |                                                                                                               |                                                                     |
| 11. Answer questions 11.a. (See exceptions) through 11.i. and 12 (if applicable) by checking or marking "yes" or "no" in the boxes to the right of the questions.                                                                                                                                                                                                                                                                                               |                 |                                                                                                                                                        |                                                                                                  |                                                                                                               |                                                                     |
| a. Are you the actual transferee/buyer of the firearm(s) listed on this form? Warning: You are not the actual buyer if you are acquiring the firearm(s) on behalf of another person. If you are not the actual buyer, the dealer cannot transfer the firearm(s) to you. (See Instructions for Question 11.a.) Exception: If you are picking up a repaired firearm(s) for another person, you are not required to answer 11.a. and may proceed to question 11.b. |                 |                                                                                                                                                        |                                                                                                  |                                                                                                               | <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No |
| b. Are you under indictment or information in any court for a felony, or any other crime, for which the judge could imprison you for more than one year? (See Instructions for Question 11.b.)                                                                                                                                                                                                                                                                  |                 |                                                                                                                                                        |                                                                                                  |                                                                                                               | <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No |
| c. Have you ever been convicted in any court of a felony, or any other crime, for which the judge could have imprisoned you for more than one year, even if you received a shorter sentence including probation? (See Instructions for Question 11.c.)                                                                                                                                                                                                          |                 |                                                                                                                                                        |                                                                                                  |                                                                                                               | <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No |
| d. Are you a fugitive from justice?                                                                                                                                                                                                                                                                                                                                                                                                                             |                 |                                                                                                                                                        |                                                                                                  |                                                                                                               | <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No |
| e. Are you an unlawful user of, or addicted to, marijuana or any depressant, stimulant, narcotic drug, or any other controlled substance?                                                                                                                                                                                                                                                                                                                       |                 |                                                                                                                                                        |                                                                                                  |                                                                                                               | <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No |
| f. Have you ever been adjudicated mentally defective (which includes a determination by a court, board, commission, or other lawful authority that you are a danger to yourself or to others or are incompetent to manage your own affairs) OR have you ever been committed to a mental institution? (See Instructions for Question 11.f.)                                                                                                                      |                 |                                                                                                                                                        |                                                                                                  |                                                                                                               | <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No |
| g. Have you been discharged from the Armed Forces under dishonorable conditions?                                                                                                                                                                                                                                                                                                                                                                                |                 |                                                                                                                                                        |                                                                                                  |                                                                                                               | <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No |
| h. Are you subject to a court order restraining you from harassing, stalking, or threatening your child or an intimate partner or child of such partner? (See Instructions for Question 11.h.)                                                                                                                                                                                                                                                                  |                 |                                                                                                                                                        |                                                                                                  |                                                                                                               | <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No |
| i. Have you ever been convicted in any court of a misdemeanor crime of domestic violence? (See Instructions for Question 11.i.)                                                                                                                                                                                                                                                                                                                                 |                 |                                                                                                                                                        |                                                                                                  |                                                                                                               | <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No |
| j. Have you ever renounced your United States citizenship?                                                                                                                                                                                                                                                                                                                                                                                                      |                 |                                                                                                                                                        |                                                                                                  |                                                                                                               | <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No |
| k. Are you an alien illegally in the United States?                                                                                                                                                                                                                                                                                                                                                                                                             |                 |                                                                                                                                                        |                                                                                                  |                                                                                                               | <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No |
| l. Are you an alien admitted to the United States under a nonimmigrant visa? (See Instructions for Question 11.l.) If you answered "no" to this question, do NOT respond to question 12 and proceed to question 13.                                                                                                                                                                                                                                             |                 |                                                                                                                                                        |                                                                                                  |                                                                                                               | <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No |
| 12. If you are an alien admitted to the United States under a nonimmigrant visa, do you fall within any of the exceptions set forth in the instructions? (If "yes," the licensee must complete question 20c.) (See Instructions for Question 12.) If question 11.l. is answered with a "no" response, then do NOT respond to question 12 and proceed to question 13.                                                                                            |                 |                                                                                                                                                        |                                                                                                  |                                                                                                               | <input type="checkbox"/> Yes <input type="checkbox"/> No            |
| 13. What is your State of residence (if any)? (See Instructions for Question 13.)                                                                                                                                                                                                                                                                                                                                                                               |                 | 14. What is your country of citizenship? (List/check more than one, if applicable. If you are a citizen of the United States, proceed to question 16.) |                                                                                                  | 15. If you are not a citizen of the United States, what is your U.S.-issued alien number or admission number? |                                                                     |
| MT                                                                                                                                                                                                                                                                                                                                                                                                                                                              |                 | <input checked="" type="checkbox"/> United States of America                                                                                           |                                                                                                  |                                                                                                               |                                                                     |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |                 | <input type="checkbox"/> Other (Specify)                                                                                                               |                                                                                                  |                                                                                                               |                                                                     |

Note: Previous Editions Are Obsolete  
Page 1 of 6

Transferee (Buyer) Continue to Next Page  
STAPLE IF PAGES BECOME SEPARATED

ATF Form 4473 (5300.9) Part I  
Revised April 2012

I certify that my answers to Section A are true, correct, and complete. I have read and understand the Notices, Instructions, and Definitions on ATF Form 4473. I understand that answering "yes" to question 11.a. if I am not the actual buyer is a crime punishable as a felony under Federal law, and may also violate State and/or local law. I understand that a person who answers "yes" to any of the questions 11.b. through 11.k. is prohibited from purchasing or receiving a firearm. I understand that a person who answers "yes" to question 11.l. is prohibited from purchasing or receiving a firearm, unless the person also answers "Yes" to question 12. I also understand that making any false oral or written statement, or exhibiting any false or misrepresented identification with respect to this transaction, is a crime punishable as a felony under Federal law, and may also violate State and/or local law. I further understand that the repetitive purchase of firearms for the purpose of resale for livelihood and profit without a Federal firearms license is a violation of law (See Instructions for Question 16).

16. Transferee's/Buyer's Signature

17. Certification Date

## Section B - Must Be Completed By Transferor (Seller)

18. Type of firearm(s) to be transferred (check or mark all that apply):

☐ Handgun ☒ Long Gun ☐ Other Firearm (Frame, Receiver, etc.  
(rifles or shotguns)  
See Instructions for Question 18.)

19. If sale at a gun show or other qualifying event.

Name of Event

City, State

20a. Identification (e.g., Virginia Driver's license (VA DL) or other valid government-issued photo identification.) (See Instructions for Question 20.a.)

Issuing Authority and Type of Identification

Number on Identification

Expiration Date of Identification (if any)

MONTANA

COMMERCIAL DRIVER

Month

Day

Year

12

12

2019

20b. Alternate Documentation (If driver's license or other identification document does not show current residence address) (See Instructions for Question 20.b.)

20c. Aliens Admitted to the United States Under a Nonimmigrant Visa Must Provide: Type of documentation showing an exception to the nonimmigrant visa prohibition. (See Instructions for Question 20.c.)

## Questions 21, 22, or 23 Must Be Completed Prior To The Transfer Of The Firearm(s) (See Instructions for Questions 21, 22 and 23.)

21a. Date the transferee's identifying information in Section A was transmitted to NICS or the appropriate State agency: (Month/Day/Year)

Month Day Year  
9 22 2016

21b. The NICS or State transaction number (if provided) was:

100152V34

21c. The response initially provided by NICS or the appropriate State agency was:

☐ Proceed ☒ Delayed  
☐ Denied  
☐ Cancelled  
(The firearm(s) may be transferred on  
9/23/16 (Missing Disposition  
information date provided by NICS) if State law  
permits (optional))

21d. If initial NICS or State response was "Delayed," the following response was received from NICS or the appropriate State agency:

☐ Proceed (date)  
☐ Denied (date)  
☐ Cancelled (date)  
☒ No resolution was provided within 3 business days.

21e. (Complete if applicable.) After the firearm was transferred, the following response was received from NICS or the appropriate State agency on: (date). ☐ Proceed ☐ Denied ☐ Cancelled

21f. The name and Brady identification number of the NICS examiner (Optional)

(name)

(number)

22. ☐ No NICS check was required because the transfer involved only National Firearms Act firearm(s). (See Instructions for Question 22.)23. ☐ No NICS check was required because the buyer has a valid permit from the State where the transfer is to take place, which qualifies as an exemption to NICS (See Instructions for Question 23.)

Issuing State and Permit Type

Date of Issuance (if any)

Expiration Date (if any)

Permit Number (if any)

## Section C - Must Be Completed Personally By Transferee (Buyer)

If the transfer of the firearm(s) takes place on a different day from the date that the transferee (buyer) signed Section A, the transferee must complete Section C immediately prior to the transfer of the firearm(s). (See Instructions for Question 24 and 25.)

I certify that my answers to the questions in Section A of this form are still true, correct and complete.

24. Transferee's/Buyer's Signature

25. Recertification Date

Transferor (Seller) Continue to Next Page  
STAPLE IF PAGES BECOME SEPARATED

| Section D - Must Be Completed By Transferor (Seller)                                                                 |           |                   |                                                                                                                             |                      |
|----------------------------------------------------------------------------------------------------------------------|-----------|-------------------|-----------------------------------------------------------------------------------------------------------------------------|----------------------|
| 26. Manufacturer and/or Importer (If the manufacturer and importer are different, the FFL should include both.)      | 27. Model | 28. Serial Number | 29. Type (pistol, revolver, rifle, shotgun, receiver, frame, etc.) (See instructions for question 29)                       | 30. Caliber or Gauge |
| REMINGTON                                                                                                            | 770       | M71863512         | RIFLE                                                                                                                       | 243 WIN              |
| X                                                                                                                    | X         | X                 | X                                                                                                                           | X                    |
| X                                                                                                                    | X         | X                 | X                                                                                                                           | X                    |
| 30a. Total Number of Firearms (Please <i>handwrite</i> by printing e.g., one, two, three, etc. Do not use numerals.) |           |                   | 30b. Is any part of this transaction a Pawn Redemption? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No |                      |
| 30c. For Use by FFL (See Instructions for Question 30c.)                                                             |           |                   |                                                                                                                             |                      |
| 406-246-3228                                                                                                         |           |                   |                                                                                                                             |                      |

## Complete ATF Form 3310.4 For Multiple Purchases of Handguns Within 5 Consecutive Business Days

|                                                                                                                                                                 |                                                                                                                                                                    |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 31. Trade/corporate name and address of transferor (seller) (Hand stamp may be used.)<br><br>CASH 1 PAWN, INC.<br>8720 ROLLER COASTER RD.<br>MISSOULA, MT 59808 | 32. Federal Firearms License Number (Must contain at least first three and last five digits of FFL Number X-XX-XXXXX.) (Hand stamp may be used.)<br><br>9-81-01841 |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------|

The Person Transferring The Firearm(s) Must Complete Questions 33-36. For Denied/Cancelled Transactions,  
The Person Who Completed Section B Must Complete Questions 33-35.

I certify that my answers in Sections B and D are true, correct, and complete. I have read and understand the Notices, Instructions, and Definitions on ATF Form 4473. On the basis of: (1) the statements in Section A (and Section C if the transfer does not occur on the day Section A was completed); (2) my verification of the identification noted in question 20a (and my reverification at the time of transfer if the transfer does not occur on the day Section A was completed); and (3) the information in the current State Laws and Published Ordinances, it is my belief that it is not unlawful for me to sell, deliver, transport, or otherwise dispose of the firearm(s) listed on this form to the person identified in Section A.

|                                                                 |                                                           |                                                |                                 |
|-----------------------------------------------------------------|-----------------------------------------------------------|------------------------------------------------|---------------------------------|
| 33. Transferor's/Seller's Name (Please print)<br>Angus McGillis | 34. Transferor's/Seller's Signature<br><i>[Signature]</i> | 35. Transferor's/Seller's Title<br>PAWN BROKER | 36. Date Transferred<br>10/3/16 |
|-----------------------------------------------------------------|-----------------------------------------------------------|------------------------------------------------|---------------------------------|

## NOTICES, INSTRUCTIONS AND DEFINITIONS

**Purpose of the Form:** The information and certification on this form are designed so that a person licensed under 18 U.S.C. § 923 may determine if he or she may lawfully sell or deliver a firearm to the person identified in Section A, and to alert the buyer of certain restrictions on the receipt and possession of firearms. This form should only be used for sales or transfers where the seller is licensed under 18 U.S.C. § 923. The seller of a firearm must determine the lawfulness of the transaction and maintain proper records of the transaction. Consequently, the seller must be familiar with the provisions of 18 U.S.C. §§ 921-931 and the regulations in 27 CFR Part 478. In determining the lawfulness of the sale or delivery of a long gun (rifle or shotgun) to a resident of another State, the seller is presumed to know the applicable State laws and published ordinances in both the seller's State and the buyer's State.

After the seller has completed the firearms transaction, he or she must make the completed, original ATF Form 4473 (which includes the Notices, General Instructions, and Definitions), and any supporting documents, part of his or her permanent records. Such Forms 4473 must be retained for at least 20 years. Filing may be chronological (by date), alphabetical (by name), or numerical (by transaction serial number), as long as all of the seller's completed Forms 4473 are filed in the same manner. FORMS 4473 FOR DENIED/CANCELLED TRANSFERS MUST BE RETAINED: If the transfer of a firearm is denied/cancelled by NICS, or if for any other reason the transfer is not complete after a NICS check is initiated, the licensee must retain the ATF Form 4473 in his or her records for at least 5 years. Forms 4473 with respect to which a sale, delivery, or transfer did not take place shall be separately retained in alphabetical (by name) or chronological (by date of transferee's certification) order.

If you or the buyer discover that an ATF Form 4473 is incomplete or improperly completed after the firearm has been transferred, and you or the buyer wish to make a record of your discovery, then photocopy the inaccurate form and make any necessary additions or revisions to the photocopy. You only should make changes to Sections B and D. The buyer should only make changes to Sections A and C. Whoever made the changes should initial and date the changes. The corrected photocopy should be attached to the original Form 4473 and retained as part of your permanent records.

**Over-the-Counter Transaction:** The sale or other disposition of a firearm by a seller to a buyer, at the seller's licensed premises. This includes the sale or other disposition of a rifle or shotgun to a nonresident buyer on such premises.

**State Laws and Published Ordinances:** The publication (ATF P 5300.5) of State firearms laws and local ordinances ATF distributes to licensees.

**Exportation of Firearms:** The State or Commerce Departments may require you to obtain a license prior to export.

## Section A

**Question 1. Transferee's Full Name:** The buyer must personally complete Section A of this form and certify (sign) that the answers are true, correct, and complete. However, if the buyer is unable to read and/or write, the answers (other than the signature) may be completed by another person, excluding the seller. Two persons (other than the seller) must then sign as witnesses to the buyer's answers and signature.

When the buyer of a firearm is a corporation, company, association, partnership, or other such business entity, an officer authorized to act on behalf of the

FBI NICS

9/22/2016

joel.christensen

New

|                                                                                                                                                                                                                          |                         |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------|
| <p>Display NDI</p> <p>The following NDI has been marked as reviewed for the selected transaction. <a href="#">Print This Message</a></p> <p>Current Time Sep 22, 2016 4:57:54 PM</p>                                     |                         |
| <p>General Information</p>                                                                                                                                                                                               |                         |
| <p>Transaction Information</p>                                                                                                                                                                                           |                         |
| NTN                                                                                                                                                                                                                      | 100152V24               |
| Created Date                                                                                                                                                                                                             | Sep 22, 2016 4:54:18 PM |
| Subject Name                                                                                                                                                                                                             | Michael Elzing Dufrenoy |
| <p>NDI Message</p> <p>NTN 100152V24 will be delayed while the NICS continues its research. If you do not receive a response from us, the Brady Law does not prohibit you from transferring the firearm on 9/28/2016.</p> |                         |
| <p>Submit</p>                                                                                                                                                                                                            |                         |



U.S. Department of Justice  
Bureau of Alcohol, Tobacco, Firearms and Explosives

## Firearms Transaction Record

**WARNING:** You may not receive a firearm if prohibited by Federal or State law. The information you provide will be used to determine whether you are prohibited from receiving a firearm. Certain violations of the Gun Control Act, 18 U.S.C. 921 et. seq., are punishable by up to 10 years imprisonment and/or up to a \$250,000 fine.

Read the Notices, Instructions, and Definitions on this form. Prepare in original only at the licensed premises ("licensed premises" includes business temporarily conducted from a qualifying gun show or event in the same State in which the licensed premises is located) unless the transaction qualifies under 18 U.S.C. 922(c). All entries must be handwritten in ink. "PLEASE PRINT."

Transferor's/Seller's  
Transaction Serial  
Number (If any)

CP1001089

Redeem

### Section A - Must Be Completed Personally By Transferee/Buyer

1. Transferee's/Buyer's Full Name (If legal name contains an initial only, record "IO" after the initial. If no middle initial or name, record "NMN".)

Last Name (Including suffix (e.g., Jr, Sr, II, III))

DEFRANCE

First Name

MICHAEL

Middle Name

BLAKE

2. Current State of Residence and Address (U.S. Postal abbreviations are acceptable. Cannot be a post office box.)

Number and Street Address

[REDACTED]

City

MISSOULA

County

MISSOULA

State

MT

ZIP Code

59808

3. Place of Birth

U.S. City and State

[REDACTED]

-OR-

Foreign Country

4. Height

Ft. 5

In. 11

5. Weight

(Lbs.) 145

6. Sex

☒ Male

☐ Female

7. Birth Date

Month

Day

Year

1993

8. Social Security Number (Optional, but will help prevent misidentification)

[REDACTED]

9. Unique Personal Identification Number (UPIN) if applicable (See Instructions for Question 9.)

10.a. Ethnicity

☐ Hispanic or Latino

☒ Not Hispanic or Latino

10.b. Race (In addition to ethnicity, select one or more race in 10.b. Both 10.a. and 10.b. must be answered.)

☐ American Indian or Alaska Native

☐ Asian

☐ Black or African American

☐ Native Hawaiian or Other Pacific Islander

☒ White

11. Answer the following questions by checking or marking "yes" or "no" in the boxes to the right of the questions.

Yes No

a. Are you the actual transferee/buyer of the firearm(s) listed on this form? Warning: You are not the actual transferee/buyer if you are acquiring the firearm(s) on behalf of another person. If you are not the actual transferee/buyer, the licensee cannot transfer the firearm(s) to you. Exception: If you are picking up a repaired firearm(s) for another person, you are not required to answer 11.a. and may proceed to question 11.b. (See Instructions for Question 11.a.)

☒ ☐

b. Are you under indictment or information in any court for a felony, or any other crime for which the judge could imprison you for more than one year? (See Instructions for Question 11.b.)

☐ ☒

c. Have you ever been convicted in any court of a felony, or any other crime for which the judge could have imprisoned you for more than one year, even if you received a shorter sentence including probation? (See Instructions for Question 11.c.)

☐ ☒

d. Are you a fugitive from justice? (See Instructions for Question 11.d.)

☐ ☒

e. Are you an unlawful user of, or addicted to, marijuana or any depressant, stimulant, narcotic drug, or any other controlled substance? Warning: The use or possession of marijuana remains unlawful under Federal law regardless of whether it has been legalized or decriminalized for medicinal or recreational purposes in the state where you reside.

☐ ☒

f. Have you ever been adjudicated as a mental defective OR have you ever been committed to a mental institution? (See Instructions for Question 11.f.)

☐ ☒

g. Have you been discharged from the Armed Forces under dishonorable conditions?

☐ ☒

h. Are you subject to a court order restraining you from harassing, stalking, or threatening your child or an intimate partner or child of such partner? (See Instructions for Question 11.h.)

☐ ☒

i. Have you ever been convicted in any court of a misdemeanor crime of domestic violence? (See Instructions for Question 11.i.)

☐ ☒

12.a. Country of Citizenship: (Check/List more than one, if applicable. Nationals of the United States may check U.S.A.)

☒ United States of America (U.S.A.)

☐ Other Country/Countries (Specify)

Yes No

12.b. Have you ever renounced your United States citizenship?

☐ ☒

12.c. Are you an alien illegally or unlawfully in the United States?

☐ ☒

12.d.1. Are you an alien who has been admitted to the United States under a nonimmigrant visa? (See Instructions for Question 12.d.)

☐ ☒

12.d.2. If "yes", do you fall within any of the exceptions stated in the instructions?

☒ N/A

☐ ☐

13. If you are an alien, record your U.S.-Issued Alien or Admission number (AR#, USCIS#, or I94#):

Previous Editions Are Obsolete

Transferee/Buyer Continue to Next Page  
STAPLE IF PAGES BECOME SEPARATED

Page 1 of 6

ATF E-Form 4473 (5300.9)  
Revised October 2016

I certify that my answers in Section A are true, correct, and complete. I have read and understand the Notices, Instructions, and Definitions on ATF Form 4473. I understand that answering "yes" to question 11.a. If I am not the actual transferee/buyer is a crime punishable as a felony under Federal law, and may also violate State and/or local law. I understand that a person who answers "yes" to any of the questions 11.b. through 11.i and/or 12.b. through 12.c. is prohibited from purchasing or receiving a firearm. I understand that a person who answers "yes" to question 12.d.1. is prohibited from receiving or possessing a firearm, unless the person answers "yes" to question 12.d.2. and provides the documentation required in 18.e. I also understand that making any false oral or written statement, or exhibiting any false or misrepresented identification with respect to this transaction, is a crime punishable as a felony under Federal law, and may also violate State and/or local law. I further understand that the repetitive purchase of firearms for the purpose of resale for livelihood and profit without a Federal firearms license is a violation of Federal law. (See Instructions for Question 14.)

14. Transferee's/Buyer's Signature

15. Certification Date

## Section B - Must Be Completed By Transferor/Seller

16. Type of firearm(s) to be transferred (check or mark all that apply):

☐ Handgun ☒ Long Gun (rifles or shotguns) ☐ Other Firearm (frame, receiver, etc. See Instructions for Question 16.)

17. If transfer is at a qualifying gun show or event:

Name of Function: \_\_\_\_\_

City, State: \_\_\_\_\_

18.a. Identification (e.g., Virginia Driver's license (VA DL) or other valid government-issued photo identification.) (See Instructions for Question 18.a.)

Issuing Authority and Type of Identification

Number on Identification

Expiration Date of Identification (if any)

MT  
CDLMonth  
[redacted]Day  
[redacted]Year  
2019

18.b. Supplemental Government Issued Documentation (If identification document does not show current residence address) (See Instructions for Question 18.b.)

18.c. Exception to the Nonimmigrant Alien Prohibition: If the transferee/buyer answered "YES" to 12.d.2. the transferor/seller must record the type of documentation showing the exception to the prohibition and attach a copy to this ATF Form 4473. (See Instructions for Question 18.c.)

## Questions 19, 20, or 21 Must Be Completed Prior To The Transfer Of The Firearm(s) (See Instructions for Questions 19, 20 and 21.)

19.a. Date the transferee's/buyer's identifying information in Section A was transmitted to NICS or the appropriate State agency:

Month: 2 Day: 24 Year: 2018

19.b. The NICS or State transaction number (if provided) was:

146 JM SSST

19.c. The response initially (first) provided by NICS or the appropriate State agency was:

☐ Proceed ☒ Delayed  
☐ Denied  
☐ Cancelled  
 (The firearm(s) may be transferred on 3/1/18 if State law permits (optional))

19.d. The following response(s) was/were later received from NICS or the appropriate State agency:

☒ Proceed 3/1/18 (date) ☐ Overturned  
☐ Denied (date)  
☐ Cancelled (date)  
☐ No response was provided within 3 business days.

19.e. (Complete if applicable.) After the firearm was transferred, the following response was received from NICS or the appropriate State agency on:

\_\_\_\_\_ (date). ☐ Proceed ☐ Denied ☐ Cancelled

19.f. The name and Brady identification number of the NICS examiner. (Optional)

(name)

(number)

19.g. Name of FFL Employee Completing NICS check. (Optional)

20. ☐ No NICS check was required because a background check was completed during the NFA approval process on the individual who will receive the NFA firearm(s), as reflected on the approved NFA application. (See Instructions for Question 20.)21. ☐ No NICS check was required because the transferee/buyer has a valid permit from the State where the transfer is to take place, which qualifies as an exemption to NICS. (See Instructions for Question 21.)

Issuing State and Permit Type

Date of Issuance (if any)

Expiration Date (if any)

Permit Number (if any)

## Section C - Must Be Completed Personally By Transferee/Buyer

If the transfer of the firearm(s) takes place on a different day from the date that the transferee/buyer signed Section A, the transferee/buyer must complete Section C immediately prior to the transfer of the firearm(s). (See Instructions for Question 22 and 23.)

I certify that my answers to the questions in Section A of this form are still true, correct, and complete.

22. Transferee's/Buyer's Signature

23. Recertification Date

Transferor/Seller Continue to Next Page  
 STAPLE IF PAGES BECOME SEPARATED

**Section D - Must Be Completed By Transferor/Seller Even If The Firearm(s) Is Not Transferred**

| 24.<br>Manufacturer and Importer (If any) (If the manufacturer and importer are different, the FFL must include both.) | 25.<br>Model<br>(If Designated) | 26.<br>Serial Number | 27.<br>Type (See Instructions for Question 27.) | 28.<br>Caliber or Gauge |
|------------------------------------------------------------------------------------------------------------------------|---------------------------------|----------------------|-------------------------------------------------|-------------------------|
| 1. STEVENS ARMS                                                                                                        | 200                             | G490490              | RIFLE                                           | 300 WIN MAG             |
| 2. X                                                                                                                   | X                               | X                    | X                                               | X                       |
| 3. X                                                                                                                   | X                               | X                    | X                                               | X                       |
| 4. X                                                                                                                   | X                               | X                    | X                                               | X                       |

**REMINDER - By the Close of Business Complete ATF Form 3310.4 For Multiple Purchases of Handguns Within 5 Consecutive Business Days**

|                                                                                                                                                                                                          |                                                                                                                                                 |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------|
| 29. Total Number of Firearms Transferred (Please <i>handwrite</i> by printing e.g., zero, one, two, three, etc. Do not use numerals.) ONE                                                                | 30. Check if any part of this transaction is a pawn redemption.<br><input checked="" type="checkbox"/> Line Number(s) From Question 24 Above: 1 |
| 31. For Use by Licensee (See Instructions for Question 31.)<br>406-499-1373 LM-DPC                                                                                                                       | 32. Check if this transaction is to facilitate a private party transfer.<br><input type="checkbox"/> (See Instructions for Question 32.)        |
| 33. Trade/corporate name and address of transferor/seller and Federal Firearm License Number (Must contain at least first three and last five digits of FFL Number X-XX-XXXXX) (Hand stamp may be used.) |                                                                                                                                                 |

CASH 1 PAWN INC 8720 ROLLERCOASTER RD MISSOULA, MT 59808 9-81-01841

**The Person Transferring The Firearm(s) Must Complete Questions 34-37.  
For Denied/Cancelled Transactions, the Person Who Completed Section B Must Complete Questions 34-36.**

I certify that: (1) I have read and understand the Notices, Instructions, and Definitions on this ATF Form 4473; (2) the information recorded in Sections B and D is true, correct, and complete; and (3) this entire transaction record has been completed at my licensed business premises ("licensed premises" includes business temporarily conducted from a qualifying gun show or event in the same State in which the licensed premises is located) unless this transaction has met the requirements of 18 U.S.C. 922(c). Unless this transaction has been denied or cancelled, I further certify on the basis of — (1) the transferee's/buyer's responses in Section A (and Section C, if applicable); (2) my verification of the identification recorded in question 18 (and my re-verification at the time of transfer, if Section C was completed); and (3) State or local law applicable to the firearms business — It is my belief that it is not unlawful for me to sell, deliver, transport, or otherwise dispose of the firearm(s) listed on this form to the person identified in Section A.

|                                                                   |                                         |                                                |                                |
|-------------------------------------------------------------------|-----------------------------------------|------------------------------------------------|--------------------------------|
| 34. Transferor's/Seller's Name (Please print)<br>Lund Christensen | 35. Transferor's/Seller's Signature<br> | 36. Transferor's/Seller's Title<br>PAWN BROKER | 37. Date Transferred<br>3/2/18 |
|-------------------------------------------------------------------|-----------------------------------------|------------------------------------------------|--------------------------------|

**NOTICES, INSTRUCTIONS, AND DEFINITIONS**

**Purpose of the Form:** The information and certification on this form are designed so that a person licensed under 18 U.S.C. 923 may determine if he/she may lawfully sell or deliver a firearm to the person identified in Section A, and to alert the transferee/buyer of certain restrictions on the receipt and possession of firearms. The transferor/seller of a firearm must determine the lawfulness of the transaction and maintain proper records of the transaction. Consequently, the transferor/seller must be familiar with the provisions of 18 U.S.C. 921-931 and the regulations in 27 CFR Parts 478 and 479. In determining the lawfulness of the sale or delivery of a rifle or shotgun to a resident of another State, the transferor/seller is presumed to know the applicable State laws and published ordinances in both the transferor's/seller's State and the transferee's/buyer's State. (See ATF Publication 5300.5, State Laws and Published Ordinances.)

Generally, ATF Form 4473 must be completed at the licensed business premises when a firearm is transferred over-the-counter. Federal law, 18 U.S.C. 922(c), allows a licensed importer, manufacturer, or dealer to sell a firearm to a nonlicensee who does not appear in person at the licensee's business premises only if the transferee/buyer meets certain requirements. These requirements are set forth in section 922(e), 27 CFR 478.96(b), and ATF Procedure 2013-2.

After the transferor/seller has completed the firearms transaction, he/she must make the completed, original ATF Form 4473 (which includes the Notices, General Instructions, and Definitions), and any supporting documents, part of his/her permanent records. Such Forms 4473 must be retained for at least 20 years and after that period may be submitted to ATF. Filing may be chronological (by date of disposition), alphabetical (by name of purchaser), or numerical (by transaction serial number), as long as all of the transferor's/seller's completed Forms 4473 are filed in the same manner.

**FORMS 4473 FOR DENIED/CANCELLED TRANSFERS MUST BE RETAINED:** If the transfer of a firearm is denied/cancelled by NICS, or if for any other reason the transfer is not completed after a NICS check is initiated, the licensee must retain the ATF Form 4473 in his/her records for at least 5 years. Forms 4473 with respect to which a sale, delivery, or transfer did not take place shall be separately retained in alphabetical (by name of transferee) or chronological (by date of transferee's certification) order.

If the transferor/seller or the transferee/buyer discovers that an ATF Form 4473 is incomplete or improperly completed after the firearm has been transferred, and the transferor/seller or the transferee/buyer wishes to correct the omission(s) or error(s), photocopy the inaccurate form and make any necessary additions or revisions to the photocopy. The transferor/seller should only make changes to Sections B and D. The transferee/buyer should only make changes to Section A and C. Whoever made the changes should initial and date the changes. The corrected photocopy should be attached to the original Form 4473 and retained as part of the transferor's/seller's permanent records.

**Exportation of Firearms:** The State or Commerce Departments may require a firearms exporter to obtain a license prior to export. **Warning:** Any person who exports a firearm without proper authorization may be fined not more than \$1,000,000 and/or imprisoned for not more than 20 years. See 22 U.S.C. 2778(c).

**Section A**

The transferee/buyer must personally complete Section A of this form and certify (sign) that the answers are true, correct, and complete. However, if the transferee/buyer is unable to read and/or write, the answers (other than the signature) may be completed by another person, excluding the transferor/seller. Two persons (other than the transferor/seller) must then sign as witnesses to the transferee's/buyer's answers and signature/certification in question 14.

**General Information**

---

The following MDI has been marked as retrieved for the selected transaction.

Current Time Feb 24, 2018 5:41:14 PM

**Transaction Information**

---

NTN 100JMSST  
Created Date Feb 24, 2018 5:07:11 PM  
Subject Name MICHAEL BLAKE DEFRANCE

**MDI Message**

---

NTN 100JMSST will be Delayed while the NICS continues its research. If you do not receive a response from us, the Brady Law does not prohibit you from transferring the firearm on 3/1/2018.

3/1/2018

Application

Case 9:21-cr-00029-DLC Document 28 Filed 09/01/21 Page 14 of 22

Search Request Details

The following is a list of detailed information for the selected transaction.

|                             |                   |
|-----------------------------|-------------------|
| NTN                         | 100JMSSST         |
| Created Date                | 2/24/18 5:07 PM   |
| Expiration Date             | 3/26/18 6:07 PM   |
| Last Name                   | DEFRANCE          |
| First Name                  | MICHAEL           |
| Middle Name                 | BLAKE             |
| Cadence (Ex. Jr., Sr., III) | Not Supplied      |
| Gender                      | M                 |
| Height                      | 511               |
| Weight                      | 145               |
| Race and/or Ethnicity       | W                 |
| Date of Birth               | 1993              |
| Place of Birth              |                   |
| Social Security No          |                   |
| UPIN                        | Not Supplied      |
| Miscellaneous No            | Not Supplied      |
| Miscellaneous Field         |                   |
| State of Residence          | MT                |
| Citizenship                 | C                 |
| Country of Citizenship      | US                |
| Country of Citizenship 2    | Not Supplied      |
| Country of Citizenship 3    | Not Supplied      |
| Purpose ID                  | 10                |
| Submitted By                | Joel.christensen  |
| Retrieved By                | Joel.christensen  |
| Retrieved Date              | 3/1/18 12:57 PM   |
| Status                      | Proceed           |
| Status Date                 | 3/1/2018 11:20 AM |

[https://www.cjls.gov/nlcs/PRServletSSO/UHko3oflAhsa1kUS6YCor2Phv4EAVa66\\*/ITABTHREAD2?pyActivity=%40baseclass.pzTransformAndRun&pz...](https://www.cjls.gov/nlcs/PRServletSSO/UHko3oflAhsa1kUS6YCor2Phv4EAVa66*/ITABTHREAD2?pyActivity=%40baseclass.pzTransformAndRun&pz...)

U.S. Department of Justice  
Bureau of Alcohol, Tobacco, Firearms and Explosives

# Firearms Transaction Record

**WARNING:** You may not receive a firearm if prohibited by Federal or State law. The information you provide will be used to determine whether you are prohibited from receiving a firearm. Certain violations of the Gun Control Act, 18 U.S.C. 921 et. seq., are punishable by up to 10 years imprisonment and/or up to a \$250,000 fine.

Read the Notices, Instructions, and Definitions on this form. Prepare in original only at the licensed premises ("licensed premises" includes business temporarily conducted from a qualifying gun show or event in the same State in which the licensed premises is located) unless the transaction qualifies under 18 U.S.C. 922(c). All entries must be handwritten in ink. "PLEASE PRINT."

Transferor's/Seller's  
Transaction Serial  
Number (If any)

CP10010984  
Sale

## Section A - Must Be Completed Personally By Transferee/Buyer

1. Transferee's/Buyer's Full Name (If legal name contains an initial only, record "IO" after the initial. If no middle initial or name, record "NMN".)

Last Name (Including suffix (e.g., Jr, Sr, II, III))

DEFRANCE

First Name

MICHAEL

Middle Name

BLAKE

2. Current State of Residence and Address (U.S. Postal abbreviations are acceptable. Cannot be a post office box.)

Number and Street Address

[REDACTED]

City

MISSOULA

County

MISSOULA

State

MT

ZIP Code

59808

3. Place of Birth

U.S. City and State

[REDACTED]

-OR-

Foreign Country

4. Height

Ft. 5

In. 11

5. Weight

(Lbs.)

145

6. Sex

☒ Male

☐ Female

7. Birth Date

Month

[REDACTED]

Day

[REDACTED]

Year

1993

8. Social Security Number (Optional, but will help prevent misidentification)

[REDACTED]

9. Unique Personal Identification Number (UPIN) if applicable (See Instructions for Question 9.)

10.a. Ethnicity

☐ Hispanic or Latino

☒ Not Hispanic or Latino

10.b. Race (In addition to ethnicity, select one or more race in 10.b. Both 10.a. and 10.b. must be answered.)

☐ American Indian or Alaska Native

☐ Asian

☐ Black or African American

☐ Native Hawaiian or Other Pacific Islander

☒ White

11. Answer the following questions by checking or marking "yes" or "no" in the boxes to the right of the questions.

Yes No

a. Are you the actual transferee/buyer of the firearm(s) listed on this form? Warning: You are not the actual transferee/buyer if you are acquiring the firearm(s) on behalf of another person. If you are not the actual transferee/buyer, the licensee cannot transfer the firearm(s) to you. Exception: If you are picking up a repaired firearm(s) for another person, you are not required to answer 11.a. and may proceed to question 11.b. (See Instructions for Question 11.a.)

☒ ☐

b. Are you under indictment or information in any court for a felony, or any other crime for which the judge could imprison you for more than one year? (See Instructions for Question 11.b.)

☐ ☒

c. Have you ever been convicted in any court of a felony, or any other crime for which the judge could have imprisoned you for more than one year, even if you received a shorter sentence including probation? (See Instructions for Question 11.c.)

☐ ☒

d. Are you a fugitive from justice? (See Instructions for Question 11.d.)

☐ ☒

e. Are you an unlawful user of, or addicted to, marijuana or any depressant, stimulant, narcotic drug, or any other controlled substance? Warning: The use or possession of marijuana remains unlawful under Federal law regardless of whether it has been legalized or decriminalized for medicinal or recreational purposes in the state where you reside.

☐ ☒

f. Have you ever been adjudicated as a mental defective OR have you ever been committed to a mental institution? (See Instructions for Question 11.f.)

☐ ☒

g. Have you been discharged from the Armed Forces under dishonorable conditions?

☐ ☒

h. Are you subject to a court order restraining you from harassing, stalking, or threatening your child or an intimate partner or child of such partner? (See Instructions for Question 11.h.)

☐ ☒

i. Have you ever been convicted in any court of a misdemeanor crime of domestic violence? (See Instructions for Question 11.i.)

☐ ☒

12.a. Country of Citizenship: (Check/List more than one, if applicable. Nationals of the United States may check U.S.A.)

☒ United States of America (U.S.A.)

☐ Other Country/Countries (Specify)

Yes No

12.b. Have you ever renounced your United States citizenship?

☐ ☒

12.c. Are you an alien illegally or unlawfully in the United States?

☐ ☒

12.d.1. Are you an alien who has been admitted to the United States under a nonimmigrant visa? (See Instructions for Question 12.d.)

☐ ☒

12.d.2. If "yes", do you fall within any of the exceptions stated in the instructions?

☒ N/A

☐ ☐

13. If you are an alien, record your U.S.-Issued Alien or Admission number (AR#, USCIS#, or I94#):

Previous Editions Are Obsolete

Transferee/Buyer Continue to Next Page  
STAPLE IF PAGES BECOME SEPARATED

Page 1 of 6

ATF E-Form 4473 (5300.9)  
Revised October 2016

I certify that my answers in Section A are true, correct, and complete. I have read and understand the Notices, Instructions, and Definitions on ATF Form 4473. I understand that answering "yes" to question 11.a. if I am not the actual transferee/buyer is a crime punishable as a felony under Federal law, and may also violate State and/or local law. I understand that a person who answers "yes" to any of the questions 11.b. through 11.i and/or 12.b. through 12.c. is prohibited from purchasing or receiving a firearm. I understand that a person who answers "yes" to question 12.d.1. is prohibited from receiving or possessing a firearm, unless the person answers "yes" to question 12.d.2. and provides the documentation required in 18.c. I also understand that making any false oral or written statement, or exhibiting any false or misrepresented identification with respect to this transaction, is a crime punishable as a felony under Federal law, and may also violate State and/or local law. I further understand that the repetitive purchase of firearms for the purpose of resale for livelihood and profit without a Federal firearms license is a violation of Federal law. (See Instructions for Question 14.)

14. Transferee's/Buyer's Signature [Signature] 15. Certification Date 3-2-18

## Section B - Must Be Completed By Transferor/Seller

16. Type of firearm(s) to be transferred (check or mark all that apply):  
☒ Handgun ☐ Long Gun (rifles or shotguns) ☐ Other Firearm (frame, receiver, etc. See Instructions for Question 16.)  
 17. If transfer is at a qualifying gun show or event:  
 Name of Function: \_\_\_\_\_  
 City, State: \_\_\_\_\_

18.a. Identification (e.g., Virginia Driver's license (VA DL) or other valid government-issued photo identification.) (See Instructions for Question 18.a.)  
 Issuing Authority and Type of Identification: MT DL Number on Identification: [Redacted] Expiration Date of Identification (if any): Month [Redacted] Day [Redacted] Year 2019

18.b. Supplemental Government Issued Documentation (If identification document does not show current residence address) (See Instructions for Question 18.b.)

18.c. Exception to the Nonimmigrant Alien Prohibition: If the transferee/buyer answered "YES" to 12.d.2. the transferor/seller must record the type of documentation showing the exception to the prohibition and attach a copy to this ATF Form 4473. (See Instructions for Question 18.c.)

## Questions 19, 20, or 21 Must Be Completed Prior To The Transfer Of The Firearm(s) (See Instructions for Questions 19, 20 and 21.)

19.a. Date the transferee's/buyer's identifying information in Section A was transmitted to NICS or the appropriate State agency:  
 Month 3 Day 2 Year 2018  
 19.b. The NICS or State transaction number (if provided) was: 100 SWLN ZT  
 19.c. The response initially (first) provided by NICS or the appropriate State agency was:  
☐ Proceed ☒ Delayed [The firearm(s) may be transferred on 3/8/18 if State law permits (optional)]  
☐ Denied ☐ Cancelled  
 19.d. The following response(s) was/were later received from NICS or the appropriate State agency:  
☐ Proceed (date) \_\_\_\_\_ ☐ Overturned  
☐ Denied (date) \_\_\_\_\_  
☐ Cancelled (date) \_\_\_\_\_  
☒ No response was provided within 3 business days.

19.e. (Complete if applicable.) After the firearm was transferred, the following response was received from NICS or the appropriate State agency on: \_\_\_\_\_ (date). ☐ Proceed ☐ Denied ☐ Cancelled

19.f. The name and Brady identification number of the NICS examiner. (Optional) (name) \_\_\_\_\_ (number) \_\_\_\_\_  
 19.g. Name of FFL Employee Completing NICS check. (Optional) \_\_\_\_\_

20. ☐ No NICS check was required because a background check was completed during the NFA approval process on the individual who will receive the NFA firearm(s), as reflected on the approved NFA application. (See Instructions for Question 20.)

21. ☐ No NICS check was required because the transferee/buyer has a valid permit from the State where the transfer is to take place, which qualifies as an exemption to NICS. (See Instructions for Question 21.)

Issuing State and Permit Type \_\_\_\_\_ Date of Issuance (if any) \_\_\_\_\_ Expiration Date (if any) \_\_\_\_\_ Permit Number (if any) \_\_\_\_\_

## Section C - Must Be Completed Personally By Transferee/Buyer

If the transfer of the firearm(s) takes place on a different day from the date that the transferee/buyer signed Section A, the transferee/buyer must complete Section C immediately prior to the transfer of the firearm(s). (See Instructions for Question 22 and 23.)

I certify that my answers to the questions in Section A of this form are still true, correct, and complete.

22. Transferee's/Buyer's Signature [Signature] 23. Recertification Date 3-2-18

Transferor/Seller Continue to Next Page  
 STAPLE IF PAGES BECOME SEPARATED

## Section D - Must Be Completed By Transferor/Seller Even If The Firearm(s) is Not Transferred

| 24.<br>Manufacturer and Importer (If any) (If the manufacturer and importer are different, the FFL must include both.) | 25.<br>Model<br>(If Designated) | 26.<br>Serial Number | 27.<br>Type (See Instructions for Question 27.) | 28.<br>Caliber or Gauge |
|------------------------------------------------------------------------------------------------------------------------|---------------------------------|----------------------|-------------------------------------------------|-------------------------|
| 1. SMITH & WESSON                                                                                                      | 60 LADY SMITH                   | DAW6108              | REVOLVER                                        | 357 MAG                 |
| 2.                                                                                                                     |                                 |                      |                                                 |                         |
| 3.                                                                                                                     |                                 |                      |                                                 |                         |
| 4.                                                                                                                     |                                 |                      |                                                 |                         |

REMINDER - By the Close of Business Complete ATF Form 3310.4 For Multiple Purchases of Handguns Within 5 Consecutive Business Days

|                                                                                                                                                                                                                                                                                   |                                                                                                                                          |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------|
| 29. Total Number of Firearms Transferred (Please handwrite by printing e.g., zero, one, two, three, etc. Do not use numerals.) ONE                                                                                                                                                | 30. Check if any part of this transaction is a pawn redemption.<br><input type="checkbox"/> Line Number(s) From Question 24 Above:       |
| 31. For Use by Licensee (See Instructions for Question 31.)<br>406-499-1373                                                                                                                                                                                                       | 32. Check if this transaction is to facilitate a private party transfer.<br><input type="checkbox"/> (See Instructions for Question 32.) |
| 33. Trade/corporate name and address of transferor/seller and Federal Firearms License Number (Must contain at least first three and last five digits of FFL Number X-XX-XXXXX.) (Hand stamp may be used.)<br>CASH 1 PAWN INC 8720 ROLLERCOASTER RD MISSOULA, MT 59808 9-81-01841 |                                                                                                                                          |

## The Person Transferring The Firearm(s) Must Complete Questions 34-37.

## For Denied/Cancelled Transactions, the Person Who Completed Section B Must Complete Questions 34-36.

I certify that: (1) I have read and understand the Notices, Instructions, and Definitions on this ATF Form 4473; (2) the information recorded in Sections B and D is true, correct, and complete; and (3) this entire transaction record has been completed at my licensed business premises ("licensed premises" includes business temporarily conducted from a qualifying gun show or event in the same State in which the licensed premises is located) unless this transaction has met the requirements of 18 U.S.C. 922(c). Unless this transaction has been denied or cancelled, I further certify on the basis of — (1) the transferee's/buyer's responses in Section A (and Section C, if applicable); (2) my verification of the identification recorded in question 18 (and my re-verification at the time of transfer, if Section C was completed); and (3) State or local law applicable to the firearms business — it is my belief that it is not unlawful for me to sell, deliver, transport, or otherwise dispose of the firearm(s) listed on this form to the person identified in Section A.

|                                                                  |                                         |                                                |                                 |
|------------------------------------------------------------------|-----------------------------------------|------------------------------------------------|---------------------------------|
| 34. Transferor's/Seller's Name (Please print)<br>Stephen Setling | 35. Transferor's/Seller's Signature<br> | 36. Transferor's/Seller's Title<br>PAWN BROKER | 37. Date Transferred<br>3/10/14 |
|------------------------------------------------------------------|-----------------------------------------|------------------------------------------------|---------------------------------|

## NOTICES, INSTRUCTIONS, AND DEFINITIONS

**Purpose of the Form:** The information and certification on this form are designed so that a person licensed under 18 U.S.C. 923 may determine if he/she may lawfully sell or deliver a firearm to the person identified in Section A, and to alert the transferee/buyer of certain restrictions on the receipt and possession of firearms. The transferor/seller of a firearm must determine the lawfulness of the transaction and maintain proper records of the transaction. Consequently, the transferor/seller must be familiar with the provisions of 18 U.S.C. 921-931 and the regulations in 27 CFR Parts 478 and 479. In determining the lawfulness of the sale or delivery of a rifle or shotgun to a resident of another State, the transferor/seller is presumed to know the applicable State laws and published ordinances in both the transferor's/seller's State and the transferee's/buyer's State. (See ATF Publication 5300.5, State Laws and Published Ordinances.)

Generally, ATF Form 4473 must be completed at the licensed business premises when a firearm is transferred over-the-counter. Federal law, 18 U.S.C. 922(c), allows a licensed importer, manufacturer, or dealer to sell a firearm to a nonlicensee who does not appear in person at the licensee's business premises only if the transferee/buyer meets certain requirements. These requirements are set forth in section 922(c), 27 CFR 478.96(b), and ATF Procedure 2013-2.

After the transferor/seller has completed the firearms transaction, he/she must make the completed, original ATF Form 4473 (which includes the Notices, General Instructions, and Definitions), and any supporting documents, part of his/her permanent records. Such Forms 4473 must be retained for at least 20 years and after that period may be submitted to ATF. Filing may be chronological (by date of disposition), alphabetical (by name of purchaser), or numerical (by transaction serial number), as long as all of the transferor's/seller's completed Forms 4473 are filed in the same manner.

**FORMS 4473 FOR DENIED/CANCELLED TRANSFERS MUST BE RETAINED:** If the transfer of a firearm is denied/cancelled by NICS, or if for any other reason the transfer is not completed after a NICS check is initiated, the licensee must retain the ATF Form 4473 in his/her records for at least 5 years. Forms 4473 with respect to which a sale, delivery, or transfer did not take place shall be separately retained in alphabetical (by name of transferee) or chronological (by date of transferee's certification) order.

If the transferor/seller or the transferee/buyer discovers that an ATF Form 4473 is incomplete or improperly completed after the firearm has been transferred, and the transferor/seller or the transferee/buyer wishes to correct the omission(s) or error(s), photocopy the inaccurate form and make any necessary additions or revisions to the photocopy. The transferor/seller should only make changes to Sections B and D. The transferee/buyer should only make changes to Section A and C. Whoever made the changes should initial and date the changes. The corrected photocopy should be attached to the original Form 4473 and retained as part of the transferor's/seller's permanent records.

**Exportation of Firearms:** The State or Commerce Departments may require a firearms exporter to obtain a license prior to export. Warning: Any person who exports a firearm without proper authorization may be fined not more than \$1,000,000 and/or imprisoned for not more than 20 years. See 22 U.S.C. 2778(c).

## Section A

The transferee/buyer must personally complete Section A of this form and certify (sign) that the answers are true, correct, and complete. However, if the transferee/buyer is unable to read and/or write, the answers (other than the signature) may be completed by another person, excluding the transferor/seller. Two persons (other than the transferor/seller) must then sign as witnesses to the transferee's/buyer's answers and signature/certification in question 14.



U.S. Department of Justice  
Bureau of Alcohol, Tobacco, Firearms and Explosives

# Firearms Transaction Record

**WARNING:** You may not receive a firearm if prohibited by Federal or State law. The information you provide will be used to determine whether you are prohibited from receiving a firearm. Certain violations of the Gun Control Act, 18 U.S.C. 921 et seq., are punishable by up to 10 years imprisonment and/or up to a \$250,000 fine.

Read the Notices, Instructions, and Definitions on this form. Prepare in original only at the licensed premises ("licensed premises" includes business temporarily conducted from a qualifying gun show or event in the same State in which the licensed premises is located) unless the transaction qualifies under 18 U.S.C. 922(c). All entries must be handwritten in ink. "PLEASE PRINT."

Transferor's/Seller's  
Transaction Serial  
Number (If any)

CA00126791  
Redum

## Section A - Must Be Completed Personally By Transferee/Buyer

1. Transferee's/Buyer's Full Name (If legal name contains an initial only, record "IO" after the initial. If no middle initial or name, record "NMN".)

Last Name (Including suffix (e.g., Jr, Sr, II, III))

DEFRANCE

First Name

MICHAEL

Middle Name

BLAKE

2. Current State of Residence and Address (U.S. Postal abbreviations are acceptable. Cannot be a post office box.)

Number and Street Address

[REDACTED]

City

MISSOULA

County

MISSOULA

State

MT

ZIP Code

59808

3. Place of Birth

U.S. City and State

[REDACTED]

-OR-

Foreign Country

4. Height

Ft.

5

In.

11

5. Weight

(Lbs.)

145

6. Sex

☒ Male

☐ Female

7. Birth Date

Month

[REDACTED]

Day

[REDACTED]

Year

1993

8. Social Security Number (Optional, but will help prevent misidentification)

[REDACTED]

9. Unique Personal Identification Number (UPIN) if applicable (See Instructions for Question 9.)

10.a. Ethnicity

☐ Hispanic or Latino

☒ Not Hispanic or Latino

10.b. Race (In addition to ethnicity, select one or more race in 10.b. Both 10.a. and 10.b. must be answered.)

☐ American Indian or Alaska Native

☐ Asian

☐ Black or African American

☐ Native Hawaiian or Other Pacific Islander

☒ White

11. Answer the following questions by checking or marking "yes" or "no" in the boxes to the right of the questions.

Yes No

a. Are you the actual transferee/buyer of the firearm(s) listed on this form? Warning: You are not the actual transferee/buyer if you are acquiring the firearm(s) on behalf of another person. If you are not the actual transferee/buyer, the licensee cannot transfer the firearm(s) to you. Exception: If you are picking up a repaired firearm(s) for another person, you are not required to answer 11.a. and may proceed to question 11.b. (See Instructions for Question 11.a.)

☒ ☐

b. Are you under indictment or information in any court for a felony, or any other crime for which the judge could imprison you for more than one year? (See Instructions for Question 11.b.)

☐ ☒

c. Have you ever been convicted in any court of a felony, or any other crime for which the judge could have imprisoned you for more than one year, even if you received a shorter sentence including probation? (See Instructions for Question 11.c.)

☐ ☒

d. Are you a fugitive from justice? (See Instructions for Question 11.d.)

☐ ☒

e. Are you an unlawful user of, or addicted to, marijuana or any depressant, stimulant, narcotic drug, or any other controlled substance?

Warning: The use or possession of marijuana remains unlawful under Federal law regardless of whether it has been legalized or decriminalized for medicinal or recreational purposes in the state where you reside.

☐ ☒

f. Have you ever been adjudicated as a mental defective OR have you ever been committed to a mental institution? (See Instructions for Question 11.f.)

☐ ☒

g. Have you been discharged from the Armed Forces under dishonorable conditions?

☐ ☒

h. Are you subject to a court order restraining you from harassing, stalking, or threatening your child or an intimate partner or child of such partner? (See Instructions for Question 11.h.)

☐ ☒

i. Have you ever been convicted in any court of a misdemeanor crime of domestic violence? (See Instructions for Question 11.i.)

☐ ☒

12.a. Country of Citizenship: (Check/List more than one, if applicable. Nationals of the United States may check U.S.A.)

☒ United States of America (U.S.A.)

☐ Other Country/Countries (Specify)

Yes No

12.b. Have you ever renounced your United States citizenship?

☐ ☒

12.c. Are you an alien illegally or unlawfully in the United States?

☐ ☒

12.d.1. Are you an alien who has been admitted to the United States under a nonimmigrant visa? (See Instructions for Question 12.d.)

☐ ☒

12.d.2. If "yes", do you fall within any of the exceptions stated in the instructions?

☒ N/A ☐

13. If you are an alien, record your U.S.-Issued Alien or Admission number (AR#, USCIS#, or I94#):

Previous Editions Are Obsolete

Transferee/Buyer Continue to Next Page  
STAPLE IF PAGES BECOME SEPARATED

Page 1 of 6

ATF B-Form 4473 (5300.9)  
Revised October 2016

I certify that my answers in Section A are true, correct, and complete. I have read and understand the Notices, Instructions, and Definitions on ATF Form 4473. I understand that answering "yes" to question 11.a. if I am not the actual transferee/buyer is a crime punishable as a felony under Federal law, and may also violate State and/or local law. I understand that a person who answers "yes" to any of the questions 11.b. through 11.i and/or 12.b. through 12.c. is prohibited from purchasing or receiving a firearm. I understand that a person who answers "yes" to question 12.d.1. is prohibited from receiving or possessing a firearm, unless the person answers "yes" to question 12.d.2. and provides the documentation required in 18.c. I also understand that making any false oral or written statement, or exhibiting any false or misrepresented identification with respect to this transaction, is a crime punishable as a felony under Federal law, and may also violate State and/or local law. I further understand that the repetitive purchase of firearms for the purpose of resale for livelihood and profit without a Federal firearms license is a violation of Federal law. (See Instructions for Question 14.)

14. Transferee's/Buyer's Signature [Signature] 15. Certification Date 8-25-18

## Section B - Must Be Completed By Transferor/Seller

16. Type of firearm(s) to be transferred (check or mark all that apply):  
☐ Handgun ☒ Long Gun (rifles or shotguns) ☐ Other Firearm (frame, receiver, etc. See Instructions for Question 16.)

17. If transfer is at a qualifying gun show or event:  
 Name of Function: \_\_\_\_\_  
 City, State: \_\_\_\_\_

18.a. Identification (e.g., Virginia Driver's license (VA DL) or other valid government-issued photo identification.) (See Instructions for Question 18.a.)  
 Issuing Authority and Type of Identification: MT CDL Number on Identification: [Redacted] Expiration Date of Identification (if any): Month [Redacted] Day [Redacted] Year 2019

18.b. Supplemental Government Issued Documentation (if identification document does not show current residence address) (See Instructions for Question 18.b.)

18.c. Exception to the Nonimmigrant Alien Prohibition: If the transferee/buyer answered "YES" to 12.d.2, the transferor/seller must record the type of documentation showing the exception to the prohibition and attach a copy to this ATF Form 4473. (See Instructions for Question 18.c.)

## Questions 19, 20, or 21 Must Be Completed Prior To The Transfer Of The Firearm(s) (See Instructions for Questions 19, 20 and 21.)

19.a. Date the transferee's/buyer's identifying information in Section A was transmitted to NICS or the appropriate State agency:  
 Month 08 Day 25 Year 2018

19.b. The NICS or State transaction number (if provided) was: 180PYPIZR

19.c. The response initially (first) provided by NICS or the appropriate State agency was: Proceed  
☒ Proceed ☒ Delayed [The firearm(s) may be transferred on 8/30/18 if State law permits (optional)]  
☐ Denied ☐ Cancelled

19.d. The following response(s) was/were later received from NICS or the appropriate State agency:  
☒ Proceed 8/30/18 (date) ☐ Overturned  
☐ Denied (date)  
☐ Cancelled (date)  
☐ No response was provided within 3 business days.

19.e. (Complete if applicable.) After the firearm was transferred, the following response was received from NICS or the appropriate State agency on: \_\_\_\_\_ (date). ☐ Proceed ☐ Denied ☐ Cancelled

19.f. The name and Brady identification number of the NICS examiner. (Optional)  
 (name) \_\_\_\_\_ (number) \_\_\_\_\_

19.g. Name of FFL Employee Completing NICS check. (Optional)  
 \_\_\_\_\_

20. ☐ No NICS check was required because a background check was completed during the NFA approval process on the individual who will receive the NFA firearm(s), as reflected on the approved NFA application. (See Instructions for Question 20.)

21. ☐ No NICS check was required because the transferee/buyer has a valid permit from the State where the transfer is to take place, which qualifies as an exemption to NICS. (See Instructions for Question 21.)

Issuing State and Permit Type \_\_\_\_\_ Date of Issuance (if any) \_\_\_\_\_ Expiration Date (if any) \_\_\_\_\_ Permit Number (if any) \_\_\_\_\_

## Section C - Must Be Completed Personally By Transferee/Buyer

If the transfer of the firearm(s) takes place on a different day from the date that the transferee/buyer signed Section A, the transferee/buyer must complete Section C immediately prior to the transfer of the firearm(s). (See Instructions for Question 22 and 23.)

I certify that my answers to the questions in Section A of this form are still true, correct, and complete.

22. Transferee's/Buyer's Signature [Signature] 23. Recertification Date 9-1-18

Transferor/Seller Continue to Next Page  
 STAPLE IF PAGES BECOME SEPARATED

## Section D - Must Be Completed By Transferor/Seller Even If The Firearm(s) is Not Transferred

| 24.<br>Manufacturer and Importer (If any) (If the manufacturer and importer are different, the FFL must include both.) | 25.<br>Model<br>(If Designated) | 26.<br>Serial Number | 27.<br>Type (See Instructions for Question 27.) | 28.<br>Caliber or Gauge |
|------------------------------------------------------------------------------------------------------------------------|---------------------------------|----------------------|-------------------------------------------------|-------------------------|
| 1. REMINGTON                                                                                                           | 770                             | M71863512            | RIFLE                                           | 243 WIN                 |
| 2.                                                                                                                     |                                 |                      |                                                 |                         |
| 3.                                                                                                                     |                                 |                      |                                                 |                         |
| 4.                                                                                                                     |                                 |                      |                                                 |                         |

REMINDER - By the Close of Business Complete ATF Form 3310.4 For Multiple Purchases of Handguns Within 5 Consecutive Business Days

|                                                                                                                                                                                                                                                                                  |                                                                                                                                                 |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------|
| 29. Total Number of Firearms Transferred (Please <i>handwrite</i> by printing e.g., zero, one, two, three, etc. Do not use numerals.) one                                                                                                                                        | 30. Check if any part of this transaction is a pawn redemption.<br><input checked="" type="checkbox"/> Line Number(s) From Question 24 Above: 1 |
| 31. For Use by Licensee (See Instructions for Question 31.)<br>8/30 + NJA 214-0361                                                                                                                                                                                               | 32. Check if this transaction is to facilitate a private party transfer.<br><input type="checkbox"/> (See Instructions for Question 32.)        |
| 33. Trade/corporate name and address of transferor/seller and Federal Firearm License Number (Must contain at least first three and last five digits of FFL Number X-XX-XXXXX.) (Hand stamp may be used.)<br>CASH 1 PAWN INC 8720 ROLLERCOASTER RD MISSOULA, MT 59808 9-81-01841 |                                                                                                                                                 |

## The Person Transferring The Firearm(s) Must Complete Questions 34-37.

For Denied/Cancelled Transactions, the Person Who Completed Section B Must Complete Questions 34-36.

I certify that: (1) I have read and understand the Notices, Instructions, and Definitions on this ATF Form 4473; (2) the information recorded in Sections B and D is true, correct, and complete; and (3) this entire transaction record has been completed at my licensed business premises ("licensed premises" includes business temporarily conducted from a qualifying gun show or event in the same State in which the licensed premises is located) unless this transaction has met the requirements of 18 U.S.C. 922(c). Unless this transaction has been denied or cancelled, I further certify on the basis of — (1) the transferee's/buyer's responses in Section A (and Section C, if applicable); (2) my verification of the Identification recorded in question 18 (and my re-verification at the time of transfer, if Section C was completed); and (3) State or local law applicable to the firearms business — it is my belief that it is not unlawful for me to sell, deliver, transport, or otherwise dispose of the firearm(s) listed on this form to the person identified in Section A.

|                                                                 |                                         |                                           |                                  |
|-----------------------------------------------------------------|-----------------------------------------|-------------------------------------------|----------------------------------|
| 34. Transferor's/Seller's Name (Please print)<br>Stephen Selway | 35. Transferor's/Seller's Signature<br> | 36. Transferor's/Seller's Title<br>BROKER | 37. Date Transferred<br>09/01/18 |
|-----------------------------------------------------------------|-----------------------------------------|-------------------------------------------|----------------------------------|

## NOTICES, INSTRUCTIONS, AND DEFINITIONS

**Purpose of the Form:** The information and certification on this form are designed so that a person licensed under 18 U.S.C. 923 may determine if he/she may lawfully sell or deliver a firearm to the person identified in Section A, and to alert the transferee/buyer of certain restrictions on the receipt and possession of firearms. The transferor/seller of a firearm must determine the lawfulness of the transaction and maintain proper records of the transaction. Consequently, the transferor/seller must be familiar with the provisions of 18 U.S.C. 921-931 and the regulations in 27 CFR Parts 478 and 479. In determining the lawfulness of the sale or delivery of a rifle or shotgun to a resident of another State, the transferor/seller is presumed to know the applicable State laws and published ordinances in both the transferor's/seller's State and the transferee's/buyer's State. (See ATF Publication 5300.5, State Laws and Published Ordinances.)

Generally, ATF Form 4473 must be completed at the licensed business premises when a firearm is transferred over-the-counter. Federal law, 18 U.S.C. 922(c), allows a licensed importer, manufacturer, or dealer to sell a firearm to a nonlicensee who does not appear in person at the licensee's business premises only if the transferee/buyer meets certain requirements. These requirements are set forth in question 22(c), 27 CFR 478.96(b), and ATF Procedure 2013-2.

After the transferor/seller has completed the firearms transaction, he/she must make the completed, original ATF Form 4473 (which includes the Notices, General Instructions, and Definitions), and any supporting documents, part of his/her permanent records. Such Forms 4473 must be retained for at least 20 years and after that period may be submitted to ATF. Filing may be chronological (by date of disposition), alphabetical (by name of purchaser), or numerical (by transaction serial number), as long as all of the transferor's/seller's completed Forms 4473 are filed in the same manner.

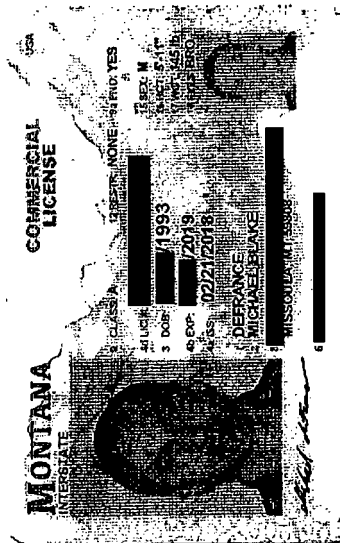
**FORMS 4473 FOR DENIED/CANCELLED TRANSFERS MUST BE RETAINED:** If the transfer of a firearm is denied/cancelled by NICS, or if for any other reason the transfer is not completed after a NICS check is initiated, the licensee must retain the ATF Form 4473 in his/her records for at least 5 years. Forms 4473 with respect to which a sale, delivery, or transfer did not take place shall be separately retained in alphabetical (by name of transferee) or chronological (by date of transferee's certification) order.

If the transferor/seller or the transferee/buyer discovers that an ATF Form 4473 is incomplete or improperly completed after the firearm has been transferred, and the transferor/seller or the transferee/buyer wishes to correct the omission(s) or error(s), photocopy the inaccurate form and make any necessary additions or revisions to the photocopy. The transferor/seller should only make changes to Sections B and D. The transferee/buyer should only make changes to Section A and C. Whoever made the changes should initial and date the changes. The corrected photocopy should be attached to the original Form 4473 and retained as part of the transferor's/seller's permanent records.

**Exportation of Firearms:** The State or Commerce Departments may require a firearms exporter to obtain a license prior to export. Warning: Any person who exports a firearm without proper authorization may be fined not more than \$1,000,000 and/or imprisoned for not more than 20 years. See 22 U.S.C. 2778(c).

## Section A

The transferee/buyer must personally complete Section A of this form and certify (sign) that the answers are true, correct, and complete. However, if the transferee/buyer is unable to read and/or write, the answers (other than the signature) may be completed by another person, excluding the transferor/seller. Two persons (other than the transferor/seller) must then sign as witnesses to the transferee's/buyer's answers and signature/certification in question 14.



## Search Request Details

The following is a list of detailed information for the selected transaction.

|                             |                   |
|-----------------------------|-------------------|
| NTN                         | 100PYP1ZR         |
| Created Date                | 8/25/18 8:05 PM   |
| Expiration Date             | 9/24/18 8:05 PM   |
| Last Name                   | Defrance          |
| First Name                  | Michael           |
| Middle Name                 | Blake             |
| Cadence (Ex. Jr., Sr., III) | Not Supplied      |
| Gender                      | M                 |
| Height                      | 511               |
| Weight                      | 145               |
| Race and/or Ethnicity       | W                 |
| Date of Birth               | ██████ 1993       |
| Place of Birth              | ██████            |
| Social Security No          | ██████████        |
| JPIN                        | Not Supplied      |
| Miscellaneous No            | Not Supplied      |
| Miscellaneous Field         |                   |
| State of Residence          | MT                |
| Citizenship                 | C                 |
| Country of Citizenship      | US                |
| Country of Citizenship 2    | Not Supplied      |
| Country of Citizenship 3    | Not Supplied      |
| Purpose ID                  | 10                |
| Submitted By                | stephen.sethney   |
| Retrieved By                | joel.christensen  |
| Retrieved Date              | 8/30/18 12:56 PM  |
| Status                      | Proceed           |
| Status Date                 | 8/29/2018 9:11 PM |

**JENNIFER CLARK**  
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**FILED**

OCT 21 2021  
Clerk, U.S. District Court  
District Of Montana  
Billings

**ATTORNEY FOR PLAINTIFF  
UNITED STATES OF AMERICA**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
MISSOULA DIVISION**

**UNITED STATES OF AMERICA,**

**Plaintiff,**

**vs.**

**MICHAEL BLAKE DEFRANCE,**

**Defendant.**

**CR 21-29-M-DLC**

**SECOND SUPERSEDING  
INDICTMENT**

**PROHIBITED PERSON IN POSSESSION  
OF FIREARMS AND AMMUNITION**

Title 18 U.S.C. § 922(g)(9)

(Count I)

(Penalty: Ten years imprisonment,  
\$250,000 fine, and three years of supervised  
release)

**FALSE STATEMENT DURING A  
FIREARMS TRANSACTION**

Title 18 U.S.C. § 922(a)(6)

(Counts II-IV)

(Penalty: Ten years imprisonment,  
\$250,000 fine and three years supervised  
release)

|  |                                                               |
|--|---------------------------------------------------------------|
|  | <b>CRIMINAL FORFEITURE</b><br><b>Title 18 U.S.C. § 924(d)</b> |
|--|---------------------------------------------------------------|

**THE GRAND JURY CHARGES:**

**COUNT I**

That on or about and between October 3, 2016, and October 2, 2018, at Missoula, in Missoula County, in the State and District of Montana, the defendant, MICHAEL BLAKE DEFRANCE, knowing he had been convicted on or about May 6, 2013, of a misdemeanor crime of domestic violence under the laws of the State of Montana, which meets the definition of a misdemeanor crime of domestic violence under 18 U.S.C. § 921(a)(33)(A)(i) and (ii), knowingly possessed, in and affecting interstate commerce, firearms and ammunition, in violation of 18 U.S.C. § 922(g)(9).

**COUNT II**

That on or about February 24, 2018, at Missoula and within Missoula County, in the State and District of Montana, the defendant, MICHAEL BLAKE DEFRANCE, in connection with his acquisition and attempted acquisition of a firearm, namely a Stevens Arms 200 rifle from Cash 1 Pawn, Inc., Missoula, Montana, a licensed dealer, knowingly made a false and fictitious written statement to Cash 1 Pawn, Inc., which statement was intended and likely to deceive Cash 1 Pawn, Inc., as to a fact material to the lawfulness of such sale and acquisition of the

said firearm to the defendant under Chapter 44 of Title 18, in that the defendant represented at item 11(i) on ATF Form 4473, Firearms Transaction Form, dated February 24, 2018, the defendant had not been convicted in any court of a misdemeanor crime of domestic violence, all in violation of 18 U.S.C. § 922(a)(6).

COUNT III

That on or about March 2, 2018, at Missoula and within Missoula County, in the State and District of Montana, the defendant, MICHAEL BLAKE DEFRANCE, in connection with his acquisition and attempted acquisition of a firearm, namely a Smith & Wesson 60 Lady Smith revolver, from Cash 1 Pawn, Inc., Missoula, Montana, a licensed dealer, knowingly made a false and fictitious written statement to Cash 1 Pawn, Inc., which statement was intended and likely to deceive Cash 1 Pawn, Inc., as to a fact material to the lawfulness of such sale and acquisition of the said firearm to the defendant under Chapter 44 of Title 18, in that the defendant represented at item 11(i) on ATF Form 4473, Firearms Transaction Form, dated March 2, 2018, the defendant had not been convicted in any court of a misdemeanor crime of domestic violence, all in violation of 18 U.S.C. § 922(a)(6).

COUNT IV

That on or about August 25, 2018, at Missoula and within Missoula County, in the State and District of Montana, the defendant, MICHAEL BLAKE DEFRANCE, in connection with his acquisition and attempted acquisition of a



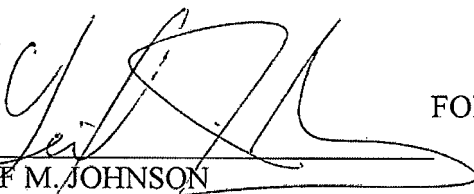
firearm, namely a Remington 770 rifle, from Cash 1 Pawn, Inc., Missoula, Montana, a licensed dealer, knowingly made a false and fictitious written statement to Cash 1 Pawn, Inc., which statement was intended and likely to deceive Cash 1 Pawn, Inc., as to a fact material to the lawfulness of such sale and acquisition of the said firearm to the defendant under Chapter 44 of Title 18, in that the defendant represented at item 11(i) on ATF Form 4473, Firearms Transaction Form, dated August 25, 2018, the defendant had not been convicted in any court of a misdemeanor crime of domestic violence, all in violation of 18 U.S.C. § 922(a)(6).

#### FORFEITURE ALLEGATION

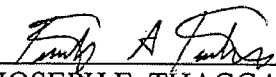
Upon conviction of any of the offenses listed in this indictment, the defendant, MICHAEL BLAKE DEFRANCE, shall forfeit, pursuant to 18 U.S.C. §924(d), any firearm and ammunition involved and used in any knowing violation of said offenses.

Foreperson signature redacted. Original document filed under seal.

A TRUE BILL.

  
LEIF M. JOHNSON  
Acting United States Attorney

FOREPERSON

  
JOSEPH E. THAGGARD  
Criminal Chief Assistant U.S. Attorney

Crim. Summons ✓ 11/18/21 @ 2:00 pm

Warrant: KLD-MSLR

Bail: \_\_\_\_\_

MICHAEL DONAHOE  
Deputy Federal Defender  
Federal Defenders of Montana  
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Attorneys for Defendant

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
MISSOULA DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MICHAEL BLAKE DeFRANCE,

Defendant.

**CR 21-29-M-DLC**

**DEFENDANT DeFRANCE'S  
RESPONSE TO COURT ORDER  
(ECF No. 64)**

**INTRODUCTION**

On November 22, 2021, the Court filed an order (ECF No. 64) directing Mr. DeFrance to file a response indicating whether he intends to renew his motions to dismiss the Superseding Indictment (ECF Nos. 14, 16 and 43). This is Mr. DeFrance's response to this Court's order.

///

**RESPONSE**

The defense respectfully moves to renew his pretrial motions as set forth in ECF Nos. 14, 16 and 43 together with all supporting briefs (ECF Nos. 15, 17, 31, 32, 44 and 53) so that the Court will consider these motions applicable to the Second Superseding Indictment as set forth in ECF No. 55.

**CONCLUSION**

WHEREFORE, this concludes Mr. DeFrance's response to this Court's order (ECF No. 64).

RESPECTFULLY SUBMITTED this 24<sup>th</sup> day of November, 2021.

/s/ Michael Donahoe  
\_\_\_\_\_  
MICHAEL DONAHOE  
Deputy Federal Defender  
Counsel for Defendant

**CERTIFICATE OF SERVICE**  
**L.R. 5.2(b)**

I hereby certify that on November 24, 2021, a copy of the foregoing document was served on the following persons by the following means:

1 CM-ECF

2 Mail

1. CLERK, UNITED STATES DISTRICT COURT

1. JENNIFER S. CLARK  
Assistant United States Attorney  
United States Attorney's Office  
105 E. Pine, 2nd Floor  
P.O. Box 8329  
Missoula, MT 59807  
Counsel for the United States of America

2. MICHAEL BLAKE DeFRANCE  
Defendant

/s/ Michael Donahoe  
FEDERAL DEFENDERS OF MONTANA

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**TRANSCRIPTION OF  
AUDIO-RECORDED INTERVIEW OF  
JERMAIN AUSTIN CHARLO**

**APRIL 14th, 2013**



1 (Audio recording began.)

2

3 OFFICER: Hi. Are you Jermain?

4 JERMAIN AUSTIN CHARLO: Yeah.

5 DEPUTY LARGENT: I'm Deputy Largent with the  
6 Sanders County Sheriff's Office.

7 Do you need medical attention?

8 JERMAIN AUSTIN CHARLO: I don't think so.

9 DEPUTY LARGENT: You don't think so? Okay.

10 Okay. What I'm going to do is we'll run  
11 through an interview here real quick, get all of the  
12 information that we need. So, I'll just run down  
13 through my -- my list of things, and -- where did he  
14 hit you at?

15 JERMAIN AUSTIN CHARLO: Uhm, right here in the  
16 temple, in the ear, and then -- and right here on my  
17 upper cheekbone.

18 DEPUTY LARGENT: Okay. It looks like you  
19 might have a mark on your cheekbone right there?

20 JERMAIN AUSTIN CHARLO: Uh-huh. And I can't,  
21 like, open my mouth. And my ear is all fucked up, and  
22 then I (inaudible).

23 DEPUTY LARGENT: Okay. No, keep your hand  
24 there. Turn to me. So where do you -- do you just  
25 want to do it over there, or --

1 JERMAIN AUSTIN CHARLO: Yeah, wherever you  
2 want.

3 DEPUTY LARGENT: Okay.

4 JERMAIN AUSTIN CHARLO: He lives right there.

5 DEPUTY LARGENT: Oh. Okay. Do you want to go  
6 inside, or are you good here, or --

7 JERMAIN AUSTIN CHARLO: I'm fine here.

8 DEPUTY LARGENT: Okay.

9 JERMAIN AUSTIN CHARLO: (Inaudible)

10 DEPUTY LARGENT: Yeah, let's do that. And you  
11 can kind of relax a little better. What I'd like to do  
12 is have you, uh, probably turn and face that way. We  
13 can use this light right here, and I can take a picture  
14 of your -- of this part of your face there. Okay.  
15 Hopefully the camera works.

16 Okay. Come on over here a little bit. Okay.  
17 Turn and face the wall a little. There, that will  
18 work. Okay. And what I'm going to do is I'm going to  
19 have you just hold this quarter just for size, okay?  
20 Just hold -- can you hold it like that?

21 JERMAIN AUSTIN CHARLO: Uh-huh.

22 DEPUTY LARGENT: And then hold it -- okay.  
23 There you go. Okay. Lower it down a little. Yeah,  
24 that -- that should work right there. So I'm going to  
25 take one more just in case. And raise that quarter up

1 just a little. All right. That's good right there.

2 Okay.

3 Any other injuries that he -- you might have,  
4 or --

5 JERMAIN AUSTIN CHARLO: Uhm, no.

6 DEPUTY LARGENT: I'm going to go ahead and  
7 take a -- I can see, uhm, right here the hair was  
8 covering that part up there. So just go ahead and put  
9 that quarter back up there, then. Okay. There's going  
10 to be a flash. Okay. I'm going to take one more.  
11 Okay. There we go.

12 All right. Go ahead and sit down and I'll run  
13 through this checklist here, get all of the information  
14 that we need. Deputy Robyn Largent, Sanders County  
15 Sheriff's Office, 359. Today's date is April 14th,  
16 2013. Officer arrival, 0034.

17 What time did the incident occur?

18 JERMAIN AUSTIN CHARLO: I don't know.

19 Approximately an hour -- an hour ago.

20 DEPUTY LARGENT: So approximately an hour  
21 prior is the time of the incident -- incident.

22 Just go ahead and state your name.

23 JERMAIN AUSTIN CHARLO: Jermain Austin Charlo.

24 DEPUTY LARGENT: Okay. Could you spell that  
25 for me, please?



1 JERMAIN AUSTIN CHARLO: J-E-R-M-A-I-N-E,  
2 A-U-S-T-I-N, C-H-A-R-L-O.

3 DEPUTY LARGENT: Date of birth?

4 JERMAIN AUSTIN CHARLO: 4/23 of '95.

5 DEPUTY LARGENT: An address where you live?  
6 In Polson, I believe?

7 JERMAIN AUSTIN CHARLO: Uhm, I don't know the  
8 address. Uhm, Keeler River Lane.

9 DEPUTY LARGENT: Okay. Is that where your  
10 mother lives?

11 JERMAIN AUSTIN CHARLO: Yes.

12 DEPUTY LARGENT: Okay. And who is your  
13 mother?

14 JERMAIN AUSTIN CHARLO: Jennifer (inaudible)  
15 Morigeau.

16 DEPUTY LARGENT: Okay. Uh, do you work?

17 JERMAIN AUSTIN CHARLO: No.

18 DEPUTY LARGENT: Uh, do you know what a home  
19 phone number is?

20 JERMAIN AUSTIN CHARLO: Yes. 883-0542.

21 DEPUTY LARGENT: Okay. And what is your  
22 account of the events that took place?

23 JERMAIN AUSTIN CHARLO: Uhm, what do you mean?

24 DEPUTY LARGENT: What happened tonight?

25 JERMAIN AUSTIN CHARLO: Oh.

1 DEPUTY LARGENT: Prior to you being struck.

2 What --

3 JERMAIN AUSTIN CHARLO: Uhm --

4 DEPUTY LARGENT: Well, how long have you been  
5 here?

6 JERMAIN AUSTIN CHARLO: I've been here since  
7 Friday.

8 DEPUTY LARGENT: Friday evening?

9 JERMAIN AUSTIN CHARLO: Yes.

10 DEPUTY LARGENT: Okay. And it is Sunday  
11 morning now. So, uhm, did anything happen on Friday?

12 JERMAIN AUSTIN CHARLO: Uhm, no.

13 DEPUTY LARGENT: Any arguments, or anything?

14 JERMAIN AUSTIN CHARLO: No.

15 DEPUTY LARGENT: So, on Saturday, about what  
16 time do you -- do you think -- what happened Saturday?

17 JERMAIN AUSTIN CHARLO: About, I would say,  
18 11:00-issue, our argument now, which was -- at lunch  
19 was just about us going into town today. We were  
20 supposed to go to town together, but it didn't happen.  
21 And then we were supposed to meet up, but that didn't  
22 happen, and I came home.

23 And I was already here at my grandpa's house  
24 waiting for him. And I went next door, brought my  
25 things in the house -- in his camper. Then I sat down

1 for awhile. And he was mad because I was at home, and  
2 that I made them sit there at China Buffet and at  
3 Walmart for over an hour, and that it was my fault.

4 So I told him that I wanted him to calm down,  
5 and then I was just going to go over to my grandpa's.  
6 And then I went and got the rest of my things, because  
7 I didn't want them broken, and I walked back over here  
8 with them.

9 And, then, so, I grabbed a pair -- a couple  
10 pairs of flip-flops, run them over. He didn't say  
11 nothing. I threw them in his camper and walked away.  
12 He came storming out of the door yelling at me about  
13 something.

14 And, then, after that, I told him I was just  
15 going to leave, and I didn't want to hear it, and I  
16 started walking away. And he -- suddenly he grabbed  
17 me, shoved me into their white van. Pushed me down  
18 into the van. Punched me into the ear, the temple, and  
19 the cheekbone. And then threw me onto the ground and  
20 spit in my face and told me how horrible I was, and  
21 then walked off.

22 And I just silently got up and came here and  
23 called the cops.

24 DEPUTY LARGENT: So any other injuries, except  
25 those, that are possible?

1 JERMAIN AUSTIN CHARLO: No.

2 DEPUTY LARGENT: How about any -- did he, at  
3 any time, have his hands around your neck?

4 JERMAIN AUSTIN CHARLO: No.

5 DEPUTY LARGENT: Okay. Has there been any --  
6 have you -- have you guys had any, uh, previous  
7 assaults or --

8 JERMAIN AUSTIN CHARLO: Uhm, I was --

9 DEPUTY LARGENT: -- domestic violence-type  
10 situations?

11 JERMAIN AUSTIN CHARLO: I was called in before  
12 about hitting him a couple of times. I mean, beating  
13 on him after finding another girl's underwear, but that  
14 was about it.

15 DEPUTY LARGENT: Okay. How long ago was that?

16 JERMAIN AUSTIN CHARLO: Uhm, I think it was  
17 months ago. I don't know exactly what month or date,  
18 but it was a while back.

19 DEPUTY LARGENT: This year, or last year?

20 JERMAIN AUSTIN CHARLO: This -- I think --  
21 yeah, this year.

22 DEPUTY LARGENT: This year? Okay. In 2013.  
23 Is there any alcohol involved?

24 JERMAIN AUSTIN CHARLO: No.

25 DEPUTY LARGENT: Any drugs?

1 JERMAIN AUSTIN CHARLO: No.

2 DEPUTY LARGENT: Okay. And what is the  
3 name -- is -- or what's your relationship with the  
4 individual?

5 JERMAIN AUSTIN CHARLO: Uhm,  
6 boyfriend/girlfriend. Uhm, we've been together since  
7 June.

8 DEPUTY LARGENT: Of 2012?

9 JERMAIN AUSTIN CHARLO: '12, yes.

10 DEPUTY LARGENT: Okay. And you came here to  
11 visit him. So, uhm, how old is he?

12 JERMAIN AUSTIN CHARLO: He is 19.

13 DEPUTY LARGENT: Okay. And then what -- and  
14 you're 17, correct?

15 JERMAIN AUSTIN CHARLO: Yes.

16 DEPUTY LARGENT: Okay. Do you guys have any  
17 children?

18 JERMAIN AUSTIN CHARLO: No.

19 DEPUTY LARGENT: Okay. Were there any  
20 children at the -- over at the residence over there  
21 where this occurred?

22 JERMAIN AUSTIN CHARLO: Yes.

23 DEPUTY LARGENT: Were they inside?

24 JERMAIN AUSTIN CHARLO: Yes.

25 DEPUTY LARGENT: Okay. When he hit you, do

1 | you know what -- what -- how he hit you? Did he have  
2 | an open hand? A closed fist?

3 | JERMAIN AUSTIN CHARLO: A closed fist.

4 | DEPUTY LARGENT: Do you remember -- was that  
5 | the right hand?

6 | JERMAIN AUSTIN CHARLO: Hits it with his  
7 | right.

8 | DEPUTY LARGENT: Okay. Any other weapons  
9 | involved?

10 | JERMAIN AUSTIN CHARLO: No.

11 | DEPUTY LARGENT: How about a temporary  
12 | restraining order, or any orders of protection?

13 | JERMAIN AUSTIN CHARLO: No.

14 | DEPUTY LARGENT: All right. Do you think  
15 | that -- what's the boyfriend's name?

16 | JERMAIN AUSTIN CHARLO: Michael.

17 | DEPUTY LARGENT: Michael, what?

18 | JERMAIN AUSTIN CHARLO: Defrance.

19 | DEPUTY LARGENT: Defrance? Okay. Do you  
20 | think Michael can seriously injure or -- injure you or  
21 | kill you?

22 | JERMAIN AUSTIN CHARLO: No.

23 | DEPUTY LARGENT: What makes you think that?

24 | JERMAIN AUSTIN CHARLO: Uhm, I'm not too sure.  
25 | Just the couple of fights we've already been into, it

1 | hasn't always been serious, so I wouldn't think so.

2 |           DEPUTY LARGENT: The other ones have been  
3 | verbal, then?

4 |           JERMAIN AUSTIN CHARLO: Yeah, more verbal.

5 |           DEPUTY LARGENT: All right. Does he  
6 | intimidate you?

7 |           JERMAIN AUSTIN CHARLO: Uhm, no.

8 |           DEPUTY LARGENT: Threaten or -- or assault  
9 | you?

10 |           JERMAIN AUSTIN CHARLO: No.

11 |           DEPUTY LARGENT: Okay. Uh, so is it a  
12 | one-time deal, or has it been escalating?

13 |           JERMAIN AUSTIN CHARLO: Uhm, a one-time deal.

14 |           DEPUTY LARGENT: Describe the most threatening  
15 | event of violence involving him -- Michael.

16 |           JERMAIN AUSTIN CHARLO: Uhm, just tonight.

17 |           DEPUTY LARGENT: Is your mother coming to pick  
18 | you up at your --

19 |           JERMAIN AUSTIN CHARLO: (Inaudible)

20 |           DEPUTY LARGENT: So, it's a long ways.

21 |           JERMAIN AUSTIN CHARLO: Yeah.

22 |           DEPUTY LARGENT: (Inaudible) Okay. What's  
23 | your height and weight?

24 |           JERMAIN AUSTIN CHARLO: Uhm, I'm five-eight,  
25 | and I'm 116 pounds.

1 DEPUTY LARGENT: And how about a phone number  
2 where you can be contacted?

3 JERMAIN AUSTIN CHARLO: 274-0679.

4 DEPUTY LARGENT: And is that your mother's  
5 phone number?

6 JERMAIN AUSTIN CHARLO: That's my mother's  
7 cell phone.

8 DEPUTY LARGENT: So you said you're dating?

9 JERMAIN AUSTIN CHARLO: Yes.

10 DEPUTY LARGENT: Former, or currently?

11 JERMAIN AUSTIN CHARLO: Currently.

12 DEPUTY LARGENT: Okay. Let's see. June. So  
13 about nine months?

14 JERMAIN AUSTIN CHARLO: Yes.

15 DEPUTY LARGENT: "Current."

16 Were you convicted of domestic violence on  
17 that last year, or is that still ongoing?

18 JERMAIN AUSTIN CHARLO: Uhm, no.

19 DEPUTY LARGENT: No?

20 Any mental illness of either of you two?

21 JERMAIN AUSTIN CHARLO: Uhm, I -- it's not --  
22 we haven't medically stated it yet, but we think that I  
23 have Bipolar, schizophrenia, and -- and depression.

24 DEPUTY LARGENT: How about any other prior  
25 violence? Any other violence documented between you --



1 either with him or with you?

2 JERMAIN AUSTIN CHARLO: Uhm, just the last  
3 one, which was months ago.

4 DEPUTY LARGENT: Okay. Who, uh, was the  
5 agency that investigated that one?

6 JERMAIN AUSTIN CHARLO: That was tribal.

7 DEPUTY LARGENT: Has the suspected stated or  
8 disclosed any of these behaviors: Suicidal and/or  
9 homicide?

10 JERMAIN AUSTIN CHARLO: No.

11 DEPUTY LARGENT: Homicidal ideations, threats,  
12 or attempts?

13 JERMAIN AUSTIN CHARLO: No.

14 DEPUTY LARGENT: Escalation in frequency of  
15 violent episodes?

16 JERMAIN AUSTIN CHARLO: No.

17 DEPUTY LARGENT: Escalation and severity of  
18 violent episodes?

19 JERMAIN AUSTIN CHARLO: No.

20 DEPUTY LARGENT: Weapons owned, threats to use  
21 a weapon, or a recent purchase?

22 JERMAIN AUSTIN CHARLO: No.

23 DEPUTY LARGENT: Does he own any weapons?

24 JERMAIN AUSTIN CHARLO: Uhm, not that I know  
25 of.

1 DEPUTY LARGENT: Okay. Prior criminal  
2 behavior or injunctions?

3 JERMAIN AUSTIN CHARLO: No.

4 DEPUTY LARGENT: Okay. Any medical mental  
5 health issues? Uhm, you said that you're being -- have  
6 you been seen by somebody and they haven't got the --

7 JERMAIN AUSTIN CHARLO: We haven't been seen.  
8 I was going to be, but I haven't been yet.

9 DEPUTY LARGENT: Okay. Any substance abuse?

10 JERMAIN AUSTIN CHARLO: No.

11 DEPUTY LARGENT: Okay. And this is, uhm --  
12 has the suspect hid or displayed any of these:

13 Any substance abuse?

14 JERMAIN AUSTIN CHARLO: No.

15 DEPUTY LARGENT: Obsessed or preoccupied with  
16 victim?

17 JERMAIN AUSTIN CHARLO: Not that I know of.

18 DEPUTY LARGENT: Says things like, "If I can't  
19 have you, nobody can"?

20 JERMAIN AUSTIN CHARLO: Yes.

21 DEPUTY LARGENT: Attempts to control partner's  
22 daily activities?

23 JERMAIN AUSTIN CHARLO: No.

24 DEPUTY LARGENT: Stalking the victim?

25 JERMAIN AUSTIN CHARLO: No.

1 DEPUTY LARGENT: Any previous violations of an  
2 order of protection?

3 JERMAIN AUSTIN CHARLO: No.

4 DEPUTY LARGENT: Suspect is violent outside of  
5 the relationship?

6 JERMAIN AUSTIN CHARLO: No.

7 DEPUTY LARGENT: Suspect is violent towards  
8 children or pets?

9 JERMAIN AUSTIN CHARLO: No.

10 DEPUTY LARGENT: Ever tried to strangle the  
11 victim?

12 JERMAIN AUSTIN CHARLO: No.

13 DEPUTY LARGENT: Okay. Were there any -- any  
14 witnesses to the event?

15 JERMAIN AUSTIN CHARLO: No.

16 DEPUTY LARGENT: And the event took place in a  
17 white van? Was it open or --

18 JERMAIN AUSTIN CHARLO: No. It was on top of  
19 the hood. He pushed me on top of the hood.

20 DEPUTY LARGENT: Okay. So he ran after you,  
21 caught up to you at the front of the van, and pushed  
22 you on top of the van, and this --

23 JERMAIN AUSTIN CHARLO: Yes.

24 DEPUTY LARGENT: And then what did he do?  
25 He --

1 JERMAIN AUSTIN CHARLO: He pushed on me top of  
2 the van. Pushed me and held me down for a while, and  
3 started punching me in the ear and the cheekbone.

4 DEPUTY LARGENT: Okay.

5 JERMAIN AUSTIN CHARLO: While I was on there.

6 DEPUTY LARGENT: Okay. Okay. Well, it's up  
7 to you to break or escape the cycle of events. So what  
8 I'm going to do is I'm going to read you what's known  
9 as the victim's rights. This is a notice of rights and  
10 services to victims in a partner or family member  
11 assault, rape, or sexual assault. This first section  
12 is criminal charges.

13 Uhm, as the victim of the PFMA, or  
14 partner/family member assault, I'll call it "PFMA," you  
15 are not responsible for any charges brought against the  
16 offender, nor is it your decision to drop any criminal  
17 charges. Only the County Attorney's Office can do  
18 that.

19 Uhm, you are entitled to follow -- to the  
20 following civil remedies, including filing for an order  
21 of protection, and it lists those there. There is six  
22 there. I encourage you to read those.

23 Uhm, you can obtain a form for an order of  
24 protection from -- from the Sanders County Coalition  
25 For Families. It sounds like you are going back to

1 Polson, uhm, but I will give you this here, since it is  
2 here in this county. Uhm, I don't know if you'll need  
3 to get one in Lake. I don't know if they will -- it  
4 will cover for Lake County.

5 Uhm, be aware that you can go to Sanders  
6 County Justice Court or the Sanders County Victim  
7 Witness Assistant. There is no cost for this civil  
8 action.

9 There is a 72-hour no contact order that will  
10 be issued to him. A violation of this order is a  
11 criminal offense, and the offender could be arrested  
12 again. Report violations to 911.

13 Restitution and compensation. You may be  
14 eligible.

15 Medical. You may be eligible for crime  
16 victim's compensation or payments.

17 Uhm, then there's -- let me read you this, but  
18 you'll find all -- the rest of the -- or all of the  
19 pertinent information.

20 The Sanders County Coalition For Families  
21 (inaudible) is a nonprofit organization designed to  
22 provide assistance to victims of a crime. Uhm, the  
23 crisis phone number is listed right here, and then  
24 there is also a local number, "827."

25 The following agencies may be able to give you

1 additional information or emergency help, uhm, and they  
2 are listed right here. The Sanders County Coalition  
3 For Families is -- is one that -- it's the nonprofit  
4 that's very helpful.

5 Uhm, so, let's see. Michael? What's his  
6 middle name, do you know?

7 JERMAIN AUSTIN CHARLO: Oh. Blake, B-L-A-K-E.

8 DEPUTY LARGENT: And D- --

9 JERMAIN AUSTIN CHARLO: -- E-F-R-A-N-C-E.

10 DEPUTY LARGENT: Okay. And just go ahead and  
11 spell -- spell your name for me, again, if you would?

12 JERMAIN AUSTIN CHARLO: J-E-R.

13 DEPUTY LARGENT: J-E-R.

14 JERMAIN AUSTIN CHARLO: M-A.

15 DEPUTY LARGENT: M-A.

16 JERMAIN AUSTIN CHARLO: I-N.

17 DEPUTY LARGENT: I-N.

18 JERMAIN AUSTIN CHARLO: Austin, A-U-S-T-I-N.

19 DEPUTY LARGENT: A-U-S-T-I-N.

20 JERMAIN AUSTIN CHARLO: Charlo.

21 DEPUTY LARGENT: C-H-A-R-L-O?

22 JERMAIN AUSTIN CHARLO: Yes.

23 DEPUTY LARGENT: Okay. And your address is in  
24 Polson somewhere. "Mom's." Uhm, just go ahead and  
25 give me the phone number again.

1 JERMAIN AUSTIN CHARLO: 274-0679.

2 DEPUTY LARGENT: All right. Thank you. Okay.

3 I'm going to -- that's just a copy.

4 JERMAIN AUSTIN CHARLO: All right.

5 DEPUTY LARGENT: And I'm going to keep an  
6 original of (inaudible) and I'm going to give you a  
7 copy.

8 JERMAIN AUSTIN CHARLO: Okay.

9 DEPUTY LARGENT: And the time is 0057 hours.  
10 Okay. I'll give you that copy there.

11 Will your mom be coming here to pick you up?

12 JERMAIN AUSTIN CHARLO: Yes.

13 DEPUTY LARGENT: Okay. And whose place is  
14 this?

15 JERMAIN AUSTIN CHARLO: This is my  
16 grandfather's.

17 DEPUTY LARGENT: Your grandfather's? What's  
18 his name?

19 JERMAIN AUSTIN CHARLO: Elmer Morigeau,  
20 Junior.

21 DEPUTY LARGENT: Okay. Oh, Junior? Okay.  
22 Oh, who is that?

23 JERMAIN AUSTIN CHARLO: (Inaudible)

24 DEPUTY LARGENT: Okay. So we've got the two  
25 (inaudible) here, uh, (inaudible). Uhm, okay. It's

1 about the definition of violence, PFMA's, and then,  
2 also, orders of protection, what you need to know. So  
3 I'll hand -- I'll give you those two forms there. Uhm,  
4 and I encourage you to break the cycle, and, maybe, you  
5 might have to do something different, then. Okay?

6 And I'm going to go. You are going to stay  
7 here?

8 JERMAIN AUSTIN CHARLO: Uhm, yeah.

9 DEPUTY LARGENT: Okay.

10 JERMAIN AUSTIN CHARLO: Until my mother gets  
11 here.

12 DEPUTY LARGENT: All right. Okay. Thank you.  
13 And what I'm going to do -- yeah, we are good. Okay.  
14 This will end the interview with Jermain. According to  
15 this officer's watch, it's zero fifty-nine hours.

16  
17 (End of audio recording.)  
18  
19  
20  
21  
22  
23  
24  
25



CERTIFICATE

I, Julie L. DeLong, certify that the foregoing  
is a correct transcript from the record of proceedings  
in the above-entitled matter to the best of my  
knowledge, skill, and ability.

/s/ Julie L. DeLong  
Julie L. DeLong

01/23/2022  
Date

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
MISSOULA DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MICHAEL BLAKE DeFRANCE,

Defendant.

**CR 21-29-M-DLC**

**DEFENDANT DeFRANCE'S  
MOTION FOR LEAVE  
TO FILE MOTION FOR  
RECONSIDERATION  
L.R. 7.3**

**MOTION FOR LEAVE TO FILE  
MOTION FOR RECONSIDERATION**

COMES NOW Defendant, Mr. DeFrance, by and through his counsel of record, Michael Donahoe, and the Federal Defenders of Montana, and moves the Court for leave to file a motion to reconsider its previous rulings which denied one of his motions to dismiss, in part, on the grounds that the categorical approach has no role in determining whether a “boyfriend” was a prohibited person which, at this

writing, is the former version of 18 USC §922(g)(9), as further defined by former §921(a)(33)(A). (Addendum at pages 1-2).

Furthermore, Mr. DeFrance seeks leave to have the Court reconsider its previous rulings that there is no legislative history or intent that a federal §922(g)(9) offense should have differing sets of elements, based on whether the predicate offense includes a relationship element. (ECF No. 71 at page 25). And finally, Mr. DeFrance moves the Court for leave to reconsider its ruling that former §922(g)(9) and §921(a)(33)(A) were neither unconstitutionally vague nor failed to furnish adequate due process notice. (ECF No. 71 at page 40-41).

#### **GROUND FOR THIS MOTION**

In satisfaction of L.R. 7.3(b), counsel states recent congressional amendments to §921(a)(33)(A) show that the now previous version of that statute was never intended to apply to dating couples in a boyfriend/girlfriend relationship. Furthermore, under the Supreme Court's recent decisions in *United States v. Taylor*, 142 S.Ct. 2015 (June 21, 2022) and *New York Rifle & Pistol Association, Inc., v. Bruen*, \_\_ U.S. \_\_, 2022WL2251305 (June 23, 2022), Mr. DeFrance's previous motions to dismiss under the categorical approach and/or for failure of due process notice/vagueness arguments ought to be reconsidered because current legal events show that the facts and/or applicable law are materially different from the facts and/or law that the parties presented before entry of the Court's previous orders.

Moreover, the laws' recent development suggests that there are new material facts which have arisen; and/or a significant change in law has occurred, since the Court's entry of the orders we seek to have reconsidered. *Cf.* L.R. 7.3(b)(1) and (2).

### DISCUSSION

In its previous rulings this Court held as follows:

There is no basis in the text of the statute or legislative history and intent for a conclusion that the federal offense should have differing sets of elements based on whether the predicate offense includes a relationship element.

...

The Court concludes that *Nobriga* and *Hayes* foreclose Mr. DeFrance's argument that the Court should engage in a categorical approach comparison of the relationship elements of his predicate offense and § 921(a)(33)(A)(ii) because the federal statute's definition of qualifying relationships is an element of the § 922(g)(9) offense, which the United States must prove beyond a reasonable doubt at trial. *Hayes*, 555 U.S. at 418, 129 S. Ct. 1079; *Nobriga*, 474 F.3d at 563–64.

(ECF No. 71, pages 25-26).

These rulings ought to be reconsidered for two reasons.

First, because by its recent amendment of 18 USC §921(a)(33)(ii) adding the term “Dating Relationship” to the other relationships covered by the federal statute Congress displays clear evidence by negative implication that, as legislatively crafted initially, §922(g)(9) was never intended to apply to the relational context of a dating relationship. Put another way, by adding the “Dating Relationship” element

to the text of §921(a)(33)(A)(ii) Congress intended to change the meaning of the statute to apply to a situation to which it was never intended to apply in the first place. *Cf. United States v. Rosser*, 528 F.2d 652, 655 (D.C. Cir. 1976) (deleting essential element from the definition of a crime changes the meaning of the statute). Where, as here, Congress adds to the statute to effect application to a new and different context (*i.e.*, “Dating Relationship”) it follows that the previous version of the statute was not intended to cover that situation in the first place.

Relatedly, the Court should reconsider its previous decisions under the Supreme Court’s recent decision in *United States v. Taylor*, 142 S. Ct. 2015 (June 21, 2022). Mr. Taylor, a Fourth Circuit defendant, was convicted on his guilty plea for conspiring to, and attempting to, commit a *Hobbs Act* robbery. In addition, Mr. Taylor pled guilty to a separate violation of 18 USC §924(c) (using a gun during a crime of violence), allowing both his *Hobbs Act* conspiracy offense and his attempted *Hobbs Act* robbery offense to serve as the predicate(s) for that §924(c) conviction.

After the Supreme Court ruled that the “residual clause” of §924(c) was unconstitutionally vague, Mr. Taylor sought to upend his §924(c) conviction by arguing that neither the *Hobbs Act* conspiracy, nor *Hobbs Act* attempted robbery, satisfied the elements clause set forth in the statute (*i.e.*, §924(c)). Important to our purpose here, the Supreme Court in *Taylor* ruled:

The parties may not see eye to eye on the outcome of this case, but they at least agree on how we should go about deciding it. To determine whether a federal felony may serve as a predicate for a conviction and sentence under the elements clause, they say, we must apply a “categorical approach.” We must because the clause poses the question whether the federal felony at issue “has as an element the use, attempted use, or threatened use of physical force”.

142 S.Ct. 2015 attached hereto as  
Addendum page 7, highlighted section).

Considering that we now know as a result of the recent amendments to 18 USC §921(a)(33)(A) that Congress never intended for a misdemeanor domestic violence conviction (founded on a dating relationship) to deny firearms rights this Court ought to reconsider whether to apply the categorical approach in Mr. DeFrance’s case or not. The recent legislative changes to 18 USC §921(a)(33)(A) not only change the law moving forward, but also alter understanding of the reach of the previous version of 18 USC §922(g)(9).

A close reading of *Taylor* strongly suggests that the Supreme Court and the government agree that the categorical approach applies even where the “predicate” is alleged to have occurred at the same time as the firearm enhancement (the §924(c)) sought to be proved. Although a subtle point, the broader implications of *Taylor* suggest that even where the firearm at issue was actually used by an accomplice to shoot an individual during the attempted robbery, the Court nevertheless felt constrained under the usual categorical approach not to consider that fact and instead

compare the elements of both alleged offenses (the attempted robbery and the firearms counts). At a minimum, *Taylor* strongly implies that where liability for one crime depends on the character of a different crime the elements of each must first be compared to each other without regard for the facts. In other words, the categorical approach always applies in situations where a predicate “conviction” is necessary to support liability for another offense.

Congress predicates a §922(g)(9) violation on a prior “conviction” not prior conduct. And here, the Montana misdemeanor “conviction” that the government wants to use, arises under a 2011 Montana statute which contains an indivisible relationship element that authorized conviction on the basis of a dating relationship; a type of relationship that has only recently been added to the text of the §921(a)(33)(A) relationship definition. In *United States v. Sullivan*, 797 F.3d 623, 638 (9<sup>th</sup> Cir. 2015), the Court expressly held that “where language and historical context tug in favor of a narrower reading” the categorical approach can still apply. *Id.*, quoting *Mellouli v. Lynch*, 135 S.Ct. 1980, 1990 (2015).

In *Mellouli* a lawful immigrant resident was convicted of a misdemeanor offense for storing Adderall tablets in his sock under a Kansas law, which made it unlawful “to use or possess with intent to use any drug paraphernalia” to conceal a controlled substance. *Id.* at 1983–84 (quoting Kan. Stat. Ann. §21–5709(b)). “At the

time of Mellouli's conviction, Kansas' schedules included at least nine substances not included in the federal lists.” *Id.* at 1984.

The Eighth Circuit upheld the determination that the offense was a crime “associated with the drug trade in general”; and since there was “nearly a complete overlap between the drugs controlled under state and federal law.” *Id.* at 1988–89 (internal quotes marks omitted). The Supreme Court reversed concluding that both the BIA and the Eighth Circuit erred by failing to give effect to the parenthetical limiting controlled substances to those “defined in section 802 of Title 21.” *Id.* at 1990–91. The Court reached this conclusion by applying the categorical approach based this determination and on its analysis of the statutory language and its historical context.

When considered together the recent amendments to §921(a)(33)(A), along with the parting comments of the Supreme Court in *Mellouli*, four ideas become clear:

- (1) Under the previous version of §922(g)(9) Congress never intended to extend a lifetime firearm ban to partner assaults based on “dating” relationships.
- (2) The decision not to apply the usual categorical analysis to Mr. DeFrance's situation fails to honor this express reveal of Congressional intent in the recent §921(a)(33)(A) amendments, since in the words of *Mellouli* it severs the connection between what Congress intended from the actual Montana predicate that Mr. DeFrance was convicted for.



(3) Under either the usual categorical approach or the modified categorical approach, or both, (depending on the divisibility analysis) Mr. DeFrance was not previously "convicted" of a misdemeanor crime of domestic violence resulting in a lifetime firearms ban, which is a statutory prerequisite for a §922(g)(9) prosecution.

(4) Combining prior assault convictions obtained under statutes with no relationship element, as in the Supreme Court's *Hayes* decision, with prior assault convictions where the statute contains a relationship element that does not conform to the federal qualifying relationship definitions in §921(a)(33)(A), is double error since it unforeseeably extends the reasoning in *Hayes* to situations Congress never intended; and it encourages, as this case illustrates, the re-litigation of factual matters often settled long ago for reasons having little or nothing to do with public safety.

Both the language of the statute (§921(a)(33)(A)) and the historical context have changed. The newly minted §922(g)(9) offense confirms that historically Congress never intended to sweep dating couples within the reach of §922(g)(9). Of course, the new law changes that but at the same time the new law clarifies that dating couples were not to be captured for permanent loss of firearms rights under the previous version of §922(g)(9). This is especially so here because under the new law it is clear that Mr. DeFrance was never intended to be a prohibited person as a result of his 2013 Montana PFMA conviction.

Next, we address Mr. DeFrance's previous vagueness and fair notice contentions. On those claims the Court ruled as follows:

In sum, Sections 921(a)(33)(A) and 922(g)(9) are not unconstitutionally vague on their face or as applied because they provide sufficient notice to ordinary persons of what conduct is prohibited and provide minimal guidelines to govern law enforcement. *See Kolender*, 461 U.S. at 357–58; *Bohonus*, 628 F.2d at 1173–75.

(ECF No. 71, page 41).

The new legislation warrants reconsideration of these rulings. This is an easy case from a due process notice/fair warning point of view for two reasons. First, because the 2011 Montana PFMA statute contains an indivisible relationship element that includes dating partners. This point stands uncontradicted. As such the modified categorical approach does not apply because the Montana 2011 PFMA law is overinclusive *vis-à-vis* the previous version of 18 USC §921(a)(33)(A), *See Descamps v. United States*, 570 U.S. 54 (2013) (holding that modified categorical approach cannot be used to determine the nature of a prior conviction when the crime of conviction has an indivisible element). As a result of the recent amendments, we now know for certain that the dating relationship has been added to the list of indivisible “means” set forth in §921(a)(33)(A) and that the 2011 version of the Montana PFMA statute and the new federal law are a categorical match. Hence, from a due process/fair warning perspective, it proves reasonable that Mr. DeFrance’s interpretation that he was not a prohibited person should be afforded deference under the rule of lenity. *United States v. Lanier*, 520 U.S. 259, 266-267 (1997) (detailing the three manifestations of the fair warning requirement).

In closing, the Court should also consider the Supreme Court's June 23, 2022, decision styled as *New York Rifle & Pistol Association, Inc., v. Bruen*, \_\_ U.S. \_\_, 2022WL2251305. In *Bruen*, the Supreme Court re-tools the analysis to conclude that the Second Amendment protects the right to bear arms both inside and outside the home. As relevant to our request for leave to file a motion for reconsideration, this is a factor because under the new amendments to §921(a)(33)(A) the "boyfriend loophole" may be closed, but the wider implication that it did not exist under the previous iteration of §922(g)(9) puts Mr. DeFrance clearly with the protected class of persons identified in the *Bruen* decision. Stated a little differently, the gravity of the right at stake here (protection under the Second Amendment) should be a consideration in deciding whether the categorical approach should be applied in Mr. DeFrance's case or not. Especially considering that by passing the new amendments to clarify that the "boyfriend loophole" is closed, extreme constitutional caution should be used to conclude that the categorical approach does not apply.

#### **CONTACT WITH OPPOSING COUNSEL**

Government counsel, Jennifer S. Clark, opposes this motion on behalf of the United States.

**CONCLUSION**

WHEREFORE, Mr. DeFrance prays the Court will grant leave to reconsider its previous ruling in this case (ECF No. 71) which denied his motions to dismiss (ECF Nos. 14, 15, 16, 17, 43 and 44), allow for further briefing, hold a hearing, and order appropriate relief.

RESPECTFULLY SUBMITTED this 1<sup>st</sup> day of July, 2022.

/s/ Michael Donahoe  
MICHAEL DONAHOE  
Deputy Federal Defender  
Counsel for Defendant

**CERTIFICATE OF SERVICE**  
**L.R. 5.2(b)**

I hereby certify that on July 1, 2022, a copy of the foregoing document was served on the following persons by the following means:

  1   CM-ECF

  2   Mail

1. CLERK, UNITED STATES DISTRICT COURT

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Defendant

/s/ Michael Donahoe  
FEDERAL DEFENDERS OF MONTANA

# **ADDENDUM**

**SEC. 12005. MISDEMEANOR CRIME OF DOMESTIC VIOLENCE.**

(a) DEFINING “DATING RELATIONSHIP”.—Section 921(a) of title 18, United States Code, is amended—

(1) in paragraph (33)(A)(ii)—

<< 18 USCA § 921 >>

(A) by striking “or by a person” and inserting “by a person”; and

(B) by inserting before the period at the end the following: “, or by a person who has a current or recent former dating relationship with the victim”; and

(2) by adding at the end the following:

<< 18 USCA § 921 >>

“(37)(A) The term ‘dating relationship’ means a relationship between individuals who have or have recently had a continuing serious relationship of a romantic or intimate nature.

“(B) Whether a relationship constitutes a dating relationship under subparagraph (A) shall be determined based on consideration of—

“(i) the length of the relationship;

“(ii) the nature of the relationship; and

“(iii) the frequency and type of interaction between the individuals involved in the relationship.

“(C) A casual acquaintanceship or ordinary fraternization in a business or social context does not constitute a dating relationship under subparagraph (A).”.

<< 18 USCA § 921 NOTE >>

(b) NO RETROACTIVE APPLICATION.—The amendments made by subsection (a) shall not apply to any conviction of a misdemeanor crime of domestic violence entered before the date of enactment of this Act.

(c) LIMITATIONS ON CONVICTIONS OF CRIMES OF DOMESTIC VIOLENCE WITH RESPECT TO DATING RELATIONSHIPS.—Section 921(a)(33) of title 18, United States Code, is amended—

(1) in subparagraph (A)—

<< 18 USCA § 921 >>

(A) in the matter preceding clause (i), by striking “subparagraph (C)” and inserting “subparagraphs (B) and (C)”; and

<< 18 USCA § 921 >>

(B) in clause (ii), by striking “State,” and inserting “State,”; and

(2) by adding at the end the following:

<< 18 USCA § 921 >>

“(C) A person shall not be considered to have been convicted of a misdemeanor crime of domestic violence against an individual in a dating relationship for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had firearm rights restored unless the expungement, pardon, or restoration of rights expressly provides that the person may not ship, transport, possess, or receive firearms: *Provided*, That, in the case of a person who has not more than 1 conviction of a misdemeanor crime of domestic violence against an individual in a dating relationship, and is not otherwise prohibited under this chapter, the person shall not be disqualified from shipping, transport, possession, receipt, or purchase of a firearm under this chapter if 5 years have elapsed from the later of the judgment of conviction or the completion of the person's custodial or supervisory sentence, if any, and the person has not subsequently been convicted of another such offense, a misdemeanor under Federal, State, Tribal, or local law which has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, or any other offense that would disqualify the person under section 922(g). The national instant criminal background check system established under section 103 of the Brady Handgun Violence Prevention Act (34 U.S.C. 40901) shall be updated to reflect the status of the person. Restoration under this subparagraph is not available for a current or former spouse, parent, or guardian of the victim, a person with whom the victim shares a child in common, a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or a person similarly situated to a spouse, parent, or guardian of the victim.”.



142 S.Ct. 2015  
Supreme Court of the United States.

UNITED STATES, Petitioner

v.

Justin Eugene TAYLOR

No. 20-1459

|

Argued December 7, 2021

|

Decided June 21, 2022

#### Synopsis

**Background:** Prisoner filed successive motion to vacate sentence, relating to conviction and enhanced sentence pursuant to guilty plea to using a firearm in furtherance of a crime of violence, with attempted Hobbs Act robbery as the predicate crime of violence. The United States District Court for the Eastern District of Virginia, M. Hannah Lauck, J.,  2019 WL 4018340, denied the motion. Prisoner appealed. The United States Court of Appeals for the Fourth Circuit, Motz, Circuit Judge,  979 F.3d 203, vacated and remanded. Certiorari was granted.

**[Holding:]** The Supreme Court, Justice Gorsuch, held that attempted Hobbs Act robbery does not qualify as a crime of violence under the elements clause of statutory definition of crime of violence, as predicate for felony conviction and enhanced sentence for using a firearm in furtherance of a crime of violence, abrogating  *United States v. St. Hubert*, 909 F.3d 335.

Court of Appeals affirmed.

Justice Thomas filed a dissenting opinion.

Justice Alito filed a dissenting opinion.

**Procedural Posture(s):** Appellate Review; Post-Conviction Review.

West Headnotes (7)

#### [1] Weapons Crimes of violence

An inquiry into how any particular defendant may commit the crime is not relevant when applying the categorical approach to determining whether a federal felony may serve as a predicate crime of violence for a conviction and enhanced sentence for using a firearm in furtherance of a crime of violence, under the elements clause of the statutory definition of crime of violence, and the only relevant question is whether the federal felony at issue always requires the government to prove—beyond a reasonable doubt, as an element of its case—the use, attempted use, or threatened use of force.  18 U.S.C.A. § 924(c)(3)(A).

1 Cases that cite this headnote

#### [2] Weapons Crimes of violence

Under the categorical approach, attempted Hobbs Act robbery does not qualify as a “crime of violence” under the elements clause of the statutory definition of crime of violence, as predicate for felony conviction and enhanced sentence for using a firearm in furtherance of a crime of violence; to secure a conviction, the government must show an intention to take property by force or threat, along with a substantial step toward achieving that object, but whatever a substantial step requires, it does not categorically require the government to prove that the defendant used, attempted to use, or even threatened to use force against another person or his property, as would satisfy the elements clause; abrogating  *United States v. St. Hubert*, 909 F.3d 335.  18 U.S.C.A. §§ 924(c)(3)(A),  1951(a).

1 Cases that cite this headnote

#### [3] Robbery Attempt

To win a conviction for attempted Hobbs Act robbery, the government must prove two things: (1) the defendant intended to unlawfully take or obtain personal property by means of actual or threatened force, and (2) the defendant completed a substantial step toward that end.

18 U.S.C.A. § 1951(a).

[4] **Robbery** ➡ Attempt

Under the common law, there will be cases, appropriately reached by a charge of attempted robbery, where the actor does not actually harm anyone or even threaten harm, so if, for example, the defendant is apprehended before he reaches his robbery victim and thus before he has actually engaged in threatening conduct, proof of his purpose to engage in such conduct can justify a conviction for attempted robbery so long as his intention and some other substantial step are present.

[5] **Weapons** ➡ Crimes of violence

Threatened use of physical force against the person or property of another, for purposes of elements clause of statutory definition of crime of violence, as predicate for felony conviction and enhanced sentence for using a firearm in furtherance of a crime of violence, requires a communicated threat of force. 18 U.S.C.A. § 924(c)(3)(A).

1 Cases that cite this headnote

[6] **Statutes** ➡ Associated terms and provisions; noscitur a sociis

As a usual rule of statutory interpretation, a law's terms are best understood by the company they keep.

[7] **Statutes** ➡ Statute as a Whole; Relation of Parts to Whole and to One Another

When interpreting federal statutes, courts do not lightly assume that Congress adopts two separate

clauses in the same law to perform the same work.

**West Codenotes**

**Recognized as Unconstitutional**

18 U.S.C.A. § 924(c)(3)(B)

*Syllabus* \*

For his participation in an unsuccessful robbery during which his accomplice shot a man, respondent Justin Taylor faced charges of violating the Hobbs Act, 18 U.S.C. § 1951(a), and of committing a “crime of violence” under § 924(c). The Hobbs Act makes it a federal crime to commit, attempt to commit, or conspire to commit a robbery with an interstate component. 18 U.S.C. § 1951(a). Section 924(c) authorizes enhanced punishments for those who use a firearm in connection with a “crime of violence” as defined in either § 924(c)(3)(A)—known as the elements clause—or § 924(c)(3)(B)—known as the residual clause. Before the District Court, the government argued that Taylor’s Hobbs Act offense qualified as a “crime of violence” under § 924(c). Taylor ultimately pleaded guilty to one count each of violating the Hobbs Act and § 924(c). The District Court sentenced Taylor to 30 years in federal prison—a decade more than the maximum sentence for his Hobbs Act conviction alone. Taylor later filed a federal habeas petition focused on his § 924(c) conviction, which was predicated on his admission that he had committed both conspiracy to commit Hobbs Act robbery and attempted Hobbs Act robbery. Taylor argued neither Hobbs Act offense qualified as a “crime of violence” for purposes of § 924(c) after *United States v. Davis*, 588 U. S. —, 139 S.Ct. 2319, 204 L.Ed.2d 757. In *Davis*, this Court held that § 924(c)(3)(B)’s residual clause was unconstitutionally vague. *Id.*, at — — —, 139 S.Ct., at — — —. In his habeas proceeding, Taylor asked the court to apply *Davis* retroactively and vacate his § 924(c) conviction and sentence. The government maintained that Taylor’s § 924(c) conviction and sentence remained sound because his crime of attempted Hobbs Act robbery qualifies as a crime of violence under the elements clause. The Fourth Circuit held that attempted Hobbs Act robbery

does not qualify as a crime of violence under § 924(c)(3)(A). The Fourth Circuit vacated Taylor's § 924(c) conviction and remanded the case for resentencing. In reaching its judgment, the Fourth Circuit noted that other courts have held that attempted Hobbs Act robbery does qualify as a crime of violence under the elements clause.

*Held:* Attempted Hobbs Act robbery does not qualify as a “crime of violence” under § 924(c)(3)(A) because no element of the offense requires proof that the defendant used, attempted to use, or threatened to use force. Pp. ———.

(a) The Court applies a “categorical approach” to determine whether a federal felony may serve as a predicate for a conviction and sentence under the elements clause, which poses the question whether the federal felony in question “has as an element the use, attempted use, or threatened use of physical force.” § 924(c)(3)(A) (emphasis added). The relevant inquiry is not how any particular defendant may commit the crime but whether the federal felony at issue always requires the government to prove—beyond a reasonable doubt, as an element of its case—the use, attempted use, or threatened use of force. This Court has long understood similarly worded statutes to demand similarly categorical inquiries. See, e.g., *Borden v. United States*, 593 U.S. ———, 141 S.Ct. 1817, 210 L.Ed.2d 63.

An attempted Hobbs Act robbery does not satisfy the elements clause. To secure a conviction for attempted Hobbs Act robbery, the government must prove that the defendant intended to complete the offense and that the defendant completed a “substantial step” toward that end. See, e.g., *United States v. Resendiz-Ponce*, 549 U.S. 102, 107, 127 S.Ct. 782, 166 L.Ed.2d 591. An intention is just that, no more. And whatever a substantial step requires, it does not require the government to prove that the defendant used, attempted to use, or even threatened to use force against another person or his property—even if the facts would allow the government to do so in many cases. As the Model Penal Code explains with respect to the Hobbs Act's common-law robbery analogue, “there will be cases, appropriately reached by a charge of attempted robbery, where the actor does not actually harm anyone or even threaten harm.” ALI, Model Penal Code § 222.1, p. 114. But no element of attempted Hobbs Act robbery requires proof that the defendant used, attempted to use, or threatened to use force. Pp. ———.

(b) The government's countervailing arguments fail. Pp. ———.

(1) The government first argues that the elements clause encompasses not only any offense that qualifies as a “crime of violence” but also any attempt to commit such a crime. But the elements clause only asks whether the defendant *did* commit a crime of violence as defined by the statute. Pp. ———.

(2) The government next argues that the “substantial step” element of attempted Hobbs Act robbery categorically requires it to prove that a defendant used, attempted to use, or threatened to use physical force. But while many who commit the crime of attempted Hobbs Act robbery do use, attempt to use, or threaten to use force, the government's problem is that no element of attempted Hobbs Act robbery requires the government to prove such facts beyond a reasonable doubt. The government maintains that anyone who takes a substantial step toward completing Hobbs Act robbery always or categorically poses a “threatened use” of force because the word “threat” can be used to speak of an abstract risk. The government submits that the elements clause uses the term to require only an objective, if uncommunicated, threat to community peace and order. But when Congress uses the word “threat” in such an abstract and predictive (rather than communicative) sense, it usually makes its point plain. The textual clues in the statute point in the opposite direction of the government's reading. Moreover, the government's view of the elements clause would have it effectively replicate the work formerly performed by the residual clause. Under usual rules of statutory interpretation, the Court does not lightly assume Congress adopts two separate clauses in the same law to perform the same work. See, e.g., *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 839, n. 14, 108 S.Ct. 2182, 100 L.Ed.2d 836. Pp. ———.

(3) The government's final theory accepts that a conviction under the elements clause requires a communicated threat of force and contends that most attempted Hobbs Act robbery prosecutions involve exactly that. But whatever this argument proves, the theory cannot be squared with the statute's terms. Congress in the elements clause did not mandate an empirical inquiry into how crimes are usually committed, let alone impose a burden on the defendant to present proof about the government's own prosecutorial habits. Attempted Hobbs Act robbery does not categorically require proof of the elements § 924(c)(3)(A) demands. That ends the inquiry, and nothing in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 127 S.Ct. 815, 166 L.Ed.2d 683, suggests otherwise. Pp. ———.

979 F.3d 203, affirmed.

GORSUCH, J., delivered the opinion of the Court, in which ROBERTS, C. J., and BREYER, SOTOMAYOR, KAGAN, KAVANAUGH, and BARRETT, JJ., joined. THOMAS, J., and ALITO, J., filed dissenting opinions.

#### Attorneys and Law Firms

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Michael R. Dreeben, Washington, DC, for respondent.

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Michael R. Dreeben, Kendall Turner, Grace Leeper, Jenya Godina, O'Melveny & Myers LLP, Washington, DC, Frances H. Pratt, Counsel of Record, Office of the Federal Public Defender, Eastern District of Virginia, Alexandria, VA, for Respondent.

#### Opinion

Justice GORSUCH delivered the opinion of the Court.

Does attempted Hobbs Act robbery qualify as a “crime of violence” under 18 U.S.C. § 924(c)(3)(A)? The answer matters because a person convicted of attempted Hobbs Act robbery alone normally faces up to 20 years in prison. But if that offense qualifies as a “crime of violence” under § 924(c)(3)(A), the same individual may face a second felony conviction and years or decades of further imprisonment.

I

After a robbery went awry and his accomplice shot a man, the federal government charged Justin Taylor with violating the Hobbs Act and § 924(c). The Hobbs Act makes it a federal crime to commit, attempt to commit, or conspire to commit a robbery with an interstate component. 18 U.S.C. § 1951(a). Meanwhile, § 924(c) authorizes further

punishments for those who use a firearm in connection with a “crime of violence.”

For purposes of § 924(c), a federal felony qualifies as a “crime of violence” if it meets either of two definitions.

The first definition is found in § 924(c)(3)(A), a provision sometimes called the elements clause. That clause covers offenses that “ha[ve] as an element the use, attempted use, or threatened use of physical force against the person or property of another.” The second definition, located next door in § 924(c)(3)(B) and often referred to as the residual clause, encompasses offenses that “by [their] nature, involv[e] a substantial risk that physical force ... may be used.”

Before the District Court, the government argued that Mr. Taylor's Hobbs Act offense qualified as a “crime of violence” under these definitions. And at that point, Mr. Taylor did not disagree, choosing instead to plead guilty to one count each of violating the Hobbs Act and § 924(c). For his crimes, the District Court sentenced Mr. Taylor to 30 years in federal prison—a decade more than he could have received for his Hobbs Act conviction alone.

Later, Mr. Taylor filed a federal habeas petition. In it, he did not challenge his Hobbs Act conviction. Instead, he focused on § 924(c). Mr. Taylor submitted that his § 924(c) conviction was predicated on his admission that he had committed both conspiracy to commit Hobbs Act robbery and attempted Hobbs Act robbery. And, Mr. Taylor argued, neither of those offenses continued to qualify as a “crime of violence” after *United States v. Davis*, 588 U. S. —, 139 S.Ct. 2319, 204 L.Ed.2d 757 (2019). In *Davis*, this Court held § 924(c)(3)(B)'s residual clause unconstitutionally vague, and we refused to enforce a conviction and sentence premised on its terms. *Id.* at — —, 139 S.Ct., at 2336. In his habeas proceeding, Mr. Taylor asked the court to apply *Davis* retroactively and vacate his own § 924(c) conviction and sentence.

The government opposed Mr. Taylor's petition. In doing so, it did not seek to revisit *Davis* or oppose its retroactive application to Mr. Taylor's case. Instead, the government observed that *Davis* declared only the residual clause unconstitutional; even today the elements clause remains in

force. And, the government argued, the crime of attempted Hobbs Act robbery qualifies as a crime of violence under the elements clause even if conspiracy to commit Hobbs Act robbery may not. By this chain of logic, the government reasoned, Mr. Taylor's § 924(c) conviction and sentence remained sound.

Ultimately, the Fourth Circuit agreed to hear the dispute and sided with Mr. Taylor. It held that attempted Hobbs Act robbery does not qualify as a crime of violence under § 924(c)(3)(A) because no element of the offense requires the government to prove that the defendant used, attempted to use, or threatened to use force. By way of remedy, the Court of Appeals vacated Mr. Taylor's § 924(c) conviction and remanded the case for resentencing in light of his sole remaining Hobbs Act conviction. In reaching its judgment, the Fourth Circuit acknowledged that other circuits have taken a different view, holding that attempted Hobbs Act robbery does qualify as a crime of violence under the elements clause. 979 F.3d 203, 208 (2020). We agreed to take up this case to resolve that question. 594 U.S. —, 141 S.Ct. 2882, 210 L.Ed.2d 990 (2021).

## II

[1] The parties may not see eye to eye on the outcome of this case, but they at least agree on how we should go about deciding it. To determine whether a federal felony may serve as a predicate for a conviction and sentence under the elements clause, they say, we must apply a “categorical approach.” We must because the clause poses the question whether the federal felony at issue “has as an element the use, attempted use, or threatened use of physical force.” § 924(c)(3)(A) (emphasis added). And answering that question does not require—in fact, it precludes—an inquiry into how any particular defendant may commit the crime. The only relevant question is whether the federal felony at issue always requires the government to prove—beyond a reasonable doubt, as an element of its case—the use, attempted use, or threatened use of force. This Court has long understood similarly worded statutes to demand similarly categorical inquiries. See, e.g., *Borden v. United States*, 593 U.S. —, —, 141 S.Ct. 1817, 210 L.Ed.2d 63 (2021); *Davis*, 588 U.S., at —, 139 S.Ct., at 2328; *Leocal v. Ashcroft*, 543 U.S. 1, 7, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004).

[2] [3] What are the elements the government must prove to secure a conviction for attempted Hobbs Act robbery? Here again the parties share common ground. Under the portion of the Hobbs Act relevant here, to win a conviction for a *completed* robbery the government must show that the defendant engaged in the “unlawful taking or obtaining of personal property from the person ... of another, against his will, by means of actual or threatened force.” § 1951(b). From this, it follows that to win a case for *attempted* Hobbs Act robbery the government must prove two things: (1) The defendant intended to unlawfully take or obtain personal property by means of actual or threatened force, and (2) he completed a “substantial step” toward that end. See, e.g., *United States v. Resendiz-Ponce*, 549 U.S. 102, 107, 127 S.Ct. 782, 166 L.Ed.2d 591 (2007). What exactly constitutes a substantial step is beyond the scope of today's case. For present purposes, it is sufficient to observe that the parties again agree. They accept that a substantial step demands something more than “mere preparation.” *Swift & Co. v. United States*, 196 U.S. 375, 402, 25 S.Ct. 276, 49 L.Ed. 518 (1905). The step, they say, must be “unequivocal,” Reply Brief 3, and “significant,” though it “need not be violent,” Brief for United States 22.

[4] To know that much is enough to resolve this case. Whatever one might say about *completed* Hobbs Act robbery, *attempted* Hobbs Act robbery does not satisfy the elements clause. Yes, to secure a conviction the government must show an intention to take property by force or threat, along with a substantial step toward achieving that object. But an intention is just that, no more. And whatever a substantial step requires, it does not require the government to prove that the defendant used, attempted to use, or even threatened to use force against another person or his property. As the Model Penal Code explains with respect to the Hobbs Act's common-law robbery analogue, “there will be cases, appropriately reached by a charge of attempted robbery, where the actor does not actually harm anyone or even threaten harm.” ALI, Model Penal Code § 222.1, p. 114 (1980). “If, for example, the defendant is apprehended before he reaches his robbery victim and thus before he has actually engaged in threatening conduct, proof of his purpose to engage in such conduct” can “justify a conviction of attempted robbery” so long as his intention and some other substantial step are present. *Id.*, at 115.

A hypothetical helps illustrate the point. Suppose Adam tells a friend that he is planning to rob a particular store on a

particular date. He then sets about researching the business's security measures, layout, and the time of day when its cash registers are at their fullest. He buys a ski mask, plots his escape route, and recruits his brother to drive the getaway car. Finally, he drafts a note—"Your money or your life"—that he plans to pass to the cashier. The note is a bluff, but Adam hopes its implication that he is armed and dangerous will elicit a compliant response. When the day finally comes and Adam crosses the threshold into the store, the police immediately arrest him. It turns out Adam's friend tipped them off.

There is little question the government could win a lawful conviction against Adam for attempted Hobbs Act robbery. After all, he intended to take property against the cashier's will by threat of force, and his actions constituted a substantial step toward that goal. At the same time, this example helps show why attempted Hobbs Act robbery does not qualify as a crime of violence under the elements clause. Adam did not "use" physical force. He did not "attempt" to use such force—his note was a bluff and never delivered. And he never even got to the point of threatening the use of force against anyone or anything. He may have intended and attempted to do just that, but he failed. Simply put, no element of attempted Hobbs Act robbery requires proof that the defendant used, attempted to use, or threatened to use force.

The upshot of all this for our case is clear. Mr. Taylor may be lawfully subject to up to 20 years in federal prison for his Hobbs Act conviction. But as the Fourth Circuit recognized, Congress has not authorized courts to convict and sentence him to a decade of further imprisonment under 18 U.S.C. § 924(c)(3)(A).<sup>1</sup>

### III

#### A

Resisting this conclusion, the government offers three principal replies. We take up first the argument the government presented before the Fourth Circuit and on which it prevailed in other circuits. See, e.g., *United States v. St. Hubert*, 909 F.3d 335, 352–353 (C.A.11 2018). This theory proceeds in the form of a syllogism. The government submits that the elements clause encompasses not only any offense that qualifies as a "crime of violence" but also any attempt to commit such a crime. And, the government reasons, because

completed Hobbs Act robbery qualifies as a crime of violence, it follows that attempted Hobbs Act robbery does too.

While the government pressed this argument in the courts of appeals, it affords it only a passing nod here. And the reason why quickly becomes clear: The government's syllogism rests on a false premise. The elements clause does not ask whether the defendant committed a crime of violence *or* attempted to commit one. It asks whether the defendant *did* commit a crime of violence—and it proceeds to define a crime of violence as a felony that includes as an element the use, attempted use, or threatened use of force. If Congress had wanted the elements clause to do the kind of work the government supposes, it could have easily said so. For example, it might have swept in those federal crimes that require as an element "the use or threatened use of force" *and* those "that constitute an attempt to commit an offense that has such an element." But that simply is not the law we have.

#### B

Recognizing the weakness of the argument it pressed below, the government spends much of its time before us elaborating two new theories. In the first, the government asks us to focus on the "substantial step" element of attempted Hobbs Act robbery. That element, the government submits, categorically requires it to prove that a defendant used, attempted to use, or threatened to use physical force.

This theory fails too, and for reasons we have already seen. Without question, many who commit the crime of attempted Hobbs Act robbery do use, attempt to use, or threaten to use force. Suppose, for example, that the police had arrested Adam after he handed over his threatening note to the cashier but before he received any money. In a case like that, the defendant would have threatened the use of force while committing an attempted Hobbs Act robbery. But *some* cases are not *all* cases, and the government's problem is that no *element* of attempted Hobbs Act robbery requires the government to prove beyond a reasonable doubt that the defendant used, attempted to use, or even threatened to use force. Individuals like our foiled robber who are arrested before they can threaten anyone may be convicted too. See *supra*, at ————; cf. Model Penal Code, at 114–115.

Seeking a way around this problem, the government responds that we (and presumably the drafters of the Model Penal Code) misconstrue what qualifies as the "threatened use" of

force. On its view, anyone who takes a substantial step toward completing Hobbs Act robbery (say, by buying a weapon, plotting his heist and getaway, writing an extortion note before he leaves home, and entering a store) objectively poses a “threatened use” of force even if he never communicates his threat to anyone.

This reply bears its own problems. To start, in the criminal law the word “threat” and its cognates usually denote “[a] communicated intent to inflict physical or other harm on any person or on property.”<sup>2</sup> Of course, threats can be communicated verbally or nonverbally—pointing a gun at a cashier conveys a threat no less effectively than passing a note reading “your money or your life.” But one way or another, some form of communication is usually required. Even the government concedes that the words “threatened force” in the Hobbs Act require proof that the defendant communicated a threat to a second person, whether or not that individual is the target of the threat. See Reply Brief 15.

That leaves the government to suggest that § 924(c)(3)(A) differs from the Hobbs Act and represents an exception to the usual rule. Seeking to make that case, the government observes that, in some contexts, the word “threat” can be used to speak of a more objective or abstract risk. So, for example, a critic might say that a prison board’s decision to parole a particular felon “threatens” community safety. Or a conservationist might argue that a government decision allowing commercial activity near a national park “threatens” wildlife habitat. Before us, the government submits that the elements clause uses the term in a similar way, requiring only an objective, if uncommunicated, threat to community peace and order. And, the government argues, anyone who takes a substantial step toward completing a Hobbs Act robbery always or categorically poses such a threat.

The trouble is, when Congress uses the word “threat” in this abstract and predictive (rather than communicative) sense, it usually makes its point plain. It may ask, for example, whether an individual or circumstance “poses” or “represents” a threat. See, e.g., 6 U.S.C. § 1170(a)(1) (discussing “individuals who may pose a threat to transportation security”); 8 U.S.C. § 1735(a) (immigration officials must determine that an “alien does not pose a threat to the safety or national security of the United States”). Here we have nothing like that. In fact, what textual clues we do have point in the opposite direction.

[5] [6] Take this one. The statute speaks of the “use” or “attempted use” of “physical force against the person

or property of another.” Plainly, this language requires the government to prove that the defendant took specific actions against specific persons or their property. Reading the statute’s remaining reference to the “threatened use of physical force against the person or property of another” as requiring a communicated threat fits with this design. By contrast, the government’s competing interpretation would vastly expand the statute’s reach by sweeping in conduct that poses an abstract risk to community peace and order, whether known or unknown to anyone at the time. It’s a reading that would defy our usual rule of statutory interpretation that a law’s terms are best understood by “the company [they] keel[p].”

*Gustafson v. Alloyd Co.*, 513 U.S. 561, 575, 115 S.Ct. 1061, 131 L.Ed.2d 1 (1995).

[7] Beyond that clue lies another. Next door to the elements clause Congress included the residual clause. Under its terms, “crimes of violence” were defined to embrace offenses that, “by [their] nature, involv[e] a substantial risk that physical force ... may be used” against a person or property. § 924(c)(3)(B). Pretty plainly, that language called for an abstract inquiry into whether a particular crime, by its nature, poses or presents a substantial risk (or “threat”) of force being used.

See *Davis*, 588 U.S., at ———, 139 S.Ct., at 2325–2327. Of course, this Court eventually held the residual clause to be unconstitutionally vague. *Id.*, at ———, 139 S.Ct., at 2336. But if the government’s view of the elements clause caught on, it would only wind up effectively replicating the work formerly performed by the residual clause, collapsing the distinction between them, and perhaps inviting similar constitutional questions along the way. It’s an outcome that would (again) defy our usual rules of statutory interpretation—this time because we do not lightly assume Congress adopts two separate clauses in the same law to perform the same work. See, e.g., *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 839, n. 14, 108 S.Ct. 2182, 100 L.Ed.2d 836 (1988).

## C

Heaping alternative upon alternative, the government’s final theory accepts that a conviction under the elements clause requires a communicated threat of force. But, the argument goes, most attempted Hobbs Act robbery prosecutions involve exactly that. Indeed, the government faults Mr. Taylor for failing to identify a single case in which it has prosecuted

someone for attempted Hobbs Act robbery without proving a communicated threat.

But what does that prove? Put aside the fact that Mr. Taylor *has* identified cases in which the government has apparently convicted individuals for attempted Hobbs Act robbery without proving a communicated threat. See, e.g., *United States v. Williams*, 531 Fed. Appx. 270, 271–272 (C.A.3 2013). Put aside the oddity of placing a burden on the defendant to present empirical evidence about the government's own prosecutorial habits. Put aside, too, the practical challenges such a burden would present in a world where most cases end in plea agreements, and not all of those cases make their way into easily accessible commercial databases. See J. Turner, *Transparency in Plea Bargaining*, 96 Notre Dame L. Rev. 973, 974, 978–981 (2021).

An even more fundamental and by now familiar problem lurks here. The government's theory cannot be squared with the statute's terms. To determine whether a federal felony qualifies as a crime of violence, § 924(c)(3)(A) doesn't ask whether the crime is *sometimes* or even *usually* associated with communicated threats of force (or, for that matter, with the actual or attempted use of force). It asks whether the government must prove, as an *element* of its case, the use, attempted use, or threatened use of force.

Maybe that is the test the statute presupposes, the government answers, but this Court's case law requires its proposed empirical study all the same. Notice, though, the move implicit here. After previously admitting that we must employ a categorical approach when interpreting the reach of § 924(c)(3)(A), the government effectively backtracks. Instead of looking to the elements of attempted Hobbs Act robbery, the government now says that a defendant must present evidence about how his crime of conviction is normally committed or usually prosecuted. If this admittedly atextual theory seems doubtful on its face, a close look at the case the government invokes does not improve the picture.

The government points to *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 127 S.Ct. 815, 166 L.Ed.2d 683 (2007). There, this Court sought to apply provisions of the Immigration and Nationality Act. *Id.*, at 185, 127 S.Ct. 815. Under the INA, an individual with a prior state-court conviction that meets certain “generic” offense definitions under federal law may face deportation. *Id.*, at 186, 189, 127 S.Ct. 815; see

also 8 U.S.C. §§ 1101(a)(43)(G), 1227(a)(2)(A)(iii). In *Duenas-Alvarez*, there was no doubt that the relevant state offense overlapped significantly with the federal definition of generic “theft.” 549 U.S. at 190, 127 S.Ct. 815. But, Mr. Duenas-Alvarez argued, state courts had interpreted the offense broadly to reach aiding and abetting conduct that fell “beyond generic theft.” *Id.*, at 190–191, 127 S.Ct. 815. To test this assertion, the Court looked to state decisional law and asked whether a “realistic probability” existed that the State “would apply its statute to conduct that falls outside” the federal generic definition. *Id.*, at 193, 127 S.Ct. 815.

None of this begins to help the government for at least two reasons. First, the immigration statute at issue in *Duenas-Alvarez* required a federal court to make a judgment about the meaning of a state statute. Appreciating the respect due state courts as the final arbiters of state law in our federal system, this Court reasoned that it made sense to consult how a state court would interpret its own State's laws. Cf. *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709, n. 8, 105 S.Ct. 2914, 86 L.Ed.2d 557 (1985). Meanwhile, no such federalism concern is in play here. The statute before us asks only whether the elements of one federal law align with those prescribed in another. Second, in *Duenas-Alvarez* the elements of the relevant state and federal offenses clearly overlapped and the only question the Court faced was whether state courts *also* “appl[ied] the statute in [a] special (nongeneric) manner.” 549 U.S. at 193, 127 S.Ct. 815. Here, we do not reach that question because there is no overlap to begin with. Attempted Hobbs Act robbery does not require proof of *any* of the elements § 924(c)(3)(A) demands. That ends the inquiry, and nothing in *Duenas-Alvarez* suggests otherwise.<sup>3</sup>

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The government quickly abandons the legal theory it advanced in the courts of appeals—and neither of the two new options it auditions before us begins to fill the void. In § 924(c)(3)(A), Congress did not condition long prison terms on an abstract judicial inquiry into whether and to what degree this or that crime poses a risk to community peace and safety. Nor did it mandate an empirical inquiry into how crimes are usually committed, let alone impose a burden on



the defendant to present proof about the government's own prosecutorial habits.

Congress tasked the courts with a much more straightforward job: Look at the elements of the underlying crime and ask whether they require the government to prove the use, attempted use, or threatened use of force. Following that direction in this case, the Fourth Circuit correctly recognized that, to convict a defendant of attempted Hobbs Act robbery, the government does not have to prove any of those things. Accordingly, Mr. Taylor may face up to 20 years in prison for violating the Hobbs Act. But he may not be lawfully convicted and sentenced under § 924(c) to still another decade in federal prison. The judgment of the Court of Appeals is

*Affirmed.*

Justice THOMAS, dissenting.

Justin Eugene Taylor and an accomplice pulled a gun on a fellow drug dealer as they tried to rob him. During the attempted robbery, the victim was shot and killed. Taylor pleaded guilty to using a firearm during an attempted Hobbs Act robbery, which he conceded was a “crime of violence” under 18 U.S.C. § 924(c)(3). Taylor made that concession because threatening to shoot someone during a robbery is undoubtedly a violent act. Yet, the Court holds that Taylor did not actually commit a “crime of violence” because a hypothetical defendant—the Court calls him “Adam”—could have been convicted of attempting to commit Hobbs Act robbery without using, attempting to use, or threatening to use physical force. *Ante*, at —; see § 924(c)(3)(A).

This holding exemplifies just how this Court's “categorical approach” has led the Federal Judiciary on a “journey Through the Looking Glass,” during which we have found many “strange things.” L. Carroll, *Alice in Wonderland and Through the Looking Glass* 227 (J. Messner ed. 1982). Rather than continue this 30-year excursion into the absurd, I would hold Taylor accountable for what he actually did and uphold his conviction. Accordingly, I respectfully dissent.

I

In 2002 and 2003, Justin Eugene Taylor was a middleman in the Richmond, Virginia, marijuana trade. He bought the

drug wholesale and sold it to retail distributors. On August 14, 2003, he offered to obtain marijuana for retail distributor Martin Sylvester. Taylor ultimately failed to procure the drug but still aimed to purloin Sylvester's cash. To that end, Taylor contacted a co-conspirator who had a handgun. The two met Sylvester in an alley, ostensibly for the sale. They brandished the handgun and demanded the money. Sylvester resisted and was shot. The robbers fled, leaving Sylvester to die. 979 F.3d 203, 205 (C.A.4 2020).

Prosecutors in the Eastern District of Virginia charged Taylor with various drug and firearms offenses. Most relevant here, they charged him with violating 18 U.S.C. § 924(c), which punishes anyone who “uses or carries a firearm” “during and in relation to any crime of violence,” or who possesses a firearm “in furtherance of any such crime.” Congress defined a “crime of violence” in one of two ways: as an offense that has “as an element the use, attempted use, or threatened use of physical force against the person or property of another” (commonly called the “elements clause”), or as an offense that, “by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense” (commonly called the “residual clause”). §§ 924(c)(3)(A), (B).

Prosecutors predicated Taylor's § 924(c) charge on his commission of attempted Hobbs Act robbery. *Ante*, at — (describing Hobbs Act robbery). In 2009, in exchange for the Government dropping most of the charges, Taylor pleaded guilty to conspiracy to commit Hobbs Act robbery and the § 924(c) charge—that is, using a firearm during and in relation to a crime of violence. In doing so, he admitted to the attempted robbery and the shooting. He also admitted that attempted Hobbs Act robbery is a “crime of violence” under § 924(c).

The District Court sentenced Taylor to 360 months' imprisonment—a 240-month sentence for the conspiracy and a 120-month consecutive sentence for the § 924(c) conviction. Taylor appealed, but in 2011 the Court of Appeals dismissed the appeal because Taylor had waived his appellate rights in his plea agreement. Order in *United States v. Taylor*, No. 09–4468, ECF Doc. 54 (CA4, Jan. 7, 2011). In 2015, he then unsuccessfully sought postconviction relief under 28 U.S.C. § 2255. *United States v. Taylor*, 2015 WL 4095845, \*1 (ED Va., July 7, 2015).

Decided around the time of his failed § 2255 motion, one of this Court's cases appeared to give Taylor another chance to challenge his conviction. In *Johnson v. United States*, 576 U.S. 591, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015), the Court struck down the similarly worded residual clause of the Armed Career Criminal Act (ACCA), as unconstitutionally vague. The following year, in *Welch v. United States*, 578 U.S. 120, 136 S.Ct. 1257, 194 L.Ed.2d 387 (2016), the Court held that *Johnson* applies retroactively on collateral review. Citing those two decisions, Taylor moved for permission to file a second-or-successive § 2255 petition. He argued that § 924(c)'s residual clause paralleled ACCA's residual clause and therefore was unconstitutionally vague. 979 F.3d at 206. He further argued that attempted Hobbs Act robbery was not a "crime of violence" under § 924(c)'s elements clause because it lacked "as an element the use, attempted use, or threatened use of physical force." § 924(c)(3)(A).

The Court of Appeals granted the motion to file a successive habeas petition and, in 2020, vacated Taylor's § 924(c) conviction. It did so because, as the Court explains, our precedents require that courts apply a "categorical approach" when interpreting the elements clause. *Ante*, at —. Under that approach, a criminal defendant who commits a violent crime nonetheless does not commit a "crime of violence" if a hypothetical criminal could commit the same offense without satisfying § 924(c)'s physical-force requirement. See *ibid*. Because someone else—"Adam"—could have committed attempted Hobbs Act robbery without physical force, the Court holds, Taylor's armed robbery that resulted in the victim's death is not a "crime of violence" under § 924(c).

## II

We have reached this point of absurdity only because this Court applies a narrow categorical approach to § 924(c)'s elements clause and has nullified the residual clause that would have captured crimes like Taylor's. It is hard to fathom why this makes sense or why any rational Congress would countenance such an outcome so divorced from reality.

## A

Our odyssey began in 1990, as the Court wrestled with a different clause found in a different part of § 924: ACCA's sentencing enhancement in § 924(e). Unlike § 924(c), which defines a substantive crime, ACCA imposes a sentencing enhancement that applies to any defendant with three or more prior "violent felon[ies]" whom the Federal Government convicts of illegally possessing a firearm. §§ 922(g), 924(e)(2). Like § 924(c), ACCA defines "violent felony" with an elements clause and a residual clause. The Act also includes an "enumerated-offenses" clause defining "violent felony" to include any crime that "is burglary, arson, or extortion, [or] involves use of explosives." § 924(c)(2).

In *Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), the Court first adopted a categorical approach when interpreting "burglary" under ACCA's enumerated-offenses clause. *Id.*, at 598, 110 S.Ct. 2143. The Court construed "burglary" in the abstract, as a "generic burglary" with elements derived from a treatise and the Model Penal Code. *Id.*, at 593–598, 110 S.Ct. 2143, and n. 8. The Court then held that the enumerated-offenses clause prohibits courts from looking to the "particular facts" of a defendant's burglary to see if the conduct satisfies the elements of generic burglary. *Id.*, at 600, 110 S.Ct. 2143. It does not matter how violent the defendant's actual conduct was. Instead, courts must determine whether the elements of the burglary statute under which a defendant was convicted "substantially correspon[d]" to generic burglary. *Id.*, at 600, 602, 110 S.Ct. 2143. Though *Taylor* gave "few reasons why" this so-called categorical approach "was the correct reading of ACCA," at the "heart of the decision" were "worrie[s]" that a conduct-based approach to a sentencing enhancement might violate the Sixth Amendment by leading to "full-blown mini-trial[s], with factfinding by the judge instead of the jury." *Sessions v. Dinwiddie*, 584 U.S. —, —, 138 S.Ct. 1204, 1253, 200 L.Ed.2d 549 (2018) (THOMAS, J., dissenting).

While *Taylor* applied the categorical approach only to ACCA's enumerated-offenses clause, the approach soon

migrated to the elements clauses in ACCA and elsewhere. See, e.g., *Borden v. United States*, 593 U. S. —, —, 141 S.Ct. 1817, 210 L.Ed.2d 63 (2021) (plurality opinion). In that context, the categorical approach demands that a court divine what constitutes the “least serious conduct [the prior conviction or predicate offense] covers” and decide whether that conduct “falls within the elements clause.” *Id.*, at —, 141 S.Ct. at 1827. To do that, a judge must “mull through any number of hypothetical ways to commit a crime that have nothing to do with the facts of the prior conviction” or the facts underlying a predicate § 924(c) offense. *United States v. Burris*, 912 F.3d 386, 409 (C.A.6 2019) (Thapar, J., concurring). If a court identifies a way to commit the crime without using, attempting to use, or threatening to use force, then the crime is not a “violent felony” or “crime of violence” under ACCA’s or § 924(c)’s elements clauses. See *Borden*, 593 U. S. at —, 141 S.Ct. at 1832.

This Court eventually extended the categorical approach to ACCA’s residual clause as well. In *James v. United States*, 550 U.S. 192, 127 S.Ct. 1586, 167 L.Ed.2d 532 (2007), the Court, at the urging of both parties, “employ[ed] the ‘categorical approach’ ” to analyze ACCA’s residual clause. *Id.* at 202, 127 S.Ct. 1586 (quoting *Shepard v. United States*, 544 U.S. 13, 17, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005)). That clause defines a “violent felony” as one that “otherwise involves conduct that presents a serious potential risk of physical injury to another.” § 924(e)(2)(B)(ii). *James* explained that ACCA’s residual-clause categorical approach boiled down to two steps. First, a court looked to the elements of the crime for which the defendant was convicted and asked what conduct the “ordinary case” of that crime entailed. *Id.* at 208, 127 S.Ct. 1586. Second, the court asked whether that “ordinary case” “present[ed] a serious potential risk of injury to another” comparable to that posed by the specific crimes listed in the enumerated-offenses clause. *Id.* at 204, 208–209, 127 S.Ct. 1586. If it did, then the predicate crime was a “violent felony.”

That test proved difficult to apply. In particular, the Court struggled with how to define the “ordinary case” of a given predicate crime. See *Johnson*, 576 U.S., at 597, 135 S.Ct. 2551 (“How does one go about deciding what kind of conduct the ordinary case of a crime involves? A statistical analysis of the state reporter? A survey? Expert evidence? Google?

Gut instinct?” (internal quotation marks omitted)). The Court likewise struggled in assessing what level of risk the ordinary case presented. *Id.*, at 598, 135 S.Ct. 2551. After trying to apply this approach several times, see, e.g., *Begay v. United States*, 553 U.S. 137, 128 S.Ct. 1581, 170 L.Ed.2d 490 (2008), the Court in *Johnson* ultimately abandoned the project. But rather than reassess whether it had adopted the right analytical framework in light of ACCA’s text and statutory context, the Court in *Johnson* nullified ACCA’s residual clause altogether. See *Id.* at 624, 135 S.Ct. 2551 (THOMAS, J., concurring in judgment). According to the Court, the “[t]wo features” of the residual-clause analysis that the Court set out in *James*—identifying “ordinary case” conduct and judging whether that abstracted conduct “presents a serious risk of physical injury”—“conspire[d] to make [the residual clause] unconstitutionally vague.” *Id.* at 597–598, 135 S.Ct. 2551 (majority opinion).

That conclusion was not inevitable. The *Johnson* Court did “not doubt the constitutionality of laws that call for the application of a qualitative standard such as ‘substantial risk’ to real-world conduct.” *Id.*, at 603–604, 135 S.Ct. 2551. Thus, the Court “all but concede[d] that the residual clause would be constitutional if,” rather than incorporating *James*’ categorical approach, it looked to whether the “‘real-world conduct’ ” of the underlying conviction presented a serious risk of physical injury to another. *Id.* at 632, 135 S.Ct. 2551 (ALITO, J., dissenting).

Despite recognizing that a conduct-based approach was constitutionally sound, the Court later extended *Johnson* to the residual clause in § 924(c). See *United States v. Davis*, 588 U. S. —, —, 139 S.Ct. 2319, —, 204 L.Ed.2d 757 (2019). The *Davis* Court decided that the § 924(c) residual clause’s language was so similar to the ACCA residual clause that it, too, must be void for vagueness. *Id.*, at — – —, — – —, 139 S.Ct., at 2326–2327, 2336. Four of us, however, advanced a more sensible approach: Rather than extend *Johnson* to nullify § 924(c)’s residual clause, we should simply not use the categorical approach when interpreting residual clauses and adopt a framework focused on the defendant’s actual conduct

that *Johnson* conceded was constitutional. See 588 U.S., at ———, 139 S.Ct., at 2331–2332 (KAVANAUGH, J., dissenting).

As the *Davis* dissent explained, § 924(c)'s residual clause is best interpreted to call for a conduct-based approach. *Id.*, at ———, 139 S.Ct., at 2332–2336. To begin with, the plain text of the residual clause strongly supports a conduct-based approach. See *ibid.* Further, none of the perceived Sixth Amendment concerns that attend to ACCA's sentencing enhancement are present in the § 924(c) context, because a "jury will find the facts or, if the case ends in a guilty plea, the defendant will accept the facts in the plea agreement." *Id.*, at ———, 139 S.Ct., at 2345. Finally, if any ambiguity remains, a conduct-based approach to § 924(c)'s residual clause best accords with the canon counseling courts to construe statutes not to violate the Constitution whenever possible. See *id.*, at ———, 139 S.Ct., at 2351 ("To be clear, the case before us is not a case of avoiding *possible* unconstitutionality. This is a case of avoiding *actual* unconstitutionality"); see also *Dimaya*, 584 U.S., at ———, 138 S.Ct., at 1252 (THOMAS, J., dissenting). Thus, read properly, the residual clause is as constitutionally sound as any other criminal law applying "a qualitative standard ... to real-world conduct." *Davis*, 588 U.S., at ———, 139 S.Ct., at 2339 (KAVANAUGH, J., dissenting) (quoting *Johnson*, 576 U.S. at 604, 135 S.Ct. 2551). Nothing in the three years since *Davis* has changed that.

## B

To the contrary, the last three years have instead shown how our § 924(c) precedents have "left prosecutors and courts in a bind." *Borden*, 593 U.S., at ———, 141 S.Ct., at 1835 (THOMAS, J., concurring in judgment). Section 924(c)'s residual clause—which squarely applies to the mine run of violent crimes—is no longer available. The categorical approach, meanwhile, forecloses § 924(c)'s elements clause unless, in every hypothetical prosecution, the crime of conviction requires the Government to prove that physical

force against another was used, attempted, or threatened. In case after case, our precedents have compelled courts to hold that heinous crimes are not "crimes of violence" just because someone, somewhere, *might* commit that crime without using force.

A few examples from the Courts of Appeals demonstrate how our precedents have emasculated § 924(c). First, in *United States v. Walker*, 934 F.3d 375 (2019), the Fourth Circuit considered whether a conviction for federal kidnapping could predicate a § 924(c) conviction. See *id.*, at 376 (citing § 1201(a)). Walker and an accomplice had kicked in the door of a family's home, held the victims at gunpoint, beat some of them, demanded money, and threatened to kill the family's 4-year-old daughter, all before locking the family in a closet and ransacking the house. Factual Basis for Guilty Plea in *United States v. Walker*, 934 F.3d 375 (2014). No one could dispute that Walker's conduct presented a "substantial risk that physical force" would be used "in the course of committing the offense." § 924(c)(3)(B). Yet, because of *Davis*, the Fourth Circuit could not invoke the residual clause. See *Walker*, 934 F.3d at 378. That left only § 924(c)(3)'s elements clause, interpreted according to the inflexible categorical approach. Compelled to imagine whether federal kidnapping could hypothetically be committed without the use of physical force, the Fourth Circuit ultimately vacated Walker's § 924(c) conviction because a criminal could commit the offense by "inveig[ing]" a victim and then holding him in captivity with a "mental restraint." *Id.*, at 378–379 (emphasis deleted).<sup>1</sup>

Second, in *United States v. Tsarnaev*, 968 F.3d 24 (C.A.1 2020), reversed on other grounds, 595 U.S. ———, 142 S.Ct. 1024, 212 L.Ed.2d 140 (2022), the First Circuit considered whether a terrorist's conviction for federal arson—which he committed in the course of carrying out the Boston Marathon bombings—counted as a crime of violence under § 924(c). Tsarnaev and his brother intentionally detonated bombs that killed three people, including an 8-year-old, and injured hundreds more. See *id.*, at ———. Yet, the categorical-approach precedents led the First Circuit to the admittedly "counterintuitive" conclusion that federal arson resulting in death arising from a terrorist bombing was not a crime of violence. *Tsarnaev*, 968 F.3d at 102. The residual clause

had been nullified, *id.*, at 99, and the First Circuit held that federal arson did not satisfy the elements clause because it theoretically could have been committed recklessly, *id.*, at 102,<sup>2</sup> which, we have held in the ACCA context, renders a crime outside the elements clause, see *Borden*, 593 U.S., at ——— (plurality opinion).

Finally, in *United States v. Ledbetter*, 929 F.3d 338 (C.A.6 2019), the Sixth Circuit vacated two convictions under 18 U.S.C. § 924(j), which criminalizes “caus[ing] the death of a person through the use of a firearm” “in the course of a violation of ” § 924(c). 929 F.3d at 360–361. The two defendants were associated with a gang called the “Short North Posse.” *Id.*, at 359. One belonged to a subunit of the gang, appropriately named the “ ‘Homicide Squad,’ ” which “specializ[ed] in murders and robberies.” *Id.*, at 345. In August 2007, they joined a team of gang members who broke into a home and shot a victim to death. *Id.*, at 359. Section 924(c)’s residual clause would have covered the defendants’ conduct, given that there is obviously a “substantial risk that physical force” would be “used in the course of ” a gangland home-invasion murder. § 924(c)(3)(B). But *Davis* had nullified that clause, and the Government conceded that conspiracy to commit Hobbs Act robbery—the predicate crime for the defendants’ § 924(j) convictions—was not a crime of violence under this Court’s elements-clause precedents. 929 F.3d at 360–361. These are not the only homicide-related § 924 convictions that *Davis* has undermined.<sup>3</sup>

These examples show how our precedents have led the Federal Judiciary to “a pretend place.” *United States v. Davis*, 875 F.3d 592, 595 (C.A.11 2017). With the residual clause nullified, courts cannot look to it to capture violent crimes. And, because of the categorical approach, the elements clause often does not apply because “other defendants at other times may have been convicted, or future defendants could be convicted, of violating the same statute without violence.” *Ibid.* Like Alice, we have strayed far “down the rabbit hole,” and “[c]uriously and curiously it has all become.” *Ibid.*

### III

There is a straightforward solution to this problem—overrule *Davis*. Cf. *Borden*, 593 U.S., at ———, 141 S.Ct., at 1835 (opinion of THOMAS, J.) (“There is a straightforward solution to this dilemma—overrule *Johnson*”). It is a demonstrably erroneous precedent that veered from the best interpretation of § 924(c)’s residual clause. See *supra*, at ——— (citing *Davis*, 588 U.S., at ———, 139 S.Ct., at 2331–2332 (KAVANAUGH, J., dissenting)); cf. *Johnson*, 576 U.S., at 613, 135 S.Ct. 2551 (THOMAS, J., concurring in judgment) (noting this Court’s habit of wielding due process doctrines like vagueness “to achieve its own policy goals”). Accordingly, I would overrule *Davis* and adopt in its place the conduct-based approach that the *Davis* dissent described. Overruling *Davis* would revive § 924(c)’s residual clause, once again allowing the statute to capture the vast majority of § 924(c) convictions that elude an elements clause straightjacketed by the categorical approach.

With a revived residual clause, resolving this case is easy. Taylor’s counsel acknowledged that Congress “enacted the residual clause to capture cases just like” Taylor’s. Tr. of Oral Arg. 48–49. His confessed conduct—an attempted armed robbery during which the victim was shot and killed—“by its nature, involve[d] a substantial risk that physical force” would be used. § 924(c)(3)(B). Thus, Taylor committed a predicate offense that supported his § 924(c) conviction. Taylor’s appeal should therefore fail, and he should serve the 10 years in prison he received for the § 924(c) conviction.

This same logic would have saved the other convictions described above. Equipped with a revived residual clause focused on the defendant’s actual conduct, those federal courts would not have had to vacate the § 924(c) convictions of kidnapers who threatened families, terrorists who bombed sporting events, or murderers who shot their victims. In other words, those courts could have applied the statute that Congress enacted rather than the one this Court effectively rewrote and then nullified.

## IV

The costs of our decisions imposing the categorical approach on § 924(c) and other statutes have been immense. Apart from the unnatural results it produces in § 924(c) cases, the categorical approach has led to equally baffling ones in the ACCA context and elsewhere. See, e.g., *Burris*, 912 F.3d at 407 (Thapar, J., concurring) (“A casual reader ... might struggle to understand why we are even debating if ramming a vehicle into a police officer is a crime of violence”); *Davis*, 875 F.3d at 604 (holding that a man charged with first-degree rape who pleaded to first-degree sexual abuse by forcible compulsion had not committed an ACCA “violent felony” because the force required was insufficiently violent). Moreover, courts attempting to apply the categorical approach waste time thinking up improbable hypotheticals, making the approach “very difficult to administer.” *Burris*, 912 F.3d at 407 (Thapar, J., concurring); see also, e.g., *Cradler v. United States*, 891 F.3d 659, 672 (C.A.6 2018) (Kethledge, J., concurring) (“Whatever the merits of this approach, accuracy and judicial efficiency are not among them”). Finally, Congress, through legislation, created crimes like § 924(c) and enhancements like ACCA to reduce gun crime rates by imposing long sentences on violent criminals who use firearms. See *Davis*, 588 U.S., at ———, 139 S.Ct., at 2336–2337 (KAVANAUGH, J., dissenting). Yet, as a growing chorus of Court of Appeals judges has explained, the categorical approach stymies that effort. See, e.g., *United States v. Ovalles*, 905 F.3d 1231, 1253–1257 (C.A.11 2018) (W. Pryor, J., concurring). No rational legislature would have implicitly imposed this byzantine and resource-depleting legal doctrine that so encumbers federal courts and threatens public safety.

Worse still, this Court has imposed these costs on the federal courts and the public even though the text of these provisions does not demand them. I have already pointed out the “absurdity of applying the categorical approach to the enumerated-offenses clause” of ACCA and have suggested that a conduct-based approach better fits the text. *Quarles v. United States*, 587 U.S. ———, ———, 139 S.Ct. 1872, 1880, 204 L.Ed.2d 200 (2019) (THOMAS, J., concurring). And although the categorical approach might

be a “linguistically possible” interpretation of the residual clauses, “the underlying-conduct approach is the better one.”

*Dimaya*, 584 U.S., at ———, 138 S.Ct., at 1255 (THOMAS, J., dissenting). And finally, while I have suggested that the categorical approach applies most plausibly in the elements-clause context, see *id.*, at ———, 138 S.Ct., at ———, the Government has suggested that even that clause might better accord with a conduct-based approach. Tr. of Oral Arg. 5–6; see also *Burris*, 912 F.3d at 409–410 (Thapar, J., concurring).

In light of the mischief that the categorical approach has caused, we should welcome briefing on whether a conduct-based approach tacks closer to statutory text and common sense—especially in the elements-clause context. If it does, we should adopt it.<sup>4</sup>

\* \* \*

Even Alice, having slaked her curiosity, eventually returned from the land beyond the looking glass. It is high time that this Court do the same. In this case, I would begin the trek back by adopting the *Davis* dissent’s conduct-based approach, reviving § 924(c)’s residual clause, and reversing the judgment below. And in future cases, when it comes to interpreting § 924(c)’s elements clause, I will carefully consider alternatives to this Court’s atextual and ever-more-absurd categorical approach. For these reasons, I respectfully dissent.

Justice ALITO, dissenting.

As Justice THOMAS clearly shows, the offense for which respondent Justin Taylor was convicted constituted a “violent felony” in the ordinary sense of the term. Taylor and an accomplice met with Martin Silvester for the ostensible purpose of selling him marijuana, but unbeknownst to Silvester, Taylor and his accomplice did not intend to complete the sale. Instead, they had agreed to threaten Silvester with a 9-millimeter pistol and demand that he hand over his money. When Silvester refused to comply with their demand, Taylor’s accomplice shot Silvester, and he died the next day. Taylor was convicted of using and carrying a firearm during, and in relation to, a crime of violence, 18 U.S.C. § 924(c)(3)(A). That conviction was based on a predicate act of

attempted robbery in violation of the Hobbs Act, 18 U.S.C. § 1951(a).

The Court holds that this violent (and, indeed, deadly) offense did not constitute a “crime of violence” under the technical definition of that term in 18 U.S.C. § 924(c)(3)(A). I agree with Justice THOMAS that our cases involving 18 U.S.C. § 924(c)(3)(A) have veered off into fantasy land.<sup>1</sup> But if the Court is going to disregard the real world and base its decisions in this area on a strict reading of the text, the “offense” for which Taylor was convicted—attempted Hobbs Act robbery—meets the definition in 18 U.S.C. § 924(c)(3)(A). That definition provides that an “offense” qualifies as a “‘crime of violence’” if it is a felony and “has as an *element* the use, attempted use, or threatened use of physical force against the person ... of another.” (Emphasis added.)

The key point is the meaning of “an element” of an offense. This is a fundamental criminal law concept, and we must therefore presume that 18 U.S.C. § 924(c)(3)(A) employs the term in its usual and established sense. See A. Scalia & B. Garner, *Reading Law* 320–321 (2012). And the usual and established meaning of an “element” is clear: It is a “‘constituent par[t]’ of a crime’s legal definition—[a] thin[g] the ‘prosecution must prove beyond a reasonable doubt to sustain a conviction.’” *Mathis v. United States*, 579 U.S. 500, 504, 136 S.Ct. 2243, 195 L.Ed.2d 604 (2016) (quoting *Black’s Law Dictionary* 634 (10th ed. 2014)). See also, e.g., *Apprendi v. New Jersey*, 530 U.S. 466, 477, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *United States v. Gaudin*, 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995).

It is also established that there are two different types of elements. Some are invariant; that is, they must be proved in every case. But it is not uncommon for statutes to include a set of alternative elements and to provide that one, but not all, of these alternative elements must be proved to secure a conviction. As the Court said in *Descamps v. United States*, 570 U.S. 254, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013), a statute may “se[t] out one or more elements of the offense in the alternative—for example, [by] stating that burglary involves entry into a building *or* an automobile.” *Id.*, at 257, 133 S.Ct. 2276 (emphasis in original).

The Hobbs Act includes both types of elements. It criminalizes a robbery that “obstructs, delays, or affects” interstate commerce, 18 U.S.C. § 1951(a), and it defines “robbery” to mean “the unlawful taking or obtaining of personal property from the person ... of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future,” 18 U.S.C. § 1951(b)(1). Accordingly, the elements of Hobbs Act robbery are (1) the unlawful taking or obtaining (2) of personal property (3) from the person of another (4) against his or her will (5) by means of actual or (6) by means of threatened force, or (7) by means of violence, or (8) by means of fear of injury. The first four elements must be proved in every case, while the last four are alternative elements any one of which is sufficient for conviction.<sup>2</sup> A completed Hobbs Act robbery satisfies 18 U.S.C. § 924(c)(3)(A) because multiple elements involve “the use, attempted use, or threatened use of physical force against the person or property of another.” Elements (5) through (8) obviously qualify, and it is possible that element (4) does as well.

The offense of attempted Hobbs Act robbery also qualifies. A person commits a criminal attempt if he or she takes a “‘substantial step’ toward completing” an intended offense. *United States v. Resendiz-Ponce*, 549 U.S. 102, 106–107, 127 S.Ct. 782, 166 L.Ed.2d 591 (2007) (quoting 2 W. LaFare, *Substantive Criminal Law* § 11.4 (2d ed. 2003)). In other words, a defendant must intend to commit some combination of elements that is sufficient to constitute Hobbs Act robbery and must take a substantial step toward the commission of such a combination of elements. If we label these combinations as A, B, C ..., then the elements of attempted Hobbs Act robbery are (1) intending to commit at least one qualifying combination, i.e., A, B, C ..., and (2) taking a substantial step toward the commission of A, B, C .... Each such combination constitutes an “offense” within the meaning of 18 U.S.C. § 924(c)(3), and several combinations satisfy the definition of a “crime of violence.”

Here is a straightforward example: A hypothetical defendant (let’s call her “Eve”) intends to take or obtain personal property from the person of another unlawfully and against his or her will by means of actual force. Eve is guilty of the “offense” of attempted Hobbs Act robbery, and her offense “has as an element the use ... of physical force against the

person ... of another.” That is where the Court must end up if it looks at only the text of § 924(c)(3)(A) and the Hobbs Act.

It is no answer to this argument that Taylor is not Eve. He is also not Adam. The whole point of the categorical approach that the Court dutifully follows is that the real world must be scrupulously disregarded.

The Court reaches the opposite conclusion only because it accepts the proposition—which the Government did not contest—that a felony “has *as an element* the use, attempted use, or threatened use of physical force” only if the felony “*always* requires the government to prove” the use, attempted use, or threatened use of force “beyond a reasonable doubt, as an element of its case.” *Ante*, at — (emphasis added); see Brief for Respondent 13–18. In other words, the Court assumes that an offense *X* has an element *A* if and only if convicting a defendant of *X* requires the Government to prove *A* in every prosecution for offense *X*. Based on this assumption, the Court infers that attempted Hobbs Act robbery is not a “crime of violence” under § 924(c)(3)(A) because it is *possible* to commit that offense without attempting to use force.

There is no textual basis for this reading, and I would not adopt an erroneous interpretation that will govern a multitude of cases just because the Government has made an improvident concession in this case. If the Court wants to hold the Government to the position it has taken here, it can dismiss the case and give Taylor the benefit of the judgment in his favor below. But a party’s mistaken argument should not be permitted to alter the meaning of the law Congress enacted.

Nothing in our precedent suggests that we should deviate from § 924(c)(3)(A)’s plain text. We have never interpreted § 924(c)(3)(A) to require a version of the categorical approach that would exclude from the elements that an offense “has” those elements that may be proved as alternatives to one another. The most we have said is that, in applying the categorical approach to *other* statutory provisions, statutes setting forth disjunctive or alternative elements should be analyzed through what we have called the “modified categorical approach.” See *Descamps*, 570 U.S. at 260–264, 133 S.Ct. 2276 (“burglary” under Armed Career Criminal Act, 18 U.S.C. § 924(e)); *Shepard v. United States*, 544 U.S. 13, 24–26, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005) (same). Under this approach, courts must examine “a

limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy)” to determine which alternative element of an offense figured in the crime for which the defendant was convicted. *Mathis*, 579 U.S. at 505, 136 S.Ct. 2243.

As I have previously explained, the modified categorical approach is difficult to apply, and I would not apply it here.

See *id.*, at 536–544, 136 S.Ct. 2243 (dissenting opinion); *Descamps*, 570 U.S. at 281–296, 133 S.Ct. 2276 (ALITO, J., dissenting). Instead, I would simply hold that because one of the elements of the attempted Hobbs Act robbery is the attempted use of force, that offense falls within § 924(c)(3)(A)’s definition of “crime of violence.”

But if we were to apply the modified categorical approach in this case, the result would be the same. In his plea agreement and associated statement of facts, Taylor admitted that he and his accomplice intended to lure Silvester into an alleyway, hold him at gunpoint, and take his money “by force” in the event that he resisted. And Taylor and his accomplice took more than a substantial step toward realizing this plan. After all, they ultimately *shot and killed* Silvester. So in accepting Taylor’s plea, it is plain that the sentencing judge determined that Taylor had intended to commit Hobbs Act robbery by using force and had taken a substantial step toward the accomplishment of that end. That is more than sufficient to show that Taylor’s actual crime “ha[d] as an element the ... use of physical force against the person ... of another.” § 924(c)(3)(A).

For these reasons, I believe that the Court’s approach and ultimate holding in this case are misguided. I would hold that Taylor committed a “crime of violence” within the meaning of § 924(c)(3)(A) and reverse the judgment of the Fourth Circuit below. But there is a silver lining in the majority opinion. Because the Court assumes—and does not hold—that alternative elements do not qualify as independent elements of a crime for purposes of applying § 924(c)(3)(A), the Government remains free to advance the correct interpretation of that provision in a future case. For my purposes, however, the text of the statute is clear enough to support reversal here and now. As a result, I respectfully dissent.



## All Citations

142 S.Ct.-2015, 22 Cal. Daily Op. Serv. 5988

## 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 Justice THOMAS concedes that the foregoing analysis is correct under our categorical approach precedents. See *post*, at — (THOMAS, J., dissenting). He contends only that we should overrule 30 years' worth of our categorical approach precedents in order to relieve the "bind" they place on prosecutors. *Post*, at —, —. But not even the prosecutors for whom Justice THOMAS professes concern seek anything like that. Nor does he articulate any plausible way to understand the terms of the elements clause without reference to the categorical approach. See *post*, at — (merely "welcom[ing] briefing" on the topic).
- 2 Black's Law Dictionary 1327 (5th ed. 1979) (defining "threat"); Stroud's Judicial Dictionary 2633 (5th ed. 1986) (defining "threat" and "threaten"); see also, e.g., Oxford English Dictionary 998 (2d ed. 1989) (threaten: "To try to influence (a person) by menaces; to utter or hold out a threat against; to declare (usually conditionally) one's intention of inflicting injury upon"); Webster's Third New International Dictionary 2382 (3d ed. 1986) (threaten: "to utter threats against"; to "promise punishment, reprisal, or other distress to"); American Heritage Dictionary 1265 (2d ed. 1985) (threat: "An expression of an intention to inflict pain, injury, evil, or punishment"); *ibid.* (threaten: "[t]o express a threat against").
- 3 Justice ALITO offers still another argument on the government's behalf. According to our colleague, the crime of completed Hobbs Act robbery requires the government to prove beyond a reasonable doubt, and a unanimous jury must agree on, the particular "means" by which the defendant committed his offense—by "actual" force, "threatened force," "violence," or "fear of injury."  § 1951(b)(1); *post*, at — — (dissenting opinion). And because attempts to commit robbery by *some* of these means could qualify as crimes of violence under  § 924(c)(3)(A), Justice ALITO would classify the *entire* offense of attempted Hobbs Act robbery a "crime of violence." *Post*, at —. But the parties have not whispered a word about any of this. Perhaps for good reason too. For one thing, it is unclear whether the Act's "means" clause sets forth elements or merely lists alternative ways a defendant may take or obtain property against the victim's will. If the latter is true, as some courts have held, a jury need unanimously conclude only that the defendant used one of the listed means; it need not agree on which one. See, e.g.,  *United States v. St. Hubert*, 909 F.3d 335, 348–349 (C.A.11 2018); *United States v. Hancock*, 168 F. Supp. 3d 817, 821 (D. Md. 2016). For another, even assuming the Act is divisible in the sense he suggests, Justice ALITO acknowledges that his some-is-good-enough approach defies this Court's precedents. *Post*, at —;  *Descamps v. United States*, 570 U.S. 254, 260–264, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013).
- 1 See also, e.g., *United States v. Brazier*, 933 F.3d 796, 798–801 (C.A.7 2019) (federal kidnaping not a crime of violence under  § 924(c) despite victim being bound, gagged, tortured, and shot); *Bufkin v. United States*, 800 Fed. Appx. 436, 437, 439 (C.A.7 2020) (Government conceding that federal kidnaping is not a crime of violence even when "the two defendants threatened the victim at gunpoint, robbed, bound, and gagged him,

- and drove him around in the trunk of the car for four hours before releasing him"); *United States v. Sanford*, 779 Fed. Appx. 568, 570 (C.A.10 2019) (vacating § 924(c) convictions even when the underlying conduct involved kidnapping, threatening, and robbing a family, all at gunpoint).
- 2 See *United States v. Moore*, 802 Fed. Appx. 338, 340–342 (C.A.10 2020) (federal arson not a crime of violence even when the defendant ignited a homemade bomb during an attempt to blow up a shopping mall).
  - 3 See, e.g., *United States v. Capers*, 20 F.4th 105, 111–112 (C.A.2 2021) (applying *United States v. Davis*, 588 U. S. —, 139 S.Ct. 2319, 204 L.Ed.2d 757 (2019), and finding that a federal Racketeer Influenced and Corrupt Organizations Act conspiracy resulting in a gangland killing could not predicate a § 924(j) conviction); see also, e.g., Brief for United States in *Grzegorzczuk v. United States*, O. T. 2021, No. 21–5967 (Government conceding that, after *Davis*, a federal murder-for-hire conviction was not a crime of violence under § 924(c)).
  - 4 Meanwhile, Justice ALITO's dissent offers an intriguing alternative interpretation of § 924(c)(3)(A)'s elements clause. See *post*, at — – —. While no party advocates for the interpretation in this case, we should welcome further briefing on it as well.
  - 1 The major reason for this excursion was the adoption and spread of the so-called categorical approach. Although the Court originally adopted the "categorical approach" in *Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), for other reasons, the major impetus for the expansion of that approach was concern that allowing the enhancement of a sentence based on facts found by a judge would violate the Sixth Amendment jury-trial right as interpreted in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and later related cases. It is questionable whether those cases are consistent with the original meaning of the Sixth Amendment. See *Alleyne v. United States*, 570 U.S. 99, 132–134, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013) (ALITO, J., dissenting); *Cunningham v. California*, 549 U.S. 270, 298, n. 1, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007) (ALITO, J., dissenting); see also M. McConnell, *The Booker Mess*, 83 *Denver U. L. Rev.* 665, 679 (2006) (explaining that "fully discretionary sentencing" was the norm "when the Sixth Amendment was adopted"); J. Mitchell, *Apprendi's Domain*, 2006 *S. Ct. Rev.* 297, 298–299 ("Apprendi's historical claim that sentencing enhancements were treated as 'elements' ... whenever they increased a defendant's maximum punishment is demonstrably mistaken"); R. Little & T. Chen, *The Lost History of Apprendi and the Blakely Petition for Rehearing*, 17 *Fed.SentencingRep.* 69, 69–70 (2004) (arguing that *Apprendi* was "undoubtedly founded on an erroneous historical understanding"); S. Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 *Yale L. J.* 1097, 1123–1132 (2001) (arguing that discretionary sentencing was characteristic of 18th-century misdemeanor sentencing and no fixed rule emerged even in the 19th century). But even if the approach were necessary when a court is determining a defendant's sentence, no Sixth Amendment concern is implicated under § 924(c), and the Court thus erred in holding that the categorical approach applied to the residual clause of that statute in *United States v. Davis*, 588 U. S. —, — – —, 139 S.Ct. 2319, 2331–2332, 204 L.Ed.2d 757 (2019) (KAVANAUGH, J., dissenting).
  - 2 There is no plausible argument that actual force, threatened force, violence, and fear of injury are only "means" of committing Hobbs Act robbery and not elements of the offense under the logic of the Court's decision in *Mathis v. United States*, 579 U.S. 500, 136 S.Ct. 2243, 195 L.Ed.2d 604. Distinct "means" of carrying out an offense are "alternative means of satisfying one (or more) of its elements." *Id.*, at 503, 136 S.Ct. 2243.

In other words, the “means” of carrying out an offense are ways of carrying out an element of that offense. But there is no overarching element of Hobbs Act robbery of which actual or threatened force, violence, or fear of injury could be subordinate means of performing. And in any case, a jury must find that the prosecution proved beyond a reasonable doubt that the defendant took or obtained property from the person of another by way of force, threatened force, violence, or fear of injury, which entails that these ways of effectuating robbery constitute elements of the offense. See *id.*, at 504–506, 136 S.Ct. 2243.

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What is the 'boyfriend loophole'? The Senate gun bill provision, explained : NPR



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## The Senate gun bill would close the 'boyfriend loophole.' Here's what that means

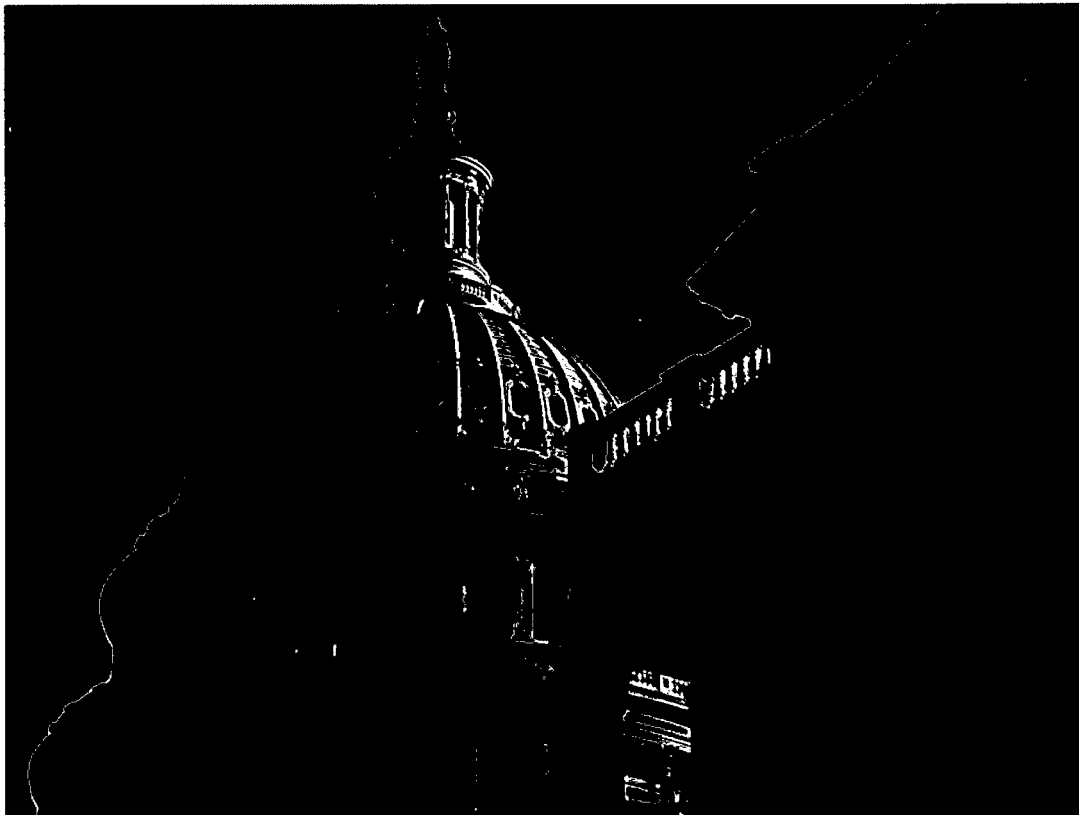
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What is the 'boyfriend loophole'? The Senate gun bill provision, explained : NPR

The U.S. Capitol Dome is pictured in Washington on Tuesday, the day Senate negotiators reached a bipartisan agreement on a gun safety bill.

*Anna Moneymaker/Getty Images*

Congress soon may pass its most significant gun legislation in three decades. Senators are working to fast-track a bipartisan gun safety bill that negotiators recently finalized, spurred by mass shootings last month in Buffalo, N.Y., and Uvalde, Texas.

The Senate, which advanced the bill in a 64-34 vote on Tuesday, will hold a procedural vote on Thursday to end debate and prevent a filibuster from blocking the bill.



#### UVALDE ELEMENTARY SCHOOL SHOOTING

Senators reach final bipartisan agreement on a gun safety bill

The Bipartisan Safer Communities Act is expected to clear that vote and head for final passage in the Senate by the weekend, just ahead of lawmakers' July recess. It would then go to the House for expected passage, at which point President Biden — who has urged Congress to move without delay — has said he would sign it.

The bill's measures are narrowly focused, with lawmakers aiming to craft legislation that would earn a filibuster-proof 60 votes in the evenly-divided Senate. That means it falls short of many of the changes that Democrats long have been pushed for, including universal background checks and a ban on military-style semiautomatic rifles.

#### Sponsor Message

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Still, Democrats and gun safety advocates are hailing the legislation as an important and incremental step in the right direction. Among other provisions, it would expand background checks for prospective gun buyers between the ages of 18 and 21, incentivize states to create red-flag laws, and give states more funding for school safety and mental health resources.

**LIFE KIT**

Abusive relationships are disturbingly common. Here's how to support a loved one

It also would close the so-called "boyfriend loophole" in a law that prevents people convicted of domestic abuse from owning a gun. That law currently only applies to people who are married to, living with or have a child with the victim.

April Zeoli, a professor of criminal justice and public health at Michigan State University, says those limited categories don't reflect the fact that people spend a lot more time dating now than they did in the past, with women marrying on average in their late 20s and men in their early 30s.

"Because we spend all this time dating, it doesn't mean that violence doesn't happen," Zeoli told *Morning Edition's* A Martínez. "It still happens, but the dating partners right now aren't covered by the federal restriction."

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More than a thousand women are killed by intimate partners every year in the United States, based on FBI and CDC data, and about half of the intimate partner homicides in the U.S. are perpetrated by an unmarried partner, a 2018 study found.

## **The bill would close the loophole, but add a caveat**

Democrats long have tried to broaden the definition of who qualifies for the ban. Their most recent attempt, an effort to add it to the reauthorization of the 1994 Violence Against Women Act that passed in March, was unsuccessful.

While that effort was on going, some states addressed the boyfriend loophole within their jurisdictions.

Thirty-one states have policies prohibiting convicted domestic abusers from having guns, according to a tracker from Everytown for Gun Safety. Of those, 19 go beyond the federal prohibition to cover abusive dating partners.



### **POLITICS**

Violence Against Women Act reauthorization is added to a \$1.5 trillion spending bill

The Bipartisan Safer Communities Act is poised to finally make that change on the federal level. It adds and defines the term dating relationship as "a relationship between individuals who have or have recently had a continuing serious relationship of a romantic or intimate nature," with considerations for the length and nature of the relationship as well as the frequency and type of interactions between the individuals involved.



### **UVALDE ELEMENTARY SCHOOL SHOOTING**

Poll: Support for controlling gun violence hits its highest point in a decade

The bill includes a related provision, allowing people who were convicted of misdemeanor domestic violence to have their gun rights restored if their record stays

6/30/22, 12:13 PM

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clean for five years. There are some exceptions for victims' spouses, parents, guardians or cohabitants.

Zeoli says she'd like to know more about the reasoning behind that provision, as it doesn't appear to be informed by any research.

"If we're talking about dating partners versus spouses, both of them can do the same types of violence, both of them can be the same level of dangerous, get the same conviction and get the same firearm restriction," she said. "But the spouses will have this lifetime firearm restriction, and the dating partners will have this five-year restriction, and I don't know the logic behind that disparity."

## Baseless fears of deception and retaliation

Why hasn't the federal law evolved with the times or research data? Zeoli offers one explanation:



### ANALYSIS

The Depp verdict could bring a chilling effect for domestic abuse survivors

"I think that there has always been a fear that women will make things up, that women will try to take revenge on their dating partners through lying about abuse and trying to get these firearm restrictions on them," she says. "And that fear is unfounded. In fact ... a large proportion of people who experience abuse never report it to the courts or law enforcement."

As a researcher, she says it's been difficult to watch as measures that data suggest could save lives — such as closing the boyfriend loophole — haven't been implemented. Zeoli says the bipartisan bill, even with its limited provisions, is a step in the right direction.

"I am encouraged by the fact that we are seeing movement at the federal level on gun safety legislation, when we haven't seen it for literally decades," Zeoli says.



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*The audio for this interview was produced by Jeevika Verma and Ben Abrams, and edited by Raquel Maria Dillon.*

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*If you or someone you know is experiencing domestic abuse, use a safe computer and contact help. That can include a local shelter, or call 911 or the National Domestic Violence Hotline at 1-800-799-7233.*

intimate partner violence   gun legislation   gun safety   domestic abuse

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Gun Talks Snag on Tricky Question: What Counts as a Boyfriend? - The New York Times

**The New York Times** | <https://www.nytimes.com/2022/06/17/us/politics/senate-guns-boyfriend-loophole.html>

## ***Gun Talks Snag on Tricky Question: What Counts as a Boyfriend?***

Among the sticking points holding up a final agreement on gun legislation is how to define a boyfriend in a provision meant to keep guns away from domestic abusers.

By Emily Cochrane and Stephanie Lai  
June 17, 2022

**Sign Up for On Politics, for Times subscribers only.** A Times reader's guide to the political news in Washington and across the nation. [Try the On Politics newsletter for 4 weeks.](#)

WASHINGTON — Among the sticking points standing in the way of a final deal on what could be the first significant bipartisan gun safety legislation in decades is an age-old question: How do you define a boyfriend?

The question may sound frivolous, but for a small group of Republicans and Democrats who are pressing to translate a hard-won compromise on guns into legislation that can draw 60 votes in the Senate, it is vital. And for millions of women who have been threatened with a firearm by an intimate partner, it is deadly serious.

At issue is a provision in the proposed agreement that would make it more difficult for domestic abusers to obtain guns.

Current law bars people convicted of domestic violence or subject to a domestic violence restraining order from being able to buy a gun, but it applies only if they have been married to or lived with the victim, or had a child with them. Lawmakers have worked unsuccessfully for years to close what has come to be known as the “boyfriend loophole” by expanding the law to include other intimate partners. Taking such a step is seen as one of the more publicly popular and effective ways to reduce gun violence.

But first, lawmakers must agree on what exactly makes someone an intimate partner. Is it one date or several? Could an ex-boyfriend count?

Senator Christopher S. Murphy, the Connecticut Democrat who has been leading the talks, described it as “a complicated question of state statutes and state charging practices.”

Senator John Thune of South Dakota, the No. 2 Republican, said the boyfriend question was surprisingly complex.

“The surface explanation seems like it would be fairly simple, but I know that as they try to reduce it to legislative text, I think it's gotten a little bit more uncomfortable,” said Mr. Thune, who is not directly involved in the negotiations.

Lawmakers are racing to finalize the legislation and pass it before the Senate's upcoming Fourth of July recess, which would require at least 10 Republican senators to join Democrats to break a Republican filibuster.

The agreement on new gun legislation includes enhanced background checks for prospective gun purchasers under the age of 21, which would for the first time allow law enforcement to examine juvenile and mental health records. It would provide federal money for states with so-called red flag laws that allow the authorities to temporarily seize firearms from people deemed to be dangerous. The compromise also is expected to toughen laws to stop gun trafficking and include money to shore up mental health resources in communities and schools, as well as for school security.

The final haggling has centered on the details of closing the boyfriend loophole, including the definition and whether those subject to the gun ban should be able to appeal. Negotiators also spent Thursday debating the red flag law funding and whether states that do not have such laws can receive money.

The impasse on the boyfriend loophole has become so sticky that Senator John Cornyn, Republican of Texas and a crucial player in the talks, said the proposal could be dropped from the package altogether.

“We're not ready to release any smoke, so we don't have a deal yet,” Mr. Cornyn said, declaring “I'm not frustrated — I'm just done” as he left a private negotiating session that stretched into the afternoon on Thursday.

Republicans want to limit the reach of the domestic violence provision, while Democrats want to write it broadly.

“There are many people who committed domestic violence who aren't actually charged with domestic violence — they are charged with simple assault, but they unquestionably committed an act of domestic violence,” Mr. Murphy said, adding, “We are at a pretty critical stage of the negotiation, and so I'm not going to share anything that jeopardizes our ability to land this.”

<https://www.nytimes.com/2022/06/17/us/politics/senate-guns-boyfriend-loophole.html>

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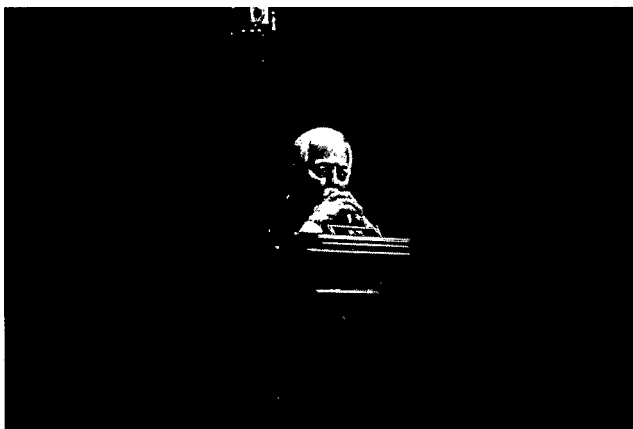
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Gun Talks Snag on Tricky Question: What Counts as a Boyfriend? - The New York Times

The inclusion of the boyfriend provision in the bipartisan framework, which was released on Sunday with the backing of 10 Republicans and 10 Democrats, was one of the biggest surprises for officials in both parties, given the repeated failed attempts to address it in the past. Earlier this year, lawmakers were forced to drop a similar provision from an updated version of the Violence Against Women Act — a landmark law intended to stop domestic violence, stalking and sexual assault — because Republicans objected.

“This is the difference between doing what sounds good and actually saving lives,” Representative Cori Bush, Democrat of Missouri, said of closing the boyfriend loophole. “We understand that we can’t get everything, but we have to do enough when we can see the research is there.”

That research, as well as analysis from leading gun safety organizations, shows that millions of women have been threatened with a gun by an intimate partner. Between 1980 and 2008, more than two-thirds of people killed by a spouse or former spouse were shot. Several of the gunmen involved in mass shootings in recent years, including at the Pulse nightclub in Orlando, Fla., in 2016 and a church in Sutherland Springs, Texas, in 2017, had histories of domestic or familial abuse.



Senator John Cornyn said on Thursday that the boyfriend provision could be dropped from the package altogether. Anna Rose Layden for The New York Times

As talks began over a compromise on gun safety legislation in the aftermath of devastating mass shootings in Buffalo, N.Y., and Uvalde, Texas, Senator Kyrsten Sinema, Democrat of Arizona, led the push to address domestic violence as part of the framework, aides involved with the discussions said.

But an agreement on the details of the provision has proved elusive, even as the lead negotiators — Ms. Sinema, Mr. Cornyn, Mr. Murphy and Senator Thom Tillis, Republican of North Carolina — have huddled repeatedly in hopes of a breakthrough that could allow votes on the legislation next week.

Other senators have raised questions about whether the provision should be retroactive, or whether someone barred from purchasing a gun under the measure, particularly because of a misdemeanor, should have an opportunity to appeal — and how long they must wait before they can do so.

“A lot of our members, as you know, are always concerned about making sure that there is robust due process built into some of those provisions, and so I think that’ll be really key on that one,” Mr. Thune said.

The proposal under discussion, like many of the elements of the agreement, is narrower than what Democrats have pushed for in the past, including in a bill introduced by Senator Amy Klobuchar of Minnesota. In a floor speech this week, Ms. Klobuchar signaled that she, like other Democrats, would support the legislation even if it fell short of her original plan and other gun safety proposals.

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**ATTORNEYS FOR PLAINTIFF  
UNITED STATES OF AMERICA**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
MISSOULA DIVISION**

|                                  |                                  |
|----------------------------------|----------------------------------|
| <b>UNITED STATES OF AMERICA,</b> | <b>CR 21-29-M-DLC</b>            |
| <b>Plaintiff,</b>                | <b>GOVERNMENT'S TRIAL BRIEF</b>  |
| <b>vs.</b>                       | <b>FOR APRIL 26, 2023, TRIAL</b> |
| <b>MICHAEL BLAKE DEFRANCE,</b>   |                                  |
| <b>Defendant.</b>                |                                  |

The United States of America, through its counsel, Jennifer S. Clark, Assistant United States Attorney for the District of Montana, submits this trial brief for the bench trial set for April 26, 2023.

**THE INDICTMENT AND ELEMENTS OF THE OFFENSES CHARGED**

The second superseding indictment provides as follows:

**COUNT I**

That on or about and between October 3, 2016, and October 2, 2018, at Missoula, in Missoula County, in the State and District of Montana, the defendant, MICHAEL BLAKE DEFRANCE, knowing he had been convicted on or about May 6, 2013, of a misdemeanor crime of domestic violence under the laws of the State of Montana, which meets the definition of a misdemeanor crime of domestic violence under 18 U.S.C. § 921(a)(33)(A)(i), knowingly possessed, in and affecting interstate commerce, firearms and ammunition, in violation of 18 U.S.C. § 922(g)(9).

**COUNT II**

That on or about February 24, 2018, at Missoula and within Missoula County, in the State and District of Montana, the defendant, MICHAEL BLAKE DEFRANCE, in connection with his acquisition and attempted acquisition of a firearm, namely a Stevens Arms 200 rifle from Cash 1 Pawn, Inc., Missoula, Montana, a licensed dealer, knowingly made a false and fictitious written statement

to Cash 1 Pawn, Inc., which statement was intended and likely to deceive Cash 1 Pawn, Inc., as to a fact material to the lawfulness of such sale and acquisition of the said firearm to the defendant under Chapter 44 of Title 18, in that the defendant represented at item 11(i) on ATF Form 4473, Firearms Transaction Form, dated February 24, 2018, the defendant had not been convicted in any court of a misdemeanor crime of domestic violence, all in violation of 18 U.S.C. § 922(a)(6).

### COUNT III

That on or about March 2, 2018, at Missoula and within Missoula County, in the State and District of Montana, the defendant, MICHAEL BLAKE DEFRANCE, in connection with his acquisition and attempted acquisition of a firearm, namely a Smith & Wesson 60 Lady Smith revolver, from Cash 1 Pawn, Inc., Missoula, Montana, a licensed dealer, knowingly made a false and fictitious written statement to Cash 1 Pawn, Inc., which statement was intended and likely to deceive Cash 1 Pawn, Inc., as to a fact material to the lawfulness of such sale and acquisition of the said firearm to the defendant under Chapter 44 of Title 18, in that the defendant represented at item 11(i) on ATF Form 4473, Firearms Transaction Form, dated February 24, 2018, the defendant had not been convicted in any court of a misdemeanor crime of domestic violence, all in violation of 18 U.S.C. § 922(a)(6).

#### COUNT IV

That on or about August 25, 2018, at Missoula and within Missoula County, in the State and District of Montana, the defendant, MICHAEL BLAKE DEFRANCE, in connection with his acquisition and attempted acquisition of a firearm, namely a Remington 770 rifle, from Cash 1 Pawn, Inc., Missoula, Montana, a licensed dealer, knowingly made a false and fictitious written statement to Cash 1 Pawn, Inc., which statement was intended and likely to deceive Cash 1 Pawn, Inc., as to a fact material to the lawfulness of such sale and acquisition of the said firearm to the defendant under Chapter 44 of Title 18, in that the defendant represented at item 11(i) on ATF Form 4473, Firearms Transaction Form, dated February 24, 2018, the defendant had not been convicted in any court of a misdemeanor crime of domestic violence, all in violation of 18 U.S.C. § 922(a)(6).

#### ELEMENTS

The elements for count I of the second superseding indictment, prohibited person in possession of firearms and ammunition, are:

- First, the defendant knowingly possessed at least one firearm or ammunition;
- Second, the firearms or ammunition had been transported from one state to another or between a foreign nation and the United States;
- Third, at the time the defendant possessed the firearms or ammunition,

the defendant had previously been convicted of a misdemeanor crime of domestic violence; and

- Fourth, at the time the defendant possessed the firearms or ammunition, the defendant knew that he had been convicted of such an offense.

The elements for counts II-IV of the second superseding indictment, false statement in acquisition of a firearm, are:

- First, Cash 1 Pawn, Inc. was a licensed firearm dealer;
- Second, in connection with acquiring a firearm from Cash 1 Pawn, Inc., the defendant made a false statement;
- Third, the defendant knew the statement was false; and
- Fourth, the false statement was material; that is, the false statement had a natural tendency to influence, or was capable of influencing Cash 1 Pawn, Inc., into believing the firearm could be lawfully sold to the defendant.

*See* Ninth Circuit Criminal Model Jury Instruction 14.15 Firearms – Unlawful Possession (18 U.S.C. § 922(g)) (March 2022); *see also* Comment to Instruction 14.13 Firearms-Unlawful Receipt (18 U.S.C. § 922(g)) (March 2022); Ninth Circuit Criminal Model Jury Instruction 14.8 Firearms—False Statement in Acquisition (18 U.S.C. § 922(a)(6)) (March 2022).



### **ANTICIPATED PROOF**

On June 27, 2018, Detective Guy Baker located a Smith and Wesson .357 caliber revolver and a box of .357 ammunition in the middle console of Michael DeFrance's truck. Two .22 caliber rifles were located under the back seat.

On October 2, 2018, a search warrant was executed at DeFrance's residence at 1035 Grizzly Mountain Road, Missoula. Detective Guy Baker located a Smith and Wesson Lady Smith .357 revolver, SN DAW6108 on a desk by the front door. Detective Baker recognized this as the revolver DeFrance had in his truck in June. DeFrance also had a Remington Model 770 .243, SN M71863512, in his bedroom with four .243 rounds. There was a .22 caliber Keystone Arms rifle, SN 208343, hanging on a wooden support beam near DeFrance's dresser. When asked if he knew he was not supposed to have guns, DeFrance replied, "I was never clear on that."

On May 6, 2013, DeFrance was sentenced for partner or family member assault on Jane Doe, under Montana Code Annotated § 45-5-206, in Sanders County. Justice of the Peace Donald Strine presided over DeFrance's change of plea hearing and imposed sentence. DeFrance signed a waiver of rights form on May 6, 2013. He acknowledged his rights, which included – on a list of possible consequences of pleading guilty – the loss of firearms rights. The same form contained a space for the defendant to explain the basis for his guilty plea, and

DeFrance's form stated: "On 4-14-2013, in Sanders County I caused bodily injury to my girlfriend."

Detective Baker interviewed Judge Strine. Judge Strine did not specifically recall DeFrance's change of plea hearing. He reviewed the file and stated he reviewed the plea agreement with the defendant because he had made a check mark next to each point as he reviewed them with DeFrance. Judge Strine stated he wrote the narratives on the document. As a matter of routine, Judge Strine would ask the defendant to tell him what he did. In this case, DeFrance stated that he caused bodily injury to his girlfriend. Judge Strine stated that when he reviewed plea agreements involving partner or family member assaults, he always made sure defendants understood they would lose their firearm rights. In DeFrance's case, Judge Strine wrote "loss of firearms rights" on the line regarding possible consequences of a guilty plea. Judge Strine always tried to make that point clear because "firearms are a big deal up in these parts." Judge Strine clarified he was referring to "Montana and specifically Sanders County."

DeFrance completed five ATF 4473 forms at Cash 1 Pawn in Missoula, Montana between 2015 and 2018. On all five forms, DeFrance represented that he had not been convicted of a misdemeanor crime of domestic violence.

Doe and DeFrance met in 2010 when the DeFrance family moved across the street from Doe's great grandparents in Dixon Agency, Montana. Prior to and

after the assault in 2013, Doe often stayed with DeFrance in a camper on the DeFrances' property. Doe kept personal items such as clothing, art supplies and a pet at the camper. Doe had unfettered access to the trailer. Doe stayed in the camper when DeFrance was fighting fires. Doe and DeFrance were in an intimate relationship. In 2010, Doe was pregnant with DeFrance's child. Doe was pregnant in late 2013. They had one child born in July 2014 and a second born in October 2015.

### **WITNESSES**

The government intends to call approximately ten witnesses and anticipates concluding its case in chief on Wednesday, April 26, 2023. The witnesses include Detective Guy Baker, the lead investigator in this case, who seized the firearms and interviewed DeFrance about his possession of them. Justice of the Peace Strine will testify about his review of DeFrance's PFMA case and the plea agreement from that proceeding, including his admonition about DeFrance losing the right to possess firearms following his conviction. Former Deputy Robyn Largent will testify about the statement Doe provided at the time of the assault and what items of personal property she had present at the camper. At least five of Jane Doe's relatives will testify about the characteristics of her relationship with DeFrance in order to establish the facts necessary to prove DeFrance was "a person similarly situated to a spouse" of Jane Doe when he assaulted her in April 2013.

Absent a stipulation, ATF Special Agent Tom Hess will testify that the firearms and ammunition seized from DeFrance were shipped or transported in interstate or foreign commerce. And Joel Christensen, owner of Cash One Pawn, will testify about the pawn shop's firearms transactions with DeFrance, including the ATF Form 4473s DeFrance completed in order to pawn and retrieve his guns.

### **EXHIBITS**

1. Notice to Appear and Complaint, Sanders County Ticket C35A 35425, dated April 14, 2013, issued to Michael Blake DeFrance (Exhibit 1);
2. Initial Appearance/Arraignment in Sanders County Justice Court case number TK-2013-342, *State of Montana v. Michael Blake DeFrance* (Exhibit 2);
3. Order and Conditions of Release Acknowledgment for Michael Blake DeFrance in Sanders County Justice Court case number TK-2013-342 (Exhibit 3);
4. Plea Agreement in Sanders County Justice Court case number TK-2013-342, *State of Montana v. Michael Blake DeFrance* (Exhibit 4);
5. Waiver of rights and entry of guilty plea for Michael Blake DeFrance, dated May 6, 2013 (Exhibit 5);
6. ATF Form 4473 dated February 4, 2015, from Cash 1 Pawn, Missoula for Michael Blake DeFrance (Exhibit 6);
7. ATF Form 4473 dated September 22, 2016, from Cash 1 Pawn, Missoula for Michael Blake DeFrance (Exhibit 7);
8. ATF Form 4473 dated February 24, 2018, from Cash 1 Pawn, Missoula for Michael Blake DeFrance (Exhibit 8);

9. ATF Form 4473 dated March 2, 2018, from Cash 1 Pawn, Missoula for Michael Blake DeFrance (Exhibit 9);
10. ATF Form 4473 dated August 25, 2018, from Cash 1 Pawn, Missoula for Michael Blake DeFrance (Exhibit 10);
11. Photos of Smith & Wesson Lady Smith, SN DAW6108 (Exhibits 11-13);
12. Photos of Remington 770 rifle, SN M71863512 (Exhibits 14-15);
13. Photos of Keystone Arms .22 rifle, SN 208343 (Exhibits 16-17);
14. Jermain Charlo, *First blog*, YouTube (Sept. 2, 2013), [https://www.youtube.com/watch?v=5\\_Ik6BgngwE](https://www.youtube.com/watch?v=5_Ik6BgngwE) (Exhibit 18);
15. Jermain Charlo, *Second day, kind of boring...*, YouTube, (Sept. 3, 2013), <https://www.youtube.com/watch?v=evtZL7YNbH0> (Exhibit 19);
16. Jermain Charlo, *Day 3 wake up call*, YouTube (Sept. 4, 2013), <https://www.youtube.com/watch?v=DCswPqId9Zk> (Exhibit 20).

## LEGAL ISSUES

### I. *Missouri v. Frye*, 132 S. Ct. 1399 (2012).

Although the defendant is proceeding to trial, the United States notes for the record that a motion for change of plea would have been more beneficial to the defendant than a conviction following trial. *See Missouri v. Frye*, 132 S. Ct. 1399 (2012). A written, proposed plea agreement was presented to the defendant for his consideration. That plea agreement represented, in the government's view, the most favorable offer extended to the defendant.

The Government does not seek to involve the Court in the plea agreement process in violation of Rule 11, but respectfully requests the Court make an inquiry to ensure the record is protected.

## **II. Potential factual issues related to the elements of count I**

Count I requires the government to prove that the defendant has been convicted of a misdemeanor crime of domestic violence. 18 U.S.C. § 922(g)(9).

A misdemeanor crime of domestic violence is defined as:

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

18 U.S.C. § 921(a)(33)(A) (i) and (ii) (2021).

### **A. Force**

The First element that the government must prove is that the predicate offense was a misdemeanor with an element of force. 18 U.S.C.

§ 921(a)(33)(A)(i). In cases where a defendant pleads guilty, courts can rely on the statement of factual basis for the charge shown by a transcript of plea colloquy or by written plea agreement presented to the court, or by a record of comparable findings of fact adopted by the defendant upon entering the plea to determine the

elements of the underlying offense. *Shepard v. United States*, 544 U.S. 13 (2005). In this case, the Court can rely on DeFrance’s waiver of rights and his acknowledgement that he caused his girlfriend bodily injury to conclude he was convicted under Section 45-5-206(a) of the Montana Code for a misdemeanor partner assault.

### **B. Relationship**

The United States will show that the relationship between DeFrance and Jane Doe – at the time of the assault – qualified as “similarly situated to a spouse.”

In 1996, Senator Lautenberg introduced an amendment to 18 U.S.C. § 922(g) to prohibit individuals convicted of misdemeanor crimes of domestic violence from possessing firearms. 142 Cong Rec. S2646-02. The reason for the amendment was to “keep guns out of the hands of people who have proven themselves to be violent and a threat to those closest to them.” Senator Lautenberg stated the intent was to include “violent crimes committed by a spouse, former spouse, paramour, parent, guardian, or similar individual.” Senator Lautenberg recognized that domestic violence acts are dangerous by nature and involve people who have a history together, and perhaps share a home or a child.

Several courts have analyzed the meaning of “similarly situated to a spouse.” The syntax of the statute suggests that Congress used the phrase to cover domestic arrangement that are not necessarily based on sexual or family

relationships. *United States v. Heckenliable*, 2005 WL 856389, \*4 (D. Utah C. Div. 2005). The *Heckenliable* court examined factors that could be used to determine if two people were “cohabiting as spouse.” *Id.* at \*3. Those included:

“the length of the relationship, shared residence as indicated by spending the night and keeping one’s belongings at the residence, intimate relations, expectation of fidelity and monogamy, shared household duties, regularly sharing meals together, joint assumption of child care, providing financial support, moving as a family unit, joint recreation and socialization, and recognition of the live-in relationship by family and friends.”

*Id.* at \*3. These same factors can be used to determine if someone is similarly situated as a spouse if there is no cohabitation to determine the domestic nature of the relationship.

“In dropping the word ‘cohabiting’ from the final clause, Congress apparently intended to sweep into the statute relationships that did not involve cohabitation.” *Id.* “Congress was no doubt concerned that some persons, while not habiting, might nonetheless remain in such frequent contact with each other that a risk of deadly violence would exist if firearms were present.” *Id.* The *Heckenliable* court determined that the statute’s plain language supported that the phrase “similarly situated to a spouse” was expansive. *Id.* at \*4. It also looked to Senator Lautenberg’s legislative comments that “anyone who attempts or threatens violence against a loved one has demonstrated that he or she poses an unacceptable risk and should be prohibited from possessing firearms.” *Id.*



The Eighth Circuit declined to disturb a jury's finding that the defendant's conviction for assaulting his secretary qualified as a misdemeanor conviction of domestic violence under 18 U.S.C. § 921(a)(33)(A)(ii). *United States v. Cuervo*, 354 F.3d 969, 998 (8th Cir. 2004) (*vacated on other grounds sub nom., Norman v. United States*, 543 U.S. 1099 (2005), *Schoenauer v. United States*, 543 U.S. 1099 (2005)).

In *Cuervo*, Schoenauer (a consolidated defendant on appeal) engaged in a long-term extramarital affair with his secretary. *Cuervo*, 345 F.3d at 997. He occasionally stayed with her at an apartment he kept. *Id.* Schoenauer remained married to and lived with his wife. *Id.* Schoenauer asserted that the statute was vague as it applied to him. *Id.* He argued at trial that because he was married to someone else and lived with his spouse, he did not fit the definition of similarly situated to a spouse of his victim girlfriend. *Id.* at 998. While the victim was not his spouse, the evidence showed they shared an intimate personal relationship. *Id.* The Eighth Circuit disagreed with the vagueness argument, stating that “a common read of the statute would alert a person of ordinary intelligence that the phrase ‘similarly situated to a spouse’ is meant to include assaults perpetrated against those who are not spouses, yet share their defining characteristics.” *Id.* The jury was free to determine as a factual matter that the relationship qualified. *Id.*

While living together is one factor a court may consider when determining if the parties were similarly situated as a spouse, it is not a requirement. *Eibler v. Dept. of Treasury, Bureau of Alcohol, Tobacco and Firearms*, 311 F. Supp. 2d 618, 622 (N.D. Ohio E. Div. 2004). Eibler filed an action arguing that his denial to purchase a firearm was improper. *Id.* at 618. He had been convicted of misdemeanor assault on his girlfriend of six years. *Id.* at 619; 622. He argued that his relationship to the victim was not domestic in nature under 922(a)(33)(A)(ii) because it didn't "fall into one of the following three categories: (1) a spouse, parent or guardian; (2) a person with whom he shares a child in common; or (3) a person with whom he has or is cohabiting with as a spouse, parent, or guardian." *Id.* at 622. The court first noted that his analysis ignored the fourth category of persons "similarly situated to a spouse, parent or guardian." *Id.* The court looked to other cases that found a "close [and] personal," relationship and being a "long-time paramour: to have qualified." *Eibler, citing White v. Dept. of Justice*, 328 F.3d 1361, 1363-1364 (Fed. Cir. 2003). The court found that because the underlying assault was against a person with whom Eibler had a domestic relationship the denial of a firearm purchase was appropriate and granted summary judgment. *Id.* at 623. Further, the court found it persuasive in *White* that even though the two had separate residence and were no longer living together, they did "maintain an intermittent relationship." *Id.* at 622. Relying

on *White* and *Cuervo*, the fact that Eibler and his victim were not living together at the time of the assault was not dispositive. *Id.*

Certain details tend to show that a relationship is similar to a spousal relationship, including “expectations of fidelity and monogamy, social activities and discussions about having children.” *United States v. Cary*, 2008 WL 879433 (N.D. Ga. 2008); *United States v. Barnes*, 295 F.3d 1354, 1366 (D.C. Cir. 2002) (“[w]e would be hard pressed to find an individual of common, or even not so common, intelligence who could not determine whether he was in one of the enumerated relationships when he committed a misdemeanor crime including an element of physical force.”).

In *White*, the Federal Circuit analyzed the entire relationship between the parties before finding their arrangement was similar to a spouse. The court relied on evidence that they lived together from August 1998 to June 1999 and then maintained an intermittent relationship until the February 2000 domestic assault. During that period, White stayed “up to five days/nights a week with her” for several months but maintained a separate residence. The nature of the relationship was similar to a spouse because it included expectations of fidelity and monogamy, shared expenses, shared household responsibilities, social activities in common, and discussions about having children.

The fact in this case that support the finding that Doe and DeFrance were similarly situated to spouses are:

1. Intimate relationship beginning in 2010;
2. Doe frequently spending the night/weekends with DeFrance;
3. Doe's possessions kept in his camper;
4. Doe's unfettered access to the camper;
5. Doe's pet in the camper;
6. Expectations of monogamy and fidelity;
7. Pregnancy early in relationship;
8. Child born shortly after PFMA;
9. Doe living with DeFrance shortly after PFMA;
10. Joint recreation and social activities;
11. Regular meals together;
12. Joining his religion.

### **C. Knowledge**

“To convict someone under § 922(g)(9), the government must prove the defendant knew he possessed a firearm, and the defendant knew he belonged to the relevant category of persons barred from possessing a firearm. *United States v. DeFrance*, 2021 WL 6197188, at \*3; citing *Rehaif v. United States*, 139 S. Ct. 2191, 2200 (2019). The United States need not prove that DeFrance “knew

his . . . status prohibited firearm ownership or possession.” *Id.*, citing *United States v. Singh*, 979 F.3d 697, 727-728 (9th Cir. 2020).

“‘Everyone knows’ the possession of firearms is a highly regulated activity and that ‘an individual’s domestic violence conviction should itself put that person on notice that the subsequent possession of a gun might well be subject to regulation.’” *United States v. Pfeifer*, 371 F.3d 430, 437 (8th Cir. 2004) (finding the statute provided fair warning a similar relevant misdemeanor could serve as a predicate offense).

The facts that show knowledge in the instant case will come from former Justice of the Peace Donald Strine. He will testify that DeFrance appeared before him for a charge entitled ‘partner or family member assault.’ DeFrance admitted guilt to “partner or family member assault” by stating he caused bodily injury to his girlfriend. Judge Strine informed DeFrance that the loss of firearms rights was a consequence of his conviction.

### **III. Anticipated challenges to evidence**

The government will seek to introduce the content of text messages from DeFrance to Doe while she was in New Mexico. The purpose of introducing the content is not to establish the Doe was pregnant with DeFrance’s child or to establish paternity. The messages from DeFrance referred to “our baby” indicating that, regardless of who the father might have been, DeFrance had reason

to believe it was his child because they had engaged in sexual relations. Doe had locked herself in the bathroom and was making comments that caused her aunt concern for her welfare. She was visibly upset by the discussion, which led her aunt to review the messages by looking at Doe's phone.

#### **A. Admissibility**

Doe's aunt will testify about things to which she has personal knowledge. Fed. R. Evid. 602. She will testify to her observations of Doe and to her observations of the text messages. She will explain circumstances that led her to believe the messages were from DeFrance, including the name on the phone with whom Doe was communicating.

The Court determines the admissibility of evidence. Fed. R. Evid. 104(a). Inadmissible evidence may be used to determine authenticity of other evidence. The Court must decide any preliminary question about whether evidence is admissible and in doing so the Court is not bound by evidence rules, except those on privilege. Fed. R. Evid. 104(a).

The admitting party must show by a preponderance that the evidence is admissible. *See Bourjaily v. United States*, 483 U.S. 171, 175 (1987). Should DeFrance object to testimony about the messages based on questions surrounding whether he sent them, his argument goes to weight rather than admissibility. *Id.*

at 181 (in determining admissibility, “the judge should receive the evidence and give it such weight as his judgment and experience counsel”).

“To satisfy the requirement of authentication or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.” Fed. R. Evid. 901(a).

Authentication may be based on circumstantial evidence including distinctive characteristics, appearance, substance, taken together with all the circumstances. Fed. R. Evid. 901(b)(5).

Lastly, the best evidence rule does not apply. An original is not required if all the originals are lost or destroyed, and not by the proponent acting in bad faith. Fed. R. Evid. 1004(a).

This evidence goes directly to establishing the nature of the relationship between Doe and DeFrance, which this Court has determined is the central issue in this case. (Doc. 71 at 27). The comments made in the text messages will be supported by evidence from another witness who heard DeFrance make the same comments to Doe. This Court should admit the evidence and give it the proper weight based on the totality of circumstances.

### **B. Hearsay**

Hearsay is defined as an out-of-court statement intended to prove the truth of the matter asserted in the statement. Fed. R. Evid. 801(c). There are exceptions

to the general rule that hearsay is inadmissible. Regardless of the availability of the declarant, a statement describing or explaining an event or conditions made while or immediately after the declarant perceives it is admissible. Fed. R. Evid. 803(1). Statements that related to a startling event and statements of the declarant's then-existing emotional condition also are admissible. Fed. R. Evid. 803(2), (3).

When a declarant is unavailable, a statement about the declarant's personal or family history is admissible. Fed. R. Evid. 804(b)(4)(A). These include statements about marriage, divorce, or similar facts of personal or family history. A statement about another person concerning these facts also is admissible if the person was so intimately associated with the person's family that the declarant's information is likely to be accurate. Fed. R. Evid. 804(b)(4)(B). A declarant is deemed unavailable if they are deceased or the statement's proponent has not been able to procure their attendance or testimony. Fed. R. Evid. 804(a)(4), (5)(B).

The residual exception to hearsay also allows for a statement to be admitted if it is "supported by sufficient guarantees of trustworthiness – after considering the totality of the circumstances under which it was made and evidence, if any corroborating the statement; and it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts." Fed. R. Evid. 807(a)(1), (2).



**a. Text message communication in 2010.**

The government intends to introduce the content of text messages between DeFrance and Doe regarding a pregnancy in 2010. The messages from DeFrance demonstrate that DeFrance believed Doe was pregnant with his child. The messages are not hearsay because they are DeFrance's statements. But even if the Court disagrees, they should be admitted since they are not being introduced to show the truth of the matter asserted – that the child was his – but to establish that there was an intimate relationship between DeFrance and Jane Doe prior to 2013. As the cases cited above explain, the depth of the relationship can be proven by evidence of the couple's intimate relations, an expectation of fidelity and monogamy, and discussions about having children.

Doe's aunt observed the text messages between Doe and DeFrance. Doe's aunt also will testify about statements Doe made in reaction to DeFrance's messages. to the statements about the text messages from DeFrance are admissible as present sense impressions, excited utterances, and then-existing mental and emotional condition. Fed. R. Evid. 803(1); Fed. R. Evid. 803(2), (3). She made these statements while perceiving the messages. They also are covered under the residual hearsay exception. Fed. R. Evid. 807.

**b. Video blogs**

The government intends to introduce YouTube videos that Doe uploaded in

September 2013. Doe stated that her boyfriend/fiancé is fighting fires and that she is a Jehovah's witness.<sup>1</sup> These statements are admissible under Fed. R. 804(b)(4).<sup>2</sup> Doe's statements about the status of the relationship and their intent to marry are facts similar to personal history such as marriage that are admissible when a declarant is unavailable. This exception is premised on the "view that certain categories of statements are 'free enough from the risk of inaccuracy and untrustworthiness' such that 'the test of cross-examination would be of marginal utility.'" *Porter v. Quarantillo*, 722 F.3d 94 (2nd Cir. 2013).<sup>3</sup>

The statements about their relationship status, that she lives in a camper with her boyfriend, and her religion, also meet the residual exception requirements. Fed. R. Evid. 807. In light of the totality of the circumstances in which they were made, they are supported by sufficient guarantees of trustworthiness. Since Doe was creating a personal blog about her life to share on the internet there was no reason for her to fabricate.

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<sup>1</sup> This comment reflects her change to DeFrance's religion.

<sup>2</sup> The government will ask the Court to find that Doe has been missing since June 2018 and is unavailable for trial under Federal Rule of Evidence 804(a).

<sup>3</sup> Courts have held that statements about personal or family history is permitted under this exception and statements about age or location of someone at a particular time is not. *Porter*, 722 F.3d at 99; *Luque v. Blinken*, 2022 WL 17592190 (9th Cir. 2022).

### **C. Confrontation Clause**

The Confrontation Clause of the Sixth Amendment prohibits testimonial hearsay statements to be admitted at trial. *Crawford v. Washington*, 541 U.S. 36 (2004). However, non-testimonial statements may be admissible if they meet other hearsay exceptions. *Davis v. Washington*, 547 U.S. 813 (2006).

Testimonial statements are statements that are made for the purpose of establishing or proving a fact. *Id.* at 824. “An accuser who makes a formal statement to the government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.” *Id.* Courts have held that statements to law enforcement solely directed at establishing the facts of a past crime or to identify a perpetrator are testimonial. *Id.* at 826. To determine if a statement is testimonial, the court must decide whether it has “a primary purpose of creating an out-of-court substitute for trial testimony.” *Michigan v. Bryant*, 562 U.S. 344, 358 (2011). When the primary purpose of a statement is not to create a record for trial, “the admissibility of the statement is the concern of state and federal rules of evidence, not the Confrontation Clause.” *Id.* at 359.

The statements made by Doe to her aunt and on her video blogs are not testimonial and thus are not subject to the Confrontation Clause. Again, Doe created a blog about her life. These videos were not made to establish or prove any fact in order to serve as a substitute for trial testimony.

### **III. Outstanding motions.**

DeFrance filed a motion for leave to file a motion to reconsider the Court's denial of his motion to dismiss the second superseding indictment. The Court denied any further pre-trial briefing, but reserved ruling on the legal issues until after trial. Doc. 111.

### **ANTICIPATED TRIAL TIME**

The United States anticipates that the trial time in this case will be one to two days.

DATED this 21st day of April, 2023.

JESSE A. LASLOVICH  
United States Attorney

/s/ Jennifer S. Clark  
JENNIFER S. CLARK  
Assistant U.S. Attorney

**CERTIFICATE OF COMPLIANCE**

Pursuant to D. Mont. CR 47.2, the attached response is proportionately spaced, has a typeface of 14 points or more, and the body contains 5,137 words.

/s/ Jennifer S. Clark

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
MISSOULA DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MICHAEL BLAKE DeFRANCE,

Defendant.

**CR 21-29-M-DLC**

**DEFENDANT DeFRANCE'S  
TRIAL BRIEF**

**INTRODUCTION**

This is a firearms/false statement case where the government has charged Michael Blake DeFrance (Mr. DeFrance) with unlawfully possessing firearms and ammunition under 18 USC §922(g)(9) along with four false statement counts under 18 USC §922(a)(6) (ECF No. 55). This case is presently set for a bench trial in Missoula on April 26, 2023. Following is Mr. DeFrance's trial brief.

## **BACKGROUND FACTS**

On Saturday, April 13, 2013, an officer of the Montana Sanders County Sheriff's Office was dispatched to the Dixon Agency for a suspected Partner Family Member Assault (PFMA) against Mr. DeFrance's then girlfriend, Jermain Charlo, who was then 17 years old. Mr. DeFrance, who was then 19 years old, was arrested the next day. A few weeks after that, Mr. DeFrance pleaded guilty to the charge and was sentenced on May 6, 2013. The Sanders County Justice Court docket sheet (Exhibit 511, pp. 8-9) shows Mr. DeFrance served his sentence allowing the Court file to close on January 14, 2014. In June of 2018, Mr. DeFrance became the object of suspicion in the disappearance of Jermain Charlo from the 2013 PFMA. During the course of that 2018 investigation, law enforcement learned that Mr. DeFrance had been convicted of a Montana PFMA and that he possessed firearms. The original indictment in this case was then filed on July 28, 2021 (ECF No. 2).

During initial defense investigation on the original single count indictment, which charged only a violation of 18 USC §922(g)(9), we learned that Mr. DeFrance had transacted in firearms on at least five (5) occasions at a local pawn shop. Furthermore, the defense learned that on each of those occasions Mr. DeFrance completed the required ATF Form 4473, which enables the FBI to conduct a background check commonly referred to as a NICS (National Instant Criminal Background System) check. As a matter of reciprocal discovery, and in conjunction

with Mr. DeFrance's assertion of certain defenses (ECF No. 27), the 4473 Forms were provided to the government. Apparently to clarify what the forms meant in the context of this prosecution government counsel emailed the forms to ATF personnel. Two ATF employees who have knowledge of the NICS check process (Mr. Stephen Feuerstein and Mr. Dana Pickles) both described the NICS process in emails and offered a determination that the NICS check on Mr. DeFrance "had been purged and NICS did not complete their investigation properly", resulting in firearms being furnished to Mr. DeFrance who, according to Mr. Feuerstein, is a prohibited person (Exhibit 509).

The sequence of events just described shows two things. That before the government filed the original indictment the government did not know that Mr. DeFrance on five (5) occasions had been cleared after a NICS check to lawfully receive a firearm from the Federal Firearms Licensee (FFL) pawn shop. Furthermore, the sequence shows that not until September 16, 2021, did the government reverse the FBI NICS check determinations that Mr. DeFrance could lawfully receive firearms when Mr. Feuerstein decided *post hoc* that Mr. DeFrance was a prohibited person on the ground that Mr. DeFrance had a Montana PFMA conviction.

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On the one hand, between February 2015 and September 2018, when the 4473 Forms were processed, the FBI NICS checks cleared Mr. DeFrance to possess firearms. On the other hand, well after the NICS checks were processed, the ATF (by way of Mr. Feuerstein) concludes on September 16, 2021 that the NICS checks rendered erroneous conclusions. Important here is the fact that of the five (5) 4473 Forms three (3) of them show that the initial result of the check put Mr. DeFrance in “delayed” status. We expect that at trial Mr. Pickles will testify that “typically” when a 4473 NICS check yields an initial status of “delayed” whoever is working on that will take “a second look” at the background data under consideration.

#### **OBJECTIONS / POTENTIAL EVIDENCE ISSUES**

The discussion here anticipates evidence issues which may arise based on assumptions concerning the evidence the government intends to offer. These assumptions, in other words, could be wrong. Hence, we offer our objections provisionally.

Although there is no clear statement in the discovery about this, we received telephone notice from the government that there may be evidence offered through Danielle Matt Garcia (Government Bates 348-349) that at some point in time when Jermain Charlo was around fourteen (14) years old, her family moved Jermain to New Mexico for a medical procedure. If allowed this evidence would show that Jermain apparently did have the medical procedure; that supposedly Mr. DeFrance

discussed that medical procedure with Jermain on the telephone. We will likely object to this evidence, if offered, on relevance grounds, foundation grounds, and hearsay grounds. We will also contend that such evidence is more prejudicial than probative as well. *See* Fed. R. Ev., Rules 103, 104, 401, and 403. Moreover, should the Court decide to admit this evidence the defense will seek to discuss with defense witness Jocelyn Stevens that around the same timeframe Jermain Charlo confided to her (Jocelyn Stevens) that she (Jermain) had a relationship with another young man which supposedly resulted in a medical procedure at the behest of Jermain's mother, Jennifer Morigeau.

Another issue for admissibility of evidence will be the defense offering of Exhibits 504, 505, 511, 512, 515, and 516 through Sanders County Deputy Largent and Sanders County Dispatcher, William "Bill" Brown. For the most part, Deputy Largent conducted the on-the-ground investigation of the PFMA on April 13 and April 14, 2013. There are two "911-calls" we want considered. The first (Exhibit 513) is the call from Tribal Police to the Sanders County Sheriff's Office explaining that there had been a PMFA complaint reported over which Tribe did not have jurisdiction since Mr. DeFrance is considered non-Native American "descendant" by the Tribe. The second "911-call" (Exhibit 515) is from the Sanders County Sheriff's Office, who took the call from Tribe (Exhibit 513), explaining the situation

to Deputy Largent for purposes of dispatching Deputy Largent to the site of the reported PMFA so he could arrest and investigate.

We want the Court to listen to both of these recordings and contend that Deputy Largent can foundation them both into evidence. Moreover, these recordings are Records of Regularly Conducted Activity and Fed. R. Ev., Rule 803(6); or Public Records under Rule 803(8)(A)(iii) and (B). **Also, the defense will rely on the residual exception to the hearsay rule set forth in Rule 807 and this constitutes our written notice to the government as required under subpart (b) of the Rule.** Likewise, we contend that Deputy Largent's recorded interview of Jermain Charlo on April 13-14, 2013, at 309 Pename Street (her great-grandfather's house) falls under the same hearsay exceptions as well. (Exhibits 504 and 505).

### **CONTINUING OBJECTIONS**

1. Since the defense contends that this case should not proceed to trial as a matter of law, we respectfully request a continuing objection to the government being entitled to assert by any evidence that Mr. DeFrance was in some sort of "spousal" relationship with the PFMA victim, where the background record of the PFMA conviction shows that Mr. DeFrance was only in a boyfriend-girlfriend, dating relationship with the victim; who was a minor, and not competent to enter into any form of "spousal" relationship whatsoever. This request is made under Fed. R. Ev. 103(b).

2. The Court has addressed the vague standard of “similarly situated as a spouse” in 18 USC §921(a)(33)(A)(ii) pretrial, in its order dated December 29, 2021. (See ECF No. 71, pp. 38-42) As stated below, we are renewing our claim of vagueness, along with all of our other pretrial motions. However, since this is an element of the offense, and the Court therefore necessarily has to apply it, we take the opportunity here to contest the Court’s reliance on a district court decision from Georgia: *United States v. Cary*, 2008 WL 879433 (ECF No. 71, p. 38). We have two immediate objections here. *Cary* is neither a reported decision; nor is it considered precedent. *Camreta v. Greene*, 563 U.S. 692, 709 n. 7:

We note, however, that the considerations persuading us to permit review of petitions in this posture may not have the same force as applied to a district court decision. “A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.” 18 J. Moore et al., *Moore’s Federal Practice* § 134.02[1] [d], p. 134–26 (3d ed.2011). Many Courts of Appeals therefore decline to consider district court precedent when determining if constitutional rights are clearly established for purposes of qualified immunity. See, e.g., *Kalka v. Hawk*, 215 F.3d 90, 100 (C.A.D.C.2000) (Tatel, J., concurring in part and concurring in judgment) (collecting cases). Otherwise said, district court decisions—unlike those from the courts of appeals—do not necessarily settle constitutional standards or prevent repeated claims of qualified immunity.

*Camreta v. Greene*, 563 U.S. 692,  
709 n. 7 (2011).

Thus, as a matter of freestanding analysis *Cary* cannot serve as a notice of any applicable standard *vis-à-vis* the “similarly situated to a spouse” element in this case.

Furthermore, the decisions cited in *Cary* do not provide any such notice either.

Consider:

1. *United States v. Barnes*, 295 F.3d 1354 (D.C. Cir. 2002) is simply a precursor to the Supreme Court's decision in *United States v. Hayes*, 555 U.S. 415 (2009). It has nothing to do with the spousal element and/or its lack of clarity in §921(a)(33)(A)(ii).
2. *Buster v. United States*, 447 F.3d 1130 (8<sup>th</sup> Cir. 2006). This decision does treat the "similarly situated to a spouse" element, rather the holding is that a "live-in girlfriend" can in some situations be "similarly situated to a spouse". See *Buster*, citing *Shelton, Denis* and *Cuervo* (447 F.3d at 1133) each of which deal with couples who cohabited. In fact, *Cuervo* announces no standard of proof at all. Next is the *White* case cited in *Buster* at page 1133. In *White* the couple lived together continuously for a year and on and off for several months after<sup>1</sup>.

Our point here is that standard hallmarks of a spousal relationship are competency to enter into such a union and cohabitation. Overnight visits or weekend get-togethers cannot and do not count. Moreover, *Cary* or any of the decisions cited in it does not serve as constitutional notice to Mr. DeFrance; and it is an internally inconsistent decision that has no precedential value.

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<sup>1</sup> Yet *Cary* states "[t]here is no requirement that the defendant and victim *ever* lived together" (emphasis added). 2008 WL 479433 at \*3. There is no authority for this categorical statement.

## DEFENSES

Mr. DeFrance renews all of his pretrial motions together with their respective supporting briefs (ECF Nos. 14, 15, 16, 17, 31, 32, 43, 44, 52, 69, 70, 74, 105, 106, 115, and 116).

Mr. DeFrance asserts each and every defense set forth in his Notice of Defenses (ECF No. 27). Those are:

- The defense of public authority;
- The defense of entrapment by estoppel; and
- The defense of innocent intent.

In addition, Mr. DeFrance asserts the defense of lack of fair warning as outlined in the Ninth Circuit's decision in styled as *United States v. Lewis*, 368 F.3d 1102, 1106 (9<sup>th</sup> Cir. 2004) and the Supreme Court's decision in *Bouie v. City of Columbia*, 378 U.S. 347 (1964) (holding that unforeseeable judicial enlargement of a criminal statute is akin to an ex post facto law and is prohibited by the Due Process Clause).

Insofar as this defense is concerned, we expect that the testimony will show that neither (or any) of the professional actors in Mr. DeFrance's PFMA proceeding (Judge, Defense Attorney, Prosecutor); nor any of the records of that proceeding, reflect that Mr. DeFrance was pleading guilty to a §922(g)(9) predicate. Since 2010 under the Supreme Court's decision in *Padilla v. Kentucky*, 559 U.S. 356, the Sixth

Amendment requires that a criminal defense attorney provide advice about important collateral matters. This holding in *Padilla* is important in this case because it runs counter to the previous and widely held distinction between direct and collateral consequences. Moreover, two other points will be important here *vis-à-vis* the evidence at trial.

First, under 18 USC §921(a)(33)(B)(i)(I) a person cannot be considered “convicted” of a §922(g)(9) predicate *unless* represented by counsel. We argue that this means competent counsel. Second, defense counsel’s failure to advise Mr. DeFrance of the consequences of a PFMA *vis-à-vis* federal firearms rights only reinforces (in a “collateral estoppel” sense) the importance of the government’s consistent approval/authorization for Mr. DeFrance to transact in firearms; not once, but on five occasions (Exhibit 508).

Through our government witnesses we expect to establish that in the situation of what are called “default proceeds” the NICS examiner working on the relevant 4473s is supposed to keep working on them and had up to ninety (90) days to reach a final determination on Mr. DeFrance’s prohibited person status. And that can even include the examiner reaching out to local law enforcement and other state agencies. Had the Sanders County law enforcement/Justice Court records and PFMA statute of conviction been examined there could be no other conclusion but that Mr. DeFrance was not a prohibited person under §922(g)(9); because he was only in a

dating relationship with his PFMA victim; a relationship not covered *until recently* by §922(g)(9). Another way to put this is that to hold this trial in an effort to prove that Mr. DeFrance and his PFMA victim were involved in some iteration of a “spousal” relationship violates the due process and *ex post facto* principles set forth in *Bouie v. City of Columbia*, 378 U.S. 544 (1964) and *United States v. Lanier*, 520 U.S. 259, 266-267 (1997).

Also, Mr. DeFrance will claim at trial that the five-year statute of limitations has expired on each and every count in the indictment as set forth in 18 USC §3282 because the government has been aware of Mr. DeFrance’s background status since at least February 10, 2015, when Mr. DeFrance filled out what would be the first of five 4473 Forms (Exhibit 508). Thus, any indictment to litigate the “relationship” element set forth in 18 USC §921(a)(33)(A)(ii) ought to have been filed on or before February 9, 2020. Since the original indictment in this case was filed on July 28, 2021, the charges are approximately seventeen (17) months out of time.

**POSSIBLE DEFENSE WITNESSES DEPENDING  
ON WHO THE GOVERNMENT CALLS**

Mr. DeFrance identifies the following possible witnesses, contingent on who the government calls, to include:

- Shane Bartschi (Principal of Charlo School);
- Claudette Bird (Records Custodian at Two Eagle River School);



- Robyn F. Largent (Retired Sanders County Deputy Sheriff);
- William “Bill” Brown (Dispatcher, Sanders County Sheriff’s Office);
- Donald M. Strine (retired Sanders County Justice of the Peace);
- Kirk Krutilla (Mr. DeFrance’s 2013 court-appointed defense counsel);
- Stephen Feuerstein (Investigative Analyst and DFD NICS Coordinator with the United States Department of Justice, Bureau of Alcohol, Tobacco and Firearms);
- Dana Pickles (Program Analyst in the Denial Enforcement and NICS Intelligence Branch of the United States Department of Justice Bureau of Alcohol, Tobacco and Firearms);
- Brian A. Barker (Records Custodian for the Federal Bureau of Investigation Criminal Justice Information Services Division’s National Instance Criminal Background Check System Section);
- Jennifer Morigeau (Jermain Charlo’s Mother);
- Valenda Morigeau (Jermain Charlo’s Aunt);
- Danielle Matt/Garcia (Jermain Charlo’s Aunt);
- Vicki Velarde (Jermain Charlo’s Grandmother);
- David Velarde Jr. (Jermain Charlo’s Step-Grandfather);
- Christian Woody (Jermain Charlo’s acquaintance in New Mexico);
- Colton Monarco (Jermain Charlo’s companion in New Mexico);
- Jocelyn M. Stevens (Jermain Charlo’s childhood friend);
- Shawn DeFrance (Mr. DeFrance’s Father);
- Jennifer DeFrance (Mr. DeFrance’s Mother); and

- Detective Guy Baker (Case Agent for the government).

### OFFERS OF PROOF

1. In its trial brief (ECF No. 166, pp. 10-11), the government states that it desires the Court to inquire regarding the fairness of its plea agreement offer. The offer included Mr. DeFrance waiving *ex post facto* concerns and pleading guilty to a single count superseding information under 18 USC §922(g)(9) (2022) because Mr. DeFrance was in a current dating relationship with Jermain Charlo. We contend that in fairness this ought to be considered an admission by the government. *See Am. Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 227 (9<sup>th</sup> Cir. 1988) (holding that “statements of fact contained in a brief may be considered admissions of the party in discretion of the district court”). To move forward with this trial where the government asserts in its trial brief (ECF No. 166) that the fairest resolution of this case was to agree that Mr. DeFrance and Jermain Charlo were simply dating violates due process under the Fifth Amendment and the doctrine of preclusion of inconsistent positions. *See Russell v. Rolfs*, 893 F.2d 1033, 1037 (9<sup>th</sup> Cir. 1990):

The doctrine of judicial estoppel, sometimes referred to as the doctrine of preclusion of inconsistent positions, is invoked to prevent a party from changing its position over the course of judicial proceedings when such positional changes have an adverse impact on the judicial process. *See 1B Moore's Federal Practice* ¶ .405[8], at 238–42 (2d Ed.1988). ‘The policies underlying preclusion of inconsistent positions are “general consideration[s] of the orderly administration of justice and regard for the dignity of judicial proceedings.” ’ *Arizona v. Shamrock*

*Foods Co.*, 729 F.2d 1208, 1215 (9th Cir.1984), *cert. denied*, 469 U.S. 1197, 105 S.Ct. 980, 83 L.Ed.2d 982 (1985) (citations omitted). Judicial estoppel is ‘intended to protect against a litigant playing “fast and loose with the courts.” ’ *Rockwell International Corp. v. Hanford Atomic Metal Trades Council*, 851 F.2d 1208, 1210 (9th Cir.1988) (citations omitted). Because it is intended to protect the integrity of the judicial process, it is an equitable doctrine invoked by a court at its discretion.

... Judicial estoppel is most commonly applied to bar a party from making a factual assertion in a legal proceeding which directly contradicts an earlier assertion made in the same proceeding or a prior one. *See generally* Note, *Judicial Estoppel: The Refurbishing of a Judicial Shield*, 55 Geo.Wash.L.Rev. 409, 410–12 (1987); Comment, *Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel*, 80 Nw.U.L.Rev. 1244 (1986).

*Russell v. Rolfs*, 893 F.2d 1033, 1037 (9<sup>th</sup> Cir. 1990).

2. The Court has signaled concerns that the defense may proffer certain evidence or questions to intended defense, government witnesses (Steven Feuerstein, Dana Pickles, and Brian Barker) that may involve inadmissible evidence (ECF No. 163). Insofar as these witnesses and/or any such evidence is concerned if the Court rules the evidence inadmissible the defense will seek permission to make an offer of proof during trial, or some other convenient time set by the Court, as to the substance and relevance of the evidence being offered as required by Fed. R. Ev. 103 and under *Holmes v. South Carolina*, 547 U.S. 319 (2006). (Defendant has a right to present his defense).

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### **JUDICIAL NOTICE**

The following Exhibits should be recognized, considered, and admitted in evidence under Fed. R. Ev. Rule 201: Exhibits 500, 501, 519, 520 and 521.

### **ANTICIPATED DEFENSE EXHIBIT LIST**

At trial, the defense will request admission of the following exhibits. A copy of the Defense's Exhibit Notebook will be hand delivered to Chambers.

| <b>Description</b>                                                                                                                                                                                                  | <b>Exhibit</b> |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------|
| Findings of Fact, Conclusions of Law, and Order<br>And Judgement (dated February 15, 2018 from Tribal<br>Court of the Confederated Salish and Kootenai Tribes<br>of the Flathead Reservation, Pablo, Montana) ..... | 500            |
| Parenting Plan and Child Support Order<br>(dated February 19, 2018 from Tribal Court of the<br>Confederated Salish and Kootenai Tribes of the<br>Flathead Reservation, Pablo, Montana).....                         | 501            |
| Jermain Charlo's Two Eagle River School Records .....                                                                                                                                                               | 502            |
| Spotify Original " <i>Stolen</i> " Podcast Transcripts re:<br>Disappearance of Jermain Charlo.....                                                                                                                  | 503            |
| April 14, 2013, Audio Recording of<br>Deputy Largent's Interview of Jermain Charlo.....                                                                                                                             | 504            |
| April 14, 2013, Transcription of Audio-Recording of<br>Deputy Largent's Interview of Jermain Charlo.....                                                                                                            | 505            |
| September 30, 2021, Audio Recording of<br>Detective Guy Baker's Interview of Vicki Velarde .....                                                                                                                    | 506            |

|                                                                                                                                                                                            |     |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| September 30, 2021, Transcription of Audio-Recording<br>of Detective Guy Baker’s Interview of Vicki Velarde.....                                                                           | 507 |
| Michael DeFrance’s <i>Sealed</i> ATF 4473 Forms (ECF No. 28) .....                                                                                                                         | 508 |
| <i>Sealed</i> Email Chain (ECF No. 63) between<br>Stephen Feuerstein, Dana Pickles, and Jennifer Clark.....                                                                                | 509 |
| Timeline of Events (for illustrative purposes).....                                                                                                                                        | 510 |
| Sanders County Justice Court Documents .....                                                                                                                                               | 511 |
| Deputy Robert F. Largent’s April 15, 2013 Case Report.....                                                                                                                                 | 512 |
| April 13, 2013, Audio Recording of Tribal 911 Call to<br>Sanders County Sheriff’s Office.....                                                                                              | 513 |
| April 13, 2013, Transcription of Audio-Recording of<br>Tribal 911 Call to Sanders County Sheriff’s Office.....                                                                             | 514 |
| April 13, 2013, Audio Recording of Deputy Largent’s<br>Call to Sanders County Sheriff’s Office.....                                                                                        | 515 |
| April 13, 2013, Transcription of Audio-Recording of<br>Deputy Largent’s Call to Sanders County Sheriff’s Office .....                                                                      | 516 |
| Vicki Velarde Deposition Timeline of Events .....                                                                                                                                          | 517 |
| Jermain Charlo’s Charlo High School Records.....                                                                                                                                           | 518 |
| Mont. Code Ann. §45-5-206 (2011);<br>United States Code §921(a)(33)(A)(ii) (2011);<br>United States Code §921(a)(33)(A)(ii) (2022); and<br>United States Code §921(a)(37)(A-C) (2022)..... | 519 |
| Blank ATF Form 4473 (Revised 2012).....                                                                                                                                                    | 520 |
| Blank ATF Form 4473 (Revised 2022).....                                                                                                                                                    | 521 |

Michael DeFrance's NCIC Interstate Identification  
Index Criminal History dated 2/26/2021 ..... 522

Vacancy Notice of 509 Penname Street, Dixon, MT ..... 523

Affidavit of Record Custodian (Brian A. Barker, FBI)..... 524

**RULE 29 - FED. R. CRIM. P.**

By his not guilty plea and under Rule 29, Fed. R. Crim. P., and *Jackson v. Virginia*, 443 U.S. 307 (1976) Mr. DeFrance contends that the government's evidence is insufficient to convict him on any charge in the second superseding indictment.

Other authorities the Court may want to consider in ruling on our Rule 29 motion would be the following, among others.

As a result of *Obergefell v. Hodges*, 576 U.S. 644 (2015), a spouse includes an individual married to a person of the opposite or same sex. On June 26, 2015, in *Obergefell*, the United States Supreme Court held that same-sex couples have the right to marry in all states and a state may not refuse to recognize a lawful same-sex marriage performed in another state based on its same-sex character. Two years prior to *Obergefell*, in *United States v. Windsor*, 570 U.S. 744 (2013), the Supreme Court held that Section 3 of the Defense of Marriage Act (DOMA) (1 U.S.C. § 7), which defined spouse to mean only a husband or wife of the opposite sex, was unconstitutional.

When Mr. DeFrance was convicted of PFMA in April, 2013, Title 1, Section 7 of the United States Code defined both “marriage” and “spouse” as follows:

**§7. Definition of “marriage” and “spouse”.**

*In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.*

1 USC §7 (emphasis added).

This statute, more commonly referred to as the 1996 Defense of Marriage Act (DOMA), was not formally repealed until December 13, 2022, by enactment of the Respect for Marriage Act. Thus, as of December 13, 2022, Title 1, Section 7 of the United States Code provides as follows:

**(a)**

For the purposes of any Federal law, rule, or regulation in which marital status is a factor, an individual shall be considered married if that individual’s marriage is between 2 individuals and is valid in the State where the marriage was entered into or, in the case of a marriage entered into outside any State, if the marriage is between 2 individuals and is valid in the place where entered into and the marriage could have been entered into in a State.

**(b)**

In this section, the term “State” means a State, the District of Columbia, the Commonwealth of Puerto Rico, or any other territory or possession of the United States.

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(c)

For purposes of subsection (a), in determining whether a marriage is valid in a State or the place where entered into, if outside of any State, only the law of the jurisdiction applicable at the time the marriage was entered into may be considered.

1 USC §7 (2022).

Under DOMA (which was only recently repealed) the words “marriage” and “spouse” connote a legal union (and as a result of *Windsor* and *Obergefell* between two people regardless of gender). As relevant here, since Congress uses the term “spouse” in the relationship aspect of 18 USC §921(a)(33)(A)(ii), under DOMA that term is confined to “legal” unions. Here, the government will be unable to prove that Mr. DeFrance was actually legally married to the PFMA victim at the time of the PFMA. Nor will the government be able to prove that Mr. DeFrance and the PFMA victim were in a lawful common law marriage either. Several states, Montana among them, currently allow what is often referred to as “common-law” marriage. While the laws differ slightly, the common-law marriage doctrine generally provides that a couple is considered legally married if both individuals are of age, agree to be married, cohabitate, and hold themselves out to be married to each other. Montana law recognizes common law marriage under § 40-1-403, MCA. The party asserting a valid common law marriage must prove by a preponderance of the evidence that the parties: 1) were competent to enter into a marriage; 2) assumed a marital relationship by mutual consent and agreement; and 3) confirmed their



marriage by cohabitation and public repute. *Barnett v. Hunsaker*, 968 P.2d 281 (1998); *also see In re J.K.N.A.*, 454 P.3d 642, 649 (2019).

Although there may be a certain amount of timeline imprecision, we expect the trial proof to show through records and testimony that Mr. DeFrance met the PFMA victim in the early part of 2010. Further proof will show that towards the end of that same year, and likely as the Fall season approached, the PFMA victim moved from Montana to New Mexico to reside there and attend school for approximately one year and eight months, returning to Montana to reside permanently in the summer of 2012. In the period prior to her departure to New Mexico the PFMA victim would have been 14-15 years old, and Mr. DeFrance would have been 16-17 years old. Not only did Mr. DeFrance and the PFMA victim not live together during that time, the evidence will show that neither the PFMA victim's parent(s), nor Mr. DeFrance's parents, ever grant, or even consider, allowing their children to marry under Mont. Code Ann. §40-1-213:

**40-1-213. Judicial approval.** (1) The district court may order the clerk of the district court to issue a marriage license and a marriage certificate form to a party 16 or 17 years of age who has no parent capable of consenting to the party's marriage or has the consent of both parents or of the parent having the actual care, parenting authority, and control to the party's marriage, if capable of giving consent, or of the party's guardian. The court must require both parties to participate in a period of marriage counseling involving at least two separate counseling sessions not less than 10 days apart with a designated counselor as a condition

of the order for issuance of a marriage license and a marriage certificate form under this section.

(2) A marriage license and a marriage certificate form may be issued under this section only if the court finds that the underaged party is capable of assuming the responsibilities of marriage and the marriage will serve the party's best interests. Pregnancy alone does not establish that the best interests of the party will be served.

(3) The district court shall authorize performance of a marriage by proxy upon the showing required by the provisions on solemnization.

Mont. Code Ann. §40-1-213.

Upon her return to Montana from New Mexico in the summer of 2012, the PFMA victim was 17 years old and still a minor. She did not turn 18 years old until April 23, 2013, ten days after the PFMA. Thus, absent proof that the PFMA victim had parental permission to marry the same analysis applies. The PFMA victim and Mr. DeFrance could not legally marry because absent parental consent, the PFMA victim was incompetent to do so. It was therefore both legally and factually impossible for Mr. DeFrance and the PFMA victim to actually be “spouses” to each

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other; or be “similarly situated” to each other as spouses at the time of the PFMA.<sup>2</sup> (See ECF No. 71, p. 37 confining relationship element to “the time the [PFMA] was committed”).

Legal impossibility exists when the intended acts would not constitute a crime under the applicable law. Factual impossibility refers to those situations in which, unknown to the defendant, the consummation of the intended criminal act is physically impossible. *United States v. Luttrell*, 889 F.2d 806, 810 (9<sup>th</sup> Cir.1989), *vacated in part on other grounds*, 923 F.2d 764 (9<sup>th</sup> Cir.1991) (*en banc*), *cert. denied sub nom. Kegley v. United States*, 503 U.S. 959 (1992).

**RULE 23(c) – FED. R. CRIM. P.**

Mr. DeFrance waives the findings required under this rule only if the Court finds Mr. DeFrance not guilty on all counts; but requests findings if the Court intends to find Mr. DeFrance guilty on any count.

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<sup>2</sup> Also, *Black’s Law Dictionary, Fifth Edition*, defines “similar” as: “Nearly corresponding; resembling in many respects; somewhat like; having a general likeness, although allowing for some degree of difference. *Gangi v. Sears, Roebuck & Co.*, 33 Conn. Sup. 81, 360 A.2d 907, 908. Word “similar” is generally interpreted to mean that one thing has a resemblance in many respects, nearly corresponds, is somewhat like, or has a general likeness to some other thing but is not identical in form and substance, although in some cases “similar” may mean identical or exactly alike. It is a word with different meanings depending on context in which it is used. *Guarantee Mut. Life Ins. Co. v. Harrison*, Tex.Civ.App., 358 S.W.2d 404, 406.”

**CONCLUSION**

WHEREFORE, Mr. DeFrance requests this Court take this trial brief into consideration.

RESPECTFULLY SUBMITTED this 21<sup>st</sup> day of April, 2023.

/s/ Michael Donahoe  
MICHAEL DONAHOE  
Deputy Federal Defender  
Counsel for Defendant

**CERTIFICATE OF SERVICE**  
**L.R. 5.2(b)**

I hereby certify that on April 21, 2023, a copy of the foregoing document was served on the following persons by the following means:

  1         CM-ECF

  2         Mail

1.     CLERK, UNITED STATES DISTRICT COURT

1.     JENNIFER S. CLARK  
       TIMOTHY J. RACICOT  
       Assistant United States Attorneys  
       United States Attorney's Office  
       101 East Front Street, Suite 401  
       Missoula, MT 59802  
       Counsel for the United States of America

2.     MICHAEL BLAKE DeFRANCE  
       Defendant

      /s/ Michael Donahoe        
FEDERAL DEFENDERS OF MONTANA

The alternative school of the  
Confederated Salish  
and Kootenai Tribes  
of the Flathead Reservation



P.O. Box 160  
Pablo, MT 59855  
(406) 675-0292  
Fax (406) 675-0294

May 27, 2022

To Whom It May Concern:

The address on file for Jermain Charlo's tenure at Two Eagle River School was 309 Frank McClure St. Dixon, MT. 59831. During 2010-11 Jermain transferred to Dulce High School in Dulce, NM. When students transfer to another school I am not given the address of new residence. For the 2012-13 school year she transferred back to Two Eagle River at the beginning of the year and attended for full year. For the 2013-14 school year Jermain enrolled beginning of the school year and was a 10 day drop ending 10/31/2013. She re-enrolled 1/8/2014 and graduated 6/5/2014.

If you have further questions please feel free to call.

Sincerely,

Claudette Bird  
Home-School Coordinator



|                                                                                                                                                                                                             |                                                                                                                                                                        |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p style="text-align: center;"><b>08-09</b></p> <p style="text-align: center;"><b>Two Eagle River School</b></p> <p>PO Box 160, Pablo, MT 59855<br/>Generated on 05/27/2022<br/>03:37:23 PM Page 1 of 2</p> | <p style="text-align: center;"><b>Student Period Attendance Detail</b></p> <p style="text-align: center;">Jermain A. Charlo<br/>ID#: 997 Grade: 08 DOB: 04/28/1995</p> |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

**CONTROLLED:** This page contains PII and should be handled to protect privacy.

**Terms Included:** All Terms  
**Course Summary**

| Course                      | Excused | Unexcused | Tardy |
|-----------------------------|---------|-----------|-------|
| 30-1 Jr. High Health        | 4       | 13        | 0     |
| 52-1 Jr. High English       | 4       | 13        | 0     |
| 59-1 Jr. High Math          | 4       | 14        | 0     |
| 63-1 Jr. High Science       | 4       | 13        | 0     |
| 64-1 Jr. High Social Stud   | 4       | 9         | 0     |
| 65-1 Jr. High Music         | 4       | 2         | 0     |
| 69-1 Jr. High Home Cult     | 4       | 2         | 0     |
| 72-1 Jr. High PE            | 4       | 13        | 0     |
| 78-1 Jr. High Art           | 4       | 2         | 0     |
| 72-1 Jr. High Reading       | 4       | 13        | 0     |
| 851-1 Jr. High Nova Net Lab | 4       | 14        | 1     |

**Period Summary**

| Period | Excused | Unexcused | Tardy |
|--------|---------|-----------|-------|
| 1      | 4       | 14        | 1     |
| 2      | 4       | 13        | 0     |
| 3      | 4       | 13        | 0     |
| 4      | 4       | 13        | 0     |
| 5      | 4       | 10        | 0     |
| 6      | 4       | 10        | 0     |
| 7      | 4       | 9         | 0     |
| 8      | 4       | 9         | 0     |
| 9      | 4       | 2         | 0     |
| 10     | 4       | 2         | 0     |
| 11     | 4       | 2         | 0     |

**Day Summary**

| Date                                                   | Periods |    |    |    |    |    |    |    |    |    |    |    |
|--------------------------------------------------------|---------|----|----|----|----|----|----|----|----|----|----|----|
|                                                        | 1       | 2  | 3  | 4  | 5  | 6  | 7  | 8  | 9  | 10 | 11 | 12 |
| 05/19/2009 Full-Day                                    | A       | A  | A  | A  | A  | A  | A  | A  | A  | A  | A  |    |
| Description: Absent                                    |         |    |    |    |    |    |    |    |    |    |    |    |
| 05/19/2009 Full-Day                                    |         |    |    |    |    |    |    |    |    |    |    |    |
| 04/30/2009 Full-Day                                    | A       | A  | A  | A  | A  | A  | A  | A  | A  |    |    |    |
| Description: Absent                                    |         |    |    |    |    |    |    |    |    |    |    |    |
| 04/29/2009 Full-Day                                    | AE      | AE | AE | AE | AE | AE | AE | AE | AE | AE | AE | AE |
| Description: Absent Excused Comments: Family           |         |    |    |    |    |    |    |    |    |    |    |    |
| 04/13/2009 Full-Day                                    | A       | A  | A  | A  | A  | A  | A  | A  | A  |    |    |    |
| Description: Absent                                    |         |    |    |    |    |    |    |    |    |    |    |    |
| 04/07/2009 Full-Day                                    | AE      |    |    |    |    |    |    |    |    |    |    |    |
| 03/30/2009 Full-Day                                    | A       | A  | A  | A  | A  | A  | A  |    |    |    |    |    |
| Description: Absent                                    |         |    |    |    |    |    |    |    |    |    |    |    |
| 03/25/2009 Full-Day                                    | A       | A  | A  | A  | A  | A  | A  | A  | A  |    |    |    |
| Description: Absent                                    |         |    |    |    |    |    |    |    |    |    |    |    |
| 03/16/2009 Full-Day                                    |         |    |    |    |    |    |    |    |    |    |    |    |
| Description: Absent Excused Comments: Family           |         |    |    |    |    |    |    |    |    |    |    |    |
| 03/09/2009 Full-Day                                    | A       | A  | A  | A  | A  | A  | A  | A  | A  |    |    |    |
| Description: Absent                                    |         |    |    |    |    |    |    |    |    |    |    |    |
| 02/26/2009 Full-Day                                    |         |    |    |    |    |    |    |    |    |    |    |    |
| 02/17/2009 Full-Day                                    | A       |    |    |    |    |    |    |    |    |    |    |    |
| Description: Absent                                    |         |    |    |    |    |    |    |    |    |    |    |    |
| 02/09/2009 Full-Day                                    | A       | A  | A  | A  | A  | A  | A  | A  | A  |    |    |    |
| Description: Absent                                    |         |    |    |    |    |    |    |    |    |    |    |    |
| 02/02/2009 Full-Day                                    |         |    |    |    |    |    |    |    |    |    |    |    |
| 01/29/2009 Full-Day                                    | A       | A  | A  | A  | A  | A  |    |    |    |    |    |    |
| Description: Absent                                    |         |    |    |    |    |    |    |    |    |    |    |    |
| 01/27/2009 Full-Day                                    | AE      | AE | AE | AE | AE | AE | AE | AE | AE | AE | AE | AE |
| Description: Absent Excused Comments: Sick stomach flu |         |    |    |    |    |    |    |    |    |    |    |    |

**Term Summary**

| Q1            | Periods |   |   |   |   |   |   |   |   |    |    |    | Total |
|---------------|---------|---|---|---|---|---|---|---|---|----|----|----|-------|
|               | 1       | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 |       |
| Absent        | 0       | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0  | 0  | 0  | 0     |
| Early Release | 0       | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0  | 0  | 0  | 0     |
| Tardy         | 0       | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0  | 0  | 0  | 0     |

Page 2 of 2  
 CONTROLLED

**Student Period Attendance Detail continued**  
 Jermain A. Charlo

Two Eagle River School -- 08-09  
 05/27/2022 03:37:23 PM

| Q2            | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 | Total |
|---------------|---|---|---|---|---|---|---|---|---|----|----|----|-------|
| Absent        | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0  | 0  | 0  | 0     |
| Early Release | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0  | 0  | 0  | 0     |
| Tardy         | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0  | 0  | 0  | 0     |

| Q3            | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 | Total |
|---------------|---|---|---|---|---|---|---|---|---|----|----|----|-------|
| Absent        | 7 | 6 | 6 | 6 | 6 | 7 | 5 | 5 | 5 | 2  | 2  | 0  | 57    |
| Early Release | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0  | 0  | 0  | 0     |
| Tardy         | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0  | 0  | 0  | 1     |

| Q4            | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 | Total |
|---------------|---|---|---|---|---|---|---|---|---|----|----|----|-------|
| Absent        | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0  | 0  | 0  | 0     |
| Early Release | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0  | 0  | 0  | 0     |
| Tardy         | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0  | 0  | 0  | 0     |



|                                                                                                                                    |                                                                                                    |
|------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------|
| <b>10-11</b><br><b>Two Eagle River School</b><br>PO Box 160, Pablo, MT 59855<br>Generated on 05/27/2022<br>03:33:59 PM Page 1 of 2 | <b>Student Period Attendance Detail</b><br>Jermaln A. Charlo<br>ID#: 997 Grade: 10 DOB: 04/23/1995 |
|------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------|

**CONTROLLED:** This page contains PII and should be handled to protect privacy.

**Terms Included:** All Terms  
**Course Summary**

| Course                       | Excused | Unexcused | Tardy |
|------------------------------|---------|-----------|-------|
| 20-1 World History           | 1       | 11        | 0     |
| 20-3 Home Cultures           | 0       | 12        | 0     |
| 61-1 Pre-Algebra             | 0       | 13        | 0     |
| 98-2 Earth Science           | 0       | 13        | 0     |
| 130-3 Physical Science       | 1       | 13        | 0     |
| 150-3 Reading with a Purpose | 0       | 13        | 0     |
| 799-1 English Comp 1         | 0       | 12        | 0     |
| 888-2 Computer Arts          | 0       | 12        | 0     |

**Period Summary**

| Period | Excused | Unexcused | Tardy |
|--------|---------|-----------|-------|
| 1      | 0       | 13        | 0     |
| 2      | 0       | 12        | 0     |
| 3      | 0       | 12        | 0     |
| 4      | 0       | 12        | 0     |
| 5      | 0       | 12        | 0     |
| 6      | 0       | 12        | 0     |
| 7      | 1       | 11        | 0     |

**Day Summary**

| Date                                                                | Periods |    |    |    |    |    |    |    |
|---------------------------------------------------------------------|---------|----|----|----|----|----|----|----|
|                                                                     | 1       | 2  | 3  | 4  | 5  | 6  | 7  | 8  |
| 10/13/2010 Regular Day                                              | A       | A  | A  | A  | A  | A  | A  | A  |
| Description: Absent Comments: transfer                              |         |    |    |    |    |    |    |    |
| 10/12/2010 Regular Day                                              |         |    |    |    |    |    |    |    |
| Description: Absent Comments: moved out of state                    |         |    |    |    |    |    |    |    |
| 10/11/2010 Regular Day                                              | A       | A  | A  | A  | A  | A  | A  | A  |
| Description: Absent Comments: moved out of state                    |         |    |    |    |    |    |    |    |
| 10/10/2010 Regular Day                                              |         |    |    |    |    |    |    |    |
| Description: Absent                                                 |         |    |    |    |    |    |    |    |
| 10/06/2010 Regular Day                                              | A       | A  | A  | A  | A  | A  | A  | A  |
| Description: Absent Comments: Moved out of state                    |         |    |    |    |    |    |    |    |
| 10/05/2010 Regular Day                                              |         |    |    |    |    |    |    |    |
| Description: Absent                                                 |         |    |    |    |    |    |    |    |
| 10/04/2010 Regular Day                                              | A       | A  | A  | A  | A  | A  | A  | A  |
| Description: Absent                                                 |         |    |    |    |    |    |    |    |
| 09/25/2010 Regular Day                                              |         |    |    |    |    |    |    |    |
| Description: Absent                                                 |         |    |    |    |    |    |    |    |
| 09/28/2010 Regular Day                                              | A       | A  | A  | A  | A  | A  | A  | A  |
| Description: Absent                                                 |         |    |    |    |    |    |    |    |
| 09/27/2010 Regular Day                                              |         |    |    |    |    |    |    |    |
| Description: Absent                                                 |         |    |    |    |    |    |    |    |
| 09/23/2010 Regular Day                                              | A       |    |    |    |    |    |    |    |
| Description: Absent                                                 |         |    |    |    |    |    |    |    |
| 09/21/2010 Regular Day                                              |         |    |    |    |    |    | A  | A  |
| Description: Absent                                                 |         |    |    |    |    |    |    |    |
| 09/16/2010 Regular Day                                              |         |    |    |    |    |    |    |    |
| Description: Absent                                                 |         |    |    |    |    |    |    |    |
| 09/15/2010 Regular Day                                              | SA      | SA | SA | SA | SA | SA | SA | SA |
| Description: School Activity Comments: Rathend Lake Honoring        |         |    |    |    |    |    |    |    |
| 09/14/2010 Regular Day                                              |         |    |    |    |    |    |    |    |
| Description: School Activity Comments: Rathend Lake Honoring        |         |    |    |    |    |    |    |    |
| 09/13/2010 Regular Day                                              |         |    |    | A  | A  | T  | AE | AE |
| Description: Absent Comments: Checkin 1:58 PM court                 |         |    |    |    |    |    |    |    |
| Description: Absent Excused Comments: CheckOut 3:59 PM home dr appt |         |    |    |    |    |    |    |    |
| 09/08/2010 Regular Day                                              |         |    |    |    |    |    |    |    |
| Description: Absent                                                 |         |    |    |    |    |    |    |    |

Page 2 of 2  
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**Student Period Attendance Detail continued**  
Jermain A. Charlo

Two Eagles River School — 10-11  
05/27/2022 03:33:59 PM

**Term Summary**

| Term Summary  |    | Periods |    |    |    |    |    |    |    |       |
|---------------|----|---------|----|----|----|----|----|----|----|-------|
|               | Q1 | 1       | 2  | 3  | 4  | 5  | 6  | 7  | 8  | Total |
| Absent        |    | 13      | 11 | 12 | 12 | 12 | 11 | 12 | 14 | 97    |
| Early Release |    | 0       | 0  | 0  | 0  | 0  | 0  | 0  | 0  | 0     |
| Tardy         |    | 0       | 0  | 0  | 0  | 0  | 1  | 0  | 0  | 1     |
|               | Q2 | 1       | 2  | 3  | 4  | 5  | 6  | 7  | 8  | Total |
| Absent        |    | 0       | 0  | 0  | 0  | 0  | 0  | 0  | 0  | 0     |
| Early Release |    | 0       | 0  | 0  | 0  | 0  | 0  | 0  | 0  | 0     |
| Tardy         |    | 0       | 0  | 0  | 0  | 0  | 0  | 0  | 0  | 0     |
|               | Q3 | 1       | 2  | 3  | 4  | 5  | 6  | 7  | 8  | Total |
| Absent        |    | 0       | 0  | 0  | 0  | 0  | 0  | 0  | 0  | 0     |
| Early Release |    | 0       | 0  | 0  | 0  | 0  | 0  | 0  | 0  | 0     |
| Tardy         |    | 0       | 0  | 0  | 0  | 0  | 0  | 0  | 0  | 0     |
|               | Q4 | 1       | 2  | 3  | 4  | 5  | 6  | 7  | 8  | Total |
| Absent        |    | 0       | 0  | 0  | 0  | 0  | 0  | 0  | 0  | 0     |
| Early Release |    | 0       | 0  | 0  | 0  | 0  | 0  | 0  | 0  | 0     |
| Tardy         |    | 0       | 0  | 0  | 0  | 0  | 0  | 0  | 0  | 0     |

|                                                                                                                             |                                                                                                     |
|-----------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------|
| <b>Two Eagle River School</b><br>12-13<br>PO Box 160, Pablo, MT 59853<br>Generated on 05/27/2022<br>03:33:08 PM Page 1 of 4 | <b>Student Period Attendance Detail</b><br>Jermelin A. Charlo<br>ID#: 997 Grade: 11 DOB: 04/23/1995 |
|-----------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------|

CONTROLLED: This page contains PII and should be handled to protect privacy.

Terms Included: All Terms  
Course Summary

| Course         | Excused | Unexcused | Tardy |
|----------------|---------|-----------|-------|
| 15-1 Chemistry | 2       | 24        | 0     |

|          |   |    |   |
|----------|---|----|---|
| 22-6 THG | 8 | 11 | 0 |
| 24-5 PE  | 3 | 7  | 2 |
| 24-9 PE  | 1 | 24 | 0 |

|                     |   |   |   |
|---------------------|---|---|---|
| 38-13 Home Cultures | 4 | 6 | 0 |
| 38-13 Home Cultures | 4 | 6 | 0 |

|                     |   |   |   |
|---------------------|---|---|---|
| 38-13 Home Cultures | 4 | 6 | 0 |
| 38-13 Home Cultures | 4 | 6 | 0 |

|                |   |    |   |
|----------------|---|----|---|
| 112-5 Algebra  | 2 | 25 | 0 |
| 401-13 Spanish | 7 | 12 | 0 |

|                            |   |   |   |
|----------------------------|---|---|---|
| 747-7 Business & Computers | 7 | 8 | 0 |
| 748-4 MT Flora & Fauna     | 3 | 7 | 0 |

|                      |   |   |   |
|----------------------|---|---|---|
| 798-4 English Comp 2 | 8 | 9 | 0 |
| 798-4 English Comp 2 | 8 | 9 | 0 |

|                       |   |    |   |
|-----------------------|---|----|---|
| 867-3 Transition Math | 3 | 8  | 0 |
| 869-1 Montana Ecology | 8 | 10 | 0 |

|               |   |    |   |
|---------------|---|----|---|
| 996-7 3-D Art | 2 | 22 | 0 |
|---------------|---|----|---|

Day Summary

Periods

| Date                 | 1 | Home | 2 | 3 | 4 | 5 | 6 | 7 | 8 |
|----------------------|---|------|---|---|---|---|---|---|---|
| 06/05/2013 8 Periods | A | A    | A | A | A | A | A | A | A |

|                      |    |    |    |    |    |    |    |    |    |
|----------------------|----|----|----|----|----|----|----|----|----|
| 05/30/2013 8 Periods | SA | SA | SA | SA | SA | SA | SA | SA | SA |
|----------------------|----|----|----|----|----|----|----|----|----|

|                      |   |   |   |   |   |   |   |   |   |
|----------------------|---|---|---|---|---|---|---|---|---|
| 05/29/2013 8 Periods | A | A | A | A | A | A | A | A | A |
|----------------------|---|---|---|---|---|---|---|---|---|

|                      |   |   |   |   |   |   |   |   |   |
|----------------------|---|---|---|---|---|---|---|---|---|
| 05/28/2013 8 Periods | A | A | A | A | A | A | A | A | A |
|----------------------|---|---|---|---|---|---|---|---|---|

|                      |   |   |   |   |   |   |   |   |   |
|----------------------|---|---|---|---|---|---|---|---|---|
| 05/22/2013 8 Periods | A | A | A | A | A | A | A | A | A |
|----------------------|---|---|---|---|---|---|---|---|---|

|                      |   |   |   |   |   |   |   |   |   |
|----------------------|---|---|---|---|---|---|---|---|---|
| 05/20/2013 8 Periods | A | A | A | A | A | A | A | A | A |
|----------------------|---|---|---|---|---|---|---|---|---|

|                      |   |   |   |   |   |   |   |   |   |
|----------------------|---|---|---|---|---|---|---|---|---|
| 05/15/2013 8 Periods | A | A | A | A | A | A | A | A | A |
|----------------------|---|---|---|---|---|---|---|---|---|

|                      |   |   |   |   |   |   |   |   |   |
|----------------------|---|---|---|---|---|---|---|---|---|
| 05/13/2013 8 Periods | A | A | A | A | A | A | A | A | A |
|----------------------|---|---|---|---|---|---|---|---|---|

|                      |   |   |   |   |   |   |   |   |   |
|----------------------|---|---|---|---|---|---|---|---|---|
| 05/08/2013 8 Periods | A | A | A | A | A | A | A | A | A |
|----------------------|---|---|---|---|---|---|---|---|---|

Page 2 of 4  
CONTROLLED

**Student Period Attendance Detail continued**  
Jermain A. Chardo

Two Eagle River School — 12-13  
05/27/2022 03:33:08 PM

| Date                                                                      | Periods |      |    |    |    |    |    |    |
|---------------------------------------------------------------------------|---------|------|----|----|----|----|----|----|
|                                                                           | 1       | Home | 2  | 3  | 4  | 5  | 6  | 7  |
| Description: Testing within School                                        |         |      |    |    |    |    |    |    |
| 05/07/2013 8 Periods                                                      |         |      |    |    |    |    |    |    |
| Description: Absent Comments: called but no answer                        |         |      |    |    |    |    |    |    |
| 05/07/2013 8 Periods                                                      |         |      |    |    |    |    |    |    |
| Description: Absent Comments: called but no answer                        |         |      |    |    |    |    |    |    |
| 05/01/2013 8 Periods                                                      | A       |      | A  | A  | A  | A  | A  | A  |
| Description: Absent Comments: called but no answer                        |         |      |    |    |    |    |    |    |
| 04/24/2013 8 Periods                                                      | A       |      | AE | AE | AE | AE | AE | AE |
| Description: Absent Excused Comments: Mom said student is home sick       |         |      |    |    |    |    |    |    |
| 04/22/2013 8 Periods                                                      | AE      |      | AE | AE | AE | AE | AE | AE |
| Description: Absent Excused Comments: Mom said student is home sick       |         |      |    |    |    |    |    |    |
| 04/15/2013 8 Periods                                                      | A       |      | A  | A  | A  | A  | A  | A  |
| Description: Absent Comments: called & left a msg.                        |         |      |    |    |    |    |    |    |
| 04/08/2013 8 Periods                                                      | A       |      | A  | A  | A  | A  | A  | A  |
| Description: Absent Comments: called & left a msg.                        |         |      |    |    |    |    |    |    |
| 04/03/2013 8 Periods                                                      | A       |      | A  | A  | A  | A  | A  | A  |
| Description: Absent Comments: called & left a msg.                        |         |      |    |    |    |    |    |    |
| 03/27/2013 8 Periods                                                      | A       |      | A  | A  | A  | A  | A  | A  |
| Description: Absent Comments: called & left a msg.                        |         |      |    |    |    |    |    |    |
| 03/21/2013 8 Periods                                                      |         |      |    | A  | A  | A  | A  | A  |
| Description: Absent Comments: called & left a msg.                        |         |      |    |    |    |    |    |    |
| 03/19/2013 8 Periods                                                      |         |      |    |    |    |    | SA | SA |
| Description: School Activity Comments: SKC                                |         |      |    |    |    |    |    |    |
| 03/14/2013 8 Periods                                                      | AE      |      | AE | AE | AE | AE | AE | AE |
| Description: Absent Excused Comments: Mom said student is still home sick |         |      |    |    |    |    |    |    |
| 03/11/2013 8 Periods                                                      | A       |      | A  | A  | A  | A  | A  | A  |
| Description: Absent Comments: called & left a msg.                        |         |      |    |    |    |    |    |    |
| 03/06/2013 8 Periods                                                      | AE      |      | AE | AE | AE | AE | AE | AE |
| Description: Absent Excused Comments: Mom said student is still home sick |         |      |    |    |    |    |    |    |
| 03/04/2013 8 Periods                                                      | AE      |      | AE | AE | AE | AE | AE | AE |
| Description: Absent Excused Comments: Mom said student is home sick       |         |      |    |    |    |    |    |    |
| 02/26/2013 8 Periods                                                      |         |      |    | A  | A  | A  | A  | A  |
| Description: Absent Comments: called & left a msg.                        |         |      |    |    |    |    |    |    |
| 02/19/2013 8 Periods                                                      | A       |      | A  | A  | A  | A  | A  | A  |
| Description: Absent Comments: called & left a msg.                        |         |      |    |    |    |    |    |    |
| 02/14/2013 8 Periods                                                      |         |      |    |    |    |    |    |    |

Page 3 of 4  
CONTROLLED

**Student Period Attendance Detail continued**  
Jermain A. Charlo

Two Eagle River School — 12-13  
05/27/2022 03:33:08 PM

|                                                                             | Periods |      |      |    |    |    |    |    |    |
|-----------------------------------------------------------------------------|---------|------|------|----|----|----|----|----|----|
| Date                                                                        | 1       | Home | 2    | 3  | 4  | 5  | 6  | 7  | 8  |
| 02/11/2013 8 Periods                                                        | A       |      | A    | A  | A  | A  | A  | A  | A  |
| Description: Absent Comments: called & left a msg.                          |         |      |      |    |    |    |    |    |    |
| 02/07/2013 8 Periods                                                        |         |      |      |    |    |    |    |    |    |
| Description: Absent Comments: called & left a msg.                          |         |      |      |    |    |    |    |    |    |
| 02/06/2013 8 Periods                                                        |         |      |      | A  |    |    |    |    |    |
| Description: Absent Comments: called & left a msg.                          |         |      |      |    |    |    |    |    |    |
| 01/28/2013 8 Periods                                                        | TEST    |      | TEST |    |    | T  | A  |    |    |
| Description: Testing within School Comments: Testing                        |         |      |      |    |    |    |    |    |    |
| Description: Testing within School                                          |         |      |      |    |    |    |    |    |    |
| 01/23/2013 8 Periods                                                        |         |      |      |    |    | A  |    |    |    |
| Description: Absent Comments: called & left a msg.                          |         |      |      |    |    |    |    |    |    |
| 01/23/2013 8 Periods                                                        |         |      |      |    |    | A  |    |    |    |
| Description: Absent Comments: called & left a msg.                          |         |      |      |    |    |    |    |    |    |
| 01/17/2013 8 Periods                                                        | AE      |      | AE   | AE | AE | AE | AE | AE | AE |
| Description: Absent Excused Comments: Aunt Vicki said jermain is still sick |         |      |      |    |    |    |    |    |    |
| 01/15/2013 8 Periods                                                        | AE      |      | AE   | AE | AE | AE | AE | AE | AE |
| Description: Absent Excused Comments: Mom said she's home sick              |         |      |      |    |    |    |    |    |    |
| 01/15/2013 8 Periods                                                        | AE      |      | AE   | AE | AE | AE | AE | AE | AE |
| Description: Absent Excused Comments: Mom said she's home sick              |         |      |      |    |    |    |    |    |    |
| 01/08/2013 8 Periods                                                        |         |      |      |    |    |    |    |    | T  |
| Description: Absent Excused Comments: Mom said she's home sick              |         |      |      |    |    |    |    |    |    |
| 12/13/2012 8 Periods                                                        | AE      |      | AE   | AE | AE | AE | AE | AE | AE |
| Description: Absent Excused Comments: Death in the family                   |         |      |      |    |    |    |    |    |    |
| 12/11/2012 8 Periods                                                        | AE      |      | AE   | AE | AE | AE | AE | AE | AE |
| Description: Absent Excused Comments: Death in the family                   |         |      |      |    |    |    |    |    |    |
| 12/03/2012 8 Periods                                                        | A       |      | A    | A  | A  | A  | A  | A  | A  |
| Description: Absent Comments: called but no answer                          |         |      |      |    |    |    |    |    |    |
| 11/19/2012 8 Periods                                                        | A       |      | A    | A  | A  | A  | A  | A  | A  |
| Description: Absent Comments: called but no answer                          |         |      |      |    |    |    |    |    |    |
| 11/14/2012 8 Periods                                                        |         |      | SA   |    |    |    | A  | A  | A  |
| Description: School Activity                                                |         |      |      |    |    |    |    |    |    |
| Description: Absent Comments: 2:25 home with mom                            |         |      |      |    |    |    |    |    |    |
| 11/07/2012 8 Periods                                                        | A       |      | A    | A  | A  | A  | A  | A  | A  |
| Description: Absent Comments: called & left a msg.                          |         |      |      |    |    |    |    |    |    |
| 11/01/2012 8 Periods                                                        | A       |      | A    | A  | A  | A  | A  | A  | A  |
| Description: Absent Comments: Mom said they slept in                        |         |      |      |    |    |    |    |    |    |

Term Summary

Periods

Page 4 of 4  
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**Student Period Attendance Detail continued**  
Jermain A. Charlo

Two Eagle River School — 12-13  
05/27/2022 03:33:08 PM

| Q1            | 1  | Home | 2  | 3  | 4  | 5  | 6  | 7  | 8  | Total |
|---------------|----|------|----|----|----|----|----|----|----|-------|
| Absent        | 0  | 0    | 0  | 0  | 0  | 0  | 0  | 0  | 0  | 0     |
| Early Release | 0  | 0    | 0  | 0  | 0  | 0  | 0  | 0  | 0  | 0     |
| Tardy         | 0  | 0    | 0  | 0  | 0  | 0  | 0  | 0  | 0  | 0     |
| Q2            | 1  | Home | 2  | 3  | 4  | 5  | 6  | 7  | 8  | Total |
| Absent        | 0  | 0    | 0  | 0  | 0  | 0  | 0  | 0  | 0  | 0     |
| Early Release | 0  | 0    | 0  | 0  | 0  | 0  | 0  | 0  | 0  | 0     |
| Tardy         | 0  | 0    | 0  | 0  | 0  | 0  | 0  | 0  | 0  | 0     |
| Q3            | 1  | Home | 2  | 3  | 4  | 5  | 6  | 7  | 8  | Total |
| Absent        | 15 | 0    | 16 | 17 | 16 | 18 | 19 | 18 | 19 | 138   |
| Early Release | 0  | 0    | 0  | 0  | 0  | 0  | 0  | 0  | 0  | 0     |
| Tardy         | 0  | 0    | 0  | 0  | 0  | 1  | 0  | 0  | 0  | 1     |
| Q4            | 1  | Home | 2  | 3  | 4  | 5  | 6  | 7  | 8  | Total |
| Absent        | 0  | 0    | 0  | 0  | 0  | 0  | 0  | 0  | 0  | 0     |
| Early Release | 0  | 0    | 0  | 0  | 0  | 0  | 0  | 0  | 0  | 0     |
| Tardy         | 0  | 0    | 0  | 0  | 0  | 0  | 0  | 0  | 0  | 0     |

|                                                                              |  |
|------------------------------------------------------------------------------|--|
| <b>Student Period Attendance Detail</b>                                      |  |
| CONTROLLED: This page contains PII and should be handled to protect privacy. |  |

Terms Included: All Terms

Course Summary

| Course   | Excused | Unexcused | Tardy |
|----------|---------|-----------|-------|
| 22-1 THG | 0       | 22        | 0     |

|          |   |    |   |
|----------|---|----|---|
| 22-2 THG | 0 | 18 | 0 |
|----------|---|----|---|

|          |   |    |   |
|----------|---|----|---|
| 22-3 THG | 0 | 20 | 0 |
|----------|---|----|---|

|         |   |    |   |
|---------|---|----|---|
| 24-3 PE | 0 | 12 | 0 |
|---------|---|----|---|

|         |   |    |   |
|---------|---|----|---|
| 24-4 PE | 0 | 12 | 0 |
|---------|---|----|---|

|         |   |    |   |
|---------|---|----|---|
| 24-5 PE | 0 | 12 | 0 |
|---------|---|----|---|

|         |   |    |   |
|---------|---|----|---|
| 24-6 PE | 0 | 12 | 0 |
|---------|---|----|---|

|         |   |    |   |
|---------|---|----|---|
| 24-7 PE | 0 | 12 | 0 |
|---------|---|----|---|

|         |   |    |   |
|---------|---|----|---|
| 24-8 PE | 0 | 12 | 0 |
|---------|---|----|---|

|         |   |    |   |
|---------|---|----|---|
| 24-9 PE | 0 | 12 | 0 |
|---------|---|----|---|

|          |   |    |   |
|----------|---|----|---|
| 24-10 PE | 0 | 12 | 0 |
|----------|---|----|---|

|          |   |    |   |
|----------|---|----|---|
| 24-11 PE | 0 | 12 | 0 |
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| 24-12 PE | 0 | 12 | 0 |
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| 24-13 PE | 0 | 12 | 0 |
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| 24-14 PE | 0 | 12 | 0 |
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| 24-15 PE | 0 | 12 | 0 |
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| 24-16 PE | 0 | 12 | 0 |
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| 24-17 PE | 0 | 12 | 0 |
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| 24-18 PE | 0 | 12 | 0 |
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| 24-19 PE | 0 | 12 | 0 |
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| 24-20 PE | 0 | 12 | 0 |
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| 24-21 PE | 0 | 12 | 0 |
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| 24-22 PE | 0 | 12 | 0 |
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| 24-23 PE | 0 | 12 | 0 |
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| 24-24 PE | 0 | 12 | 0 |
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| 24-25 PE | 0 | 12 | 0 |
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| 24-26 PE | 0 | 12 | 0 |
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| 24-27 PE | 0 | 12 | 0 |
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| 24-28 PE | 0 | 12 | 0 |
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| 24-29 PE | 0 | 12 | 0 |
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| 24-30 PE | 0 | 12 | 0 |
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| 24-31 PE | 0 | 12 | 0 |
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| 24-32 PE | 0 | 12 | 0 |
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| 24-33 PE | 0 | 12 | 0 |
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| 24-34 PE | 0 | 12 | 0 |
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| 24-35 PE | 0 | 12 | 0 |
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| 24-36 PE | 0 | 12 | 0 |
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| 24-37 PE | 0 | 12 | 0 |
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| 24-38 PE | 0 | 12 | 0 |
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| 24-39 PE | 0 | 12 | 0 |
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| 24-40 PE | 0 | 12 | 0 |
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| 24-41 PE | 0 | 12 | 0 |
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| 24-42 PE | 0 | 12 | 0 |
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| 24-43 PE | 0 | 12 | 0 |
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| 24-44 PE | 0 | 12 | 0 |
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| 24-45 PE | 0 | 12 | 0 |
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| 24-46 PE | 0 | 12 | 0 |
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| 24-47 PE | 0 | 12 | 0 |
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| 24-48 PE | 0 | 12 | 0 |
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| 24-49 PE | 0 | 12 | 0 |
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13-14

Two Eagle River School

PO Box 160, Pablo, MT 59855

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02:31:37 PM Page 1 of 5

Jermelin A. Charlie

ID#: 997 Grade: 12 DOB: 04/23/1995

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Period Summary

| Period | Excused | Unexcused | Tardy |
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| 1      | 2       | 68        | 3     |

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| 2 | 2 | 61 | 1 |
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| 15 | 2 | 61 | 1 |
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| 48 | 2 | 61 | 1 |
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13-14

Two Eagle River School

PO Box 160, Pablo, MT 59855

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02:31:37 PM Page 1 of 5

Jermelin A. Charlie

ID#: 997 Grade: 12 DOB: 04/23/1995

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Period Summary

| Period | Excused | Unexcused | Tardy |
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| 1      | 2       | 68        | 3     |

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| 48 | 2 | 61 | 1 |
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13-14

Two Eagle River School

PO Box 160, Pablo, MT 59855

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02:31:37 PM Page 1 of 5

Jermelin A. Charlie

ID#: 997 Grade: 12 DOB: 04/23/1995

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Period Summary

| Period | Excused | Unexcused | Tardy |
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| 1      | 2       | 68        | 3     |

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| 2 | 2 | 61 | 1 |
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| 3 | 2 | 61 | 1 |
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| 26 | 2 | 61 | 1 |
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Page 2 of 5  
CONTROLLED**Student Period Attendance Detail continued**  
Jermain A. ChoTwo Eagle River School — 13-14  
05/27/2022 03:31:37 PM

| Date                        | Periods |    |    |    |    |    |    |    |
|-----------------------------|---------|----|----|----|----|----|----|----|
|                             | 1       | 2  | 3  | 4  | 5  | 6  | 7  | 8  |
| 05/09/2014 Regular          | A       | A  | A  | A  | A  | A  | A  | A  |
| Day                         |         |    |    |    |    |    |    |    |
| 04/30/2014 Regular          |         |    |    |    | A  | A  | A  | A  |
| Day                         |         |    |    |    |    |    |    |    |
| 04/29/2014 Regular          |         |    |    |    |    |    |    |    |
| Day                         |         |    |    |    |    |    |    |    |
| 04/28/2014 Regular          | A       | A  | A  | A  | A  | A  |    |    |
| Day                         |         |    |    |    |    |    |    |    |
| 04/24/2014 Regular          |         |    |    |    |    |    |    |    |
| Day                         |         |    |    |    |    |    |    |    |
| 04/23/2014 Regular          | A       | A  | A  | A  | A  | A  | A  | A  |
| Day                         |         |    |    |    |    |    |    |    |
| 04/22/2014 Regular          |         |    |    |    |    |    |    |    |
| Day                         |         |    |    |    |    |    |    |    |
| 04/16/2014 Regular          | A       | A  | A  | A  | A  | A  | A  | A  |
| Day                         |         |    |    |    |    |    |    |    |
| Description: Absent         |         |    |    |    |    |    |    |    |
| 04/15/2014 Regular          |         |    |    |    |    |    |    |    |
| Day                         |         |    |    |    |    |    |    |    |
| 04/14/2014 Regular          | A       | A  | A  | A  | A  |    | A  |    |
| Day                         |         |    |    |    |    |    |    |    |
| Comments: switched to 1st   |         |    |    |    |    |    |    |    |
| 04/09/2014 Regular          |         |    |    |    |    |    |    |    |
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| 04/09/2014 Regular          |         |    |    |    | A  |    |    | A  |
| Day                         |         |    |    |    |    |    |    |    |
| Comments: switched to 1st   |         |    |    |    |    |    |    |    |
| 04/08/2014 Regular          |         |    |    |    |    |    |    |    |
| Day                         |         |    |    |    |    |    |    |    |
| 04/03/2014 Regular          |         |    | A  |    |    |    |    | A  |
| Day                         |         |    |    |    |    |    |    |    |
| 04/02/2014 Regular          |         |    |    |    |    |    |    |    |
| Day                         |         |    |    |    |    |    |    |    |
| 04/01/2014 Regular          |         |    |    |    | T  |    |    |    |
| Day                         |         |    |    |    |    |    |    |    |
| 03/31/2014 Regular          |         |    |    |    |    |    |    |    |
| Day                         |         |    |    |    |    |    |    |    |
| 03/27/2014 Regular          | A       | A  | A  | A  | A  | A  | A  | A  |
| Day                         |         |    |    |    |    |    |    |    |
| Description: Absent         |         |    |    |    |    |    |    |    |
| 03/25/2014 Regular          |         |    |    |    |    |    |    |    |
| Day                         |         |    |    |    |    |    |    |    |
| 03/25/2014 Regular          | A       | A  | A  | A  | A  | A  | A  | A  |
| Day                         |         |    |    |    |    |    |    |    |
| Description: Absent         |         |    |    |    |    |    |    |    |
| 03/24/2014 Regular          |         |    |    |    |    |    |    |    |
| Day                         |         |    |    |    |    |    |    |    |
| 03/20/2014 Regular          | AE      | AE | AE | AE | AE | AE | AE | AE |
| Day                         |         |    |    |    |    |    |    |    |
| Description: Absent Excused |         |    |    |    |    |    |    |    |
| 03/19/2014 Regular          |         |    |    |    |    |    |    |    |
| Day                         |         |    |    |    |    |    |    |    |
| Description: Absent         |         |    |    |    |    |    |    |    |
| 03/18/2014 Regular          |         |    |    |    |    |    | A  |    |
| Day                         |         |    |    |    |    |    |    |    |
| 03/17/2014 Regular          |         |    |    |    |    |    |    |    |
| Day                         |         |    |    |    |    |    |    |    |
| 03/13/2014 Regular          | A       | A  | A  | A  | A  | A  | A  | A  |
| Day                         |         |    |    |    |    |    |    |    |
| 03/12/2014 Regular          |         |    |    |    |    |    |    |    |
| Day                         |         |    |    |    |    |    |    |    |
| Description: Absent         |         |    |    |    |    |    |    |    |
| 03/11/2014 Regular          | A       | A  | A  | A  | A  | A  | A  | A  |
| Day                         |         |    |    |    |    |    |    |    |
| 03/10/2014 Regular          |         |    |    |    |    |    |    |    |
| Day                         |         |    |    |    |    |    |    |    |



Page 3 of 5  
CONTROLLED

**Student Period Attendance Detail continued**  
Jermaln A. Charko

Two Eagle River School — 13-14  
05/27/2022 03:31:37 PM

| Date                                              | Periods |    |    |    |    |    |    |    |
|---------------------------------------------------|---------|----|----|----|----|----|----|----|
|                                                   | 1       | 2  | 3  | 4  | 5  | 6  | 7  | 8  |
| 03/06/2014 Regular Day                            |         | T  |    |    |    |    | A  | A  |
| 03/05/2014 Regular Day                            |         |    |    |    |    |    |    |    |
| 02/27/2014 Regular Day                            | A       | A  |    | A  |    | A  | A  | A  |
| 02/26/2014 Regular Day                            |         |    |    |    |    | SA | SA | SA |
| 02/25/2014 Regular Day                            | SA      | SA | SA | SA | SA | SA | SA | SA |
| Description: School Activity Comments: With Kathy |         |    |    |    |    |    |    |    |
| 02/20/2014 Regular Day                            |         |    |    |    |    |    |    |    |
| 02/19/2014 Regular Day                            | A       | A  | A  |    | A  |    |    |    |
| 02/18/2014 Regular Day                            |         |    |    |    |    |    |    |    |
| 02/13/2014 Regular Day                            | A       | A  | A  | A  | A  | A  | A  | A  |
| 02/12/2014 Regular Day                            |         |    |    |    |    |    |    |    |
| 02/11/2014 Regular Day                            | A       | A  | A  | A  | A  | A  | A  | A  |
| Description: Absent                               |         |    |    |    |    |    |    |    |
| 02/07/2014 Regular Day                            |         |    |    |    |    |    |    |    |
| 02/06/2014 Regular Day                            | A       | A  | A  | A  | A  | A  | A  | A  |
| 02/05/2014 Regular Day                            |         |    |    |    |    |    |    |    |
| 02/03/2014 Regular Day                            |         |    |    | A  |    |    |    |    |
| 01/30/2014 Regular Day                            |         |    |    |    |    |    |    |    |
| 01/29/2014 Regular Day                            | A       |    | A  | A  | A  | A  |    | A  |
| 01/28/2014 Regular Day                            |         |    |    |    |    |    |    |    |
| 01/27/2014 Regular Day                            | AE      |    | AE | AE | AE | AE | AE | AE |
| Description: Absent Excused Comments: Out Sick    |         |    |    |    |    |    |    |    |
| 01/23/2014 Regular Day                            |         |    |    |    |    |    |    |    |
| 01/20/2014 Regular Day                            |         |    | A  | A  | A  | T  | A  | A  |
| 01/16/2014 Regular Day                            |         |    |    |    |    |    |    |    |
| 01/15/2014 Regular Day                            | A       |    | A  |    | A  | A  | A  | A  |
| 01/13/2014 Regular Day                            |         |    |    |    |    |    |    |    |
| 01/09/2014 Regular Day                            | A       |    | A  |    | A  | A  | A  | A  |
| 10/30/2013 Regular Day                            |         |    |    |    |    |    |    |    |
| 10/30/2013 Regular Day                            | A       |    |    |    |    |    |    | A  |
| 10/29/2013 Regular Day                            |         |    |    |    |    |    |    |    |
| 10/28/2013 Regular Day                            |         |    |    |    |    |    |    |    |

Page 4 of 5  
CONTROLLED

**Student Period Attendance Detail continued**  
Jermain A. Charlo

Two Eagle River School — 13-14  
05/27/2022 03:31:37 PM

| Date                                                               | Periods |   |   |   |   |   |    |    |
|--------------------------------------------------------------------|---------|---|---|---|---|---|----|----|
|                                                                    | 1       | 2 | 3 | 4 | 5 | 6 | 7  | 8  |
| 10/26/2013 Regular                                                 |         |   |   |   |   |   | A  | A  |
| Day                                                                |         |   |   |   |   |   |    |    |
| 10/24/2013 Regular                                                 |         |   |   |   |   |   |    |    |
| Day                                                                |         |   |   |   |   |   |    |    |
| 10/23/2013 Regular                                                 | A       | A | A | A | A | A | A  | A  |
| Day                                                                |         |   |   |   |   |   |    |    |
| 10/22/2013 Regular                                                 |         |   |   |   |   |   |    |    |
| Day                                                                |         |   |   |   |   |   |    |    |
| 10/21/2013 Regular                                                 | A       | A | A | A | A | A | A  | A  |
| Day                                                                |         |   |   |   |   |   |    |    |
| Description: Absent                                                |         |   |   |   |   |   |    |    |
| 10/20/2013 Regular                                                 |         |   |   |   |   |   |    |    |
| Day                                                                |         |   |   |   |   |   |    |    |
| 10/19/2013 Regular                                                 | A       | A | A | A | A | A | A  | A  |
| Day                                                                |         |   |   |   |   |   |    |    |
| Description: Absent                                                |         |   |   |   |   |   |    |    |
| 10/18/2013 Regular                                                 |         |   |   |   |   |   |    |    |
| Day                                                                |         |   |   |   |   |   |    |    |
| 10/17/2013 Regular                                                 | A       | A | A | A | A | A | A  | A  |
| Day                                                                |         |   |   |   |   |   |    |    |
| 10/16/2013 Regular                                                 |         |   |   |   |   |   |    |    |
| Day                                                                |         |   |   |   |   |   |    |    |
| 10/15/2013 Regular                                                 | A       | A | A | A | A | A | A  | A  |
| Day                                                                |         |   |   |   |   |   |    |    |
| Description: Absent                                                |         |   |   |   |   |   |    |    |
| 10/14/2013 Regular                                                 |         |   |   |   |   |   |    |    |
| Day                                                                |         |   |   |   |   |   |    |    |
| 10/13/2013 Regular                                                 | A       | A | A | A | A | A | A  | A  |
| Day                                                                |         |   |   |   |   |   |    |    |
| 10/12/2013 Regular                                                 |         |   |   |   |   |   |    |    |
| Day                                                                |         |   |   |   |   |   |    |    |
| 10/11/2013 Regular                                                 | A       | A | A | A | A | A | A  | A  |
| Day                                                                |         |   |   |   |   |   |    |    |
| Description: Absent                                                |         |   |   |   |   |   |    |    |
| 10/10/2013 Regular                                                 |         |   |   |   |   |   |    |    |
| Day                                                                |         |   |   |   |   |   |    |    |
| 10/9/2013 Regular                                                  | A       | A | A | A | A | A | A  | A  |
| Day                                                                |         |   |   |   |   |   |    |    |
| Description: Absent                                                |         |   |   |   |   |   |    |    |
| 10/8/2013 Regular                                                  |         |   |   |   |   |   |    |    |
| Day                                                                |         |   |   |   |   |   |    |    |
| 10/7/2013 Regular                                                  | A       | A | A | A | A | A | A  | A  |
| Day                                                                |         |   |   |   |   |   |    |    |
| 10/6/2013 Regular                                                  |         |   |   |   |   |   |    |    |
| Day                                                                |         |   |   |   |   |   |    |    |
| 10/5/2013 Regular                                                  | A       | A | A | A | A | A | A  | A  |
| Day                                                                |         |   |   |   |   |   |    |    |
| Description: Absent                                                |         |   |   |   |   |   |    |    |
| 10/4/2013 Regular                                                  |         |   |   |   |   |   |    |    |
| Day                                                                |         |   |   |   |   |   |    |    |
| 10/3/2013 Regular                                                  |         |   |   |   |   |   |    |    |
| Day                                                                |         |   |   |   |   |   |    |    |
| 10/2/2013 Regular                                                  | A       | A | A | A | A | A | A  | A  |
| Day                                                                |         |   |   |   |   |   |    |    |
| Description: Absent                                                |         |   |   |   |   |   |    |    |
| 10/1/2013 Regular                                                  |         |   |   |   |   |   |    |    |
| Day                                                                |         |   |   |   |   |   |    |    |
| 09/30/2013 Regular                                                 | A       | A | A | A | A | A | A  | A  |
| Day                                                                |         |   |   |   |   |   |    |    |
| Description: Absent                                                |         |   |   |   |   |   |    |    |
| 09/29/2013 Regular                                                 |         |   |   |   |   |   |    |    |
| Day                                                                |         |   |   |   |   |   |    |    |
| 09/28/2013 Regular                                                 |         |   |   |   |   |   |    |    |
| Day                                                                |         |   |   |   |   |   |    |    |
| 09/27/2013 Regular                                                 |         |   |   |   |   |   |    |    |
| Day                                                                |         |   |   |   |   |   |    |    |
| 09/26/2013 Regular                                                 |         |   |   |   |   |   |    |    |
| Day                                                                |         |   |   |   |   |   |    |    |
| 09/25/2013 Regular                                                 |         |   |   |   |   |   | AE | AE |
| Day                                                                |         |   |   |   |   |   |    |    |
| Description: Absent Excused Comments: 2:27 Checked out for an appt |         |   |   |   |   |   |    |    |
| 09/24/2013 Regular                                                 |         |   |   |   |   |   |    |    |
| Day                                                                |         |   |   |   |   |   |    |    |
| 09/23/2013 Regular                                                 | A       | A | A |   | A | A |    | A  |
| Day                                                                |         |   |   |   |   |   |    |    |
| 09/22/2013 Regular                                                 |         |   |   |   |   |   |    |    |
| Day                                                                |         |   |   |   |   |   |    |    |
| 09/21/2013 Regular                                                 | A       | A | A | A | A | A | A  | A  |
| Day                                                                |         |   |   |   |   |   |    |    |
| 09/20/2013 Regular                                                 |         |   |   |   |   |   |    |    |
| Day                                                                |         |   |   |   |   |   |    |    |
| 09/19/2013 Regular                                                 | A       | A | A | A |   | A | A  | A  |
| Day                                                                |         |   |   |   |   |   |    |    |
| 09/18/2013 Regular                                                 |         |   |   |   |   |   |    |    |
| Day                                                                |         |   |   |   |   |   |    |    |
| 09/17/2013 Regular                                                 | A       | A |   |   | A | A |    |    |
| Day                                                                |         |   |   |   |   |   |    |    |

Page 5 of 5  
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**Student Period Attendance Detail continued**  
Jermain A. Charlo

Two Eagle River School - 13-14  
05/27/2022 03:31:37 PM

**Term Summary**

|               |  | Periods |    |    |    |    |    |    |    | Total |
|---------------|--|---------|----|----|----|----|----|----|----|-------|
| Q1            |  | 1       | 2  | 3  | 4  | 5  | 6  | 7  | 8  |       |
| Absent        |  | 22      | 22 | 21 | 20 | 21 | 23 | 22 | 23 | 174   |
| Early Release |  | 0       | 0  | 0  | 0  | 0  | 0  | 0  | 0  | 0     |
| Tardy         |  | 0       | 1  | 0  | 0  | 0  | 0  | 0  | 0  | 1     |
| Q2            |  | 1       | 2  | 3  | 4  | 5  | 6  | 7  | 8  | Total |
| Absent        |  | 19      | 10 | 18 | 15 | 18 | 18 | 18 | 20 | 136   |
| Early Release |  | 0       | 0  | 0  | 0  | 0  | 0  | 0  | 0  | 0     |
| Tardy         |  | 0       | 1  | 1  | 1  | 0  | 1  | 0  | 1  | 5     |
| Q3            |  | 1       | 2  | 3  | 4  | 5  | 6  | 7  | 8  | Total |
| Absent        |  | 19      | 10 | 18 | 15 | 18 | 18 | 18 | 20 | 136   |
| Early Release |  | 0       | 0  | 0  | 0  | 0  | 0  | 0  | 0  | 0     |
| Tardy         |  | 0       | 1  | 1  | 1  | 0  | 1  | 0  | 1  | 5     |
| Q4            |  | 1       | 2  | 3  | 4  | 5  | 6  | 7  | 8  | Total |
| Absent        |  | 19      | 10 | 18 | 15 | 18 | 18 | 18 | 20 | 136   |
| Early Release |  | 0       | 0  | 0  | 0  | 0  | 0  | 0  | 0  | 0     |
| Tardy         |  | 0       | 1  | 1  | 1  | 0  | 1  | 0  | 1  | 5     |

| NOTICE TO APPEAR AND COMPLAINT                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |  | SANDERS COUNTY SHERIFF                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | C35A | 35425 |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|-------|
| STATE OF MONTANA<br>CITY OF THOMPSON FALLS vs.<br>COUNTY OF SANDERS<br><br><b>THE DEFENDANT IS HEREBY GIVEN NOTICE TO APPEAR IN</b><br><br><input type="checkbox"/> TRIBAL COURT<br>PO BOX 278<br>PABLO, MT 59855<br>406-675-4700<br><br><input type="checkbox"/> YOUTH COURT<br>PO BOX 519<br>1111 MAIN<br>THOMPSON FALLS, MT 59873<br>406-827-6904<br><br><input checked="" type="checkbox"/> JUSTICE COURT<br>PO BOX 519<br>1111 MAIN STREET<br>THOMPSON FALLS, MT 59873<br>406-827-6941<br><br><input type="checkbox"/> HOT SPRINGS<br>CITY COURT<br>HOT SPRINGS, MT 59845<br>406-741-2353<br><br><input type="checkbox"/> THOMPSON FALLS<br>CITY COURT<br>PO BOX 99<br>THOMPSON FALLS, MT 59876<br>406-827-3557<br><br><input type="checkbox"/> PLAINS CITY COURT<br>PO BOX 557<br>PLAINS, MT 59859<br>406-826-5253 |  | <b>DEFENDANT (F/M/L)</b><br><u>Michael Blake DeFrance</u><br><b>STREET</b><br><u>509 Pename St</u><br><b>CITY</b><br><u>Dixon</u> <b>ST</b><br><u>MT</u> <b>ZIP</b><br><u>59831</u><br><b>SEX</b><br><u>M</u> <b>WT</b><br><u>135</u> <b>HT</b><br><u>5'10</u> <b>HAIR</b><br><u>Blk</u> <b>EYES</b><br><u>Blk</u> <b>DNR</b><br><u>MT</u><br><b>DL STATE</b> <b>DL EXP. YR</b><br><u>2024</u><br><b>HOME PHONE</b> <u>246-3311</u> <b>CELL PHONE</b><br><b>VEHICLE LICENSE NO.</b><br><b>LICENSE STATE</b> <b>MO.</b> <b>YR.</b><br><b>VEHICLE MAKE &amp; MODEL</b><br><b>VEH. COLOR</b> <b>VEH. YEAR</b><br><b>VEHICLE TYPE</b><br><input type="checkbox"/> CAR <input type="checkbox"/> TRK<br><input type="checkbox"/> M/C <input type="checkbox"/> TRK/TRL<br><input type="checkbox"/> PICKUP <input type="checkbox"/> BUS<br><input type="checkbox"/> CMV <input type="checkbox"/> CMV-H<br><input type="checkbox"/> COL HOLDER<br><b>DOCKET NUMBER</b> |      |       |
| <b>MUST BE ACCOMPANIED BY PARENT/GUARDIAN IF CHECKED</b><br><b>ON OR BEFORE:</b> <u>24</u> DAY OF <u>April</u> <u>2013</u><br><b>THE A</b> <u>10:00 AM</u> <b>TO ANSWER THIS CHARGE.</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |  |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |      |       |
| <b>PERSONAL APPEARANCE IN COURT REQUIRED IF BOX IS CHECKED.</b><br><input type="checkbox"/> Failure to appear may result in a suspension of your driver's license or privilege to drive                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |  |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |      |       |
| <b>RADAR #</b> <u>213CR0001603</u><br><b>CR #</b> <u>213CR0001603</u><br><input type="checkbox"/> B/A Test Given <input type="checkbox"/> Accident                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |  |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |      |       |
| I hereby swear that all information contained on this document is true and correct to the best of my knowledge.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |  |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |      |       |
| <u>Robyn Spigant</u><br>OFFICER SIGNATURE                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |  | <u>3509</u><br>BADGE #                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |      |       |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |  | <b>TOTAL APPEARANCE</b><br><b>\$ Custody</b><br><b>BOND RECEIVED</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |      |       |

CBS SAFEGUARD (800) 823-4587

 GOVERNMENT  
 EXHIBIT  
 CR-21-29-M-DLC

1

IN THE JUSTICE COURT, STATE OF MONTANA  
IN AND FOR SANDERS COUNTY  
BEFORE THE HONORABLE DONALD M. STRINE, JUSTICE OF THE PEACE

INITIAL APPEARANCE / ARRAIGNMENT

DATE 4-15-13 CASE NO. TK-2013-0342  
DEFENDANT'S NAME: Michael Blake DeFrance  
STATE REPRESENTED BY: \_\_\_\_\_  
DEFENDANT PRO SE: ☒ ; REPRESENTED BY: \_\_\_\_\_  
CHARGES: PFMA 45-5-206

- ☒ YOU HAVE THE RIGHT TO AN ATTORNEY.  
☒ YOU MAY HAVE AN ATTORNEY APPOINTED TO REPRESENT YOU.  
OFFICE OF PUBLIC DEFENDER? ☒ YES ☐ NO FORM ☒  
OTHER COUNSEL? \_\_\_\_\_  
☒ YOU HAVE THE RIGHT TO REMAIN SILENT / ANY STATEMENTS YOU  
MAKE COULD BE USED AGAINST YOU IN EVIDENCE.  
☒ YOU HAVE THE RIGHT TO HAVE BAIL SET. BAIL SET AT O/R  
☒ YOU MAY BE RELEASED O/R PENDING FINAL OUTCOME  
CONDITIONS OF O/R RELEASE order and conditions of  
release Acknowledgment  
☒ A CONVICTION FOR CERTAIN OFFENSES MAY RESULT IN THE LOSS OF  
VARIOUS RIGHTS REGARDING FIREARMS UNDER STATE AND FEDERAL LAWS.

YOU HAVE THE RIGHT TO A PRELIMINARY HEARING FOR JUDICIAL  
DETERMINATION OF PROBABLE CAUSE, IF CHARGED WITH A FELONY.

PRELIMINARY HEARING DATE / TIME \_\_\_\_\_ FORM FILED \_\_\_\_\_

☒ YOU HAVE AT LEAST 24 HOURS BEFORE REQUIRED TO ENTER PLEA.

I UNDERSTAND MY RIGHTS AS ADVISED ABOVE:

NAME X Michael de France DATE 4-15-13  
READY TO ENTER PLEA AT THIS TIME? YES \_\_\_\_\_ NO ☒

entry of plea before 4/29/13

GOVERNMENT  
EXHIBIT  
CR-21-29-M-DLC  
2

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IN THE JUSTICE COURT OF SANDERS COUNTY,  
STATE OF MONTANA,  
BEFORE DONALD M. STRINE, JUSTICE OF THE PEACE

STATE OF MONTANA,  
Plaintiff,

Cause No: TK-2013-342

-vs-

ORDER AND CONDITIONS OF  
RELEASE ACKNOWLEDGMENT

Michael Blake DeFrance  
Defendant.

The above-named Defendant shall be released upon the following conditions:

- X 1. Prior to being released, Defendant shall post a bond with the Sanders County Sheriff's Office in the amount of \$ 0/R.
- X 2. Defendant will appear to answer in this Court as ordered by the Court until discharged on final order.
- X 3. Defendant will not depart from the State of Montana without specific, written leave of Court. MAY leave for fighting fires 5/06/13 DMS
- X 4. Defendant shall obey all municipal, county, state and federal laws.
- X 5. Defendant shall have no contact with any victims or prosecution witnesses personally or by 3<sup>rd</sup> party, either by telephone, personally or in writing, except through counsel as necessary for the preparation of the defense.
- X 6. Defendant will report at least weekly to his/her defense counsel \_\_\_\_\_, telephone \_\_\_\_\_, and give defense counsel a telephone number and address at which the Defendant may be

1 reached. Notice to defense counsel is notice to the Defendant, so it is imperative  
2 that the Defendant stay in contract with defense counsel.

3 7. The Defendant shall remain in the custody of \_\_\_\_\_, a person  
4 who agrees to supervise Defendant's appearance as required and to report any  
5 violation of a release condition to the Court.

6 ☒ 8. The Defendant shall maintain employment or, if unemployed, seek employment.

7 9. The Defendant shall abide by additional specific travel restrictions: \_\_\_\_\_  
8 \_\_\_\_\_  
9 \_\_\_\_\_

10 10. The Defendant shall comply with a specified curfew as follows: \_\_\_\_\_  
11 \_\_\_\_\_  
12 \_\_\_\_\_

13 ☒ 11. The Defendant shall refrain from possessing a firearm, destructive device, or  
14 other dangerous weapon.

15 ☒ 12. The Defendant shall not possess alcohol nor enter any establishment where  
16 alcohol is the chief item of sale.

17 13.

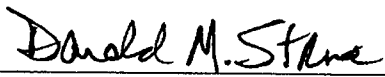
18 Others: \_\_\_\_\_  
19 \_\_\_\_\_  
20 \_\_\_\_\_  
21 \_\_\_\_\_  
22 \_\_\_\_\_  
23 \_\_\_\_\_

24 The Court reserves the right to amend this Order to impose additional different  
25 conditions of release.

FAILURE TO ABIDE BY THE ABOVE CONDITIONS may result in:

- 1 a. The forfeiture of any bail and the issuance of a warrant for the Defendant's arrest;
- 2 b. The Defendant being charged with a separate offense of bail-jumping, a felony,
- 3 for which Defendant could receive up to ten years imprisonment in the Montana State
- 4 Prison and a \$50,000 fine; and/or
- 5 c. The introduction of the Defendant's flight in the State's case as evidence of
- 6 Defendant's knowledge of guilt.

7 DATED this 15 day of April, 2013.

8   
9 JUSTICE OF THE PEACE

10  
11 ACKNOWLEDGMENT

12 The undersigned represents that he/she is the Defendant in the above-entitled action and

13 that he/she has read the foregoing conditions of release, he/she has discussed these conditions

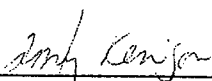
14 with his or her counsel, and he/she understands and agrees to the conditions.

15  
16   
17 DEFENDANT

18 ATTEST:

19 \_\_\_\_\_  
Defendant's counsel

20  
21 The above conditions of release are made at the request of the Sanders County Attorney.

22   
23 Robert L. Zimmerman/Amy Kenison  
24 County Attorney/Deputy County Attorney



1 Amy Kenison  
2 Deputy County Attorney  
3 PO Box 519  
4 Thompson Falls, MT 59873  
5 (406) 827-6903

6  
7  
8 IN THE JUSTICE COURT OF SANDERS COUNTY, MONTANA  
9 BEFORE DONALD M. STRINE, JUSTICE OF THE PEACE

10 STATE OF MONTANA,

11 Plaintiff,

12 vs.

13 MICHAEL BLAKE DEFRANCE,

14 Defendant.

Cause No: TK-2013-342

PLEA AGREEMENT

15 I.

16 The Defendant, Michael Blake Defrance, on advice of counsel, Kirk Krutilla, agrees to  
17 the following plea agreement with Deputy County Attorney, Amy Kenison. This agreement is  
18 entered in order to resolve the charge now pending in Sanders County Justice Court.

19 The Defendant understands that he is charged with the following offense:

20 **Count I** Partner or Family Member Assault, in violation of Mont. Code Annot.  
21 § 45-5-206, and punishable by a fine of not less than \$100.00 or more than  
22 \$1,000.00 and imprisonment in the county jail for a term not to exceed 1  
23 year or not less than 24 hours; required to pay for and complete a  
24 counseling assessment with a focus on violence, controlling behavior,  
25 dangerousness, and chemical dependency; shall complete all  
recommendations for counseling, referrals, attendance at

Plea Agreement  
Page 1 of 4

GOVERNMENT  
EXHIBIT  
CR-21-29-M-DLC  
4

1 psychoeducational groups, or treatment, including any indicated chemical  
2 dependency treatment, made by the court approved counseling provider,  
3 which shall include a minimum of 40 hours of counseling, pursuant to  
4 Mont. Code Annot. § 45-5-206(4).

5 II.

6 The Defendant acknowledges that he has the following rights in regard to the charges  
7 alleged:

- 8 I. The right to plead not guilty or to persist in that plea if it has already been made;  
9 II. The right to be tried by a judge or jury;  
10 III. The right to effective assistance of counsel;  
11 IV. The right to have witnesses testify on his behalf;  
12 V. The right to confront and cross examine witnesses who testify against him;  
13 VI. The right to be free from self incrimination; and,  
14 VII. The right to have his guilt proven beyond a reasonable doubt.

15 The Defendant acknowledges that he is waiving such rights and enters this agreement  
16 willingly in order to secure the benefits set forth below.

17 DATED this 1 day of May, 2013.

18 Michael Blake DeFrance  
19 Michael Blake DeFrance, Defendant

20 III.

21 Understanding the charges, the maximum penalty for the charges, and his rights in regard  
22 to the above-stated charges, the Defendant is willing to enter the following agreement:

- 23 a. With regard to Count I, Partner or Family Member Assault, a misdemeanor, in  
24 violation of Mont. Code Annot. § 45-5-206:  
25



The Defendant understands that the Court may accept or reject this agreement.

Michael Blake DeFrance  
Michael Blake DeFrance, Defendant

5/1/13  
Date

Kirk Krutilla  
Kirk Krutilla, Defendant

5/6/2013  
Date

Amy Kenison  
Amy Kenison, Deputy County Attorney

05-06-2013  
Date

**ORDER**

THE FOREGOING IS HEREBY APPROVED BY ORDER OF THE JUSTICE COURT  
AND SHALL HENCEFORTH BE ENFORCED AS AN ORDER OF THIS COURT.

DATED this 6th day of May, 2013.

Donald M. Strine  
DONALD M. STRINE, Justice Of the Peace

IN THE JUSTICE COURT, STATE OF MONTANA  
IN AND FOR SANDERS COUNTY  
BEFORE THE HONORABLE DONALD M. STRINE, JUSTICE OF THE PEACE

INITIAL APPEARANCE / ARRAIGNMENT

DATE 4-15-13 CASE NO. TK-2013-0342  
DEFENDANT'S NAME: Michael Blake DeFrance  
STATE REPRESENTED BY: \_\_\_\_\_  
DEFENDANT PRO SE: ✓; REPRESENTED BY: \_\_\_\_\_  
CHARGES: PFMA 45-5-206  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

✓ YOU HAVE THE RIGHT TO AN ATTORNEY.  
✓ YOU MAY HAVE AN ATTORNEY APPOINTED TO REPRESENT YOU.  
OFFICE OF PUBLIC DEFENDER? YES NO FORM ✓  
OTHER COUNSEL? \_\_\_\_\_  
✓ YOU HAVE THE RIGHT TO REMAIN SILENT / ANY STATEMENTS YOU  
MAKE COULD BE USED AGAINST YOU IN EVIDENCE.  
✓ YOU HAVE THE RIGHT TO HAVE BAIL SET. BAIL SET AT O/R  
✓ YOU MAY BE RELEASED O/R PENDING FINAL OUTCOME  
CONDITIONS OF O/R RELEASE order and conditions of  
release Acknowledgment  
✓ A CONVICTION FOR CERTAIN OFFENSES MAY RESULT IN THE LOSS OF  
VARIOUS RIGHTS REGARDING FIREARMS UNDER STATE AND FEDERAL LAWS.

YOU HAVE THE RIGHT TO A PRELIMINARY HEARING FOR JUDICIAL  
DETERMINATION OF PROBABLE CAUSE, IF CHARGED WITH A FELONY.

PRELIMINARY HEARING DATE / TIME \_\_\_\_\_ FORM FILED \_\_\_\_\_

✓ YOU HAVE AT LEAST 24 HOURS BEFORE REQUIRED TO ENTER PLEA.

I UNDERSTAND MY RIGHTS AS ADVISED ABOVE:

NAME X Michael de France DATE 4-15-13  
READY TO ENTER PLEA AT THIS TIME? YES \_\_\_\_\_ NO ✓

entry of plea before 4/29/13

GOVERNMENT  
EXHIBIT  
CR-21-29-M-DLC  
5

ARRAIGNMENT IS SET FOR \_\_\_\_\_

☒ I AM PREPARED TO ENTER A PLEA OF GUILTY. K.K.

DEFENDANT REPRESENTED BY COUNSEL YES ☒ NO \_\_\_\_\_

I HEREBY KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY WAIVE MY RIGHT TO BE REPRESENTED BY AN ATTORNEY. NAME \_\_\_\_\_

☒ UNDERSTAND I AM GIVING UP MY RIGHT TO PLEAD NOT GUILTY, AND HAVE THE CHARGES AGAINST ME PROVEN BY THE STATE BEYOND A REASONABLE DOUBT AT A TRIAL; I AM GIVING UP MY RIGHT TO CONFRONT AND CROSS EXAMINE WITNESSES, AND TO CALL WITNESSES ON MY OWN BEHALF.

\_\_\_\_\_ I UNDERSTAND THAT THE MAXIMUM POSSIBLE PENALTIES ARE: \_\_\_\_\_;

AND THE MANDATORY MINIMUM PENALTY IS \_\_\_\_\_

☒ I UNDERSTAND THAT OTHER POSSIBLE CONSEQUENCES OF A GUILTY PLEA ARE: loss of firearms rights

☒ I UNDERSTAND THAT BY PLEADING GUILTY, I AM GIVING UP MY RIGHT TO APPEAL AND HAVE A NEW TRIAL IN DISTRICT COURT.

☒ I AM PLEADING GUILTY VOLUNTARILY, AND NOT BECAUSE OF THREATS OR PROMISES.

☒ I AM NOT SUFFERING FROM ANY EMOTIONAL OR PHYSICAL DISABILITIES; NOT UNDER THE INFLUENCE OF ALCOHOL OR DRUGS OF ANY KIND AND I FULLY UNDERSTAND WHAT I AM DOING.

☒ I UNDERSTAND THAT IF I AM NOT A UNITED STATES CITIZEN, A GUILTY PLEA MIGHT RESULT IN MY DEPORTATION FROM OR EXCLUSION FROM ADMISSION TO THE UNITED STATES.

THIS PLEA OF GUILTY IS MADE AS A RESULT OF A PLEA BARGAIN?

YES ☒ NO \_\_\_\_\_

☒ DO YOU UNDERSTAND THAT THE COURT IS NOT BOUND TO ACCEPT THE TERMS OF THE AGREEMENT, AND YOU MAY NOT BE ENTITLED TO WITHDRAW YOUR PLEA.

I AM PLEADING GUILTY TO THIS CHARGE BECAUSE I DID THE FOLLOWING:

On 4-14-2013 in Sanders County I caused bodily injury to my girlfriend

I UNDERSTAND MY RIGHTS AND ENTER A PLEA OF GUILTY.

NAME X. Michael de France DATE 5/06/13

No. \_\_\_\_\_

---

IN THE  
SUPREME COURT OF THE UNITED STATES

---

October Term, 2024

---

MICHAEL BLAKE DeFRANCE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

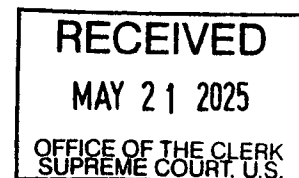
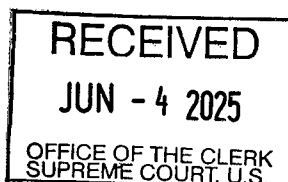
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**APPENDIX D**  
**TO THE PETITION FOR WRIT OF**  
**CERTIORARI TO THE UNITED STATES**  
**COURT OF APPEALS FOR THE NINTH CIRCUIT**

---

RACHEL JULAGAY  
Federal Defender  
**\*MICHAEL DONAHOE**  
Deputy Federal Defender  
Federal Defenders of Montana  
50 West 14<sup>th</sup> Street, Suite 1  
Helena, MT 59601  
Telephone: (406) 449-8381  
**\*Counsel of Record**

SUBMITTED: May 16, 2025



## TABLE OF APPENDIX

### **Appendix D:**

|                                                                                                                                                                                                                                      |         |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------|
| Combined Motion for Acquittal, to Arrest Judgment, and for a New Trial (Doc. 189) (May 15, 2023),<br>Cause No. CR 21-29-M-DLC, United States District Court,<br>District of Montana, Missoula Division .....                         | 395-398 |
| Brief in Support of Combined Motion for Acquittal, to Arrest Judgment, and for a New Trial (Doc. 190) (May 15, 2023),<br>Cause No. CR 21-29-M-DLC, United States District Court,<br>District of Montana, Missoula Division .....     | 399-433 |
| Defense Trial Exhibit 516: Transcript of Audio-Recorded Interview of Officer Largent and Sanders County Sheriff's Office,<br>Cause No. CR 21-29-M-DLC, United States District Court,<br>District of Montana, Missoula Division ..... | 434-446 |
| Defense Trial Exhibit 512: Officer Largent's Case Report (April 15, 2013),<br>Cause No. CR 21-29-M-DLC, United States District Court,<br>District of Montana, Missoula Division .....                                                | 447-451 |
| Sanders County Sheriff's Deputy Robyn Largent's Trial Testimony (April 26, 2023),<br>Cause No. CR 21-29-M-DLC, United States District Court,<br>District of Montana, Missoula Division .....                                         | 452-471 |
| Retired Justice of the Peace Donald Strine's Trial Testimony (April 26, 2023),<br>Cause No. CR 21-29-M-DLC, United States District Court,<br>District of Montana, Missoula Division .....                                            | 472-497 |
| Detective Guy Baker's Trial Testimony (Cross) (April 26, 2023),<br>Cause No. CR 21-29-M-DLC, United States District Court,<br>District of Montana, Missoula Division .....                                                           | 498-519 |

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|                                                                                                                                                                                                                                           |         |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------|
| Sanders County Dispatch Officer William Brown’s Trial Testimony<br>(April 26, 2023),<br>Cause No. CR 21-29-M-DLC, United States District Court,<br>District of Montana, Missoula Division .....                                           | 520-529 |
| Christian Woody’s Trial Testimony (April 26, 2023),<br>Cause No. CR 21-29-M-DLC, United States District Court,<br>District of Montana, Missoula Division .....                                                                            | 530-534 |
| Colton Monarco’s Trial Testimony (April 26, 2023),<br>Cause No. CR 21-29-M-DLC, United States District Court,<br>District of Montana, Missoula Division .....                                                                             | 535-541 |
| Reply Brief in Support of Combined Motion for Acquittal, to<br>Arrest Judgment, and for a New Trial (Doc. 196) (June 1, 2023),<br>Cause No. CR 21-29-M-DLC, United States District Court,<br>District of Montana, Missoula Division ..... | 542-556 |
| Excerpts of Opening Brief, blue heading pages 9-12 and 49-57,<br>(DktEntry: 13.1) (January 22, 2024),<br>CA No. 23-2409, United States Court of Appeals<br>for the Ninth Circuit.....                                                     | 557-570 |
| Excerpts of Reply Brief, blue heading pages 6-27<br>(DktEntry: 29.1) (May 15, 2024),<br>CA No. 23-2409, United States Court of Appeals<br>for the Ninth Circuit.....                                                                      | 571-593 |
| Mont. Code Ann. §45-2-101(5) .....                                                                                                                                                                                                        | 594     |
| Mont. Code Ann. §45-5-206 (2011) .....                                                                                                                                                                                                    | 595-598 |
| Rule 4(b)(1)(A), Federal Rules of Appellate Procedure.....                                                                                                                                                                                | 599     |
| Rule 11, Federal Rules of Criminal Procedure .....                                                                                                                                                                                        | 600-603 |
| Rule 12, Federal Rules of Criminal Procedure .....                                                                                                                                                                                        | 604-606 |
| Rule 29, Federal Rules of Criminal Procedure .....                                                                                                                                                                                        | 607-608 |

|                                                    |         |
|----------------------------------------------------|---------|
| Rule 33, Federal Rules of Criminal Procedure ..... | 609     |
| Rule 34 .....                                      | 610     |
| 8 USC §1227(a)(2)(E)(i).....                       | 611     |
| 18 USC §513(c)(4).....                             | 612     |
| 18 USC §921(a)(21).....                            | 613-614 |
| 18 USC §921(a)(32).....                            | 615     |
| 18 USC §921(a)(33)(A)(ii) (2011 vs. 2022).....     | 616     |
| 18 USC §921(a)(33)(C) .....                        | 617     |
| 18 USC §921(a)(37).....                            | 618     |
| 18 USC §922(a)(6).....                             | 619     |
| 18 USC §922(g)(9).....                             | 620     |
| 18 USC §922(t)(2)(C) .....                         | 621     |
| 18 USC §925(a) .....                               | 622-623 |
| 18 USC §3231 .....                                 | 624     |
| 18 USC §3742 .....                                 | 625     |
| 28 USC §1254(1) .....                              | 626     |
| Fifth Amendment to the U.S. Constitution .....     | 627     |
| Sixth Amendment to the U.S. Constitution .....     | 628     |
| Tenth Amendment to the U.S. Constitution .....     | 629     |
| Administrative Rule 27 CFR 478.21 .....            | 630     |

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Attorneys for Defendant

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
MISSOULA DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MICHAEL BLAKE DeFRANCE,

Defendant.

**CR 21-29-M-DLC**

**DEFENDANT DeFRANCE'S  
COMBINED OPPOSED MOTION  
FOR ACQUITTAL AND MOTION  
TO ARREST JUDGMENT UNDER  
RULES 29(c) AND 34, Fed.R.Crim.P.;  
AND ALTERNATIVE MOTION  
FOR A NEW TRIAL UNDER RULE  
33(b)(2), Fed.R.Crim.P.**

**MOTION**

COMES NOW, Michael Blake DeFrance, the above-named Defendant, by and through his counsel of record, Michael Donahoe, and the Federal Defenders of Montana, and respectfully moves for acquittal under Rule 29(c) of the Federal Rules

of Criminal Procedure; and likewise moves to arrest the Court's May 1, 2023, judgment in this case (ECF No. 182) on the ground that the Court lacks jurisdiction to enter it. Further, Mr. DeFrance contends under Rule 33 that the Court should take additional proof, if necessary.

### GROUND

1. Mr. DeFrance is not a prohibited person under the Court's findings and conclusions considering passage of the Bipartisan Safer Communities Act on June 25, 2022.
2. It was impossible for the victim of Mr. DeFrance's 2013 Partner Family Member Assault (PFMA) conviction to be situated as a spouse both because she was a minor, had no permission to marry from a court or her parent, and did not cohabit with Mr. DeFrance.
3. The Court's findings and conclusions are insufficient to convict beyond a reasonable doubt under *Jackson v. Virginia*, 443 U.S. 307 (1979).
4. The collateral estoppel clause/issue preclusion rules and the double jeopardy clause in the Fifth Amendment prohibit the Court from retrying the Montana PFMA relationship element. Mr. DeFrance, as a matter of both fact and law, was in a boyfriend-girlfriend dating relationship with his PFMA victim which at the time of the PFMA in 2013 did not render him a prohibited person under §922(g)(9) and its affiliated statutes; and the Court has no jurisdiction under 18 USC §3231 to change that by retrying the relationship element of his PFMA. A categorical analysis of the 2013 Montana PFMA statute *vis-à-vis* §922(g)(9) and its affiliated statutes shows that the former is overinclusive *vis-à-vis* the latter and the second superseding indictment should, therefore, be dismissed because it fails to state an offense both on its face and post-trial. The Court did not have, and does not have, jurisdiction to retry the Montana PFMA.

///

///

### **CONTACT WITH OPPOSING COUNSEL**

Government counsel, Jennifer S. Clark, opposes this motion on behalf of the United States.

### **CONCLUSION**

WHEREFORE, based on this motion and the brief that supports it, Mr. DeFrance prays the Court will acquit him of the charges against him; arrest its May 1, 2023, judgment for lack of jurisdiction in this case pursuant to Rules 29(c) and 34 of the Federal Rules of Criminal Procedure; or in the alternative, grant him a new trial and/or take additional evidence under Rule 33(b)(2) of the Federal Rules of Criminal Procedure.

RESPECTFULLY SUBMITTED this 15<sup>th</sup> day of May, 2023.

/s/ Michael Donahoe  
MICHAEL DONAHOE  
Deputy Federal Defender  
Counsel for Defendant

**CERTIFICATE OF SERVICE**  
**L.R. 5.2(b)**

I hereby certify that on May 15, 2023, a copy of the foregoing document was served on the following persons by the following means:

1 CM-ECF

2 Mail

1. CLERK, UNITED STATES DISTRICT COURT

1. JENNIFER S. CLARK  
TIMOTHY J. RACICOT  
Assistant United States Attorneys  
United States Attorney's Office  
101 East Front Street, Suite 401  
Missoula, MT 59802  
Counsel for the United States of America

2. MICHAEL BLAKE DeFRANCE  
Defendant

/s/ Michael Donahoe  
FEDERAL DEFENDERS OF MONTANA

MICHAEL DONAHOE  
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Attorneys for Defendant

**IN THE UNITED STATES DISTRICT COURT  
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MISSOULA DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MICHAEL BLAKE DeFRANCE,

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**CR 21-29-M-DLC**

**DEFENDANT DeFRANCE'S  
BRIEF IN SUPPORT OF  
COMBINED OPPOSED MOTION  
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RULES 29(c) AND 34, Fed.R.Crim.P.;  
AND ALTERNATIVE MOTION  
FOR A NEW TRIAL UNDER RULE  
33(b)(2), Fed.R.Crim.P.**

**INTRODUCTION**

Mr. DeFrance has filed a motion for acquittal and to arrest the Court's May 1, 2023, judgment in this case pursuant to Rules 29(c) and 34 of the Federal Rules of Criminal Procedure. (ECF No. 189). Along with a suggestion that the proof be re-opened. This brief supports that motion.

Before we begin our legal/factual analysis on our jurisdictional/lack or proof arguments we want to pause here to make clear that at their core the following arguments come squarely within the embrace of Rule 29(c) and Rule 34, Fed. R. Crim. P., in the sense that the issues presented under this motion have both jurisdictional aspects as well as factual aspects that go to the merits of the case. This is an important starting point because pre-trial the defense filed a motion and supporting briefs to dismiss for failure to state an offense (ECF Nos. 14, 15, and 31).

Which the Court denied in a written order stating:

On a motion to dismiss for failure to state an offense, “the district court is bound by the four corners of the indictment.” *United States v. Boren*, 278 F.3d 911, 914 (9th Cir. 2002). Distinguished from pre-trial motions to dismiss premised on other grounds—where the court may take evidence and make factual determinations—the court considering a motion for failure to state an offense “must accept the truth of the allegations in the indictment[.]” *Id.* “The indictment either states an offense or it doesn’t.” *Id.* To ensure that “the respective provinces of the judge and jury are respected,” a Rule 12(b)(3)(B)(v) motion to dismiss “cannot be used as a device for a summary trial of evidence.” *Id.* (quoting *United States v. Jensen*, 93 F.3d 667, 669 (9th Cir. 1996)). To that end, “[t]he Court should not consider evidence not appearing on the face of the indictment.” *Id.* (quoting *Jensen*, 93 F.3d at 669).

(ECF No. 71, pp. 5-6).

Careful consideration of the *Boren* case cited in the above quote reveals that *Boren* actually quotes and cites *United States v. Nukida*, 8 F.3d 665, 670 (9<sup>th</sup> Cir. 1993). That case holds, in part, that when the Court’s jurisdiction is interdependent



with the factual merits of the case the proper way to challenge the Court's jurisdiction is by way of Rule 29. *Id.*

Furthermore, as we will discuss here momentarily, Mr. DeFrance proffered defenses that involve fair warning "that he [did not know] he belonged to the relevant category of persons barred from possessing a firearm". *Rehaif v. United States*, 139 S. Ct. 2191, 2208 (2019). According to the Court's findings, conclusions, and guilty verdict the only applicable status that applies in this case is that Mr. DeFrance was "similarly situated as a spouse". We submit that on the intermeshed question of federal jurisdiction and the merits, neither federal jurisdiction nor Mr. DeFrance's knowledge that he belonged to the relevant category of persons barred from possessing firearms, were proved beyond a reasonable doubt. Wherefore, this case should be dismissed for lack of federal jurisdiction and Mr. DeFrance's lack of knowledge. *See United States v. Lewis*, 368 F.3d 1102, 1106 (9<sup>th</sup> Cir. 2004) (Fair warning claim involved questions inextricably intertwined with the questions of guilt). In other words, now that the evidence is in, the Court needs to grant what is essentially a renewal of Mr. DeFrance's previous motion to state an offense for lack of jurisdiction, lack of fair warning, estoppel and/or the defense of public authority.

///

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**ARGUMENT - GROUND NO. 1**

***Mr. DeFrance is not a prohibited person after the new law.***

Under federal law as it existed before passage of the Bipartisan Safer Community Act (BSCA) the definition of “misdemeanor crime of domestic violence” covered only such violence committed against a spouse, coparent, or cohabitating partner. The definition did not extend to someone convicted of domestic violence against a boyfriend or girlfriend with whom that person did not share a residence or a child. The BSCA enacted June 25, 2022, closes this loophole by expanding the definition of “misdemeanor crime of domestic violence” to include such crimes committed against an individual with whom the perpetrator has “a continuing serious relationship of a romantic or intimate nature”, based on the length and nature of the relationship, the frequency, and the type of interaction. Thus, §922(g)(9), as of June 25, 2022, now applies to an individual convicted of domestic violence against a romantic partner with whom they do not live or share a child, so long as the relationship is serious and intimate. Moreover, under the BSCA first time offenders under the new law are automatically restored their gun rights after five years; if not convicted of domestic abuse again during the five-year period. Importantly, the new law enacted under the BSCA “shall not apply to any conviction of a misdemeanor crime of domestic violence entered before the date of enactment this Act [June 25, 2022].”

The proof and argument put on by the government as well as the Court's factual findings only show that Mr. DeFrance and his victim were in a serious, non-cohabitating dating relationship of an intimate nature. Thus, the second superseding indictment (which totally fails to allege any relationship element), the proof at trial, and the Court's findings each and all show that the Court has no jurisdiction over the offense in Count I; and that, in fact, Mr. DeFrance did not make any false statements as alleged in Counts II, III, and IV.

By amending the statute Congress displays by negative implication that, as legislatively crafted initially, §922(g)(9) does not apply to the relational context of dating. Put another way, by adding the "Dating Relationship" element on June 25, 2022, to the definition of §921(a)(33)(A) and §921(a)(37) Congress changes the meaning of the statute in order to apply it to a context that it clearly did not apply to originally. *Compare by contrast, United States v. Rosser*, 528 F.2d 652, 655 (D.C. Cir. 1976) (Congress must have intended to change the meaning of the statute when it deleted a previously essential element from the definition of that crime), *citing United States v. Guthrie*, 387 F.2d 569, 571 (4<sup>th</sup> Cir. 1967).

Even though here Congress did not delete an element, but added one, the result should be the same because "[i]t is an accepted canon of statutory construction that where Congress has advertently changed the legislative language the change must be given effect". *Id.* Where, as here, Congress adds to the statute in order to effect

its application to a new and different context (*i.e.*, Dating Relationships) it follows that the previous version of the statute never intended to cover that situation as promulgated originally.

**ARGUMENT - GROUND NO. 2**

***It was impossible for Mr. DeFrance to be similarly situated as a spouse.***

At the time of Mr. DeFrance's PFMA in 2013, the following definitions applied to "marriage" and "spouse":

*"In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."*

1 USC §7 (emphasis added).

Mr. DeFrance was not a spouse to the 2013 PFMA victim under this definition. Nor was he similarly situated to the PFMA victim as a spouse. A primary, almost core, feature of marriage and spousal relationship is cohabitation. There is none here and the Court has specifically made that finding. (ECF No. 182, p. 21, ¶99). The only relationship proved was a serious dating relationship. One that was not swept in as set forth in the Utah district court decision discussed below. In fact, the Utah decision does not even mention, let alone address, 1 USC §7.

To be married as a minor in Montana, you have to be an adult or get permission from a parent and the Court. Absent the capacity to marry a minor cannot

marry. Ergo absent capacity to marry a minor cannot common law marry. The evidence here shows the 2013 PFMA victim was a high school student who was told repeatedly by her mother that she did not approve of the relationship with Mr. DeFrance and would have preferred that her minor daughter not spend time with him. Further, Mr. DeFrance was not monogamous as evidenced by the 2013 PFMA victim admitting that she found another girl's underwear at the camper. Two key features of spousal relationships are therefore missing here: cohabitation and monogamy. Also, there was no actual marriage; no common law marriage; no children; and nothing similar to marriage. It was a dating relationship not covered by the pre-2022 version of §922(g)(9).

Legal impossibility exists when the intended acts would not constitute a crime under the applicable law. Factual impossibility refers to those situations in which, unknown to the defendant, the consummation of the intended criminal act is physically impossible. *United States v. Luttrell*, 889 F.2d 806, 810 (9<sup>th</sup> Cir.1989), *vacated in part on other grounds*, 923 F.2d 764 (9<sup>th</sup> Cir.1991) (*en banc*), *cert. denied sub nom. Kegley v. United States*, 503 U.S. 959 (1992).

### **ARGUMENT - GROUND NO. 3**

***The evidence was insufficient to convict especially considering the proffered defenses.***

Mr. DeFrance's fair warning/*Rehaif* defense is composed of three parts. First, since there is not even a hint *in the statute* what a "similarly situated spouse" might

look like, any judicial gloss that may have been applied to the statutory language in question must make “the unlawfulness” apparent in order to furnish fair warning.

*United States v. Lanier*, 520 U.S. 259, 271-272 (1997).

The Court relies on the following cases in this regard:

*United States v. Slaughter*, 124 Fed.Appx. 542 (9<sup>th</sup> Cir. 2005);

*Buster v. United States*, 447 F.3d 1130 (8<sup>th</sup> Cir. 2006);

*United States v. Shelton*, 325 F.3d 553 (5<sup>th</sup> Cir. 2003);

*United States v. Denis*, 297 F.3d 25 (1<sup>st</sup> Cir. 2002);

*United States v. Heckenliable*, No. 2:04CR00697PGC, 2005 WL 856389 (D. Utah Apr. 13, 2005);

*Eibler v. Dep’t of Treasury, Bureau of Alcohol, Tobacco & Firearms*, 311 F. Supp. 2d 618 (N.D. Ohio 2004);

*United States v. Arnold*, 836 Fed.Appx. 500 (9<sup>th</sup> Cir. 2020);

*White v. Dep’t of Just.*, 328 F.3d 1361 (Fed. Cir. 2003); and

*United States v. Minor*, 63 F.4th 112 (1<sup>st</sup> Cir. 2023).

The *Slaughter* case is a pre-2007 unpublished decision that does not meet the criteria of Circuit Rule 36-3. Furthermore, it does not address in any respect the element of similarly situated spouse; and, in fact, states that the California statute that Mr. Slaughter was convicted under required the relationships of spouses, coparents, and/or cohabitation, all of which the Court found to be absent here. (ECF No. 182, p. 21, ¶99).

The *Buster* case, the *Shelton* case, and the *Denis* case all involved live-in girlfriends. Likewise, *White* and *Minor* involved a live-in girlfriend and a spouse, respectively. As for the *Arnold* case, unlike here, it was decided on a “plain error” standard. Furthermore, there is no discussion of the “similarly situated” prong of the statute; and the relationship was cohabitant and/or parent. Clearly, not the situation presented here.

So that leaves *Heckenliable* and *Eibler*, two federal district court decisions, the latter being published and the former not. As for each of these cases, we first point out that neither of them amounts to an authoritative judicial gloss under the Supreme Court’s decision in *Lanier*. See too *Waldron v. McAtee*, 73 F.2d 1348, 1354 (1983) (Vagueness doctrine works not to make statutes more reasonable but to limit discretion of police and prosecutors). Also, *Camreta v. Greene*, 563 U.S. 692, 709 and footnote 7 (2011) observe that “. . . district court decisions – unlike those from the courts of appeals – do not necessarily settle constitutional standards . . .”. If, as *Lanier* states, clearly established law for purposes of qualified immunity in the civil realm; and fair notice in the criminal realm, are pretty much identical, the categorical exclusion of district court decisions (published or not) from the data set that would resolve such questions is a big deal. Also, on the individual level *Eibler* follows *Shelton* and *Denis*, which are live-in girlfriend cases (*see above*). And

further *Eibler* goes on to find as a factual matter from a “police report” that the parties in the domestic assault under review there were “living as spouses”<sup>1</sup>.

Therefore, the only decision left is *Heckenliable*, which: i) is not precedent; ii) does not clearly establish the law along fair due process notice lines; and iii) is wrong and/or an unexpected and indefensible extension of the statute. *See Bouie v. City of Columbia*, 378 U.S. 347 (1964). Simply put, to be similarly situated as a spouse under the pre-2022 version of the statute, the person needs to be “cohabiting” or have “cohabited” with the victim as a spouse. This factor is absent here. We submit that in terms of Mr. DeFrance’s fair warning defense all the cases cited by the Court are distinguishable because they involve live-in girlfriends. The only remaining decision there is *Heckenliable*, which does not amount to an authoritative judicial gloss.

The next two parts of our fair warning/notice defense is the estoppel claim and the Public Authority defense. Here, the evidence shows that on Mr. DeFrance’s NCIC report (Defense Exhibit 522) the PFMA is listed. The NICS witness (Mr. Barker) and the ATF witnesses (Mr. Pickles and Mr. Feuerstein) testified that when the NICS # is assigned and the NICS check run the NCIC report is accessed. Thus,

<sup>1</sup> Here, of course, the police reporting materials and interviews show that Mr. DeFrance was in a boyfriend-girlfriend, dating relationship and not living with the victim, only “visiting”. This alone is reasonable doubt, especially now that dating relationships were only recently added to the statute.



the evidence shows that Mr. DeFrance was cleared after the NCIC report was consulted with the PFMA obviously on it. Moreover, ATF witness Mr. Feuerstein testified that once the PFMA is known to the government, as it was here from the NCIC report, investigation would be conducted into all of the circumstances surrounding the predicate PFMA by looking at all manner of documents: police reports, charging documents, etc. Thus, given that we know that PFMA is on Mr. DeFrance's NCIC report, the only reasonable inference is that all of the appropriate documents were consulted in Mr. DeFrance's PFMA record; and the NICS analyst(s) concluded that Mr. DeFrance was not a prohibited person. Moreover, at a minimum, given the state of the record that Mr. DeFrance's PFMA is on his NCIC report (for any NICS analyst to see) the burden should shift to the government that the appropriate documents were not consulted. Which, of course, it cannot do because all of those documents have been destroyed.

The final pillar in our fair warning claim has two subparts. First, that neither Mr. DeFrance's PFMA Judge (Donald M. Strine), nor Mr. DeFrance's PFMA appointed counsel (Kurk Krutilla), provided Mr. DeFrance actual notice that as a result of this PFMA conviction he would fall within the class of persons prohibited from possessing a firearm. The proof at trial clearly showed this. The second subpart to this aspect of our fair warning claim is that a key component of the constitutional vagueness/notice doctrine is not to necessarily make statutes more

understandable by the public. Rather it is the role of the legislative to establish minimal guidelines for enforcement of the statute. As the Supreme Court has expressed:

Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine “is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.” *Smith, supra*, 415 U.S. at 574, 94 S.Ct., at 1247–1248. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit “a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.” *Id.*, at 575, 94 S.Ct., at 1248.

*Kolender*, 461 U.S. at 357-358.

Again, the new version of 18 USC §922(g)(9) and its affiliated statutes is important. It shows that up until June 25, 2022, there was no existing federal firearms ban for persons involved in a non-cohabiting, serious dating relationship. We know this because the new law specifically states that such relationships can only be prosecuted under §922(g)(9) going forward from June 25, 2022. This means that such relationships were not prosecutable under the previous version of the statute. And second, that along the lines of the *Kolender v. Lawson*, 461 U.S. 352 (1983) and footnote 7 set forth therein, only recently has Congress established guidelines for police and prosecutors to determine who does or does not fall within

the embrace of §922(g)(9) by amending it to include dating relationships defined by statutes:

Our concern for minimal guidelines finds its roots as far back as our decision in *United States v. Reese*, 92 U.S. 214, 221, 23 L.Ed. 563 (1875):

“It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government.”

461 U.S. at 358, n. 7.

In this connection, it is also relevant here that the government offered Mr. DeFrance a plea agreement under the new law. A point which we raised in our trial brief (ECF No. 167, p. 13). In its trial brief (ECF No. 166, pp. 10-11), the government stated that it desired the Court to inquire regarding the fairness of its plea agreement offer. The agreement included Mr. DeFrance waiving *ex post facto* concerns and pleading guilty to a single count superseding information under the new version of 18 USC §922(g)(9) (2022) because Mr. DeFrance was in a dating relationship with Jermain Charlo, in exchange for probation. (See Plea Agreement (Exhibit A) and Superseding Information (Exhibit B) attached hereto). This ought to be considered an admission by the government. See *Am. Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 227 (9<sup>th</sup> Cir. 1988) (holding that statements of fact contained

in a brief may be considered admissions of the party). To convict Mr. DeFrance where the government asserted in its trial brief (ECF No. 166) that the fairest resolution of this case was to agree that Mr. DeFrance and Jermain Charlo were simply dating violates due process under the Fifth Amendment and the doctrine of preclusion of inconsistent positions. *See Russell v. Rolfs*, 893 F.2d 1033, 1037 (9<sup>th</sup> Cir. 1990):

The doctrine of judicial estoppel, sometimes referred to as the doctrine of preclusion of inconsistent positions, is invoked to prevent a party from changing its position over the course of judicial proceedings when such positional changes have an adverse impact on the judicial process. *See 1B Moore's Federal Practice* ¶ .405[8], at 238–42 (2d Ed.1988). ‘The policies underlying preclusion of inconsistent positions are “general consideration[s] of the orderly administration of justice and regard for the dignity of judicial proceedings.” ’ *Arizona v. Shamrock Foods Co.*, 729 F.2d 1208, 1215 (9th Cir.1984), *cert. denied*, 469 U.S. 1197, 105 S.Ct. 980, 83 L.Ed.2d 982 (1985) (citations omitted). Judicial estoppel is ‘intended to protect against a litigant playing “fast and loose with the courts.” ’ *Rockwell International Corp. v. Hanford Atomic Metal Trades Council*, 851 F.2d 1208, 1210 (9th Cir.1988) (citations omitted). Because it is intended to protect the integrity of the judicial process, it is an equitable doctrine invoked by a court at its discretion.

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. . . Judicial estoppel is most commonly applied to bar a party from making a factual assertion in a legal proceeding which directly contradicts an earlier assertion made in the same proceeding or a prior one. *See generally* Note, *Judicial Estoppel: The Refurbishing of a Judicial Shield*, 55 Geo.Wash.L.Rev. 409, 410–12 (1987); Comment, *Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel*, 80 Nw.U.L.Rev. 1244 (1986).

*Russell v. Rolfs*, 893 F.2d 1033,  
1037 (9<sup>th</sup> Cir. 1990).

Furthermore, although the facts here differ somewhat the Court should be guided by cases like *Smith v. Goose*, 205 F.3d 1045, 1052 (8<sup>th</sup> Cir. 2000) (prosecutions use of inherently factually contradictory theories violates due process); and *Thompson v. Calederon*, 120 F.3d 1045, 1059 (9<sup>th</sup> Cir. 1997), *rev'd on other grounds*, 523 U.S. 538 (1998) (prosecutor cannot convict separate defendants on inconsistent theories). Here, the legal theory underpinning the plea agreement concedes that Mr. DeFrance was in a dating relationship, which was not a crime under the now former version of §922(g)(9) and its affiliated statutes. The plea agreement proposal rested entirely on the concession by the government that the proof showed a serious, dating relationship. Just because Mr. DeFrance rejected the offer does not speak to the government's decision to revive and pursue the theory that Mr. DeFrance was in some sort of spousal relationship with his PFMA victim.

Relevant here is *Bradshaw v. Stumpf*, 125 S.Ct. 2398 (2005). In *Bradshaw*, petitioner, Stumpf, and another man, Wesley, carried guns to the home of Mr. and

Mrs. Stout, intending to commit an armed robbery. 125 S.Ct. at 2402. Stumpf admitted that he shot Mr. Stout, but denied that he shot Mrs. Stout. *Id.* at 2403. Stumpf argued that the prosecutor asserted inconsistent theories regarding who actually shot Mrs. Stout. The Supreme Court holds that the precise identity of the triggerman was in the end immaterial to Stumpf's conviction of the aggravated murder of Mrs. Stout because both men could be found guilty of the crime under Ohio law, either as the shooter or as an aider and abettor. *Id.* at 2406.

Therefore, the Supreme Court went on to hold that "[t]he Court of Appeals was wrong to hold that prosecutorial inconsistencies between the Stumpf and Wesley cases required voiding Stumpf's guilty plea." *Id.* at 2407. However, the Supreme Court goes on to state that inconsistent theories might have a more direct effect in the sentencing phase of Stumpf's case so the case was remanded for consideration of whether the prosecutor's action amounted to a prejudicial due process violation in connection with Stumpf's sentencing. *Id.* at 2407-08.

Unlike the situation presented in *Stumpf* the inconsistency between the government's concession in the plea agreement that Mr. DeFrance should suffer a conviction based on a dating relationship over and against the government's contention at trial that Mr. DeFrance was in a spousal relationship is not "immaterial". The two theories are mutually exclusive and inconsistent as a matter of law. A person could only be in one such relationship and not the other. Moreover,

the dating relationship was not even a federal crime at the time of the PFMA, insofar as firearms possession is concerned.

For the reasons stated there as well as those stated here, we argue that in totality Mr. DeFrance stated defenses sufficient to raise a reasonable doubt as a matter of law. To recap Mr. DeFrance's defenses go like this:

1. There is no sufficient judicial gloss on the relational aspect of "similarly situated to a spouse". Nor is there a statutory definition, except for the one contained in the Defense of Marriage Act of the word "spouse". Moreover, nearly all of the decisions the Court cites involve live-in girlfriend situations, which we do not have here. And *Heckenliable* is not reported, nor is it precedent, and it is just analytically wrong.
2. The federal government actors (ATF and FBI) knew from the NCIC report that Mr. DeFrance was convicted of the PFMA. As such the only fair inference to draw is that at the times Mr. DeFrance traded in guns at the pawn shop, he was cleared on each and every Form 4473. The Forms were not falsified because the government checked out all of the background material on the PFMA (police reports, 911 calls, etc.) and determined that Mr. DeFrance was not a prohibited person. The fact that we cannot see presently what material the government looked at should be resolved against the government.
3. Neither the state court judge on the PFMA nor Mr. DeFrance's court appointed counsel advised him on the PFMA plea that he would permanently lose his federal firearms rights. If it was so obvious to Mr. DeFrance that his PFMA resulted in a permanent federal firearms ban (a point we assume but do not concede) his court appointed counsel or the PFMA judge should have confirmed that, especially given the stature of the Second Amendment right as recently articulated in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S.Ct. 2111 (2022). Gun rights are now equal to admonishment on topics along the lines of the right to counsel and

jury trial which must be discussed with the defendant to make the PFMA plea valid. §922(g)(9) requires that a defendant have effective counsel on a PFMA plea.

4. The government's offer to allow Mr. DeFrance to plead under the new §922(g)(9) law shows the lack of warning under the former version of the statute. And it is itself a due process violation for the government to have ultimately tried the case on the inconsistent theory that Mr. DeFrance was in some sort of spousal relationship with the 17-year-old high school student. Which is not what the proof showed. It was a non-live-in dating relationship.

#### **ARGUMENT - GROUND NO. 4**

***The collateral estoppel clause/issue preclusion rules and the double jeopardy clause in the Fifth Amendment prohibit the Court from retrying the Montana PFMA relationship element. The categorical analysis applies and under it, Mr. DeFrance is not guilty.***

The test articulated in *Blockburger v. United States*, 284 U.S. 299 (1932) (the elements test) is primarily a rule of statutory construction designed as a means of discerning congressional purpose, see *Albernaz v. United States*, 450 U.S. 333, 340 (1981). Also, the *Blockburger* test, the very test used to judge both double jeopardy and/or categorical approach claims, serves as a type of legal weathervane to guide when the categorical approach or issue preclusion rules apply. Here, Congress has recently and clearly signaled that the now former version of §922(g)(9) did not apply any federal firearms ban to dating couples. The obvious congressional intent all along was to exclude that cohort from §922(g)(9) prosecutions. Under either the categorical or the modified categorical approach, designed to protect Sixth Amendment rights; or under issue preclusion rules of the double jeopardy clause,



designed to protect Fifth Amendment rights, Mr. DeFrance is not guilty.

The key point is that “[t]he *Blockburger* test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense.” *Brown v. Ohio*, 432 U.S. 161, 166 n.6 (1977). Both the categorical approach and the collateral estoppel/issue preclusion component(s) of the double jeopardy clause are designed to protect constitutional rights that warrant such protection. And insofar as the double jeopardy claim is concerned, the Supreme Court articulates that the clause is designed to protect two important interests:

Our cases have recognized that the Clause embodies two vitally important interests. The first is the “deeply ingrained” principle that “the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.” *Green v. United States*, 355 U.S. 184, 187–188, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957); see *Benton v. Maryland*, 395 U.S. 784, 795–795, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969); *DiFrancesco*, 449 U.S. at 127–128, 101 S.Ct. 426. The second interest is the preservation of “the finality of judgments.” *Crist v. Bretz*, 437 U.S. 28, 33, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1978).

*Yeager v. United States*,  
557 U.S. 110, 117-118 (2009).

Here both of these interests are implicated. Finality because §922(g)(9) requires a “conviction” for misdemeanor domestic assault involving a limited class of relationships. Mr. DeFrance was only recently tried and convicted by the Court

on a Montana PFMA involving a “spousal” type relationship. His original PFMA was premised on a dating relationship. Where, as here, the state court record shows that the prior conviction involved a domestic relationship of a boyfriend-girlfriend type, and not involving marriage or cohabitation, no federal firearms ban ever arose. Appellant should not have been subjected to a trial which would only “enhance[] the possibility that even though innocent he may be found guilty”. *Yeager v. United States*, 557 U.S. at 118.

What the court learned from the record in this case, beyond doubt, is that Mr. DeFrance committed a PFMA as a dating, non-cohabitating partner which was not a federal predicate crime banning firearm possession until 2022. As the Ninth Circuit stated in its closing in *United States v. Strickland*, 601 F.3d 693 (9<sup>th</sup> Cir. 2010) (*en banc*), “[t]he modified categorical approach is not a judicial version of three-card monte. Rather, the challenge is to determine whether a conviction under a non-categorical state statute was clearly based on facts that meet the federal generic definition of the crime.” 601 F.3d at 970.

### **CONCLUSION**

WHEREFORE, based on his motion and this brief which supports it, Mr. DeFrance prays the Court will acquit him of the charges against him; arrest its May 1, 2023, judgment for lack of jurisdiction in this case pursuant to Rules 29(c) and 34 of the Federal Rules of Criminal Procedure; or in the alternative, grant him a new

trial and/or take additional evidence under Rule 33(b)(2) of the Federal Rules of Criminal Procedure.

RESPECTFULLY SUBMITTED this 15<sup>th</sup> day of May, 2023.

/s/ Michael Donahoe  
MICHAEL DONAHOE  
Deputy Federal Defender  
Counsel for Defendant

**CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief is in compliance. The brief's line spacing is double spaced, and is proportionately spaced, with a 14-point font size and contains less than 6,500 words. (Total number of words: 5,217 excluding tables and certificates).

RESPECTFULLY SUBMITTED this 15<sup>th</sup> day of May, 2023.

/s/ Michael Donahoe  
MICHAEL DONAHOE  
Deputy Federal Defender  
Counsel for Defendant

**CERTIFICATE OF SERVICE**  
**L.R. 5.2(b)**

I hereby certify that on May 15, 2023, a copy of the foregoing document was served on the following persons by the following means:

  1         CM-ECF

  2         Mail

1.     CLERK, UNITED STATES DISTRICT COURT

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2.     MICHAEL BLAKE DeFRANCE  
       Defendant

/s/ Michael Donahoe  
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**ATTORNEY FOR PLAINTIFF**  
**UNITED STATES OF AMERICA**

**IN THE UNITED STATES DISTRICT COURT**  
**FOR THE DISTRICT OF MONTANA**  
**MISSOULA DIVISION**

|                                  |                                                   |
|----------------------------------|---------------------------------------------------|
| <b>UNITED STATES OF AMERICA,</b> | <b>CR 21-29-M-DLC</b>                             |
| <b>Plaintiff,</b>                | <b>PLEA AGREEMENT</b>                             |
| <b>vs.</b>                       | <b>Rule 11(c)(1)(A), (B), and (C),</b>            |
| <b>MICHAEL BLAKE DEFRANCE,</b>   | <b><i>Federal Rules of Criminal Procedure</i></b> |
| <b>Defendant.</b>                |                                                   |

Pursuant to Rule 11 of the Federal Rules of Criminal Procedure, the United States of America, represented by Jennifer S. Clark, Assistant United States Attorney for the District of Montana, and the defendant, Michael Blake DeFrance, and the defendant's attorney, Michael Donahoe, have agreed upon the following:

1. **Scope:** This plea agreement is between the United States Attorney's Office for the District of Montana and the defendant. It does not bind any other federal, state, or local prosecuting, administrative, or regulatory authority, or the United States Probation Office.

2. **Charges:** The defendant agrees to plead guilty to the superseding information, which charges prohibited person in possession of firearms and ammunition in violation of 18 U.S.C. § 922(g)(9). This offense carries a maximum punishment of ten years of imprisonment, a \$250,000 fine, three years of supervised release, and a \$100 special assessment.

At the time of sentencing, if the Court accepts this plea agreement, the United States will move to dismiss the indictment, superseding indictment, and second superseding indictment.

The defendant also agrees to admit the forfeiture allegation contained in the superseding information and agrees to forfeit all right, title and interest in the following firearms and ammunition:

- Smith and Wesson Lady Smith .357 revolver, SN DAW6108;
- five rounds of .357 ammunition;
- Remington Model 770 .243 rifle, SN M71863512;
- four rounds of .243 ammunition; and
- Keystone Arms .22 caliber rifle, SN 208343.

**3. Nature of the Agreement:** The parties agree that this plea agreement will be governed by:

- Rule 11(c)(1)(C), *Federal Rules of Criminal Procedure*. The defendant and the United States agree that a specific disposition of five years of probation is appropriate, with no agreement as to any other term. The defendant understands that, if the agreement is accepted by the Court, the defendant will not have an automatic right to withdraw the guilty plea. Rule 11(d)(2)(A), *Federal Rules of Criminal Procedure*. If the Court rejects the agreement, pursuant to Rule 11(c)(5), *Federal Rules of Criminal Procedure*, the defendant will be able to withdraw the plea and the parties will proceed to trial on all the counts in the second superseding indictment.

- Rule 11(c)(1)(A) and (B), *Federal Rules of Criminal Procedure*. The defendant and the United States agree that the agreement will be fulfilled provided the United States: a) moves to dismiss, and the Court agrees to dismiss the indictment, superseding indictment, and second superseding indictment; and b) makes the recommendations provided below. The defendant understands that if the agreement is accepted by the Court, and the indictment, superseding indictment, and second superseding indictment are dismissed, there will not be an automatic right to withdraw the plea, even if the Court does not accept or follow the recommendations made by the United States.



**4. Admission of Guilt:** The defendant will plead guilty because the defendant is guilty of the charge contained in the superseding information. In pleading guilty, the defendant acknowledges that:

First, the defendant knowingly possessed firearms or ammunition;

Second, the firearms and ammunition had been shipped and transported from one state to another;

Third, at the time the defendant possessed the firearms or ammunition, he had been convicted of a misdemeanor crime of domestic violence; and

Fourth, at the time the defendant possessed the firearms or ammunition, he knew he had been convicted of a misdemeanor crime of domestic violence.

The parties agree that the defendant's conviction for the misdemeanor crime of domestic violence was based on the fact he was in a current dating relationship with the victim at the time of the offense.

**5. Waiver of Rights by Plea:**

(a) The defendant is entitled to have the charge outlined in paragraph 2, above, prosecuted by an indictment returned by a concurrence of 12 or more members of a legally constituted grand jury, consisting of not less than 16 and not more than 23 members.

(b) The government has a right to use against the defendant, in a prosecution for perjury or false statement, any statement given under oath during the plea colloquy.

(c) The defendant has the right to plead not guilty or to persist in a plea of not guilty.

(d) The defendant has the right to a jury trial unless, by written waiver, the defendant consents to a non-jury trial. The United States must also consent and the Court must approve a non-jury trial.

(e) The defendant has the right to be represented by counsel and, if necessary, have the Court appoint counsel at trial and at every other stage of these proceedings.

(f) If the trial is a jury trial, the jury would be composed of 12 laypersons selected at random. The defendant and the defendant's attorney would have a say in who the jurors would be by removing prospective jurors for cause where actual bias or other disqualification is shown, or without cause by exercising peremptory challenges. The jury would have to agree unanimously before it could return a verdict of either guilty or not guilty. The jury would be instructed that the defendant is presumed innocent, and that it could not convict unless, after hearing all the evidence, it was persuaded of the defendant's guilt beyond a reasonable doubt.

(g) If the trial is held by the judge without a jury, the judge would find the facts and determine, after hearing all of the evidence, whether or not the judge was persuaded of the defendant's guilt beyond a reasonable doubt.

(h) At a trial, whether by a jury or a judge, the United States would be required to present its witnesses and other evidence against the defendant. The defendant would be able to confront those government witnesses and the defendant's attorney would be able to cross-examine them. In turn, the defendant could present witnesses and other evidence. If the witnesses for the defendant would not appear voluntarily, their appearance could be mandated through the subpoena power of the Court.

(i) At a trial, there is a privilege against self-incrimination so that the defendant could decline to testify and no inference of guilt could be drawn from the refusal to testify. Or the defendant could exercise the choice to testify.

(j) If convicted, and within 14 days of the entry of the Judgment and Commitment, the defendant would have the right to appeal the conviction to the Ninth Circuit Court of Appeals for review to determine if any errors were made that would entitle the defendant to reversal of the conviction.

(k) The defendant has a right to have the district court conduct the change of plea hearing required by Rule 11, Federal Rules of Criminal Procedure. By execution of this agreement, the defendant waives that right and agrees to hold

Case 9:21-cr-00029-DLC Document 190-1 Filed 05/15/23 Page 7 of 10  
that hearing before, and allow the Rule 11 colloquy to be conducted by, the U.S.  
Magistrate Judge, if necessary.

(k) If convicted in this matter, a defendant who is not a citizen of  
the United States may be removed from the United States, denied citizenship, and  
denied admission to the United States in the future.

The defendant understands that by pleading guilty pursuant to this  
agreement, the defendant is waiving all of the rights set forth in this paragraph.  
The defendant's attorney has explained those rights and the consequences of  
waiving those rights.

**6. Recommendations:** The United States will recommend the  
defendant's offense level be decreased by two levels for acceptance of  
responsibility, pursuant to USSG §3E1.1(a), unless the defendant is found to have  
obstructed justice prior to sentencing, pursuant to USSG §3C1.1, or acted in any  
way inconsistent with acceptance of responsibility. The United States will move  
for an additional one-level reduction, pursuant to USSG §3E1.1(b), if appropriate  
under the Guidelines. The parties reserve the right to make any other arguments at  
the time of sentencing that are not inconsistent with the recommendation of a  
sentence of probation for five years. The defendant understands that the Court is  
not bound by these recommendations.

7. **Sentencing Guidelines:** Although advisory, the parties agree that the U.S. Sentencing Guidelines must be applied, and a calculation determined, as part of the protocol of sentencing to determine what sentence will be reasonable.

8. **Waivers:**

a. *Waiver of Appeal of the Sentence – General:* The defendant understands the law provides a right to appeal and collaterally attack the sentence imposed in this case. 18 U.S.C. § 3742(a); 28 U.S.C. §§ 2241, 2255. Based on the concessions made by the United States, the defendant knowingly waives any right to appeal or collaterally attack any aspect of the sentence, including conditions of probation or supervised release. This waiver includes challenges to the constitutionality of any statute of conviction and arguments the admitted conduct does not fall within any statute of conviction. This waiver does not prohibit the right to pursue a collateral challenge alleging ineffective assistance of counsel.

b. *Waiver – Ex Post Facto:* The defendant understands that the statute to which he is pleading guilty was amended in June 2022 and the definition of a “misdemeanor crime of domestic violence” was expanded to include a “current or recent former dating relationship” between the defendant and the victim. The defendant knowingly waives any claim or argument that the expanded definition of “misdemeanor crime of domestic violence” does not apply to his 2013

Case 9:21-cr-00029-DLC Document 190-1 Filed 05/15/23 Page 9 of 10  
conviction and expressly agrees that he was in a current dating relationship with  
the victim when he committed that offense.

**9. Voluntary Plea:** The defendant and the defendant's attorney  
acknowledge that no threats, promises, or representations have been made to  
induce the defendant to plead guilty, and that this agreement is freely and  
voluntarily endorsed by the parties.

**10. Detention/Release After Plea:** The United States agrees that it will  
not move for detention pending sentencing as long as the defendant continues to  
comply with any release conditions imposed by the Court.

**11. Breach:** If the defendant breaches the terms of this agreement or  
commits any new criminal offenses between signing this agreement and  
sentencing, the U.S. Attorney's Office is relieved of its obligations under this  
agreement, but the defendant may not withdraw the guilty plea.

**12. Entire Agreement:** Any statements or representations made by the  
United States, the defendant, or defense counsel prior to the full execution of this  
plea agreement are superseded by this plea agreement. No promises or  
representations have been made by the United States except as set forth in writing  
in this plea agreement. This plea agreement constitutes the entire agreement  
between the parties. Any term or condition which is not expressly stated as part of  
this plea agreement is not to be considered part of the agreement.

JESSE A. LASLOVICH  
United States Attorney

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JENNIFER S. CLARK  
Assistant U. S. Attorney  
Date: \_\_\_\_\_

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MICHAEL BLAKE DEFRANCE  
Defendant  
Date: \_\_\_\_\_

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MICHAEL DONAHOE  
Defense Counsel  
Date: \_\_\_\_\_

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**Assistant U.S. Attorney**  
**U.S. Attorney's Office**  
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**Missoula, MT 59802**  
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**ATTORNEY FOR PLAINTIFF**  
**UNITED STATES OF AMERICA**

**IN THE UNITED STATES DISTRICT COURT**  
**FOR THE DISTRICT OF MONTANA**  
**MISSOULA DIVISION**

|                                  |                                                      |
|----------------------------------|------------------------------------------------------|
| <b>UNITED STATES OF AMERICA,</b> | <b>CR 21-29-M-DLC</b>                                |
| <b>Plaintiff,</b>                | <b>SUPERSEDING INFORMATION</b>                       |
| <b>vs.</b>                       | <b>PROHIBITED PERSON IN POSSESSION</b>               |
| <b>MICHAEL BLAKE DEFRANCE,</b>   | <b>OF FIREARMS AND AMMUNITION</b>                    |
| <b>Defendant.</b>                | <b>Title 18 U.S.C. § 922(g)(9)</b>                   |
|                                  | <b>(Penalty: Ten years of imprisonment,</b>          |
|                                  | <b>\$250,000 fine, and three years of supervised</b> |
|                                  | <b>release)</b>                                      |
|                                  | <b>CRIMINAL FORFEITURE</b>                           |
|                                  | <b>Title 18 U.S.C. § 924(d)</b>                      |

**THE UNITED STATES ATTORNEY CHARGES:**

That on or about and between October 3, 2016, and October 2, 2018, at  
Missoula, in Missoula County, in the State and District of Montana, the defendant,  
MICHAEL BLAKE DEFRANCE, knowing he had been convicted on or about May



6, 2013, of a misdemeanor crime of domestic violence under the laws of the State of Montana, which meets the definition of a misdemeanor crime of domestic violence under 18 U.S.C. § 921(a)(33)(A)(i) and (ii) because it involved a current dating relationship with the victim, knowingly possessed, in and affecting interstate commerce, firearms and ammunition, in violation of 18 U.S.C. § 922(g)(9).

#### FORFEITURE ALLEGATION

Upon conviction of the offense listed in this superseding information, the defendant, MICHAEL BLAKE DEFRANCE, shall forfeit, pursuant to 18 U.S.C. §924(d), any firearm and ammunition involved and used in any knowing violation of said offenses.

JESSE A. LASLOVICH  
United States Attorney

/s/ Jennifer S. Clark  
Assistant U.S. Attorney  
Attorney for Plaintiff

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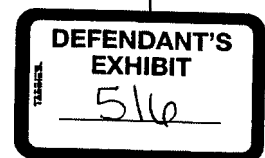
JESSE A. LASLOVICH  
United States Attorney

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CYNDEE L. PETERSON  
Criminal Chief Assistant U.S. Attorney

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TRANSCRIPTION OF  
235216DA\_20130413-911 POSITION 1  
(9:59)



1 (Call begins.)

2  
3 SHERIFF'S OFFICE: Sheriff's Office.

4 SANDERS COUNTY DEPUTY: Hey, Bill, it's  
5 Robert.

6 SHERIFF'S OFFICE: Hey. I got a call from  
7 the Tribe. Uh, Dixon Agency. They got a call from  
8 an RP down there. A 17-year-old female said that  
9 she was assaulted by a male down there.

10 The male left the residence. He's next  
11 door at this point. No ambulance was required.  
12 The 17-year-old is still at the residence.

13 The mom, who is in Polson, called Tribe,  
14 also, and wants charges pressed against the other  
15 party, the male party that's next door.

16 Uh, the female is at grandpa's house at  
17 309 Frank McClure Street. Okay? He's a -- their  
18 phone number out there is 246-3315.

19 The 17- --

20 SANDERS COUNTY DEPUTY: Is he tribal?

21 SHERIFF'S OFFICE: No. The suspect is not  
22 tribal. The 17-year-old and the mother are tribal.

23 Germaine Charlo is the female. Her name  
24 is J-E-R-M-A-I-N (sic), Charlo, C-H-A-R-L-O. Date  
25 of birth, 4/23 of '95. I was unable to find a

1 driver's license for her.

2 The male suspect is a Michael DeFrance.  
3 David, Edward, Frank, Robert, Adam, Nora, Charles,  
4 Edward. His date of birth is 7/11 of '93. So,  
5 he's 19.

6 Mom lives in Polson. Her name is Jennifer  
7 Morigeau. Mom's phone number is 274-0679.

8 The Tribe says they are sending an  
9 officer, also, down there.

10 SANDERS COUNTY DEPUTY: Okay. So, you  
11 said 309 Frank McClure?

12 SHERIFF'S OFFICE: Frank McClure is where  
13 the 17-year-old victim is.

14 SANDERS COUNTY DEPUTY: You said 309?

15 SHERIFF'S OFFICE: Yeah, 309.

16 SANDERS COUNTY DEPUTY: Not 209, right?

17 SHERIFF'S OFFICE: Nope. 3. 309.

18 SANDERS COUNTY DEPUTY: Okay.

19 SHERIFF'S OFFICE: And, I guess, that's  
20 grandpa's house.

21 SANDERS COUNTY DEPUTY: Do you happen to  
22 know who he is?

23 SHERIFF'S OFFICE: Oh, let me check on the  
24 map here. They didn't give me that, but let me  
25 check. I show that an Elmer Morigeau lives there.

1 Nickname, "Sonny."

2 SANDERS COUNTY DEPUTY: How do you spell  
3 "Morigeau"?

4 SHERIFF'S OFFICE: Uh, M-O-R-I-G-A-E-U  
5 (sic).

6 SANDERS COUNTY DEPUTY: M-O-R-I-G-A-U?

7 SHERIFF'S OFFICE: G-E-A-U.

8 SANDERS COUNTY DEPUTY: J-E-A-U.

9 SHERIFF'S OFFICE: Uh, G. Like, George.  
10 So, Mary, Ocean, Robert, Ida, George, Edward, Adam,  
11 Union.

12 SANDERS COUNTY DEPUTY: Right.

13 SHERIFF'S OFFICE: Okay.

14 SANDERS COUNTY DEPUTY: And do you have a  
15 case report number?

16 SHERIFF'S OFFICE: Our CR number on this  
17 is 1603. 1603.

18 SANDERS COUNTY DEPUTY: 1603. And were  
19 there sexuals, or was there --

20 SHERIFF'S OFFICE: Uh, no. This was a  
21 domestic. Physical. And I haven't had a chance to  
22 call them yet. And I'm going to call her, just to  
23 reconfirm that she doesn't want an ambulance. Lake  
24 County said she didn't -- or Tribal said that she  
25 didn't, so... But I'm going to call just to make

1 | sure that we are covered on our end.

2 | SANDERS COUNTY DEPUTY: So, is -- so, is  
3 | her -- are they related?

4 | SHERIFF'S OFFICE: Uh, they said it was a  
5 | domestic, so I'm guessing they must be a  
6 | boyfriend/girlfriend type a deal.

7 | SANDERS COUNTY DEPUTY: Oh, okay.

8 | SHERIFF'S OFFICE: So, I'm -- when I call,  
9 | I'll ask them that, too.

10 | SANDERS COUNTY DEPUTY: And who are you  
11 | calling to talk to?

12 | SHERIFF'S OFFICE: Uh, Germaine. Grandpa.  
13 | That's where this victim is. And I want to make  
14 | sure that she doesn't need an ambulance.

15 | SANDERS COUNTY DEPUTY: At Elmer's  
16 | residence.

17 | SHERIFF'S OFFICE: Yep.

18 | SANDERS COUNTY DEPUTY: And that was  
19 | 246-3315?

20 | SHERIFF'S OFFICE: Yep.

21 | SANDERS COUNTY DEPUTY: Okay. I'll be  
22 | heading that direction. I'm over here on  
23 | (inaudible) Road, so I (inaudible) right there.

24 | SHERIFF'S OFFICE: Okay. And I'll be --  
25 | I'll get ahold of her and find out who -- what type

1 of relationship they had, and if she needs an  
2 ambulance, and if she has got any visible physical  
3 signs --

4 SANDERS COUNTY DEPUTY: Okay.

5 SHERIFF'S OFFICE: -- or injuries. Okay.

6  
7 (Call ends.)

8  
9 \*\*\*\*\*

10  
11 (Call begins.)

12  
13 (Phone ringing.)

14  
15 SHERIFF'S OFFICE: It's down by Hot  
16 Springs.

17  
18 (Phone ringing.)

19  
20 GERMAINE CHARLO: Hello.

21 SHERIFF'S OFFICE: Hi. Is this Germaine?

22 GERMAINE CHARLO: Yeah.

23 SHERIFF'S OFFICE: Hi, Germaine, this is  
24 the Sheriff's Office for Sander's County. Uh, the  
25 Tribe had gotten ahold of me to tell me that you

1 had been in some type of a domestic altercation  
2 with a Michael Defrance.

3 GERMAINE CHARLO: Yeah.

4 SHERIFF'S OFFICE: Is Michael a boyfriend,  
5 or?

6 GERMAINE CHARLO: He's my boyfriend, yeah.

7 SHERIFF'S OFFICE: Yeah. Okay. And does  
8 he live with you, or --

9 GERMAINE CHARLO: No, no. I was -- I was  
10 spending this weekend with him at his --

11 SHERIFF'S OFFICE: Oh, okay. And you're  
12 at 309 Frank McClure?

13 GERMAINE CHARLO: Yeah.

14 SHERIFF'S OFFICE: Is that where --

15 GERMAINE CHARLO: That's my grandpa's  
16 house, yes.

17 SHERIFF'S OFFICE: Is this where that  
18 happened?

19 GERMAINE CHARLO: No. It happened at his  
20 house. I don't know his address.

21 SHERIFF'S OFFICE: Is he next door?

22 GERMAINE CHARLO: Yeah.

23 SHERIFF'S OFFICE: Is that where it  
24 happened?

25 GERMAINE CHARLO: He's just next door,



1 yes.

2 SHERIFF'S OFFICE: Did you need an  
3 ambulance at all?

4 GERMAINE CHARLO: No. No, I don't. I'm  
5 fine.

6 SHERIFF'S OFFICE: Okay. Are -- was this  
7 a physical altercation? Is that what happened,  
8 or --

9 GERMAINE CHARLO: Yeah. Uhm, you know,  
10 I -- we -- we were supposed to go to Missoula  
11 together, and, uh, I went with my aunt. And we  
12 were supposed to meet up and it didn't happen. And  
13 he was frustrated with it.

14 SHERIFF'S OFFICE: Uh-huh.

15 GERMAINE CHARLO: I go -- I told him, "I'm  
16 going to -- I don't want to be around you when  
17 you're blowing up, I'm going to" -- (crying). I'm  
18 sorry. "I'm going to walk away, go over to my  
19 grandpa's and visit him, and bring my stuff so it  
20 don't get broken."

21 SHERIFF'S OFFICE: Uh-huh.

22 GERMAINE CHARLO: And, you know, "I'm just  
23 going to walk away from it." Because the last two  
24 fights we've had, I was the one who got upset. So,  
25 I didn't want to get upset, so I walked off and let

1 it be. And he told me that I was being rude. And  
2 I told him, no, I just wanted to walk away and not  
3 fight.

4 SHERIFF'S OFFICE: Okay.

5 GERMAINE CHARLO: And I had brought my  
6 clothes over here. And I had some of his clothes,  
7 and I brought them over to him. And I didn't want  
8 to go inside of the camper, so I had picked up the  
9 clothes, and I put them in his camper, and I shut  
10 the door. And I walked off.

11 SHERIFF'S OFFICE: Okay.

12 GERMAINE CHARLO: I didn't say anything to  
13 him. And he came out and started hollering at me,  
14 and told me if I was going to leave we were done  
15 for. And I told him that I wanted him to calm down  
16 first before we could talk.

17 SHERIFF'S OFFICE: Okay.

18 GERMAINE CHARLO: And he turned around,  
19 and he grabs me by my sweatshirt, throws me into  
20 his van, punches me in the head a couple of times,  
21 and then pulls me up and knocks me on the ground  
22 and spits in my face.

23 SHERIFF'S OFFICE: Oh, okay. Uh, and the  
24 places that he punched you, did he leave a bruise,  
25 or anything, on you?

1 GERMAINE CHARLO: Uhm, I'm -- I'm a little  
2 red.

3 SHERIFF'S OFFICE: Okay.

4 GERMAINE CHARLO: He punched me only four  
5 times, and it's around my temple and my ear.

6 SHERIFF'S OFFICE: Okay.

7 GERMAINE CHARLO: But I'm a little red,  
8 like, --

9 SHERIFF'S OFFICE: Okay.

10 GERMAINE CHARLO: -- around there.

11 SHERIFF'S OFFICE: Okay. I do have a  
12 deputy that's coming down to speak with you.

13 GERMAINE CHARLO: All right.

14 SHERIFF'S OFFICE: So, he should be there  
15 pretty soon. I think the Tribe is also sending an  
16 officer down to speak with you.

17 GERMAINE CHARLO: Alrighty.

18 SHERIFF'S OFFICE: You're -- you're a  
19 tribal member, but he's not a tribal member?

20 GERMAINE CHARLO: Yeah.

21 SHERIFF'S OFFICE: Oh, okay. Michael is  
22 not a tribal member. Okay.

23 GERMAINE CHARLO: Yes.

24 SHERIFF'S OFFICE: Okay. Has he done this  
25 before?

1 GERMAINE CHARLO: Uhm, no.  
2 SHERIFF'S OFFICE: Okay.  
3 GERMAINE CHARLO: I'm not going to lie, I  
4 have -- we've had this fight before. Like,  
5 arguments.  
6 SHERIFF'S OFFICE: Uh-huh.  
7 GERMAINE CHARLO: About stupid little  
8 things. And I've had fights with him, where I  
9 would get mad at him and barely hit him, but it's  
10 never been this physical.  
11 SHERIFF'S OFFICE: Oh, okay.  
12 GERMAINE CHARLO: So...  
13 SHERIFF'S OFFICE: Did -- do you and your  
14 boyfriend live together, or do you just visit?  
15 GERMAINE CHARLO: No, I just visit --  
16 SHERIFF'S OFFICER: Okay.  
17 GERMAINE CHARLO: -- (inaudible) weekend.  
18 SHERIFF'S OFFICE: Okay. Okay. All  
19 right, Germaine. I've got a deputy on the way down  
20 to come speak with you. You're at 309 Frank  
21 McClure Street, right?  
22 GERMAINE CHARLO: Yes.  
23 SHERIFF'S OFFICE: With Elmer?  
24 GERMAINE CHARLO: Yes.  
25 SHERIFF'S OFFICE: Okay. Okay. We'll

1 have a deputy come down and talk to you.

2 GERMAINE CHARLO: Alrighty. Thank you.

3 SHERIFF'S OFFICE: You bet. Bye.

4  
5 (Call ends.)  
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CERTIFICATE

I, Julie L. DeLong, certify that the foregoing is a correct transcript from the recorded audio proceedings in the above-entitled matter to the best of my knowledge, skill, and ability.

/s/ Julie L. DeLong  
Julie L. DeLong

08/05/2022  
Date

SANDERS COUNTY SHERIFFS  
CASE REPORT - 213CR0001603

Printed 07/21/2020-13:30 By 4262NELSE Page 1

Sector 31 Level 5

SECURE SIGNED BY DEPUTY ROBYN F LARGENT, 5851 LARGE ON 04/15/13 AT 01:26

CORE DATA

Case Report# 213CR0001603  
Other#  
Master CR#  
Classification 45-5-206-1-A PFMA - MINOR INJ/PHYSICAL CONT  
Ranking MISDEM  
Reported As DOMESTIC ABUSE  
Time Reported (SAT) 04/13/2013 23:49  
Taken By 3906BROWN  
Reported How PHONE 406-246-3315  
Time of Occurrence 04/13/2013 23:49 (SAT) To  
Injuries Y  
Weapons N  
Stolen Property\$ Stolen Vehicle\$  
Damaged Property\$ Damaged Vehicle\$  
Scene 509 FRANK MCLURE DIXON AGENCY  
Sector 31  
Premise 20  
Time Dispatched  
Time On Scene 04/14/2013 00:35 13509  
Time Cleared Scene 04/14/2013 02:32  
Assigned To SCSO  
Cleared

MORE CORE

Pattern  
Time-Of-Day DARKNESS  
Weather Condition CLOUDY  
Forms Prepared NOTICE OF VICTIMS RIGHTS, DOMESTIC VIOLENCE SUPPLEMENTAL REPORT, 72 HR NO CONTACT ORDER

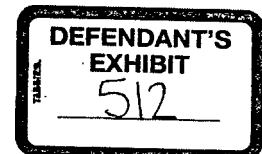
OFFENSES

04/14/2013 01:10 STATE, 45-5-206-1-A PFMA - MINOR INJ/PHYSICAL CONT MISDEM (B)  
Arrest# 213AR0000159

NAMES

|              |                                      |            |              |            |           |
|--------------|--------------------------------------|------------|--------------|------------|-----------|
| ARRESTEE     | DEFRANCE, MICHAEL BLAKE M WN 510 135 | DOB        | 07/11/1993   | SocSec     | 540430932 |
| Address      | 509 PENNAME ST DIXON, MT 59831       | Home Phone | 406-246-4550 |            |           |
| Employer     |                                      | Occupation |              |            |           |
| State#/NCIC# | /                                    | Arrest#    | 213AR0000159 | Work Phone |           |
| Gang         |                                      | ID How/By  |              | Deposed    | N         |

054



**SANDERS COUNTY SHERIFFS**

**CASE REPORT - 213CR0001603**

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Page 2

Sector 31 Level 5

SECURED/ISSUED BY DEPUTY ROBYN F LARGENT, 5851 LARGENT, ON 04/15/13 AT 01:26

**NAMES (continued...)**

|                                                    |                        |                                   |
|----------------------------------------------------|------------------------|-----------------------------------|
| <b>COMPLAINANT</b> CHARLO, JERMAIN                 | <b>DOB</b> [REDACTED]  | <b>1995 SocSec</b> U              |
| <b>Address</b> [REDACTED]                          | <b>MT</b> 59831        | <b>Home Phone</b> [REDACTED] 3315 |
| <b>Employer</b>                                    | <b>DIXON</b>           | <b>Work Phone</b>                 |
| <b>State#/NCIC#</b> /                              | <b>Occupation</b>      | <b>Deposed</b>                    |
| <b>Gang</b>                                        | <b>Arrest#</b>         |                                   |
|                                                    | <b>ID How/By</b>       |                                   |
|                                                    |                        |                                   |
| <b>VICTIM</b> CHARLO, JERMAINE AUSTIN F IN 508 116 | <b>DOB</b> [REDACTED]  | <b>1995 SocSec</b> U              |
| <b>Address</b> [REDACTED]                          | <b>DIXON, MT</b> 59831 | <b>Home Phone</b>                 |
| <b>Employer</b>                                    | <b>Occupation</b>      | <b>Work Phone</b>                 |
| <b>State#/NCIC#</b> /                              | <b>Arrest#</b>         | <b>Deposed</b> N                  |
| <b>Gang</b>                                        | <b>ID How/By</b>       |                                   |

**PROPERTY**

|                                                                           |                |                               |
|---------------------------------------------------------------------------|----------------|-------------------------------|
| <b>EVIDENCE</b> RECORDINGS AUDIOVISUAL                                    | <b>Qty</b> 1   | <b>Value</b> U                |
| <b>Description</b> 911 RECORDING                                          |                |                               |
| <b>Make</b>                                                               | <b>Model</b>   | <b>Evidence#</b> 213EV0000166 |
| <b>SerialNo</b>                                                           | <b>OwnerNo</b> | <b>State#/NCIC#</b> /         |
|                                                                           |                |                               |
| <b>EVIDENCE</b> RECORDINGS AUDIOVISUAL                                    | <b>Qty</b> 1   | <b>Value</b> U                |
| <b>Description</b> CD OF PHOTOGRAPHS DOCUMENTED IN 213CR0001603 PHOTO LOG |                |                               |
| <b>Make</b>                                                               | <b>Model</b>   | <b>Evidence#</b> 213EV0000157 |
| <b>SerialNo</b>                                                           | <b>OwnerNo</b> | <b>State#/NCIC#</b> /         |
|                                                                           |                |                               |
| <b>EVIDENCE</b> RECORDINGS AUDIOVISUAL                                    | <b>Qty</b> 1   | <b>Value</b> U                |
| <b>Description</b> CD OF STATEMENTS, VICTIM AND SUSPECT                   |                |                               |
| <b>Make</b>                                                               | <b>Model</b>   | <b>Evidence#</b> 213EV0000156 |
| <b>SerialNo</b>                                                           | <b>OwnerNo</b> | <b>State#/NCIC#</b> /         |

**DISPATCH WRITTEN BY 3906BROWN ON 04/13/2013**

23:55 3906BROWN> TLO ADV RECIEVED REPORT OF DOEMSTIC THAT HAD OCCURED EARLIER AT DIXON AGENCY, MALE SUSPECT HAS LEFT THE RES AND IS NEXT DOOR, THE FEMALE 17YR VICTIM IS AT THE RES AND DID NOT NEED AMB. MOTHER OF 17YR REQ CHARGES AGAINST THE MALE SUSPECT..

TRIBE OFFICER ENROUTE

ADV 3509 ENROUTE

0001>SPOKE WITH VICTIM AND DID NOT WANT AMB SHE ADV THAT BOYFRIEND HAD STRUCK HER THE HEAD APPROX 4TIMES AFTER THROWING HER TO THE GROUND AND THEN SPAT ON HER.

00:26 9225CARNA> 0024 > TLO LL/ADV A COUPLE IO'S ARE 10-97/REQ ETA ON DEPUTY //

3509 ADV 15 MIN OUT // TLO ADV MALE IS DETAINED AT THIS TIME // ADV 3509.

0110 > 3509 10-15.

0016 > 3509 STOPPED TO READJUST RESTRAINTS.

0120 > 3509 IN TRANSIT.

0133 > 3509 E REPEATER.

0208 > 3509 W REPEATER.

0221 > 3509 10-81.



**SANDERS COUNTY SHERIFFS**

**CASE REPORT - 213CR0001603**

Printed 07/21/2020-13:30

By 4262NELSE

Page 3

Sector 31 Level 5

SECURE SIGNED BY DEPUTY ROBYN F LARGENT, 5851LARGE ON 04/15/13 AT 01:26

INVESTIGATION WRITTEN BY 5851LARGE ON 04/14/2013

On 041314, at approximately 2350 hours, I was dispatched to 309 Pename St. for a report of domestic violence that had occurred at 509 Pename St.

At approximately 0034 hours, I arrived on scene at 509 Pename St. I observed two Tribal (TLO) patrol vehicles already on scene. One of the officers is known to me as TLO -14, TJ Haynes. I was told that the suspect, Michael Blake Defrance, was being detained and they would watch him while I interviewed the victim.

At approximately 0037 hours, I activated my recorder as I walked up to the steps at 309 Pename St. I observed a female sitting on the front steps. She told me her name was Jermaine (Jermaine Austin Charlo). I identified myself to Charlo. I took photographs of Charlo's injuries to the left side of her face (reference photo log). With Charlo's assistance, I completed a Domestic Violence Supplemental Report as well as document Charlo's answers to the PFMA Report Writing Checklist. Charlo told me her name was Jermaine Austin Charlo with a date of birth of [REDACTED] 95.

**Charlo Interview:**

During my interview with Charlo she told me the following:

1. Michael Blake Defrance was her boyfriend. They have been dating since June of 2012.
2. Charlo and Defrance had an argument. According to Charlo, Defrance followed her out of the camper where he lives, held her down across the hood of the van and struck her in the face.

At approximately 0050 hours, I read to Charlo portions of the Notice of Victim's Rights Form. I encouraged Charlo to read the form in its entirety. I gave Charlo a copy of the form. She authorized me to fax the form to SCCFF. (Later at the station, I faxed the form to SCCFF at 827-9111.) I handed to Charlo two pamphlets: Walking on Eggshells and Orders of Protection. At approximately 0059 hours, I concluded the interview with Charlo.

This narrative is not the complete interview conducted with Charlo, reference the audio recording for complete statement.

At approximately 0105 hours, I met with Defrance. Defrance told me that he had hit Charlo. I informed him he was under arrest for PFMA. Defrance was cooperative. I placed handcuffs onto Defrance with his hands to the rear. I checked the handcuffs for tightness. Defrance's mother and father swarmed me at the patrol vehicle. I told them to step away. I frisked Defrance for weapons. Defrance took a seat in the rear passenger transport area of my patrol vehicle. I secured Defrance with a seat belt. I informed the parents that Defrance would be transported to the SCSO Jail. At approximately 0110 hours, I notified dispatch I was with one adult male in custody.

Prior to my departure, I asked TLO 14 to transfer the guinea pig belonging to Charlo from Defrance's residence to Charlo's possession at 309 Pename St.

I transported Defrance to the Post Office in Dixon and parked in a well lit area. I notified dispatch I was stopping to readjust the restraints. I asked Defrance to cooperate. Defrance exited the patrol vehicle as requested. I placed Defrance in a transport restraint with his hands to the front. I checked the handcuffs for tightness and double-locked them. Defrance took a seat in the patrol vehicle and I secured his seat belt.

Defrance was transported without incident to the Sanders County Jail (SCSO). I released Defrance to the detention officer on duty, Krista Olesen.

I issued Defrance a Notice to Appear in Justice Court on April 24, 2013 at 10:00 AM for violation of

**SANDERS COUNTY SHERIFFS  
CASE REPORT - 213CR0001603**

Printed 07/21/2020-13:30

By 4262NELSE

Page 4

Sector 31 Level 5

SECURED/SIGNED BY DEPUTY ROBYN FLARGENT, 5851LARGE ON 04/15/13 AT 01:26

INVESTIGATION WRITTEN BY 5851LARGE ON 04/14/2013 (continued...)

MCA 45-5-206; PFMA. I completed a PC Form, a 72 No Contact Order and placed them along with the NTA in the Justice Court Inbox.

**Defrance Interview:**

I met with Defrance at the booking window located at the SCSO Jail. At approximately 0319 hours, I activated my voice recorder. I read to Defrance a Miranda Warning. Defrance agree to speak with me without an attorney present. During our interview, Defrance told me that he struck Charlo with an open hand, then two more times with his fist. I told Defrance there was a 72 hour no contact order in place and explained to him the "no contact". I informed Defrance there was no bond; that he would need to see the judge prior to being released.

I took photographs of Defrance's hands. Reference Photo Log for more details. The interview was ended at approximately 0331 hours.

This narrative is not the complete interview with Defrance, reference the audio recording for complete statement.

I downloaded the recorded audio statements conducted with Charlo and Defrance to CD. I entered the CD into the Property/Evd Section of Swift. The evidence CD was assigned the following evidence number, 213EV0000156. At approximately 0010 hours, I placed evidence 213EV0000156 in the evidence locker located at the SCSO.

I downloaded the photographs documented in the Photo Log to CD. I entered the CD into the Property/Evd Section of Swift. The evidence was assigned the following evidence number, 213EV0000157. At approximately 0109 hours, on 041513, I placed evidence 213EV0000157 in the evidence locker located at the SCSO.

I printed black and white copies of the six photographs to be included in case report.

End of statement,  
Robyn Largent,  
SCSO Deputy 3509.

PHOTO LOG WRITTEN BY 5851LARGE ON 04/14/2013

On 041413, at approximately 0040 hours, I took photographs of Jermaine Austin Charlo's injuries to the left side of her face. I asked Jermaine to hold a quarter. The photographs were taken on the front porch of 309 Pename St.

1. Image 1812 was taken at approximately 0040 hours, on 041413.  
Subject: Ear, left, swollen.
2. Image 1813 was taken at approximately 0040 hours, on 041413.  
Subject: Marks, cheek, left.
3. Image 1814 was taken at approximately 0041 hours, on 041413.  
Subject: Bruising, cheek, left.
4. Image 1815 was taken at approximately 0041 hours, on 041413.  
Subject: Another of bruising, cheek, left.

**SANDERS COUNTY SHERIFFS**

**CASE REPORT - 213CR0001603**

Printed 07/21/2020-13:30

By 4262NELSE

Page 5

Sector 31 Level 5

SECURE SIGNED BY DEPUTY ROBYN F LARGENT, 5851LARGE ON 04/15/13 AT 01:26

*PHOTO LOG WRITTEN BY 5851LARGE ON 04/14/2013 (continued...)*

On 041413, at approximately 0328 hours, I took photographs of Michael Blake Defrance's hands. The pictures were taken at the booking area located at the SCSO Jail.

5. Image 1816 was taken at approximately 0328 hours, on 041413.  
Subject: Palms, left and right of Defrance's hands.

6. Image 1817 was taken at approximately 0328 hours, on 041413.  
Subject: Hands, backside, left and right of Defrance's hands.

End of photo log,  
Robyn Largent,  
SCSO Deputy 3509.

*STATEMENT WRITTEN BY 5851LARGE ON 04/15/2013*

On 041513, at approximately 0124 hours, I placed this case report in the "To be filed" Inbox located at the SCSO.

Robyn Largent,  
SCSO Deputy 3509.

SECURE SIGNED BY DEPUTY ROBYN F LARGENT, 5851LARGE ON 04/15/13 AT 01:24

1 JoAnn Jett Corson  
2 Registered Diplomate Reporter  
3 Certified Realtime Reporter  
4 P. O. Box 8006  
5 Missoula, Montana 59807-8006  
6 406/829-7123 office  
7 joann\_corson@mtd.uscourts.gov  
8  
9 United States Court Reporter  
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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
MISSOULA DIVISION

11 UNITED STATES OF AMERICA, )  
12 Plaintiff,) No. CR 21-29-M-DLC  
13 vs. )  
14 ) VOLUME 1 OF 2  
15 MICHAEL BLAKE DeFRANCE, )  
16 Defendant.) TRANSCRIPT OF BENCH TRIAL  
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BEFORE THE HONORABLE DANA L. CHRISTENSEN  
UNITED STATES DISTRICT COURT JUDGE  
FOR THE DISTRICT OF MONTANA

Russell Smith United States Courthouse  
201 East Broadway  
Missoula, Montana 59802  
Wednesday, April 26, 2023  
08:36:38 to 17:00:21

Proceedings recorded by machine shorthand  
Transcript produced by computer-assisted transcription

**LARGENT DIRECT EXAMINATION BY CLARK**

1 THE COURT: You may.

2 MS. CLARK: (Handing.)

3 (Discussion off the record.)

4 THE COURT: Deputy Largent, if you would raise your  
5 right hand, the courtroom deputy will administer an oath.

6 (Oath administered to the witness.)

7 THE COURT: Deputy Largent, if you would make  
8 yourself comfortable up here in the witness stand and speak  
9 directly into the microphone so we all can hear you.

10 THE WITNESS: Thank you, sir.

11 WHEREUPON,

12 MR. ROBYN LARGENT,  
13 called for examination by counsel for plaintiff, after having  
14 been first duly sworn to testify the truth, the whole truth,  
15 and nothing but the truth, testified as follows:

16 DIRECT EXAMINATION

17 BY MS. CLARK:

18 Q Good morning.

19 A Good morning.

20 Q I'm Jennifer Clark. We haven't formally met. Thank you  
21 for being here.

22 Could you please introduce yourself to the Court?

23 A My name is Robyn Largent.

24 Q And are you currently employed?

25 A I am.

**LARGENT DIRECT EXAMINATION BY CLARK**

1 Q How are you employed?

2 A I'm self-employed, and also I am employed as a part-time  
3 employee for the Plains Police Department.

4 Q Were you ever a deputy for Sanders County Sheriff's  
5 Department?

6 A Yes.

7 Q And what years did you work in that capacity?

8 A I was a reserve deputy from 2009 to 2011, full-time  
9 deputy from 2011 until September of 2019.

10 Q What were your duties as a deputy for the sheriff's  
11 department?

12 A Perform patrol duties. Respond to calls for service.

13 Q Did you receive training to become a deputy?

14 A I did.

15 Q What training did you receive?

16 A I attended the law enforcement officers' basic training  
17 in Helena, Montana.

18 Q And part of your training, was it in report writing?

19 A Yes.

20 Q Why do officers write reports?

21 A To document and to -- the facts of what occurred in a  
22 call for service.

23 Q Do you ever use the written report to refresh your memory  
24 after time has passed?

25 A Yes.

**LARGENT DIRECT EXAMINATION BY CLARK**

1 Q Do those reports always refresh your memory?

2 A They help, yes.

3 Q Okay. And are those reports written close in time to  
4 when the events occur that you are writing the report about?

5 A Yes, they are.

6 Q Why is that done?

7 A To document what occurred at the incident. If it isn't  
8 documented timely, then we move on to other cases, so it needs  
9 to be done. And also to provide that information for -- if  
10 there's any prosecution.

11 Q Are the memories or recollection of events freshest the  
12 closer in time that you are to that event?

13 A Yes.

14 Q How many cases do you deal with or did you deal with as a  
15 deputy?

16 A Multiple calls on a shift.

17 Q Okay. Fair to say that you did not live the experiences  
18 that the people involved in each other's lives that you're  
19 responding to are?

20 A I did not live that lifestyle.

21 Q All right. You didn't.

22 So things that happened, you wouldn't remember or have an  
23 independent recollection of necessarily?

24 A True.

25 Q Were you approached to review a case involving a 2013

**LARGENT DIRECT EXAMINATION BY CLARK**

1 partner/family member assault investigation involving Michael  
2 DeFrance and Jermain Charlo?

3 A Yes.

4 Q When you were approached about that event, did you have  
5 any independent recollection?

6 A I remembered the event but other than that, I did not.

7 Q What did you do to prepare for an interview?

8 A The defense approached me first. Provided me with  
9 transcripts. And then I was also provided a case report.

10 Q Did you review those materials?

11 A I did.

12 Q Did that help refresh your memory about what occurred in  
13 2013?

14 A Yes, it helped.

15 Q Do you recall what date this incident occurred?

16 A I believe it was April 13 of 2013.

17 Q Do you recall what date you were called by dispatch?

18 A I don't recall the date, no.

19 Q Do you recall if it was -- this event kind of spanned  
20 over, I would say, two days, but occurred on the 13th and  
21 response was on the 14th of April? Does that sound fair?

22 A That would be, that would be fair. I was quite a  
23 distance from the call for service when I received it.

24 Q All right. Where did this incident occur?

25 A It would be called the Agency outside of Dixon, Montana.



**LARGENT DIRECT EXAMINATION BY CLARK**

1 Q And do you remember the specific address that it  
2 occurred?

3 A 509 Frank McClure Street, and then I was dispatched to  
4 309.

5 Q 309 what street?

6 A Frank McClure. I'm sorry.

7 Q Is 509 Frank McClure also known as 509 Penname Street?

8 A Yes, that is true.

9 Q I've seen it both ways --

10 A Yes.

11 Q -- so is it kind of an overlap or --

12 A It faces both streets, so, yes.

13 Q Did you write a report regarding -- well, you said you  
14 reviewed your report. You wrote a report regarding this  
15 incident?

16 A Yes.

17 Q Did you take a recorded statement from Jermain Charlo?

18 A Yes.

19 Q Did you take a recorded statement from Michael DeFrance?

20 A Yes.

21 MS. CLARK: And, Judge, I think at this time we've  
22 agreed that we would play the statement that Deputy Largent  
23 took from Jermain Charlo. We don't object to it, and neither  
24 does the defense.

25 THE COURT: And what exhibit number is this?

**LARGENT DIRECT EXAMINATION BY CLARK**

1 MR. DONAHOE: 504, Your Honor.

2 THE COURT: And you would like to play it now,

3 Ms. Clark?

4 MS. CLARK: Yes, Your Honor.

5 THE COURT: How long is it?

6 MR. DONAHOE: It's about 19 minutes.

7 THE COURT: Okay. And is it being offered as an  
8 exhibit?

9 MS. CLARK: It is, Judge.

10 THE COURT: Any objection, Mr. Donahoe?

11 MR. DONAHOE: No, Your Honor. It's my exhibit.

12 THE COURT: I, I realize that.

13 MS. CLARK: Judge, and also in the interest of  
14 brevity, if you wish, we do have Exhibit 505 which is a  
15 transcript of that call. We can show Deputy Largent portions  
16 of that and inquire about it if that would -- if the Court  
17 would prefer.

18 THE COURT: No, let's go ahead and play it.

19 504 is admitted. And, 505, are you offering that as  
20 well, the transcript?

21 MS. CLARK: Yes, Your Honor.

22 THE COURT: Any objection to that? It's your  
23 exhibit, Mr. Donahoe.

24 MR. DONAHOE: No. That's fine. Thank you.

25 THE COURT: All right. So Exhibits 504 and 505 are

**LARGENT DIRECT EXAMINATION BY CLARK**

1 admitted.

2 (Exhibits 504 and 505 were received in evidence.)

3 THE COURT: And let's go ahead and play it.

4 (Exhibit 504 played.)

5 BY MS. CLARK:

6 Q Deputy Largent, in your conversation with Jermain, did  
7 she discuss her relationship with Michael DeFrance?

8 A Yes.

9 Q What did she say the relationship was?

10 A Boyfriend/girlfriend.

11 Q Did she say how long they had been together?

12 A Since 2012.

13 Q In June of 2012?

14 A Correct.

15 Q Do you know if she was spending the weekend with him?

16 A That's what she stated, yes.

17 Q Was there anything else through your investigation that  
18 indicated to you that she was spending the weekend with him?

19 A She said she had to gather her items. She was afraid  
20 there were things that were gonna get broken.

21 Q Did she have personal items in -- well, let's back up.

22 Where was Michael DeFrance living at this time?

23 A I don't, I don't know what that answer is. Or in the  
24 van, I guess, there at 509.

25 Q Was it a camper?

**LARGENT DIRECT EXAMINATION BY CLARK**

1 A Yeah, camper van.

2 Q Okay. Did Jermain have personal items in that camper?

3 A Yes.

4 Q Do you recall what personal items she had?

5 A Clothing, and then there was a gerbil or a guinea pig or

6 something.

7 Q Did you ask an officer to remove the guinea pig from the

8 camper for Jermain?

9 A I asked for assistance on that, yes.

10 Q Did you personally see her take any of her items out of

11 the van to take back to her grandfather's house?

12 A I can't answer that at this point in time.

13 Q Did she tell you that she was taking personal items out

14 of the camper?

15 A She did.

16 Q When you were interviewing her, did she say anything to

17 you that indicated what Mr. DeFrance thought this relation --

18 the status of this relationship was?

19 A I don't remember her stating what he thought it was.

20 Q Okay. Did she make the comment, "If I can't have you, no

21 one can," that the defendant had said to her at one point?

22 A Yes.

23 Q Would that indicate to you that he felt this was a

24 serious, committed relationship?

25 A She believed it was, according to her statement.

**LARGENT DIRECT EXAMINATION BY CLARK**

1 Q When she left the camper, did she say where she was going  
2 to be going?

3 A I believe she was gonna stay with her grandfather.

4 Q And do you know who her grandfather was?

5 A Elmer Morigeau, Jr.

6 Q How close in proximity was Elmer's house to the DeFrance  
7 house?

8 A Within three or four residences. It was fairly close.

9 Q Did she tell you how long she had been at DeFrance's?

10 A She commented on Friday. She had been there since  
11 Friday, I believe.

12 Q Did she tell you what the argument was about that they  
13 had?

14 A Allegedly she did not show up where she said she was  
15 gonna be. Supposed to meet with the defendant and his family  
16 at Walmart or something like that.

17 Q Did you have an opportunity in this case to review the  
18 report that you wrote?

19 A I have.

20 Q And is that a true and accurate copy of what you  
21 documented on April 14, 2013?

22 A Yes, it is.

23 MS. CLARK: Your Honor, I would move for admission;  
24 I believe it's marked as Defense Exhibit 512.

25 THE COURT: Any objection, Mr. Donahoe?

**LARGENT DIRECT EXAMINATION BY CLARK**

1 MR. DONAHOE: No, Your Honor. Thank you.

2 THE COURT: Exhibit 512 is admitted.

3 (Exhibit 512 was received in evidence.)

4 BY MS. CLARK:

5 Q Were there also 911 calls that were made in relation to  
6 this event? That Jermain made to 911?

7 A I spoke with my dispatcher. He contacted me, so I  
8 wouldn't know what calls were made to him or to them.

9 Q Did you have any --

10 A But apparently --

11 Q I'm sorry.

12 A Apparently something occurred because they contacted me.

13 Q Did you have any contact with Jermain by phone prior to  
14 meeting with her?

15 A I don't remember if I called her or not.

16 MS. CLARK: Judge, I know Mr. Donahoe had requested  
17 for admission of the 911 calls. We don't object to that as  
18 well, but I'm looking at what he's provided in his binder this  
19 morning and trying to compare that to what we have. I'm not  
20 sure if that's a complete transcript or not of the 911 calls.  
21 I would, if allowed, either have time to confer with him or to  
22 offer the transcript that we have of the 911 calls.

23 THE COURT: So you're referring to Exhibits 513 and  
24 514?

25 MS. CLARK: (No response.)

**LARGENT DIRECT EXAMINATION BY CLARK**

1 THE COURT: Defense's Proposed Exhibits 513 and 514?

2 MS. CLARK: Correct. Well, and then --

3 THE COURT: Is that what you're referring to?

4 MS. CLARK: Actually I was referring to 514 and 516.

5 I see he has them split up. So we don't oppose. We would  
6 move for admission of Defendant's 514 and 516.

7 THE COURT: Any objection, Mr. Donahoe?

8 MR. DONAHOE: To?

9 THE COURT: The admission of Exhibits 514 and 516.  
10 Those are the transcripts. Appears to be the transcripts of a  
11 couple of -- 514, the transcript of the 911 call to the  
12 Sanders County sheriff's office, and your Exhibit 516 is a  
13 transcript of the audio recording of Deputy Largent's call to  
14 Sanders County sheriff's office.

15 MR. DONAHOE: Right, right.

16 THE COURT: Any objection?

17 MR. DONAHOE: We have no objection to any of that.

18 THE COURT: 514 and 516 are admitted.

19 (Exhibits 514 and 516 were received in evidence.)

20 THE COURT: And in order to be complete, is there  
21 any objection to admitting, Ms. Clark, the actual recordings,  
22 which would be 513 and 515?

23 MS. CLARK: No objection, Your Honor.

24 THE COURT: Mr. Donahoe?

25 MR. DONAHOE: That's fine. Thank you.

**LARGENT DIRECT EXAMINATION BY CLARK**

1 THE COURT: Okay. They're admitted as well.

2 (Exhibits 513 and 515 were received in evidence.)

3 THE COURT: So let's just make sure the record is  
4 clear. I just admitted Exhibits 513, 514, 515, and 516.

5 Go ahead, Ms. Clark.

6 MS. CLARK: Thank you, Your Honor.

7 BY MS. CLARK:

8 Q As a result of your investigation, did you issue a  
9 citation to Mr. DeFrance?

10 A Yes.

11 MS. CLARK: All right. And if I could have  
12 Exhibit 1, please?

13 MR. RACICOT: (Indicating.)

14 MS. CLARK: And could we have our --

15 THE CLERK: One second.

16 MS. CLARK: Sorry.

17 MR. RACICOT: (Complied with request.)

18 BY MS. CLARK:

19 Q I believe you can see what's been marked as Government's  
20 Exhibit 1. Is that a true and accurate copy of a citation  
21 that you issued in this case?

22 A Yes, it is.

23 MS. CLARK: Your Honor, we'd move for admission of  
24 Government's Exhibit 1.

25 THE COURT: Any objection?



*LARGENT CROSS-EXAMINATION BY DONAHOE*

1 MR. DONAHOE: No objection.

2 THE COURT: Government's Exhibit 1 is admitted.

3 (Exhibit 1 was received in evidence.)

4 MS. CLARK: We have no further questions at this  
5 time, Your Honor.

6 THE COURT: Mr. Donahoe, you may cross-examine.

7 MR. DONAHOE: Thank you.

8 CROSS-EXAMINATION

9 BY MR. DONAHOE:

10 Q Sir, do you remember, just sort of being reinvolved in  
11 the case -- I don't want to replot all the ground that's  
12 already been covered -- that you actually talked to Bill Brown  
13 before you went over to talk to Jermain?

14 A Yes, I did.

15 Q Okay. And so did Bill Brown call you, or did you call  
16 him? Do you remember that?

17 A He called me.

18 Q He called you. Okay.

19 And he just gave you sort of a summary of what was going  
20 on, thinking that you would be the deputy that would respond  
21 to the scene?

22 A Yes.

23 Q Okay.

24 A He dispatched me to that call.

25 Q Okay. That's a better way to put it. Thank you.

**LARGENT CROSS-EXAMINATION BY DONAHOE**

1           And did you realize that Tribal had called him to report  
2 the incident?

3     A     He mentioned, I believe, he mentioned that Tribal had  
4 called him.

5     Q     Okay. And after you got on the phone with Bill Brown,  
6 did you take just basic information of what Bill Brown knew so  
7 that you would be prepared to go talk to Jermain?

8     A     Yes.

9     Q     Okay. And did you guys discuss -- or do you recall  
10 discussing, maybe is the better question, you and Mr. Brown,  
11 Bill Brown, the relationship issue? Did you inquire of  
12 Mr. Brown whether he knew what the relationship between the  
13 parties was?

14    A     He either provided me with that information or I asked if  
15 there was a relationship between them.

16    Q     Okay. Fair enough. And we'll get to that. We have a  
17 separate transcript of that.

18           But why -- my question would be: Why would you make that  
19 inquiry? You did make the inquiry, what was the relationship.  
20 Why would you want to know that from Mr. Brown?

21    A     He would have that information to give me. I'm needing  
22 to know if it was a domestic violence incident or just an  
23 assault.

24    Q     Okay. So there would be a distinction that you would  
25 draw in your mind between just an assault and a domestic

**LARGENT CROSS-EXAMINATION BY DONAHOE**

1 violence situation?

2 A They're both violence. One has a different investigatory  
3 set than the other.

4 Q Okay. Fair enough.

5 So is the relationship issue the distinguishing feature  
6 between the two?

7 A Intimate partners would be a domestic violence.

8 Q Okay.

9 A Would --

10 Q So I guess turning to Exhibit 512, your written report,  
11 you had satisfied yourself -- we just listened to the  
12 recording, and your written report said it was a dating  
13 relationship. That would have qualified under the Montana  
14 statute for a domestic violence citation?

15 A I don't remember if I wrote "dating" within my report.  
16 However, boyfriend/girlfriend would be an intimate  
17 relationship, which would be a domestic violence.

18 Q Okay. All right.

19 Can I see Exhibit 512 at Bates 056?

20 MS. ULSHER: (Complied with request.)

21 MR. DONAHOE: All right. I just need it up a little  
22 bit. Right there is good.

23 MS. ULSHER: (Complied with request.)

24 BY MR. DONAHOE:

25 Q All right. Can you see that on the screen there, sir?

**LARGENT CROSS-EXAMINATION BY DONAHOE**

1 A Yes, sir, I can.

2 Q Do you see the word "During"?

3 A Under the "Charlo Interview"?

4 Q Yeah. It says --

5 A Yes, I do.

6 Q -- "Charlo Interview," and then it starts, "During my  
7 interview"?

8 A Yes, I do.

9 Q Could you read that to yourself, that little portion  
10 there?

11 A To myself?

12 Q Yeah.

13 (Pause.)

14 THE WITNESS: I read that paragraph.

15 BY MR. DONAHOE:

16 Q Okay. So you did at least satisfy yourself at the time  
17 that you wrote this that there was, one, a dating relationship  
18 between the parties and that it was boyfriend and girlfriend  
19 since June of 2012?

20 A That's what they told me, yes.

21 Q Okay.

22 A That's what she stated. I'll correct that.

23 Q That's what Jermain said?

24 A Yes.

25 MR. DONAHOE: Okay. I don't have anything else.

**LARGENT REDIRECT EXAMINATION BY CLARK**

1 Thanks.

2 THE COURT: Any redirect, Ms. Clark?

3 REDIRECT EXAMINATION

4 BY MS. CLARK:

5 Q Do you have any other information about the extent of  
6 their relationship besides the conversation you had with both  
7 of them that night?

8 A I have their statements that they were  
9 boyfriend/girlfriend.

10 Q And he also stated that?

11 A I believe so, yes.

12 Q Do you know how often they spent time together?

13 A I believe she said over the weekends.

14 Q Okay. Do you know what activities they did together?

15 A Only that they were supposed to meet together. That  
16 would be the only -- I do not know.

17 Q Okay. So your report and your investigation just dealt  
18 with a small part of time in their relationship?

19 A Correct.

20 Q And you don't have any outside information about the  
21 extent of that relationship?

22 A Nothing beyond what she stated and they stated to me.

23 MS. CLARK: All right. I have nothing further.

24 THE COURT: May this witness be excused, Ms. Clark?

25 MS. CLARK: We, yes, would ask for him to be

**LARGENT REDIRECT EXAMINATION BY CLARK**

1 excused. I don't know; I know defense has --

2 THE COURT: Any objection, Mr. Donahoe?

3 MR. DONAHOE: No. I think we're finished. Thank  
4 you.

5 THE COURT: All right.

6 Deputy Largent, you are excused, sir. Thank you.

7 THE WITNESS: Okay. Do I need to remain in the  
8 area?

9 THE COURT: Excuse me?

10 THE WITNESS: Do I need to remain?

11 THE COURT: No. You can leave or you can stay.  
12 That's up to you.

13 THE WITNESS: Thank you, Your Honor.

14 THE COURT: Yes.

15 Ms. Clark, you may call the government's next  
16 witness.

17 MS. CLARK: The government calls Judge Strine.

18 THE COURT: Judge, good morning. If you would come  
19 forward, and the deputy clerk will administer an oath.

20 (Oath administered to the witness.)

21 THE WITNESS: Good morning, Judge.

22 THE COURT: Good morning. If you would make  
23 yourself comfortable up here, sir, and speak directly into the  
24 microphone so we all can hear you.

25 THE WITNESS: Yes, sir.

**LARGENT REDIRECT EXAMINATION BY CLARK**

1     excused. I don't know; I know defense has --

2             THE COURT: Any objection, Mr. Donahoe?

3             MR. DONAHOE: No. I think we're finished. Thank  
4     you.

5             THE COURT: All right.

6             Deputy Largent, you are excused, sir. Thank you.

7             THE WITNESS: Okay. Do I need to remain in the  
8     area?

9             THE COURT: Excuse me?

10            THE WITNESS: Do I need to remain?

11            THE COURT: No. You can leave or you can stay.  
12     That's up to you.

13            THE WITNESS: Thank you, Your Honor.

14            THE COURT: Yes.

15            Ms. Clark, you may call the government's next  
16     witness.

17            MS. CLARK: The government calls Judge Strine.

18            THE COURT: Judge, good morning. If you would come  
19     forward, and the deputy clerk will administer an oath.

20            (Oath administered to the witness.)

21            THE WITNESS: Good morning, Judge.

22            THE COURT: Good morning. If you would make  
23     yourself comfortable up here, sir, and speak directly into the  
24     microphone so we all can hear you.

25            THE WITNESS: Yes, sir.

1 JoAnn Jett Corson  
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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
MISSOULA DIVISION**

11 UNITED STATES OF AMERICA, )  
12 Plaintiff, ) No. CR 21-29-M-DLC  
13 vs. )  
14 ) **VOLUME 1 OF 2**  
15 MICHAEL BLAKE DeFRANCE, ) **TRANSCRIPT OF BENCH TRIAL**  
16 Defendant.)  
17 \_\_\_\_\_)

**BEFORE THE HONORABLE DANA L. CHRISTENSEN  
UNITED STATES DISTRICT COURT JUDGE  
FOR THE DISTRICT OF MONTANA**

Russell Smith United States Courthouse  
201 East Broadway  
Missoula, Montana 59802  
Wednesday, April 26, 2023  
08:36:38 to 17:00:21

Proceedings recorded by machine shorthand  
Transcript produced by computer-assisted transcription



**STRINE DIRECT EXAMINATION BY CLARK**

1 THE COURT: Ms. Clark.

2 MS. CLARK: Thank you.

3 WHEREUPON,

4 MR. DONALD STRINE,

5 called for examination by counsel for plaintiff, after having  
6 been first duly sworn to testify the truth, the whole truth,  
7 and nothing but the truth, testified as follows:

8 DIRECT EXAMINATION

9 BY MS. CLARK:

10 Q Good morning. Can you please introduce yourself to the  
11 Court?

12 A I'm Donald Strine. Thompson Falls, Sanders County,  
13 former justice of the peace.

14 Q Okay. When you were -- well, prior to being justice of  
15 the peace in Sanders County, what occupation did you have?

16 A Law enforcement for 28 years, eight years back East and  
17 then 20 here in Missoula, actually, yeah.

18 Q Okay. Is justice of the peace an elected position?

19 A Yes.

20 Q What years did you serve as justice of the peace in  
21 Sanders County?

22 A From 2007 to 2017.

23 Q What training did you receive to be a justice of the  
24 peace?

25 A Well, my first initial training was down here with

**STRINE DIRECT EXAMINATION BY CLARK**

1 Judge -- not Townsend. The female judge in Justice Court.

2 Sorry.

3 Q Was it Judge Orzech?

4 A Yes. Thank you.

5 And then after that, we had two sessions per year,  
6 week-long sessions, of training, so a total of 20 plus.

7 Q What types of things did the trainings cover?

8 A It covered criminal law, civil, landlord/tenant issues.  
9 Things of that nature. Updated us on Montana Code. Any  
10 changes that affected our court, a court of limited  
11 jurisdiction.

12 Q I was just gonna say, what type of cases did justices of  
13 the peace hear?

14 A Courts of limited jurisdiction. Misdemeanors. Things  
15 like that.

16 Q So did you preside over misdemeanor criminal cases?

17 A Yes, ma'am.

18 Q Okay. And you presided over some civil cases as well?

19 A Yes.

20 Q Did you preside over orders of protection hearings?

21 A Yes.

22 Q Did you preside over cases that were initially filed as a  
23 felony before they were removed to District Court?

24 A Yes.

25 Q I want to focus on partner/family member assault cases in

**STRINE DIRECT EXAMINATION BY CLARK**

1 general. Did you have a standard colloquy that you would  
2 engage in with individuals who appeared before you for  
3 partner/family member assault charges?

4 A Yes. It was a form that was there prior to my arrival  
5 through Judge Beitz, was the initial appearance form. You  
6 read the defendant their rights, rights to counsel.

7 Q All right. And if I may show you what we've marked as  
8 Government's Exhibit 2, is this the form that you're referring  
9 to?

10 A Yes, ma'am.

11 MR. DONAHOE: (Indicating.)

12 THE CLERK: You don't have it?

13 MS. CLARK: (Handing.)

14 MR. DONAHOE: Okay. Thank you. There it is.

15 MS. CLARK: Okay.

16 MR. DONAHOE: Do you need this back? (Handing.)

17 MS. CLARK: Sorry, Judge.

18 BY MS. CLARK:

19 Q Is this the form that you used in the particular case  
20 that we're before the Court on regarding Michael DeFrance?

21 A Yes.

22 Q Okay. In general on this form, would you cover it with  
23 everybody that appeared before you?

24 A Yes.

25 Q Was that a standard practice?

**STRINE DIRECT EXAMINATION BY CLARK**

1 A Yes, ma'am.

2 Q Did you complete this form or did the defendant complete  
3 the form?

4 A I filled in the blanks. His signature is at the bottom.

5 Q Okay. How would you fill out this form? If you could  
6 walk the Court through this process?

7 THE COURT: Are we gonna offer it and get it  
8 admitted?

9 MS. CLARK: Oh. Yes, Judge. We would move for  
10 admission of Government's Exhibit 2.

11 THE COURT: Any objection, Mr. Donahoe?

12 MR. DONAHOE: No, Your Honor. Thank you.

13 THE COURT: Exhibit 2 is admitted.

14 (Exhibit 2 was received in evidence.)

15 THE WITNESS: So when the defendant would be brought  
16 over, if they were in custody, I would fill out the date, the  
17 TK number, the defendant's name, the charges. And then if the  
18 defendant had an attorney present, I would list that person's  
19 name. If the state was represented by anyone, I would put  
20 their initials in there as well.

21 I would start by advising the defendant of their  
22 rights to an attorney, as you see there. Read everything down  
23 and then continue on to rights of bail. If they're released,  
24 there will be conditions of that release. And then a  
25 conviction of certain offenses, which, in this case, a

**STRINE DIRECT EXAMINATION BY CLARK**

1 partner/family member assault conviction, could result in loss  
2 of various firearms rights.

3 And then I'd always tell them, "You don't have to  
4 enter a plea today. You can wait 24 hours, visit with an  
5 attorney before you enter a plea." And it looks, by this,  
6 that Mr. DeFrance did not enter a plea that date.

7 So I have them enter a plea within ten days,  
8 15 days, or something like that.

9 BY MS. CLARK:

10 Q And just going back, just generally, you would complete  
11 this form as you discussed the initial appearance with the  
12 defendant?

13 A Yes.

14 Q Okay. Regarding Michael DeFrance, were you approached  
15 and requested to review the documents in this case? Or in his  
16 case, the PFMA case?

17 A I read the citation, the charges --

18 Q Oh, I guess I should back up.

19 Were you approached by -- from a detective or an officer  
20 about the case in general, after?

21 A After? No.

22 Q In regards to -- let me see how I can phrase this.

23 In preparation for testimony here today, did somebody  
24 contact you?

25 A The defense counsel --

**STRINE DIRECT EXAMINATION BY CLARK**

1 Q Okay.

2 A -- and you. Yes.

3 Q Okay. And asked you to review your file regarding

4 Michael DeFrance?

5 A Correct. And also Detective Baker.

6 Q Okay. And you reviewed that --

7 A Yes.

8 Q -- file?

9 A Um-hmm.

10 Q Where did you obtain the file from?

11 A Part of the file I obtained through the Sanders County

12 Sheriff's Department, through the booking procedure. And then

13 my court documents from prior. I received information from

14 defense counsel. Also, some from your office.

15 Q Okay. Did you have any independent recollection of this

16 case when you were contacted by defense counsel or the

17 government?

18 A Not to start with, no.

19 Q Did you refresh your memory about the case?

20 A I did by obtaining the documents from Justice Court.

21 Q Do you recall which documents you reviewed?

22 A One of which you have on the screen here, his initial

23 appearance forms. The plea agreement. Orders of conditions

24 of release.

25 Q Okay. I am going to ask to show you what's been marked

**STRINE DIRECT EXAMINATION BY CLARK**

1 as Government's Exhibit 3 and ask if you recognize this  
2 document.

3 A Yes.

4 Q What is this document?

5 A It's conditions of his release. He was released on his  
6 own recognizance, and there were certain conditions listed  
7 there that were checked off. I did grant him permission to  
8 leave. He was supposedly fighting fires, I guess.

9 MS. CLARK: Okay. And if I could have counsel go  
10 through page 2 and page 3, just to show you the entire  
11 document?

12 MR. RACICOT: (Complied with request.)

13 THE WITNESS: Okay.

14 BY MS. CLARK:

15 Q Is this a true and accurate copy of the conditions of  
16 release that were issued and ordered in Michael DeFrance's  
17 partner/family member assault case?

18 A Yes, ma'am.

19 MS. CLARK: Your Honor, I move for admission of  
20 Government's Exhibit 3.

21 THE COURT: Any objection?

22 MR. DONAHOE: No, Your Honor.

23 THE COURT: Exhibit 3 is admitted.

24 (Exhibit 3 was received in evidence.)

25 MS. CLARK: May I have Exhibit 4, please?

**STRINE DIRECT EXAMINATION BY CLARK**

1 MR. RACICOT: (Complied with request.)

2 BY MS. CLARK:

3 Q Judge Strine, do you see what's marked as Government's  
4 Exhibit 4?

5 A Yes, ma'am.

6 MS. CLARK: And if I may have counsel go through  
7 page 2, 3, and 4 of this document to have you review the  
8 entire document?

9 MR. RACICOT: (Complied with request.)

10 BY MS. CLARK:

11 Q Is this a true and accurate copy of the plea agreement  
12 that was filed in Michael DeFrance's partner/family member  
13 assault case in Sanders County in your court?

14 A Yes, ma'am.

15 MS. CLARK: Your Honor, I move for admission of  
16 Government's Exhibit 4.

17 THE COURT: Any objection, Mr. Donahoe?

18 MR. DONAHOE: No, Your Honor.

19 THE COURT: It's admitted, Exhibit 4.

20 (Exhibit 4 was received in evidence.)

21 MS. CLARK: And if I may show Judge Strine  
22 Exhibit 5?

23 MR. RACICOT: (Complied with request.)

24 BY MS. CLARK:

25 Q All right. We're looking again at the initial appearance



**STRINE DIRECT EXAMINATION BY CLARK**

1 and arraignment form. Let me go to the second page of this.

2 Do you recognize this page?

3 A Yes.

4 Q What is this page?

5 A This is the second page of the initial appearance form  
6 that I fill out and have the defendant sign. As it states  
7 here, he under- --

8 Q All right. Before you go on, I'll just --

9 A Sorry.

10 Q Yeah. You're fine.

11 And is this a true and accurate copy of the second page  
12 of the exhibit that we saw earlier as Exhibit 2?

13 A Yes.

14 MS. CLARK: Your Honor, I move for admission of  
15 Exhibit 5.

16 THE COURT: Any objection?

17 MR. DONAHOE: No, Your Honor.

18 THE COURT: Exhibit 5 is admitted.

19 (Exhibit 5 was received in evidence.)

20 MS. CLARK: Thank you.

21 BY MS. CLARK:

22 Q Now we can go on, and let's discuss this.

23 When is this form completed?

24 A This is completed by myself and then signed upon  
25 agreement, if there's a plea agreement or the defendant is

**STRINE DIRECT EXAMINATION BY CLARK**

1 found -- well, not found guilty, but if a plea agreement is  
2 entered and then the defendant agrees to the plea agreement.

3 Q Who completes this form?

4 A I did.

5 Q Do you review this form with the defendant as he's  
6 changing his plea or before he changes his plea?

7 A Yes, ma'am.

8 Q Okay. Is a defendant typically sentenced at this time as  
9 well?

10 A Yes.

11 Q And you recognize your handwriting on this form?

12 A Yes, ma'am.

13 Q Regarding about midway on the page, you have marked that,  
14 "I understand that other possible consequences of a guilty  
15 plea are: loss of firearm rights"; is that correct?

16 A Yes.

17 Q Can you please explain to the judge what you discussed  
18 with the defendant regarding that?

19 A Well, certain offenses, you are limited to your rights  
20 regarding firearms, and partner/family member assault is one  
21 of those, and I just wanted to make sure that the defendant  
22 understood that before the Court accepted this plea agreement.  
23 Loss of firearms rights, especially in Sanders County, is a  
24 big deal. People could go without a driver's license or  
25 insurance for their car and they couldn't care, but you lose

**STRINE DIRECT EXAMINATION BY CLARK**

1 your firearms rights and that gets their attention.

2 Q Okay. So is that something that you always cover with  
3 somebody who is pleading guilty to a partner/family member  
4 assault?

5 A Yes.

6 Q And do you make sure, before they enter that plea and are  
7 sentenced, that they understand that?

8 A Yes.

9 Q All right. And by your check mark and your writing here,  
10 what does that indicate to you?

11 A That he understood it.

12 Q Later on on the form, you have, at the bottom, "On  
13 April 14, 2013 in Sanders County, I caused bodily injury to my  
14 girlfriend"; is that correct?

15 A Yes.

16 Q Did you write that on the form?

17 A Yes.

18 Q Where does that information come from?

19 A It came from the citation issued by the deputy. And the  
20 defendant just -- I basically needed something to confirm that  
21 he knows what he's pleading guilty to, and that covers the  
22 partner/family member assault statute right there.

23 Q Okay. After you complete this form and take a  
24 defendant's plea and sentence him, do you have him sign this  
25 form?

**STRINE CROSS-EXAMINATION BY DONAHOE**

1 A Yes.

2 Q And did Michael DeFrance sign this form?

3 A Yes, ma'am.

4 Q What does his signature on this form indicate?

5 A That he understood his rights and entered a plea of  
6 guilty.

7 Q Okay. Did Mr. DeFrance have an attorney representing him  
8 when he entered this plea?

9 A He had a public defender, yes.

10 Q Do you recall who the attorney was?

11 A Kirk Krutilla.

12 Q Is that an attorney that appears often in your court?

13 A Yes.

14 MS. CLARK: I have no further questions at this  
15 time. Thank you.

16 THE COURT: Thank you, Ms. Clark.

17 Mr. Donahoe, you may cross-examine.

18 MR. DONAHOE: Thank you.

19 CROSS-EXAMINATION

20 BY MR. DONAHOE:

21 Q So, sir, the arraignment form, there's no attorney there.  
22 I saw on that box you checked "Pro Se."

23 A Correct.

24 Q Is that correct?

25 A Correct, yes.

**STRINE CROSS-EXAMINATION BY DONAHOE**

1 Q All right. And on that same form, I think it says  
2 there's a possibility of losing state and federal firearms  
3 rights.

4 A Correct.

5 Q Okay. And you and I had a visit in the parking lot when  
6 I came to serve you your subpoena, correct?

7 A Correct.

8 Q And you told me, and my recollection at that time, that  
9 any admonition you were giving to Mr. DeFrance about firearms  
10 rights would have been under Montana law; is that correct?

11 A Correct.

12 Q All right. So you didn't really visit with him about the  
13 whys and wherefores of federal firearms law, did you?

14 A No, I did not.

15 Q Okay. Now you said -- you made a categorical statement  
16 that PFMA is an offense that denies you your firearms rights.

17 A Possibly.

18 Q All right. Possibly.

19 So there would be two categories of PFMA; that maybe you  
20 could lose those rights and maybe you couldn't lose those  
21 rights? What's the possibility? What's the ambiguity there?

22 A I was reading from Montana Code that it's a possibility  
23 that you could lose your rights to firearms under a conviction  
24 for misdemeanor partner/family member assault.

25 Q Okay. And do you have a code citation that you could

**STRINE CROSS-EXAMINATION BY DONAHOE**

1 give us or we could reference that says that?

2 A Not off the top of my head. I would go with the Montana  
3 Code 45-5-206, the charging Section (4), the partner or family  
4 member assault. I would have to look it up.

5 Q Okay. And I'm pretty conversant with that statute. I  
6 think it says that if there was a weapon used in the context  
7 of the PFMA, that can be restricted.

8 A That weapon can be restricted, correct.

9 Q Okay. Was there any indication to you at the time of the  
10 plea that there was a weapon used in this PFMA?

11 A No, sir.

12 Q All right. So that would go by the boards in terms of  
13 limitation of firearms rights, correct?

14 A On that particular firearm, if there was one used, yes.

15 Q Okay. So what other section could we reference that  
16 would say, because you're convicted of PFMA in Montana, you  
17 lose your firearms rights?

18 A Possibly a penalty section further into the 45 code.

19 Q Okay. But you're not certain of that?

20 A I couldn't tell you right now, no.

21 Q Okay. Did you discuss that section with Mr. DeFrance?

22 A No.

23 Q Did you tell him he was limited because of 45-X-Y-Z?

24 A I informed him of the 45-5-206 about the weapon  
25 possibility.

**STRINE CROSS-EXAMINATION BY DONAHOE**

1 Q Okay. So that was pretty much exclusively what you were  
2 relying on?

3 A Yes.

4 Q Okay. Have you had any training in federal firearms law?

5 A No.

6 Q All right. Does the relationship issue in a PFMA make a  
7 difference in your court?

8 A Relationship between victim and suspect or --

9 Q Yes, sir.

10 A No.

11 Q No. Okay. So it doesn't matter how the parties might be  
12 related or what kind of relationship they may have?

13 A No.

14 Q All right. If I assault you, am I guilty of  
15 partner/family member assault?

16 A No.

17 Q Why not?

18 A Because we're not partners. We don't live together.  
19 We're not intimate. It would be an assault.

20 Q Okay. It would just be an assault.

21 A Correct.

22 Q All right. So you have to find some kind of relationship  
23 between the parties, correct?

24 A Correct.

25 Q And in this case, you found boyfriend/girlfriend?

**STRINE CROSS-EXAMINATION BY DONAHOE**

- 1 A Correct.
- 2 Q And is that covered by Montana PFMA?
- 3 A Yes.
- 4 Q Was it so covered in 2011?
- 5 A To my knowledge, it was, yes.
- 6 Q And is that the one that you relied on in taking --
- 7 accepting this guilty plea?
- 8 A Yes.
- 9 Q And sentencing Mr. DeFrance?
- 10 A By the plea agreement, yes.
- 11 Q All right. So did you explore in any depth, at the plea
- 12 hearing or prior to the plea hearing, what the circumstances
- 13 or relationship was between Mr. DeFrance and this victim?
- 14 A Just by the probable cause.
- 15 Q Okay. Did you know anything about their relationship?
- 16 A No.
- 17 Q Did you know how long it had lasted?
- 18 A No.
- 19 Q Did you know if it was intimate or not?
- 20 A No.
- 21 Q So you only knew that he hit his girlfriend.
- 22 A I went by what the officer had in his probable cause.
- 23 Q All right. Was the officer present at the guilty plea
- 24 hearing?
- 25 A No.



**STRINE CROSS-EXAMINATION BY DONAHOE**

1 Q Did you take any testimony from the officer?  
2 A Didn't have to. It was a plea agreement.  
3 Q Okay. And is anything recorded? Is your court, at the  
4 time, a court of record?  
5 A No.  
6 Q Stenographically recorded?  
7 A No.  
8 Q Is it recorded on any kind of electronic device?  
9 A No.  
10 Q So there's no transcript of that hearing.  
11 A Only in writing.  
12 Q Okay.  
13 A Right.  
14 Q Now your form says that there's a possible loss of  
15 firearms rights.  
16 A Yes.  
17 Q To revisit our meeting in the parking lot when I came to  
18 serve you the subpoena, did you indicate to me at the time  
19 that it was your feeling that firearms rights ultimately was  
20 the responsibility of his lawyer, his defense lawyer?  
21 A To advise him of that --  
22 Q Yes, sir.  
23 A -- further? Yes.  
24 Q Okay. So you told him there was a possibility, correct?  
25 A Correct.

**STRINE REDIRECT EXAMINATION BY CLARK**

1 Q You didn't tell him he was restricted, as a matter of  
2 sentencing, from possessing firearms.

3 A It was a possibility, and that's --

4 Q Just a possibility.

5 A Correct.

6 Q So it wasn't part of your sentence. It was advice?

7 A Advice.

8 Q Okay. And your expectation was is that Kirk Krutilla  
9 would flesh out that advice and give to Mr. DeFrance some  
10 certain notice of what his actual firearms rights were?

11 A Yes.

12 MR. DONAHOE: I don't have anything further. Thank  
13 you.

14 THE COURT: Ms. Clark?

15 REDIRECT EXAMINATION

16 BY MS. CLARK:

17 Q I want to clarify some things that Mr. Donahoe asked you  
18 about.

19 He asked you about the conditions of release and the  
20 restriction on firearms possession at that stage in the  
21 proceeding, correct?

22 A Yes.

23 Q Is that restriction different than the restriction that  
24 is imposed after a conviction?

25 A Basically no.

**STRINE REDIRECT EXAMINATION BY CLARK**

1 Q Okay. You referenced state law when he asked you about  
2 conditions of release.

3 A Yes.

4 Q Okay. And is -- well, the conditions of release, you can  
5 impose a firearms restriction independent of state law,  
6 correct?

7 A Yes.

8 Q Okay. And as a result of the conviction, there could  
9 be -- and you're not sure if there is -- a state statute that  
10 prohibits firearm possession?

11 A No, I'm not positive.

12 Q Okay. But you're aware of a potential federal  
13 prohibition --

14 A Yes.

15 Q -- based on a partner/family member --

16 A Yes.

17 Q -- assault conviction?

18 And your form and your colloquy with the defendant at his  
19 change of plea was to advise him and put him on notice that  
20 there's a potential firearms restriction based on his  
21 conviction?

22 A Yes, ma'am.

23 Q Because your court isn't a court of record, did you take  
24 care in completing the forms while you were conducting  
25 hearings?

*STRINE REDIRECT EXAMINATION BY CLARK*

1 A Yes.

2 Q And kept those forms for future proceedings such as this?

3 A Yes.

4 MS. CLARK: Okay. Thank you. I have nothing  
5 further.

6 THE COURT: Judge, I have a couple of questions.

7 THE WITNESS: Yes.

8 THE COURT: Could I have Exhibit 5, please?

9 MR. RACICOT: (Complied with request.)

10 THE COURT: Actually, maybe that's not the one that  
11 I want. I want the exhibit where there's the reference to the  
12 event, and I don't remember which one that was.

13 MR. RACICOT: (Complied with request.)

14 MS. CLARK: This page.

15 THE COURT: There we go.

16 MR. DONAHOE: Boyfriend/girlfriend?

17 THE COURT: Yes. What exhibit number is this?

18 MS. CLARK: Exhibit 5, page 2, Your Honor.

19 THE COURT: It's the second page of Exhibit 5. All  
20 right.

21 So focusing on the writing there that says, "I am  
22 pleading guilty to this charge because I did the following,"  
23 and then you wrote in, as I understand, "On 4/14/2013 in  
24 Sanders County, I caused bodily injury to my girlfriend," and  
25 then, of course, this was signed by Mr. DeFrance on April 6 --

1 or May 6 of 2013, that language that you wrote in, Judge  
2 Strine, is that language -- tell me, tell me what the origin  
3 or the source of that language is. Was it -- was that words  
4 that were provided to you by Mr. DeFrance unprompted, or did  
5 you ask him whether he admitted to these things? How did that  
6 happen, if you remember?

7 THE WITNESS: I do. The wording on that came from  
8 his attorney, Kirk Krutilla --

9 THE COURT: Okay.

10 THE WITNESS: -- as to what he needed to plead  
11 guilty to in order to be found guilty of this certain offense.

12 THE COURT: And I understand, taking changes of plea  
13 myself on a regular basis, that we ask the defendants to  
14 explain why they think they are guilty of the offense charged.

15 THE WITNESS: (Nodded head affirmatively.)

16 THE COURT: In this particular case, you're saying  
17 you believe that language that you wrote in there was provided  
18 to you by his counsel, his attorney.

19 THE WITNESS: Through him to his counsel to me, yes.

20 THE COURT: Okay. So how did -- how would this have  
21 happened in your court in your practice? Would you say to the  
22 attorney, "Can you please tell me," you know, "why you believe  
23 or why your client believes he's guilty?" Or how do you do  
24 this?

25 THE WITNESS: I would ask the defendant, and with

1 the counsel present, "Okay, in order for the Court to accept  
2 this guilty plea, I need to know what happened."

3 THE COURT: Yes.

4 THE WITNESS: And normally, 95 percent of the time,  
5 especially with Kirk Krutilla, this is what he would say,  
6 something along those lines. Short, sweet, and to the point.

7 THE COURT: Okay. And then you wrote it in?

8 THE WITNESS: Yes.

9 THE COURT: And completed all of this form. You  
10 dated it. And then you provided this form at the same time in  
11 open court to Mr. DeFrance and his counsel to be reviewed and  
12 signed?

13 THE WITNESS: Yes, Your Honor.

14 THE COURT: And was that something that would happen  
15 in your presence in the courtroom?

16 THE WITNESS: Yes.

17 THE COURT: And do you have any recollection of  
18 Mr. DeFrance or his lawyer taking the time to read this before  
19 he signed it?

20 THE WITNESS: I would imagine they did. I don't  
21 recall exactly.

22 THE COURT: You don't recall. All right.

23 THE WITNESS: Yes.

24 THE COURT: All right. Thank you, Judge.

25 Ms. Clark, did my questions trigger any further

**STRINE REDIRECT EXAMINATION (CONTINUED) BY CLARK**

1 questions from you?

2 MS. CLARK: Just a couple, Judge, for clarification.

3 THE COURT: Excuse me?

4 MS. CLARK: Just a couple.

5 THE COURT: Yeah. Go ahead.

6 REDIRECT EXAMINATION (Continued)

7 BY MS. CLARK:

8 Q Judge Strine, is it common practice in Justice Court for  
9 defense attorneys to allocute on behalf of their clients?

10 A Yes.

11 Q Is there a reason for that?

12 A I think because the attorney is more familiar with the  
13 procedures, the proceedings, the language, and they are to  
14 advise their client of what's actually taking place.

15 Q Okay. And did this sometimes happen when a defendant,  
16 you know, might not be familiar with the elements that needed  
17 to be stated and the defense attorney would help establish the  
18 elements required?

19 A Correct.

20 MS. CLARK: All right. Thank you. Nothing further.

21 THE COURT: Mr. Donahoe, any follow-up?

22 MR. DONAHOE: Yeah. I just --

23 THE COURT: You may. You may.

24 MR. DONAHOE: Thank you.

25 THE COURT: Go ahead.

1 RE CROSS-EXAMINATION

2 BY MR. DONAHOE:

3 Q So, sir, I'm just getting a little confused here on what  
4 your sentence was based on this discussion.

5 Did you sentence Mr. DeFrance to a permanent ban on his  
6 firearms?

7 A No.

8 Q Okay. At the end of his sentence, in any case, if you  
9 had imposed such a condition, would he have been reinvested  
10 with his firearms rights under the Montana Constitution? Do  
11 you know that?

12 A It was taken away as a tool in the partner/family member  
13 assault. Eventually he would get it back. But, no, I didn't  
14 restrict any firearms --

15 Q Okay.

16 A -- under federal or state law.

17 Q So I guess my confusion was from government counsel's  
18 questions about the conditions of release. You did clearly  
19 tell him --

20 MS. CLARK: Judge, I would object as this is outside  
21 what you had asked Judge Strine.

22 THE COURT: It is, but I'm going to allow it so we  
23 can get this cleared up.

24 MR. DONAHOE: All right.

25 ///



**STRINE RECROSS-EXAMINATION BY DONAHOE**

1 BY MR. DONAHOE:

2 Q So Government's 3 -- I'm on page 2 -- "The defendant  
3 shall refrain from possessing a firearm, destructive device,  
4 or other dangerous weapon." So that was a condition of his  
5 release well before the plea?

6 A Correct.

7 Q And it wasn't part of his sentence?

8 A No.

9 Q Okay. So when his case was finished, he was entitled to  
10 possess firearms under Montana law, right?

11 A That would be up to -- yes.

12 MR. DONAHOE: Thank you.

13 THE COURT: Ms. Clark, do you want to follow up on  
14 that --

15 MS. CLARK: No.

16 THE COURT: -- since I allowed some questioning  
17 outside the scope of my questions?

18 MS. CLARK: No, Your Honor. Thank you.

19 THE COURT: All right. May Judge Strine be excused?

20 MS. CLARK: Yes, Your Honor.

21 THE COURT: Any objection, Mr. Donahoe?

22 MR. DONAHOE: No. Thank you.

23 THE COURT: Judge, you're excused. Thank you.

24 THE WITNESS: Thank you, sir. Have a good day.

25 THE COURT: Ms. Clark, you may call the government's

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16 **IN THE UNITED STATES DISTRICT COURT**  
17 **FOR THE DISTRICT OF MONTANA**  
18 **MISSOULA DIVISION**

19 UNITED STATES OF AMERICA, )  
20 Plaintiff,) No. CR 21-29-M-DLC  
21 vs. )  
22 ) **VOLUME 1 OF 2**  
23 MICHAEL BLAKE DeFRANCE, ) **TRANSCRIPT OF BENCH TRIAL**  
24 Defendant.)  
25 \_\_\_\_\_)

26 **BEFORE THE HONORABLE DANA L. CHRISTENSEN**  
27 **UNITED STATES DISTRICT COURT JUDGE**  
28 **FOR THE DISTRICT OF MONTANA**

29 Russell Smith United States Courthouse  
30 201 East Broadway  
31 Missoula, Montana 59802  
32 Wednesday, April 26, 2023  
33 08:36:38 to 17:00:21

34 Proceedings recorded by machine shorthand  
35 Transcript produced by computer-assisted transcription

**BAKER CROSS-EXAMINATION BY DONAHOE**

1 BY MS. CLARK:

2 Q Have there also been private individuals that have joined  
3 in the search for Jermain?

4 A Yes.

5 Q And have those been ongoing over the last five years?

6 A Yes. Every effort to determine what happened to her has  
7 been unsuccessful.

8 Q Regarding the firearms that were taken in this case, did  
9 the ATF also determine that those were actual firearms?

10 A Yes.

11 Q And we talked a little bit earlier with some other  
12 witnesses that Jermain had two children. Do you know the date  
13 of birth of Thomas?

14 A Yes.

15 Q And what is his date of birth?

16 A July 11, 2014.

17 MS. CLARK: All right. Thank you.

18 I have no further questions, Your Honor.

19 THE COURT: Mr. Donahoe.

20 MR. DONAHOE: Thank you.

21 CROSS-EXAMINATION

22 BY MR. DONAHOE:

23 Q Good afternoon, Detective Baker.

24 A Good afternoon.

25 Q We meet again.

**BAKER CROSS-EXAMINATION BY DONAHOE**

1 A Yep.

2 Q So I guess to the first several questions by government  
3 counsel here, these efforts that you've generally described,  
4 what do they consist of?

5 A Following leads, talking to dozens of people, conducting  
6 searches, searches with canine, processing evidence,  
7 processing crime scenes, and that would pretty much sum it up.

8 Q Okay. Where did the searches occur?

9 A Lake County, Missoula County.

10 Q Anything beyond the county borders?

11 A Some activity happened in Sanders County, but pretty much  
12 Lake County, Missoula County, Sanders County.

13 Q Okay. Any national effort to look in other states?

14 A Yeah. She's been entered as a missing person early on  
15 from when she was reported missing on June 20, 2018, and so if  
16 anyone had contact with her in law enforcement, they would  
17 know she's a missing person.

18 Q Okay. So do we reach a time -- because I don't know. Do  
19 we reach a time where a person is considered deceased?

20 A The family can make that choice and go through those  
21 motions. I have not done that. It's still an open  
22 investigation because we haven't determined what happened to  
23 her yet.

24 Q All right. Do people disappear and not want to be found?

25 A That happens.

**BAKER CROSS-EXAMINATION BY DONAHOE**

1 Q So you testified before the grand jury on two occasions  
2 in this case, right?

3 A I believe so.

4 Q Yeah. Once in July, and I think I'm in the same year,  
5 2021?

6 A That sounds right.

7 Q And then once in October.

8 A Sounds correct.

9 Q Okay. And can you -- do you know what the intervening  
10 need there was for you to go back the second time?

11 A I believe, in the superseding indictment, for the issue  
12 on the false statements on the ATF forms.

13 Q Okay. And did you add anything to the 922(g)(9) count in  
14 your discussion with the grand jury at that time?

15 A The false statements, I believe, yes.

16 Q No, I mean with respect to the not disclosing the  
17 misdemeanor crime of domestic violence. Was there a piece  
18 that you added to that?

19 A I believe that was included, yes.

20 Q Yeah. And that involved the relationship element, did it  
21 not?

22 A Correct.

23 Q Okay. So between the first indictment and the first time  
24 you testified and the second time that you testified, what you  
25 did investigatively was what?

**BAKER CROSS-EXAMINATION BY DONAHOE**

1 A Those, the ATF forms, were brought to my attention, which  
2 I hadn't had previous during that first indictment.

3 Q And did you knuckle down on the relationship aspect of  
4 the case?

5 A No. I was under the impression for the conviction of  
6 PFMA that was sufficient at that point.

7 Q At that point. Well, I'm talking about the second time.  
8 Did you add discussion about the relationship element?

9 A Discussion with who?

10 Q With the grand jury.

11 A (No response.)

12 Q All right. Let me do it this way.

13 A Yeah.

14 Q Did you conduct interviews of family members between the  
15 first indictment and the second time that you testified before  
16 the grand jury?

17 A I believe -- I'd have to see the dates but, yes, I think  
18 Agent Kroschel and myself had conducted interviews between  
19 those two indictments.

20 Q Right. And I think in the second indictment, grand jury,  
21 the Jencks material at page 9, you tell the grand jury that  
22 you interviewed Vicki and that Agent Kroschel interviewed the  
23 aunts, Dani Garcia and Valenda.

24 A Correct.

25 Q Correct. All right. And you went in and discussed the

**BAKER CROSS-EXAMINATION BY DONAHOE**

1 relationship element with the grand jury.

2 A I would have discussed with the grand jury what the  
3 content of my interviews were. I guess if you have the  
4 transcript, that would help.

5 Q Okay. Yeah, I do have the transcript here, and I don't  
6 want to get in the weeds on this. Alls I'm just trying to  
7 determine here is that you didn't highlight anything about the  
8 relationship between Mr. DeFrance and Jermain in the first  
9 session with the grand jury that you had.

10 A No.

11 Q You just told them that he had a PFMA.

12 A That's correct.

13 Q Okay. And the second time, you -- intervening, you  
14 interviewed some folks along with your colleague, Agent  
15 Kroschel, and then went back and told them what that  
16 relationship was.

17 A Correct.

18 Q And, pretty much in stride with what we've talked about  
19 here through the day, that they spent a lot of time together  
20 and so on.

21 A Yeah, that's correct.

22 Q Okay. So you say, in your testimony before the grand  
23 jury, that the relationship probably started in 2009. Do you  
24 remember that?

25 A Yes.

**BAKER CROSS-EXAMINATION BY DONAHOE**

1 Q Okay. But then there's a qualification: when the  
2 DeFrances moved to Dixon.

3 A Correct.

4 Q Okay. So did you ever determine investigatively when the  
5 DeFrances moved to Dixon?

6 A Yes.

7 Q When did they move?

8 A February 2010.

9 Q Okay. And you checked that with some Indian Affairs  
10 housing records or something of that nature?

11 A After the grand juries, yes.

12 Q Okay. So the qualification of your testimony in the  
13 grand jury was when they moved to Dixon. So are we all safe  
14 to assume now that the Dixons -- or, I'm sorry, that the  
15 DeFrances moved into Dixons, Dixon Agency, in February of  
16 2010?

17 A According to tribal records, that would be when, yes.

18 Q All right. Now you've heard -- you've been present for  
19 most of the testimony, correct?

20 A Yes.

21 Q And you've heard comings and goings to New Mexico and so  
22 on. And you're familiar with all that, right?

23 A Correct.

24 Q All right. Did you ever determine investigatively when  
25 Jermain left Montana for Dulce, New Mexico?



**BAKER CROSS-EXAMINATION BY DONAHOE**

1 A Based on my investigation, I would say it would be in  
2 August or the beginning of the school year in the fall of  
3 2010.

4 Q All right. Did you ever harvest any school records or  
5 anything of that nature to see where Jermain might have been  
6 going to school in Montana during that window?

7 A No.

8 Q Why not?

9 A I thought it was sufficient that people knew that she was  
10 going to eighth grade, and by taking 14 years past her birth  
11 date of '95, that's what I was figuring on.

12 Q Okay. So you just did it another way.

13 A I was trying -- yeah, because there was problems with  
14 people's memory from a decade ago, and we were trying to  
15 figure out. Sometimes when people can't remember dates, they  
16 can remember years of school. So that's what we were trying  
17 to go with, that, and she would have been turning 15 in April  
18 of 2011, which made her 14 in the fall, which would have been  
19 logical to be an eighth grader.

20 Q Okay. She would have been 15 in 2011. She would have  
21 been 15 in 2010?

22 A Oh, yeah. Yes. My mistake. You're correct, yeah.

23 Q Yeah. 2010, 14, 15.

24 A Yes.

25 Q True?

**BAKER CROSS-EXAMINATION BY DONAHOE**

1 A Yep.

2 Q Okay. So your ages were off there, right?

3 A Yeah.

4 Q Apparently.

5 Okay. Why wouldn't a solid record of attendance at  
6 school nail down when Jermain left Montana?

7 A I guess it would have.

8 Q Okay. So we could agree on that, that school records  
9 could show that?

10 A Yes.

11 Q If I told you that she leaves sometime around October of  
12 2010 and I have those records to prove that, could we agree on  
13 that?

14 A Yes.

15 Q Okay. So are you with me here? February of 2010 to  
16 October of 2010. Is it your contention, as the lead  
17 investigator in this case, that Jermain moved in with the  
18 DeFrances and lived with them?

19 A She was residing with them at that time, yes. Well, I  
20 mean, going back and forth between Sonny's residence across  
21 the street and being over there against the wishes of her  
22 mother.

23 Q Okay. So from the inception, she was spending copious  
24 amounts of time -- "she," Jermain -- at that residence as soon  
25 as they moved into Dixon Agency.

**BAKER CROSS-EXAMINATION BY DONAHOE**

1 A No. So it sounds like the relationship picked up within  
2 a month or two of them arriving, like summer of 2010 --

3 Q Okay.

4 A -- is when it started. And then obviously if Mom was  
5 having trouble with her not going to school, that would be the  
6 spring of that school year or the fall, August, September,  
7 October, as you say, of that year.

8 Q Okay. So are we moving down a couple months from the  
9 entry into Dixon Agency by the DeFrances if we know they're  
10 there in February of 2010? March, April? So are we in April  
11 now?

12 A I'm not sure. Obviously we're going by the memories and  
13 the interviews with the family, which weren't concise because  
14 it was a decade ago, and their best recollection, which was  
15 conflicting.

16 Q Okay. So -- but if we did move two months down, we'd  
17 have April. And if I'm right about October 2010, that's  
18 April, May, June, July, August, September, October. Can we  
19 agree on that?

20 A I agree with you.

21 Q That would be about seven months that they were hanging  
22 out together. And it's your contention that Jermain spent  
23 numerous hours and days in that -- in the DeFrance household?

24 A Over that period of time before she went to New Mexico,  
25 and it sounded it got progressively more time with the

**BAKER CROSS-EXAMINATION BY DONAHOE**

1 DeFrance as their relationship progressed.

2 Q Now the people that you interviewed, I think you told the  
3 grand jury that you interviewed Vicki Morigeau Velarde --

4 A Correct.

5 Q -- is that correct?

6 A Yes.

7 Q Right. And then your colleague, Agent Kroschel, he  
8 interviewed Dani Garcia and Valenda Morigeau, right?

9 A Correct.

10 Q Did you ever interview the DeFrance family?

11 A Regarding this, no.

12 Q And why wouldn't you check in with them?

13 A I think we're trying to nail down the timeline for better  
14 clarification, and I chose to talk to her family. I could  
15 have talked to them, but I did not.

16 Q Okay. Do you think they might have a different view of  
17 how that relationship evolved, when it started and so on?

18 A They probably would have, but I didn't think they would  
19 cooperate with me due to our past experience on this  
20 investigation.

21 Q Okay. So you figured that they were stonewalling you  
22 somehow because of the other investigation?

23 A Yeah.

24 Q Okay.

25 A That's why I didn't attempt to talk to them.

**BAKER CROSS-EXAMINATION BY DONAHOE**

1 Q All right. So you just made a professional judgment not  
2 to use them as a source of information.

3 A That's correct.

4 Q Do you have any evidence that Jermain and Mr. DeFrance  
5 lived together in 2009?

6 A No.

7 Q So that was inaccurate, when you told the grand jury that  
8 the first time around?

9 A Yes, according to those records being February of 2010.  
10 But, again, that was the math I was using for making her 14 or  
11 eighth grade age, so --

12 Q All right.

13 A -- that's how that happened.

14 Q Did you tell the grand jury that Jermain moved to  
15 New Mexico with her grandmother, Vicki Velarde, and returned  
16 to Dixon sometime in 2010?

17 A I'd have to see the transcript.

18 MR. DONAHOE: Your Honor, can I approach?

19 THE COURT: You may.

20 MR. DONAHOE: I don't have this marked because it  
21 was Jencks material, yeah.

22 THE COURT: Go ahead.

23 BY MR. DONAHOE:

24 Q (Handing.) So I'm at the bottom of the first page and  
25 just the very top of the second. Could you read that to

**BAKER CROSS-EXAMINATION BY DONAHOE**

1 yourself and tell me when you're through?

2 (Discussion off the record at counsel table.)

3 THE WITNESS: I read it.

4 BY MR. DONAHOE:

5 Q All right. Did that refresh your recollection, what you  
6 told the grand jury?

7 A That is correct, but, again, it's based on her being  
8 14 years old from her birthday in 2005 -- or, I mean, in 1995,  
9 trying to figure out when they're talking about her leaving  
10 her eighth grade year.

11 Q All right. But I guess my overall point is that you told  
12 the grand jury that she was back in Montana in 2010.

13 A That's correct, but obviously an error to my math of  
14 trying to make her 14 years old at the time that she left when  
15 she was an eighth grader, according to the family.

16 Q Okay. And the math, can it be affected by her absence --  
17 "her," Jermain's -- absence from the state?

18 A Yes. I was just trying to take the age of an eighth  
19 grader to figure out the year, because Vicki was having  
20 trouble with the year. So she knew the school year, and we  
21 were trying to figure out by going back to her birthday and  
22 then how old is an eighth grader to determine what year it  
23 might have been.

24 Q Okay. So we used the school year, but we didn't use the  
25 school records, right?

**BAKER CROSS-EXAMINATION BY DONAHOE**

1 A That's correct.

2 Q Okay. All right.

3 Now do you know, of your personal knowledge or from your  
4 investigative work, I guess, which would be your personal  
5 knowledge, did Jermain complete the school year in New Mexico,  
6 2010?

7 A I don't know.

8 Q All right. Moving on to the next school year, so within  
9 the fall of 2010, the spring of 2011, did Jermain go to school  
10 in Dulce in 2011, that spring semester?

11 A I don't know.

12 Q Did Jermain, from your investigative work, return to  
13 Montana in the summer of 2011 with a boyfriend named Colton  
14 Monarco?

15 A Yes. According to the family, she did come back for a  
16 period of time with Colton.

17 Q And after that visit, did Jermain return to Dulce with  
18 Colton Monarco?

19 A I recall that he went back after being here a short  
20 period of time, like a week or two, and then she may have went  
21 back for a period of time.

22 Q Okay. And do you know whether or not she attended that  
23 semester of school?

24 A I do not.

25 Q You do not. All right.

**BAKER CROSS-EXAMINATION BY DONAHOE**

1           So you don't know where she went to school in the fall of  
2 2011?

3 A    No. According to the family, she would have been down  
4 there for that eighth grade year, and either towards the end  
5 of that year or the end of that year, she came back to  
6 Montana.

7 Q    Okay. Do you know, from your investigative work or the  
8 checking of any record or speaking with the family, whether  
9 Jermain went -- attended Dulce High School in the winter  
10 session of 2012?

11 A    I do not know.

12 Q    All right. Is it conceivable that she was in high school  
13 down there at that time?

14 A    Yes, that would be possible.

15 Q    All right. So that would mean, essentially, that with  
16 the exception of the summer visit, Jermain had left the state  
17 in October of 2010 and didn't return until the session, the  
18 winter session ended in Dulce in the spring of 2012; is that  
19 right?

20 A    According to you, I see we are coming up with that. What  
21 I had learned from the family, her eighth grade year is when  
22 she was down there and she came back.

23 Q    Okay. And she came back. All right.

24           Well, in the PFMA, when you investigated that, and I  
25 think there's evidence already in the record for this, Deputy



**BAKER CROSS-EXAMINATION BY DONAHOE**

1 Largent questions Jermain and says: "[W]hat's your  
2 relationship?"

3 And she says: We date.

4 And he says: How long?

5 And she says: June.

6 And he says: "So about nine months?"

7 A That's correct.

8 Q All right. So if you piece that together, and she's  
9 leaving Dulce education in the winter of 2012 and she gets  
10 back to Montana June-ish of 2012, does that square with the  
11 PFMA record?

12 A That would.

13 Q All right. Because it's nine months back from April,  
14 right?

15 A Correct.

16 Q All right. So if we piece this together, Jermain was out  
17 of the state of Montana from October '10 until the spring of  
18 2012, save for that vacation visit. Can you agree with that?

19 A I would agree where you are saying that, yes.

20 Q Okay. All right.

21 So Jermain -- and I'm not trying to be disrespectful  
22 here. But on that premise, that she was gone for some  
23 20 months from this jurisdiction, could she ever live in a  
24 camper trailer in Dixon Agency with Michael DeFrance?

25 A She would have to be back here. So I didn't know that

**BAKER CROSS-EXAMINATION BY DONAHOE**

1 timeline until recently. I was operating that she was gone  
2 during her eighth grade year for what I knew at that time.

3 Q Okay. All right.

4 A I agree with what you're saying.

5 Q But you get my point.

6 A Yes.

7 Q Okay. So that would leave time that they spent together  
8 in the camp trailer, apparently, either in 2010, which there's  
9 apparently no evidence of that, or 2012, June, forward?

10 A Yeah. I was under the impression they lived in the  
11 camper trailer together after she came back from New Mexico.

12 Q Okay. So we can agree on that?

13 A Yes.

14 Q All right. So if we can agree on that, she's in the camp  
15 trailer maybe how many months?

16 A According to your math, from September of 2012 to --

17 Q June --

18 A -- or --

19 Q -- when she gets back.

20 A Okay. When she gets back. I was trying to go nine  
21 months back from the April 2013.

22 Q Yeah, and I think that takes you back to June.

23 A Okay. Okay.

24 Q Yeah.

25 A Yes, I agree.

**BAKER CROSS-EXAMINATION BY DONAHOE**

1 Q So -- okay. So -- and I'm giving you full play there --

2 A Yeah.

3 Q -- you know, for -- she gets back. She moves in. All  
4 right?

5 A (No response.)

6 Q Now why would Jermain tell Deputy Largent and Dispatcher  
7 Bill Brown that she does not live in that camper?

8 A I wouldn't know why she would. I could speculate.

9 Q Okay. Go ahead.

10 A Because --

11 MS. CLARK: Objection. We'd object to speculation.

12 THE COURT: Yeah. Sustained.

13 BY MR. DONAHOE:

14 Q Did you review all of the material associated with the  
15 PFMA, to include the audios and transcripts that we've put  
16 into evidence so far?

17 A Yes.

18 Q All right. Do we agree that Jermain tells Bill Brown,  
19 the dispatcher, that she does not live with Mr. DeFrance?

20 A I believe so, yes.

21 Q And that, likewise, she's in a dating relationship with  
22 him and that has been ongoing for approximately nine months.

23 A That's correct.

24 Q All right. Did you check with any law enforcement in the  
25 vicinity when you conducted your investigation about the

**BAKER CROSS-EXAMINATION BY DONAHOE**

1 Q Okay.

2 A I didn't hear back from them.

3 Q Oh, you didn't hear back from them?

4 A No.

5 Q Okay. So they never produced any material?

6 A No.

7 Q Okay. You interviewed, late in the investigation,  
8 Jocelyn Stevens, correct?

9 A Correct.

10 Q And who is Jocelyn Stevens?

11 A She was Jermain's childhood friend that lived in the  
12 DeFrance residence before the DeFrances moved to that  
13 location.

14 Q Okay. And they had been very young friends? They knew  
15 each other as almost children, didn't they?

16 A Sounds that way.

17 Q Yeah. So Jocelyn Stevens moved out of Dixon Agency and  
18 the DeFrances moved in; is that right?

19 A Correct.

20 Q And in your visit with Jocelyn Stevens, did she say she  
21 had lost touch with Jermain after she left Dixon Agency?

22 MS. CLARK: Objection. Hearsay.

23 MR. DONAHOE: She's gonna testify.

24 THE COURT: Overruled.

25 THE WITNESS: Can you repeat the question?

**BAKER CROSS-EXAMINATION BY DONAHOE**

1 BY MR. DONAHOE:

2 Q Did you discover that Jocelyn Stevens lost contact with  
3 Jermain Charlo after she left Dixon Agency?

4 A I wouldn't agree she said lost contact but the contact  
5 diminished, that it was more come and go, is --

6 Q Okay.

7 A -- what I think she said.

8 Q All right. So less intense.

9 A Yes.

10 Q All right. In your discussions with Jocelyn Stevens, did  
11 she tell you -- "she," Jocelyn -- that Jermain and herself,  
12 Jocelyn, had dated the same boy on one occasion?

13 MS. CLARK: Objection. Hearsay. If Ms. Stevens is  
14 gonna testify, we can get this testimony from her.

15 THE COURT: That's true. Sustained.

16 BY MR. DONAHOE:

17 Q On the trip that Jermain took from Dulce or New Mexico  
18 back to Montana in the summer of 2011 with Colton Monarco, did  
19 you determine where they stayed, Colton and Jermain?

20 A I did not.

21 Q Did you know that Sonny Morigeau was the owner of the  
22 camp trailer?

23 A Yes.

24 Q Did you ever determine or put any effort into  
25 investigating when Sonny let the trailer go?

**BAKER CROSS-EXAMINATION BY DONAHOE**

1 A No. I just knew that he had sold it to Michael's father.

2 Q Okay. But you never checked in with Michael's father to  
3 ask when that transaction took place?

4 A That's correct.

5 MR. DONAHOE: I don't have anything else. Thanks.

6 THE COURT: Thank you, Mr. Donahoe.

7 Ms. Clark, any redirect?

8 MS. CLARK: No, Your Honor.

9 THE COURT: Detective Baker, you can return to  
10 counsel table. Thank you.

11 THE WITNESS: Thank you.

12 THE COURT: Ms. Clark.

13 MS. CLARK: The government rests, Your Honor.

14 THE COURT: All right.

15 Do we need to take a recess, Mr. Donahoe, before you  
16 call your first witness?

17 MR. DONAHOE: Yeah. I could use five minutes.

18 THE COURT: Let's take ten.

19 MR. DONAHOE: All right.

20 (Recess taken from 15:40:48 to 15:53:49.)

21 (Open court.)

22 (Defendant present.)

23 THE COURT: Please be seated.

24 Mr. Donahoe, you may call the defendant's first  
25 witness.

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16 **IN THE UNITED STATES DISTRICT COURT**  
17 **FOR THE DISTRICT OF MONTANA**  
18 **MISSOULA DIVISION**

19 UNITED STATES OF AMERICA, )  
20 Plaintiff,) No. CR 21-29-M-DLC  
21 vs. )  
22 ) **VOLUME 1 OF 2**  
23 MICHAEL BLAKE DeFRANCE, ) **TRANSCRIPT OF BENCH TRIAL**  
24 Defendant.)  
25 \_\_\_\_\_)

26 **BEFORE THE HONORABLE DANA L. CHRISTENSEN**  
27 **UNITED STATES DISTRICT COURT JUDGE**  
28 **FOR THE DISTRICT OF MONTANA**

29 Russell Smith United States Courthouse  
30 201 East Broadway  
31 Missoula, Montana 59802  
32 Wednesday, April 26, 2023  
33 08:36:38 to 17:00:21  
34  
35

36 Proceedings recorded by machine shorthand  
37 Transcript produced by computer-assisted transcription

**BROWN DIRECT EXAMINATION BY DONAHOE**

1 (Oath administered to the witness.)

2 THE CLERK: You can have a seat over there. Thank  
3 you.

4 (Discussion off the record at counsel table.)

5 WHEREUPON,

6 MR. WILLIAM BROWN,  
7 called for examination by counsel for defendant, after having  
8 been first duly sworn to testify the truth, the whole truth,  
9 and nothing but the truth, testified as follows:

10 DIRECT EXAMINATION

11 BY MR. DONAHOE:

12 Q Mr. Brown, would you state your name and tell me what you  
13 do for a living?

14 A My name is William Brown, and I work for the dispatch  
15 center for Sanders County sheriff's office in Thompson Falls,  
16 Montana.

17 Q Okay. Inviting your attention to in or around April of  
18 2013, do you recall a call that you took from, I guess, tribal  
19 law enforcement concerning one Jermain Charlo?

20 A Once I read the transcripts, yes.

21 Q All right.

22 A Vaguely, yes --

23 Q Yeah.

24 A -- it's been quite a while.

25 Q Quite a while ago.



**BROWN DIRECT EXAMINATION BY DONAHOE**

1 And I provided you the transcripts --

2 A Right.

3 Q -- and the audio recordings, correct?

4 A Yes, sir.

5 Q Did you go through those and --

6 A Yes, I have.

7 Q -- decide whether the transcript tracked the audio  
8 recording?

9 A Yes.

10 Q And you did find a mistake, didn't you, in the  
11 transcript?

12 A Yes. The officer in the transcription was referred to as  
13 Robert when it should have been Robyn.

14 Q Okay. All right.

15 THE REPORTER: Would you let him finish his question  
16 before you --

17 THE WITNESS: Yes, ma'am.

18 THE REPORTER: -- begin to answer? Thank you.

19 BY MR. DONAHOE:

20 Q So after reviewing the materials, the call that you took  
21 from Tribal, could you just summarize it for me? Was that a  
22 regular thing, for you to get a call from another agency and  
23 ask for assistance?

24 A Yes. Tribal will call us on occasion when they have an  
25 incident that occurs within the reservation boundaries and

**BROWN DIRECT EXAMINATION BY DONAHOE**

1 then forward it on to us for further action.

2 Q Okay. So you talked to the tribal officer. I think her  
3 name was Cathy. And you told her you would kind of take it  
4 from there, right?

5 A I told her, yes, that I would get a deputy sent that  
6 direction.

7 Q All right. So that's the sequence? You talked to  
8 Tribal, and then you contacted one of your officers, right?

9 A Yes, sir.

10 Q How did you do that?

11 A I called him on the radio and advised him that I -- if he  
12 could contact dispatch. And then, from there, I gave him the  
13 information over the phone.

14 Q Right. So -- and who was the deputy that called you?

15 A Deputy Largent.

16 Q All right.

17 A Badge 359.

18 Q He, yeah, he calls you, right?

19 A Correct.

20 Q And you send that message out on the radio for security  
21 reasons, don't you?

22 A Sometimes I will come over the radio, because we have a  
23 lot of people with scanners in the area and you don't want  
24 them to overhear our radio traffic on some of the calls that  
25 we have.

**BROWN DIRECT EXAMINATION BY DONAHOE**

1 Q Yeah, especially a call like that, right?

2 A Yes, sir.

3 Q Okay. So Deputy Largent called in, and you guys had a  
4 little discussion there, correct?

5 A Yes.

6 Q And I don't think we need to go through that. That's  
7 already in evidence. But Deputy Largent asked you, in that  
8 conversation, what was the relationship between the parties.  
9 Do you remember that question?

10 A Yes.

11 Q And you said you didn't know but you were gonna call  
12 Jermain Charlo and ask that question, among others, right?

13 A Yes.

14 Q And you were also concerned whether she needed an  
15 ambulance or any kind of medical assistance, right?

16 A Yes. Tribal had told me that she didn't need any, but I  
17 called her just to reconfirm that she did not need an  
18 ambulance.

19 Q Okay. Now as law enforcement, between you and Deputy  
20 Largent, why, at the very top of the discussion, would the  
21 relationship be important in a matter like the PFMA?

22 A To establish if it was an assault or a domestic assault  
23 or a partner/family member assault. To determine to what  
24 degree the assault was.

25 Q Okay.

**BROWN DIRECT EXAMINATION BY DONAHOE**

- 1 A If they cohabitated together or not.
- 2 Q So you told Deputy Largent that you would go ahead and
- 3 call Jermain, ask those questions, and he said that was fine,
- 4 and he was gonna ride over there.
- 5 A Yes. He was --
- 6 Q Is that how that worked out?
- 7 A Correct.
- 8 Q Okay. And then did you call Jermain Charlo?
- 9 A Yes, I did.
- 10 Q All right. And you talked to her; for a few minutes,
- 11 anyway. Did you establish what her relationship to the
- 12 defendant was, Mr. DeFrance?
- 13 A Yeah. She had said that she was there for the weekend
- 14 for visitation, for visiting.
- 15 Q Okay. Did she say that they were dating?
- 16 A I don't recall her saying that they were actually dating.
- 17 Q All right.
- 18 A But --
- 19 Q Did you -- go ahead. Go ahead.
- 20 A But that she was there with him for the weekend, and
- 21 she'd had disputes with him in the past. So at that point, I
- 22 assumed that they were boyfriend/girlfriend.
- 23 Q Okay. All right. So did you ask her, "Was Michael your
- 24 boyfriend?"
- 25 A I don't, I don't recall asking her that question, that

**BROWN DIRECT EXAMINATION BY DONAHOE**

1 specific question.

2 Q All right. At page 7 of Exhibit 514, the "Sheriff's  
3 Office" is you, right?

4 A Yes, okay.

5 Q Yeah. And it says, "Is Michael a boyfriend?"

6 A Okay.

7 Q And she says, "He's my boyfriend."

8 A Okay. Yep.

9 Q Okay.

10 A In the transcription of the recording, it does say that I  
11 did ask that question.

12 Q Okay. And then right underneath that, you say, "And does  
13 he live with you?" Do you see that?

14 A Yes.

15 Q And she says?

16 A "No, no. I was -- I was spending the weekend with him."

17 Q Okay. So you determined that they were boyfriend and  
18 girlfriend and she was visiting him.

19 A (Nodded head affirmatively.)

20 THE REPORTER: Is that a --

21 THE WITNESS: Yes.

22 THE REPORTER: Thank you.

23 BY MR. DONAHOE:

24 Q All right. Also on page 7, down around line 19, 20, "Is  
25 this where that happened?"

**BROWN DIRECT EXAMINATION BY DONAHOE**

1           And Jermain says, "No. It happened at his house. I  
2 don't know his address."

3           THE COURT: What exhibit are we referring to?

4           MR. DONAHOE: I am in 516.

5           THE COURT: All right. I thought you said 514.

6           THE CLERK: He did.

7           THE COURT: All right. Go ahead.

8           THE WITNESS: Okay. What was the question again?  
9 I'm sorry.

10 BY MR. DONAHOE:

11 Q       The question is that you were trying to determine where  
12 the event took place, where the assault took place, and she  
13 said "at his house"; is that right?

14 A       Right. I asked her, "And you're at 309 Frank McClure"  
15 Street?

16 Q       Right.

17 A       And she said, "Yeah."

18       And, "Is that where --"

19       And then she said, "That's my grandpa's house, yes,"  
20 which is the house that she had went to, which was next door  
21 to the incident location.

22 Q       Um-hmm. And you say, "Is this where that happened?"

23       And she says, "No. It happened at his house."

24 A       And she said, "I don't know his address."

25       And I asked her, "Is he next door?"

**BROWN CROSS-EXAMINATION BY CLARK**

1 Q Okay.

2 A And at that point she said, "Yeah."

3 Q Okay. All right.

4 A And then I asked her, "Is that where it happened?"

5 And she just said, "He's just next door."

6 Q All right. And then, last, on page 11, you sort of went  
7 over that again. "[D]o you and your boyfriend live together."

8 Do you see it, lines 13 and 14?

9 A Correct.

10 Q And she says, "No, I just visit."

11 A Correct.

12 MR. DONAHOE: Thanks. I have nothing further.

13 THE COURT: Ms. Clark.

14 CROSS-EXAMINATION

15 BY MS. CLARK:

16 Q Good afternoon.

17 A Good afternoon.

18 Q When you were asking these questions of Jermain, are you  
19 just getting a cursory overview of what the officer is  
20 responding to?

21 A Yes. He's en route at that time. I'm trying to get some  
22 background information.

23 Q You don't do a deep dive into the relationship between  
24 the two parties?

25 A Just the basics.

**KRUTILLA DIRECT EXAMINATION BY DONAHOE**

1 Q All right.

2 A Boyfriend/girlfriend, husband/wife.

3 MS. CLARK: Okay. Thank you. Nothing further.

4 THE COURT: Mr. Donahoe, any redirect?

5 MR. DONAHOE: No, thank you.

6 THE COURT: May this witness be excused?

7 MR. DONAHOE: Yes.

8 THE COURT: Any objection, Ms. Clark?

9 MS. CLARK: No, Your Honor.

10 THE COURT: Mr. Brown, you are excused. Thank you,  
11 sir.

12 Mr. Donahoe, you may call the defendant's next  
13 witness.

14 THE CLERK: Who is it, Michael?

15 MR. DONAHOE: Kirk Krutilla.

16 (Oath administered to the witness.)

17 THE COURT: Mr. Krutilla, if you would sit up here  
18 in the witness stand, please, and speak directly into the  
19 microphone so we all can hear you.

20 THE WITNESS: (Complied with request.)

21 WHEREUPON,

22 MR. KIRK KRUTILLA,  
23 called for examination by counsel for defendant, after having  
24 been first duly sworn to testify the truth, the whole truth,  
25 and nothing but the truth, testified as follows:



1 JoAnn Jett Corson  
2 Registered Diplmate Reporter  
3 Certified Realtime Reporter  
4 P. O. Box 8006  
5 Missoula, Montana 59807-8006  
6 406/829-7123 office  
7 joann\_corson@mtd.uscourts.gov  
8  
9 United States Court Reporter  
10  
11  
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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
MISSOULA DIVISION**

11 UNITED STATES OF AMERICA, )  
12 Plaintiff,) No. CR 21-29-M-DLC  
13 vs. )  
14 ) **VOLUME 1 OF 2**  
15 MICHAEL BLAKE DeFRANCE, ) **TRANSCRIPT OF BENCH TRIAL**  
16 Defendant.)  
17 \_\_\_\_\_)

**BEFORE THE HONORABLE DANA L. CHRISTENSEN  
UNITED STATES DISTRICT COURT JUDGE  
FOR THE DISTRICT OF MONTANA**

Russell Smith United States Courthouse  
201 East Broadway  
Missoula, Montana 59802  
Wednesday, April 26, 2023  
08:36:38 to 17:00:21

Proceedings recorded by machine shorthand  
Transcript produced by computer-assisted transcription

**WOODY DIRECT EXAMINATION BY DONAHOE**

1 MR. DONAHOE: Christian Woody.

2 THE COURT: Mr. Woody, if you would come forward and  
3 the clerk will administer an oath. If you would raise your  
4 right hand, please.

5 (Oath administered to the witness.)

6 THE COURT: And, Mr. Woody, if you would please sit  
7 up here in the witness stand and speak directly into the  
8 microphone so that we all can hear you.

9 THE WITNESS: (Complied with request.)

10 THE COURT: Thank you.

11 WHEREUPON,

12 MR. CHRISTIAN WOODY,  
13 called for examination by counsel for defendant, after having  
14 been first duly sworn to testify the truth, the whole truth,  
15 and nothing but the truth, testified as follows:

16 DIRECT EXAMINATION

17 BY MR. DONAHOE:

18 Q Good afternoon, sir.

19 A Hello.

20 Q Mr. Woody, where do you live?

21 A I currently live in Flagstaff, Arizona.

22 Q And prior to that, at some point in your life, did you  
23 live in Dulce, New Mexico?

24 A Yes. I grew up in Dulce, New Mexico.

25 Q And did you go to school there?

**WOODY DIRECT EXAMINATION BY DONAHOE**

1 A I went to the Dulce High School, yes.

2 Q And do you know Colton Monarco?

3 A I do know Colton Monarco, yes.

4 Q And how do you know him, sir?

5 A I knew him from childhood. We would both attend powwows  
6 together, dancing in the powwow circles. I knew him in school  
7 up until about elementary. After some time apart, he  
8 approached me to be in a band with him, which we were in for  
9 about a year in the years 2013-2014.

10 Q And do you know whether or not Mr. Monarco ever had a  
11 relationship with Jermain Charlo?

12 A Yes. I did know that he was in a relationship with  
13 Jermain Charlo. Dulce was a pretty small town, and everyone  
14 typically knows one another. In school, especially, everyone  
15 kind of knows who is dating who, and I did understand that  
16 they were dating at one point.

17 Q So Jermain Charlo was living in Dulce, New Mexico?

18 A Yes.

19 Q And had a relationship with Colton Monarco?

20 A Yes. To my understanding, yes.

21 Q And do you know anything about the longevity or the  
22 length of that relationship; when it began, when it ended,  
23 maybe?

24 A I wouldn't be able to accurately tell about when it  
25 started or when it ended, but, to my understanding, they were

**WOODY DIRECT EXAMINATION BY DONAHOE**

1 together in high school.

2 Q All right. Do you know if they shared intimacy of a  
3 physical nature?

4 A I wouldn't know.

5 Q Okay. Do you know whether Jermain and Mr. Monarco had  
6 traveled to Montana at any point in time?

7 A I wouldn't know about that.

8 Q All right. Did you ever talk to Jermain about  
9 Mr. Monarco?

10 A No. I never talked to her about Colton, no.

11 Q All right. Do you have any connection to Jermain's  
12 family?

13 A Her grandmother, Vicki, was married to my grandfather, my  
14 grand-uncle. My mom's mother is his sister.

15 Q Okay.

16 A So that would, that would be the familial connection.

17 Q All right. So there was a remote familial connection.

18 A Yes.

19 Q Okay. Did you ever hear about Jermain and Mr. Monarco  
20 breaking up?

21 A That happened outside of my awareness, and, again, Dulce  
22 is a very small place. It was one of those things that we  
23 just kind of found out they weren't together anymore on social  
24 media and just among friends.

25 Q All right. Did you ever discover how Mr. Monarco took

**WOODY DIRECT EXAMINATION BY DONAHOE**

1 that breakup?

2 A It wasn't until years later when I was in a band with  
3 him, again probably about 2013-2014. Getting to know him a  
4 little better in the context of our group, he did express that  
5 he was, I guess, pretty heartbroken about the fact that they  
6 had broken up.

7 MR. DONAHOE: Okay. Thank you, sir. I have nothing  
8 further.

9 THE COURT: Ms. Clark?

10 MS. CLARK: No questions. Thank you.

11 THE COURT: May this witness be excused?

12 MR. DONAHOE: Yes.

13 THE COURT: Any objection, Ms. Clark?

14 MS. CLARK: No objection.

15 THE COURT: Mr. Woody, you are excused. Thank you,  
16 sir.

17 THE WITNESS: Yes. Thank you.

18 THE COURT: We've still got time, Mr. Donahoe.

19 MR. DONAHOE: Okay.

20 THE COURT: I just want to -- you may have witnesses  
21 that you have subpoenaed that are here that you would like to  
22 call and get their testimony done. And, within reason, I  
23 would -- I'm willing to accommodate that so people don't need  
24 to stay unnecessarily, so --

25 MR. DONAHOE: Yeah. I only have one more, I think,

1 JoAnn Jett Corson  
2 Registered Diplomate Reporter  
3 Certified Realtime Reporter  
4 P. O. Box 8006  
5 Missoula, Montana 59807-8006  
6 406/829-7123 office  
7 joann\_corson@mtd.uscourts.gov

8 United States Court Reporter

9 **IN THE UNITED STATES DISTRICT COURT**  
10 **FOR THE DISTRICT OF MONTANA**  
11 **MISSOULA DIVISION**

12 UNITED STATES OF AMERICA, )  
13 Plaintiff, ) No. CR 21-29-M-DLC  
14 vs. )  
15 ) **VOLUME 1 OF 2**  
16 MICHAEL BLAKE DeFRANCE, ) **TRANSCRIPT OF BENCH TRIAL**  
17 Defendant.)  
18 \_\_\_\_\_)

19 **BEFORE THE HONORABLE DANA L. CHRISTENSEN**  
20 **UNITED STATES DISTRICT COURT JUDGE**  
21 **FOR THE DISTRICT OF MONTANA**

22 Russell Smith United States Courthouse  
23 201 East Broadway  
24 Missoula, Montana 59802  
25 Wednesday, April 26, 2023  
08:36:38 to 17:00:21

26 Proceedings recorded by machine shorthand  
27 Transcript produced by computer-assisted transcription

**MONARCO DIRECT EXAMINATION BY DONAHOE**

1 THE WITNESS: (Complied with request.)

2 THE COURT: And then speak directly into the  
3 microphone so that we all can hear you.

4 WHEREUPON,

5 MR. COLTON MONARCO,  
6 called for examination by counsel for defendant, after having  
7 been first duly sworn to testify the truth, the whole truth,  
8 and nothing but the truth, testified as follows:

9 DIRECT EXAMINATION

10 BY MR. DONAHOE:

11 Q Mr. Monarco, do you know Jermain Charlo?

12 A Yes.

13 Q And how did you know her, sir?

14 A She was my girlfriend for a brief period.

15 Q Okay. And can you tell me about that, like when that  
16 happened and where?

17 A It was in Dulce, and it was around 2011.

18 Q Okay. And you met while you went to school together?

19 A Yes.

20 Q And that was at Dulce High School?

21 A Dulce High School.

22 Q And at some point in time in that 2011 area, did you take  
23 a trip to Montana with Jermain Charlo?

24 A Yes.

25 Q And you came here and visited and met with her family?

**MONARCO DIRECT EXAMINATION BY DONAHOE**

- 1 A Yeah, yes.
- 2 Q And that was at Dixon Agency?
- 3 A Yes.
- 4 Q And did you return from the trip with Jermain back to  
5 Dulce after that visit?
- 6 A Yes.
- 7 Q And return to school?
- 8 A Yes.
- 9 Q Did you have a physical, intimate relationship with  
10 Jermain Charlo?
- 11 A Yes.
- 12 Q And did you consider the relationship a serious one?
- 13 A No.
- 14 Q And why not?
- 15 A It just didn't feel like we were gonna end up together in  
16 any way.
- 17 Q Okay. All right. Do you have a friend named Christian  
18 Woody?
- 19 A Yes.
- 20 Q And did you and Mr. Woody connect through some music  
21 activities --
- 22 A Yes.
- 23 Q -- after high school?
- 24 A Yes.
- 25 Q And did you discuss with Mr. Woody your relationship with



**MONARCO CROSS-EXAMINATION BY RACICOT**

1 Jermain Charlo?

2 A I don't believe so.

3 Q All right. You never expressed any kind of  
4 disappointment in the breakup with Jermain Charlo; to  
5 Mr. Woody, that is?

6 A Oh. I think I might have, yes.

7 Q Okay. All right. What kind of things did you do with  
8 Jermain?

9 A We mainly just hung out. Watched movies. She introduced  
10 me to some anime.

11 Q Okay.

12 A We talked about books.

13 Q All right. And where did she live?

14 A With her grandmother.

15 Q Did she ever stay with you?

16 A Yes.

17 Q On occasion overnight?

18 A Yes.

19 MR. DONAHOE: I have nothing further. Thanks.

20 THE COURT: Mr. Racicot.

21 MR. RACICOT: Thank you, Your Honor.

22 CROSS-EXAMINATION

23 BY MR. RACICOT:

24 Q Good afternoon.

25 A (No response.)

**MONARCO CROSS-EXAMINATION BY RACICOT**

1 Q You went to Montana with Jermain and her family during  
2 the summer of 2011; is that right?

3 A Yes.

4 Q That was after school got out?

5 A I believe so.

6 Q And you were just there for a couple of days?

7 A Yes.

8 Q And while you were in Montana, you were taking a walk  
9 with Jermain, and at one point Michael DeFrance drove by the  
10 two of you, correct?

11 A Yes.

12 Q Had Jermain talked to you before about who Michael  
13 DeFrance was?

14 A No.

15 Q And after Michael DeFrance drove by you and Jermain while  
16 you were on your walk, at one point later during the same  
17 visit to Montana, Jermain actually went to Michael's house and  
18 left you with the other members of her family.

19 A Yes.

20 Q And while she was gone visiting Michael DeFrance, her  
21 mother asked you where she was, you told her, and her mother  
22 seemed upset about that.

23 A Yes.

24 Q And when you got back -- so then when you left Montana,  
25 Jermain went with you back to Dulce, New Mexico?

**MONARCO CROSS-EXAMINATION BY RACICOT**

1 A Yes.

2 Q And when you got back to New Mexico, you noticed that  
3 Jermain was talking to Michael DeFrance more often than she  
4 had been before you went to Montana.

5 A Yes.

6 Q And is that when you realized that maybe your  
7 relationship with Jermain wasn't gonna become very serious?

8 A Yes.

9 Q And was it because it seemed like she wanted to get back  
10 together with Michael?

11 A Yes.

12 Q And then at some point, Jermain moved back to Montana and  
13 started going to school in Montana again.

14 A Yes.

15 MR. RACICOT: That's all that I have. Thank you.

16 THE COURT: Any redirect, Mr. Donahoe?

17 MR. DONAHOE: I don't have anything. Thank you.

18 THE COURT: May this witness be excused?

19 MR. DONAHOE: Yes.

20 THE COURT: Any objection, Mr. Racicot?

21 MR. RACICOT: No objection, Your Honor. Thank you.

22 THE COURT: All right. Mr. -- is it "Monarco"?

23 THE WITNESS: It's "Monarco."

24 THE COURT: You are excused, sir. Thank you.

25 THE WITNESS: Okay. Thank you.

1           THE COURT: We will be in recess until 9 o'clock  
2 tomorrow morning.

3           MR. DONAHOE: Okay.

4           (Proceedings were recessed at 17:00:21.)

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MICHAEL DONAHOE  
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Federal Defenders of Montana  
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Helena, Montana 59601  
Phone: (406) 449-8381  
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Email: michael\_donahoe@fd.org  
Attorneys for Defendant

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
MISSOULA DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MICHAEL BLAKE DeFRANCE,

Defendant.

**CR 21-29-M-DLC**

**DEFENDANT DeFRANCE'S  
REPLY BRIEF IN SUPPORT OF  
COMBINED OPPOSED MOTION  
FOR ACQUITTAL AND MOTION  
TO ARREST JUDGMENT UNDER  
RULES 29(c) AND 34, Fed.R.Crim.P.;  
AND ALTERNATIVE MOTION  
FOR A NEW TRIAL UNDER RULE  
33(b)(2), Fed.R.Crim.P.**

**INTRODUCTION**

Mr. DeFrance filed a motion for acquittal under Rule 29(c) of the Fed. R. Crim. P. and to arrest the Court's May 1, 2023, judgment under Rule 34 (ECF No. 182). The grounds are that the Court lacks, both legally and factually, jurisdiction to enter judgment under Rule 29(c) and 34; in the alternative, Mr. DeFrance seeks a new trial under Rule 33(b)(2) (ECF Nos. 189 and 190). The government filed its

response brief on June 12, 2023 (ECF No. 195). This is Mr. DeFrance's reply brief to the government's response brief.

### **REPLY ARGUMENTS**

We begin with the government's argument's set forth on the last page of its brief:

The prosecution entertained the offer to resolve the case from defense counsel in good faith. The government feels that it was set up so the defendant could make this precise argument. Even if the offer was taking (sic) as a position of the government, a dating relationship is a lesser and included relationship of similarly situated to a spouse. The theories are not different and DeFrance's facts meet the elements under both theories.

ECF No. 195, p. 25.

There are several issues to unpack here. First, the argument contradicts the correct plea agreement sequence, which began with an invitation from government counsel:

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From: Racicot, Tim (USAMT) <Tim.Racicot2@usdoj.gov>  
Sent: Wednesday, March 29, 2023 6:32 PM  
To: Michael Donahoe <Michael\_Donahoe@fd.org>  
Cc: Clark, Jennifer (USAMT) <Jennifer.Clark2@usdoj.gov>  
Subject: USA v. DeFrance - Potential Trial Exhibits

Michael,

I'm trying to help Jen get ready for the trial in USA v. DeFrance. We would like to introduce these videos (at least the first blog) at trial and wondered if you have any objection. If you do, we'll try to tee the issue up for the Court in our trial brief.

First blog - YouTube

Second day, kind of boring... - YouTube

Day 3 wake up call - YouTube

Also, if we can get approval, do you think your client would be interested in a binding plea agreement under 11(c)(1)(C) where the parties agree on a sentence of probation following a guilty plea to one of the false statements? We haven't broached the subject with our supervisors and wanted to see if it's something worth pursuing.

Thanks,  
Tim

This is the email that opened the plea agreement discussion. Under settled Supreme Court precedent more than a decade old the undersigned had a constitutionally based duty to furnish effective counsel during these negotiations. *Missouri v. Frye*, 132 S. Ct. 1399, 1407-1408 (2012) ("criminal defendants require effective counsel during plea negotiations"). Accordingly, in due course defense counsel communicated this counteroffer:

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**From:** Michael Donahoe  
**Sent:** Friday, March 31, 2023 9:50 AM  
**To:** Clark, Jennifer (USAMT) Racicot, Tim (USAMT)  
**Subject:** [EXTERNAL] Plea Counter Offer

Hi There,

I have a counter-offer.

He waives any ex post facto argument vis-à-vis the new June 2022 version of Section 921(a)(33) that now covers dating relationships. Meaning he would plead to a Section 922(g)(9) violation in a superseding Information. The goal being for him to qualify to get his gun rights back under the new version of the statute. Moreover, the Indictment is then dismissed. And he does a C Plea for probation.

I realize this is unorthodox but this is an unusual situation. I just looking for a way to bring this to a conclusion.

Thanks

(ECF No. 195-1, p.2).

There is nothing untoward here. It was an ordinary plea agreement discussion *initiated by government counsel* where different ways of resolving the case were exchanged. Moreover, the government's contention that it was "set up" is baseless. The United States Attorney's Office in the District of Montana is blessed with highly qualified and experienced lawyers who were under no obligation to even consider the defense's counter proposal; but nevertheless, in the end, it approved and sent the plea agreement along for Mr. DeFrance's consideration.

The assertion that defense counsel "set up" the government raises serious questions, at least one of which was left open by *Missouri v. Frye*, 132 S. Ct. 1399, 1407-1408 (2012):

///



. . . criminal defendants require effective counsel during plea negotiations. “Anything less ... might deny a defendant ‘effective representation by counsel at the only stage when legal aid and advice would help him.’ ” *Massiah*, 377 U.S., at 204, 84 S.Ct. 1199 (quoting *Spano v. New York*, 360 U.S. 315, 326, 79 S.Ct. 1202, 3 L.Ed.2d 1265 (1959) (Douglas, J., concurring)).

## B

The inquiry then becomes how to define the duty and responsibilities of defense counsel in the plea bargain process. This is a difficult question. “The art of negotiation is at least as nuanced as the art of trial advocacy, and it presents questions further removed from immediate judicial supervision.” *Premo v. Moore*, 562 U.S. 115, 125, 131 S.Ct. 733, 741, 178 L.Ed.2d 649 (2011). Bargaining is, by its nature, defined to a substantial degree by personal style. The alternative courses and tactics in negotiation are so individual that it may be neither prudent nor practicable to try to elaborate or define detailed standards for the proper discharge of defense counsel's participation in the process. Cf. *ibid*.

This case presents neither the necessity nor the occasion to define the duties of defense counsel in those respects, however.

*Missouri v. Frye*, 132 S. Ct. at 1407-1408  
(emphasis added).

The situation here generates the need for the Court to determine the difference between effective, ineffective, and maybe even unethical representation in the plea agreement context. By leveling the accusation that defense counsel “set up” the government, the United States suggests that defense counsel merely staged the mechanics of a plea agreement process as a charade to plant a foundation for the due process arguments set forth in Mr. DeFrance’s post-trial motions. Which carried to

its logical conclusion could be conceived as unethical behavior on defense counsel's part. (*See* Montana Rules of Professional Conduct, Rule 3.4(b) "A lawyer shall not . . . falsify evidence"). In other words, was there never any intent on the defense's part to enter a plea agreement? Was the real subtext of defense counsel's plea agreement strategy to trick the government into making the concession of an existing "dating relationship", which no doubt would be harmful to the government's case? Given the gravity of this allegation that defense counsel "set up" the government, a hearing should be conducted to determine whether this was a legitimate plea agreement process or merely a charade crafted by defense counsel to get the government to damage its case.

In any event, the issue of the applicability of the new law had been raised before the Court as early as July 1, 2022, in the context of Mr. DeFrance's motion for permission to move for reconsideration (ECF No. 105). And importantly, in the Court's written order denying that request, the Court stated that it would "defer ruling on [the] issue *until after the trial*" (ECF No. 111, pp. 1-2) (emphasis added). Thus, for the government to claim surprise here, where it well knew that the applicability of the new law was a live issue, is not only wrong, it's offensive. Knowing that Mr. DeFrance's claim rested on the contention that he was in a dating relationship, *not covered under the pre-2022 version of the statute* the government nevertheless carefully considered Mr. DeFrance's counter proposal by processing it

through its hierarchical and internal plea agreement consideration procedures. And then it proposed a plea agreement which clearly states that:

The parties agree that the defendant's conviction for the misdemeanor crime of domestic violence was based on the fact he was in a current dating relationship with the victim at the time of the offense.

(ECF No. 190-1, p. 4)<sup>1</sup>.

Next in its trial brief the government references this plea agreement claiming that it "represented in the government's view, the most favorable offer extended to the defendant" (ECF No. 166, p. 10). Hence the issue here is the theory for guilt supporting the plea agreement (a dating relationship); which is clearly irreconcilable with the theory for guilt propounded by the government at trial (spousal relationship).

Relatedly, two other points are important. First, that it was the government which raised the "fairness" of the plea agreement in its trial brief:

A written, proposed plea agreement was presented to the defendant for his consideration. That plea agreement represented, in the government's view, the most favorable offer extended to the defendant. The Government does not seek to involve the Court in the plea agreement process in violation of Rule 11, but respectfully requests the Court make an inquiry to ensure the record is protected.

(ECF No. 166, pp. 10-11) (emphasis added).

<sup>1</sup> This admission by the government is not covered by Rule 410, Fed. R. Evid.

And the second is that in his *dissenting* opinion in *Lafler v. Cooper*, 132 S. Ct.

1376, 1392 (2012), Justice Scalia predicted:

And it would be foolish to think that “constitutional” rules governing counsel's behavior will not be followed by rules governing the *prosecution's* behavior in the plea-bargaining process that the Court today announces “ ‘is the criminal justice system,’ ” *Frye, post*, at 1407, 132 S.Ct. 1399 (quoting approvingly from Scott & Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1912 (1992) (hereinafter Scott)). Is it constitutional, for example, for the prosecution to withdraw a plea offer that has already been accepted? Or to withdraw an offer before the defense has had adequate time to consider and accept it? Or to make no plea offer at all, even though its case is weak—thereby excluding the defendant from “the criminal justice system”?

*Lafler v. Cooper*, 132 S. Ct. at 1392 (emphasis original).

Considering *Lafler* and *Frye*, there is no reason why the Court cannot consider the government’s admission during the plea agreement process that the evidence in this case would clearly support a guilty plea under the new law. In both *Lafler* and *Frye*, the Court evaluated the performance of defense counsel, an actor with legal duties in the plea agreement process. Thus, although the context here is slightly different, the same sort of evaluation of government counsel’s performance should likewise be subject to scrutiny. By offering a plea under the new statute, along with a stipulation that Mr. DeFrance waive ex post facto rights, the government not only signals, but actually *admits*, that the facts in this case satisfy the new law, which closes what was commonly known as the boyfriend-girlfriend loophole:

The parties agree that the defendant's [PFMA] conviction for the misdemeanor crime of domestic violence was based on the fact he was in a current dating relationship with the victim at the time of the offense.

(ECF No. 190-1, p. 4).

Add to this the fact that the state PFMA law that Mr. DeFrance pled guilty under covered "dating" relationships the conclusion is inevitable. By the government's own admission in approving a plea agreement under the new law it recognized a substantive federal offense that did not exist at the time Mr. DeFrance possessed his firearms, and/or answered to the relevant questions on the Form 4473s. *See e.g., United States v. Pepe*, 895 F.3d 679, 686 (9<sup>th</sup> Cir. 2018) ("If our case law interpreting a statute is clearly irreconcilable with the text and history of subsequent legislation, we are not bound by the decisions of prior panels."); and *United States v. McNeil*, 362 F.3d 570, 574 (9<sup>th</sup> Cir. 2004) ("[W]hen Congress amends statutes, our decisions that rely on the older versions of the statutes must be reevaluated in light of the amended statute.").

Moreover, this analysis figures heavily in Mr. DeFrance's arguments and defenses grounded in lack of notice. Again, the Ninth Circuit's decision in *Pepe* proves important here:

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Aside from what the 2013 amendment revealed about Congressional intent, there are good reasons to interpret the former statute as we do. We normally resolve "ambiguity concerning the ambit of criminal statutes ... in favor of lenity." *Jones v. United States* , 529 U.S. 848, 858, 120 S.Ct. 1904, 146 L.Ed.2d 902 (2000) (quoting *Rewis v. United States* , 401 U.S. 808, 812, 91 S.Ct. 1056, 28 L.Ed.2d 493 (1971) ). This canon of construction serves the policy of giving "fair warning ... to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *United States v. Bass* , 404 U.S. 336, 348, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971) (quoting *McBoyle v. United States* , 283 U.S. 25, 27, 51 S.Ct. 340, 75 L.Ed. 816 (1931)). In addition, "because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *Id.*

*United States v. Pepe*, 895 F.3d at 688.

What is most puzzling however is the government's argument that "a dating relationship is a lesser and included relationship of similarly situated to a spouse". Which is quickly followed by the statement that "DeFrance's facts meet the elements under both theories". (ECF No. 195, p.25 quoted above at p. 2). Yet again, another admission by the government, in writing, that the proof in this case is sufficient to convict Mr. DeFrance under *either* theory. But the problem is that if that's really the case, Mr. DeFrance is not guilty and/or the Court lacks jurisdiction, because firearm possession under §922(g)(9) did not involve "dating relationships" until June 25, 2022, long after Mr. DeFrance's Montana PFMA.

The proof at trial showed beyond any doubt that the PFMA victim was “visiting” Mr. DeFrance over a weekend in the context of a “dating” relationship. The dating relationship amendments to 18 USC §921(a)(33) were legislated “not [to] apply to any conviction of a misdemeanor crime of domestic violence entered before” June 25, 2022<sup>2</sup>. The government admits in its internally approved plea agreement that Mr. DeFrance’s relationship with his PFMA victim in 2013 was based “on the fact he was in a current dating relationship with victim at the time of the offense”. Plus, the government admits in its opposing brief (ECF No. 195) that “DeFrance’s facts meet the elements under both [the pre and post 2022] theories. *Id.* at page 25.

Thus, the theory for the plea agreement was and remains based on the theory that Mr. DeFrance’s PFMA was covered under the new statute; whereas the theory for prosecution at trial was that his conduct was covered under the former statute. It simply cannot be both. And it violates due process under the Fifth Amendment to the United States Constitution for the government to agree to a factual theory for guilt during the plea agreement process, which effectively rendered Mr. DeFrance not guilty under the Indictment. Another way to put this is that dismissing the

<sup>2</sup> Federal Criminal Code and Rules, Thomson Reuters, 2023 Edition, p. 634, under the Heading **Historical Notes**.

Indictment under the plea agreement would not be an act of discretion; it would be necessity, given the mutual exclusivity of the two theories<sup>3</sup>.

Finally, the government fails to address any of the decisions cited in Mr. DeFrance's supporting brief outlining judicial estoppel and due process violations based on inconsistent theories. (See ECF No. 190, pp. 14-17), *citing Russell v. Rolfs, Smith v. Goose, Thompson v. Calderon, and Bradshaw v. Stumpf*, cites omitted. In *Goose*, similar to the situation presented here, the state used two factually contradictory versions of relevant events by a witness to convict two different defendants. The *Goose* Court ruled:

"Smith contends that this manipulation of the evidence deprived him of due process and rendered his trial fundamentally unfair. We agree. The State's use of factually contradictory theories in this case constituted "foul blows," error that fatally infected Smith's conviction. Even if our adversary system is "in many ways, a gamble," *Payne v. United States*, 78 F.3d 343, 345 (8th Cir.1996), that system is poorly served when a prosecutor, the state's own instrument of justice, stacks the deck in his favor. The State's duty to its citizens does not allow it to pursue as many convictions as possible without regard to fairness and the search for truth."

*Smith v. Goose*, 205 F.3d at 1051.

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<sup>3</sup> After the government approved the defense's counter proposal, the written plea agreement was communicated to Mr. DeFrance, not before. After careful consideration Mr. DeFrance rejected it asking why he had to plead guilty to a felony under a law that did not apply to him. A question defense counsel had no reasonable answer to.



**CONCLUSION**

WHEREFORE, the Court should hold a hearing, grant Mr. DeFrance's post-trial motions, acquit him and dismiss this case with prejudice for insufficient evidence, lack of jurisdiction, or both.

RESPECTFULLY SUBMITTED this 16<sup>th</sup> day of June, 2023.

/s/ Michael Donahoe  
MICHAEL DONAHOE  
Deputy Federal Defender  
Counsel for Defendant

**CERTIFICATE OF COMPLIANCE**

I hereby certify that this Brief is in compliance with Local Rule 7.1(d)(2) (as amended). The brief's line spacing is double-spaced, and is proportionately spaced, with a 14-point font size and contains less than 3,250 words. (Total number of words: 2,518 excluding tables and certificates).

DATED this 16<sup>th</sup> day of June, 2023.

/s/ Michael Donahoe  
MICHAEL DONAHOE  
Deputy Federal Defender  
Counsel for Defendant

**CERTIFICATE OF SERVICE**  
**L.R. 5.2(b)**

I hereby certify that on June 16, 2023, a copy of the foregoing document was served on the following persons by the following means:

  1         CM-ECF

  2         Mail

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      Defendant

/s/ Michael Donahoe  
FEDERAL DEFENDERS OF MONTANA

**Ninth Circuit Court of Appeals No. 23-2409**  
**IN THE UNITED STATES COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**

---

**UNITED STATES OF AMERICA,**

**Plaintiff-Appellee**

**vs.**

**MICHAEL BLAKE DeFRANCE,**

**Defendant-Appellant**

---

**OPENING BRIEF OF DEFENDANT-APPELLANT**

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA, MISSOULA DIVISION  
DISTRICT COURT NO. CR 21-29-M-DLC  
HONORABLE DANA L. CHRISTENSEN  
UNITED STATES DISTRICT JUDGE

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SUBMITTED: January 22, 2024

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**Ninth Circuit Court of Appeals No. 23-2409**  
**IN THE UNITED STATES COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**

---

UNITED STATES OF AMERICA,

Plaintiff-Appellee

vs.

MICHAEL BLAKE DeFRANCE,

Defendant-Appellant

---

***OPENING BRIEF OF DEFENDANT-APPELLANT***

---

**I. STATEMENT OF JURISDICTION**

**A. Subject Matter Jurisdiction in the District Court**

Michael Blake DeFrance (DeFrance) denies that the district court had jurisdiction over this case under 18 USC §3231 (federal district courts shall have “original jurisdiction . . . of all offenses against the laws of the United States”) (Addendum page 12). As explained in the argument section below, this follows for a variety of reasons, chief among them being:

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- None of the three indictments filed against DeFrance in this case specifically alleged the relationship DeFrance had with his domestic violence victim, such that he became a prohibited person under 18 USC §921(a)(33)(A) and §922(g)(9) (Addendum pages 8-9, 11).
- Under the categorical approach and/or the issue preclusion doctrine of the Fifth Amendment DeFrance's prior misdemeanor domestic violence conviction involved a victim he was only "dating", a relationship not covered under §921(a)(33)(A) (Addendum page 8) until June 25, 2022, some nine (9) years after the conviction (Addendum page 9).
- Also, under the categorical approach this Court's recent decision in *United States v. Castro*, 71 F.4<sup>th</sup> 735 (9<sup>th</sup> Cir. 2023) forecloses this prosecution because as a separate matter *Castro* holds that the Montana domestic violence statute under which DeFrance was convicted does not necessarily contain an element involving the use or attempted use of force.

#### **B. Jurisdiction in the Court of Appeals**

This Court's jurisdiction arises under 28 USC §1291, 18 USC §3742 (Addendum pages 13-14), and *United States v. Ruiz*, 536 U.S. 622, 628 (2002) because DeFrance timely appealed the final judgment and sentence entered against him in the district court below. *Also see United States v. Hosoi*, 314 F.3d 353, 354 (9<sup>th</sup> Cir. 2002) (*Per Curiam*) (court has jurisdiction to determine its own jurisdiction even where merits must be reached to do so, *citing Ruiz*).

#### **C. Appealability of District Court Order and Timeliness of the Appeal**

The district court sentenced DeFrance on September 21, 2023, to 21 months of incarceration to be followed by 3 years of supervised release. A written judgment

was filed the same day (I-ER-2-8). At the conclusion of his sentencing hearing on September 21, 2023, DeFrance requested the Court to direct the Clerk to file a notice of appeal on the conviction, the judgment, the sentence, and the forfeiture (I-ER-33). That notice of appeal satisfies the time requirements set forth in Rule 4(b)(1)(A) of the Federal Rules of Appellate Procedure (Addendum page 1).

## **II. BAIL STATUS**

DeFrance is currently released on conditions during the pendency of this appeal.

His address is set forth in the proof of service to this brief.

## **III. STATEMENT OF THE ISSUES**

1. WHETHER ANY OF THE THREE CHARGING DOCUMENTS PROPERLY STATED A FEDERAL OFFENSE UNDER §922(g)(9).
2. WHETHER THE §922(g)(9) COUNT IN THE INDICTMENT, AND BY EXTENSION THE ADDED FALSE STATEMENT COUNTS, SHOULD HAVE BEEN DISMISSED UNDER THE CATEGORICAL APPROACH, THE ISSUE PRECLUSION DOCTRINE OF THE DOUBLE JEOPARDY CLAUSE, OR BOTH.
3. CONSIDERING CONGRESS' PROMULGATION OF THE "BIPARTISAN SAFER COMMUNITIES ACT" WHETHER THE SECOND SUPERSEDING INDICTMENT SHOULD HAVE BEEN DISMISSED UNDER THIS COURT'S DECISIONS IN *United States v. Pepe*, 895 F.3d 679, 686 (9<sup>th</sup> Cir. 2018) ("if our case law interpreting a statute is clearly irreconcilable with the text and history of subsequent legislation, we are not bound by the decisions of prior panels."); OR *United States v. McNeil*, 362 F.3d 570, 574 (9<sup>th</sup> Cir. 2004) ("[w]hen

Congress amends statutes, our decisions that rely on the older versions of the statutes must be reevaluated in light of the amended statute.").

4. WHETHER 18 USC §922(g)(9) AND ITS ASSOCIATED STATUTES FAILED TO PROVIDE ADEQUATE DUE PROCESS FAIR WARNING EITHER ON THEIR FACE OR AS APPLIED IN THIS CASE.
5. WHETHER DeFRANCE WAS DENIED PROCEDURAL DUE PROCESS IN CONNECTION WITH THE GOVERNMENT'S ASSERTION THAT HE IS A DOMESTIC VIOLENCE MISDEMEANANT UNDER 18 USC §921(a)(33)(A) AND §922(g)(9) AND WHETHER THE SECOND SUPERSEDING INDICTMENT SHOULD HAVE BEEN DISMISSED UNDER THE VINDICTIVENESS DOCTRINE.
6. WHETHER THE GOVERNMENT'S APPROVED AND SUBSEQUENTLY OFFERED PLEA AGREEMENT ON THE EVE OF TRIAL ACKNOWLEDGING THAT DeFRANCE WAS IN A "DATING" RELATIONSHIP WITH HIS DOMESTIC VIOLENCE VICTIM VIOLATES DUE PROCESS AND FAIR TRIAL PRINCIPLES.
7. WHETHER THE COURT SHOULD HAVE GRANTED DeFRANCE'S POST-TRIAL MOTIONS TO ACQUIT AND/OR FOR ARREST OF JUDGMENT.
8. WHETHER THE "SPORTING EXCEPTION" UNDER USSG §2K2.1(b)(2) (Addendum page 15) SHOULD HAVE BEEN APPLIED IN THE FORMULATION OF DEFRANCE'S GUIDELINE RANGE.

#### **IV. PERTINENT CONSTITUTIONAL PROVISIONS, RULES AND STATUTES**

In satisfaction of Circuit Rule 28-2.7 where the constitutional provision, rule and/or statute is not set forth in the body of this brief, it is included in a separate



exists where “the scaled are evenly balanced”). In other words, if “the relevant evidence leaves a trier of fact in ‘equipoise’ the party with the burden of proof loses”.

*Id.*

***(E) DeFrance’s post-trial motion to acquit and/or to arrest judgment ought to have been granted for lack of jurisdiction.***

***(1) Reviewability/Standards of Review.***

The arguments developed under this heading were exhausted in the district court below in the following record entries: District Court ECF Nos. 189, 190, 195, 196, 198 (II-ER-232-314, I-ER-36-61).

We contend the standard of review to evaluate the following arguments is *de novo* because DeFrance preserved his sufficiency of the indictment claim. (See above pp. 8-19); also see *United States v. Pernillo-Fuentes*, 252 F.3d 1030, 1032 (9<sup>th</sup> Cir. 2001) (sufficiency of indictment reviewed *de novo*); *United States v. James*, 980 F.2d 1314, 1316-1318 (9<sup>th</sup> Cir. 1992) (when sufficiency of indictment is questioned “prior” to trial review is *de novo* and reference to statute cannot cure the defect of failure to allege an element of the crime) (emphasis added). We do alert the Court, however, that inasmuch as the arguments here involve the trial proof there could be disagreement about the standard of review under *United States v. Barone*, 71 F.3d 1442, 1444 n.4 (9<sup>th</sup> Cir. 1995):

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We note that the appropriate standard of review for this issue is not clear. Jurisdiction is a legal question which is ordinarily reviewed de novo. However, we held in *United States v. Nukida*, 8 F.3d 665, 672 (9th Cir.1993), that the question whether a defendant's actions resulted in sufficient effects on interstate commerce under 18 U.S.C. § 1365(a) is a jurisdictional question which is intertwined with the merits, and which must be resolved by the jury. Because the question is resolved by the jury, the standard for reviewing the sufficiency of evidence to support a jury verdict, *see Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979), may well apply to this issue. We need not decide this issue here, however, because we conclude that reversal is required even under the more deferential *Jackson* standard.

71 F.3d at 1444, n.4.

**(2) Discussion.**

Whether a prior conviction qualifies as a predicate offense is a legal question. *United States v. McAdory*, 935 F.3d 838, 842 (9<sup>th</sup> Cir. 2019) (In §922(g)(1) case whether conviction qualifies as felony is purely legal question). We argue that the same rule should apply in §922(g)(9) cases. At the time DeFrance pled guilty in Montana to Partner Family Member Assault (PFMA) under Mont. Code Ann. §45-5-206, Montana law provided in relevant part:

(2) For the purposes of Title 40, chapter 15, 45-5-231 through 45-5-234, 46-6-311, and this section, the following definitions apply:

(a) "Family member" means mothers, fathers, children, brothers, sisters, and other past or present family members of a household. These relationships include relationships created by adoption and remarriage, including stepchildren, stepparents, in-laws, and adoptive children and parents. These relationships continue regardless of the ages of the parties and whether the parties reside

in the same household.

(b) "Partners" means spouses, Former spouses, persons who have a child in common, and persons who have been or are currently in a dating or ongoing intimate relationship with a person of the opposite sex.

(Addendum page 3).

Both before and at trial the proof showed that DeFrance's relationship to the domestic violence victim was of a dating nature that had been on-going for about nine months.

First, we invite the Court to review the statement of Jermain Charlo to Officer Largent on the evening of the PFMA. Since this document is sealed, we will not quote it here. It can be found in the sealed excerpts of record at VI-ER-1011-1020. Essentially Ms. Charlo conveys to Officer Largent that she was 17 years old; involved in a dating relationship with DeFrance for about nine months; that she resided with her mother; that she had no children; and was visiting DeFrance for the weekend and staying at her great-grandfather's house.

Second, the Court is encouraged to review the trial testimony of Officer Largent who was the law enforcement on scene the night of the domestic assault:

Q Okay. And did you guys discuss -- or do you recall discussing, maybe is the better question, you and Mr. Brown, Bill Brown, the relationship issue? Did you inquire of Mr. Brown whether he knew what the relationship between the parties was?

A He either provided me with that information or I asked if there was a relationship between them.

Q Okay. Fair enough. And we'll get to that. We have a separate transcript of that. But why -- my question would be: Why would you make that inquiry? You did make the inquiry, what was the relationship. Why would you want to know that from Mr. Brown?

A He would have that information to give me. I'm needing to know if it was a domestic violence incident or just an assault.

Q Okay. So there would be a distinction that you would draw in your mind between just an assault and a domestic violence situation?

A They're both violence. One has a different investigatory set than the other.

Q Okay. Fair enough. So is the relationship issue the distinguishing feature between the two?

A Intimate partners would be a domestic violence.

Q Okay.

A Would --

Q So I guess turning to Exhibit 512, your written report, you had satisfied yourself -- we just listened to the recording, and your written report said it was a dating relationship. That would have qualified under the Montana statute for a domestic violence citation?

A I don't remember if I wrote "dating" within my report. However, boyfriend/girlfriend would be an intimate relationship, which would be a domestic violence.

Q Okay. All right. Can I see Exhibit 512 at Bates 056?

MS. ULSHER: (Complied with request.)

MR. DONAHOE: All right. I just need it up a little bit. Right there is good.

MS. ULSHER: (Complied with request.)

BY MR. DONAHOE:

Q All right. Can you see that on the screen there, sir?

A Yes, sir, I can.

Q Do you see the word "During"?

A Under the "Charlo Interview"?

Q Yeah. It says --

A Yes, I do.

Q -- "Charlo Interview," and then it starts, "During my interview"?

A Yes, I do.

Q Could you read that to yourself, that little portion there?

A To myself?

Q Yeah.

(Pause.)

THE WITNESS: I read that paragraph.

BY MR. DONAHOE:

Q Okay. So you did at least satisfy yourself at the time that you wrote this that there was, one, a dating relationship between the parties and that it was boyfriend and girlfriend since June of 2012?

A That's what they told me, yes.

Q Okay.

A That's what she stated. I'll correct that.

Q That's what Jermain said?

A Yes.

MR. DONAHOE: Okay. I don't have anything else.

(III-ER-413-415).

Also, Officer Largent's report declaring that DeFrance and Jermain Charlo were involved in a dating relationship can be reviewed at II-ER-336.

Moreover, neither the Justice of the Peace who took DeFrance's PFMA plea, nor DeFrance's defense counsel, in 2013 admonished DeFrance regarding his federal firearms rights:

Q So, sir, I'm just getting a little confused here on what your sentence was based on this discussion. Did you sentence Mr. DeFrance to a permanent ban on his firearms?

A No.

Q Okay. At the end of his sentence, in any case, if you had imposed such a condition, would he have been reinvested with his firearms rights under the Montana Constitution? Do you know that?

A It was taken away as a tool in the partner/family member assault. Eventually he would get it back. But, no, I didn't restrict any firearms –

Q Okay.

A -- under federal or state law.

Q So I guess my confusion was from government counsel's questions about the conditions of release. You did clearly tell him –

MS. CLARK: Judge, I would object as this is outside what you had asked Judge Strine.

THE COURT: It is, but I'm going to allow it so we can get this cleared up.

MR. DONAHOE: All right.

Q So Government's 3 -- I'm on page 2 -- "The defendant shall refrain from possessing a firearm, destructive device, or other dangerous weapon." So that was a condition of his release well before the plea?

A Correct.

Q And it wasn't part of his sentence?

A No.

Q Okay. So when his case was finished, he was entitled to possess firearms under Montana law, right?

A That would be up to -- yes.

MR. DONAHOE: Thank you.

(III-ER-441-442).

The Court can review all the papers associated with DeFrance's domestic assault prosecution at ECF No. 178, Exhibits 1-5). These documents are in the record as government trial exhibits, and they reflect that DeFrance was in a boyfriend-girlfriend relationship.

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Next, we invite the Court to review DeFrance's PFMA defense counsel's testimony admitting that he, likewise, failed to admonish DeFrance concerning his firearms rights:

So at that time, my best guess is I was just going along with what the judge had said, that this was a possibility he would not get gun rights.

Q Okay. So from the Court, it was just a possibility, right?

A That's correct.

Q And do you -- well, I'll just ask you. I mean, the Court would rely on you to go further and explain to Mr. DeFrance?

A Yeah. That's definitely what would be my bad, if -- again, I never got real clear on this. I couldn't get, I felt, accurate information from the OPD on the issue. It was always confusing. But the judge would have, would have had to come to me, I would guess, and that certainly was my bad and my ineffectiveness.

Q Okay. So you didn't -- and I understand it. You know, I'm in the business with you.

A Um-hmm.

Q -- make a full explanation, sort of categorically one way or the other, to Mr. DeFrance whether he lost firearms rights or he was good to go with his firearms rights?

A I definitely did not. I, again, I had no idea either way.

(III-ER-625-626).

Furthermore, DeFrance was deemed eligible to possess firearms on five previous occasions by the processing of the ATF 4473 Forms. Thus, as both a matter



of fact and a matter of law, DeFrance is not a prohibited person under 18 USC §922(g)(9). Accordingly, all charges against DeFrance should be dismissed.

***(F) DeFrance should have been awarded the “sporting exception” under USSG §2K2.1(b)(2) of the guidelines.***

***(1) Reviewability/Standards of Review.***

The arguments developed under this heading were exhausted in the district court below in the following record entries: District Court ECF Nos. 199, 200, 204, 216 (II-ER-186-192; II-ER- 216-231; I-ER-9-35).

The standard of review to evaluate the following arguments is *de novo*. *United States v. Lam*, 20 F.3d 999, 1001 (9<sup>th</sup> Cir. 1994) (the district court’s interpretation of the Guidelines is a question of law which we review *de novo*).

***(2) Discussion.***

Before the sentencing hearing the parties weighed in on whether DeFrance was entitled to reductions in his guideline range for acceptance of responsibility (USSG §3E1.1) and under the lawful sporting purposes carve out (USSG §2K2.1(b)(2)). We argue that DeFrance should have been awarded both reductions. In his acceptance of responsibility statement DeFrance stated:

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**Ninth Circuit Court of Appeals No. 23-2409**  
**IN THE UNITED STATES COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**

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**UNITED STATES OF AMERICA,**

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**REPLY BRIEF OF DEFENDANT-APPELLANT**

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA, MISSOULA DIVISION  
DISTRICT COURT NO. CR 21-29-M-DLC  
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SUBMITTED: May 15, 2024

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APPENDIX D - Page 571

**Ninth Circuit Court of Appeals No. 23-2409**  
**IN THE UNITED STATES COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**

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UNITED STATES OF AMERICA,

Plaintiff-Appellee

vs.

MICHAEL BLAKE DeFRANCE,

Defendant-Appellant

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***REPLY BRIEF OF DEFENDANT-APPELLANT***

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**I. INTRODUCTION**

Defendant-Appellant, Michael Blake DeFrance (Mr. DeFrance), replies to the government's Answering Brief (Red Brief) as follows.

**II. KEY POINTS DEVELOPED IN THE  
REPLY ARGUMENTS BELOW**

- A. Under *Lafler v. Cooper*, 566 U.S. 156 (2012), and *Missouri v. Frye*, 566 U.S. 134 (2012), district courts are obliged to address due process issues generated, even under plea agreement “rejected” by the defendant. *Also see In re Morgan*, 506 F.3d 705, 710 (2007) *citing and quoting United States v. Miller*, 722 F.2d 562, 566 (9<sup>th</sup> Cir. 1983) (“district courts must review every charge plea bargain placed before them”).

- B. Under the party presentation rule in *Greenlaw v. United States*, 554 U.S. 237 (2008), the government introduced a due process issue of plea agreement fairness in its trial brief, an argument that in the government's view represented the most favorable disposition of the case.
- C. The district court's post-trial assessment of the impact of the government's offer for a plea agreement was insufficient for several reasons. Chief among them being that the government's admission in the agreement that Mr. DeFrance's Montana Partner Family Member Assault (PFMA) conviction rested on a "dating" relationship, at a minimum, confirmed that the state conviction record showed that Mr. DeFrance was not guilty under the pre-2022 version of §922(g)(9).
- D. Just like defense counsel's admission of his client's guilt can be structural error (*McCoy v. Louisiana*, 584 U.S. 414, 427 (2018)); where the government admits that a defendant's conduct was lawful, especially *vis-à-vis* a jurisdictional element, the case should be dismissed, or Mr. DeFrance should be acquitted.

### III. REPLY ARGUMENTS

#### *A. Plea agreement issue.*

The government's argument on this claim ignores the sea change effected by the Supreme Court's companion decisions in *Lafler v. Cooper*, 566 U.S. 156 (2012), and *Missouri v. Frye*, 566 U.S. 134 (2012). As Justice Scalia observes in his dissenting opinion in *Cooper*, going forward no longer does it matter that the complaining party in a plea agreement context was afforded a fair trial:

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[T]he Court today opens a whole new field of constitutionalized criminal procedure: plea-bargaining law. . . . Today's opinions deal with only two aspects of counsel's plea-bargaining inadequacy, and leave other aspects (who knows what they might be?) to be worked out in further constitutional litigation that will burden the criminal process. And it would be foolish to think that “constitutional” rules governing *counsel's* behavior will not be followed by rules governing the *prosecution's* behavior in the plea-bargaining process that the Court today announces “ ‘is the criminal justice system,’ ”. . . . Is it constitutional, for example, for the prosecution to withdraw a plea offer that has already been accepted? Or to withdraw an offer before the defense has had adequate time to consider and accept it? Or to make no plea offer at all, even though its case is weak—thereby excluding the defendant from “the criminal justice system”?

. . .

The Court nonetheless concludes that Cooper is entitled to some sort of habeas corpus relief (perhaps) because his attorney's allegedly incompetent advice regarding a plea offer caused him to receive a full and fair trial. That conclusion is foreclosed by our precedents. Even if it were not foreclosed, the constitutional right to effective plea bargainers that it establishes is at least a new rule of law, which does not undermine the Michigan Court of Appeals' decision and therefore cannot serve as the basis for habeas relief.

*Lafler v. Cooper*, Scalia, J. *dissenting*, 566 U.S. at 175-176 (emphasis original) (internal cite omitted).

Under the majority decisions in *Cooper* and *Frye* whether a plea agreement is fair in a particular instance must be considered regardless whether the defendant had been afforded a fair guilty plea hearing or a fair trial. *See Frye*, 566 U.S. 143-144 (“it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process”). This shift in focus brought about by

*Cooper* and *Frye* places assessment of prosecutorial conduct in the plea agreement context on a completely different footing. Contrary to the government's claims that Mr. DeFrance was afforded adequate plea agreement due process (Red Brief, p. 66) there are compelling reasons to rule otherwise here.

First, we challenge the government's self-serving assertion in its brief that the only reason the government alerted the district court that it had offered Mr. DeFrance a plea agreement was to ensure on the record that Mr. DeFrance had been notified of the existence of the proposal. (Red Brief at p. 64). There is no such limitation contained in the language the government used to put the district court on notice regarding the plea agreement offer. Citing *Missouri v. Frye*, the government states:

"A written, proposed plea agreement was presented to the defendant for his consideration. That plea agreement represented, in the government's view, the most favorable offer extended to the defendant.

The Government does not seek to involve the Court in the plea agreement process in violation of Rule 11, but respectfully requests the Court make an inquiry to ensure the record is protected."

(IV-ER-773-774).

These words are freighted with the assertion that the government made Mr. DeFrance a fair offer for a plea agreement which, in the government's view was the

most favorable disposition<sup>1</sup>. Furthermore, the government's words expressly request that the district court inquire as to the accuracy of that claim. Unfortunately, even though we agreed with the government that the district court ought to have inquired (IV-ER-752); the district court moved forward with the trial without addressing the plea agreement concession issue pretrial at all. Not until after Mr. DeFrance had been forced to trial on a faulty indictment and "convicted" on an inconsistent legal theory did the district court attempt any sort of analysis on this plea agreement issue. (I-ER-52-57). That was too little and too late.

In the *Frye* decision Justice Kennedy outlines in detail preemptive measures lower courts can implement to avoid plea agreement issues before the trial occurs:

The prosecution and the trial courts may adopt some measures to help ensure against late, frivolous, or fabricated claims after a later, less advantageous plea offer has been accepted or after a trial leading to conviction with resulting harsh consequences. First, the fact of a formal offer means that its terms and its processing can be documented so that what took place in the negotiation process becomes more clear if some later inquiry turns on the conduct of earlier pretrial negotiations. Second, States may elect to follow rules that all offers must be in writing, again to ensure against later misunderstandings or fabricated charges. See N.J. Ct. Rule 3:9–1(b) (2012) ("Any plea offer to be made by the prosecutor shall be

<sup>1</sup> In total there were four plea agreement offers. The first three involved offers to charges as they existed in the indictments; *i.e.*, guilty to §922(g)(9) or §922(a)(6). The last offer changed the theory for guilt to the revised iteration of §922(g)(9) and its allied statutes, enacted on June 25, 2022, which added "dating" as a relationship element. Mr. DeFrance rejected the government's final offer because he could not understand why he had to plead guilty to a "felony" that was not a crime at the time of commission. (II-ER-243).

in writing and forwarded to the defendant's attorney"). Third, formal offers can be made part of the record at any subsequent plea proceeding or *before a trial on the merits*, all to ensure that a defendant has been fully advised before those further proceedings commence. At least one State often follows a similar procedure before trial. See Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 20 (discussing hearings in Arizona conducted pursuant to *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App.2000)); see also N.J. Ct. Rules 3:9–1(b), (c) (requiring the prosecutor and defense counsel to discuss the case prior to the arraignment/status conference including any plea offers and to report on these discussions in open court with the defendant present); *In re Alvernaz*, 2 Cal.4th 924, 938, n. 7, 8 Cal.Rptr.2d 713, 830 P.2d 747, 756, n. 7 (1992) (encouraging parties to “memorialize in some fashion prior to trial (1) the fact that a plea bargain offer was made, and (2) that the defendant was advised of the offer [and] its precise terms, ... and (3) the defendant's response to the plea bargain offer”); Brief for Center on the Administration of Criminal Law, New York University School of Law, as *Amicus Curiae* 25–27.

*Frye*, 566 U.S. at 146-147 (emphasis added).

Furthermore, in a decision styled as *In re Morgan*, 506 F.3d 705 (9<sup>th</sup> Cir. 2007) this Court specifically addressed the authority and necessity for district courts to consider the content of a plea agreement in some situations. Especially in circumstances, which like here, involve a Rule 11(c)(1)(C) plea and a “charge” bargain. As indicated in the plea agreement papers (II-ER-299-310), the Rule 11(c)(1)(C) plea in Mr. DeFrance’s case involved dismissal of all charges in exchange for a plea to a new charge under the Bipartisan Safer Communities Act of 2022 (BSCA), based on Mr. DeFrance having been in a “dating” relationship, which was



not a federal offense at the time of Mr. DeFrance's Montana PFMA. Hence, it is our contention that preferably before trial, and in any event post-trial, the district court should have ruled both that the government's concession of the jurisdictional fact of a "dating" relationship warranted either dismissal or acquittal of all of the charges. *Cf. Russell v. Rolfs*, 893 F.2d 1033, 1037 (9<sup>th</sup> Cir. 1990) (explaining doctrine of preclusion of inconsistent positions by a litigant).

This doctrine is relevant here because in a plea agreement context the government proffered a charge bargain as discussed in *In re Morgan, supra*, 506 F.3d at 710-711 under one theory, *i.e.* "dating"; only to turn around at trial to deploy a different theory, *i.e.* "putative spouses". This flip-flop implicates both "judicial estoppel" as explained in *Russell v. Rolfs*, 893 F.2d at 1037; as well as the power of the district court to analyze charge bargains that are "clearly contrary to manifest public interest". *In re Morgan*, 506 F.3d at 710.

Descending to particulars, of immediate concern is the government's unambiguous admission in the proposed plea agreement that the basis for Mr. DeFrance's guilty plea would be that "[t]he parties agree that the *defendant's conviction for the misdemeanor crime of domestic violence was based on the fact he was in a current dating relationship with the victim at the time of the offense.*" (II-ER-302) (emphasis added). A key fact which clearly takes the case outside the jurisdictional reach of 18 USC §922(g)(9) as written in 2013. *Cf. United States v.*

*Nukida*, 8 F.3d 665 (9<sup>th</sup> Cir. 1993). *United States v. Lewis*, 368 F.3d 1102 (9<sup>th</sup> Cir. 2004) (lack of factual fair warning); *United States v. Tallmadge*, 829 F.2d 767 (9<sup>th</sup> Cir. 1987) (entrapment by collateral estoppel). This conclusion is reinforced by the additional plea agreement requirement that Mr. DeFrance waive any and all ex post facto claims *vis-à-vis* the BSCA (II-ER-306). A clear indication that the government well knew that “dating” was not a relationship covered by the previous iteration of §922(g)(9), under which Mr. DeFrance had been charged. Not to be reductive, but the government’s proposal distills to having Mr. DeFrance plead guilty to conduct *that was not a federal offense at the time of its commission*. A theory inconsistent with the one the government argued at trial.

A government admission of innocence is like the flip side of defense counsel’s concession of a client’s guilt, which is structural error. *See e.g. by contrast, McCoy v. Louisiana*, 584 U.S. 414, 427 (2018) (“counsel’s admission of a client’s guilt over the client’s express objection is error structural in kind”). Under any metric this is unfair in a due process sense. For the government to formally sanction such a resolution via its internal plea agreement procedure denies due process in its own right; and in combination with other record facts shows that Mr. DeFrance had no due process fair warning that he was a prohibited person under 18 USC §922(g)(9), based on his Montana PFMA conviction. *See United States v. Lanier*, 520 U.S. 259, 266 (1997) (outlining three related manifestations of the fair warning requirement).

Turning to the district court's post-trial analysis of the plea agreement issue (I-ER-52-57) there are several reasons why it is wrong.

***(1). The district court fails to read the government's plea agreement concession of a dating relationship in the context of the record as a whole.***

In his opening brief Mr. DeFrance argues the merits of all of his defenses, to include failure of due process fair warning under *United States v. Lewis*, 368 F.3d 1102, 1106 (9<sup>th</sup> Cir. 2004) (*See e.g.*, Blue Brief at pp. 33-38; and FER-4-16). This latter defense (fair warning) rests primarily on the idea that it was reasonable for Mr. DeFrance to believe at the time of his PFMA conviction, his "dating" relationship with his PFMA victim did not disqualify him from firearm possession/ownership. In other words, it would not be unreasonable for a citizen in Mr. DeFrance's position to conclude that it was never entirely clear that his PFMA conviction served to revoke his firearms rights.

Accordingly, the government's unambiguous concession in the proposed plea agreement that Mr. DeFrance's PFMA conviction record rests on a "dating" relationship brings the following aspect of the district court's post-trial plea agreement analysis into sharp relief:

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To be sure, it could have been easier for the government to prove that Mr. DeFrance and Ms. Charlo were in a dating relationship as defined by the amended statute when Mr. DeFrance committed the PFMA; he has all but conceded as much during this litigation. But the evidence and arguments supporting such a conclusion are consistent, not inconsistent, with the government's position at trial that they were similarly situated to spouses. The United States nowhere conceded that it could *only* prove that the couple was in a dating relationship, and the Court will not construe the offered plea agreement in that manner.

(I-ER-54) (emphasis original).

For Mr. DeFrance's due process fair warning defense the fact that "dating" was not the "*only*" provable relationship is a positive, not a limitation. Recognizing that more than one reasonable interpretation of Mr. DeFrance's conviction record was possible left the district court little choice but to, either grant Mr. DeFrance's pretrial motion to dismiss based on lack of jurisdiction; or acquit Mr. DeFrance of all charges on the merits. And here it is important to stress that assessing the basis for a prior conviction under 18 USC §922(g) is a question of law. *United States v. McAdory*, 935 F.3d 838 (9<sup>th</sup> Cir. 2019). As is the question of jurisdiction *Cf. United States v. Barone*, 71 F.3d 1442, 1444, n.4 (9<sup>th</sup> Cir. 1995).

To expand on this point a little further, there can be no disagreement that under 18 USC §922(g)(9) the government must prove that the defendant "*has been [previously] convicted . . . of a misdemeanor crime of domestic violence*" (emphasis added). *Cf. Almendarez-Torres v. United States*, 523 U.S. 224, 230 (1998) ("prior

felony conviction an element but *not* conduct otherwise unlawful”) (emphasis original). Both the arresting officer and the guilty plea judge in Mr. DeFrance’s Montana PFMA case testified at trial that the “dating” was the relationship isolated as the basis for Mr. DeFrance’s PFMA arrest and conviction.

First, the arresting officer admitted on cross-examination that “dating” was the operative relationship, as set forth in his written report, which enabled him to distinguish simple assault from domestic assault:

Q Okay. So there would be a distinction that you would draw in your mind between just an assault and a domestic violence situation?

A They're both violence. One has a different investigatory set than the other.

Q Okay. Fair enough. So is the relationship issue the distinguishing feature between the two?

A Intimate partners would be a domestic violence.

Q Okay.

A Would –

Q So I guess turning to Exhibit 512, your written report, you had satisfied yourself -- we just listened to the recording, and your written report said it was a dating relationship. That would have qualified under the Montana statute for a domestic violence citation?

A I don't remember if I wrote "dating" within my report. However, boyfriend/girlfriend would be an intimate relationship, which would be a domestic violence.

...

Q Okay. So you did at least satisfy yourself at the time that you wrote this that there was, one, a dating relationship between the parties and that it was boyfriend and girlfriend since June of 2012?

A That's what they told me, yes.

Q Okay.

A That's what she stated. I'll correct that.

Q That's what Jermain said?

A Yes.

(III-ER-413-415).

This was followed by Judge Strine's testimonial admission that he "went by what the [arresting] officer had in his probable cause" when taking Mr. DeFrance's guilty plea (III-ER-432-433). Given that Mr. DeFrance asserted the defenses of fair warning and estoppel, this evidence foreclosed further inquiry into the basis for Mr. DeFrance's prior Montana PFMA conviction.

Another way to think about this is that in light of the government's admission that Mr. DeFrance was convicted in state court under a "dating" relationship, there arose a complete jurisdictional defense to all of the federal charges brought in any of the three indictments handed up by the grand jury. Both because "dating" was not a listed relationship in §922(g)(9) until June 25, 2022; and on the §922(a)(6) counts because Mr. DeFrance correctly answered the relevant domestic violence conviction questions on the 4473 Forms in the negative.

This argument gains further strength based on the obvious point that up until June 25, 2022, a “dating” relationship was considered a “loophole” to §922(g)(9) liability. (IV-ER-812-819). In other words, the important takeaway is that Mr. DeFrance’s state court conviction record reasonably reflects that Mr. DeFrance’s Montana PFMA was entered on the basis of a “dating” relationship, which did not become a federal offense under §922(g)(9) until June 25, 2022. While the government candidly admits this in its proposed plea agreement, the district court refused to assess or consider that point before trial, in contradiction to the companion decisions in *Cooper* and *Frye*, and in light of this Court’s decision in *In re Morgan*. In any event, post-trial the district court should have either retroactively dismissed the case for lack of jurisdiction or acquitted Mr. DeFrance on all charges.

To recap:

- Both the arresting officer on the state PFMA and the Justice of the Peace who took Mr. DeFrance’s guilty plea stated that the relationship which formed the basis for the PFMA arrest and conviction was “dating”.
- Neither the Justice of the Peace or Mr. DeFrance’s own lawyer explained to Mr. DeFrance in any way that his firearms rights had been revoked.
- The state PFMA statute under which Mr. DeFrance was convicted only addresses restriction of a firearm that may have been used in or during the assault, which was not an issue in Mr. DeFrance’s PFMA case because no firearm was involved. (See Addendum to Blue Brief (p. 6) and III-ER-431).

When we add to this mix of facts the government's admission that Mr. DeFrances's PFMA was premised on a "dating" relationship, it is incontrovertible that the district court did not have jurisdiction over Mr. DeFrance's case because the government admitted in its proposed plea agreement that Mr. DeFrance was not a prohibited person at the time of the offense. Alternatively, Mr. DeFrance had no due process fair warning that his federal firearms rights were terminated as a result of his Montana 2013 PFMA conviction, because there are admittedly two reasonable interpretations of the relationship element supporting his PFMA conviction. One that was a crime and one that was not.

***(2). The government's plea agreement admission applies equally, and maybe even more forcefully, to Mr. DeFrance's claims of vindictive prosecution and estoppel.***

In *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) the Supreme Court sanctioned the prosecution's filing of habitual offender charges, resulting in an increased prison term for the defendant. This result obtained in a situation where the recidivist charge was i) fully justified by the evidence; and ii) where the prosecutor was in possession of that evidence at the time of the original indictment. 363 U.S. at 359. By contrast, in the situation presented here, after Mr. DeFrance filed his Notice of Defenses (FER-4-16) and the ATF 4473 Forms (VI-ER-1035-1053) respectively; the government went back to grand jury and added three false statement counts under 18 USC §922(a)(6). (V-ER-912); *also see* VI-ER-1075-1078 (showing how the government



linked the 4473 Forms and the Notice of Defenses). The first point being that in contrast to the factual scenario in *Bordenkircher v. Hayes* here the government *had no idea* that, on no less than five previous occasions, Mr. DeFrance had been cleared to possess firearms by federal government actors.

Unlike *Bordenkircher v. Hayes*, where there was no dispute that habitual offender evidence was known to the prosecutor at the time of the original indictment. In Mr. DeFrance's case the government did not know about the 4473 transactions. Yet when Mr. DeFrance disclosed them and noticed up his defenses in reliance thereon, the government both filed the additional false statement charges under 18 USC §922(a)(6); *and* ultimately offered Mr. DeFrance a plea agreement that involved his pleading guilty to conduct that was clearly not a federal criminal offense at the time of the conduct. A compelling distinction between *Bordenkircher v. Hayes* (where relief for vindictiveness was denied); and the evident government vindictiveness on display here in the government's bringing additional charges to neutralize the impact of Mr. DeFrance's 4473 Form disclosure and his Notice of Defenses. (FER-4-16).

There are two other important points to consider here. First, careful review of the testimony of ATF witnesses, Dana Pickles (IV-ER-665-667) and Steven Feurestein (IV-ER-676-679), and FBI witness, Brian Barker (IV-ER-669-671), shows that the prosecutors in this case never requested a fresh vetting by those government actors of Mr. DeFrance's criminal history, to include his Montana PFMA conviction

record. Second, the reason for this is because review of Mr. DeFrance's PFMA conviction record, to include the arresting officer's probable cause for Mr. DeFrance's PFMA arrest, would have only revealed a "dating" relationship. In fact, at trial ATF Agent Feurestein was asked on direct examination whether a "dating" relationship would have justified a "no" answer to Question 11 on the 4473 Form, but the government objected to the question. (IV-ER-681-688).

The point is that in combination the 4473 Forms along with the arresting officer's police report and the PFMA victim's own interview (VI-ER-1020, lns. 8-15) show that "dating" was the operative relationship in this case. Put another way, the most reasonable conclusion is that when the ATF/FBI conducted the *original* NICS checks on the 4473 Forms Mr. DeFrance was on each and every occasion appropriately deemed not to be a prohibited person. Yet, instead of adopting that interpretation favoring innocence, the government went out of its way to create ambiguity where there was none. Even to the point of objecting to a question put to an important government witness (Agent Feurestein) that would have clarified the key point that indeed Mr. DeFrance had likely been classified on the original NICS checks as not being a prohibited person. (IV-ER-688). Hence, the government's admission of "dating" status in the plea agreement deserves careful, careful consideration.

Before closing this discussion there are three loose ends that warrant consideration in the wider context of all of the arguments we have made so far.

First is that the facial validity of the indictments is still a live issue in this case. The fact is that from the very beginning of this proceeding the government never specified which of the relationships from §922(a)(33) applied here in any of the indictments. And as far as we can see, nothing along that line was put before the grand jury at all. Granted, in one grand jury transcript, there is an oblique reference to people acting like they were married (VI-ER-1073); but beyond that, no evidence put before any grand jury to justify the conclusion that Mr. DeFrance's PFMA conviction was based on the couple living as "putative spouses". Nor did the trial proof confirm that either.

The second loose end is that in the government's written opposition to the defense's post-trial acquittal motion the government states as follows:

Here, however, the parties were engaged in plea negotiations. The government never argued inconsistent theories. The prosecution entertained the offer to resolve the case from defense counsel in good faith. The government feels that it was set up so the defendant could make this precise argument. Even if the offer was taking as a position of the government, a dating relationship is a lesser and included relationship of similarly situated to a spouse. The theories are not different and DeFrance's facts meet the elements under both theories.<sup>2</sup>

(II-ER-271).

<sup>2</sup> The district court in its order denying acquittal makes a similar conflating reference to the idea that dating is simply part of the putative spousal relationship under which Mr. DeFrance was found guilty. (I-ER-57-58).

These comments warrant consideration because they display important misconceptions. First, as to the law of lesser included offenses, while it may be true that *today* “dating” is a lesser included offense of (or moots out) the putative spouse prong in §922(a)(33); that clearly was not the case in 2013<sup>3</sup>. Because in 2013 a “dating” relationship was not a covered relationship under 18 USC §922(g)(9). To state the obvious, lawful conduct not included in the greater offense cannot be considered a lesser included offense. Moreover, from previous discussion “dating” was considered a “loophole” or exception to §922(g)(9) liability (IV-ER-812-819). Loopholes or exceptions cannot be lesser included crimes.

In addition is the government’s assignment of blame: “The government feels that it was set up so the defendant could make this precise argument.”. (II-ER-271, fourth line from the top). This criticism is not grounds for denying Mr. DeFrance relief. Negotiation conduct is addressed by Justice Kennedy in *Missouri v. Frye*, 366 U.S. at 144-145:

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<sup>3</sup> The version of the 4473 form defining misdemeanor crime of domestic violence that Mr. DeFrance filled out contained the “putative spouse” language, but in 2022 the form dropped that language and included “dating” in its place. *Compare by contrast* II-ER-365 *with* II-ER-372.

“The inquiry then becomes how to define the duty and responsibilities of defense counsel in the plea bargain process. This is a difficult question. “The art of negotiation is at least as nuanced as the art of trial advocacy, and it presents questions further removed from immediate judicial supervision.” *Premo v. Moore*, 562 U.S. 115, 125, 131 S.Ct. 733, 741, 178 L.Ed.2d 649 (2011). Bargaining is, by its nature, defined to a substantial degree by personal style. The alternative courses and tactics in negotiation are so individual that it may be neither prudent nor practicable to try to elaborate or define detailed standards for the proper discharge of defense counsel's participation in the process. Cf. *ibid.*”.

*Frye*, 366 U.S. at 144-145.

Bearing in mind these remarks by the Court the situation here is that just before trial the undersigned took a phone call from one of the Assistant United States Attorneys (AUSA) working the case involving a verbal offer for a plea to one of the false statement counts in exchange for dismissal of all other charges and a sentence of probation. That offer was quickly carried to Mr. DeFrance and he rejected it. That is when the defense made the counteroffer by email. (II-ER-275). As is customary the AUSAs working the case had to seek and obtain approval from supervisors before the government could make any sort of offer along these lines. But eventually the plea agreement under development was authorized by the supervising government attorneys. Being shrewd in behalf of a client is not a crime it is an obligation. And here it exposed the truth that the government knew all along that the PFMA conviction was based on a “dating” relationship. Frankly, in making the counter proposal the defense was fairly confident that the government would never approve the counter

proposal and return with a formal offer for Mr. DeFrance to consider. In other words, the counter proposal was the proverbial “Hail Mary” that the defense thought had zero chance of being approved. Plus, we had no idea, let alone a hand in, how the documents were to be drafted; that is the actual phrasing of the plea agreement language.

The fact that the plea agreement documents disadvantage the government could have easily been avoided by the government simply declining Mr. DeFrance’s email counteroffer. *Cf. United States v. Transfiguracion*, 442 F.3d 1222, 1228 (9<sup>th</sup> Cir. 2006) (ambiguities in plea agreements construed against the drafter and in favor of the defendant). Furthermore, the trigger that generates this plea agreement issue was not the government being “set up”. It was the government’s thoughtful decision to admit that Mr. DeFrance is innocent, under the previous version of §922(g) and its allied definitional statutes. The final straw being the government asking the district court to “inquire” under *Frye* as to the offer’s fairness in its trial brief. In short:

- we did not write the agreement;
- we had no hand in the actual wording of the agreement;
- we did not tout the agreement for the district court’s consideration as the most favorable resolution of the case; and
- we were not aware that the government had the erroneous notion that “dating” under the 2022 version of the statute was a lesser included offense of the pre-2022 version of the statute.

As quoted by the Supreme Court in *Greenlaw v. United States*, 554 U.S. 237, 244 (2008) regarding government counsel and the rule of party presentation:

“[Courts] do not, or should not, sally forth each day looking for wrongs to right. We wait for cases to come to us, and when they do we normally decide only questions presented by the parties. *Counsel almost always know a great deal more about their cases than we do, and this must be particularly true of counsel for the United States, the richest, most powerful, and best represented litigant to appear before us.*” *United States v. Samuels*, 808 F.2d 1298, 1301 (C.A.8 1987) (R. Arnold, J., concurring in denial of reh'g en banc).

*Greenlaw*, 554 U.S. at 244 (emphasis added).

The government knew all along that there were reasonable grounds to believe that Mr. DeFrance’s PFMA conviction record was based on “dating” but insisted nevertheless to try and shoehorn Mr. DeFrance into a role of “putative spouse” with a teenaged girl who had no lawful capacity to marry; and whose mother vehemently disapproved of the relationship to the point where the youngster was moved to New Mexico for approximately twenty months.

In closing, we urge that both *Lafler v. Cooper*, 566 U.S. 156 (2012), and *Missouri v. Frye*, 566 U.S. 134 (2012) serve to supersede the comments in *Bordenkircher v. Hayes* suggesting that plea agreements are entirely off limits to scrutiny by the Court. We contend that *Cooper* and *Frye* expressly intend to increase the oversight role the district court plays in the plea agreement process. Meaning that where, as here, the government contends that Mr. DeFrance was offered a fair deal,

the district court had the obligation to ensure that such assertion was truly the case. Had the district court held a pretrial hearing and “inquired”, as the government requested, it would have confronted very serious issues of both fairness and jurisdiction as outlined herein and in Mr. DeFrance’s Blue Brief. Those errors should be taken up by this Court and corrected by reversing all of Mr. DeFrance’s convictions.

***B. The government’s argument that United States v. Castro does not resolve this case is wrong.***

The government argues that *United States v. Castro*, 71 F.4<sup>th</sup> 735 (9<sup>th</sup> Cir. 2023) does not resolve this case (Red Brief, pp. 28-47). But *Castro* prefigures its ultimate conclusion that Montana PFMA is not a crime of violence under the Guidelines with this reasoning:

We begin by analyzing the state statute's text, and we may also consider state court interpretations of the statute. *See United States v. Baldon*, 956 F.3d 1115, 1123 (9<sup>th</sup> Cir. 2020). Montana defines PFMA in relevant part as “purposely or knowingly caus[ing] bodily injury to a partner or family member.”<sup>3</sup> Mont. Code Ann. § 45-5-206(1)(a). Bodily injury, in turn, “means physical pain, illness, or an impairment of physical condition and includes mental illness or impairment.” *Id.* § 45-2-101(5).

...

The [indivisible] definition of “bodily injury” incorporated into PFMA includes more conduct than the “use of physical force” required by § 4B1.2(a)(1). We must presume that Castro's PFMA conviction “rested upon nothing more than the least of the acts criminalized,” *Baldon*, 956 F.3d at 1125 (cleaned up) (quoting *Moncrieffe v. Holder*, 569 U.S. 184, 190–91, 133 S.Ct. 1678, 185 L.Ed.2d 727 (2013)), which is intentionally causing



**MONTANA CODE ANNOTATED 2011**  
TITLE 45. CRIMES  
CHAPTER 2. GENERAL PRINCIPLES OF LIABILITY  
Part 1. Definitions and State of Mind

**45-2-101(5). General definitions.** Unless otherwise specified in the statute, all words must be taken in the objective standard rather than in the subjective, and unless a different meaning plainly is required, the following definitions apply in this title:

...

(5) "Bodily injury" means physical pain, illness, or an impairment of physical condition and includes mental illness or impairment.

**MONTANA CODE ANNOTATED 2011**  
TITLE 45. CRIMES  
CHAPTER 5. OFFENSES AGAINST THE PERSON  
Part 2. Assault and Related Offenses

**45-5-206. Partner or family member assault -- penalty.**

(1) A person commits the offense of partner or family member assault if the person:

(a) purposely or knowingly causes bodily injury to a partner or family member;

(b) negligently causes bodily injury to a partner or family member with a weapon; or

(c) purposely or knowingly causes reasonable apprehension of bodily injury in a partner or family member.

(2) For the purposes of Title 40, chapter 15, 45-5-231 through 45-5-234, 46-6-311, and this section, the following definitions apply:

(a) "Family member" means mothers, fathers, children, brothers, sisters, and other past or present family members of a household. These relationships include relationships created by adoption and remarriage, including stepchildren, stepparents, in-laws, and adoptive children and parents. These relationships continue regardless of the ages of the parties and whether the parties reside in the same household.

(b) "Partners" means spouses, former spouses, persons who have a child in common, and persons who have been or are currently in a dating or ongoing intimate relationship with a person of the opposite sex.

(3) (a) (i) An offender convicted of partner or family member assault shall be fined an amount not less than \$100 or more than \$1,000 and be imprisoned in the county jail for a term not to exceed 1 year or not less than 24 hours for a first offense.

(ii) An offender convicted of a second offense under this section shall be fined not less than \$300 or more than \$1,000 and be imprisoned in the county jail not less than 72 hours or more than 1 year.

(iii) Upon a first or second conviction, the offender may be ordered into misdemeanor probation as provided in 46-23-1005.

(iv) On a third or subsequent conviction for partner or family member assault, the offender shall be fined not less than \$500 and not more than \$50,000 and be imprisoned for a term not less than 30 days and not more than 5 years. If the term of imprisonment does not exceed 1 year, the person shall be imprisoned in the county jail. If the term of imprisonment exceeds 1 year, the person shall be imprisoned in the state prison.

(v) If the offense was committed within the vision or hearing of a minor, the judge shall consider the minor's presence as a factor at the time of sentencing.

(b) (i) For the purpose of determining the number of convictions under this section, a conviction means a conviction, as defined in 45-2-101, in this state, conviction for a violation of a similar statute in another state, or a forfeiture of bail or collateral deposited to secure the defendant's appearance in court in this state or in another state for a violation of a similar statute, which forfeiture has not been vacated. A prior conviction for domestic abuse under this section is a prior conviction for purposes of subsection (3)(a).

(ii) A conviction for assault with a weapon under 45-5-213, if the offender was a partner or family member of the victim, constitutes a conviction for the purpose of calculating prior convictions under this section.

(4) (a) An offender convicted of partner or family member assault is required to pay for and complete a counseling assessment with a focus on violence, controlling behavior, dangerousness, and chemical dependency. An investigative criminal justice report, as defined in 45-5-231, must be copied

and sent to the offender intervention program, as defined in 45-5-231, to assist the counseling provider in properly assessing the offender's need for counseling and treatment. Counseling providers shall take all required precautions to ensure the confidentiality of the report. If the report contains confidential information relating to the victim's location or not related to the charged offense, that information must be deleted from the report prior to being sent to the offender intervention program.

(b) The offender shall complete all recommendations for counseling, referrals, attendance at psychoeducational groups, or treatment, including any indicated chemical dependency treatment, made by the counseling provider. The counseling provider must be approved by the court. The counseling must include a preliminary assessment for counseling, as defined in 45-5-231. The offender shall complete a minimum of 40 hours of counseling. The counseling may include attendance at psychoeducational groups, as defined in 45-5-231, in addition to the assessment. The preliminary assessment and counseling that holds the offender accountable for the offender's violent or controlling behavior must be:

(i) with a person licensed under Title 37, chapter 17, 22, or 23;

(ii) with a professional person as defined in 53-21-102; or

(iii) in a specialized domestic violence intervention program.

(c) The minimum counseling and attendance at psychoeducational groups provided in subsection (4)(b) must be directed to the violent or controlling conduct of the offender. Other issues indicated by the assessment may be addressed in additional counseling beyond the minimum 40 hours. Subsection (4)(b) does not prohibit the placement of the offender in other appropriate treatment if the court determines that there is no available treatment program directed to the violent or controlling conduct of the offender.

(5) In addition to any sentence imposed under subsections (3) and (4), after determining the financial resources and future ability of the offender to pay restitution as provided for in 46-18-242, the court shall require the offender, if able,

to pay the victim's reasonable actual medical, housing, wage loss, and counseling costs.

(6) In addition to the requirements of subsection (5), if financially able, the offender must be ordered to pay for the costs of the offender's probation, if probation is ordered by the court.

(7) The court may prohibit an offender convicted under this section from possession or use of the firearm used in the assault. The court may enforce 45-8-323 if a firearm was used in the assault.

(8) The court shall provide an offender with a written copy of the offender's sentence at the time of sentencing or within 2 weeks of sentencing if the copy is sent electronically or by mail.

**FEDERAL RULES OF APPELLATE PROCEDURE**

**FRAP 4**

**Appeal as of Right—When Taken**

**Rule 4(b)(1)(A).**

...

**(b) Appeal in a Criminal Case.**

**(1) Time for Filing a Notice of Appeal.**

**(A)** In a criminal case, a defendant's notice of appeal must be filed in the district court within 14 days after the later of:

**(1)** the entry of either the judgment or the order being appealed;  
or

**(2)** the filing of the government's notice of appeal.

# **FEDERAL RULES OF CRIMINAL PROCEDURE**

## **Rule 11. Pleas**

### **Rule 11. Pleas.**

#### **(a) ENTERING A PLEA.**

(1) *In General.* A defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere.

(2) *Conditional Plea.* With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.

(3) *Nolo Contendere Plea.* Before accepting a plea of nolo contendere, the court must consider the parties' views and the public interest in the effective administration of justice.

(4) *Failure to Enter a Plea.* If a defendant refuses to enter a plea or if a defendant organization fails to appear, the court must enter a plea of not guilty.

#### **(b) CONSIDERING AND ACCEPTING A GUILTY OR NOLO CONTENDERE PLEA.**

(1) *Advising and Questioning the Defendant.* Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

(A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;

(B) the right to plead not guilty, or having already so pleaded, to persist in that plea;

(C) the right to a jury trial;

(D) the right to be represented by counsel—and if necessary have the court appoint counsel—at trial and at every other stage of the proceeding;

(E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;

(F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;

(G) the nature of each charge to which the defendant is pleading;

(H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;

(I) any mandatory minimum penalty;

(J) any applicable forfeiture;

(K) the court's authority to order restitution;

(L) the court's obligation to impose a special assessment;

(M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. §3553(a) ;

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence; and

(O) that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

(2) *Ensuring That a Plea Is Voluntary.* Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).

(3) *Determining the Factual Basis for a Plea.* Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

(c) PLEA AGREEMENT PROCEDURE.

(1) *In General.* An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:

(A) not bring, or will move to dismiss, other charges;

(B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular



provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

(2) *Disclosing a Plea Agreement.* The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.

(3) *Judicial Consideration of a Plea Agreement.*

(A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C) , the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.

(B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B) , the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request.

(4) *Accepting a Plea Agreement.* If the court accepts the plea agreement, it must inform the defendant that to the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C) , the agreed disposition will be included in the judgment.

(5) *Rejecting a Plea Agreement.* If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C) , the court must do the following on the record and in open court (or, for good cause, in camera):

(A) inform the parties that the court rejects the plea agreement;

(B) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and

(C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

(d) **WITHDRAWING A GUILTY OR NOLO CONTENDERE PLEA.** A defendant may withdraw a plea of guilty or nolo contendere:

- (1) before the court accepts the plea, for any reason or no reason; or
- (2) after the court accepts the plea, but before it imposes sentence if:
  - (A) the court rejects a plea agreement under 11(c)(5) ; or
  - (B) the defendant can show a fair and just reason for requesting the withdrawal.
- (e) FINALITY OF A GUILTY OR NOLO CONTENDERE PLEA. After the court imposes sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack.
- (f) ADMISSIBILITY OR INADMISSIBILITY OF A PLEA, PLEA DISCUSSIONS, AND RELATED STATEMENTS. The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410 .
- (g) RECORDING THE PROCEEDINGS. The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device. If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c) .
- (h) HARMLESS ERROR. A variance from the requirements of this rule is harmless error if it does not affect substantial rights.

# **FEDERAL RULES OF CRIMINAL PROCEDURE**

## **Rule 12. Pleadings and Pretrial Motions**

### **Rule 12. Pleadings and Pretrial Motions.**

(a) **PLEADINGS.** The pleadings in a criminal proceeding are the indictment, the information, and the pleas of not guilty, guilty, and nolo contendere.

(b) **PRETRIAL MOTIONS.**

(1) *In General.* A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits. Rule 47 applies to a pretrial motion.

(2) *Motions That May Be Made at Any Time.* A motion that the court lacks jurisdiction may be made at any time while the case is pending.

(3) *Motions That Must Be Made Before Trial.* The following defenses, objections, and requests must be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits:

(A) a motion alleging a defect in instituting the prosecution, including:

- (i) improper venue;
- (ii) preindictment delay;
- (iii) a violation of the constitutional right to a speedy trial;
- (iv) selective or vindictive prosecution; and
- (v) an error in the grand-jury proceeding or preliminary hearing;

(B) a defect in the indictment or information; including:

- (i) joining two or more offenses in the same count (duplicity);
- (ii) charging the same offense in more than one count (multiplicity);
- (iii) lack of specificity;
- (iv) improper joinder; and
- (v) failure to state an offense;

(C) suppression of evidence;

(D) severance of charges or defendants under Rule 14 ; and

(E) discovery under Rule 16 .

(4) *Notice of the Government's Intent to Use Evidence.*

(A) *At the Government's Discretion* . At the arraignment or as soon afterward as practicable, the government may notify the defendant of its intent to use specified evidence at trial in order to afford the defendant an opportunity to object before trial under Rule 12(b)(3)(C).

(B) *At the Defendant's Request* . At the arraignment or as soon afterward as practicable, the defendant may, in order to have an opportunity to move to suppress evidence under Rule 12(b)(3)(C) , request notice of the government's intent to use (in its evidence-in-chief at trial) any evidence that the defendant may be entitled to discover under Rule 16 .

(c) **Deadline for a Pretrial Motion; Consequences of Not Making a Timely Motion.**

1. **Setting the Deadline.** The court may, at the arraignment or as soon afterward as practicable, set a deadline for the parties to make pretrial motions and may also schedule a motion hearing. If the court does not set one, the deadline is the start of the trial.

2. **Extending or Resetting the Deadline.** At any time before trial, the court may extend or reset the deadline for pretrial motions.

3. **Consequences of Not Making a Timely Motion Under Rule 12(b)(3).** If a party does not meet the deadline for making a Rule 12(b)(3) motion, the motion is untimely. But a court may consider the defense, objection, or request if the party shows good cause.

(d) **RULING ON A MOTION.** The court must decide every pretrial motion before trial unless it finds good cause to defer a ruling. The court must not defer ruling on a pretrial motion if the deferral will adversely affect a party's right to appeal. When factual issues are involved in deciding a motion, the court must state its essential findings on the record.

(e) [Reserved]

(f) RECORDING THE PROCEEDINGS. All proceedings at a motion hearing, including any findings of fact and conclusions of law made orally by the court, must be recorded by a court reporter or a suitable recording device.

(g) Defendant's Continued Custody or Release Status. If the court grants a motion to dismiss based on a defect in instituting the prosecution, in the indictment, or in the information, it may order the defendant to be released or detained under 18 U.S.C. §3142 for a specified time until a new indictment or information is filed. This rule does not affect any federal statutory period of limitations.

(h) PRODUCING STATEMENTS AT A SUPPRESSION HEARING. Rule 26.2 applies at a suppression hearing under Rule 12(b)(3)(C) . At a suppression hearing, a law enforcement officer is considered a government witness.

## **FEDERAL RULES OF CRIMINAL PROCEDURE**

### **Rule 29. Motion for a Judgment of Acquittal**

#### **Rule 29. Motion for a Judgment of Acquittal.**

(a) Before Submission to the Jury. After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.

(b) Reserving Decision. The court may reserve decision on the motion, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

#### **(c) After Jury Verdict or Discharge.**

(1) Time for a Motion. A defendant may move for a judgment of acquittal, or renew such a motion, within 14 days after a guilty verdict or after the court discharges the jury, whichever is later.

(2) Ruling on the Motion. If the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal. If the jury has failed to return a verdict, the court may enter a judgment of acquittal.

(3) No Prior Motion Required. A defendant is not required to move for a judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury discharge.

#### **(d) Conditional Ruling on a Motion for a New Trial.**

(1) Motion for a New Trial. If the court enters a judgment of acquittal after a guilty verdict, the court must also conditionally determine whether any motion for a new trial should be granted if the judgment of acquittal is later vacated or reversed. The court must specify the reasons for that determination.

(2) Finality. The court's order conditionally granting a motion for a new trial does not affect the finality of the judgment of acquittal.

(3) Appeal.

(A) Grant of a Motion for a New Trial . If the court conditionally grants a motion for a new trial and an appellate court later reverses the judgment of acquittal, the trial court must proceed with the new trial unless the appellate court orders otherwise.

(B) Denial of a Motion for a New Trial . If the court conditionally denies a motion for a new trial, an appellee may assert that the denial was erroneous. If the appellate court later reverses the judgment of acquittal, the trial court must proceed as the appellate court directs.

## **FEDERAL RULES OF CRIMINAL PROCEDURE**

### **Rule 33. New Trial**

#### **Rule 33. New Trial.**

(a) Defendant's Motion. Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. If the case was tried without a jury, the court may take additional testimony and enter a new judgment.

#### **(b) Time to File.**

(1) *Newly Discovered Evidence.* Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty. If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case.

(2) *Other Grounds.* Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 14 days after the verdict or finding of guilty.



## **FEDERAL RULES OF CRIMINAL PROCEDURE**

### **Rule 34. Arresting Judgment**

#### **Rule 34. Arresting Judgment.**

(a) In General. Upon the defendant's motion or on its own, the court must arrest judgment if the court does not have jurisdiction of the charged offense.

(b) Time to File. The defendant must move to arrest judgment within 14 days after the court accepts a verdict or finding of guilty, or after a plea of guilty or nolo contendere.

**UNITED STATES CODE**

8 USC §1227(a)(2)(E)(i)

**8 U.S. Code §1227 - Deportable aliens.**

(a) Classes of deportable aliens

...

(2) Criminal offenses

...

(E) Crimes of domestic violence, stalking, or violation of protection order, crimes against children and

(i) Domestic violence, stalking, and child abuse

Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. For purposes of this clause, the term “crime of domestic violence” means any crime of violence (as defined in section 16 of title 18) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual’s acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.

**UNITED STATES CODE**

18 USC §513(c)(4)

**18 U.S. Code §513 - Securities of the States and private entities.**

...

(c) For purposes of this section—

...

(4) the term “organization” means a legal entity, other than a government, established or organized for any purpose, and includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, society, union, or any other association of persons which operates in or the activities of which affect interstate or foreign commerce; and

**UNITED STATES CODE**

18 USC §921(a)(21)

**18 U.S. Code §921 – Definitions.**

(a) As used in this chapter—

...

(21) The term “engaged in the business” means—

(A) as applied to a manufacturer of firearms, a person who devotes time, attention, and labor to manufacturing firearms as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of the firearms manufactured;

(B) as applied to a manufacturer of ammunition, a person who devotes time, attention, and labor to manufacturing ammunition as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of the ammunition manufactured;

(C) as applied to a dealer in firearms, as defined in section 921(a)(11)(A), a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business to predominantly earn a profit through the repetitive purchase and resale of firearms, but such term shall not include a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms;

(D) as applied to a dealer in firearms, as defined in section 921(a)(11)(B), a person who devotes time, attention, and labor to engaging in such activity as a regular course of trade or business with the principal objective of livelihood and profit, but such term shall not include a person who makes occasional repairs of firearms, or who occasionally fits special barrels, stocks, or trigger mechanisms to firearms;

(E) as applied to an importer of firearms, a person who devotes time, attention, and labor to importing firearms as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of the firearms imported; and

(F) as applied to an importer of ammunition, a person who devotes time, attention, and labor to importing ammunition as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of the ammunition imported.

**UNITED STATES CODE**

18 USC §921(a)(32)

**18 U.S. Code §921 - Definitions.**

(a) As used in this chapter—

...

(32) The term “intimate partner” means, with respect to a person, the spouse of the person, a former spouse of the person, an individual who is a parent of a child of the person, and an individual who cohabitates or has cohabited with the person.

**UNITED STATES CODE**  
18 U.S. Code §921(a)(33)(A)(ii)

**18 U.S. Code §921 – Definitions.**

**UNITED STATES CODE**  
**§921(a)(33)(A)(ii)**  
**(2011)**

**(a)** As used in this chapter—

**(33)**

**(A)** Except as provided in subparagraph (C), the term “misdemeanor crime of domestic violence” means an offense that—

...

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

**UNITED STATES CODE**  
**§921(a)(33)(A)(ii)**  
**(2022)**

**(a)** As used in this chapter—

**(33)**

**(A)** Except as provided in subparagraphs (B) and (C), the term “misdemeanor crime of domestic violence” means an offense that—

...

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

**UNITED STATES CODE**  
18 U.S. Code §921(a)(33)(C)

**18 U.S. Code §921 – Definitions.**

(a) As used in this chapter—

...

(33)

...

(C) A person shall not be considered to have been convicted of a misdemeanor crime of domestic violence against an individual in a dating relationship for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had firearm rights restored unless the expungement, pardon, or restoration of rights expressly provides that the person may not ship, transport, possess, or receive firearms: Provided, That, in the case of a person who has not more than 1 conviction of a misdemeanor crime of domestic violence against an individual in a dating relationship, and is not otherwise prohibited under this chapter, the person shall not be disqualified from shipping, transport, possession, receipt, or purchase of a firearm under this chapter if 5 years have elapsed from the later of the judgment of conviction or the completion of the person's custodial or supervisory sentence, if any, and the person has not subsequently been convicted of another such offense, a misdemeanor under Federal, State, Tribal, or local law which has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, or any other offense that would disqualify the person under section 922(g). The national instant criminal background check system established under section 103 of the Brady Handgun Violence Prevention Act (34 U.S.C. 40901) shall be updated to reflect the status of the person. Restoration under this subparagraph is not available for a current or former spouse, parent, or guardian of the victim, a person with whom the victim shares a child in common, a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or a person similarly situated to a spouse, parent, or guardian of the victim.



**UNITED STATES CODE**

18 U.S. Code §921(a)(37)

**18 U.S. Code §921- Definitions.**

(a) As used in this chapter—

...

(37)

(A) The term “dating relationship” means a relationship between individuals who have or have recently had a continuing serious relationship of a romantic or intimate nature.

(B) Whether a relationship constitutes a dating relationship under subparagraph (A) shall be determined based on consideration of—

- (i) the length of the relationship;
- (ii) the nature of the relationship; and
- (iii) the frequency and type of interaction between the individuals involved in the relationship.

(C) A casual acquaintanceship or ordinary fraternization in a business or social context does not constitute a dating relationship under subparagraph (A).

**Statutory Notes and Related Subsidiaries**

**EFFECTIVE DATE OF 2022 AMENDMENT**

Pub. L. 117–159, div. A, title II, § 12005(b), June 25, 2022, 136 Stat. 1332, provided that: “The amendments made by subsection (a) [amending this section] shall not apply to any conviction of a misdemeanor crime of domestic violence entered before the date of enactment of this Act [June 25, 2022].” Amendment by Pub. L. 117–103 not effective until Oct. 1 of the first fiscal year beginning after Mar. 15, 2022, see section 4(a) of div. W of Pub. L. 117–103, set out as an Effective Date note under section 6851 of Title 15, Commerce and Trade.

**TITLE 18 UNITED STATES CODE**

**18 USC §922(a)(6)**

**18 U.S. Code §922 – Unlawful Acts.**

(a) It shall be unlawful-

...

(6) for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter.

**UNITED STATES CODE**

18 U.S. Code §922(g)(9)

**18 U.S. Code §922 – Unlawful Acts.**

...

(g) It shall be unlawful for any person —

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

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

**UNITED STATES CODE**

18 USC §922(t)(2)(c)

**18 U.S. Code §922 – Unlawful Acts.**

...

(t)

(2) If transfer or receipt of a firearm would not violate subsection (d), (g), or (n) (as applicable) or State, local or Tribal law, the system shall—

(C) destroy all records of the system with respect to the call (other than the identifying number and the date the number was assigned) and all records of the system relating to the person or the transfer.

**UNITED STATES CODE**

18 USC §925(a)

**18 U.S. Code §925 - Exceptions: Relief from disabilities.**

**(a)**

(1) The provisions of this chapter, except for sections 922(d)(9) and 922(g)(9) and provisions relating to firearms subject to the prohibitions of section 922(p), shall not apply with respect to the transportation, shipment, receipt, possession, or importation of any firearm or ammunition imported for, sold or shipped to, or issued for the use of, the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof.

(2) The provisions of this chapter, except for provisions relating to firearms subject to the prohibitions of section 922(p), shall not apply with respect to (A) the shipment or receipt of firearms or ammunition when sold or issued by the Secretary of the Army pursuant to section 4308 of title 10 before the repeal of such section by section 1624(a) of the Corporation for the Promotion of Rifle Practice and Firearms Safety Act, and (B) the transportation of any such firearm or ammunition carried out to enable a person, who lawfully received such firearm or ammunition from the Secretary of the Army, to engage in military training or in competitions.

(3) Unless otherwise prohibited by this chapter, except for provisions relating to firearms subject to the prohibitions of section 922(p), or any other Federal law, a licensed importer, licensed manufacturer, or licensed dealer may ship to a member of the United States Armed Forces on active duty outside the United States or to clubs, recognized by the Department of Defense, whose entire membership is composed of such members, and such members or clubs may receive a firearm or ammunition determined by the Attorney General to be generally recognized as particularly suitable for sporting purposes and intended for the personal use of such member or club.

(4) When established to the satisfaction of the Attorney General to be consistent with the provisions of this chapter, except for provisions relating to firearms subject to the prohibitions of section 922(p), and

other applicable Federal and State laws and published ordinances, the Attorney General may authorize the transportation, shipment, receipt, or importation into the United States to the place of residence of any member of the United States Armed Forces who is on active duty outside the United States (or who has been on active duty outside the United States within the sixty day period immediately preceding the transportation, shipment, receipt, or importation), of any firearm or ammunition which is (A) determined by the Attorney General to be generally recognized as particularly suitable for sporting purposes, or determined by the Department of Defense to be a type of firearm normally classified as a war souvenir, and (B) intended for the personal use of such member.

(5) For the purpose of paragraph (3) of this subsection, the term "United States" means each of the several States and the District of Columbia.

**UNITED STATES CODE**

18 USC §3231

**18 U.S. Code §3231 - District courts.**

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

**UNITED STATES CODE**

**18 USC §3742**

**18 U.S. Code §3742 - Review of a sentence.**

(a) Appeal by a Defendant.— A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

- (1) was imposed in violation of law;
- (2) was imposed as a result of an incorrect application of the sentencing guidelines; or
- (3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11)[1] than the maximum established in the guideline range; or
- (4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.



**UNITED STATES CODE**

28 USC §1254(1)

**28 U.S. Code §1254 - Courts of appeals; certiorari; certified questions.**

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

- (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

**UNITED STATES CONSTITUTION**  
**FIFTH AMENDMENT**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**UNITED STATES CONSTITUTION**  
**SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

**UNITED STATES CONSTITUTION**  
**TENTH AMENDMENT**

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.



**ADMINISTRATIVE RULE**

27 CFR 478.21

**§478.21 Forms prescribed.**

(a) The Director is authorized to prescribe all forms required by this part. All of the information called for in each form shall be furnished as indicated by the headings on the form and the instructions on or pertaining to the form. In addition, information called for in each form shall be furnished as required by this part.

(b) Requests for forms should be submitted to the ATF Distribution Center (<http://www.atf.gov>) or made by calling (202) 648-6420.