IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CASE NO. 10-3164

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

DELROY FISCHER,

Defendant-Appellant.

BRIEF OF APPELLEE

APPELLEE'S RESPONSE TO APPELLANT'S
PETITION FOR REHEARING *EN BANC*

The Honorable Joseph F. Bataillon, Chief United States District Court

UNITED STATES OF AMERICA,
Plaintiff-Appellee

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SUMMARY OF ARGUMENT

The district court properly denied Fischer's motion to dismiss when it found Fischer's prior conviction had an element of physical force as required by federal law and met the definition for a misdemeanor crime of domestic violence under 18 U.S.C. § 921(a)(33). Fischer pled "no contest" and was convicted of Attempted Assault in the Third Degree, in violation of Neb. Rev. Stat. § 28-310. Because it was unclear whether Fischer was convicted under subsection (a) or (b) of § 28-310, the district court looked at the Complaint, the Affidavit in Support of Arrest Warrant and the transcript of the plea hearing. Upon reviewing the Buffalo County records, the district court found the facts of the case fell under § 28-310(a) and involved domestic violence and that Fischer had agreed the county court could take judicial notice of both the affidavit and the warrant. On appeal the Panel correctly concluded that the district court did not err in denying Fischer's motion to dismiss and affirmed its judgment. Fischer's petition for rehearing *en banc* should be denied.

STANDARD FOR DECISION

Rehearing *en banc* is not favored and ordinarily will not be provided unless one of two conditions is met. First, if separate panels of the Court reach different results on an important issue, an *en banc* hearing may be necessary to secure or

maintain uniformity of the court's decisions. Fed. R. App. Pro. 35(a)(1). Second, if the matter involves a question of exceptional importance, an *en banc* hearing will afford the full Court an opportunity to deliberate and reach a binding result. Fed. R. App. Pro. 35(a)(2).

The Panel's decision was entirely consistent with other rulings of the circuit (*See* United States v. Amerson, 599 F.3d 854 (8th Cir. 2010)) and it does not involve a matter of exceptional importance. Thus, the Petition is not appropriate for *en banc* review.

ARGUMENT

In determining whether Fischer's misdemeanor attempted assault conviction qualified as a predicate under 18 U.S.C.§ 922(g)(9), the district court noted that the Eighth Circuit,

> requires a district court to make a legal determination as to whether the underlying conviction is a predicate misdemeanor for the charge in question. United States v. Boaz, 558 F.3d 800, 805 (8th Cir. 2009); e.g., United States v. Stanko, 491 F.3d 408, 412 (8th Cir. 2007). A district court is sometimes required to determine whether there was a use of physical force when construing a generic statute.

In order to determine whether a statute is sufficient under § 921(a)(33)(A)(ii), the court looks to the plain meaning of the words in the statute. Id., United States v. Kirchoff, 387 F.3d 748, 750 (8th Cir. 2004). If

multiple subsections to a statute exist, the court must look to the predicate offense, expanding its inquiry, to determine which subsection was implicated. Smith, 171 F.3d at 620; United States v. Howell, 531 F.3d 621, 622-23 (8th Cir. 2008); United States v. Amerson, 599 F.3d 854, 855 (8th Cir. 2010). When the prior conviction is based on a guilty plea, the court may inquire into the "written plea agreement, transcript of the plea colloquy, and any explicit factual finding by the trial judge to which the defendant has assented." Howell, 531 F.3d at 623 (citing Shepard v. United States, 544 U.S. 13, 16 (2005)).

The facts in Smith, supra, are similar to the case at hand. The predicate offense in Smith was an Iowa misdemeanor assault charge involving an incident where Smith had assaulted the mother of his child. 171 F.3d at 619. Smith pled guilty to a misdemeanor assault. Id.

After being indicted on a § 922(g)(9) offense, Smith challenged the application of § 921(a)(33), which defines a misdemeanor crime of domestic violence, arguing the Iowa Code, § 708.1, conviction "does not contain the required elements of a) the use or attempted use of physical force, and b) a domestic relationship; and 2) he did not intelligently and knowingly waive his right to counsel at the underlying plea hearing as required. . .". Id.

Reviewing the state court record, as permitted, the Eighth Circuit noted,

> the state court complaint accused Smith of "commit[ting] an act which was intended to cause pain or injury to another, coupled with the apparent ability to execute said act." (Appellee's App. At 20.) The complaint recited that Smith grabbed Lorenson "by the throat, and did also push her down." (Id.).

Id. at 621. The Eighth Circuit concluded that "Smith was charged, and pleaded guilty to, an offense with an element of physical force within the meaning of 18 U.S.C. § 921(a)(33)(A)(ii)." Id. Addressing Smith's argument that § 708.1(1) "contains, as an element, physical contact that is merely insulting or offensive" the Eighth Circuit found little merit to Smith's argument opining that, "such physical contact, by necessity, requires physical force to complete." Id. at FN2.

In Amerson, the defendant argued his Nebraska conviction under Neb. Rev. Stat. § 28-323 did not involve the "use or attempted use of physical force." 599 F.3d at 855. The Eighth Circuit instructed that, "[b]ecause [§ 28-323] reaches a broad range of conduct (including 'intentionally and knowingly caus[ing] bodily injury'), this Court may expand its inquiry to determine which part of the statute Amerson violated." Id. The Eighth Circuit noted, that during Amerson's state court plea hearing,

> the state judge adopted the factual recital that he and his girlfriend got into an argument over the child and the defendant slapped her and pushed her head into the wall.

Id. The Eighth Circuit found that Amerson assented to factual findings that satisfy the force requirement of 18 U.S.C. § 921(a)(33)(A)(ii). Id. The same is true in the instant case.

After reviewing the certified county court records, the district court determined Fischer was convicted of a violation of Neb. Rev. Stat. § 28-310. (Tr1. 6-7, Filing No. 26). Section 28-310, Assault in the Third Degree, provides, in pertinent part,

> (1) A person commits the offense of assault in the third degree if he:
>
> > (a) Intentionally, knowingly, or recklessly causes bodily injury to another person; or
> >
> > (b) Threatens another in a menacing manner.

Because § 28-310 contains two subsections, the district court properly expanded its inquiry to determine which subsection was implicated.

Taking into consideration the warrant affidavit and the plea colloquy which set forth Fischer used physical force when he hit the mother of his child and bit her nose, the district court properly found the Buffalo County conviction involved physical force and met the definition of "misdemeanor crime of domestic violence" set out in under § 921(a)(33)(A)(ii). As such, the conviction qualified as a predicate under§ 922(g)(9).

The Appellant argues that Amerson was wrongly decided, the Panel erroneously followed Amerson, and that the decision herein conflicts with Howell and Smith. Additionally, the Appellant argues that both Amerson and the Panel's decision here conflict with United States v. Hayes, 555 U.S. 415 (2009). A close examination of the aforementioned cases illuminates the shortcomings of Appellant's arguments.

In Amerson, the Court followed Howell and Smith by first looking to the predicate offense rather than the defendant's underlying acts to determine whether the required elements were present. 599 F.3d at 855. Because the predicate offense reached a broad range of conduct, the Court expanded its inquiry pursuant to Howell and Smith. Id. For the purposes of determining the subsection under which the conviction occurred, the Court in Amerson looked to the recital of facts in the plea colloquy. Id. Once it was determined that subsection (a) of the applicable statute was violated based on physical force being an element of the underlying conviction, the Court concluded its review. The determination that the predicate offense involved the use or attempted use of physical force was not a determination of fact, but a determination of law. Amerson does not conflict with Smith and Howell, and it was not wrongly decided. The Panel's decision does not conflict with previous Eighth Circuit precedent and, in fact, relied on Amerson,

Smith, and Howell in its decision to uphold the conviction under 18 U.S.C. 922(g)(9).

In Howell, defendant pled guilty to misdemeanor assault in the third degree under section 565.070, Missouri Revised Statutes. 531 F.3d at 623. Since the statute covers a broad range of conduct, the Court looked to the charging document to determine the subsection under which Howell was convicted. Id. However, the inquiry can include admissions made by the defendant, the charging document, plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented. Id.; Shepard v. United States, 544 U.S. 13, 16 (2005).

The Court in Howell determined that conviction was under subsection (4) which "requires that a person recklessly engage in conduct which creates a grave risk of death or serious physical injury to another". 531 F.3d at 624. The Court referred to this portion as a "catch-all provision applicable to innumerable factual situations." Id. While the statutory portion may include physical force, the Howell Court found that "it is not the ordinary case contemplated by the subsection." Id. In fact, the Court cited to Begay v.United States, 553 U.S. 137 (2008) and stated "[W]e consider the offense generically, that is to say, we examine it in terms of how the law defines the offense and not in terms of how an

individual offender might have committed it on a particular occasion."

The Nebraska statute under which Fischer was convicted "in the ordinary case contemplated by the subsection" does involve physical force. In a case cited by the Appellant, United States v. Nason, 269 F.3d 10 (1st Cir. 2001), the First Circuit examined the exact same language in a Maine statute[1]. The Nason Court found that a statute requiring proof of the causation of the bodily injury "unambiguously involves the use of physical force". Id. at 20. The Maine statute prohibits the causing of bodily injury which constitutes a sufficient actus reus as it proscribes *acts* that cause physical pain, illness or impairments of physical condition. (emphasis added) Id. at 18.

State assault statutes in the Eighth Circuit have similar language regarding the intentional, knowing, or reckless causing of bodily or physical injury to another person, and are consistently held to meet the use of force element of 18 U.S.C. 922(g)(9) pursuant to the 8th Circuit decision in Smith. Neb. Rev. Stat. 28-310(1)(a); Mo. Rev. Stat. 565.070.1(1); Iowa Code 708.1 (1); Minn. Stat. 609.02(10) and 609.224; S.D. Codified Laws Ann. 22-18-1(2) and 22-18-35(1); Smith, 171 F.3d 617. Further, the Court in Rodriguez-Gomez found that a

[1]"A person is guilty of assault if he intentionally, knowingly or recklessly causes bodily injury...to another" Me.Rev.Stat.Ann. tit. 17-A§207(1)

similarly worded assault statute in Illinois met the use of force element of 18 U.S.C. 922(g)(9) as it requires the use, attempted use, or threatened use of physical force. 608 F.3d at 974; See also United States v. Marciniak, 2010 U.S. Dist. LEXIS 140682 (E.D. Wisc. (2010).

The Appellant also argues that the Panel decision conflicts with the Supreme Court decision in United States v. Hayes, 555 U.S. 415 (2009). The Hayes decision directs courts to look to the elements of the crime not the facts underlying the conviction to determine if the *offense* has an element of physical force. (Emphasis added) Id. at 1084. The elements of the Nebraska statute at issue involve intentionally, knowingly or recklessly causing bodily injury. Neb. Rev. Stat. §310(1)(a). In line with the decisions in Smith and Nason, it is the causation of the bodily injury which necessarily entails the use of physical force by someone or something. 171 F.3d 617(8th Cir. 1999), 269 F.3d 10 (1st Cir. 2001).

In the Petition, the Defendant cites to Judge Colloton's concurrence where the argument is made that one could cause bodily injury to another without proof of "physical force". *See* Petition, pg.7, citing Slip. Op., pg. 4. Specifically, Colloton cites United States v. Vinton, 631 F.3d 476 (8th Cir. 2011) as holding that a Missouri assault statute has as an element the use or attempted use of physical

force where a person commits the crime if he "attempts to cause or knowingly causes physical injury to another person by means of a deadly weapon or dangerous instrument". One could easily hypothesize a fact situation where a deadly weapon such as a knife or a dangerous instrument, such as a mousetrap, was left by a defendant in a place or manner where it was foreseeable that the intended victim would come into contact with the object and suffer bodily injury.

Even the extreme examples that are cited account for the malfeasant to "use or attempt to use" physical force. The physical force may have come from another actor or even an object, it is still the malfeasant that caused it to be applied to the victim. "Common sense supplies the missing piece of the puzzle: to cause physical injury, force necessarily must be physical in nature". Nason, 269 F.3d 10, 20 (1st Cir. 2001). The Nason case in the First Circuit takes a common sense view of an identical Maine assault statute and further a common sense reading of the cases in the 8th Circuit, such as Vinton, supports the implicit premise of the Amerson decision and the specific holding in this case.

CONCLUSION

For the reasons set out above, the Appellee, United States of America, respectfully requests this Court deny Fischer's Petition for Rehearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2011, I electronically filed the foregoing with the Clerk of the Eighth Circuit Court of Appeals using the CM/ECF system which sent notification of such filing to the following:

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