PRACTICE ADVISORY[*]
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WHY *UNITED STATES v. CASTLEMAN* DOES NOT HURT YOUR IMMIGRATION CASE AND MAY HELP IT

INTRODUCTION

On March 26, in *United States v. Castleman*,[1] the Supreme Court settled a circuit split over the meaning of a federal criminal law that prohibits people who have been convicted of misdemeanor domestic violence crimes from possessing guns or ammunition. *Castleman* is a problematic decision for criminal defendants that may also embolden the Department of Homeland Security (DHS) to try to expand the reach of the "domestic violence" and "crime of violence" removal grounds. However, because of strong language in the opinion limiting its reasoning to the criminal context, it should have no negative impact on immigration law. This advisory covers (1) the holding of *Castleman* as to federal criminal law; (2) the reasons *Castleman* does not affect existing court and agency decisions holding that an offense must require the intentional employment of strong, violent force to trigger immigration consequences as a "crime of violence" aggravated felony or as a "crime of domestic violence"; and (3) how *Castleman* may help support arguments to narrow the "domestic violence" and "aggravated felony" removal grounds.

I. The Holding of *Castleman*

James Castleman pled guilty in 2001 to misdemeanor assault against the mother of his child under Tenn. Code Ann. § 39-13-111(b). In 2008, federal authorities charged him with violating 18 U.S.C. § 922(g)(9), which prohibits anyone who has previously been "convicted . . . of a misdemeanor crime of domestic violence" from possessing firearms or ammunition. A "misdemeanor crime of domestic violence" for purposes of this law is defined as a misdemeanor offense that

> 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

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This Practice Advisory is intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case.

[1] No. 12-1371 (U.S. Mar. 26, 2014). Citations to pages in *Castleman* refer to the slip opinion (available at http://www.supremecourt.gov/opinions/13pdf/12-1371_6b35.pdf).

> 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.[2]

18 U.S.C. § 921(a)(33)(A) (emphasis added). Castleman moved to dismiss his indictment on the ground that his prior Tennessee conviction, which punished "intentionally or knowingly caus[ing] bodily injury" to the victim,[3] did not categorically involve "the use . . . of physical force." The district court agreed, and the Sixth Circuit affirmed. The Sixth Circuit relied on the Supreme Court's decision in *Johnson v. United States*, 559 U.S. 133 (2010), which interpreted nearly identical language in a different federal firearm statute, the Armed Career Criminal Act ("ACCA"). ACCA imposes heightened sentences for firearm possession by people with three or more prior convictions for a "violent felony," which includes an offense that "has as an element the use . . . of physical force against the person of another."[4] In *Johnson*, the Court had held that this language did *not* include offenses that amounted to battery at common law—that is, offenses that punished mere offensive touching—because the term "physical force" meant "violent force . . . capable of causing pain or injury to another person."[5]

The Supreme Court granted certiorari in *Castleman* to resolve a circuit split over whether *Johnson*'s definition of "use . . . of physical force" for the ACCA also applied to the same phrase used in the definition of a "misdemeanor crime of domestic violence" in § 922(g)(9).[6] Justice Sotomayor, writing for a seven-member majority of the Court, reversed the Sixth Circuit and held that "physical force" for purposes of the "misdemeanor crime of violence" definition means common-law battery—i.e., any offensive physical contact, not just strong or violent force. The Court also held that this offensive touching includes the use of *any* physical mechanism, even an indirect one, that causes some kind of injury—for example, inducing the victim to ingest poison.

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[2] With some critical differences discussed *infra*, this definition is similar to the definition of a "crime of domestic violence" that triggers deportability under INA § 237(a)(2)(E)(i): "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." In turn, 18 U.S.C. § 16 defines a "crime of violence" (in part) as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another."

[3] Tenn. Code Ann. § 39-13-111(b) (incorporating definition of "assault" at § 39-13-101).

[4] 18 U.S.C. § 924(e)(2)(B)(i).

[5] 559 U.S. at 140.

[6] The Fourth, Sixth, Ninth and Tenth Circuits held that "physical force" meant violent force. *United States v. White*, 606 F.3d 144 (4th Cir. 2010); *United States v. Hays*, 526 F.3d 674 (10th Cir. 2008); *United States v. Belless*, 338 F.3d 1063 (9th Cir. 2003). The First, Eighth and Eleventh Circuits held that 922(g)(9) applied to prior convictions involving any application of force, however slight. *United States v. Armstrong*, 706 F.3d 1 (1st Cir. 2013); *United States v. Hays*, 526 F.3d 674 (10th Cir. 2008); *United States v. Griffith*, 455 F.3d 1339 (11th Cir. 2006).

In finding that "physical force" under § 921(a)(33)(A) includes all offensive contact, the Court reasoned that *Johnson*'s central point – that it would be a "comical misfit" to give the term "physical force" within the term "violent felony" under ACCA a meaning that originated from the use of the term "physical force" in *misdemeanor* battery offenses—pointed in the opposite direction here, where the term being defined is "misdemeanor crime of domestic violence." Op. at 5-6. Also, the Court reasoned that "domestic violence" was a broader concept than "violence" and encompassed many kinds of assaultive behavior that would not be characterized as "violent" in ordinary speech. Op. at 6-7.

Using the categorical and modified categorical approaches applicable to immigration and many federal criminal statutes,[7] the Court then applied this expansive definition of "force" to Castleman's prior conviction and concluded that it categorically required the use of physical force.

II. Implications of *Castleman* for Immigration Law

A. The definition of "use . . . of physical force" for immigration law is unchanged

The single biggest takeaway from *Castleman* for immigration practitioners is that the Court at footnote 4 made explicit that the decision does not affect the existing case law interpreting the "aggravated felony" "crime of violence" definition[8] or the "crime of domestic violence" ground of deportability.[9] The Court said:

> The Courts of Appeals have generally held that mere offensive touching cannot constitute the "physical force" necessary to a "crime of violence," just as we held in *Johnson* that it could not constitute the "physical force" necessary to a "violent felony"…. The Board of Immigration Appeals has similarly extended *Johnson's* requirement of violent force to the context of a "crime of violence" under §16. *Matter of Velasquez*, 25 I. & N. Dec. 278, 282 (2010). Nothing in today's opinion casts doubt on these holdings, because—as we explain—"domestic violence" encompasses a range of force broader than that which constitutes "violence" simpliciter.[10]

Castleman, Op. at 7 n.4 (citations omitted). Footnote 4 adds that the Immigration and Nationality Act (INA) defines "crimes of domestic violence" in reference to 18 U.S.C. § 16, and in so doing, does not have the expansive meaning that the Court held applies to Castleman's misdemeanor crime of domestic violence conviction under 18 U.S.C. § 922(g)(9). The footnote concludes by saying:

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7 *See generally Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007); *Shepard v. United States*, 544 U.S. 13 (2005).

8 8 U.S.C. § 1101(a)(43)(F), INA § 101(a)(43)(F).

9 8 U.S.C. § 1227(a)(2)(E)(i), INA § 237(a)(2)(E)(i).

10 "Simpliciter" means "simply" or "without any condition."

> Our view that "domestic violence" encompasses acts that might not constitute "violence" in a nondomestic context does not extend to a provision like this, which specifically defines "domestic violence" by reference to a generic "crime of violence."

Castleman, Op. at 7 n.4.

In order to understand the holdings on which the *Castleman* decision does not "cast doubt," a very brief review of the case law is necessary. The Supreme Court has held that the term "force" in 18 U.S.C. § 16 means active, violent force. *Leocal v. Ashcroft*, 543 U.S. 1 (2004). The Supreme Court again interpreted the meaning of "physical force" in *Johnson v. United States*, 59 U.S. 133 (2010), which involved the ACCA. In *Johnson*, the Court held that to qualify as a "violent felony" the level of "physical force" required for a conviction must be "*violent* force—that is, force capable of causing physical pain or injury to another person." *Id*. at 140. In *Johnson*, the Court found that the crime of battery by offensive touching does not require violent force. *Id*. at 140-41. Because the ACCA's definition of a "violent felony" is almost identical to 18 U.S.C. § 16(a),[11] the BIA in *Matter of Velasquez*, 25 I&N Dec. 278, 282-83 (BIA 2010), treated the rule in in *Johnson* as controlling authority in interpreting whether an offense is a "crime of violence" under § 16(a).[12]

Under *Johnson* and *United States v. Descamps*, 133 S. Ct. 2276, 2283-85 (2013),[13] a battery statute for which the minimum conduct includes a non-violent, offensive touching should not be a crime of violence because it does require violent force.[14] It is not a crime of violence even if the offender's actual conduct involved violent force because the fact finder looks to the elements, not the particular facts relating to the crime. *See Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013).

By affirming the authority of *Matter of Velasquez*, 25 I&N Dec. at 282-83, and the holdings on which it relies, the Court is drawing a clear line of demarcation between a misdemeanor crime of domestic violence under 18 U.S.C. § 922(g)(9) on the one hand, and a crime of violence under 18 U.S.C. § 16(a) and the crime of domestic violence ground of

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[11] *See* 18 U.S.C. § 924(e)(2)(B)(i) (defining "violent felony" in relevant part as an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another.").

[12] The statute at issue in *Velasquez* was the Virginia offense for assault and battery of a family member under Virginia Code Annotated § 8.2-57.2(A), which is a common law offense. *Carter v. Commonwealth*, 606 S.E.2d 839, 841 (Va. 2005).

[13] *Castleman* cites *Descamps* as supplying the test of whether a statute is divisible, but the issue of the Tennessee statute's divisibility was not squarely before the Court in *Castleman* because both parties agreed it was divisible. Op. at 12.

[14] At issue in *Johnson* was a conviction under Fla. Stat. § 784.03, which includes as battery "any intentional touching, no matter how slight." *State v. Hearns*, 961 So. 2d 211, 218 (Fla 2007).

deportability on the other hand.[15] The Court's disclaimer that its expansive holding regarding "misdemeanor crime of domestic violence" does not apply to the aggravated felony crime of violence definition and the crime of domestic violation definition is so explicit that it should prevent DHS attorneys from even arguing that a common law battery is a crime of violence or a crime of domestic violence. Should DHS attorneys attempt to import the special meaning that attaches to "misdemeanor crime of domestic violence" into removal charges, a practitioner should quote the language in footnote 4 to disabuse the immigration judge of that notion.

B. *Castleman*'s holding regarding "indirect force" does not apply to the Domestic Violence and Aggravated Felony removal grounds

In *Castleman*, the Court found that even an indirect application of force, if knowing or intentional, qualifies as a use of physical force under common law, and thus under 18 U.S.C. § 922(g)(9). Op. at 12-13. Though the district court had reasoned that one can cause bodily injury under the Tennessee law "without the use of physical force," for example, by "deceiving [the victim] into drinking a poisoned beverage, without making contact of any kind," Op. at 12, the Court disagreed, clarifying the meanings of both "force" and "use" for the purposes of 18 U.S.C. § 922(g)(9).

First, the Court noted with regards to "force," that under common law, the force used in battery "need not be applied directly to the body of the victim," and may encompass "administering a poison or infecting with a disease." Op. at 12-13 (citing 2 W. LaFave, Substantive Criminal Law § 16.2(b) (2d ed. 2003)). The Court concluded that "it is impossible to cause bodily injury without applying force in the common-law sense." Op. at 13.

Second, the Court explained that as long as the application of force (as defined by common law) is intentional or knowing, it qualifies as a "use" of force. In doing so, the Court looked to the analysis in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), an immigration case interpreting 18 U.S.C. § 16. Op. at 13 ("*Leocal* held that the 'use' of force must entail a higher degree of intent than negligent or merely accidental conduct; it did not hold that the word 'use' somehow alters the meaning of 'force.'") (internal citations omitted).

Because of *Castleman's* discussion of *Leocal*, DHS may argue that an application of indirect force, such as causing injury by drugging someone, qualifies as a use of force even for the purposes of 18 U.S.C. § 16 and the INA in Circuits that have held otherwise.[16] In response, a practitioner can point out that the analysis in *Castleman* is expressly limited to the common law

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[15] The Supreme Court has held that a factfinder must construe § 16(a) and § 16(b) identically. *Leocal*, 543 U.S. at 11. *See* section II.D.

[16] *See, e.g., U.S. v. Andino-Ortega*, 608 F.3d 305 (5th Cir. 2010) (finding that the offense of injury to a child does not meet the definition of a crime of violence because it can be committed by an intentional act without the use of physical force such as by putting poison or another harmful substance in the child's food or drink); *Chrzanoski v. Ashcroft*, 327 F.3d 188 (2d Cir. 2003) (finding that the offense of intentionally causing injury to another does not satisfy § 16(a) where use of force is not a formal element and rejecting reasoning in *Matter of Martin*, 23 I&N Dec. 491, 498 (BIA 2002)).

concept of "force," which applies only to a "misdemeanor crime of domestic violence" under 18 U.S.C. § 922(g)(9), and not to 18 U.S.C. § 16. Op. at 5-10 (attributing the common-law meaning of "force" to §921(a)(33)(A)'s definition of a "misdemeanor crime of domestic violence," after declining to read the common-law meaning of "force" into ACCA's definition of a "violent felony," and 18 U.S.C. § 16's crime of violence). The Court throughout the opinion makes clear that this common law definition was correctly rejected in *Johnson* "because it was a 'comical misfit.'" Op. at 5 (internal citations omitted).

C. *Castleman* strengthens arguments that the categorical approach applies to determining whether an offense was committed against a qualifying victim for "Domestic Violence" deportability

The Court in *United States v. Hayes*, 555 U.S. 415, 418 (2009) held that the predicate "misdemeanor crime of domestic violence" in a prosecution under 18 U.S.C. § 922(g)(9) need not have a domestic relationship element. This means that the categorical approach does not apply to proving that the defendant's predicate misdemeanor was committed against a family member; the federal prosecutor charging a § 922(g)(9) offense can introduce evidence from outside the record of conviction to show that a general assault or battery offense was committed (in fact) against a person who has the requisite relationship to the defendant. *Id*. at 421-23. The *Hayes* Court reasoned that it would be under-inclusive to require the domestic relationship be an element of the predicate "misdemeanor crime of domestic violence," because at the time Congress passed § 922(g)(9), many states prosecuted domestic violence under generally applicable assault/battery statutes that did not have any element of a domestic relationship. *Id* at 427.

Many advocates had assumed that *Hayes*' holding that a "misdemeanor crime of domestic violence" does not require the factfinder to apply the categorical approach to determine the requisite domestic relationship would also apply to determining deportability for a crime of domestic violence under 8 U.S.C. § 1227(a)(2)(E). The BIA said as much in *dicta* (but did not decide this point) in *Matter of Velasquez*, 25 I&N Dec. 278, 281 (BIA 2010).[17] Arguably, under *Castleman* a different calculus for determining underinclusiveness should apply to a "crime of domestic violence" under the INA, which, per footnote 4 in *Castleman*, has a less expansive meaning than the term "misdemeanor crime of domestic violence." According to footnote 4, the term "misdemeanor crime of domestic violence" conveys the broad common law meaning of force, while the term "crime of domestic violence" means "active and violent force" as the BIA said in *Velasquez*, 25 I&N Dec. at 282. That Congress intended for the terms to have a different scope suggests that it might not be under-inclusive to require that the domestic nature of the relationship be an element of the offense of conviction for the "crime of domestic violence" ground of deportability, which Congress never intended to have as expansive a meaning as the term "misdemeanor crime of domestic violence."

[17] *See also Bianco v. Holder*, 624 F.3d 265, 272 (5th Cir. 2010) (holding that, in light of *Hayes*, a crime of domestic violence under the INA "need not have as an element the domestic relation of the victim to the defendant").

D. *Castleman* strengthens arguments that a reckless use of force is not an aggravated felony or deportable domestic violence offense

In discussing the various subsections of the Tennessee assault statute, the Court explained that "the merely reckless causation of bodily injury under § 39–13–101(1) may not be a 'use' of force," and thus may not satisfy 18 U.S.C. § 922(g)(9). Op. at 11. The Court noted that while "*Leocal* reserved the question whether a reckless application of force could constitute a 'use' of force" under 18 U.S.C. § 16, "the Courts of Appeals have almost uniformly held that recklessness is not sufficient." *Id*. at 11, n. 8 (citing cases holding that reckless crimes are not crimes of violence under either 18 U.S.C. § 16(a) or (b)).[18] While the specific issue was not presented in *Castleman*, the Court's discussion in footnote 8 suggests that reckless offenses do not satisfy either § 16(a) or § 16(b), and undermines contrary Board law, which suggests that reckless conduct may satisfy § 16(b).[19]

Should DHS charge a noncitizen as removable or ineligible for relief based on an asserted "crime of violence" aggravated felony for conviction for a crime with a reckless mental state, practitioners should point to *Castleman* as additional support for the proposition that reckless conduct is not sufficiently purposeful to constitute a crime of violence under 18 U.S.C. § 16.

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[18] In *Leocal*, the Court interpreted 18 U.S.C. § 16 and held that it must identically construe both § 16(a) and § 16(b). *Leocal*, 543 U.S. at 11 (because "[16(b)] contains the same formulation we found to be determinative in § 16(a) … we must give the language in §16(b) an identical construction, requiring a higher *mens rea* than the merely accidental or negligent conduct").

[19] *See Matter of Singh*, 25 I&N Dec. 670, 676 (BIA 2012) ("the critical inquiry [under 16(b)] is not the mens rea required for conviction of a crime, but rather whether the offense, by its nature, involves a substantial risk that the perpetrator will [intentionally] use force in completing its commission"). *See also Aguilar v. Attorney General of U.S.*, 663 F.3d 692, 699 (3d Cir. 2011) ("crimes carrying a mens rea of recklessness may qualify as crimes of violence under § 16(b) if they raise a substantial risk that the perpetrator will resort to intentional physical force in the course of committing the crime").