IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

USCA No. 18-1908

SAMUEL BRYCE SILK, JR.,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
WESTERN DIVISION
HONORABLE DANIEL L. HOVLAND
CHIEF UNITED STATES DISTRICT COURT JUDGE

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. The district court erred in denying Silk relief because the categorical approach as applied to his 2013 simple assault establishes that it is not a valid predicate conviction under 18 U.S.C. § 117.

a) The district court erred by declining to apply the categorical approach to analyze whether Silk's 2013 simple assault conviction was a predicate under 18 U.S.C. § 117.

The proper review for predicate convictions under 18 U.S.C. § 117 is the categorical approach. The district court erred by applying the circumstance-based approach to Silk's 2013 simple assault. The categorical approach is applied to statutory language that, when "read naturally[,] ... refer[s] to a generic crime as generally committed." *Nijhawan v. Holder*, 557 U.S. 29, 34 (2009). To determine whether the categorical approach applies, this Court looks to the statute's language and structure. *United States v. Rodriguez*, 581 F.3d 775, 806 (8th Cir. 2009); *United States v. Torrez*, 869 F.3d 291, 313 (4th Cir. 2017).

Section 117 outlines three qualifying crimes: assault, sexual abuse, and serious violent felony. 18 U.S.C. § 117(a). Assault is a generic crime with a federal definition. *See United States v. Whitefeather*, 275 F.3d 741, 743 (8th Cir. 2002). Sexual abuse is also a generic crime. *See* 18 U.S.C. § 2242. Even the term "serious violent felony" has a statutory definition referring to specific federal criminal statutes. *See* 18 U.S.C. § 3559(c)(2)(F). The term "serious violent felony" includes:

> (i) a Federal or State offense, by whatever designation and wherever committed, consisting of murder (as described in section 1111); manslaughter other than involuntary manslaughter (as described in section 1112); assault with intent to commit murder (as described in section 113(a)); assault with intent to commit rape; aggravated sexual abuse and sexual abuse (as described in sections 2241 and 2242); abusive sexual contact (as described in sections 2244(a)(1) and (a)(2)); kidnapping; aircraft piracy (as described in section 46502 of Title 49); robbery (as described in section 2111, 2113, or 2118); carjacking (as described in section 2119); extortion; arson; firearms use; firearms possession (as described in section 924(c)); or attempt, conspiracy, or solicitation to commit any of the above offenses; and
>
> (ii) any other offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another or that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense;

Id. "[S]erious violent felony" does not refer to conduct. It refers to precisely defined crimes. Section 117(a)(2) also includes "an offense under chapter 110A," which also refers to listed crimes. It does not describe conduct. When read in conjunction with "serious violent felony" and "an offense under chapter 110A," and "sexual abuse," it is clear Congress intended a categorical analysis for predicate convictions under § 117's "any assault."

The government incorrectly argues, "Imposing the categorical approach to § 117 would effectively limit the use of prior convictions, as predicates, to only those prior offenses that include an element of domestic violence." GB, p. 15. Under § 117, "any assault" and "intimate partner" are separate elements. *See United States v. Drapeau*, 827 F.3d 773, 776 (8th Cir. 2016) (listing five elements). The fact that

a predicate offense may contain a non-domestic element is not the end of the inquiry, however.

Comparing the analysis of predicate convictions under 18 U.S.C. § 922(g)(9) and the definition section under 18 U.S.C. § 921(a)(33)(A) illustrates the government's position is incorrect. Under § 922(g)(9), the Supreme Court has held that for a "misdemeanor crimes of domestic violence" the domestic relationship need not be an element under the predicate offense. *United States v. Hayes*, 555 U.S. 415, 418 (2009). In *Hayes*, the defendant was charged with violating § 922(g)(9) based on a prior state conviction for battery. *Id*. at 419. The Supreme Court first looked at the definition of "misdemeanor crime of domestic violence," which states it is, in relevant part, an offense that "has, as an element, the use or attempted use of physical force…committed by a current or former spouse…" *Id*. at 420-21 *citing* 18 U.S.C. § 921(a)(33)(A)(ii). The Supreme Court has found that particular section concern two elements: 1) use or attempted use of force; and 2) it must be committed by a person in a domestic relationship with the victim. *Id*. at 421. Under § 921(a)(33)(A), the categorical approach applies to the force element. *See United States v. Castleman*, 572 U.S. 157, 168 (2014) (applying a common law definition of "force" under the categorical approach).

Similar to § 921(a)(33)(A)'s force element, § 117 begins with the "any assault" element. It also contains a distinct "domestic relationship" element. *See*

United States v. Drapeau, 827 F.3d at 776. The government must prove both elements individually beyond a reasonable doubt. *See id*. This table illustrates the two statutes' similarities:

	Sect. 117(a)	Sect. 921(a)(33)(A)
I.	A final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings	A misdemeanor under Federal, State, or Tribal law
II.	"[A]ny assault"	Has, as an element, the use or attempted use of physical force
III.	Against a spouse or intimate partner	Committed by a current or former spouse

Despite the government's position, there is no appreciable difference in the structure of these two statutes. *See* GB, p. 14. Congress intended the application of the categorical approach under §§ 922(g) and 921(A)(33). *United States v. Smith*, 171 F.3d 617, 620 (8th Cir. 1999). Because § 117's "any assault" element is similar to § 921(a)(33)(A)'s force element, Silk's 2013 predicate conviction should be analyzed under the same categorical application. Such a result would not "run afoul" of Congressional intent regarding reviewing § 117 predicate convictions. *See* GB, p. 15.

The government also argues that it needs a circumstance-based evidence to prove beyond a reasonable doubt the "any assault" element. GB, p. 13. This is demonstrably false. The government cites to *United States v. Harlan*, 815 F.3d 1100

(8th Cir. 2016), which proves § 117's "any assault" without regard to circumstance-based testimony. GB, p. 13; *Harlan*, 815 F.3d at 1103-04. *Harlan*'s factual summary illustrates the separation of the elements. There, the victim of the underlying assault differed from the victim involved in the predicate offenses. *Id.* at 1103-04. To prove the predicate offenses, the government offered exhibits detailing the *convictions*. *Id*. at 1103. The government then questioned the predicate-victim about her relationship with the defendant. *Id*. at 1103-04. There is no indication, in a detailed factual summary, that the government adduced testimony from the predicate-victim surrounding the conduct involved in the predicate offenses. This is because it was not necessary.

Although the government cites to *Harlan* to further its argument that the categorical approach should not apply, the *Harlan* court essentially applied it to § 117 predicate convictions. *See id*. at 1105-06. The issue was whether an attempted assault qualified as a valid predicate. *Id*. at 1105. This Court analyzed the elements of the assault. *Id*. at 1106. This Court then noted that when a common law term is used, like assault, the common law definition is applied. *Id*. citing *United States v. Turley*, 352 U.S. 407, 411 (1957). This court determined that an attempted assault amounts to the common law definition of assault, which was an attempted battery. *Id*. at 1106 citing *United States v. Olson*, 646 F.3d 569, 573-74 (8th Cir. 2011). The district court, therefore, erred in declining to adopt the categorical approach.

b) Under the categorical or modified categorical approach, Silk's 2013 simple assault conviction does not meet the definition of "assault" under 18 U.S.C. § 117.

Silk's 2013 conviction for simple assault under Bismarck Municipal Code § 6-03-01 included a minimum mental state of negligence, which falls outside the generic definition of assault. Under a categorical approach, the elements of Silk's simple assault are compared with a generic assault. *See United States v. Schneider*, No. 17-3034, 2018 WL 4653433, at *4 (8th Cir. Sept. 28, 2018). The question then turns on whether the elements of a crime are the same as or narrower than the generic offense. *Id*. citing *Descamps v. United States*, 570 U.S. 254, 257 (2013). Here, if the simple assault's negligent mens rea falls outside the generic mens rea of assault, then Silk's conviction cannot qualify under § 117. *See Schneider*, 2018 WL 4653433 at *4.

Assault is defined under federal caselaw. *United States v. Whitefeather*, 275 F.3d 741, 743 (8th Cir. 2002) *citing United States v. Dupree*, 544 F.2d 1050, 1052 (9th Cir. 1976). The federal caselaw has adopted the common-law definition of assault. *See United States v. Yates*, 304 F.3d 818, 821-22 (8th Cir. 2002). The Eighth Circuit jury instructions are illustrative:

> "Assault" means any **intentional and voluntary** attempt or threat to injure another person, combined with the apparent present ability to do so, which is sufficient to put the other person in reasonable fear of immediate bodily harm or any **intentional and voluntary** harmful and offensive touching of another person without justification or excuse.

Eighth Circuit Model Criminal Jury Instruction 6.18.111 (2017 ed.) (emphasis added). "The common law offense of simple assault ... requires the showing of an offer or attempt by force or violence to do a corporal injury to another." *Yates*, 304 F.3d at 822 citing *United States v. Bear Ribs*, 562 F.2d 563, 564 (8th Cir. 1977). Simple assault equates with traditional, common-law assault. *Harlan*, 815 F.3d at 1105-06. *United States v. LeCompte*, 108 F.3d 948, 952 (8th Cir. 1997); *United States v. McCulligan*, 256 F.3d 97, 104 (3d Cir. 2001).

This Court in *Harlan* analyzed "any assault" to include attempt. *Harlan*, 815 F.3d at 1105-06. To reach its conclusion, this Court defined assault to include the common-law term. *Id*. at 1106. The common-law definition, according to *Harlan*, included attempted battery – an intended effort to cause bodily harm. *Harlan*, 815 F.3d at 1106. Or an intended act to cause a victim to fear harm. *Id*. Negligent acts are not included. One can be convicted of a simple assault under Bismarck Municipal Code § 06-03-01(2) for a negligent act. Because negligence is a lesser culpable mental state than allowed by the generic federal "assault" definition, elements of the Bismarck Municipal Code fall outside the generic definition of assault. *See* SB at 16.

In applying the modified-categorical approach, it is unclear whether Silk was convicted for negligent or willful means. *Id*. The *Shepard* documents provide no answer and uncertainty favors Silk. *Id*; *see United States v. Eason*, 829 F.3d 633,

642 (8th Cir. 2016). And regardless, the mental state elements sets out alternative means, so this court should assume the least culpable such means: negligence. *See Schneider*, 2018 WL at *5-7.

But the government's brief only argued that the categorical approach should not apply. It failed to argue the issue of whether under a categorical approach Silk's 2013 conviction falls outside the generic definition of "any assault" under § 117. *See* GB, pp 9-22. So the United States has waived the issue of whether Silk's 2013 conviction qualifies under the categorical or modified categorical approach. *See United States v. Greene*, 513 F.3d 905, 906-07 (8th Cir. 2008).

II. Silk is not procedurally barred from relief because his claim falls under the actual innocence exception.

Silk has not procedurally defaulted because his claim invoked the actual innocence exception. Actual innocence requires proof of factual innocence. *Bousely v. United States*, 523 U.S. 614, 623-24 (1998). Proving predicate convictions under § 117 is not a purely legal argument. Because predicates were elements required for his underlying conviction, Silk's claim is proper under the actual innocence exception.

In pleading guilty, a defendant admits all factual allegations in the indictment. *O'Leary v. United States*, 856 F.2d 1142, 1143 (8th Cir. 1988). "A defendant pleading guilty also waives all challenges that do not relate to jurisdiction." *O'Leary*, 856 F.2d at 1143. To establish a jurisdictional defect, one must show the indictment

failed to state an offense. *Id*. citing *United States v. DiFonzo*, 603 F.2d 1260, 1263 (7th Cir. 1979). Silk's claim relates to jurisdiction. One of the listed predicate offenses was plainly not final at the time of the alleged underlying assault. SB, pp. 5-6. Silk's broader argument is that not only is the indictment deficient on its face, but there exists nowhere in Silk's criminal history two qualifying convictions necessary to support a conviction under § 117. *See* SB, pp. 16-17. The Indictment thus fails to state an offense and Silk's claim relates to jurisdiction. *See* App. 1.

The district court erred determining that Silk's claim of actual innocence involved only legal innocence and not the required factual innocence. *See Bousley*, 523 U.S. at 623-24. Silk's argument that his conviction lacked proper predicate convictions involves necessary elements required for conviction under §117. Without proper predicates, his conviction cannot stand. This is factual innocence.

United States v. Adams, 814 F.3d 178 (4th Cir. 2016), is comparable. In *Adams*, the Fourth Circuit held that an invalid predicate conviction established a claim of actual innocence. *Adams*, 814 F.3d at 180. The defendant was convicted of violating 18 U.S.C. § 922(g). *Id*. at 180. The defendant did not challenge the predicate conviction on direct appeal. *Id*. at 181. He later filed a motion under 28 U.S.C. § 2255 asserting that the felony convictions underlying his § 922(g) conviction were invalid under *United States v. Simmons*, 649 F.3d 237, 244-45 (4th Cir. 2011) (stating that a prior felony requires actually facing the possibility of more

than one year in prison). *Id*. Therefore, the defendant argued he was actually innocent of being a felon in possession of a firearm. *Id*.

In *Adams*, the government argued that the defendant was in procedural default and that the defendant could not make a claim of actual innocence. *Id*. at 183. The government argued that the defendant's claim was one of legal not actual innocence. *Id*. The government relied on *Bousley* to state that the defendant was still "somehow still factually guilty." *Id*. The Fourth Circuit disagreed. *Id*. The Fourth Circuit pointed out that under § 922(g), the government must prove as an element that a defendant was a convicted felon at the time of the offense. *Id*. Because it was determined that the defendant's predicate conviction was invalid, he could not have violated § 922(g). *Id*. The Fourth Circuit concluded that this established a claim of factual innocence under *Bousley* because it was impossible for the government to prove a required element of a charge. *Id*.

The same reasoning applies here. Under § 117, the government was required to prove that Silk, at the time of the instant assault, was twice convicted of a qualifying offense. *See* 18 U.S.C. § 117(a), The existence of two prior convictions were elements necessary for conviction. *Drapeau*, 827 F.3d at 776. Like *Adams*, the predicate element was required. *Adams*, 814 F.3d at 183. Without it, the government would be unable to prove Silk was guilty of violating § 117. In *Adams*, the Fourth

Circuit concluded that the defendant was not merely legally innocent but was "in fact" not a felon. *Id*.

Silk was "in fact" not previously twice convicted. The indictment alleged that Silk committed the underlying assault on July 12, 2014. App. 1. The indictment further alleges at that time "on at least two (2) separate prior occasions" Silk had final convictions for assaults "against a spouse and intimate partner." *Id*. The indictment included just one prior conviction plainly dated July 14, 2014, which would have become final two days after the instant assault. *Id*. This was no scrivener's error. *See* PSIR ¶ 43. The 2014 predicate was not final at the time of the instant offense. That predicate was used and accepted as a part of the factual basis. PH 12:22-25, 13:1-25, 13:1-23. If that were the extent of Silk's claim, then perhaps Silk's argument would be one of mere legal innocence. But that is not Silk's argument. Silk did not have two prior convictions for qualifying offenses. This is different than a deficient factual basis. It is also different than challenging a sentencing enhancement. *See McKay v. United* States, 657 F.3d 1190, 1199 (11th Cir. 2011) (finding that career offender challenge involved a legal innocence claim). There was not "in fact" two convictions required to be proven beyond a reasonable doubt at trial. Silk's claim is thus one of actual innocence. There is no procedural default here.

CONCLUSION

This Court should reverse the district court's order denying Silk's claim under 28 U.S.C. § 2255 and vacate his conviction.

Dated this 5th day of October, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on 5th day of October, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that Microsoft Word 2013 was used to prepare Appellant's Brief and that the word count done under that word processing system shows there are 2766 words in Appellant's Reply Brief.

Dated this 5th day of October, 2018.

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