IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA

UNITED STATES OF AMERICA, Plaintiff, vs. HUNTER JACOB PENEAUX, Defendant.	3:22-cr-30105-RAL MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

This memorandum is offered in support of Mr. Peneaux's motion to dismiss. The indictment fails to state an offense because Mr. Peneaux does not have a qualifying prior conviction for "a misdemeanor crime of domestic violence" under 18 U.S.C. § 922(g)(9) and 18 U.S.C. § 921(a)(33)(A), as charged in the indictment.

The Court should grant this motion because the categorical approach applies to the "use of force" element of the definition of "misdemeanor crime of domestic violence."[1] The Court should analyze the statute of conviction, Title 5, Chapter 38, Section 2 of the Rosebud Sioux Tribe Law and Order Code (RSTLOC 5-38-2), under the categorical approach, and not the modified categorical approach, because the statute is indivisible.[2] Under the categorical approach analysis, RSTLOC 5-38-2 prohibits a broader range of conduct than the federal generic offense of

[1] *See United States v. Castleman*, 572 U.S. 157, 168 (2014) (stating categorical approach is appropriate in analyzing the use of force element).
[2] *See Descamps v. United States*, 570 U.S. 254, 258 (2013) (holding the modified categorical approach should not be applied when the statute of conviction is indivisible).

"misdemeanor crime of domestic violence"[3] because alternative means of commission broaden the use of force element beyond the scope of the federal generic offense.[4] Therefore, any conviction under RSTLOC 5-38-2 cannot serve as a predicate conviction for a prosecution under 18 U.S.C. § 922(g)(9). Consequently, dismissal under Rule 12(b) is appropriate.

PROCEDURAL HISTORY

On October 12, 2022, a federal grand jury returned a one-count indictment charging Mr. Peneaux with possession of a firearm by a prohibited person, in violation of 18 U.S.C. § 922(g)(9). The indictment alleges that Mr. Peneaux has "been convicted of a misdemeanor crime of domestic violence," and is thereby prohibited from possession of firearms. The government provided defense counsel with tribal complaints and judgments of conviction for three convictions in the Rosebud Sioux Tribal Court.

Each of the three convictions involved RSTLOC 5-38-2, a section labeled "Domestic Abuse."[5] The first case is Case No. CR16-2385, which involved an incident on July 27, 2016. The complaint alleged Mr. Peneaux unlawfully committed "Domestic Abuse," in violation of RSTLOC 5-38-2 in that he "did purposely or knowingly cause bodily injury to Selena Pretty Bird, a household

[3] 18 U.S.C. § 921(a)(33)(A).
[4] *See Mathis v. United States*, 579 U.S. 500, 519-20 (2016) (holding where a statute is broadened beyond the generic offense definition by allowing an element to be satisfied by alternative means of committing the crime, it may not be used as a predicate offense under the categorical approach).
[5] RSTLOC 5-38-2.

member, by repeatedly striking her in the face and body."[6] The judgment states Mr. Peneaux pleaded guilty to RSTLOC 5-38-2. Neither the complaint nor the judgment specifies any subsection of RSTLOC 5-38-2.[7]

The second conviction, Case No. CR17-0398, involved an incident on January 18, 2017. The complaint alleged Mr. Peneaux committed the offense of "Domestic Abuse," in that he "did purposely or knowingly cause apprehension of bodily injury to Selena Pretty Bird, a household member, arguing with her and yelling at her causing her to flee the home with her children in fear of bodily injury."[8] The judgment states Mr. Peneaux pleaded guilty to RSTLOC 5-38-2. Neither the complaint nor the judgment specifies any subsection of RSTLOC 5-38-2.[9]

The third conviction, Case No. CR20-0710, involved an incident on March 5, 2020. The complaint alleged in one singular count that Mr. Peneaux committed the offense of "Domestic Abuse," in that he "did purposely or knowingly cause apprehension of or actual bodily injury to Selena Pretty Bird, a household member, by hitting her, causing her to fear bodily injury."[10] The judgment states Mr. Peneaux pleaded guilty to RSTLOC 5-38-2.[11] Neither the complaint nor the judgment specifies any subsection of RSTLOC 5-38-2.

[6] Defendant's Exhibit A.
[7] Defendant's Exhibit B.
[8] Defendant's Exhibit C.
[9] Defendant's Exhibit D.
[10] Defendant's Exhibit E.
[11] Defendant's Exhibit F.

DISCUSSION

The indictment fails to state an offense because Mr. Peneaux's tribal domestic violence convictions are based on an indivisible statute that is categorically overbroad. To convict, the government must prove Mr. Peneaux has a valid predicate conviction for "a misdemeanor crime of domestic violence."[12] As defined, under 18 U.S.C. § 921(a)(33)(A), a misdemeanor crime of violence has two elements: (1) the use or attempted use of physical force, or the threatened use of a deadly weapon, and (2) it must be "committed by" a person who has a specified domestic relationship with the victim.[13] According to the Supreme Court, the categorical approach applies to the force element.[14] This motion focuses on the use-of-force element.[15] The Rosebud Sioux Tribe's domestic abuse statute broadens the use-of-force element to include conduct more expansively than the generic definition at 18 U.S.C. § 921(a)(33)(A).

I. This motion raises purely legal issues that can be decided before trial.

Parties may "raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits."[16] Rule 12(b)(1) encourages courts to entertain and dispose of pretrial criminal motions before trial if they are

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[12] 18 U.S.C. § 922(g)(9).
[13] *See United States v. Hayes*, 555 U.S. 415, 421 (2009).
[14] *See Castleman*, 572 U.S. at 168.
[15] See *Hayes*, 555 U.S. at 421 (holding that the domestic relationship element may be proven at trial and is a factual inquiry).
[16] Fed. R. Crim. P. 12(b)(1); *United States v. Turner*, 842 F.3d 602, 604 (8th Cir. 2016).

capable of determination without trial of the general issues.[17] Courts may decide motions to dismiss before trial if they raise questions of law rather than fact.[18] Courts may not, however, make factual findings when an issue is "inevitably bound up with evidence about the alleged offense itself."[19] The arguments in this memorandum are purely legal. Therefore, under Rule 12(b)(1), the Court may entertain and resolve this motion.

II. The categorical approach is the appropriate analysis to determine whether a prior conviction qualifies as a predicate under § 922(g)(9).

To determine the validity of predicate convictions under § 922(g)(9), courts apply the categorical approach.[20] The categorical approach compares only the statute of conviction with the general commission of a generic federal offense.[21] A crime of conviction is a predicate offense "if its *elements* are the same as, or

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[17] *United States. v. Levin*, 973 F.2d 463, 470 (6th Cir. 1992).
[18] *Id.* at 470 (quoting *United States v. Miller*, 491 F.2d 638, 647 (5th Cir. 1974)).
[19] *Turner*, 842 F.3d at 605 (citing *United States v. Grimmett*, 150 F.3d 958, 962 (8th Cir. 1998)).
[20] *See Castleman*, 572 U.S. at 168 (stating analysis of predicate conviction of domestic violence begins with categorical approach). *See also United States v. Gourneau*, No. 3:21-CR-83-PDW, 2022 WL 1001468, at *4 (D.N.D. Apr. 4, 2022) (stating use of the word "conviction" signals to a court to apply categorical approach).
[21] *See Taylor v. United States*, 495 U.S. 575, 602 (1990) (describing categorical approach as "look[ing] only to the fact of conviction and the statutory definition of the prior offense"); *Shepard v. United States*, 544 U.S. 13, 19 (2005) (stating categorical approach "refers to predicate offenses in terms not of prior conduct but of prior 'convictions' and the 'element[s]' of crimes"); *Descamps v. United States*, 570 U.S. 254, 257 (2013) (describing categorical approach as comparing the elements of the statute of conviction with the federal generic crime); *Mathis*, 579 U.S. at 504 (describing categorical approach as a comparison of elements "while ignoring the particular facts of the case").

narrower than, those of the generic offense."[22] Conversely, however, "if the crime of conviction covers any more conduct than the generic offense," then it is not a valid predicate conviction.[23]

The modified categorical approach may apply only where a statute of conviction is "divisible," meaning it lists separate crimes with different elements in the alternative.[24] This modified categorical approach is for the sole purpose of determining which of the alternative elements, and therefore which distinct crime, sustained the prior conviction.[25] However, when the statute is indivisible, or sets out a single crime with a single set of elements, courts *may not* apply the modified categorical approach.[26] The United States Supreme Court has held that this

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[22] *Mathis*, 579 U.S. at 504 (emphasis in original).
[23] *Id.*
[24] *Descamps v. United States*, 570 U.S. 254, 257 (2013) (stating modified categorical approach may apply where a "statute sets out one or more elements of the offense in the alternative" and a court must "determine which alternative formed the basis of the defendant's prior conviction"); *See Mathis*, 579 U.S. at 505 (stating "[a] single statute may list elements in the alternative, and thereby define multiple crimes"); *United States v. Horse Looking*, 828 F.3d 744,747 (stating a court is directed to apply "modified categorical approach" where the statute of the predicate conviction lists separate crimes with different elements in the alternative to determine which of the alternative crimes formed the basis for the defendant's conviction*);*;
[25] *See Mathis*, 579 U.S. at 513-14 (clarifying, "[i]n other words, the modified approach serves—and serves solely—as a tool to identify the elements of the crime of conviction when a statute's disjunctive phrasing renders one (or more) of them opaque. It is not to be repurposed as a technique for discovering whether a defendant's prior conviction, even though for a too-broad crime, rested on facts (or otherwise said, involved means) that also could have satisfied the elements of a generic offense") (internal citations omitted); Descamps, 570 U.S. at 278 ("[a] court may use the modified approach only to determine which alternative element in a divisible statute formed the basis of the defendant's conviction").
[26] *See Descamps*, 570 U.S. at 258 (holding "courts may not apply the modified categorical approach when the crime of which the defendant was convicted has a single, indivisible set of elements").

framework "does not change when a statute happens to list possible alternative *means* of commission."[27] That is, the categorical approach applies where the alternative language of a statute actually "spells out various factual ways of committing some component of the offense."[28] When the prior conviction is based on such an indivisible statute, courts are still required to apply the categorical approach rather than the modified categorical approach.[29]

Here, RSTLOC 5-38-2 is indivisible. Therefore, the Court should apply the categorical approach to determine whether Mr. Peneaux's prior convictions are valid predicates. RSTLOC 5-38-2 provides:

> A person commits the crime of domestic abuse if he or she:
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> 1. Purposely or knowingly causes bodily injury to a family member or household member; or
> 2. Purposely or knowingly causes apprehension of bodily injury in a family member or household member.[30]

The statute contains two elements. The first element is causation and the second specifies a certain relationship between perpetrator and victim. The first element, causation, can either be satisfied by 1.) causing actual bodily injury or, alternatively, 2.) causing apprehension of bodily injury. Causing actual bodily

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[27] *Mathis*, 579 U.S. at 519 (emphasis added). *See also Sorensen v. United States*, No. 4:19-CV-04190-KES, 2020 WL11191679, at *8 (D.S.D Sept. 22, 2020) (stating "[u]nder the categorical approach, courts are limited to comparing the elements of the offense of conviction—without regard to the facts or means of the crime—with the elements of the generic offense").
[28] *Mathis*, 579 U.S. at 506.
[29] *Id.* at 519 (stating "that rule does not change when a statute happens to list possible alternative means of commission: Whether or not made explicit, they remain what they ever were—just the facts").
[30] RSTLOC 5-38-2.

injury satisfies the use of force element for 18 U.S.C. § 921(a)(33)(A).[31] However, subsection 2 of the statute serves to broaden the causation element, providing an alternative means to commit the crime: to cause apprehension. Subsection 2 does not describe an alternative element or distinct crime.[32] The first element, that of causation, is broadened by two "alternative means": causing actual bodily injury or causing apprehension of bodily injury.[33] This reading of the statute, within the appropriate analysis outlined below, confirms RSTLOC 5-38-2 is an indivisible statute.

In analyzing whether a statute is divisible or indivisible, this Court should look to "authoritative sources of [tribal] law."[34] Such sources may include the language and structure of the statute itself,[35] court decisions from the relevant

[31] *See Castleman*, 572 U.S. at 169 (stating "causation of bodily injury necessarily involves the use of physical force").
[32] *See Mathis*, 579 U.S. at 506 (stating "legislatures frequently enumerate alternative means of committing a crime without intending to define separate elements or separate crimes) (citing *Schad v. Arizona*, 501 U.S. 624, 636 (1991)).
[33] *See Mathis*, 579 U.S. at 519 (describing a statute that "happens to list possible alternative means of commission").
[34] *United States v. Kinney*, 888 F.3d 360, 363 (8th Cir. 2018) (stating determining whether listed items are elements or means "should be resolved by looking to "authoritative sources of state law") (citing *Mathis*, 579 U.S. at 518).
[35] *United States v. Fisher*, 25 F.4th 1080, 1085-86 (8th Cir. 2022) (stating "language and structure" of the statute of conviction is pertinent in divisibility inquiry).

jurisdiction,[36] model jury instructions,[37] and the record of the prior conviction.[38] The Rosebud Sioux Tribe Law and Order Code and the tribe's court opinions interpreting the code do not provide definitive or clear instruction on whether RSTLOC 5-38-2 is divisible or indivisible (i.e. whether subsections 1 and 2 are alternative elements and therefore distinct crimes, or whether the two subsections provide for alternative means of committing the crime). Likewise, the tribe does not have model jury instructions in publication which could help ascertain whether the statute is divisible or indivisible. The records of the prior convictions, however, demonstrate that the statue is indivisible. Therefore, the categorical approach is appropriate.

A. Language and structure of the statute of conviction.

The language and structure of RSTLOC 5-38-2 does not expressly establish whether the statute is divisible or indivisible. Courts reviewing predicate offenses to determine whether the statute of conviction is divisible or indivisible first look to

[36] *United States v. McMillan*, 863 F.3d 1053, 1057 (8th Cir. 2017) (stating "state court decisions" are relevant to the analysis of divisibility); *Morales v. United States*, No. 4:20-CV-04112-KES, 2021 WL 2415038, (D.S.D. Mar 8, 2021) *9 (stating "it would be necessary to read Kansas court decisions interpreting [statute] to determine if the statute sets forth elements or alternative means and to determine is the statute is divisible).

[37] *United States v. Harris*, 950 F.3d (8th Cir. 2020) (citing model jury instructions as key interpretation source in determining divisibility of a statute).

[38] *See McMillan*, 863 F.3d at 1057(stating "when analyzing which words or phrases of a statute form the elements of a crime, courts may look to the statute of prior conviction, state court decisions, and as a last resort, 'the record of a prior conviction itself") (quoting *Mathis*, 579 at 518).

the language and structure of the statute itself.[39] A statute may appear divisible because it lists enumerated alternatives but may nevertheless be indivisible because the alternatives are actually different ways of committing a single element.[40] That is, simply because a statute enumerates a list of alternatives that does not necessarily make the statute divisible as defining separate elements.[41]

Here, the numerically listed structure of RSTLOC 5-38-2, on its face, may suggest alternative elements, simply because two enumerated subsections exist. However, the language of the subsections demonstrates the two subsections are alternative means of committing one crime. The language between the two subsections is nearly identical. The only difference between subsections is the addition of the phrase "apprehension of."[42] The two subsections are separated by disjunctive phrasing (i.e. "or").[43] In the second subsection, the element of causation is broadened to include causing the apprehension of bodily injury.[44]

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[39] *See* Fisher, 25 F.4th at 1085-86 (reviewing language and structure in divisibility analysis); *Harris*, 950 F.3d at 1020 (reviewing and finding statutory language inconclusive); *Kinney*, 888 F.3d at 363-65 (discussing language of statute being pertinent factor).

[40] *See United States v. Quigley*, 943 F.3d 390, 393-94 (8th Cir. 2019) (holding an Iowa statute with enumerated alternatives is indivisible and stating "[s]ometimes, a statute may seem divisible because it lists alternatives, but in fact it is indivisible because those alternatives are not alternative elements, going toward the creation of separate crimes, but are simply alternative ways or means of satisfying a single element.")(internal citations omitted); *See Mathis*, 579 U.S. at 506 (stating "legislatures frequently *enumerate* alternative *means*") (citing *Schad v. Arizona*, 501 U.S. 624, 636 (1991)) (emphasis added).

[41] *See Quigley*, 943 F.3d at 393-94; *Mathis*, 579 U.S. at 506.

[42] *See* RSTLOC 5-38-2. The proceeding prepositional words are also changed (i.e. "to" vs. "in").

[43] RSTLOC 5-38-2.

[44] See Kinney, 888 F.3d at 364, n.1 (stating "disjunctive phrasing merely triggers

Likewise, whether a statute provides for distinct penalties or punishments is relevant to determining divisibility.[45] If a statute does not establish different penalties, that is an indication that the alternative terms are means rather than elements.[46] Here, RSTLOC 5-38-2 does not provide for distinct punishments between the two alternatives but describes the classification of the crime in the singular.[47] An analysis of the language and structure of RSTLOC 5-38-2 is inconclusive in determining whether it is divisible or indivisible, but tends to suggest it is indivisible.

B. Court decisions in the jurisdiction of conviction.

Court decisions from the relevant jurisdiction may also resolve the issue of whether a statute is divisible or indivisible.[48] The Rosebud Sioux Tribe has established the Rosebud Sioux Tribal Court, which acts as a trial court, and the

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the inquiry into whether the alternatively phrased items are means or elements") (citing United States v. Naylor, No. 16-2047, slip op. at 3, 887 F.3d 397, 399-400, 2018 WL 1630249).

[45] *See Kinney*, 888 F.3d at 364.

[46] *Id.* (stating where a North Dakota statute did not carry different punishments, that "may indicate that the terms are means"). *See also McMillan*, 863 F.3d at 1057 (stating "uniform punishment for commission of" a particular crime is a factor in deciding whether a statute lists alternative means or alternative elements); *cf. Harris*, 950 F.3d at 1018.

[47] RSTLOC 5-38-2 states "[t]he crime of domestic abuse shall be a Class A crime." RSTLOC 5-38-9, which describes penalties for a violation of RSTLOC 5-38-2, does not provide distinct penalties for causing bodily injury or causing apprehension of bodily injury.

[48] *See Mathis*, 579 U.S. at 517 (stating "here, a state court decision definitively answers the question"); *Fischer*, 25 F.4th at 1086 (analyzing "Minnesota state court decisions"); *Harris*, 950 F.3d at 1018-19 (indicating "state court decisions" may resolve this issue"); *Kinney*, 888, F.3d at 364 (explaining that "controlling or persuasive state court precedent" may be determinant"); *McMillan*, 863 F.3d at 1057 (stating a court may look to "state court decisions").

Rosebud Sioux Tribe Supreme Court, which is established to "take appeals" from the lower court.[49] Per defense counsel's review,[50] the Rosebud Sioux Tribe Supreme Court has not opined on the issue of whether the enumerated alternatives in RSTLOC 5-38-2 are distinct elements or means.[51] Because there is no decisive precedent from the Rosebud Sioux Tribe Supreme Court, this Court must continue the analysis reviewing other sources of authoritative.[52]

C. Model jury instructions from the jurisdiction of conviction.

Model jury instructions may establish whether a statute contains alternative elements or means.[53] Neither the Rosebud Sioux Tribe Law and Order Code nor

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[49] Constitution and Bylaws of the Rosebud Sioux Tribe of South Dakota, Article XI.
[50] On January 10, 2023, defense counsel visited the Rosebud Sioux Tribal Court at Rosebud, SD seeking judicial opinions from the Rosebud courts. Defense counsel's conclusions and narrations in this section are based on counsel's review of available materials at the tribal court, as well as consultation with Chief Clerk Denita Whipple, other tribal court staff, and Dakota Plains Legal Services Deputy Director Annemarie Michaels.
[51] The Rosebud Sioux Tribe Supreme Court issues opinions that are published within the case files. Dakota Plains Legal Services has compiled a "digest" that summarizes judicial opinions from the Rosebud courts. *See* Defendant's Exhibit 7. *See also* https://libguides.law.usd.edu/c.php?g=744258&p=5329464 (judicial opinions written by Frank Pommersheim, Associate Justice of the Rosebud Sioux Tribe Supreme Court).
[52] *Mathis*, 579 U.S. at 518 (stating "[a]rmed with such authoritative sources of state law, federal sentencing courts can readily determine the nature of an alternatively phrased list").
[53] *Mathis*, 579 U.S. at 519 (indicating jury instructions may provide guidance in the elements-or-means inquiry); *Fisher* 25 F.4th at 1085-86 (reviewing Minnesota model jury instructions); *Harris* 950 F.3d at 1019-1020 (reviewing Arkansas model jury instructions); *United States v. Naylor*, 887 F.3d 397, 401 (8th Cir. 2018) (stating "Missouri model jury instructions may also guide our inquiry).

Rosebud caselaw show that model jury instructions exist in Rosebud courts.[54] Indeed, in Rosebud courts, the failure to provide any jury instruction is not automatic grounds for reversal in a criminal case.[55]

D. Record of prior conviction.

The Rosebud Sioux Tribe body of law, in view of caselaw and tribal codes, does not provide a clear answer as to whether RSTLOC 5-38-2 is divisible or indivisible. Accordingly, this Court should look to the records of Mr. Peneaux's prior convictions.[56] Here, the records demonstrate that the statute delineates alternative means of satisfying the causation element (which is correlative to the federal use of force element in 18 U.S.C. § 921(a)(33)(A)). Charging documents from Mr. Peneaux's prior convictions establish that the distinction between causing bodily injury or causing *apprehension of* bodily injury is a means to broaden the causation element. The two alternatives are charged interchangeably and in conjunction, rather than charging separate crimes in separate counts, as demonstrated in the most recent conviction record.

In Case No. CR20-0710, the complaint alleges in one singular count that Mr. Peneaux "did purposely or knowingly cause apprehension of or actual bodily injury

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[54] Defense counsel's consultation with tribal court staff indicates the tribe uses South Dakota jury instructions in the event there is a jury trial.
[55] *See* Defendant's Exhibit G, p. 33 (citing *Waln v. Rosebud Sioux Tribe*, CA 97-02, pp. 3-4 (1999)).
[56] *Mathis*, 579 U.S. at 518-19 (stating "if state law fails to provide clear answers, federal judges have another place to look: the record of a prior conviction itself"); *Kinney*, 888 F.3d at 364 (stating where the "authoritative sources fail to provide an answer," the court may view the record of prior conviction). *See also McMillan*, 863 F.3d at 1057.

to Selena Pretty Bird."[57] The judgment states Mr. Peneaux pleaded guilty to RSTLOC 5-38-2.[58] Neither the complaint nor the judgment specifies any subsection of RSTLOC 5-38-2.[59] This record is a strong indication that to "cause [1] apprehension of *or* [2] actual bodily injury"[60] are separate means of satisfying one element of one crime: the causation element of RSTLOC 5-38-2.[61] The use of the two alternatives in the same count illustrates these are alternative means of commission.[62] The record of the 2020 conviction from Case No. CR20-0710 establishes that RSTLOC 5-38-2 enumerates means rather than elements.

The records of Mr. Peneaux's other two tribal convictions, from Case No. CR16-2385 and Case No. CR17-0398 show that in those cases the prosecutor elected to charge only one of the possible means of commission under RSTLOC 5-38-2. In Case No. CR16-2385, the complaint charged that Mr. Peneaux "did purposely or knowingly cause bodily injury to Selena Pretty Bird," thereby violating the first of the two alternative means of commission.[63] The complaint did not specify a

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[57] Defendant's Exhibit E.
[58] Defendant's Exhibit F.
[59] Defendant's Exhibit E; Defendant's Exhibit F.
[60] Defendant's Exhibit E.
[61] *Mathis*, 579 at 519 (stating "[s]uppose, for example, that one count of an indictment and correlative jury instructions charge a defendant with burgling a 'building, structure, or vehicle' – thus reiterating all the terms of Iowa's law. That is a clear an indication as any that each alternative is only a possible means of commission, not an element that the prosecutor must prove to a jury beyond a reasonable doubt").
[62] *See Verdugo-Morales v. Sessions*, 719 F. App'x 507, 510 (6th Cir. 2018) (stating "charging documents and jury instructions that include *all* of the alternatives support the conclusion that the statute contains multiple means") (emphasis in original).
[63] Defendant's Exhibit A.

subsection of RSTLOC 5-38-2.[64] In Case No. CR17-0398, the complaint charged that Mr. Peneaux "did purposely or knowingly cause apprehension of bodily injury to Selena Pretty Bird."[65] The complaint did not specify the invocation of a subsection of RSTLOC 5-38-2.[66] These records do not negate the conclusion that the 2020 conviction record establishes means rather than elements. Under a statute that lists alternative means of commission, "prosecutors may charge that a defendant violated such a statute by one, some, or all of the possible ways, so long as the means that are selected are set out in the conjunctive in the charging document."[67]

The records of prior convictions, particularly in the most recent case, confirm that RSTLOC 5-38-2 is indivisible, and the categorical approach should apply in assessing whether the convictions are valid prior offenses.

III. Application of the categorical approach.

The application of the categorical approach is a comparison of the statute of conviction with the generic federal offense. If the statute of conviction prohibits any conduct broader than that prohibited in the generic offense, the statute is categorically overbroad.[68] A categorically overbroad statute may not serve as a predicate offense for a prosecution under 18 U.S.C. § 922(g)(9).[69] The generic federal offense requires 1.) use or attempted use of physical force and 2.) perpetrated on a

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[64] *Id.*
[65] Defendant's Exhibit C.
[66] *Id.*
[67] *Naylor*, 887 F.3d at 402.
[68] *Mathis*, 579 U.S. at 504.
[69] *See Kinney*, 888 F.3d at 365 (stating "because the statute is both overbroad and indivisible, Kinney's prior convictions cannot serve as predicate felonies").

victim with a specified relationship to the defendant.[70] In comparison, RSTLOC 5-38-2, requires 1.) causation of "apprehension of *or* actual bodily injury"[71] 2.) perpetrated on a victim with a specified relationship to the defendant.

Because there are alternative means of committing the causation element in RSTLOC 5-38-2, including merely causing apprehension, the statute is categorically overbroad. As demonstrated in prior records, the causation element of RSTLOC 5-38-2 may be satisfied by an act not equating to the use of force. Under this statute, then, a conviction does not necessarily have a physical force element.[72] RSTLOC 5-38-2 is therefore categorically overbroad. As such, a conviction under RSTLOC 5-38-2 may not serve as a predicate offense in a § 922(g)(9) prosecution, regardless of the facts supporting the underlying conviction(s).

The categorical approach requires a degree of certainty in evaluating predicate offenses.[73] Admittedly, the tribe's underdeveloped caselaw and nonexistence of jury instructions frustrates the analysis of whether the statute delineates separate elements of distinct crimes or alternative means of committing

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[70] 18 U.S.C. § 921(a)(33)(A). *Hayes*, 555 U.S. at 421 (domestic relationship may be alleged in indictment and proven beyond a reasonable doubt at trial).
[71] Defendant's Exhibit) (emphasis added).
[72] *See Horse Looking*, 828 F.3d at 747-49 (stating under the South Dakota domestic assault statute, a defendant may commit "physical menace" by committing a physical act, but a conviction not necessarily requiring physical force cannot serve as a predicate offense").
[73] *Horse Looking*, 828 F.3d at 748 ("We have been instructed time and again that the categorical approach introduced by *Taylor* created a 'demand for certainty' when determining whether a defendant was convicted of a qualifying offense.").

the same crime.[74] Likewise, the tribe's discretionary invocation of one or both of the alternative means in charging documents may seem irregular. However, this does not amount to the demand of certainty required in determining the validity of prior convictions under the categorical approach.[75] The vagaries or inconsistencies of state or tribal courts is not a justification to validate prior convictions.[76]

CONCLUSION

Based on the foregoing analysis, Mr. Peneaux argues that his prior convictions may not serve as predicate convictions under 18 U.S.C. § 922(g)(9). As such, dismissal under Rule 12(b) is required. Mr. Peneaux moves this court for a dismissal of the indictment in this case.

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[74] The Rosebud courts and judicial processes are markedly developed in the sphere of tribal jurisprudence.

[75] *Harris*, 950 F.3d at 1020 (enforcing "the categorical approach's 'demand for certainty'") (citing *Mathis*, 579 U.S. at 512 n.3); *Shepard*, 544 U.S. at 21 (alluding to "*Taylor*'s demand for certainty") (citing Taylor v. U.S., 495 U.S. 575). *See also Naylor*, 887 F.3d at 401 (stating [i]f the record materials do not speak plainly on the means–elements issue, we will be unable to meet the "demand for certainty").

[76] *Horse Looking*, 828 F.3d at 749 (stating that "vagaries of state court" do not justify altering the analysis in the face of *Taylor*'s demand for certainty); *Shepard*, 544 U.S. at 22 (warning against "the vagaries of state prosecutors' charging practices").

WHEREFORE, the defense moves to dismiss the indictment.

Dated this 20th day of January, 2023.

Respectfully submitted,

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