

Legal Sidebar

Tying Up Loose Ends... Supreme Court To Evaluate Federal Firearm Provision Again

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On October 30, 2015, the Supreme Court granted certiorari to hear *Voisine v. United States*, a decision examining the federal provision that makes it unlawful for an individual to possess a firearm or ammunition if he or she has been convicted of a misdemeanor crime of domestic violence (MCDV). A MCDV is defined as a misdemeanor offense under federal or state law that has, as an element, “the use or attempted use of physical force, or threatened use of a deadly weapon” committed by and against certain persons. The Court decided to hear one of two questions presented: whether a misdemeanor crime with a mens rea of recklessness qualifies as a “misdemeanor crime of domestic violence” as defined by 18 U.S.C. §§ 921(a)(33)(A) and 922(g)(9). The Court decided not to review the constitutionality of the provision under the Second, Fifth, and Sixth Amendments or the Ex Post Facto Clause.

Arguably the Justices paved the way for this case when deciding *United States v. Castleman* [last term](#). In *Castleman*, the Court held that the requirement of “physical force” is satisfied by the degree of force that supports a battery conviction at common law, namely “offensive touching.” However, the Court noted that it had not resolved whether “a reckless application of force could constitute ‘use’ of force.” This is now the issue before the Court when it hears *Voisine*.

In *Voisine*, the First Circuit upheld the defendants’ MCDV conviction under 18 U.S.C. § 922(g)(9), finding that their underlying convictions pursuant to Maine law qualified as predicate MCDV offenses. In doing so, the First Circuit analyzed whether Maine’s assault statute, which includes reckless acts, categorically fits within § 922(g)(9). The First Circuit in *United States v. Booker* had earlier held that a reckless misdemeanor satisfies the federal definition of MCDV. In *Castleman*, the Court did not say *Booker* was wrong, but highlighted other circuit court decisions, which had determined that “recklessness is not sufficient” to satisfy the use-of-force requirement. In *Voisine*, the First Circuit dismissed these other circuit cases, stating that “[a]ll but one of the ten cases cited in *Castleman* ... as deciding the § 922(g)(9) mens rea issue in fact considered other statutes in other contexts...” Given § 922(g)(9)’s legislative history and unique purpose in ensuring that “domestic abusers convicted of misdemeanors, in addition to felonies, are barred from possessing firearms,” the First Circuit opined that the provision should be interpreted more broadly than other statutes, which do not include reckless crimes as qualifying predicate offenses.

Section 922(g)(9), according to the court, “is meant to embrace those seemingly minor predicate acts, occurring sometimes in moments of passion, where the perpetrator consciously disregarded a risk in light of known circumstances.” The First Circuit reviewed Maine’s definition of recklessness, which occurs “when the person consciously disregards a risk that the person’s conduct will cause such result.” This definition, according to the court, involves a volitional component and a substantial amount of deliberateness and intent. The First Circuit found the state’s definition of reckless “sufficiently volitional,” such that the crime of reckless assault in Maine constitutes a predicate offense for purposes of § 922(g)(9).

Notably, the First Circuit made clear that it was not deciding that “recklessness in the abstract is always enough to satisfy § 922(g)(9),” realizing that the term has not always been consistently used. Given the First Circuit’s focus on whether Maine’s mens rea requirement of reckless satisfies the statute and the different definitions a state may employ, it will be interesting to see what definition the Court will turn to upon hearing *Voisine*. Will it survey the states to see how they have defined recklessness in a particular context or will the Court turn to the meaning of the term under

common law? If the Court overturns the First Circuit's decision, the result could limit the types of state domestic violence convictions that qualify as predicate offenses under § 922(g)(9). As a consequence, there could be an increase in the number of persons eligible to possess a firearm, despite a misdemeanor conviction for domestic abuse, as such offenses would no longer satisfy § 922(g)(9). Were the Court to exclude crimes of domestic violence with a mens rea requirement of recklessness, Congress could pass a law including recklessness as a type of mental state that would satisfy § 922(g)(9)'s definition of MCDV.

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