STRATEGIES in Brief

ÆQUITAS

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Federal Firearms Prohibition Extends to Persons Convicted of Reckless Misdemeanor Crimes of Domestic Violence: *Voisine v. United States*[1]

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The United States Supreme Court has held that the federal firearms prohibition under 18 U.S.C. § 922(g)(9) for individuals convicted of "misdemeanor crimes of domestic violence" applies even to convictions having recklessness as an element of the offense.[3] In *Voisine v. United States*, decided June 27, 2016, the Court rejected the petitioners' argument that the prohibition was inapplicable where the predicate offense could have been based upon a finding of reckless conduct, as opposed to purposeful/intentional or knowing conduct. The Court affirmed, in a 6-2 opinion, the First Circuit's decision upholding their convictions.

FACTS AND LOWER COURT PROCEEDINGS

The *Voisine* case involved the consolidated appeals of two defendants convicted of possessing firearms in violation of federal law as a result of their Maine state court convictions for assault of a domestic partner.

Stephen Voisine was convicted in 2004 of assaulting his girlfriend, in violation of Me. Rev. Stat. Ann., tit. 17–A, § 207(1)(A), which prohibits "intentionally, knowingly or recklessly caus[ing] bodily injury or offensive physical contact to another person." After he was subsequently investigated for killing a bald eagle, which resulted in the discovery that he owned a rifle, Voisine was charged with violation of 18 U.S.C. § 922 (g)(9), which prohibits the possession of firearms by anyone convicted of a "misdemeanor crime of domestic violence."[4]

William Armstrong was convicted in 2008 of assaulting his wife, in violation of Me. Rev. Stat. Ann., tit. 17–A, § 207-A, which prohibits assault against a "family or household member." During a subsequent search of his home in connection with a narcotics investigation, he was found to be in possession of firearms. He, too, was charged with violation of 18 U.S.C. § 922(g)(9).[5]

The District Court rejected the claims of both men that they could not be prosecuted because their predicate convictions were based upon statutes that included recklessness as an element of the offense. Both entered guilty pleas, reserving their right to appeal the question whether a conviction under a statute that includes the *mens rea* element of recklessness qualifies as a "misdemeanor crime of domestic violence" under § 922.[6]

After the First Circuit affirmed their convictions,[7] both defendants filed petitions for *certiorari* in the United States Supreme Court. The Court granted both petitions, vacated the convictions, and remanded their cases for reconsideration in light of *United States v. Castleman*,[8] the Court's then-recent decision interpreting § 922(g)(9).

On remand, the First Circuit consolidated the cases and again affirmed both convictions.[9] Voisine and Armstrong again petitioned for *certiorari*, which was granted, on the issue of whether the term "misdemeanor crime of domestic violence" includes crimes with recklessness as an element of the offense.[10]

SUPREME COURT

On June 27, 2016, the Supreme Court announced its decision affirming the First Circuit's decision and upholding the petitioners' convictions. In a 6-2 decision, with the majority opinion authored by Justice Kagan (joined by the Chief Justice and Justices Kennedy, Ginsburg, Breyer, and Alito), the Court held that convictions under criminal statutes that include the element of reckless conduct could constitute "misdemeanor crimes of domestic violence" under 18 U.S.C. § 922(g)(9). Justice Thomas filed a dissenting opinion, which Justice Sotomayor joined in part.

In the majority opinion, the Court distinguished the truly accidental infliction of harm from the reckless infliction of injury. If, for example, someone with soapy hands accidentally drops a plate, which shatters and injures another, it is an accident and not a "use of force" as required by the statutory definition of "misdemeanor crime of domestic violence." On the other hand, if someone hurls a plate in anger, and it shatters and injures the victim, such an act (with disregard for the substantial risk of the injurious consequences) *is* a "use of force" under the statute (even though not specifically intended to cause injury).[11]

The Court also considered the legislative history and the purposes of the enactment. The statute was, the Court observed, enacted to close the "dangerous loophole" left by previous legislation that barred convicted felons from possession of firearms but did not address the vast numbers of domestic violence offenders who are typically prosecuted under generally applicable assault and battery statutes.[12] Since the criminal codes of so many jurisdictions include reckless infliction of injury in their assault or battery statutes, to exclude reckless conduct from the reach of § 922(g)(9) would render that provision inoperative in as many as 35 states—a result that, the Court concluded, Congress could not have intended.[13]

The Court rejected the petitioners' argument that Congress intended to reach only assault and battery as defined in the common law (which, petitioners asserted, required purposeful or knowing conduct). The Court said that the traditional, common-law definitions of those offenses were no longer applicable in the vast majority of jurisdictions and that there was therefore no reason to believe those definitions had any relevance to Congressional intent in drafting the statute.[14] Finally, the Court rejected petitioners' contentions that applying a lifetime ban on firearms possession for recklessly committed crimes would implicate Second Amendment concerns and that the rule of lenity required their convictions to be reversed.[15]

In dissent, Justice Thomas distinguished the intentional use of force that results in the reckless infliction of injury from the reckless creation of force that causes unintended injury. As examples, he contrasted the "Angry Plate Thrower" described in the majority opinion with the "Text-Messaging Dad" who recklessly causes an accident (by text-messaging while driving) that results in injury to his son in the passenger seat of the car. Observing that Maine's statute would be applicable to both scenarios, Justice Thomas concluded that the two scenarios were sufficiently distinguishable that the first could be considered a "use of force" but the second could not; therefore, because the Maine statute included broader conduct than that described in the federal statute, conviction under the statute could not be considered a "misdemeanor crime of domestic violence."[16] Justice Sotomayor joined this portion of the dissent. In a separate portion of his dissent (not joined by Justice Sotomayor), Justice Thomas expressed his view that by including, within its sweep, domestic assaults committed by recklessly-caused force (*e.g.*, "The Text-Messaging Dad"), the majority had moved into "patently unconstitutional territory" by imposing a lifetime ban on firearms possession for individuals who did not pose a risk to others, in violation of the Second Amendment.[17]

CONCLUSION

The *Voisine* decision has definitively settled the question of whether convictions under statutes that include the reckless infliction of injury qualify as "misdemeanor crimes of domestic violence" for purposes of the federal firearms prohibition under 18 U.S.C. § 922(g)(9). This opinion will greatly facilitate the accurate identification of convictions for purposes of determining whether an individual is permitted to purchase, or possess, firearms under federal law. Convictions for assault or battery of a person with the requisite domestic relationship to the offender will almost always qualify. Prosecutors should continue to take care to identify, wherever possible, the domestic relationship between the parties to make identification of predicate convictions simple for purposes of instant background checks at the time of purchase, determining whether firearms should be seized in connection with a domestic violence response, determining whether firearms already seized may be returned,[18] and determining whether dispossession of firearms is required as part of a protective order or bail condition. In addition, it is important to request firearms surrender—and follow-up to ensure compliance—at bail hearings, protective order hearings, and sentencing proceedings. Creating and implementing protocols for safe surrender, storage, and return of firearms will facilitate the enforcement of laws designed to keep victims—and communities—safe.

ENDNOTES

1 Voisine v. United States, 136 S.Ct. 2272 (2016).

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3 The Court's prior opinion in *Castleman* had explicitly left this question unanswered. *See* United States v. Castleman, 134 S.Ct. 1405, 1414 & n.8.

4 *Voisine*, 136 S.Ct. at 2277.

5 *Id.*

6 *Id.*

7 United States v. Voisine, 495 Fed.Appx. 101 (1st Cir. 2013) (per curiam); United States v. Armstrong, 706 F.3d 1 (1st Cir. 2014).

8 Armstrong v. United States, 134 S.Ct. 1759 (2014).

9 United States v. Voisine, 778 F.3d 176 (1st Cir. 2015).

10 *Voisine*, 136 S.Ct. at 2277-78.

11 *Id.* at 2278-80.

12 *Id.* at 2276 (citing *Castleman*, 134 S.Ct. at 1409 (quoting United States v. Hayes, 555 U.S. 415, 426 (2009)).

13 *Id.* at 2280-81.

14 *Id.* at 2281-82.

15 *Id.* at 2282 n.6.

16 *Id.* at 2282-90 (Thomas, J., dissenting).

17 *Id.* at 2290-92 (Thomas, J., dissenting).

18 Where the basis for a firearms prohibition under 18 U.S.C. § 922(g)(8) (which prohibits possession of firearms by persons subject to qualifying protective orders) or (9) no longer exists (*e.g.*, the protective order has been dismissed or the conviction vacated or expunged), it may still be important to determine whether the individual otherwise qualifies under federal, state, or tribal law to possess a firearm.

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