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Research Report

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VOISINE V. UNITED STATES

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FEDERAL LAW

A knowing violation of the federal law prohibiting people convicted of a misdemeanor crime of violence from possessing firearms is a felony punishable by up to 10 years' imprisonment.

ISSUE

Does a misdemeanor conviction for a domestic violence assault preclude an individual from possessing a gun under federal law if the assault is merely reckless, as opposed to premeditated?

SUMMARY

The U.S. Supreme Court says yes. The Court says the applicable federal law does not distinguish between domestic assaults committed knowingly or intentionally and those committed recklessly.

Federal law prohibits firearm possession by anyone convicted of a "misdemeanor crime of domestic violence" (18 U.S.C. § 922(g)(9)). The law defines such a misdemeanor as one that necessarily involves the "use...of physical force (18 U. S. C. § 921(a)(33)(A))." In *United States v. Castleman* (134 S. Ct. 1405 (2014)), the Supreme Court held that a knowing or intentional assault (based on offensive touching) qualifies as such a crime but left unanswered the question of whether the same was true for reckless assaults.

The Court answered this question in *Voisine v. United States* (136 S. Ct. 2272 (2016)). The case involved two Maine residents convicted under federal law (§ 922(g)(9)) for possessing firearms after prior convictions for domestic assault under Maine's statute prohibiting "intentionally, knowingly or recklessly caus[ing] bodily injury or offensive physical contact to another person" (Me. Rev. Stat. Ann., Tit. 17–A, § 207(1)(A)).

The men challenged the federal prohibition, arguing that (1) their prior domestic assault convictions were based on reckless, as opposed to knowing or intentional, conduct and (2) the federal law applies only to intentional acts of domestic abuse, not reckless acts.

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In a 6-2 opinion, written by Justice Elena Kagan and issued last June, the U.S. Supreme Court disagreed. Justice Kagan wrote that both the statutory text and background alike led to the conclusion that a reckless domestic assault qualifies as a misdemeanor crime of domestic violence under the challenged statute (*id.* at 2278). Kagan wrote that Congress's definition of a "misdemeanor crime of violence" contains no exclusion for convictions based on reckless behavior. A person who assaults another recklessly uses force, no less than one who carries out the same action knowingly or intentionally" (*id*. at 2280). And Congress, the majority concluded, intended to include in the firearms prohibition exactly the type of misdemeanor domestic assault actions the men were convicted of committing.

The Court held that "a reckless domestic assault" qualifies as a "misdemeanor crime of domestic violence" under the challenged federal law (*id*. at 2278 – 2282).

Justices Clarence Thomas and Sonia Sotomayor dissented. They rejected what they characterized as the majority's "overly broad conception of a use of force," arguing that "use" implies intention and requires "more than negligent or merely accidental conduct" (*id*. at 2283). And "force generally connotes the use of violence against another" (*id*. at 2283). Thus, the "use of physical force" against a family member refers to intentional acts of violence against a family member" (*id.* at 2284). According to the dissent, based on this interpretation, Maine's assault statute likely does not qualify as a "misdemeanor crime of domestic violence" and thus does not trigger the prohibition of possessing firearms under federal law (*id*. at 2284).

BACKGROUND

Federal Law

Federal law bars felons, fugitives, and specified others from owning firearms, including anyone convicted of a "misdemeanor crime of domestic violence" (18 U.S.C. § 922(g)(9)). This crime includes a misdemeanor under federal, state, or tribal law, committed by an individual with a specified domestic relationship with the victim, that "has, as an element, the use or attempted use of physical force" (18 U.S.C. § 921(a)(33)(A)).

United States v. Castleman

In *Castleman*, the U.S. Supreme Court held that a knowing or intentional assault (in this case, offensive touching) qualifies as a misdemeanor crime of domestic violence for purposes of the federal prohibition but expressly left open whether the same was true of reckless assault. In this case, Castleman was charged with intentionally or knowingly causing bodily injury to the mother of his child and then

was found selling firearms on the black market. He argued that the abuse was not severe enough to count as domestic violence. The Supreme Court disagreed and held that offensive touching satisfied the "physical force" requirement of the federal statute.

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Case History

Stephen Voisine was convicted of a misdemeanor under Maine law for assaulting his girlfriend. When law enforcement officials subsequently investigated him for killing a bald eagle, they learned that he owned a rifle. When a background check revealed his prior domestic assault conviction, he was charged with violating the federal law banning firearms possession by domestic abusers. William Armstrong was convicted of a misdemeanor for assaulting his wife. While searching his home as part of a drug investigation a few years later, law enforcement officials discovered firearms and ammunition and charged him with violating the federal law.

The two men argued that the federal prohibition did not apply to them because their prior convictions could have been based on reckless, rather than knowing or intentional, conduct and thus did not quality as misdemeanor crimes of domestic violence (*Voisine* at 2277). The district court disagreed, and both petitioners pleaded guilty, conditioned on the right to appeal.

When the First Circuit Court of Appeals affirmed the lower court's decision (*id.* at 2277), the defendants filed a joint petition for certiorari. In light of the *Castleman* decision, the Supreme Court vacated the First Circuit's decisions and remanded the cases for further consideration.

On remand, the First Circuit again upheld the convictions on the same ground. The Supreme Court decided to hear the case.

Majority Opinion

The issue before the Supreme Court was whether the federal prohibition on possessing firearms after a conviction for a misdemeanor crime of domestic violence "applies to reckless assaults, as it does to knowing or intentional ones" (*Voisine* at 2278). By a vote of 6-2, the Court agreed that it applies. Writing for the majority, Justice Elena Kagan said that this conclusion was based on the statutory text of § 922(g)(9) and background.

Kagan wrote that "reckless" conduct is widely understood to be conduct undertaken with conscious disregard of the "substantial risk that the conduct will cause harm" (*id.* at 2278). And while the word "use" in the phrase "use of force" implies some volition in the exercise of force, it "does not demand that the person applying force have the purpose or practical certainty that it will cause harm, as compared with the understanding that it is substantially likely to do so. Or otherwise said, that word is indifferent as to whether the actor has the mental state of intention, knowledge, or recklessness with respect to the harmful consequences of his volitional conduct" (*id.* at 2279).

In support of this position, Kagan cited *Leocal v. Ashcroft* (543 U.S. 1, 125 S.Ct. 377), which held that the "use" of force excludes accidents. Reckless conduct, which requires the conscious disregard of a known risk, is not an accident: it involves a deliberate decision to endanger another (*Voisine* at 2278 – 2280).

According to Kagan, Congress defined the term "misdemeanor crime of domestic violence" under § 922(g)(9) to include crimes that necessarily involve the "use...of physical force" and reckless assaults, no less than knowing or intentional ones, satisfy the definition. Further, Kagan wrote:

> Congress enacted § 922(g)(9) in order to prohibit domestic abusers convicted under run-of-the-mill misdemeanor assault and battery laws from possessing guns. Because fully two-thirds of such state laws extend to recklessness, construing § 922(g)(9) to exclude crimes committed with that state of mind would substantially undermine the provision's design (*id.* at 2278).

In sum, Kagan continued:

> Congress's definition of a "misdemeanor crime of violence" contains no exclusion for convictions based on reckless behavior. A person who assaults another recklessly "use[s]" force, no less than one who carries out that same action knowingly or intentionally. The relevant text thus supports prohibiting petitioners, and others with similar criminal records, from possessing firearms (*id.* at 2280).

The opinion goes on to discuss the relevant history, noting that when Congress enacted the statute in 1996, it intended to "bar those domestic abusers convicted of garden-variety assault or battery misdemeanors—just like those convicted of felonies—from owning guns." At that time, she wrote, a significant majority of jurisdictions defined such misdemeanor offenses to include the reckless infliction of

bodily harm. In targeting those laws, "Congress must have known it was sweeping in some persons who had engaged in reckless conduct...and indeed, that was part of the point: to apply the federal firearms restriction to those abusers, along with all others, whom the States' ordinary misdemeanor assault laws covered" (*id.* at 2280).

Justice Kagan noted that the common law was both mixed and unclear as well as, more importantly, displaced by modern developments—most notably the adoption of the Model Penal Code and state laws following it:

> Nothing suggests that, in enacting 18 U.S.C. § 922(g)(9), Congress wished to look beyond that real world to a common-law precursor that had largely expired. To the contrary, such an approach would have undermined Congress's aim by tying the ban on firearms possession not the laws under which abusers are prosecuted but instead to a legal anachronism....[T]he watershed change in how state legislatures thought of *mens rea* after the Model Penal Code makes the common law a bad match for the ordinary misdemeanor assault and battery statutes in Congress's sightline (*id*. at 2281 and footnote 5).

The majority opinion concludes:

> The federal ban on firearms possession applies to any person with a prior misdemeanor conviction for the "use...of physical force" against a domestic relation. § 921(a)(33)(A). That language, naturally read, encompasses acts of force undertaken recklessly—*i.e.,* with conscious disregard of a substantial risk of harm. And the state-law backdrop to that provision, which included misdemeanor assault statutes covering reckless conduct in a significant majority of jurisdictions, indicates that Congress meant just what it said (*id.* at 2282).

Dissenting Opinion

Justice Clarence Thomas wrote the three-part dissenting opinion. He was joined in Part I and Part II by Justice Sotomayor.

Parts I and II of the dissent faulted the majority for failing "to appreciate the distinction between intentional and reckless conduct" and for "concluding that only "volitional" acts constitute uses of force...and that mere "accidents do not" (*id.* at 2287*).* According to the dissent:

> When a person talks about "using force" against another, one thinks of intentional acts—punching, kicking, shoving, or using a weapon (*id*. at 2284)....And the distinction between intentional and reckless conduct is key for defining "use." When a person acts with a practical certainty that he will employ force, he intends to cause harm; he has actively employed force for an instrumental purpose, and that is why we can fairly say he "uses" force. In the case of reckless wrongdoing, however, the injury the actor has caused is just an accidental byproduct of inappropriately risky behavior; he has not actively employed force (*id.* at 2289).

In Part III, Justice Thomas, writing only for himself, contended that the majority's interpretation of the statute creates serious constitutional problems (*id.*at 2291). "In construing the statute...so expansively so that causing a single minor reckless injury or offensive touching can lead someone to lose his right to bear arms forever, the Court continues to relegate the Second Amendment to a second-class right," Justice Thomas wrote (*id.* at 2292, citing *Friedman v. Highland Park*, 136 S. Ct. 447, 450)).

The opinion ends as follows:

> In enacting §922(g)(9)...Congress was worried that family members were abusing other family members through acts of violence and keeping their guns by pleading down to misdemeanors. Prohibiting those convicted of intentional and knowing batteries from possessing guns—but not those convicted of reckless batteries—amply carries out Congress' objective....The "use of physical force" does not include crimes involving purely reckless conduct. Because Maine's statute punishes such conduct, it sweeps more broadly than the "use of physical force" (*Voisine* at 2292).

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