

NATIONAL JUDICIAL INSTITUTE  
ON DOMESTIC VIOLENCE

# CASE UPDATE

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## ***VOISINE V. UNITED STATES***



# Voisine v. United States

On June 26th the United States Supreme Court decided Voisine v. United States,<sup>1</sup> the latest Supreme Court case to clarify what crimes trigger the ban on firearms under 18 U.S.C. section 922(g)(9).<sup>2</sup> In this case update, the National Judicial Institute on Domestic Violence (NJIDV) explores what *Voisine* means for judges who handle domestic violence cases.

## What do I need to know?

The United States Supreme Court held that crimes committed with reckless force (force where a defendant ignores the propensity to inflict injury)<sup>3</sup> satisfy the federal definition of a “misdemeanor crime of domestic violence” and trigger the lifetime firearms ban under U.S.C. section 922(g)(9).<sup>4</sup>

## Who was the trial judge?

Judge John Woodcock is a federal district court judge in Maine, and former Chief District Judge from 2009 to 2015. Judge Woodcock serves on the Judicial Conference’s Advisory Committee on Evidence Rules and is slated to take senior status as a federal judge this year. He will continue to serve in a judicial capacity in Portland, Maine.





Dr. Jacquelyn Campbell's is one of the most highly regarded researchers on firearms and domestic violence. Her work has shown significant connections between domestic violence homicide and the use of firearms. Dr. Campbell's Danger Assessment is also part of the [curriculum materials](#) in the National Judicial Institute on Domestic Violence (NJIDV).

## Firearms, Domestic Violence and the Lautenberg Amendment

The link between domestic violence and firearms is well documented in peer-reviewed literature.<sup>5</sup> In 2003 Dr. Jacquelyn Campbell found that the presence of firearms in a domestic violence relationship can increase the probability of female victim lethality nearly five times.<sup>6</sup> The Violence Policy Center also found that the vast majority of women killed by firearms are killed by intimate partners or men they knew.<sup>7</sup> In a 2014 survey conducted by the National Domestic Violence Hotline more than 52% of victims said they would feel safer if their abuser had his firearms taken away.<sup>8</sup>

The clear correlation between firearms and domestic violence was the backdrop to the 1997 Lautenberg Amendment,<sup>9</sup> which banned domestic violence offenders from owning or possessing firearms. The amendment was codified in U.S.C. section 922(g) (9) which prohibited anyone “who has been convicted in any court of a misdemeanor crime of domestic violence” from possessing firearms.<sup>10</sup> Over the next decade, questions have arisen as to what constitutes a crime of domestic violence thereby triggering the ban.

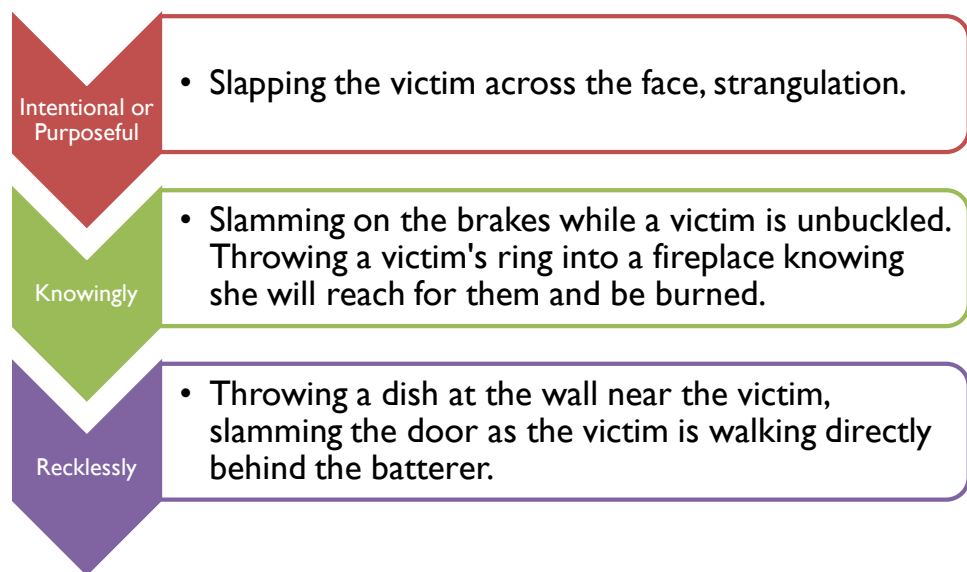
Criminal offenses are composed of two basic elements, the *actus reus*, or physical element, and the *mens rea* or mental element.<sup>11</sup> *Mens rea* or mental states are often separated into three classes: recklessness (acting while ignoring a substantial risk of harm), *knowingly* (acting with the knowledge that harm is almost certain) and *intention* (acting to cause the harm itself).<sup>12</sup> In most cases, state domestic violence laws are written to allow interchangeable use of these mental states to capture different variations of the use of force.<sup>13</sup> For example, Mississippi's domestic abuse statute includes “intentionally,

knowingly or recklessly causing bodily injury” to represent the alternative prohibited mental states. The use of different types of mental states in a single law lies at the heart of the legal challenges in *Voisine*.

U.S.C. Section 922 prohibits a person who is convicted of a misdemeanor crime of domestic violence from possessing or transferring firearms.<sup>14</sup> Section 921(a)(33) defines the exclusion further by stating that a misdemeanor crime of domestic violence is “an offense that has...the use or attempted use of physical force [as an element].”<sup>15</sup> The majority of crimes include some use of force, but the use of force may not specifically be set forth in either the conviction or factual basis. Had the trial court in *Voisine*’s original domestic violence case made a finding that *Voisine* intentionally used force upon the victim, the ban on firearms would have been triggered without question. The court’s language would have made clear that the facts of the case did trigger the ban on firearms. However as is often the case, the judge made no such finding.

Intentional (also called purposeful) force in a crime of domestic violence is usually self-evident. Intentional offenses include punches, slaps, strikes, kicks and various forms of physical violence where the batterer intends to hurt the victim. Likewise, force used with knowledge (knowingly) also tends to be easier to define. An offense committed knowingly is defined as an action where the defendant “is aware that [harm] is practically certain.”<sup>16</sup> For example, a batterer driving the car at a high rate of speed who slams the brakes while a victim is unbuckled, knows with near certainty that she will be thrown forward and injured.

The issue in *Voisine* was whether force used with “recklessness” qualified as the “use of force” and therefore could be defined as a misdemeanor crime of domestic violence. If reckless force did qualify, certain crimes committed with recklessness would trigger the firearms ban under 922(g)(9). On the other hand, and as aptly noted in Justice Thomas’ dissent, “When a person talks about “using force” against another, one thinks of intentional acts—punching, kicking, shoving, or using a weapon.”<sup>17</sup> Recklessness is one of the lowest scales of criminal *mens rea* and only requires that a defendant ignore the possibility of substantial risk of harm to the victim. This seemed, at the outset of the case a very low threshold when juxtaposed with the lifetime ban on firearms.



### What happened in *Voisine*?

Stephen Voisine was convicted in 2004 of a domestic violence assault under Maine Law.<sup>18</sup> This offense was defined as “intentionally, knowingly, or recklessly, causing bodily injury or offensive physical contact to a [family or household member].<sup>19</sup> In that case, Voisine’s slapped his girlfriend in the face by Voisine

while he was intoxicated. Voisine’s conviction triggered the firearms ban under section 922.<sup>20</sup> Eight years later, Voisine was arrested for shooting a bald eagle. (Ironically, an exceedingly rare federal crime.) He was charged and convicted in federal district court. The U.S. District Court Judge, Hon. John Woodcock was particularly harsh in his words, noting,

*From the court’s perspective, it is bad enough to shoot our national bird out of the sky ...I would have believed you were intoxicated [when the eagle shooting took place] because it was so stupid.*

In addition to the federal crime, Voisine was also charged with possession of a firearm in violation of section 922, the domestic violence firearms ban. In part, this charge was levied because of evidence that not only had Voisine possessed not one gun, but six.<sup>21</sup>

Following his plea of guilty, Voisine’s defense attorney moved to dismiss the count alleging unlawful possession of a firearm. The basis of his motion was that the underlying crime did not trigger section 922(g)(9). Although section 921 defined a misdemeanor crime of domestic violence as one which has “as an element the use of force,” Voisine’s attorney argued the court should interpret that provision in line with *Johnson v. United States*<sup>22</sup> and *United States v. Holloway*.<sup>23</sup> In *Johnson*, the courts held that the definition of force under the Armed Career Criminals Act (ACCA)<sup>24</sup> was “violent force—that is, force capable of causing physical pain or injury to another person.”<sup>25</sup> In *Holloway* the court held that “[a] conviction under...a simple assault and battery statute does not qualify as a predicate offense under [The Armed Career Criminals Act].”<sup>26</sup> Under the logic of both *Johnson* and *Holloway*, reckless force, (force used with “conscious disregard of the propensity to inflict injury) would not trigger a

firearms ban under section 922, abrogating Voisine’s conviction.

The U.S. District Court denied Voisine’s motion (*Read the order of the U.S. District Court [here](#)*), and Voisine appealed to the First Circuit Court of Appeals. The First Circuit affirmed the District Court’s judgement. Voisine then appealed to the U.S. Supreme Court but in the intervening period, the U.S. Supreme Court decided *United States v. Castleman*.<sup>27</sup> (*Read U.S. v. Castleman [here](#)*) which also addressed the use of force in section 922. Castleman paid particular attention to whether an “offensive touching” triggered section 922, and also cleared up the underlying question of whether the Armed Career Criminal Act definition applied to domestic violence stating “The very reasons we gave for rejecting that meaning in defining a “violent felony” are reasons to embrace it in defining a “misdemeanor crime of domestic violence.”<sup>28</sup> The court held in *Castleman* that whereas the word “violent” or “violence” standing alone “connotes a substantial degree of force,”...that is not true of “domestic violence.”<sup>29</sup> “Domestic violence” is not merely a type of “violence”; it is a term of art encompassing acts that one might not characterize as “violent” in a nondomestic context.”<sup>30</sup>

In light of Castleman’s discussion the Supreme Court vacated the judgment of the First Circuit without opinion and remanded it back for review in light of its decision. The First Circuit then took up the case again, but found more ambiguity than the Supreme Court anticipated. In fact, the First Circuit’s opinion alluded to the specific ambiguity in the Supreme Court’s opinion:

The Supreme Court left open whether a conviction with the mens rea of recklessness could serve as a § 922(g)(9) predicate...In footnote 8 [of *Castleman*], the [Supreme] Court stated, “the Courts of Appeals have almost uniformly held that recklessness is not sufficient... Simply put, we



are aware of no case -- including the cases in Castleman footnote 8 -- in conflict with Booker’s holding that a reckless misdemeanor assault satisfies § 922(g)(9)’s particular definition of a “misdemeanor crime of domestic violence.” Rather, § 922(g)(9)’s unique context, as described in Castleman and supported by the legislative history, suggests that § 922(g)(9) should be interpreted more broadly than other provisions.<sup>31</sup>

So back went Voisine to the Supreme Court. The court then directly took up the question of reckless force, tackling the issue of whether “§922(g)(9) applies to reckless assaults, as equally as it does to knowing or intentional ones.”<sup>32</sup>

**922(g)(9) (The lifetime ban on firearms) is triggered if:**

The underlying crime is a conviction	The underlying offense has an element of "the use or attempted use of physical force"	The defendant is a current or former spouse, parent, or guardian of the victim, child in common, Spousal cohabitant or former cohabitant, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim
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**In a nutshell, what was the court’s rationale for holding that reckless force satisfied the statute?**

Section 922(a)(33)(A) defines a misdemeanor crime of domestic violence as one which has “the use of force” as an element. The Supreme Court held that the term “use” includes crimes committed with a reckless mental state. Although the term

“use” implies some volition on the part of the actor, that volition does not need to be with the intent or “practical certainty” which may typify intentional or knowing mens rea. The volition required in the word “use” can simply be a use of force while ignoring the substantial risk that someone may be hurt.

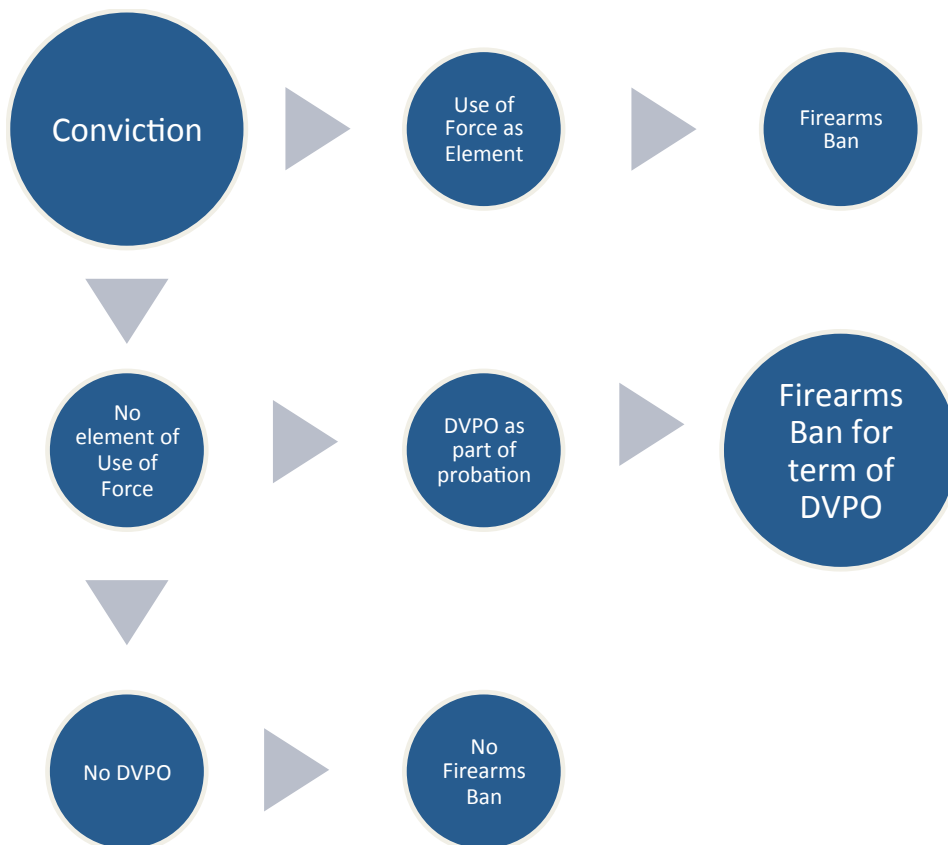
### **So what do judges need to know about reckless force?**

First, how much force was used or how strong the amount of force is not a dispositive method for determining the mental state of the defendant. Justice Elena Kagan stated “... to commit an assault recklessly is to take that action with a certain state of mind...to “consciously disregard” a substantial risk that the conduct will cause harm to another.”<sup>33</sup> This mental state can include different forms of conduct. For example, if a defendant rapidly accelerates a car while a victim is getting into the passenger seat, the force used is substantial, but may still be defined as reckless. On the other hand, if a defendant slaps a victim with a slight amount of force leaving a bruise, the offense is intentional although the force is minimal. While the strength of the force may be informative it does not define *mens rea* entirely.

Second, because the triggering provision in section 922 has the term “use of force,” the force must be volitional. Involuntary actions such as tripping and falling on a victim while intoxicated, will not satisfy recklessness because they do not convey the use of force as an instrumentality. Voisine was clear that “[T]he word ‘use’ conveys the idea that the [physical force] has been made the user’s instrument.”<sup>34</sup> However, judges should be wary about domestic violence crimes which do not require force.

A state can define conduct as domestic violence even though they may not have the “use or attempted use of force.”

For example, if a batterer says “I am going to slap you,” the defendant could potentially be convicted of a crime of domestic violence under state law. However, this conviction would not trigger the federal firearms ban as the use of force is not an element of the offense. However, if the batterer is convicted of the criminal threat and the court orders a domestic violence protection order as a term of probation, the resulting DVPO would trigger section 922(g)(8) which bars the defendant from firearms ownership for the length of the protection order.



“Consider a couple of examples to see the ordinary meaning of the word “use” in this context. If a person with soapy hands loses his grip on a plate, which then shatters and cuts his wife, the person has not “use[d]” physical force in common parlance. But now suppose a person throws a plate in anger against the wall near where his wife is standing. That throw counts as a “use” of force even if the husband did not know for certain (or have as an object), but only recognized a substantial risk, that a shard from the plate would ricochet and injure his wife.”

Justice Elena Kagan,  
*Voisine v. United States*

### **What should judges remember during sentencing?**

Judges should remember that 922(g)(9) can be triggered even if there is no harm to the victim. Section 921(a)(33)(A) includes “[the] attempted use of physical force, or the threatened use of a deadly weapon.” Thus it is possible for a batterer to “attempt” to use force, fail to harm the victim entirely, and still trigger a firearms ban under section 922(g)(9). For example, if a defendant throws a plate at a victim and misses her entirely, but is convicted of attempted battery, this will satisfy 922(g)(9) as an attempted battery has as an element the “attempted use of force.” In addition, if a defendant holds a baseball bat and says “I am going to hit you,” this conduct would satisfy section 922(g)(9) as the “threatened use of a deadly weapon.”

The firearms ban under section 922(g)(9) is also automatic and does not require any balancing test. Balancing tests are common in criminal court and are attractive ways to frame sentencing logic. However, judges should remember that an argument which attempts to relieve the defendant of firearms restrictions is, in most cases, legally impermissible. Section 922(g)(9) is a federal statute and state court judges do not have discretion to absolve a defendant of responsibility under federal law. Similarly, arguments which attempt to relieve a defendant of firearms restrictions by balancing the harm to the victim with the likely impact upon the defendant are legally irrelevant.

### **What about plea bargaining?**

Judges should remember that the firearms restriction in section 922(g)(9) is not dependent upon the classification of the misdemeanor crime under state law. All that is required for the firearms ban to be triggered is that the crime has the use of force as an element (and the victim is within the statutory

definition). Therefore, it is legally inaccurate for an attorney to argue that pleading to a certain crime which is not defined as domestic violence under state law will unilaterally absolve the defendant of the firearms ban. For example, if a defendant pleads to the crime of disturbing the peace as a reduction from a battery, but disturbing the peace has, as an element “recklessly using force upon a victim” the defendant will still be barred from possessing firearms.

Judges should remember that crime does have to be a misdemeanor itself, as USC section 922(g)(9) does indicate the crime must be a “misdemeanor crime of domestic violence.” If a defendant was convicted under a petty misdemeanor or ordinance offense such a regulatory violation for disorderly conduct this would not trigger the firearms ban.

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## End Notes

1 *Voisine v. United States*, No. 14–10154, slip op. at X (U.S. Jun. 27, 2016), [https://www.supremecourt.gov/opinions/15pdf/14-10154\\_19ml.pdf](https://www.supremecourt.gov/opinions/15pdf/14-10154_19ml.pdf)

2 18 U.S.C. § 922(g)(9) (West 2016).

3 Throughout this case update the definition of “Conscious disregard of propensity to inflict injury” is paraphrased as “ignoring substantial risk of harm.”

4 § 922(g)(9)

5 Elizabeth Vigdor and J.A. Mercy, *Do laws restricting access to firearms by domestic violence offenders prevent intimate partner homicide?* 30 Eval. Rev. 313 (2006); Jacquelyn Campbell et.al., *Risk Factors for Femicide in Abusive Relationships: Results From a Multisite Case Control Study*, 93 Am. J. Pub. Health 1089 (2002); Kellermann et. al., Gun Ownership as a Risk Factor for Homicide in the Home, 329 New. England J. of Med. 1084 (1993). A.M. Zeoli. R. Malinski and B. Turchan, *Risks and Targeted Interventions: Firearms in Intimate Partner Violence*, 38 Epedemiol. Rev. 125 (2016); K.A. Vittes et.al., *Removing guns from batterers: findings from a pilot survey of domestic violence restraining order recipients in California*, 19 Viol. Against Women 602 (2013).

6 Jacquelyn Campbell et.al., *Risk Factors for Femicide in Abusive Relationships: Results From a Multisite Case Control Study*, 93 Am. J. Public Health 1089 (2003).

7 When Men Murder Women: An Analysis of 2010 Homicide Data: Females Murdered by Males in Single Victim/Single Offender Incidents. 2012. Violence Policy Center. Washington, DC. Retrieved January 17, 2013. <http://www.vpc.org/studies/wmmw2012.pdf>.

8 Nat'l Domestic Violence Hotline Survey, Nat'l Domestic Violence Firearms Focus Survey (2014), available at, [http://www.thehotline.org/wp-content/uploads/2015/10/Hotline\\_Firearms\\_Survey.pdf](http://www.thehotline.org/wp-content/uploads/2015/10/Hotline_Firearms_Survey.pdf)

9 142 Cong. Rec. S11872-S11876 (Sept. 30, 1996)(Statement of Sen. Lautenberg).

10 § 922(g)(9)

11 Eugene N. Chesney, *Concept of Mens Rea in the Criminal Law*, 29 J. of Crim. L. and Criminology 627 (1939)(Discussing the principle of *actus non facit reum nisi mens sit rea*, or roughly translated, an act is not guilty-worthy without a guilty mind).

12 Model Penal Code § 2.02 Gen Requirements of Culpability (A.L.I.) (Note: The Model Penal Code actually separates mental states into four classes, purposefully\ intentionally, knowingly, recklessly and negligently).

13 See, e.g., Miss. Code. Ann. § 93-21-3 (2016); Nev. Rev. Stat § 33.018 (2016); Or. Rev. Stat. § 107.705 (2016); Pa. Stat. Ann. § 6102 (West 2016).

14 The precise language of this subsection states “to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.”

15 18 U.S.C. § 922(a)(33) (2016).

16 *Voisine v. United States*, No. 14–10154, slip op. at 3 (U.S.  
Jun. 27, 2016)

17 *Id.* at Dissenting Op. of Justice Thomas, No. 14–10154,  
slip op. at 3 (U.S. Jun. 27, 2016)

18 *Voisine*, No. 14–10154 at 2 (U.S. Jun. 27, 2016)

19 ME. Rev. Stat. Ann. 17-A § 207 & 207-A (2016)

20 § 922(g)(9).

21 *Voisine*, Slip Op. at 3.

22 *Johnson v. United States*, 559 U.S. 133 (2010).

23 *United States v. Holloway*, 630 F.3d 252 (1st Cir. 2011).

24 18 U.S.C. § 924(e) (2016)

25 *Johnson*, 559 U.S. at 140.

26 *Holloway*, 630 F.3d at 261.

27 *United States v. Castleman*, 134 S.Ct. 1405 (2014).

28 *Castleman*, 134 S.Ct. at 1407.

29 *Id.*

30 *Id.*

31 *United States v. Voisine*, 778 F. 3d 176 (2015).

32 *Voisine*, slip op. at 4.

33 *Voisine*, slip op. at 4.

34 *Voisine* slip op. at 6.





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