STRATEGIES in Brief

ÆQUITAS

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Disarming the Batterer: *United States v. Castleman*

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Domestic violence prosecutors across the country breathed a collective sigh of relief following the March 26, 2014, decision of the United States Supreme Court in *United States v. Castleman*.[2] The decision ensures that individuals who have been convicted of misdemeanor crimes of domestic violence, including those convicted under state or tribal statutes incorporating the common-law definition of battery (which includes physical force resulting in only slight injury, as well as offensive touching), will be subject to the federal prohibition on possession of firearms under 18 U.S.C. § 922(g)(9).

The issue in *Castleman* was interpretation of the phrase "use … of physical force,"[3] which is part of the statutory definition for the § 922(g)(9) term "misdemeanor crime of domestic violence." In *Johnson v. United States*,[4] the Court had interpreted a similar phrase[5] used in the federal Armed Career Criminal Act (ACCA),[6] to require "*violent* force"—more force than that required for the common-law offense of battery.[7] Many prosecutors and domestic violence professionals had feared that *Johnson*'s construction of "physical force" under the ACCA would be extended to the interpretation of "physical force" under § 922(g)(9). Such an interpretation would have rendered the firearms prohibition under § 922(g)(9) a "dead letter" in a number of states where a common-law definition of battery is incorporated in the criminal statutes under which domestic violence is prosecuted.[8]

Facts of the Case

In 2001, James Alvin Castleman was convicted of domestic assault in Tennessee for "intentionally or knowingly caus[ing] bodily injury to" the mother of his child, in violation of Tenn. Code Ann. § 39–13–111(b). In 2008 he was charged in federal court with violation of 18 U.S.C. § 922(g)(9) for possession of firearms, having previously been convicted of a "misdemeanor crime of domestic violence." The defendant moved to dismiss the indictment, contending that the Tennessee offense did not qualify as a "misdemeanor crime of domestic violence" because, he claimed, the crime lacked the element of the "use … of physical force" as required for conviction under the federal statute.[9]

The Tennessee domestic violence assault statute under which the defendant had been convicted in 2001 prohibited "an assault … against" a "family or household member."[10] Assault was defined as "(1) [i]ntentionally, knowingly or recklessly caus[ing] bodily injury to another; (2) [i]ntentionally or knowingly caus[ing] another to reasonably fear imminent bodily injury; or (3) [i]ntentionally or knowingly caus[ing] physical contact with another" in a manner that a "reasonable person would regard … as extremely offensive or provocative."[11]

The U.S. District Court for the Western District of Tennessee granted the motion to dismiss, holding that the "use … of physical force" required "violent contact with the victim"—something that, the court reasoned, was not required by the Tennessee statute because bodily injury could be caused without "violent contact."[12]

The U.S. Court of Appeals for the Sixth Circuit affirmed, reasoning that the Supreme Court's holding in *Johnson*—that a "violent felony" involving the "use … of physical force" for purposes of the ACCA required a higher degree of force than that implicated by common-law battery[13]—was equally applicable to the definition of "physical force" for purposes of defining "misdemeanor crime of domestic violence" under § 922(g)(9).[14] The Sixth Circuit therefore interpreted "misdemeanor

crime of domestic violence" to mean "any crime requiring strong and violent physical force, which happens to be a misdemeanor."[15] The court further held that an element of causing or attempting to cause "bodily injury" was insufficient to satisfy the requirements of § 922(g)(9); rather, a predicate statute with an injury element must specify "serious bodily injury" to qualify as a "misdemeanor crime of domestic violence."[16]

Since there was a split in authority among the various Circuits with regard to the interpretation of "use of force" for purposes of § 922(g)(9),[17] the Supreme Court granted *certiorari* to resolve the issue.

Analysis

The majority opinion, written by Justice Sotomayor and joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Bryer, and Kagan, began with a recitation of authority recognizing the "potentially deadly combination" of domestic violence and firearms.[18] The Court observed that Congress enacted § 922(g)(9) to "close [a] dangerous loophole" that had permitted so many domestic violence offenders, who had been convicted only of misdemeanors, to possess firearms when such possession by felons was prohibited.[19]

The Court first contrasted Congress's use of the term "violent felony" in the ACCA with the term "misdemeanor crime of domestic violence" in § 922(g)(9). Although Congress likely intended the sentencing enhancement for conviction of prior felonies to apply only to crimes involving physical force that could be considered "violent," domestic violence offenders are "routinely" prosecuted under generally applicable misdemeanor assault and battery statutes. It therefore made sense, the Court reasoned, for Congress to have intended, in the context of prior misdemeanor crimes of domestic violence, to reach offenses requiring the same degree of force as for conviction of common-law battery.[20]

Secondly, the Court said, "domestic violence" is a term of art encompassing comparatively minor acts of violence that collectively and cumulatively subject the victim to the violent partner's power and control. The Court cited a definition of "domestic violence" used by the Department of Justice's Office on Violence Against Women (OVW), which includes "[h]itting, slapping, shoving, grabbing, pinching, biting, [and] hair pulling."[21]

Thirdly, the Court reasoned, in contrast to the ACCA sentencing enhancement that labels an offender falling within its reach an "armed career criminal," individuals convicted of misdemeanor crimes of domestic violence were statutorily grouped with persons prohibited from possessing firearms because of their addictions, mental health problems, immigration status, or renunciation of American citizenship, as well as those subject to domestic violence restraining orders. The Court concluded that it is, therefore, not anomalous to treat persons convicted of minor acts of domestic violence in the same manner as those convicted of no crime at all.[22]

Finally, the Court observed that if the *Johnson* definition of "use of force" for purposes of the ACCA were imposed for purposes of § 922(g)(9), the latter provision would be ineffective in at least ten states, home to more than 30 percent of the nation's population. In those states, including California, offensive touching suffices for a conviction for assault or battery. Congress could not have intended that the provision be interpreted in a manner that would have rendered it so widely inapplicable, the Court concluded.[23]

Although Castleman's Tennessee conviction rested on a finding that he had intentionally or knowingly caused bodily injury to the victim, the Court explicitly declined to reach the question whether physical force causing, or capable of causing, bodily injury is necessarily the kind of "violent" force required by the *Johnson* decision.[24] Instead, the Court interpreted "force" for purposes of § 922(g)(9) to include any degree of force, including offensive touching.[25]

The Court noted that infliction of any degree of injury necessarily entails some degree of physical force. "It is impossible to cause bodily injury without applying force in the common-law sense."[26] The Court further held that "the knowing or intentional application of force is a 'use' of force,"[27] although the Court stopped short of declaring that reckless or negligent conduct would be insufficient to constitute a "use" of force.[28]

The Court reaffirmed the applicability of the "modified categorical approach" to the analysis of criminal statutes for the purpose of determining whether the prohibition under § 922(g)(9) applies, where the elements of the statute include alternative acts or mental elements constituting the offense. That approach, as set forth in *Shepard v. United States*, permits the examination of reliable documents, such as "the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information," to determine which of the statutory elements were satisfied by the defendant's conviction.[29] Thus, although the Tennessee statute Castleman was charged with violating also prohibited a threatened act of violence not involving a deadly weapon (an act that would not qualify as a "use or attempted use of force, or the threatened use of a deadly weapon"), the indictment to which he pled guilty specified that the assault involved the infliction of bodily injury. It was therefore clear that he had been convicted of a predicate "misdemeanor crime of domestic violence."[30]

In a concurring opinion, Justice Scalia said that he would have affirmed based upon *Johnson*'s definition of "physical force" as "*violent* force—that is *force capable of causing physical pain or injury to another person*,"[31] reasoning that "it is impossible to cause bodily injury without using force 'capable of' producing that result."[32] Justice Scalia would not have reached the question whether the definition included "offensive touching," but he strongly disagreed that acts of offensive touching should be considered "crimes of domestic violence" under the statute. He interpreted "force" as having the same definition under both the ACCA and § 922(g)(9), and was not persuaded that interpretation of the latter statute should depend upon how the term "domestic violence" was used by experts in the field.[33]

Justice Alito, joined by Justice Thomas, concurred in the judgment, noting their dissent from the decision in *Johnson*, and disagreeing that the decision in *Castleman* should depend upon distinguishing the ACCA's use of the term "force" from the manner in which the term is used in § 922(g)(9). They would have interpreted "force" to include the common-law definition of battery for purposes of both statutory provisions.[34]

Strategies

Prosecutorial response to the *Castleman* decision should center on maximizing the effectiveness of the federal firearms prohibition as a tool to disarm batterers.[35] These efforts include ensuring that defendants are, to the extent possible, convicted of offenses that will qualify as "misdemeanor crimes of domestic violence," as that term has been defined. They also include simplifying identification of such convictions using the "modified categorical approach" for "divisible" statutes that set forth alternative elements constituting a crime, for purposes of invoking the provisions of § 922(g)(9).

Although *Shepard* identifies a number of reliable court documents that can be consulted to determine the precise elements that support a criminal conviction for violation of a "divisible" statute, to the extent those elements can be identified readily, without resort to the transcript of a plea or of jury instructions, it will be easier for police, prosecutors, or others responsible for enforcing the law to identify persons subject to the prohibition under § 922(g)(9).

Criminal complaints, indictments, or other charging instruments should specify the precise act a defendant is charged with committing. Remember that threats must involve a threat to use a deadly weapon in order to come within the ambit of § 922(g)(9), so if there was such a threat, it should be specifically charged in that manner. Although *Castleman* did not hold that offenses committed in a reckless or negligent manner are excluded, the safest course is to charge purposeful,

intentional, or knowing conduct where the statute permits and where there is probable cause to support such mental elements.[36] Be careful not to include extraneous elements that are not applicable to the specific offense charged.

In the case of a guilty plea, the plea colloquy should cover any elements necessary to invoke the provisions of § 922(g)(9).In the case of a bench trial, the court should make findings of the specific elements of the crime that are implicated. In a jury trial, be sure that the jury instructions and the verdict sheet accurately reflect the specific elements involved with respect to the act and the mental state or intent constituting the crime. Where the law permits it, special interrogatories may be included as part of the verdict sheet specifying the elements that the jury has found. The judgment of conviction should, likewise, specify the elements of the crime of which the defendant has been convicted.

The domestic relationship between the defendant and the victim is not an element of the predicate offense in many states, and the Supreme Court has held that although the domestic relationship must be proved beyond a reasonable doubt in a prosecution for violation of § 922(g)(9), that relationship need not be an element of the predicate offense in order for it to qualify as a "misdemeanor act of domestic violence."[37] Even where the domestic relationship is not an element of the offense, however, including a description of the relationship in the charging documents or in other documents, such as the judgment of conviction, will facilitate identification of convictions that will trigger the prohibition against possession of firearms. This may be particularly useful in jurisdictions where the designation "domestic violence" (which may be noted on criminal histories) includes relationships (such as unrelated household members) that do not fall within the scope of § 922(g)(9).

Conclusion

The Court's decision in *Castleman* will bring the majority of domestic violence offenders who have convictions for misdemeanor crimes involving any level of force against their intimate partners or children within the federal prohibition on possession of firearms. The effectiveness of the federal statute as a means of disarming such offenders will depend upon the care and diligence of prosecutors who must correctly identify and prosecute those offenders so that professionals having the responsibility for enforcing that prohibition can accurately and easily determine their ineligibility to possess a firearm.[38]

ENDNOTES

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

3 18 U.S.C. § 921(a)(33)(A)(ii).

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

5 *See* 18 U.S.C. § 924(e)(2)(B)(i) (defining "violent felony" to include one that has as an element the "use, attempted use, or threatened use of physical force against the person of another").

6 18 U.S.C. § 924(e)(1). The ACCA is a sentencing enhancement for defendants who have three prior convictions for "violent felonies" at the time of their sentencing for prohibited possession of a firearm under 18 U.S.C. § 922(g).

7 *Johnson*, 559 U.S. at 440.

8 If the Supreme Court had affirmed on the basis of the Sixth Circuit's opinion, the statute would have been ineffective in all but a handful of states, since the Sixth Circuit would also have excluded offenses that could be committed by inflicting less than "serious" physical injury. *See* United States v. Castleman, 695 F.3d 582, 590 (6th Cir. 2012).

9 *See Castleman*, 133 S.Ct. at 1409. A "misdemeanor crime of domestic violence" is defined in 18 U.S.C. § 921(a)(33)(A) as "an offense that ... (i) is a misdemeanor under Federal, State, or Tribal law; and (ii) has, as an element, *the use or attempted use of physical force*, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim" (emphasis added).

10 TENN. CODE ANN. § 39–13–111(b).

11 TENN. CODE ANN. § 39–13–101(a).

12 *See Castleman*, 134 S. Ct. at 1409.

13 Common-law battery requires only the slightest force, and includes "offensive touching." *See Johnson*, 130 U.S. at 139.

14 *Castleman*, 695 F.3d at 586-87.

15 *Id.* at 588.

16 *Id.* at 589-90.

17 *Compare, e.g.,* United States v. White, 606 F.3d 144 (4th Cir. 2010) (holding that "offensive touching" is insufficient to constitute "force" under § 922(g)(9)); United States v. Hays, 526 F.3d 674 (10th Cir. 2008) (same); United States v. Belless, 338 F.3d 1063 (9th Cir. 2003) (same), *with* United States v. Griffith, 455 F.3d 1339 (11th Cir. 2006) (holding that "offensive touching" is sufficient to constitute force under the same statute); United States v. Nason, 269 F.3d 10 (1st Cir. 2001) (same); United States v. Smith, 171 F.3d 617 (8th Cir. 1999) (same).

18 *Castleman*, 134 S. Ct. at 1408-09.

19 *Id.* at 1409.

20 *Id.* at 1411.

21 *Id.* at 1411-12 (citing *Domestic Violence,* DEPARTMENT OF JUSTICE, OFFICE ON VIOLENCE AGAINST WOMEN, http://www.ovw.usdoj.gov/domviolence.htm (last visited Aug. 5, 2014)).

22 *Id.* at 1412.

23 *Id.* at 1413.

24 *Id.* at 1413. *See Johnson*, 130 U.S. at 140 ("We think it clear that in the context of a statutory definition of '*violent* felony,' the phrase 'physical force' means *violent* force—that is, force capable of causing physical pain or injury to another person") (emphasis in original).

25 *Castleman,* 134 S. Ct. at 1413.

26 *Id.* at 1415.

27 *Id.* (citing Leocal v. Ashcroft, 543 U.S. 1 (2004) (holding that a crime involving negligent conduct—in that case, a DUI with resulting bodily injury—did not constitute an "aggravated felony" involving a "use … of physical force" for purposes of a provision of the Immigration and Nationality Act mandating removal of an immigrant who has been convicted of an aggravated felony)).

28 Such a declaration would have been *dicta* in the context of this case, which did not present an issue of conduct that was less than "knowing." *Cf.* Begay v. United States, 553 U.S. 137, 146-47 (2008) (for purposes of ACCA predicate crime, conduct cannot be reckless or negligent).

29 Shepard v. United States, 544 U.S. 13, 26 (2005).

30 *Castleman*, 134 S. Ct. at 1414.

31 *Id.* at 1416 (Scalia, J., concurring) (quoting *Johnson*, 559 U.S. at 140 (second emphasis added)).

32 *Id.* at 1416-17 (Scalia, J., concurring).

33 *Id.* at 1417-22 (Scalia, J., concurring).

34 *Id.* at 1422 (Alito, J., concurring).

35 AEquitas, in partnership with the Battered Women's Justice Project (BWJP), has commenced a special initiative with the goal of improving practices to keep firearms out of the hands of domestic violence offenders. If you or a colleague is a prosecutor having expertise with firearms issues in domestic violence cases (removals, returns, forfeitures of weapons and firearms permits, etc.), we need your input as we examine practices and procedures to disarm abusers. Prosecutors interested in participating in this project, which will initially consist of a series of discussions about obstacles and creative solutions to enforcement of the laws prohibiting possession of firearms by domestic violence offenders, should send an email to tgarvey@aequitasresource.org.

36 A fact-finder may still consider offenses with elements of recklessness or negligence where they are lesser-included offenses of the purposeful or knowing offense.

37 United States v. Hayes, 555 U.S. 415 (2009).

38 For additional information on prosecuting domestic violence cases involving firearms, see John Wilkinson, *Domestic Violence and Firearms: A Deadly Combination* 3 STRATEGIES (Mar. 2011), http://www.aequitasresource.org/library.cfm.

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