18 U.S.C. § 922(g)(9) Case Law

Revised 2015

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This project is supported by Grant No. 2014-TA-AX-K046 awarded by the Office on Violence Against Women, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this publication are those of the author(s) and do not necessarily reflect the views of the U.S. Department of Justice, Office on Violence Against Women.

Compiled by the National Center on Protection Orders and Full Faith & Credit

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18 U.S.C. § 922(g)(9) Case Law

First Circuit (Maine, Massachusetts, New Hampshire, Rhode Island, Puerto Rico)

Bailey v. State, No. CR-01-036, 2003 Me. Super. LEXIS 158 (Me. Super. Ct. July 28, 2003). After pleading guilty to assaulting his then wife, Bailey filed a petition for post-conviction review, arguing *inter alia* that his plea was not knowing and intelligent because he was not aware that it would result in the loss of his firearm rights. He also argued that he had been affirmatively misled by the prosecutor regarding the effect of the plea on his firearm rights. Regarding the first argument, the court found that neither the state nor the court must advise defendants of the collateral consequences of a plea. The court agreed with Bailey's second contention, however, finding that his plea was not knowing and intelligent because he had specifically entered the agreement based upon representations by the prosecutor that it would not result in the loss of his firearm rights. When Bailey asked the prosecutor whether he could keep his firearms, the prosecutor replied "This is the deal, that's it." Despite the fact that the law was in flux at the time regarding whether the Maine assault statute triggered the prohibition in 18 U.S.C. § 922(g)(9), the court found that the prosecutor's response meant that Bailey's "plea was generated by an understanding that no jeopardy would lie as to his right to possess firearms." Consequently, the court found that his plea was not voluntarily and intellectually made. **Key Issue: Voluntariness of Guilty Plea.**

Carew v. Centracchio, 17 F. Supp. 2d 56 (D. R.I. 1998). [Defendant's motion for summary judgment.] Plaintiff Carew was a security specialist in the Rhode Island Air National Guard. In 1996, Carew was charged with a "Domestic Simple Assault" in Rhode Island, and entered a plea of nolo contendere. He was sentenced to one year of probation. In 1997, Carew was notified by letter that the disposition of his criminal case rendered him unqualified for continued employment as a state security officer, and referenced 18 U.S.C. § 922. Carew argued that disposition pursuant to his nolo contendere plea is not a conviction under state law, and he is therefore not subject to the provisions of 922(g)(9). Carew relied upon a section of the Rhode Island code that provides for special circumstances under which a nolo contendere plea and successful completion of probation will not constitute a conviction. However, the district court found that on the date that Carew was discharged, he had not yet successfully completed his term of one year probation, and was therefore subject to the prohibition imposed by 922(g)(9). The district court granted summary judgment for the defendant as to Carew's claims of procedural and substantive due process (Carew was afforded notice and a hearing and his termination was for cause). **Key Issue: Definition of "Conviction."**

D'Alessadro v. Pensylvania State Police, 937 A.2d 404 (Pa. S. Ct. 2007). D'Alessandro sought a license to carry a firearm, which was denied by appellant Pennsylvania State Police (PSP) because he had committed an act of domestic violence (simple assault) and thus could not obtain a firearm under 18 U.S.C.S. § 922(g)(9). The Office of the Attorney General agreed with the PSP's determination. The lower court, the Commonwealth Court of Pennsylvania, reversed on the grounds that the police report on which the denial was based was inadmissible "hearsay;" D'Alessandro claimed that he was not living with the victim of the assault at the time and so the relationship requirement was not met. PSP argues that D'Alessandro's testimony that he had a sexual relationship with the victim, coupled with the information contained in the police report that the victim lived at the same address as D'Alessandro and was his "live in girlfriend," established that he cohabitated with the victim. The Court subscribes to the PSP's argument, says that the evidence is not hearsay, and reverses and remands the case. **Key Issue: Relationship Requirement.**

Frazier v. Northern State Prison, Dept. of Corrections, 392 N.J. Super. 514, 921 A.2d 479 (App.Div. 2007). Frazier was a corrections officer who was dismissed for "conduct unbecoming an officer" and "inability to perform job duties" when he was arrested on domestic violence assault charges. He appeals, saying that a simple assault under N.J.S.A. 2C:12-1a(3) does not constitute a "misdemeanor crime of domestic violence" and therefore that 18 U.S.C. 922(g)(9) does not apply. An Administrative Law Judge held that his removal as an officer was permissible solely on the grounds that he could no longer carry a firearm. The Court holds assault, which consists of an "[a]ttempt by physical menace to put another in fear of imminent serious bodily injury," N.J.S.A. 2C:12-1a(3), is not a "misdemeanor crime of domestic violence," because it does not have, "as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon." There was no actual physical force used: "An assailant could violate N.J.S.A. 2C:12-1a(3) by raising a clenched fist in a menacing manner, without hitting or attempting to hit the victim." **Key Issue: Physical Force Element.**

Lemieux v. U.S., 2008 U.S. Dist. LEXIS 22792 (D. Me. 2008). This was a motion for habeas corpus. The Petitioner claimed ineffective assistance of counsel. Lemieux states that he informed his attorney that he was convicted, with some confusion on his part about the consequences, of a MCDV in 2004. Since that conviction Lemieux had successfully purchased firearm on one occasion. Lemieux argued that because he was able to get approval to purchase a firearm in December 2004, he had been informed by federal authorities that his prior conviction was not a qualifying misdemeanor conviction of domestic violence. After this December 2004 approval, Lemieux argued, he reasonably believed that the January 2005 response of restricting the sale of firearms "was [a] mistaken one." Lemieux stated that he went to the same firearms dealer all three times, an indication that he was not "firearm dealer shopping." In sum, Lemieux argued that because federal authorities had issued the gun dealer a "proceed to sale," he could not be a prohibited individual, at least his confusion or reliance on the 2004 ATF proceed sale would absolve him. (It was deemed that as a strategic move the attorney did not enter post conviction purchases and reliance on ATF approval into evidence. The Court ruled that as a legal matter there was no attorney misconduct.) The motion was denied. **Key Issue: Nature of Purchase after Proceed to Sale.**

United States v. Booker, 570 F. Supp. 2d 161 (D. Me. 2008). Booker was indicted under 18 U.S.C. § 922(g)(9) for possessing a firearm although convicted of a misdemeanor crime of domestic violence. Booker claimed the statute violated the Second Amendment. The district court noted *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) does not stand for a universal right to bear arms, but also stated *Heller* did not answer questions regarding the level of scrutiny required in restricting possession of firearms. The court declines to answer this question; instead, the court asks whether "a statutory prohibition against the possession of firearms by felons and the mentally ill is similar enough to the statutory prohibition against the possession of firearms by persons convicted of the misdemeanor crime of domestic violence to justify its inclusion in the list of 'longstanding prohibitions' that survive Second Amendment scrutiny." *Booker* at 163. The court decides that it does, and therefore denies the defendant's motion to reconsider the order denying his motion to dismiss the indictment.

United States v. Booker, 644 F.3d 12 (1st Cir. Me. 2011). Two defendants, Booker and Wyman were convicted of assault against their respective significant others. They were later charged with knowingly possessing firearms in violation of 18 U.S.C. § 922(g)(9). Maine's undifferentiated assault statute stated that a person could commit assault intentionally, knowingly, or recklessly. The two men appealed their convictions under 18 U.S.C.S. § 922(g)(9), arguing that the assault must be intentional to trigger 18 U.S.C. § 922(g)(9). They also argued that 18 U.S.C. § 922(g)(9) violated their 2nd Amendment right to possess a weapon. The Court found both arguments unpersuasive and upheld the conviction. **Key**

Issues: 2nd Amendment rights, nature of domestic violence misdemeanor, intent and physical force requirement.

United States v. Bryant, 2011 U.S. Dist. LEXIS 39809 (D. Me. Apr. 13, 2011). On February 24, 2011, a federal grand jury indicted Troy Bryant for possessing ammunition after having been convicted of a misdemeanor crime of domestic violence in violation of 18 U.S.C. § 922(g)(9). Bryan argued that his 2nd Amendment rights had been violated. He also asserted that he had not committed a predicate crime under 18 U.S.C. § 922(g)(9). His stated that Maine's assault statute did not have the same requirements of *mens rea* or physical force. Bryant stated that the Supreme Court's decision in *U.S. v. Johnson*, and that of the 1st Circuit in *U.S. v. Holloway*, which construed the term physical force in different terms in reference to the Armed Career Criminal Act. The Court denied both these arguments and affirmed the conviction. **Key Issues: 2nd Amendment rights, nature of domestic violence misdemeanor, intent and physical force requirement.**

United States v. Cadden, 98 F. Supp. 2d 193 (D. R.I. 2000). In July 1998, Cadden pled nolo contendere to one count of simple domestic assault in the Rhode Island District Court, and was placed on probation. In April 1999, Cadden was arrested by local law enforcement and charged with several offenses, including one count of possessing two pipe bombs. Cadden pled guilty to the indictment, and sentencing was scheduled. The court asked the parties to submit memoranda addressing whether Cadden was a prohibited person under 18 U.S.C. § 921(a)(33). The court held that a determination of whether a conviction is a conviction for purposes of (g)(9) must be decided as a matter of federal, not state, law, and therefore, the nolo plea plus probation constitutes a conviction for purposes of the federal sentencing guidelines. **Key Issue: Definition of "Conviction."**

United States v. Costigan, No. 00-9-B-H, 2000 U.S. Dist. LEXIS 8625 (D. Me. June 16, 2000). Maria Santos lived with David Costigan; during this time Costigan was physically violent toward Ms. Santos and was convicted of assaulting her (he was convicted once before for assaulting her when they were not living together). Costigan was indicted for violation of 18 U.S.C. § 922(g)(9). At trial, he claimed that the government failed to prove that he had cohabited with Ms. Santos "as a spouse." Costigan also argued that because the phrase "cohabit as a spouse" is not defined, the statute is vague and does not provide adequate notice of the conduct it prohibits. After a review of what it means to cohabit as a spouse, the court found that (1) the government was not required to prove that Costigan knew he was prohibited from possessing a firearm, (2) Costigan and Ms. Santos had, in fact, cohabited as spouses, (3) the government was not required to prove that Costigan knew that his misdemeanor conviction was for domestic violence, and (4) the government proved that by the time of the second misdemeanor Costigan was cohabiting with Ms. Santos as a spouse. The district court found Costigan guilty of violating § (g)(9). **Key Issues: Relationship Requirement; Due Process (notice).**

United States v. Denis, 297 F.3d. 25 (1st Cir. 2002). In May 1996, Denis entered a plea of nolo contendere on a charge of assaulting his live-in girlfriend under Maine law. The criminal complaint did not designate the charge as domestic violence in nature. Several months later, Congress enacted section 922(g)(9), and in March 2000 law enforcement in Maine discovered that Denis was in possession of a rifle. Denis was charged with violating section 922(g)(9) and he entered a conditional guilty plea after his motion to dismiss was denied. On appeal to the First Circuit, Denis argued that his conviction violated due process because he was denied fair warning that his conduct was criminal. He proffered this argument on two grounds: First, that he was justifiably ignorant of the federal statute. Second, that section 922(g)(9) is unconstitutional as applied to him because the predicate conviction occurred prior to the enactment date of the statute. The First Circuit rejected both contentions. Regarding the first contention, the

court found that Denis' claim failed under both prongs of the test articulated in Lambert v. California, 355 U.S. 225 (1957), in that his conduct was not "wholly passive" and, pursuant to United States v. Meade, 175 F.3d 215 (1st Cir. 1999) (applying 18 U.S.C. 922(g)(8)), Denis' domestic violence conviction was sufficient to alert him to the possible consequences of firearm possession. The First Circuit was not concerned that the predicate conviction was not styled a "domestic violence" offense, nor that district courts had disagreed about whether both variants of the Maine assault statute triggered the section 922(g)(9) prohibition, because Denis himself knew that his crime involved the use or attempted use of physical force as required by the federal statute. Regarding Denis' argument relating to the enactment date of the statute, the First Circuit held that the punished conduct was not the original offense, but the firearm possession subsequent to the enactment of section 922(g)(9). **Key Issues: Due Process (notice); Ex Post Facto Clause.**

United States v. Frechette, 456 F.3d 1 (1st Cir. 2006). The Defendant was indicted for possession of a firearm after being convicted of a misdemeanor crime of domestic violence pursuant to 18 U.S.C. §922(g)(9). He moved to dismiss the indictment based on the argument that the superseding conviction did not qualify, because it was obtained with out knowing and intelligent waiver of counsel and jury trial as required by 18 U.S.C. §921(a)(33)(B)(i). The predicate offense was a conviction of a misdemeanor of domestic violence in Maine after the Defendant plead "no contest" to the charges. Before he entered the no contest plea, Frechette had been advised, in a group arraignment, that his right to possess a firearm may be prohibited, and was informed of his rights to counsel and to a jury trial. The district court determined knowing and intelligent waiver was to be was to be evaluated by the law of the state of the predicate conviction and not by federal law. Under Maine law, the waiver was invalid. *State* v. *Rowell*, 468 A.2d 1005 (Me. 1983). It was also stated that if the federal constitutional standard applied, their determination would be reversed and the conviction would be valid. The indictment was then dismissed for failing to meet the Maine standards for waiver of counsel, but the waiver of a jury trial was valid. The First Circuit reversed the district court's ruling, holding that the validity of a waiver of counsel for purposes of 18 U.S.C. §921(a)(33)(B)(i)(II)(bb) should be evaluated under the federal constitutional standard and that Frechette validly waived that right. They noted that when a federal statutory term is used, it is to be defined by federal law and federal standards, unless otherwise indicated. The First Circuit agreed with the district court in concluding that Frechette validly waived his right to counsel. As a result the order of dismissal was vacated and remanded. **Key Issue: Sixth Amendment.**

United States v. Hartsock, 347 F. 3d 1 (1st Cir. 2003), *on remand*, 2004 WL 114984 (D. Me. 2004). Hartsock was charged with violating § 922(g)(9) based upon a 1992 conviction of misdemeanor domestic assault in a Maine court. The federal district court granted Hartsock's motion to exclude the record of the conviction because the government had failed to meet its burden to show that Hartsock had knowingly and intelligently waived his right to counsel. The government appealed to the First Circuit, which reversed, finding that though the government does bear the burden of proving that the defendant was convicted of a misdemeanor crime of domestic violence, the defendant must raise as an affirmative defense that he qualifies for the exception available to those who have not knowingly and intelligently waived their right to counsel. The First Circuit further held that the defendant, rather than the government, should bear the burden of persuasion that he is within the exception. The court noted that the defendant is likely to have significantly greater knowledge regarding the circumstances of the predicate misdemeanor offense, and that the government is unlikely to be able to offer any proof beyond the record of the conviction. On remand, the district court found that Hartsock had met his burden of proof, based in large part upon the fact that the state court judge had never discussed the issue with Hartsock and Hartsock's assertion that he never understood that he could have sought the advice of his own counsel. **Key Issue: Waiver of Right to Counsel.**

United States v. Kinney, Crim. No. 03-57-B-W, 2003 U.S. Dist. LEXIS 23002 (D. Me Feb. 11, 2004). Kinney was charged with violating § 922(g)(9) based upon his possession of a firearm after having been convicted of a Maine misdemeanor crime of domestic violence five years earlier. Kinney filed a motion to dismiss, alleging that he had not waived his right to counsel or his right to a jury trial. The federal district court rejected Kinney's argument, finding that the state court judge had adequately advised Kinney of his right to a lawyer and to a jury, and that Kinney had understood that he was giving up these rights in pleading guilty to the state offense. **Key Issue: Waiver of right to counsel and right to jury trial.**

United States v. Meade, 175 F. 3d 215 (1st Cir. 1999). Meade, while subject to an active protection order, threatened to shoot his wife as he pounded on her apartment door. When police arrived, they instructed him to lie face down and show his hands. Instead, he crouched down and thrust his hand into his parked car. After his arrest, police retrieved a loaded handgun from the car. Meade was found guilty in district court of violating §§ 922(g)(8) and (g)(9). On appeal, he argued that both § 922(g)(8) and (g)(9) are unconstitutional. The 1st Circuit affirmed. Meade made two challenges to § (g)(9). First, Meade contended that his conviction under a Massachusetts general assault and battery statute is not a qualifying misdemeanor crime of domestic violence. He argued that the only crimes that qualify under the statute are those whose elements require a showing of the mode of aggression (e.g., use of a weapon) and the defendant's relationship status (e.g., spouse). The court rejected this argument, saying that Congress did not intend that the only misdemeanors that would qualify under § 922(g)(9) are those that include the relationship status as an element within their formal definition; rather, in construing statutes, "courts should presume, absent contrary evidence, that Congress, knew, and meant to adopt, the background legal concepts associated with the words that it chose to incorporate into a law." Meade also argued that the statute is unconstitutionally vague because it does not define the offense with sufficient clarity so that an ordinary person would know what is prohibited by it. The court rejected this argument because the statute clearly specifies what is prohibited and to whom it applies. **Key Issues: Required Elements of Misdemeanor Offense; Vagueness.**

United States v. Nason, 269 F.3d 10 (1st Cir. 2001). In 1998, Nason pled guilty to a charge of assaulting his wife under Maine's general-purpose assault statute. No distinction was made at the time between the two possible prongs of the statute, which state that a person is guilty of a misdemeanor if he: (1) "Intentionally, knowingly, or recklessly causes bodily injury ... to another," or (2) "intentionally, knowingly, or recklessly causes ... offensive physical contact to another." In 2000, Nason was indicted for violating 922(g)(9) after he was found in possession of a cache of firearms. Nason pled guilty to the charge, but moved to withdraw his plea after a different district court in Maine found that an undifferentiated assault conviction may have involved "offensive physical contact," and therefore does not satisfy the requirements of the federal law. On appeal, the First Circuit, which consolidated the cases for oral argument, found that section 922(g)(9) encompasses misdemeanor crimes involving all types of "physical force," regardless of whether they could reasonably be expected to cause bodily injury. Interpreting the Maine statute's "offensive physical contact" prong, the appellate court held that it necessarily involves the use of physical force and that as a result any conviction under the Maine statute, whether under the "bodily injury" or "offensive physical contact" prong, constitutes a predicate offense under section 922(g)(9), provided the other requirements of the statute are satisfied. The First Circuit also rejected Nason's claim that section 922(g)(9) was unconstitutionally vague. **Key Issue: Use of Physical Force Requirement; Vagueness.**

United States v. Pettengill, 682 F. Supp. 2d 49 (D. Me. 2010). Pettengill was indicted under 18 U.S.C. § 922(g)(9) for possession of a firearm after being convicted for a misdemeanor crime of domestic violence in 2003. Pettengill moved to dismiss by arguing the statute was a violation of the Second Amendment. First, Pettengill attacked *United States v. Booker*, 570 F. Supp. 2d 161 (D. Me. 2008) (holding the Second Amendment did not prevent prohibiting possession of a firearm for those convicted of misdemeanor domestic violence crimes) by stating the court did not provide a meaningful distinction between felonies and misdemeanors. The district court said this argument "miss[ed] the point," as the *Booker* decision was primarily based on distinguishing between categories of firearm prohibition in light of *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). Furthermore, the district court noted every court faced with such a challenge to 18 U.S.C. § 922(g)(9) after *Heller* had affirmed the constitutionality of the statute. Next, Pettengill argued that Second Amendment restrictions should be afforded higher scrutiny. The court, which had not previously ruled on this issue, applied an intermediate level of scrutiny and upheld the constitutionality of the statute. Motion to dismiss denied. **Key issues: 2nd Amendment.**

United States v. Salley, 651 F.3d 159 (1st Cir. Me. 2011). Defendant Salley appealed his conviction for knowingly possessing a firearm in violation of 18 U.S.C. § 922(g)(9). Salley argued that two statements the prosecutor made about the lack of evidence showing an absence of knowledge concerning the firearm constituted prosecutorial misconduct. Salley stated that these statements emphasized his choice not to testify. The Court denied this argument, noting that the defense strategy opened up the door to the prosecutor's statements, which did not explicitly mention the defendant's decision not to testify. **Key Issues: prosecutorial misconduct.**

United States v. Stedt, 324 F. Supp. 2d 116 (D. Me 2004). Stedt was indicted for a violation of § 922(g)(9) based upon a 1993 misdemeanor domestic violence conviction in a Maine court. He moved to dismiss the indictment, claiming that he was eligible for the civil rights restoration exception in § 921(a)(33)(B)(ii). Although Stedt was sentenced to a period of incarceration based upon the conviction, the parties did not dispute that he did not lose any civil rights under Maine law. Stedt urged the court to follow the reasoning in a First Circuit decision involving the civil rights restoration exception that applies to 18 U.S.C. § 922(g)(1) and hold that Stedt's civil rights had been "restored" even though they were never lost. The district court declined to do so, and instead relied on precedent form other federal circuits to find that a defendant must have first lost his civil rights and then had them restored to be eligible for the exception. The court denied Stedt's motion to dismiss on that basis. **Key Issue: Civil Rights Restoration.**

United State v. Swain, 26 Fed. Appx. 15 (1st Cir. 2001) (unpublished). Swain, after having pled guilty to possession of an unregistered firearm, appealed his sentence. He challenged the district court's enhancement of the sentence based upon its finding that his prior conviction under Maine's misdemeanor assault statute was a misdemeanor crime of domestic violence under section 922(g)(9). Swain's appeal was consolidated with *United States v. Nason* (below), and the First Circuit upheld the enhancement on the same grounds as set forth in that decision. **Key Issue: Use of Physical Force Requirement.**

United States v. Voisine, 2011 U.S. Dist. LEXIS 40931 (D. Me. Apr. 14, 2011). Defendant argued that his conviction under 18 U.S.C.S. § 922(g)(9) violated his 2nd Amendment right to bear arms. The Court held that this was the same argument asserted in *United States v. Bryant, 1:11-CR-00021-JAW,* (2011 U.S. Dist. LEXIS 39809 and dismissed the case. **Key Issues: 2nd Amendment rights.**

United States v. Voisine, 778 F.3d 176 (1st Cir. 2015). Defendant argued that because his conviction of domestic violence assault was based on recklessness, and not intent or knowledge, that 18 U.S.C. § 922(g)(9) did not trigger. Similar to previous cases, such as *United States v. Booker*, the Court rejected the argument, holding that recklessness is a satisfactory *mens rea* for 922(g)(9) predicate offenses. **Key Issues: Required elements of misdemeanor offense.**

United States v. Wyman, No. CR-08-154-B-W, 2009 WL 426293 (D. Me. Feb. 20, 2009). Wyman was indicted for possession of a firearm in violation of 18 U.S.C. § 922(g)(9) as he was previously convicted of a misdemeanor domestic violence crime. Wyman relied on *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), to argue he has a Second Amendment right to bear arms, which the court promptly rejects. Wyman next contends that the Maine assault statute does not qualify as a prior "misdemeanor crime of domestic violence" pursuant to § 922(g)(9) as it lacks a spousal/domestic partner requirement. The court rejects this argument pursuant to *United States v. Meade*, 175 F.3d 215 (1st Cir. 1999) (stating Congress did not intend to limit § 922(g)(9) to offenses that include a definition of a relationship status as an element).* Wyman also raises, and the court rejects, an argument regarding the reckless conduct scienter requirement for conviction under the assault statute. Motion to dismiss denied. **Key Issues: 2nd Amendment, required elements of a misdemeanor offense.**

***** The court noted the possibility that *Meade* may be overruled due to a case that was currently before the United States Supreme Court. That case, *United States v. Hayes*, 129 S. Ct. 1079 (2009), has been decided and affirmed the *Meade* ruling. The court held a domestic relationship is not required to convict an individual for possession of a firearm when the individual has been convicted of a misdemeanor domestic violence crime.

Second Circuit (Connecticut, New York, Vermont)

People v. Frederick, 2015 IL App (2d) 140540 (Ill. App. Ct. 2015). Defendant convicted of battery against a former girlfriend. Conviction qualified as a predicate offense to trigger 922(g)(9). The court also found that under 922, the Department of State Police cannot issue a Firearm Owner's Identification Card to an individual convicted of a misdemeanor crime of domestic violence. **Key issues: Firearm Owner's Identification Card.**

United States v. Kavoukian, 315 F.3d 139 (2d Cir. 2002). Kavoukian was indicted in federal court for possessing firearms in violation of section 922(g)(9). The predicate offense was a prior conviction for Menacing in the Second Degree under New York law. During the commission of that crime, Kavoukian had "displayed a rifle" in a "manner intended to place [the victim] in fear." Kavoukian moved to dismiss the indictment on, *inter alia*, the grounds that the conviction did not qualify as a predicate offense under section 922(g)(9) because the New York statute does not have as a required element the existence of a domestic relationship. The district court agreed, dismissing the section 922(g)(9) counts and stating that in order to sustain the indictment it would have to reexamine the state-court conviction to determine whether the requisite relationship existed. The district court balked at doing so, and instead examined the statement of conviction and sentencing records, which it found to be insufficient to support the existence of the requisite relationship.

On appeal, the Second Circuit reversed the district court, holding that the language and legislative history of section 922(g)(9) make it clear that the requisite relationship does not have to be an element of the predicate misdemeanor crime. The appellate court noted that its decision was consistent with those of all other Courts of Appeal that have considered the issue. The Second Circuit did suggest,

however, that the district court consider on remand whether the indictment's failure to allege a domestic relationship between the defendant and the victim of the predicate offence renders it insufficient. Neither party had raised that specific issue. **Key Issue: Required Elements of Misdemeanor Offense; Relationship Requirement.**

United States v. Wells, 826 F. Supp. 2d 441 (N.D.N.Y 2011). Defendant Wells appealed his conviction of knowingly possessing a firearm under 18 U.S.C. § 922(g)(9). He puts forward three arguments. First, he states that the charge against him for the predicate crime of false imprisonment, a misdemeanor crime of domestic violence, failed to state that the crime was committed against a person with whom he was in a domestic relationship with. It was clear that the crime was committed against his wife, but Wells argues that the relationship needed to be specified. Second, Wells argues that the conviction under 18 U.S.C. § 922(g)(9) violated his 2nd Amendment rights. Thirdly, he argues that the crime of false imprisonment should not be a predicate crime under 18 U.S.C. § 922(g)(9) because it does not require physical force. The Court denied the appeal to dismiss. **Key Issues: 2nd Amendment rights, nature of domestic violence misdemeanor, intent and physical force requirement, domestic relationship requirement.**

Third Circuit (Delaware, New Jersey, Pennsylvania, Virgin Islands)

D'Alessadro v. Pensylvania State Police, 937 A.2d 404 (Pa. S. Ct. 2007). D'Alessandro sought a license to carry a firearm, which was denied by appellant Pennsylvania State Police (PSP) because he had committed an act of domestic violence (simple assault) and thus could not obtain a firearm under 18 U.S.C.S. § 922(g)(9). The Office of the Attorney General agreed with the PSP's determination. The lower court, the Commonwealth Court of Pennsylvania, reversed on the grounds that the police report on which the denial was based was inadmissible "hearsay;" D'Alessandro claimed that he was not living with the victim of the assault at the time and so the relationship requirement was not met. PSP argues that D'Alessandro's testimony that he had a sexual relationship with the victim, coupled with the information contained in the police report that the victim lived at the same address as D'Alessandro and was his "live in girlfriend," established that he cohabitated with the victim. The Court subscribes to the PSP's argument, says that the evidence is not hearsay, and reverses and remands the case. **Key Issue: Relationship Requirement.**

Frazier v. Northern State Prison, Dept. of Corrections, 392 N.J. Super. 514, 921 A.2d 479 (App.Div. 2007). Frazier was a corrections officer who was dismissed for "conduct unbecoming an officer" and "inability to perform job duties" when he was arrested on domestic violence assault charges. He appeals, saying that a simple assault under N.J.S.A. 2C:12-1a(3) does not constitute a "misdemeanor crime of domestic violence" and therefore that 18 U.S.C. 922(g)(9) does not apply. An Administrative Law Judge held that his removal as an officer was permissible solely on the grounds that he could no longer carry a firearm. The Court holds assault, which consists of an "[a]ttempt by physical menace to put another in fear of imminent serious bodily injury," N.J.S.A. 2C:12-1a(3), is not a "misdemeanor crime of domestic violence," because it does not have, "as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon." There was no actual physical force used: "An assailant could violate N.J.S.A. 2C:12-1a(3) by raising a clenched fist in a menacing manner, without hitting or attempting to hit the victim." **Key Issue: Physical Force Element.**

Hesse v. Pennsylvania State Police, 850 A.2d 829 (Pa. Commw. 2004). Hesse was convicted of recklessly endangering another person when he and his estranged wife were injured in an accident that occurred while Hesse was driving. Several years later he was denied an application for a firearm permit as a result

of the conviction. Hesse appealed to the court, which reversed, holding that he reckless endangerment crime did not include as an element the "use or attempted use of physical force … by a current or former spouse" against the victim. [Note: This decision appears to be contrary to precedent from every federal court to have decided the issue of whether the crime itself must include the relationship between the parties as a required element.] **Key Issue: Relationship Requirement.**

Pennsylvania State Police v. McPherson, 831 A.2d 800 (Pa. Commw. 2003). In 1999, McPherson pled guilty to disorderly conduct charge involving his ex-wife. In 2001, McPherson applied for a firearm permit, but was denied by the Pennsylvania State Police (PSP) based upon the disorderly conduct conviction. McPherson appealed to an administrative law judge, who found insufficient evidence to support the PSP's determination that McPherson's conviction was for a misdemeanor crime of domestic violence under 18 U.S.C. § 922(g)(9). The PSP appealed, and the appellate court reversed. The primary issue was whether McPherson's conviction was pursuant to a provision of the disorderly conduct statute that, as required under section 922(g)(9), encompasses the use or attempted use of force. Citing several relevant federal decisions, the appellate court examined the statutory definition of the offense and found that McPherson pled guilty to engaging in "fighting or threatening, or violent or tumultuous behavior…." The court concluded that this language included as a necessary element the use or attempted use of physical force, and furthermore, that McPherson had also pled guilty to a count charging that he had "push[ed] or shove[d]" his ex-wife to the ground. Consequently, the court held that the requirements of section 922(g)(9) were satisfied and McPherson was properly denied the firearm permit. **Key Issue: Use of Physical Force Requirement.**

State v. Wahl, 839 A.2d 120 (N.J. Super. Ct. 2004). Wahl's wife obtained a temporary restraining order against him under New Jersey's domestic violence statute. The TRO included a prohibition on the possession of firearms. In addition, Wahl was criminally charged with acts of domestic violence. Pursuant to both the TRO and the authority in the criminal domestic violence statute, law enforcement seized all of Wahl's weapons. The prosecutor subsequently sought an order concerning the disposition of the seized weapons, and at the hearing the parties entered into an agreement that Wahl could not receive his firearms for one year, during which time he was to undergo counseling. At two subsequent hearings, the court took up the issue of whether the weapons should be returned. The government argued that the weapons should not be returned on state-law grounds, because Wahl posed a danger "to the public in general or a person or person in particular," and on federal-law grounds, pursuant to 18 U.S.C. § 922(g)(9). The trial judge ordered that the weapons be returned, but granted a stay pending appeal. On appeal, the appellate court considered two issues: (1) Whether section 922(g)(9) preempted New Jersey law; and (2) whether the trial court ignored credible and reliable evidence when it ruled that Wahl was not a danger to the public in general or a person in particular. The court found that though Wahl had committed crimes that satisfy the requirements of section 922(g)(9), it did not need to reach the preemption question. Instead, it found that because New Jersey's laws do not permit the return of firearms to a person who is "unfit," and being subject to the prohibition in section 922(g)(9) renders one "unfit" under New Jersey law, the state and federal laws are "in harmony" and the preemption analysis is unnecessary. The court remanded the case to the trial court for a determination whether the firearms in question had been shipped or transported in interstate commerce, as required by the federal law. **Key Issue: Federal Preemption.**

Fourth Circuit (Maryland, North Carolina, South Carolina, Virginia, West Virginia)

Correa v. United States, 2013 U.S. Dist. LEXIS 23114 (W.D.N.C. Feb. 20, 2013). Mr. Correa files a pro-se motion to vacate, set aside, or correct sentence in consideration of his September 29, 2009 conviction.

Mr. Correa was convicted of: use and carry of a firearm during and relation to a drug trafficking crime, possession of a firearm by an individual with a prior domestic violence conviction (violation of 18 U.S.C. § 922(g)(9)), and possession of a firearm by an illegal alien. The court of appeals affirmed the conviction on appeal. The petitioner asserts ineffective counsel because his defense counsel failed to argue that the weapon was never tested for his fingerprints. After examining the record in the matter, the court found that the argument presented could be resolved without an evidentiary hearing. The Fourth Circuit Court of Appeals affirmed Mr. Correa's sentence and issued a mandate on June 14, 2011 which made Mr. Correa's conviction final after 90 days, when the opportunity to file a writ of Certiorari expired. This instant motion was filed five moths of time from the one year limitation. The petitioned claims that the motion was filed out of time due to surgery, the court determined however that equitable tolling does not apply here. Equitable tolling is only available when it would be unconscionable to enforce the limitation period against a party because gross injustice would result. The statute of limitations did not run until more than a year after the surgery of Mr. Correa, because of his untimely motion, his petition has been dismissed. **Key Issues: Fireams, Convictions, Statute of Limitations, Equitable Tolling, Motion to Vacate.**

In Re Application of John Doe, 1998 Va. Cir. LEXIS 428 (Va. Cir. Ct. 1998). Doe attempted to renew of a concealed handgun permit. The prosecutor's office opposed the renewal on the grounds that Doe had been convicted of misdemeanor assault against his ex-wife several years earlier. The court overruled the prosecutor's objections, holding that under the applicable Virginia law no reference is made to the federal law as a potential impediment to issuing or renewing a concealed carry permit. Thus, the court reasoned, it had no authority to inquire about the applicant's status under federal law to possess a firearm. The court did note, however, that its determination had no bearing on the applicant's ability to lawfully possess a firearm under the federal law. **Key Issue: Effect of Federal Prohibition on State Firearm Permits.**

In Re Parsons, 218 W. Va. 353 (W. Va. S. Ct. 2005). Robert Parsons plead *nolo contendere* to charges of "wanton endangerment involving a firearm" and "domestic battery" for abusing his girlfriend and pointing a gun at her. He was a police officer at the time, and after the *nolo contendere* plea he petitioned to regain his right to possess a firearm. The lower court found that this would violated 18 U.S.C. 922(g)(9). He appeals to the Supreme Court of West Virginia, arguing that a restoration of his civil rights that did not contain a provision excepting handgun ownership meant that he could now possess handguns under 18 U.S.C. 921(a)(33)(B)(ii). However, the Court says that because the defendant was not incarcerated for his misdemeanor domestic violence conviction, he lost none of his civil rights and thus could not have them restored. *United States v. Jennings*, 323 F.3d 263 (4th Cir. 2003). The Court also rejects Parsons' argument that gun ownership is a civil right, saying that voting, sitting on a jury, and holding public office are civil rights; gun ownership is not. *United States v. King*, 119 F.3d 290, 293 (4th Cir. 1997). Finally, Parsons argues that elements of a misdemeanor crime of domestic violence under the federal statute are not the same as the elements of the crime of domestic assault under West Virginia law. The Court says that a violation of §922(g)(9) does not require that the underlying statute include as an element of the offense a domestic relationship between the victim of the domestic violence and the misdemeanant. It requires only that the misdemeanor was committed against a person who is enumerated in one of the domestic relationships specified in 18 U.S.C. § 921(a)(33)(A)(ii). The victim in this case falls into that category.

Ross v. Fed. Bureau of Alcohol, Tobacco, & Firearms, 807 F. Supp. 2d 362 (D. Md. 2011). Ross claims 18 U.S.C. 922(g)(9) violates his constitutional and statutory rights. Ross attempted to purchase his firearm from a pawnbroker. The purchase was delayed because when the pawnbroker ran a criminal

background check and the response came back as "delayed," meaning the dealer could not sell the firearm for 3 days, unless a denial message was received. Ross claims the dealer then denied the purchase of the weapon, believing that the purchase of the weapon had been denied because of a previous charge that the FBI claimed to have removed from his record. Ross appealed the decision to the FBI. The FBI discovered that the charge Ross was claiming had not been removed had in fact been removed, but there was a claim misdemeanor charge still on his record that did not specify whether the charge was related to domestic violence. While the FBI informed Ross that this would merely delay any purchase he attempted to make, rather than deny a purchase, he filed a claim of a violation of his rights in District Court.

In court Ross brought two claims; (1) claiming the Gun Control Act (GCA) is unconstitutional; and in the alternative; (2) he was improperly denied a firearm under the terms of the GCA. The court determined that none of Ross's constitutional claims had any merit. The court then looked at the second claim, and determined that if the FBI actually "denied" his attempt to purchase the weapon, he might have a claim. Under provision 925A of the GCA, "an individual may bring an action for improper denial of a firearm if that person 1) was subject to "the provision of erroneous information relating to the person," or, 2) "was not prohibited from receipt of a firearm pursuant to" § 922(g) or (n). However, because Ross's complaint did not state that his attempt was "denied", it merely said "delayed", Ross had no claim. The court granted the defendant's motion to dismiss and gave Ross 21 days to amend his complaint if the dealer informed him the criminal search actually came up as "denied." **Key Issue: Improper denial of a right to purchase firearms.**

United States v. Artis, 132 Fed. Appx. 483 (4th Cir. 2005). Artis appealed his conviction based in part on an 18 U.S.C. §922(g)(9) violation. Artis contended that the district court erroneously concluded that his prior conviction for domestic violence qualified as a predicate offense for the purposes of §922(g)(9). The Gun Control Act (GCA) goes on to state that a person shall not be considered to have been convicted of misdemeanor crime of domestic violence (MCDV) unless "the person was entitled to a jury trial in the MCDV case under the laws of the jurisdiction in which the MCDV case was tried, [or] knowingly and intelligently waived the right to have the [MCDV] case tried by a jury, by guilty plea or otherwise." *United States v. Jennings*, 323 F.3d 263, 265 (4th Cir. 2003); 18 U.S.C. § 921(a)(33)(B) (2000). Artis pled guilty to the crime in the Juvenile and Domestic Relations Court in Virginia. In these particular courts, jury trial is not provided. To obtain a jury trial the defendant must invoke this right in the Virginia Circuit Court of Appeals. Artis failed to file a notice of appeal with the Circuit Court and as a matter of law was not entitled to a jury trial. The Fourth Circuit affirms the district court's ruling. **Key Issue: Right to a Jury Trial.**

United States v. Ayers, 64 Fed. Appx. 400 (4th Cir. 2003) (unpublished). After entering a conditional plea of guilty to a charge of violating § 922(g)(9), Ayers appealed, arguing that hat Congress exceeded its authority under the Commerce Clause in enacting § 922(g)(9) because it is merely a criminal statute that has nothing to do with interstate commerce. He also argued that the statute violates the 10th Amendment and the Due Process Clause of the 5th Amendment. The Fourth Circuit rejected these arguments summarily based upon circuit precedent. **Key Issues: Commerce Clause; 10th Amendment; Due Process (notice).**

United States v. Ball, 7 Fed. Appx. 210 (4th Cir. 2001) (unpublished). Ball appealed his conviction after a jury trial for a section 922(g)(9) violation, based upon an incident in which he aimed a loaded gun at his wife's head and threatened to kill her. Ball argued, *inter alia*, that section 922(g)(9) lacks a sufficient nexus to interstate commerce, that his prosecution violated the Ex Post Facto Clause, that the predicate

offense, simple battery under West Virginia law, was not a qualifying offense under the federal law, and that there was insufficient evidence to support the jury's verdict. The Fourth Circuit rejected the interstate commerce and Ex Post Facto Clause arguments out of hand, citing prior case law, including *United States v. Mitchell, infra.* The court also rejected Ball's contention that the predicate offense did not constitute the requisite misdemeanor crime of domestic violence, stating that the federal law requires only one element—the use or attempted use of physical force, and that the relationship requirement does not have to appear in the formal definition of the offense. The Fourth Circuit also found that the evidence was sufficient to support the conviction, rejecting, among other arguments, Ball's contention that the government should have been required to prove that he had actual knowledge that his possession of a firearm was an illegal act. **Key Issue: Commerce Clause, Ex Post Facto Clause; Required Elements of Misdemeanor Offense; Knowledge Requirement.**

United States v. Chester, 2013 U.S. App. LEXIS 5888 (4th Cir. W. Va. Mar. 25, 2013). Mr. William Chester Jr. Appeals a conviction which stems from his guilty plea of possession of a firearm after being convicted of a misdemeanor domestic violence crime, which is a violation of 18 U.S.C. § 922(g)(9). The Court determined that the previous case once remanded to district court established that the statute 18 U.S.C. § 922(g)(9) substantially fit the governmental scrutiny and satisfied intermediate scrutiny. In this appeal, Mr. Chester raised three issues: 1. Whether strict scrutiny applies in a case affecting an individual's second amendment right to bear arms, 2. Whether the statute is substantially related to the governmental goal of reducing acts of domestic violence, 3. Whether the statute is an overbroad and facially invalid infringement on the second amendment right to bear arms. The court determined that the district court was correct in their application of intermediate and not strict scrutiny, and that the relationship of 18 U.S.C. § 922(g)(9) is substantially important to the governmental goal of reducing incidence of domestic violence. The appellate court opines that the district court properly rejected the overbreadth argument, as no circuit court has accepted an overbreadth challenge where the second amendment is involved. **Key Issues: Firearms, Misdemeanor Domestic Violence, Scrutiny, Overbreadth, Second Amendment, Remand, Appeal.**

United States v. Elkins, 2:10CR00017, 2011 WL 1642271 (W.D. Va. May 2, 2011). Elkins was charged with a violation of 18 U.S.C. 922(g)(8) for possessing a firearm when there was an existing domestic violence protection order. Elkins claims that the government cannot prove his knowledge of the existence of a domestic protection order beyond a reasonable doubt, because he was not aware of the 922(g)(8) provision preventing the possession of a firearm. The court determined that because the protection order specifically states in the section labeled "WARNINGS TO RESPONDENT" that the government has penalties for the possession of a firearm, this requirement is satisfied. Ignorance of the law is not a defense, and the government is required to show that the respondent was aware of the protection order, and is not required to show that the respondent was aware of the prohibition on the possession of firearms. **Key Issue: Ignorance is not a defense.**

United States v. Finnell, 256 F. Supp. 2d 493 (E.D. Va. 2003). In 1993, Finnell was convicted of Assault and Battery Against a Family or Household Member, in violation of Virginia law. In 2000, Finnell severely assaulted his wife with a weapon and threatened to kill her. Finnell was subsequently convicted of violating § 922(g)(9) and, two years later, he filed a motion to vacate, set aside or correct the sentence, alleging that § 922(g)(9) violates the 8th, 9th, 13th, and 14th Amendments. Although the court concluded that the motion was procedurally barred, it went on to rule that all of the claims were without merit based upon clear precedent. **Key Issues: 8th Amendment; 9th Amendment; 13th Amendment; 14th Amendment.**

United States v. Frye, No. 98-4289, 1998 U.S. App. LEXIS 23357 (4th Cir. Sept. 21, 1998) (unpublished). In 1994, Frye was convicted in Virginia state court of misdemeanor assault and battery against his wife. Three years later, while questioning Frye about a complaint by his ex-girlfriend that he was harassing her, Frye admitted that he had a gun. The officers searched his car and found a loaded Bryco Arms .380 caliber pistol. A grand jury indicted Frye on one count of violating § 922(g)(9). Frye entered a conditional guilty plea, reserving the right to raise on appeal challenges to the district court's holdings that § 922(g)(9) does not violate the ex post facto clause and that scienter is not an element of the offense. The court sentenced him to one year of probation and six months in home detention as a condition of probation. On appeal, Frye claimed that because his domestic violence conviction predates the effective date of § 922(g)(9), his conviction violates the ex post facto clause of the U.S. Constitution. The Fourth Circuit held that the conviction does not violate the ex post facto clause because to violate it, a law must: (1) be retrospective and (2) disadvantage a defendant by changing the definition of criminal conduct or increasing the punishment for a crime. A law is retrospective if it changes the legal consequences of acts completed before the law's effective date. The illegal act of possession of a firearm was not completed until 1997, which was after the date 922(g)(9) went into effect. Regarding the scienter argument, the 4th circuit held that the government is not required to show that the defendant knew that the law prohibited him from possessing a firearm in order to prove a violation under 922(g)(9). Frye's conviction was affirmed. **Key Issues: Ex Post Facto Clause; Knowledge Requirement.**

United States v. Hayes, 129 S.Ct. 1079 (2010). On grant of certiorari, the Supreme Court, Justice Ginsburg, held that a domestic relationship need not be a defining element of the predicate offense to support a conviction for possession of a firearm by a person convicted of misdemeanor crime of domestic violence. **Key Issues: Domestic Violence, element, firearm**

United States v. Hayes, 482 F.3d 749 (4th Cir. 2007). Hayes was charged with unlawful possession of a firearm pursuant to 18 U.S.C. 922(g)(9). He sought dismissal of the superseding indictment, maintaining that it was legally flawed because his 1994 state offense was not a misdemeanor crime of domestic violence under federal law. The Defendant argued that his conviction under W. Va. Code §61-2-9(c) for simple battery did not constitute a conviction of a MCDV. This statute lacked, as a statutory element of the crime, the relationship between the defendant and victim as illustrated in 18 U.S.C. § 922 (a)(33)(A)(ii). Although the victim of Defendant's battery was the Defendant's then wife, with whom he lived and had a child , the West Virginia statute of conviction failed to define the domestic relationship as an element a of the crime. The Fourth Circuit deemed that the domestic relationship must be an element of the crime for the infraction to qualify as a MCDV. The prior conviction was found to be inapplicable and the Fourth Circuit Court of Appeals reversed and remanded the district court's denial of the motion to dismiss the superseding indictment. The Fourth Circuit is the only circuit to hold that the domestic relationship must be a statutory element of the crime for the infraction to qualify as a MCDV. This case was granted *certiorari* in the U.S. Supreme Court March 24, 2008. **Key Issue: Relationship Requirement.**

United States v. Jennings, 323 F.3d 263 (4th Cir. 2003). In 1997, Jennings was convicted of criminal domestic violence in South Carolina court, for which he received a suspended sentence of 30 days. He lost none of his civil rights under SC law because he was not incarcerated. In June 2000, Jennings was indicted under § 922(g)(9) for possessing a firearm and ammunition, and he was convicted following a bench trial. On appeal, Jennings contended that he could not be convicted of violating § 922(g)(9) because his civil rights, though they were never taken away, were nevertheless "restored" under 18 U.S.C. § 921(a)(33)(B)(ii), and because he had not knowingly and intelligently waived his right to counsel.

Regarding the civil-rights-restoration argument, the Fourth Circuit concluded, after an exhaustive analysis of the case law, that Jennings could not avail himself of the exception because the word "restored" in the statute requires the defendant to establish that his civil rights were lost and then restored, something that Jennings could not do because he had never lost his civil rights in the first place. The court disagreed that this interpretation led to absurd results and it agreed with other federal appellate courts' holdings that no equal protection violation resulted. As to the waiver of counsel argument, the Fourth Circuit found that the procedure used by the trial court judge to secure a defendant's waiver of the right to counsel was constitutionally adequate and satisfied the requirements of § 922(g)(9). **Key Issues: Civil Rights Restoration; Waiver of Right to Counsel.**

United States v. Kelly, 2013 U.S. Dist. LEXIS 1969 (W.D.N.C. Jan. 4, 2013). The defendant in this case brings a Motion In Limine before the court to preclude the government from producing evidence. The defendant was found guilty in January, 2001 of assault on a female, and the record has since been purged. On October 14, 2011 the defendant was arrested and charged with working as an armed security guard without a license and a handgun, a knife, a black shotgun which was found in the defendant's vehicle were confiscated. The defendant was charged with possession of a firearm after being convicted of a misdemeanor crime of domestic violence which is a violation of 18 U.S.C. § 922(g)(9), and also charged with making false statements during the purchase of the aforementioned firearms by not representing that he had been convicted of a misdemeanor crime of domestic violence. The court based their analysis on whether the previous conviction of assault on a female qualifies as a misdemeanor crime of violence under federal law. The court determined that North Carolina common law does not include a clear requirement that force and violence is a necessary part of being convicted of assault on a female. Therefore the court cannot conclude that the defendant's former conviction constitutes a misdemeanor crime of domestic violence. "North Carolina is the only state in the union that does not permit a federal court to certify questions of state law to the high state court for resolution". The defendant's prior conviction for assault on a female does not constitute as a a misdemeanor crime of domestic violence, his motion was converted to a motion to dismiss and was granted. **Key Issues: Firearms, Assault, Misdemeanor Domestic Violence.**

United States v. Mendoza, No. 98-4479, 1999 U.S. App. LEXIS 2734 (4th Cir. Feb. 23, 1999) (unpublished). Mendoza was convicted of misdemeanors involving domestic violence in October 1996 and May 1997. Under Virginia law, there is no right to a jury trial for the offenses he was charged with, but on appeal to the circuit court, a defendant may request a de novo jury trial. Mendoza appealed the second conviction, but waived the jury trial. On appeal for conviction under (g)(9), Mendoza made several arguments including that there was no evidence that he knew that the firearm traveled in interstate commerce, and that he did not knowingly waive his right to a jury trial when he was tried and convicted of the underlying misdemeanor crime of domestic violence. The court found no reversible error and affirmed. **Key Issues: Knowledge Requirement; Waiver of Right to Jury Trial.**

United State v. Metheny, 11 Fed. Appx. 92 (4th Cir. 2001) (unpublished). Metheny pled guilty to possession of a firearm in violation of section 922(g)(9). He appealed the sentence imposed by the district court, alleging that he should have been granted a downward departure because he was actually innocent of the predicate domestic violence offense. That conviction had been based on Metheny's wife's allegation that he had burned her arm with a cigarette, but she testified that he had not done so intentionally during a hearing related to the federal charges. The Fourth Circuit upheld the sentence, finding that Metheny's claim of actual innocence was not an established fact and that the district court

correctly determined that it lacked authority to consider Metheny's collateral attack on his prior conviction. **Key Issue: Collateral Attack on Misdemeanor Conviction.**

United States v. Mills, 82 Fed. Appx. 287 (4th Cir. 2003) (unpublished). After his conviction for violating § 922(g)(9), Mills appealed on four grounds, among others: (1) that § 922(g)(9) fails to provide adequate notice regarding the defendant's change in status; (2) that the statute violates due process by creating a permanent irrebutable presumption that a defendant is incapable of reform because it provides no way to regain the right to possess a firearm; (3) that the statute denied him equal protection of the law because it deprives MCDV offenders the right to possess firearms while other misdemeanants do not lose that right; and (4) that the statute violates the Commerce Clause. The court rejected each of these challenges, citing Fourth Circuit precedent and the fact that there are mechanisms for Mills to regain his right to possess a firearm. **Key Issues: Due Process (notice); Equal Protection; Commerce Clause.**

United States v. Mitchell, 209 F. 3d 319 (4th Cir. 2000). In 1998, Mitchell's wife, Verlette, notified the Alexandria, Virginia Police Department that her husband had threatened her, and that he possessed a handgun and homemade silencer. Pursuant to a consensual search, the responding officers found a .38 caliber handgun and 23 rounds of ammunition. Mitchell was convicted under § 922(g)(9), and appealed. Mitchell argued that the government was required to prove that Mitchell knew that possessing a firearm was illegal. Relying on a plethora of case precedent, the court held that the government was only required to prove knowledge of possession of the firearm. Mitchell also argued that, as applied to him, the statute violates the Ex Post Facto Clause, because his firearm purchase and misdemeanor domestic violence conviction occurred prior to the statute's enactment. The court rejected this argument, because the conduct prohibited by the statute is possession of a firearm, and Mitchell illegally possessed the firearm after enactment of the statute. Mitchell argued that his conviction violates the Due Process clause of the 5th Amendment because he did not have notice that his continued possession of the firearm was illegal. Relying on the maxim, "ignorance of the law will not excuse any person," the court rejected this argument. Moreover, even if the case is viewed as falling into the *Lambert* (355 U.S. 225 (1957)) exception, Mitchell's assault of his wife put Mitchell on sufficient notice. **Key Issues: Knowledge Requirement; Ex Post Facto Clause; Due Process (notice).**

United States v. Morse, 97 Fed. Appx. 430 (4th Cir. 2004) (unpublished). Morse entered a conditional guilty plea to two counts of possessing a firearm or ammunition after being convicted of a "misdemeanor crime of domestic violence" in violation of § 922(g)(9). On appeal, he argued: (1) That the district court erred in finding that his prior Virginia conviction for assault and battery against a family or household member under Virginia law was a predicate "misdemeanor crime of domestic violence" and (2) that the district court erred in overruling his motion to dismiss on the grounds that § 922(g)(9) violates: (a) His right to notice that it was illegal for him to possess a firearm or ammunition, (b) the Commerce Clause, (c) the 10th Amendment and (d) the Equal Protection Clause. The Fourth Circuit found that the conviction satisfied all requirements of § 922(g)(9) and it summarily rejected all of Morse's remaining arguments based upon circuit precedent and case law from other federal circuits. **Key Issues: Required Elements of Misdemeanor Offense; Due Process (notice); Commerce Clause; 10th Amendment; Equal Protection.**

United States v. Organ, No. 00-4151, 2000 U.S. App. LEXIS 23559 (4th Cir. Sept. 20, 2000). Organ was convicted of violating § 922(g)(9), and appealed, claiming that his prosecution violated the notice and fair warning principles of due process, and that Congress exceeded its powers under the Commerce Clause in enacting the statute. The court rejected these arguments based on its decisions in *Mitchell,*

infra, and *United States v. Bostic*, 168 F. 3d 718 (4th Cir. 1999), *cert. denied*, 527 U.S. 1029 (1999). **Key Issues: Due Process (notice); Commerce Clause.**

United States v. Rice, 65 Fed. Appx. 490 (4th Cir. 2003) (unpublished). On appeal from his conviction under § 922(g)(9), Rice argued that, to support the interstate commerce element of the offense, the Government must prove a present and substantial connection between the firearm and interstate commerce. The Fourth Circuit rejected this argument summarily based upon circuit precedent. **Key Issue: Commerce Clause.**

United States v. Rice, 2007 U.S. Dist. LEXIS 3550; 2007 WL 128889 (D.S.C. 2007). This matter dealt with a motion in limine. Rice was charged with one count of possessing a firearm in violation of 18 U.S.C. §922(g)(9). Rice sought to suppress evidence of a prior conviction for criminal domestic violence. The government was seeking to use the prior conviction to gain a sentence enhancement through the Armed Career Criminal Act, 18 U.S.C. §924(e) ("ACCA"). This required the court to explore Rice's predicate conviction. The U.S. Supreme Court's holding in *Shepard v. United States,* 544 U.S. 13, 26 (2005), "limits inquiry into the circumstances of the predicate offense being used to apply the ACCA to information provided in 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." The district court found that the holding in *Shepard* was applicable to an inquiry under 18 U.S.C. §§921(a)(33)(A) and 922(g)(9) as well. To prove whether Rice's prior state conviction qualifies as a misdemeanor crime of domestic violence, the government can only rely upon the charging document, plea transcript, judgment and other similar documents. The district court held that for Rice's South Carolina conviction to constitute a misdemeanor crime of domestic violence, S.C. Code Ann. § 16-25-20 must have as an element either "the use or attempted use of physical force" or "the threatened use of a deadly weapon." §921(a)(33)(A). The district court found that the word "offer" in S.C. Code Ann. §16-25-20 should be read as encompassing threats of violence as well as attempts of violence, and did not contain as an element the use or attempted use of physical force. The district court held that Rice's prior state conviction based on a violation of §16-25-20 did not qualify as a misdemeanor crime of domestic violence pursuant to 18 U.S.C. § 922(g)(9). Rice's motion in limine was granted. **Key Issue: Statutory Requirement.**

United States v. Staten, 666 F.3d 154 (4th Cir. 2011) *cert. denied,* 132 S. Ct. 1937 (U.S. 2012). Staten was arrested for a violation of 18 U.S.C. 922 (g)(9) when the police discovered guns in his home when he had three misdemeanor domestic violence charges, and he was aware that he was not allowed to have possession of a weapon. Staten motioned to dismiss the charge because of a claimed violation of his 2nd amendment right to bear arms. The district court denied the motion to dismiss and Staten entered a conditional guilty plea, pursuant to a plea bargain that reserved his right to appeal the court's decision to deny his motion to dismiss. Staten was then sentenced to nine and a half months of imprisonment, and he filed a timely appeal.

During the appeal, the government has the burden of establishing a reasonable fit between § 922(g)(9) and a substantial governmental objective. The government argued that reducing gun violence is the substantial government objective that 922(g)(9) was created to support, and after looking at the issues with domestic violence and recidivism in the United States, the court determined that §922(g)(9) satisfies the reasonable fit requirement. The court then affirmed the decision of the district court in denying the motion to dismiss. **Key Issue: 2nd Amendment**

United States v. White, 606 F.3d 144 (4th Cir. 2010). The Defendant is challenging the definition of what is considered to be the appropriate force to then be charged with this crime. The Court defines it as 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. The Court decided that even a battery conviction is enough for a misdemeanor conviction. Key Terms: Physical Force, Definition of Terms.

United States v. Williams, 2007 US Dist. LEXIS 91961 (E.D. Va. 2007). The Petitioner moved to dismiss his indictment including one count of violating 18 U.S.C. §922(g)(9). Williams argued that the predicate conviction did not qualify as a MCDV. The Fourth Circuit agreed and dismissed the indictment based on the circumstances detailed below. The warrant for the predicate offense stated that the relationship between the Petitioner and survivor was one that qualified under the requirements for MCDV. The Juvenile & Domestic Relations (JDR) judge assigned to the case determined that the venue was improper and sent the case to General District Court (GDC). Upon this transfer the judge amended the warrant, striking the relationship language, but maintaining the elements of the Virginia code section of which Williams was originally charged. This crime included that the victim be a household or family member but lacked that the Petitioner and the victim had been cohabitating for 12 months. This fact was stated on the warrant. The case was sent back down to the original judge who would act as a GDC judge. Williams was convicted and then indicted on illegal possession of a weapon due to the predicate offense. The Petitioner explained that he was convicted of simple assault rather than a MCDV. Pursuant to *U.S. v. Blevins*, 802 F. 2d 768 (4th Cir. 1986), the Fourth Circuit did not question the validity of the underlying conviction. The Court determined that the predicate conviction did not qualify as a MCDV. The Fourth Circuit, relying on its decision in *U.S. v. Hayes*, 482 F.3d 789, determined that the statute did not contain the requisite statutory relationship element of the crime. The crime itself had the possibility to qualify, but for the modification of the charging documents. Because of this modification, the crime did not qualify as a MCDV. **Key Issue: Relationship Requirement.**

Fifth Circuit (Louisiana, Mississippi, Texas)

United States v. Bethrum, 343 F.3d 712 (5th Cir. 2003). In June of 1997, Bethrum was convicted of misdemeanor attempted assault with bodily injury for kicking his wife. He pleaded guilty *pro se* to the assault charge, signing a waiver of appointment of an attorney and waiver of jury trial. In April of 2002, he was indicted on eight counts of possessing a firearm in and affecting interstate commerce in violation of § 922(g)(9). Bethrum contended that his waivers could not have been knowing and intelligent because he was not specifically warned about the effect that a guilty plea would have on his ability to possess a firearm. The court found that the judge's procedures at the time that Bethrum signed the waiver for the assault charge, which include having the defendant sign a detailed waiver form, thoroughly explaining the form to each defendant, and specifically warning the defendant about the advantages of being represented by counsel, adequately ensure that the waiver was both knowing and intelligent. As held in other cases, a defendant can effectively waive his rights even if not informed of all the consequences that may flow from conviction or from the imposition of a sentence. Thus, the court in this case held that the lack of a specific warning by the judge in a misdemeanor domestic violence prosecution about the impact of conviction upon the defendant's future right to possess weapons did not preclude subsequent federal prosecution for possession of firearms. **Key Issue: Waiver of Right to Counsel.**

United States v. Castleman, 134 S. Ct. 1405 (U.S. 2014). Castleman was charged with violating 18 U.S.C.S. § 922(g)(9) as a result of his guilty plea under Tenn. Code Ann. § 39-13-111(b). The United States Court of Appeals held that Castleman's conviction did not qualify as a misdemeanor crime of domestic violence. Castleman moved to dismiss his indictment under 18 U.S.C. §922(g)(9). He argued that his previous conviction for intentionally or knowingly causing bodily injury to the mother of his child, did not qualify as a misdemeanor crime of domestic violence because it did not involve the use or attempted use of physical force as required under 18 U.S.C. §921(a)(33)(A)(ii). The Supreme Court granted certiorari to resolve the split among the circuits.

The Supreme Court of the United States broadened the definition of "physical force" to include the common-law meaning of force, and specifically this includes "offensive touching." Common-law force does not require "direct" application of force, but instead can be done indirectly; force can be applied through administration of a poison, infection with a disease, etc. The court in applying this definition of "physical force," concluded that Castleman's conviction qualifies as a misdemeanor crime of domestic violence purposes of 18 § U.S.C. 922(g)(9). The court also determined neither legislative history nor the rule of required a different interpretation.
Key Issues: Definition of "physical force,"

United States v. Shelton, 325 F.3d 553 (5th Cir. 2003). The United States District Court for the Southern District of Texas convicted Shelton for unlawful possession of a firearm following a misdemeanor conviction of domestic violence, in violation of 18 U.S.C.S. § 922(g)(9). Shelton appealed his conviction. Prior to Shelton's possession of a shotgun, Shelton had been convicted in state court of the misdemeanor offense of assault, the predicate offense. The victim of the assault was Shelton's live-in girlfriend who had resided with Shelton for approximately two months. Regarding the conviction under 18 U.S.C.S. § 922(g) (9), Shelton challenged the sufficiency of the evidence on several bases. The court rejected Shelton's arguments and upheld the conviction. The court determined that the misdemeanor assault offense constituted a misdemeanor crime of domestic violence under § 922(g) (9) because (1) the assault offense pursuant to Tex. Penal Code Ann. § 22.01(a) (1) contained bodily injury as an element and thus use of physical force was a necessary element of the crime, and (2) the predicate offense did not need to contain the element of a relationship between Shelton and the victim. In addition, sufficient evidence established that the victim of the assault was similarly situated to a spouse.
Key Issues: Use of Physical Force Requirement; Required Elements of Misdemeanor Offense; Relationship Requirement.

United States v. Stroud, 2012 U.S. Dist. LEXIS 161280 (W.D. La. Nov 9, 2012). The court is considering several motions from the defense: motion to suppress evidence and dismiss charge, motion to dismiss and or exclude evidence, motion for pretrial determination on admissibility of predicate conviction. The defendant was charge with one count of violating 18 U.S.C. § 922(g) (9) on November 18, 2010 which prohibits those who have been convicted of Misdemeanor Domestic Violence crimes from possessing firearms. The defendant had been convicted of the aforementioned crime in 2002, his attorney argue that the defendant's guilty plea in the 2002 MCDV case was not knowingly and intelligently made as required by the federal rules of criminal procedure. The controlling language of the appellate court states that the court's involvement be clear and consistent at the time of the underlying plea, and the rights and advice by the prosecutor is inadequate. Because of this the court cannot determine that the guilty plea made in the underlying MDCV case was made knowingly and intelligently, and the defendant's motion to dismiss is granted. **Key Issues: Firearms, Misdemeanor Crimes of Domestic Violence, Knowingly and Intelligently Guilty Pleading, Controlling Court.**

United States v. White, 258 F.3d 374 (5th Cir. 2001). In 1999, White was charged with violating section 922(g) (9) based upon his possession of a firearm after having been convicted on August 1, 1994 of two offenses under Texas state law, reckless conduct and terroristic threat. The first conviction was based on an incident in which White pointed a gun at his wife, and the second was based on his threats to kill his ex-wife at the time. After pleading guilty, White appealed to the Fifth Circuit, arguing that neither of the two convictions constituted predicate offenses under section 922(g)(9) because neither has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon. The Fifth Circuit agreed and reversed the conviction. The court found that the reckless conduct conviction was not one that required that the perpetrator actually use physical force against another (or at all), because the statutory language provides that one commits the offense "if he recklessly engages in conduct that places another in imminent danger of serious bodily injury." The court also noted that the "attempted use" of physical force prong of the federal statute was not satisfied because attempt is a specific intent crime, while the Texas statute required only the less culpable state of mind of recklessness. Nor was the court convinced that another provision of the reckless conduct offense, which presumed recklessness and danger if the perpetrator knowingly pointed a firearm at or in the direction of another, was sufficient to satisfy the federal law's "threatened use of a deadly weapon" prong. The court concluded that the provision was not a required element of the offense, but rather a permissive means by which to trigger a presumption of recklessness, and that pointing a firearm at or in the direction of another does not per se constitute "threatened use" of a deadly weapon, which is the section 922(g)(9) requirement. Regarding the terroristic threat conviction, the Fifth Circuit found that the Texas offense does not trigger section 922(g)(9) because it does not require the use or attempted use of physical force, nor does it mention the use of a weapon. The court noted that all that was required for a conviction was a threat to use violence, which is insufficient under the federal law. **Key Issue: Use of Physical Force Requirement.**

White v. Weinstein, No. 05-02-00608-CV, 2002 Tex. App. LEXIS 8937 (Tex. Ct. App. Dec. 18, 2002) (unpublished). White was represented by Weinstein in several divorce and divorce proceedings, in which White pled nolo contendere to charges of deadly conduct and terroristic threat. White sued Weinstein for malpractice for failing to inform him of the firearm possession consequences of his plea in light of 18 U.S.C. § 922(g) (9). The court found that Weinstein owed White no duty to inform him that his gun ownership would become illegal under federal law upon the plea. **Key Issue: Malpractice for Failure to Inform Client about Federal Prohibition.**

Sixth Circuit (Kentucky, Michigan, Ohio, Tennessee)

City of Cleveland v. Carpenter, 803 N.E.2d 871 (Ohio Mun. Ct. 2003), *aff'd* 2003 Ohio 6923 (Ohio Ct. App. 2003). Carpenter pled no contest to misdemeanor assault charges under a Cleveland ordinance after having assaulted his ex-wife. Law enforcement had seized Carpenter's firearms at the time of his arrest, and after his conviction he sought their return. The prosecutor objected on several grounds, including that Carpenter was prohibited under 18 U.S.C. § 922(g)(9) from possessing the firearms. The court agreed, finding that although the assault conviction was not designated a domestic assault, such a designation is not necessary under the federal law, and the requisite relationship existed between Carpenter and his ex-wife. The court noted that it was bound to follow the federal law under the Supremacy Clause of the U.S. Constitution. It also rejected Carpenter's claim that his plea was invalid because he had not been informed of the effect of his plea on his firearm rights under federal law. The court held that a defendant need not be informed of the federal consequences of a state conviction. **Key Issues: Return of Firearms; Collateral Consequences.**

City of Cleveland v. Gould, 2002 Ohio App. LEXIS 2763 (Ohio Ct. App. 2002). Gould was convicted of a domestic violence misdemeanor and, after serving his suspended sentence and paying a fine, he appealed the conviction. Gould argued that the appeal was not moot because he would suffer a loss of his Second Amendment right to possess firearms pursuant to 18 U.S.C. § 922(g)(9). The appellate court rejected this argument, finding that Gould had presented no evidence that he ever applied to own a gun or owns a gun. **Key Issue: Right to Appeal in State Court.**

Eibler v. Dept. of Treasury, 311 F. Supp. 2d 618 (N.D. Ohio 2004). Eibler was convicted of misdemeanor assault under Ohio law in 1998. In 2002, Eibler attempted to purchase a firearm from a local gun shop but was denied the purchase. He subsequently received a letter from the Bureau of Alcohol, Tobacco and Firearms notifying him that under § 922(g)(9) he was prohibited from purchasing or possessing weapons based on his prior conviction for domestic violence. Eibler filed suit in federal court, claiming that he was improperly denied a firearm purchase based on the erroneous information provided to the gun shop from the National Instant Criminal Background Check System ("NICS"). Specifically, he claimed that he had not been convicted of a misdemeanor crime of domestic violence because the crime was not called a domestic violence offense and because he and the victim, his long-term girlfriend at the time, did not have the requisite relationship. As to the first argument, the court determined that the existence of a domestic relationship is not a required element of the predicate offense, but must simply exist in fact. As to the second argument, the court found that the "similarly situated to a spouse" relationship existed between Eibler and girlfriend. The court noted that the fact that the two may not have been living together at the time of the assault is not dispositive, so long as they had "a long-time close and personal relationship." The court granted the defendants' motion for summary judgment because the denial of Eibler's firearm purchase did not violate § 922(g)(9). **Key Issues: Required Elements of Misdemeanor Offense; Relationship Requirement.**

Thompson v. U.S., 2007 WL 2109834 (E.D. Mich. 2007); No Lexis citation available. Thompson argued that he was improperly convicted under 18 U.S.C. 922(g)(9) because he was no longer a prohibited person. Thompson cited to *United States v. Wegrzyn*, 305 F.3d 593 (6th Cir.2002) which was undecided as he filed his direct appeal. *Wegrzyn* was used to state that "a misdemeanant convicted of domestic violence in Michigan who was not sentenced to periods of incarceration should be able to possess firearms upon completion of the sentence of probation." Thompson had been sentenced to 6 months probation and completed his probationary term on April 3, 1996. In the superseding indictment, the government charged Thompson with possession of a handgun on December 3, 1998, after he had completed probation. Under the holding in *Wegrzyn,* Thompson was not prohibited from possessing a firearm on that date. Michigan provides for the restoration of the right to legally possess a firearm after the convicted has been released from custody or upon successful completion of the probationary sentence. That person is no longer considered ineligible to possess firearms. *Id.* at 597. 18 U.S.C. §921(a)(33)(B)(ii) provides that a for a conviction to qualify as a misdemeanor crime of domestic violence under the federal statute, it must not be sent aside, expunged or be an offense for which the person has been pardoned or has had civil rights restored, unless the pardon or expungement expressly provided a continuing firearms prohibition. The Court found that there was a fundamental defect in the proceedings that led to Thompson's conviction under §922(g)(9) and ordered that the conviction under the corresponding count be vacated. **Key Issue: Civil Rights Restoration.**

United States v. Beavers, 206 F.3d 706 (6th Cir. 2000). Beavers pled guilty to possessing a firearm in violation of § 922(g)(9). He had previously pled guilty in 1995 to a misdemeanor assault charge. At his change-of-plea-hearing, Beavers stated that he had two pistols and a shotgun in his house at the time of the original indictment and that, while he did not know the law existed, he was guilty of possessing the

firearms. Beavers later moved to withdraw his guilty plea and to dismiss the indictment on the ground that the statute violated his due process rights under the 5th Amendment. He entered a conditional guilty plea, and was sentenced to a term of two months' prison time, followed by two months of home confinement and two years of supervised release, and was fined $2,000. The court affirmed the district court's denial of the motion to dismiss. Relying on *United States v. Meade*, 175 F.3d 215, 226 (1st Cir. 199) and *United States v. Baker*, 197 F3d at 220 (adopting reasoning in Meade, the court rejected the due process argument, concluding that Beavers' conviction of a misdemeanor crime of domestic violence provided him with sufficient notice that the government might regulate his ability to own or possess a firearm. Beavers also argued that the statute is unconstitutional as applied to him because the state of Michigan misled him by returning one of pistols in July 1996 after he finished his period of probation without telling him about the future applicability of § 922(g)(9). The court also rejected this argument because (1) the statute did not become law until Sept. 30, 1996, (2) the state of Michigan is "under no obligation to update state-law violators on recent additions to federal law," and (3) the returned pistol was only one of three firearms for which he was indicted under the federal statute. **Key Issue: Due Process (notice).**

United States v. Jenkins, 2007 U.S. Dist. LEXIS 11381 (E.D. Tenn. 2007). This case deals with a false statement to obtain a firearm in violation of 18 U.S.C. 922(a)(6). Jenkins attempted to purchase a firearm and falsely indicated that he had not been convicted of a MCDV. This particular case sparked a detailed discussion of the relationship requirement contained in 18 U.S.C. 921(a)(33)(A)(ii). While there is no precedent in the Sixth Circuit concerning the relationship requirement, the language in this opinion stated that no relationship element is needed for a statute to qualify as a MCDV. The opinion cited *United States v. Heckenliable,* 446 F.3d 1048 (10th Cir. 2006) as another circuit's controlling authority on the relationship requirement, as well as *Shepard v. United States,* 544 U.S. 13 (2005) in determining what documents courts can use to illustrate relationships in these cases. **Key Issue: Relationship Requirement.**

United States v. Roberts, 2013 U.S. App LEXIS 13263 (6th Cir. Ky. 2013). Defendant Jackie Roberts was convicted in federal court of drug trafficking and unlawful possession of a firearm. The court applied a sentencing enhancement of 253 months of imprisonment due to prior convictions. In this instant case the defendant asserts that there was insufficient proof to support his conviction, a violation of his fourteenth amendment right. The court must determine in this sufficiency challenge if after viewing the evidence in the light most favorable to the prosecution whether any rational trier of fact would have found the fulfillment of the elements of the crime beyond a reasonable doubt. For a defendant to be convicted of a violation of 18 U.S.C. § 922 the government must show actual or constructive control of a firearm. The defendant asserts that the government's evidence of his knowledge and intent to control the firearm recovered is insufficient due to the lack of credibility of the witnesses. The jury was aware of the defendant's reasons for the non-credibility of the witnesses against him and chose to believe the witnesses' testimony. The defendant was also made aware of sentencing enhancements if convicted before the trial commenced. The court affirms the conviction and sentence of the defendant. **Key Issues: firearm, conviction, actual or constructive control.**

United States v. Trabue, No. 99-6406, 2000 U.S. App. LEXIS 31926 (6th Cir. Dec. 5, 2000) (unpublished). Trabue's girlfriend petitioned for, and was granted, a protection order after Trabue poured lighter fluid on her clothing and flicked a cigarette at her, telling her that killing her was not a threat, but a promise. Five days before, Trabue threatened to kill her, stuck a gun in her stomach, and pulled the trigger. Less than two months after Trabue's former girlfriend obtained the protection order, Trabue struck her and her son in the head with a gun, and held two of his children hostage. A SWAT team was called in, and

Trabue was subsequently arrested. Trabue was indicted on one count of possessing a firearm while subject to a protection order, in violation of § 922(g)(8), and one count of possessing a firearm after having previously been convicted of a misdemeanor crime of domestic violence, in violation of § 922(g)(9). Trabue entered a guilty plea for both counts, and the district court sentenced him to 57 months in prison, and two years of supervised release. He appealed the sentence, but the 6th Circuit affirmed the lower court's judgment. **Key Issue: Sentencing.**

United States v. Watkins, 407 F. Supp. 2d 825 (E.D. KY 2006). The Defendant was charged with a violation of 18 U.S.C. §922(g)(9). In this case the Defendant has moved to dismiss the charge because the Kentucky misdemeanor crime of domestic violence statute (K.R.S. 508.030) of conviction failed to contain, as a statutory element, a domestic relationship. The District Court stated that while the Sixth Circuit had not formed case law in this area, District Court agreed with the opinions formulated in the majority of circuits that have addressed the issue. A domestic relationship is not needed as a statutory element of the crime of violence to meet the requirements of a MCDV. *See United States v. Meade,* 175 F.3d 215 (1st Cir. 1999); *United States v. Kavoukian,* 315 F.3d 139 (2d Cir. 2002); *United States v. Shelton,* 325 F.3d 553 (5th Cir. 2003); *United States v. Smith,* 171 F.3d 617 (8th Cir. 1999); *United States v. Belless,* 338 F.3d 1063 (9th Cir. 2003); *United States v. Chavez,* 204 F.3d 1305 (11th Cir. 2000); *United States v. Barnes,* 353 U.S. App. D.C. 87, 295 F.3d 1354 (D.C. Cir. 2002). At the trial level the United States must prove the presence of a qualifying relationship, the lack of a domestic relationship element in the Kentucky statute was not sufficient basis to warrant dismissal. **Key Issue: Relationship Requirement.**

United States v. Wegrzyn, 305 F.3d 593 (6th Cir. 2002). Wegrzyn was charged with possessing a firearm in violation of section 922(g)(9). He had been convicted of a Michigan misdemeanor crime that triggers section 922(g)(9). However, a Michigan statute strips misdemeanants of their civil right to vote only while they are confined in a correctional facility. Pursuant to that law, the offender's civil right to vote is restored immediately upon release. Both the district court and the Sixth Circuit found that any person confined in Michigan for a misdemeanor domestic violence crime would therefore be exempt from section 922(g)(9)'s prohibition by operation of 18 U.S.C. § 921(a)(33)(B)(ii), which exempts a person who "has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense)." The Sixth Circuit found that misdemeanants, like Wegrzyn, who are not incarcerated should also be able to possess firearms after serving their sentences of probation or the like. Otherwise, "the untenable situation would occur in which an individual who presumably committed a more egregious offense justifying incarceration would nevertheless be allowed – upon completion of the jail sentence -- to possess a firearm, while another misdemeanant whose transgression did not merit such severe punishment would be treated more harshly at the conclusion of a more lenient punishment." The Sixth Circuit noted that this result, though perceived as absurd by some, gives effect to the congressional intent to allow states to have input in the definition of the parameters of the crime, and gives effect to the expressed intent of the Michigan legislature. The court noted that the Michigan legislature's decision to strip misdemeanants of the right to vote is highly unusual, and that had such a law not been passed, the section 921(a)(33)(B)(ii) exemption would not have come into play at all. **Key Issue: Restoration of Civil Rights Exception.**

Seventh Circuit (Illinois, Indiana, Wisconsin)

Gillespie v. City of Indianapolis, 185 F.3d 693 (7th Cir. 1999). Jerald Gillespie, an employee of the Indianapolis Police Department, lost his job because he was no longer able to carry a firearm, pursuant to § 922(g)(9). Gillespie filed suit, and the district court dismissed his claim. Gillespie appealed, arguing that the statute violates the 10th Amendment, the due process clause of the 5th Amendment, and the 2nd

Amendment. The 7th Circuit affirmed. The court held that because the statute does not violate the Tenth Amendment "by intruding upon an area of authority reserved to the States[,]" because Congress clearly has the power to regulate interstate commerce, and the statute includes the requisite jurisdictional element (firearms "in or affecting commerce"). The court also rejected Gillespie's argument that because the statute implicates a fundamental right (the right to bear arms under the 2nd Amendment), the district court should have applied the strict scrutiny standard of review. The court relied on precedents in the 7th Circuit and the U.S. Supreme Court holding that the right to possess a firearm is not a fundamental right, and therefore only the rational basis test need be applied. The statute withstands rational basis because Congress could have rationally concluded that those who have been convicted of misdemeanor crimes of domestic violence have the highest likelihood of using a firearm to harm a family member. Finally, the court also rejected Gillespie's 2nd Amendment argument because he did not demonstrate a "reasonable relationship between his inability to carry a firearm and the preservation of a well regulated militia." **Key Issues: 10th Amendment; Due Process (notice); 2nd Amendment.**

Gillespie v. Indiana, 736 N.E.2d 770 (Ind. App. 2000). After Gillespie, a former Indianapolis police officer, was convicted in 1995 of a qualifying misdemeanor crime of domestic violence pursuant to a plea agreement, he was terminated by the police department. He filed an action in federal court, which failed. *See Gillespie v. City of Indianapolis, supra.* Gillespie subsequently filed motions for post-conviction relief and to withdraw his guilty plea in state court. The motions were denied, and Gillespie appealed. On appeal, he argued that (1) 18 U.S.C. § 922(g)(9) was "new evidence not available at the time of his conviction; (2) the trial court's inability to advise him of the law resulted in an unintelligent and involuntary plea; and (3) the trial court erred by not allowing him to withdraw his guilty plea because he had not been fully advised of the consequences of the plea. The appellate court rejected all three arguments. Regarding the first argument, the court held that the enactment of the federal law did not cast doubt on the inference that Gillespie was guilty of felonious assault and so could not have produced a different result at trial. Regarding the second argument, the court held that the court is not required to advise a defendant of collateral or potential consequences of a guilty plea. The court rejected Gillespie's third argument for the same reasons it rejected the other two. **Key Issues: Voluntariness of Guilty Plea.**

O'Neill v. Dir. of the Ill. Dep't of State Police, 28 N.E.3d 1020 (Ill. App. Ct. 3d Dist. 2015). O'Neil convicted of misdemeanor crime of domestic violence. The Department of State Police revoked O'Neil's Firearm Owner's Identification Card. O'Neil petitioned the court to reinstate his card. The Court concluded that pursuant to 922(g)(9), the department could not reinstate the ownership card. **Key Issues: Firearm Owner's Identification Card.**

State v. Baldauf, 652 N.W.2d 133 (Wis. Ct. App. 2002). After having pled no contest to a charge of disorderly conduct, Baldauf moved to withdraw his plea because it was not knowingly, intelligently, and voluntarily entered. Among other things, Baldauf argued that his plea was defective because he had not been advised of the federal firearms prohibition under 18 U.S.C. § 922(g)(9). Citing *State v. Kosina*, 595 N.W.2d 464 (Wis. Ct. App. 1999), infra, the appellate court rejected this argument, finding that the court was not required to advise Baldauf of the federal prohibition because it was not an "automatic consequence" of the guilty plea and because, even if it did apply automatically, it was a collateral, not a direct, consequence. **Key Issues: Voluntariness of Guilty Plea; Collateral Consequences.**

State v. Kosina, 595 N.W.2d 464 (Wis. Ct. App. 1999). Kosina pled guilty to misdemeanor disorderly conduct based upon his abuse of his wife and subsequently moved to withdraw the plea, contending

that the trial court erroneously failed to inform him that he would be prohibited from possessing firearms by operation of 18 U.S.C. § 922(g)(9). The court disagreed, holding that the effect of the federal law is not an automatic consequence of the guilty plea because whether or not his conviction triggers the federal prohibition is an open question that he can contest. The court also found that, even assuming the federal prohibition would be an automatic one, it is a collateral consequence of the guilty plea because it arises from a body of law that is collateral to the state court proceedings. In particular, the court found that the effect of the federal statute is not a decision in which the state court can participate. Based upon this analysis, the appellate court held that the trial court was not required to inform Kosina about the effect of the federal statute on his guilty plea, and therefore that the plea was valid. **Key Issues: Voluntariness of Guilty Plea; Collateral Consequences.**

State v. Leonard, 2015 WL 3674019 (Wis. Ct. App. 2015). Defendant convicted of disorderly conduct for waving around a .44 Magnum revolver. The circuit court determined that the conviction served as a predicate offense to trigger 18 U.S.C. § 922(g)(9) in regards to the .44 Magnum. However, the Court also found that the offense did not trigger 922 in regards to his other guns and ammunition. **Key issues: Firearms.**

State v. Molzner, 600 N.W.2d 56 (Wis. Ct. App. 1999). The Molzners, a couple that had been charged with disorderly conduct, pled guilty to the charge but subsequently challenged the validity of their plea based upon, among other things, the fact that they had not been advised that they would lose their right to possess firearms pursuant to 18 U.S.C. § 922(g)(9). The appellate court rejected this argument, holding that the effect of the federal law is a collateral consequence and therefore that the court was under no obligation to advise the Molzner about its effect on their right to possess firearms after the guilty pleas. In finding that the Molzner's status under the federal law was a collateral consequence, the court held that the federal statute does not have "a definite, immediate and automatic effect on the Molzner's range of punishment for domestic disorderly conduct." **Key Issues: Voluntariness of Guilty Plea; Collateral Consequences.**

United States v. Brown, 235 F. Supp. 2d 931 (S.D. Ind. 2002). Brown was indicted for possessing firearms in violation of section 922(g)(9) and for knowingly providing false information in connection with the purchase of a firearm on ATF Form 4473 when he answered "no" to a question about whether he had a prior conviction. Brown moved to dismiss both counts, arguing that though he was convicted of a misdemeanor domestic violence under Indiana law, it was not a qualifying conviction because his civil rights had been restored. The government argued that Brown had not been deprived of his civil rights as a result of the conviction, and so the exception in 18 U.S.C. § 921(a)(33)(B)(ii) was not applicable. The court, agreeing that restoration of civil rights could only occur where they had been taken away, found that under Indiana law Brown had lost both his right to vote and his right to serve on a jury, but that upon service of his sentence he regained both of those rights. The court rejected the government's argument that the state's denial of voting rights to misdemeanants violated the Indiana constitution. The court also rejected the government's contention, based upon the phrase "loss of civil rights *under such an offense*" in section 921(a)(33)(B)(ii), that the defendant must have been denied the right to sit on a jury as a result of his "conviction," and not as a result of the imposition of his sentence (in Brown's case, incarceration). The court found such a distinction to strain the ordinary meaning of language. Finally, the court rejected the government's argument that a finding that Brown was not disqualified under section 922(g)(9) would be contrary to congressional intent. The court held that courts cannot disregard the plain meaning of a congressional statute, even if it produces results contrary to the legislative intent. **Key Issue: Civil Rights Restoration exception.**

United States v. Donovan, 410 Fed.Appx. 979 (7th Cir. 2011)(Unpublished opinion). Donovan plead guilty to possession of a firearm after conviction of a misdemeanor crime of domestic violence in violation of 18 U.S.C. § 922(g)(9) in the U.S. District Court for the Western District of Wisconsin. He was sentenced to 46 months imprisonment and three years' supervised release. On appeal, Donovan argued that § 922(g)(9) was unconstitutional under the Second Amendment, because § 922(g)(9) would restrict his use of firearms for hunting/sport purposes. He further stated that the government had not shown a reasonable connection between prohibiting his possession of firearms and the government's goal of reducing the use of firearms in perpetrating violence against domestic partners. The Seventh Circuit affirmed the district court, finding that although Donovan's guilty plea did not waive his right to a constitutional challenge under the *Blackledge-Menna* exception ("the right not to be hauled into court at all upon the felony charges") his argument under the Second Amendment was precluded by the Seventh Circuit's recent decision in *Skoien II*, where the court found that there was a reasonable connection between prohibiting the possession of firearms by those convicted of a misdemeanor crime of domestic violence and the government's goal of preventing the use of firearms against victims of domestic violence. **Key Issues: Second Amendment.**

United States v. Lewitzke, 176 F. 3d 1022 (7th Cir. 1999). Lewitzke was found guilty of possessing six firearms in violation of § 922(g)(9). At trial, Lewitzke's defense theory was that the guns found in his home had been left there by his father, brother, and friends, since they regularly stopped by to engage in recreational target shooting. At his trial, defense witnesses testified that Lewitzke had become aware in January 1997 that he was no longer permitted to possess firearms due to his prior domestic violence conviction, and that Lewitzke at that time surrendered possession of all of his guns to his father. After his conviction, Lewitzke appealed, arguing that the statute irrationally bars persons convicted of misdemeanor crimes of domestic violence from possessing firearms, in violation of equal protection principles. The 7th Circuit affirmed. Applying the rational basis test, the court found that the rationale for keeping guns out of the hands of those convicted of domestic violence is "eminently reasonable," and Congress could reasonably believe that such individuals may resort to violence again. **Key Issue: Equal Protection.**

United States v. Pierotti, 2013 WL 5278655 (Wis. Dis. Ct 2013). Pierotti was convicted of a misdemeanor crime of domestic violence. He later attempted to purchase a hunting rifle at Wal-Mart. He falsely denied his previous misdemeanor crime of domestic violence when filling out his ATF form. The jury found him guilty of knowingly making a false statement. He argued for an offense reduction under U.S.S.G. § 2K2.1 (b)(2), which provides:

"If the defendant, other than a defendant subject to subsection (a)(1), (a)(2), (a)(3), (a)(4), or (a)(5), possessed all ammunition and firearms solely for lawful sporting purposes or collection, and did not unlawfully discharge or otherwise unlawfully use such firearms or ammunition, decrease the offense level determined above to level 6." The government argued against the reduction because Pierotti never possessed the gun. The Court agreed with Pierotti, and permitted a sentencing reduction because he intended to use the firearm solely for lawful sporting purposes. **Key Issue: Sentencing.**

United States v. Skoien, 587 F.3d 803 (7th Cir. 2009). Defendant was indicted for possessing a firearm after being convicted of misdemeanor crime of domestic violence in violation of 18 U.S.C. § 922(g)(9). At the district court level the defendant was unsuccessful in his motion to dismiss the charge. In denying the defendant's motion to dismiss the District Court elied on *Gillespie v. City of Indianapolis,* 185 F.3d 693 (7th Cir.1999), and the passage in *District of Columbia v. Heller* presumptively approving felon-dispossession laws. Skoien then pled guilty and reserved his right to appeal on the basis that the statute

interfered with his Second Amendment right to bear arms. In deciding whether 18 U.S.C. § 922(g)(9) is constitutional the Court of Appeals did not apply a strict level of scrutiny since the facts revealed that the defendant used the firearm for hunting and therefore the core right of self-defense identified in *Heller* is not implicated. Instead, the Court of Appeals applied an intermediate level of scrutiny, and therefore had to decide whether the government has established that the statute is substantially related to an important governmental interest. The court concluded that the government did not do enough to establish a reasonable fit between the government's interest in protecting against domestic-violence gun injury and death and § 922(g)(9)'s blanket ban on firearms possession by persons who have been convicted of a domestic-violence misdemeanor. The court ruled that the defendant's conviction be vacated and remanded the case to the district court. **Key Issue: Second Amendment (*Rehearing en Banc Granted, Opinion Vacated by* U.S. v. Skoien, 2010 WL 1267262 (7th Cir.(Wis.) Feb 22, 2010) (NO. 08-3770))**

United States v. Skoien, 614 F.3d 638 (7th Cir. 2010). Skoien plead guilty to the possession of a firearm after having been convicted of two misdemeanor crimes of domestic violence, in violation of 18 U.S.C. § 922(g)(9) in the U.S. District Court for the Western District of Wisconsin, he was sentenced to 24 months imprisonment. On appeal (rehearing en banc), Skoien argued that § 922(g)(9) was unconstitutional under the Second Amendment, relying on *Heller.* Skoien also argued that the perpetual prohibition of the possession of firearms for a misdemeanor conviction was unjust, as an individual may pose less risk to others with the passage of time. The Seventh Circuit found that categorical limitations on the possession of firearms was valid under the Second Amendment and *Heller*, and that § 922(g)(9) did not impose perpetual disarmament, because convicted individuals have the option to pursue pardon, expungement or the restoration of their civil rights (depending on state law). The court also noted Skoien's continuing risk to his domestic partners, given his two convictions for domestic violence. **Key Issues: Second Amendment, Perpetual Disarmament.**

United States v. Stein, 712 F.3d 1038 (7th Cir. 2013). Wisconsin. Stein was charged with violating 18 U.S.C.S. §922(g)(9). He argued that the district court should have allowed evidence that his lawyer led him to believe that the misdemeanor conviction would not disqualify him from possessing firearms. The 7th Circuit rejected his argument. They concluded that for subsection (g)(8) "knowingly" means knowledge of the facts constituting the offense, not knowledge that those facts make gun possession illegal. The court noted that there is no principled reason for drawing an analytical distinction between §922(g)(8) and §922(g)(9). Citing *Bryan v. United States*, 524 U.S. 184, 192-93, 118 S. Ct. 1939, 141 L. Ed. 2d 197 (1998) "unless the text of the statue dictates a different result, the term 'knowingly' merely requires proof of knowledge of the facts that constitute the offense". **Key Issue: Definition of knowingly.**

Eighth Circuit (Arkansas, Iowa, Missouri, Minnesota, Nebraska, North Dakota, South Dakota)

Blackburn v. Jansen, 241 F. Supp. 2d 1047 (D. Neb. 2003). Blackburn was arrested for assaulting his wife and the responding officers seized his firearms. The prosecutor ultimately dismissed the assault charges, and Blackburn sought the return of his firearms. The prosecutor's office refused to release the weapons because of Blackburn's 2001 conviction for a misdemeanor crime of domestic violence involving abuse of his son. Blackburn subsequently sued the prosecutor and law enforcement officials involved under 42 U.S.C. § 1983, alleging, among other things, that § 922(g)(9) violates the Second, Fifth, and Eighth Amendments to the United States Constitution. The district ruled that the suit against the defendants in their individual capacities was barred because the defendants enjoyed absolute prosecutorial and/or limited immunity. The court found that the constitutional claims were wholly

without merit. The court specifically noted that the Second Amendment right to bear arms applies where possession has a reasonable relationship to the preservation or efficiency of a well-regulated militia. Consequently, the court found that the claims against the defendants in their official capacities were meritless. **Key Issues: 2nd Amendment; Equal Protection; Commerce Clause; 8th Amendment.**

Buster v. U.S., 447 F.3d 1130 (8th Cir. 2006). Through advice of counsel, Buster pled guilty to possession of a firearm, in violation of 18 U.S.C. §922 (g)(9). Buster had a predicate offense in which he was convicted of assaulting his live-in girlfriend. This particular assault fell within a specific domestic violence statute, Iowa Code § 236.2(2). Buster moved to set aside, or vacate the predicate offense based on the claim that the relationship did not "qualify" within the meaning of the statute. 18 U.S.C. §921(a)(33)(A)(ii). The trial court denied this motion without an evidentiary hearing. This contention was discussed on appeal. The court states that Buster's attorney did not provide ineffective counsel and went on to state that two other circuits have directly addressed issues identical to the one that was at hand. *United States v. Shelton*, 325 F.3d 553, 563 (5th Cir. 2003); *United States v. Denis*, 297 F.3d 25, 31 (1st Cir. 2002). Both the First and the Fifth Circuits have ruled that a "live-in" girlfriend can qualify as an individual similarly situated to a spouse. The Eighth Circuit chose to agree with these sister circuits and held that a live-in girlfriend was an individual similarly situated to a spouse for the purposes of 18 U.S.C. §§922(g)(9) and 921(a)(33)(A)(ii). The motion to vacate was denied at the district court level and that ruling was affirmed by the Eighth Circuit. **Key Issue: Qualifying Relationship.**

United States v. Allman, 2012 U.S. Dist. LEXIS 135428 (D.S.D. 2012). Allman was charged with violating 18 U.S.C.S. §922(g)(9) along with four other counts involving assault.
Allman filed a Motion to Sever Counts for Trial, seeking to sever the count charging him with being a convicted domestic violence offender in possession of a firearm from all other counts. Allman argued that his prior misdemeanor charge of domestic violence would prejudice the jury against him. The court denied the motion stating that a jury instruction restricting use and consideration of the domestic violence incident only to the 18 U.S.C.S. §922(g)(9) charge would ensure no prejudice. **Key Issue: Severing a 18 U.S.C.S. §922(g)(9) from other criminal charges.**

United States v. Amerson, 599 F.3d 854 (8th Cir. 2010). Amerson plead guilty to attempted domestic assault in Nebraska state court, he was then indicted by a federal grand jury under 18 U.S.C. § 922(g)(9) for the possession of a firearm after a domestic violence conviction. The U.S. District Court for the District of Nebraska denied his motion to dismiss the indictment. After a conditional guilty plea, Amerson was sentenced to18 months incarceration, he appealed the district court's denial of his motion. Amerson argued that "he did not knowingly and intelligently plead guilty to the state charge, because the state court did not advise him of the possibility of a future firearm conviction" under § 922(g)(9). The Eighth Circuit found that the state court had no duty to inform Amerson of consequences of a plea that do not relate to the length or nature of a sentence. The court did not consider conviction under § 922(g)(9) to be direct consequence of his plea and affirmed the district court. Amerson also argued the state court's failure to disclose the possibility of conviction under § 922(g)(9) violated Nebraska Revised Statute § 29-2291(1), the court found that § 29-2291(1) did not become effective until after Amerson's sentencing. **Key Issues: Sentencing, Due Process (notice).**

United States v. Brun, 2004 U.S. Dist. LEXIS 1774 (D. Minn., Feb. 2, 2004). Brun pled guilty to "fifth degree domestic assault." The transcript from the entry of plea/ sentencing hearing showed that Brun shoved his wife and told her to leave him alone, breaking a car window in the process. The question that the court addressed is whether the government had established that Brun had committed a crime of domestic violence as defined by the applicable statutes, but it first had to determine what evidence is

permitted to review to make such a determination. The court held that plea transcripts are admissible as evidence in determining such a matter. The Minnesota statute to which Brun pled guilty has two subsections. Minn.Stat. § 609.2242, subd. 1(2) would establish, under 18 U.S.C. § 921(a)(33)(A)(ii), that he committed a crime of domestic violence, and Minn.Stat. § 609.2242, subd. 1(1) would not. Since it is unclear which subsection he pled guilty to, the court looked to the plea transcript to decide, which cannot definitively show that Brun pleaded guilty to Minn.Stat. § 609.2242, subd. 1(2). The court held that, since the government could not establish that Brun pleaded guilty to the subsection that would establish that he committed a crime of domestic violence, it likewise cannot establish that Brun is ineligible to possess a firearm. **Key Issue: Use of Physical Force Requirement.**

United States v. Cuervo, 354 F.3d 969 (8th Cir. 2004). Schoenauer, one of several defendants in the case, stipulated to his gun possession at trial, but contested the fact that the prior assault was a crime of domestic violence. The statute includes as domestic violence crimes those perpetrated on a person similarly situated to a spouse of the defendant. While Schoenauer's victim, his secretary, was not his spouse, the evidence showed and the jury found that she shared an intimate personal relationship with him. Thus, the appeals court would not disturb the jury's finding and held that the jury was free to determine, as a factual matter, that she was in a position similar to a spouse. **Key Issue: Relationship Requirement.**

United States v. Eagle, 266 F. Supp. 2d 1039 (D.S.D. 2003). Eagle was charged with a violation of § 922(g)(9) and moved to dismiss the indictment, arguing that his 2000 disorderly conduct conviction in South Dakota state court could not serve as the predicate offense. Specifically, Eagle alleged that his disorderly conduct conviction is not a "misdemeanor crime of domestic violence" because it does not include, as an element, "the use or attempted use of physical force." He noted that under South Dakota law the disorderly conduct offense he was convicted of can be committed in ways that do not involve the use of physical force. Although the court agreed with Eagle that a disorderly conduct conviction could result from acts that do not involve physical force, it found that it could look "beyond the predicate offense to the underlying acts in order to determine whether the element of physical force is present." The court further concluded that "where, as here, the earlier conviction results from a guilty plea and the charging document sheds no light whatsoever on whether the defendant committed a crime that had an element of physical force to it, courts may and should delve further and consider court records in its review process." Thus, the court examined the affidavit of probable cause executed by the arresting officer, which alleged that Eagle struck his wife in the mouth with his fist, and Eagle written and oral statements to the state court, in which he acknowledged that he "hit her." In addition, the district court noted that Eagle, in the initial charging document, had been charged with "[t]he public offense of Simple Assault … in that he did intentionally cause bodily injury to another, to wit: Mondae L. Medicine Eagle, which did not result in serious bodily injury." Thus, the court concluded that the charging documents "as a whole" show that Eagle was accused of and pled guilty to an offense that involved an element of physical force. **Key Issue: Physical Force Element.**

United States v. Ficke, 58 F. Supp. 2d 1071 (D. Neb. 1999). Defendant's motions to dismiss the indictment. In April 1994, Ficke entered a pro se plea of no contest to a charge of misdemeanor assault in connection with a domestic violence incident. The county court judge sentenced Ficke to six months of probation, and ordered the defendant to complete anger control classes. In September 1998, Oakland, Nebraska law enforcement officers arrested Ficke after his wife reported that Ficke had assaulted her. The officers found and confiscated a Mossberg .12 gauge pump shotgun, a Mossberg .410 bolt action shotgun, and a .22 caliber rifle. Ficke was indicted on one count of violating § 922(g)(9), and entered a guilty plea. Two weeks later, a district court in Texas made its decision in the *Emerson*

case, 46 F. Supp. 2d 598 (N.D. Tex. 1999), and Ficke filed a motion to withdraw his guilty plea. The motion was denied, but the district court advised Ficke that it would entertain a motion to dismiss if it were filed before sentencing. Ficke filed such a motion, arguing that § 922(g)(9) is an unconstitutional violation of the fundamental due process principles of notice and fair warning. The district court agreed, and dismissed the indictment. In its opinion, the court relied heavily on the *Emerson* case and Judge Posner's dissent in *Wilson*, 159 F.3d 280 (7th Cir. 1998). The court reasoned that Ficke would have had no way of knowing that "mere possession of hunting firearms had become felonious conduct two years after his misdemeanor conviction unless he spent considerable time in law libraries keeping track of amendments to federal firearms statutes…or he otherwise received notice of the section's enactment and its application to his situation." (NB: See *United States v. Hutzell*, *supra*, which reached the opposite ruling on similar facts. *See United States v. Denis, supra* (noting that "*Ficke* was effectively overruled by the Eighth Circuit's subsequent decision in *Hutzell*.") **Key Issue: Due Process (notice).**

United States v. Fischer, 641 F.3d 1006 (8th Cir. 2011). Fischer plead guilty to the possession of a firearm after conviction of a misdemeanor crime of domestic violence in violation of 18 U.S.C. § 922(g)(9) in the U.S. District Court for the District of Nebraska, but reserved the right to appeal the district court's denial of his motion to dismiss the indictment. Fisher argued that his state conviction of third degree attempted assault did not qualify as a misdemeanor crime of domestic violence under18 U.S.C. § 921(a)(33)(A), because that conviction did not have "as an element, the use or attempted use of physical force." The Eighth Circuit affirmed the district court, finding that documents accepted by the state court as the factual basis for Fischer's plea showed that Fischer had hit his ex-girlfriend in the face and bit her nose, showing that he had intentionally caused bodily injury, satisfying the force requirement for a qualifying conviction of a misdemeanor crime of domestic violence. **Key Issues: Qualifying Conviction of Misdemeanor Crime of Domestic Violence.**

United States v. Gammage, 580 F.3d 777 (8th Cir. 2009). Defendant was convicted of knowingly possessing a firearm after having been convicted of a misdemeanor crime of domestic violence, and was sentenced to 180 months. The sentence was severe because the Defendant had already been convicted of 3 other offenses, burglaries. However, the Defendant appealed on the basis that he was never actually convicted of the 3rd burglary. The Court of Appeals looked at the record at the District Court level and determined that the only evidence of the third burglary conviction was that there was an indictment for burglary. The Court of Appeals reversed and remanded stating that the defendant is not subject to an enhanced sentence since he was not actually convicted of 3 prior offenses. **Key Issue: Prior Convictions, Enhanced Sentencing.**

United States v. Glenn, 403 Fed.Appx. 133 (8th Cir. 2010). Glenn was convicted, following a bench trial, of being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. §§ 922(g)(1), (g)(9), and 924(a)(2) in the U.S. District Court for the Southern District of Iowa. On appeal, Glenn argued that there was not enough evidence for the district court to have concluded he possessed the firearm and ammunition, and that the district court should not have denied his motion to suppress statements he made to a police officer. Glenn further argued that evidence obtained from a warrantless search of his apartment should have been suppressed. The Eighth Circuit affirmed the district court, finding that under *Miranda*, Glenn's statements to the police officer were made knowingly and voluntarily, and that the evidence presented at trial supported his conviction of possession of a firearm and ammunition. The court considered Glenn's argument that evidence obtained from a warrantless search should have been suppressed to have been waived, as it was not presented to the district court. **Key Issues: Sufficiency of Evidence, Admissibility of Statements.**

United States v. Huntley, 2007 U.S. Dist. LEXIS 17525; 2007 WL 778403 (N.D. Iowa). Defendant Huntley moved to dismiss counts 1 and 4 of the indictment (possession of a firearm after having been convicted of a misdemeanor crime of domestic violence). The Defendant argued that the predicate misdemeanor crime of domestic violence, a 1995 assault conviction, did not constitute a MCDV, as a matter of law for purposes of §922(g)(9). In response to the motion to dismiss, the U.S. magistrate filed a report that included findings that the state court judgment established that the Defendant did not just plead to a generic "simple assault" charge, but he specifically pled guilty to an assault under Iowa Code § 708.1(1) and that the requirement of "physical force" in 18 U.S.C. § 921(a)(33)(A)(ii) is satisfied by a conviction under that statute. The district court reviewed the merits of the motion to dismiss *de novo*. The district court concluded that the Defendant pled guilty to an offense with an element of physical force within the meaning of 18 U.S.C. § 921(a)(33)(A)(ii). *See United States v. Smith,* 171 F.3d at 621 (8th Cir. 1999). The state court record, in this case, was legally sufficient to prove the predicate offense. The Defendant's objections to the magistrate's report are denied. The district court noted that §922(g)(9) did not require that the underlying misdemeanor crime charge, as an element, a domestic relationship. The domestic relationship element of §922(g)(9) need not be an element of the predicate offense but was instead an element of the offense to be proven at trial. **Legal Issue: Statutory Requirements.**

United States v. Hutzell, 217 F. 3d 966 (8th Cir. 2000). In 1996, Hutzell pled guilty to a state charge of "domestic abuse assault." Two years later, during an argument with his girlfriend, Hutzell fired a gun. He was charged with violating 18 U.S.C. §922 (g)(9). He entered a conditional guilty plea, and moved to dismiss the indictment. The district court denied the motion, and the 8th Circuit affirmed. Hutzell appealed, arguing that his conviction was improper because he was unaware of (g)(9) at the time he fired the gun, and because no one could be presumed to have had notice that the conduct described in the statute was unlawful. The court rejected the due process argument because, given the current level of concern about domestic violence exhibited in daily news reports and other media attention, it is "disingenuous for Hutzell to claim that his conviction under the statute involved the kind of unfair surprise that the 5th Amendment prohibits." **Key Issue: Due Process (notice).**

United States v. Larson, 13 Fed. Appx. 439 (8th Cir. 2001) (unpublished). Larson pled guilty in 1992 to a Minnesota misdemeanor assault charge. The statute set forth two separate bases for an assault conviction: Acting with intent to cause fear in another of immediate bodily harm or death; or intentionally inflicting or attempting to inflict bodily harm upon another. In 2000, Larson was charged with three counts of violating various subsections of 18 U.S.C. § 922, including section 922(g)(9). He filed a motion in limine to dismiss the charge based upon the 1992 conviction, arguing that it was unclear from the state-court record which of the two prongs of the statute underlay his conviction. The district court granted Larson's motion, and the government appealed. On appeal, the Eighth Circuit affirmed the decision, agreeing that neither the plea transcript nor the record of conviction nor the charging document reveals which clause Larson had pled guilty under. Only a conviction under the second clause, the court concluded, could serve as a predicate for a section 922(g)(9) conviction. **Key Issue: Record; Use of Force Physical Force Requirement.**

United States v. Myers, 1999 U.S. App. LEXIS 14658, 187 F.3d 644 (8th Cir. 1999) (per curiam) (unpublished). Myers was charged with violating both §§ 922(g)(8) and (g)(9). He pled guilty to violating § 922(g)(9), and the charge for violating (g)(8) was dismissed after his guilty plea. Myers challenged both § 922(g)(8) and (9), arguing that they unconstitutionally violate the 10th Amendment. The 8th Circuit affirmed the conviction. The court held that the statutes do not violate the 10th Amendment

because both subsections contain the jurisdictional element required for a valid exercise of Congress's powers under the Commerce Clause. **Key Issue: 10th Amendment; Commerce Clause.**

United States v. Pfeifer, 371 F.3d 430 (8th Cir. 2004). Pfeifer was convicted of simple assault against his wife in 1985, eleven years before Congress enacted 18 U.S.C. § 922(g)(9). He went hunting with a rifle on Nov. 10, 2001, and was subsequently charged with violating § 922(g)(9). At his 1985 arraignment, Pfeifer stated that he wished to proceed without a lawyer and pled guilty. Despite an extensive discussion of his rights conducted at the colloquy, Pfeifer now asserts that his waiver of counsel was not knowing and intelligent because the trial court did not specifically inform him that he would eventually lose his right to possess firearms. Citing its previous decision in *United States v. Smith,* 171 F. 3d 617 (8th Cir. 1999), *infra*, the court held that, regardless of what Pfeifer knew about the future consequences of his conviction, his waiver of counsel was knowing and intelligent, and therefore valid for the purposes of § 922(g)(9) even though he was not informed of the effect of his guilty plea on his ability to possess a firearm.

Pfeifer also argued that, as applied to him, § 922(g)(9) violates the Ex Post Facto Clause of the U.S. Constitution because it increases the punishment for his misdemeanor conviction from 17 years earlier. Although this was an issue of first impression for the Eighth Circuit, other circuits, including the Seventh, Fourth, and Second, have concluded that § 922(g)(9) does not violate the clause. The court in this case held that it is immaterial that the predicate offense occurred before the law was enacted; the critical factor is that the prohibited conduct - possession of a firearm - occurred after the enactment of the statute. Since Pfeifer possessed the firearm after the enactment of § 922(g)(9), it does not violate the Ex Post Facto clause.

Pfeifer next argued that the statute was unconstitutionally vague, since it does not provide fair warning that his possession of a firearm is prohibited conduct. The court rejected this challenge, citing two previous Eighth Circuit cases in which the court held that firearm possession is a highly regulated activity, and the general nature of the convictions should put the defendants on notice that subsequent possession of a gun might be subject to regulation. In addition to the binding effect of circuit precedent, the court concluded that the overwhelming evidence in the record of Pfeifer's actual knowledge of § 922(g)(9), alone, would have satisfied the due process requirements. **Key Issues: Waiver of Right to Counsel; Ex Post Facto Clause; Due Process (notice).**

United States v. Ray, 411 F.3d 900 (8th Cir. 2005). Ray appealed his 18 U.S.C. §922(g)(9) conviction and sentence based on Federal Firearms License which failed to indicate that he may have been prohibited from possessing firearms if convicted of a MCDV. Ray was a licensed gun dealer. After being convicted of a MCDV, law enforcement learned that Ray had guns in his apartment. A warrant was issued and authorities recovered 72 firearms. Ray claimed that the government was estopped from prosecuting him under §922(g)(9) because of the statements on the FFL. The FFL contained six GCA prohibitors but lacked information on the (g)(9) prohibitor. The list did not indicate that it was exhaustive. Ray argued that because the license did not expressly prohibit people convicted of a MCDV from owning a firearm, he was not a prohibited person. Ray maintained that the warning on the FFL affirmatively misstated the law for purposes of estoppel by entrapment. The difficulty with the warning, he argued, is that it did not state that the six listed conditions were illustrative, rather than exhaustive, **a**nd people presumed that the express mention of things excludes any other things which are not mentioned. The Eighth Circuit found that the FFL did not support an estoppel-by-entrapment defense. Ray argued that the warning on the license did not sufficiently explain the law, i.e., illustrative rather than exhaustive. The Eighth Circuit has stated that an incomplete explanation of law cannot support an estoppel-by-entrapment defense.

U.S. v. Benning, 248 F.3d 772, 776 (8th Cir. 2001). The Ninth Circuit's holding in *United States v. Ramirez-Valencia*, 202 F.3d 1106, 1109 (9th Cir. 2000) was instructive here. The Eighth Circuit based its denial of Ray's petition on similar reasoning. The conviction and sentencing of the district court is affirmed. **Key Issue: Estoppel by Entrapment.**

United States v. Recker, 2012 U.S. Dist. LEXIS 124900 (N.D. Iowa 2012). Recker was charged with a violation of 18 U.S.C. §922(g)(9). He asked the court to admit the following evidence: 1) he did not use a firearm during the misdemeanor crimes of domestic violence and 2) he had a good-faith belief that he could lawfully possess a firearm. The court denied both. First, the court held that whether Recker used or displayed a firearm during the crimes of domestic violence is irrelevant. Second, the government did not need to prove that Recker knew it was illegal to possess a firearm. The government need only prove the defendant knew the facts constituting the offense not that he knew it was illegal to possess a gun. The court also noted that having a hunting license does not alter the fact that he was prohibited from possessing a firearm. **Key Issues: Knowledge; Use of firearm**

United States v. Smith, 171 F. 3d 617 (8th Cir. 1999). In 1994, Smith pled guilty to an assault involving an incident with Lorenson, and was convicted of misdemeanor assault. The state court appointed counsel to represent Smith on the assault charge, but his counsel did not appear at his plea hearing. Following counsel's failure to appear, Smith signed a "Waiver of Right to Counsel" and pleaded guilty. He was fined $100. In 1996, Smith shot and wounded Lorenson, and he was indicted for violating § 922(g)(9). Smith conditionally pleaded guilty. He appealed denial of his motion to dismiss the charge, basing his appeal on a challenge to the application of the statute, arguing that the Iowa Code assault crime does not contain the required elements of the use or attempted use of physical force and the intimate partner relationship, and he did not intelligently and knowingly waive his right to counsel. Additionally, Smith challenged the statute on the grounds that it is vague and overbroad and violates equal protection. In terms of his challenge to the statute as applied to him, since the state court complaint accused Smith of "committing an act which was intended to cause pain or injury to another, coupled with the apparent ability to execute said act[,]" and charged him under Iowa Code § 708.1(1), for committing an act intended to cause pain, injury, or offensive or insulting physical contact, the underlying crime meets the physical force criterion of (g)(9). The court did not address the intimate partner element in its published opinion. The 8th Circuit rejected the argument that the waiver to counsel was not knowing and intelligent for a number of reasons: (1) The magistrate presiding over the plea hearing indicated that her general practice would have been to continue the proceeding to another day if Smith had requested the court to wait for his counsel, but Smith does not claim to have made such a request, and there is no evidence that the magistrate did not follow her general practice; (2) relying on precedent, the court held that a written waiver of counsel can be the basis of a valid waiver, and Smith signed a form waiving his right to counsel before entering the plea; and (3) there is no 6th Amendment right to counsel for a misdemeanor crime if the defendant's sanction did not include imprisonment. The court also found the vagueness and equal protection arguments to be without merit. **Key Issues: Required Elements of Misdemeanor Offense; Use of Physical Force Requirement; Waiver of Right to Counsel; Due Process (notice); Equal Protection.**

United States v. Yocum, 401 Fed.Appx. 166 (8th Cir. 2010). Yocum plead guilty to the possession of firearms, after having been convicted of a misdemeanor crime of domestic violence and while being a user of controlled substances (marijuana, ecstasy and crack cocaine), in violation of 18 U.S.C. §§ 922(g)(9) and (g)(3), in the U.S. District Court for the Western District of Missouri. Yocum was sentenced to 87 months imprisonment for both counts, to be served concurrently. On appeal, Yocum argued that the district court erred in convicting and sentencing him under both §§ 922(g)(9) and (g)(3), because

both counts arose out of a single incident of firearms possession. Yocum argued he should have only been convicted and sentenced once under § 922(g). The Eight Circuit found plain error on the part of the district court in convicting and sentencing Yocum for two violations under § 922(g), stemming from a single act of possession. The government conceded the plain error. The Eight Circuit remanded to the district court, ordering the two convictions be merged into a single count and appropriate resentencing take place, in accordance with a single conviction. **Key Issues: Sentencing; Duplicitous Charges under § 922(g).**

Ninth Circuit (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam, Northern Mariana Islands)

Baker v. Holder, 475 Fed. App'x. 156 (9th Cir. 2012). This disposition is not appropriate for publication and is not precedent except as provided by the 9th Cir. R. 36-3.

The district court erred in dismissing the complaint with prejudice for a failure to state a claim because Baker's complaint sets forth a statutory and constitutional argument as to the unconstitutionality of 18 U.S.C. § 922(g)(9), the firearms prohibition for a conviction of a domestic violence misdemeanor. The court affirmed the Rule 12(b)(1) dismissal without prejudice, reversed the Rule 12(b)(6) dismissal, and remanded with leave to amend the complaint. **Key Issue: Sufficiency of claim of unconstitutionality to withstand Rule 12(b)(6) motion.**

Duffy v. State, 120 P.3d 398 (Mont. 2005). Duffy seeks to withdraw his guilty plea for "partner or family member assault" on various grounds, including that the judge did not inform him of the collateral consequences, i.e., 922(g)(9)'s firearm prohibition. The court ruled that, although evidence suggested the judge had in fact notified Duffy of the collateral consequences, Montana law did not require a judge to inform a defendant of collateral consequences. **Key Issue: Plea withdraw ; competency; Notification of 922(g)(9)'s consequences.**

Enos v. Holder, 855 F. Supp. 2d 1088 (E.D. Cal. 2012). Plaintiffs were each convicted of a misdemeanor crime of domestic violence over 10 years ago. Under California law, the right to possess a firearm is restored 10 years after the dates of conviction, but, under the Violence Against Women Act, an individual is barred from possession a firearm after a misdemeanor conviction of domestic violence. Plaintiffs seek declaratory relief to restore their right to possess firearms under federal law, and they bring an as-applied challenge to the constitutionality of 18 U.S.C. § 922(g)(9) under the Second Amendment.

The court reviewed definitions of "misdemeanor crimes of domestic violence" and how to determine if an individual's conviction may be set aside and have civil rights restored. See 18 U.S.C. § 921(a)(33)(B). Citing Ninth Circuit precedent, the court held that the Plaintiffs having their records cleared under California Penal Code § 1203.4 does not qualify as expungement under 18 U.S.C. § 921(a)(33)(B)(ii). See Jennings v. Mukasey, 511 F.3d 894 (9th Cir. 2007). Furthermore, the court does not extend the restoration of civil rights, which has repeatedly included the right to vote, hold public office, and sit on a jury, to possess firearms. Furthermore, the court includes a ban on firearm possession by those convicted of domestic violence misdemeanors as one constitutional under Heller. **Key Issue: Restoration of civil rights; Second Amendment; Records of previous crimes cleared by state law.**

Fisher v. Kealoha, CIV. 11-00589 ACK, 2012 WL 2526923 (D. Haw. June 29, 2012). Plaintiff was placed on six-month probation for harassment and required to surrender his firearms pursuant to H.R.S. §§ 806-

11, 134-7. After his probation period, Plaintiff's firearms were returned. In 2009, Plaintiff applied for a permit to acquire firearms, was denied, and ordered to surrender his firearms. Plaintiff seeks a preliminary injunction, maintaining the requirement to relinquish his firearms violates his Second Amendment rights.

According to state law, however, harassment is not a "crime of violence" which would trigger the firearm prohibition. Similarly, potentially-applicable federal restrictions on firearm possession relate to crimes of violence, and the court found that harassment is not a crime of violence. Additionally, the court found that prohibiting Plaintiff from acquiring a firearm impacts his Second Amendment rights.

The court granted the preliminary injunction and orders the defendant to issue a permit authorizing the plaintiff to acquire firearms. **Key Issue: Definition of "crime of violence."**

Fortson v. City Attorney of Los Angeles, CV 12-5256-MWF SP, 2013 WL 1431624 (C.D. Cal. Mar. 4, 2013). The plaintiff was convicted of a misdemeanor crime of domestic violence in 2009, and, in 2011, pursuant to state law prohibiting firearm possession for 10 years by an individual convicted of a misdemeanor of domestic violence, Los Angeles police officers seized his firearms. Despite the plaintiff's efforts to demonstrate the his use and possession of firearms for work and the termination of his probation and restraining order, the plaintiff was charged with possession of a firearm within 10 years of a misdemeanor conviction for spousal battery. The court had previously permitted him to maintain firearms for his work, and, although the charges were dismissed, the firearms were ordered destroyed and he was told he would not be permitted to possess firearms until 2019.

Claims against the Bureau of Firearms are barred by state sovereign immunity, and claims of malicious prosecution, violation of due process rights, and violation of Second Amendment rights against the Los Angeles City Attorney are barred by absolute prosecutorial immunity. The court found the complaint fails to state a claim against the LAPD and LAPD officers because the court could not infer from the facts that any of the defendants committed a civil rights violation.

Additionally, citing other Courts of Appeal, the court found that 18 U.S.C. § 922(g)(9) does not violate Second Amendment rights as the statute supports the government's interest in preventing domestic gun violence. Furthermore, citing Ninth Circuit precedent that affirms the constitutionality of 18 U.S.C. § 922(g)(3) – criminalizing firearms possession by individuals who use or are addicted to drugs, the court affirms the constitutionality of the provision at issue. **Key Issues: Use of firearms in work; claims against government departments.**

Jennings v. Mukasey, 511 F.3d 894 (9th Cir. 2007). Petitioner sought to overturn the decision of the ATF in denying a Federal Firearms License. The Petitioner was convicted of a misdemeanor assault against his wife in 1985. This was before the amendment to the Gun Control Act which included (g)(9) in 1996. In 1998 Jennings sought renewal of his FFL, stating on the questionnaire that he had not been convicted of a prohibiting crime. The following year the ATF revoked this license based on the false statement provided on the questionnaire and the fact that the Petitioner was a prohibited individual. Later in 1999, the Superior Court of California issued an "Order Expunging Conviction *Nunc Pro Tunc* on October 18, 1987." That order granted Jennings relief under California Penal Code §1203.4, replaced his *nolo contendere* plea with a "not guilty" plea and dismissed the case against him. The California court's order required Jennings "to disclose the fact of this misdemeanor conviction in response to any direct question contained in any questionnaire or application for public office, for licensure by any state or local agency, or for contracting with the California State lottery." In 2001, the Petitioner filed a renewal

of his FFL, which was revoked by the ATF. The ATF's decision was upheld by the district court. "A number of courts have used forms of the word 'expunge' to describe the relief" under California Penal Code §1203.4, but "the statute does not in fact produce such a dramatic result." *People v. Frawley*, 82 Cal. App. 4th 784, 790-91 (2000). In *Frawley*, the defendant was convicted of a felony in the early 1990s. That conviction was dismissed under §1203.4 in August 1997. In 1999, Frawley was charged with possession of ammunition and a firearm by an ex-felon. *Id*. at 787. Frawley moved to dismiss on the ground that his prior conviction had been expunged under §1203.4. The California Court of Appeals rejected that argument. When comparing Jennings' claim with that brought by *United States v. Andrino*, 497 F.2d 1103 (9th Cir. 1974), a similar outcome is necessary. Andrino was a convicted felon who argued that he had been relieved from his prior conviction under §1203.4. The Ninth Circuit stated, "The California legislature, by specific enactment, has negated the very theory under California law by which Andrino seeks to demonstrate the absence" of his underlying conviction. *See id*. The Ninth Circuit held that Andrino remained convicted for GCA purposes even though he had received relief under §1203.4. In the present case, the Petitioner was granted the same relief and the result does not expunge the prior conviction. **Key Issues: Expungement.**

Shirey v. Los Angeles Cnty. Civil Serv. Comm'n, 216 Cal. App. 4th 1 (2013). Shirey, a deputy sheriff was convicted of simply battery involving his girlfriend. He was placed on probation against firearm possession. His battery conviction was set aside after completing probation, however, the agency discharged him on the ground that he was prohibited under 18 U.S.C. § 922(g)(9) from possessing a firearm. The court held that the sheriff was not disqualified because his conviction for simple battery under the state penal code does not qualify as a conviction of a domestic violence crime under the meaning of 18 U.S.C. § 922(g)(9). *See Leocal v. Ashcroft*, 543 U.S. 1 (2004); *United States v. Hayes*, 555 U.S. 415 (2009); *Johnson v. United States*, 559 U.S. 133 (2010).

The court also considered Ninth Circuit precedent from Wyoming, explaining that a misdemeanor crime of domestic violence requires something beyond rude or impolite touching. Thus, the court found that the federal statute does not apply to a conviction for conduct in which de minimus or no force was used or attempted. The judgment is reversed and remanded to the district court to vacate its order denying the plaintiff's petition and to issue a new order granting his petition. **Key Issues: Definition of crime of violence.**

State v. Cantrell, 945 P.2d 1251 (Ariz. 1997). Cantrell was charged with assaulting the son of his girlfriend, which constituted a domestic violence misdemeanor under Arizona law. He argued that he was entitled to a jury trial on the charge, despite the fact that misdemeanor assault does not qualify for a jury trial under Arizona law. Cantrell asserted that he was entitled to a jury trial because a conviction would render him ineligible to possess a firearm under federal law, specifically 18 U.S.C. § 922(g)(9). The Arizona Supreme Court rejected Cantrell's argument, holding that neither the designation of the crime as "domestic violence" under Arizona law nor the existence of section 922(g)(9) trigger the jury trial requirement. The court ruled that in determining whether or not the jury right attaches the most significant element is the potential punishment authorized by the state statute creating the crime, and that courts should not look to collateral consequences imposed by laws of other jurisdictions. The court further held that the loss of firearm rights is not the type of "universal grave consequence" that invokes the right to jury trial. Finally, the court refused to "fall into lockstep with federal courts on the issue of jury entitlement. **Key Issues: Right to Jury Trial; Collateral Consequences.**

State v. Liefert, 43 P.3d 329 (Mont. 2002). Liefert pled guilty to partner assault under Montana state law. Subsequently, he was charged under federal law with unlawfully possessing a firearm under 18

U.S.C. § 922(g)(9). After the federal charge was brought, Liefert filed a motion to withdraw his guilty plea, asserting that it was not voluntary because he was not informed of the federal firearm disability that would result from the plea. The trial court denied the motion and Liefert appealed to the Montana Supreme Court. On appeal, Liefert argued that the federal statute preempts Montana law, which provides for a discretionary, not mandatory, firearm prohibition, and therefore that the court is required to inform defendants of the firearm restriction because it must give fair warning regarding the punishment that can result from a guilty plea. The Montana Supreme Court affirmed the trial court's denial of Liefert's motion, finding that the trial court only had a responsibility to inform Liefert of the direct consequences of the guilty plea, and not any collateral consequences. The court held that the federal firearms prohibition was a collateral consequence, because it did not have a "definite, immediate, and largely automatic effect" on Liefert. Specifically, the court held that Liefert himself had discretionary control over whether he would violate the federal law (by choosing whether or not to possess a weapon), and that the federal prosecution was not automatic but rather under the control of the federal government. **Key Issues: Voluntariness of Guilty Plea; Collateral Consequences.**

United States v. Belless, 338 F.3d 1063 (9th Cir. 2003). Belless pled guilty to "assault and battery" for grabbing his wife by the chest and neck and pushing her against a car. He was afterward convicted of illegally possessing a firearm, in violation of § 922(g)(9). The court, in this case, held that a domestic relationship does not have to be an element in the predicating offense in order for § 922(g)(9). Thus, even misdemeanors like "assault and battery," which do not deal specifically with domestic violence, will invoke the statute, provided that the victim is a current or former spouse of the perpetrator. The court also stated that conduct resulting in the predicating offence must be more than merely a rude or insolent touching [this portion of the opinion was abrogated by *United States v. Castleman,* 134 S.Ct. 1405 (U.S. 2014). As the court in this case had no way of knowing the extent of the touching, since the record did not reveal the conduct for which Belless was convicted, it could not rule on this issue. The statute requires that the prior conviction have been obtained with counsel or that the right to counsel have been waived knowingly and intelligently. 18 U.S.C. § 921(a)(33)(B)(i)(I). The court in this case held that Belless did not knowingly and intelligently waive his right to counsel, as the form he signed did not include a warning of the dangers and disadvantages of self- representation, nor is there any record of other such warning, oral or written. Thus, Belless did not knowingly and intelligently waive his right to counsel when he plead guilty to the misdemeanor crime, as is required by the statute. **Key Issues: Required Elements of Misdemeanor Offense; Use of Physical Force Requirement; Waiver of Right to Counsel.**

United States v. Brailey, 408 F.3d 609 (9th Cir. 2005). The Petitioner assaulted his wife and pled guilty to the charges. He completed his sentence in 1996. In 1997, the Utah court granted his petition to reduce his felony conviction to a class A misdemeanor assault pursuant to Utah Code Ann. § 76-3-402. Until 2000, when the Utah legislature enacted Utah Code Ann. § 76-10-503, anyone convicted of a crime of violence, misdemeanor or felony, was prohibited from possessing weapons. The new law allowed for misdemeanants to possess firearms. The Petitioner argued that due to this new enactment, his civil rights had been restored. The federal statute affords the ability to possess firearms for those who have had their civil rights restored. 18 U.S.C. §921(a)(33)(A). One can qualify for that exception only if the applicable state law provided for the loss of civil rights upon conviction in the first place. Under the language of the federal statute, the question became whether the law of Utah ever provided for the loss of civil rights for misdemeanor convictions. The district court correctly stated that when Brailey's conviction was changed from a felony to a misdemeanor crime of domestic violence in 1997, he "did not lose any 'core civil rights', (the right to vote, the right to serve on a jury, and the right to hold public office)." The Petitioner's civil rights could not have been "restored" in 2000 within the meaning of the

federal exception because his misdemeanor conviction had not resulted in the loss of his civil rights as expressly required to qualify for the federal exception. Most of the other circuits to have addressed the question that was before the Ninth Circuit and have concluded similarly, that in states where civil rights are not divested for misdemeanor convictions, a person convicted of a misdemeanor crime of domestic violence cannot benefit from the federal restoration exception. The district court's ruling was affirmed. **Key Issue: Restoration of Civil Rights.**

United States v. Bryant, 769 F.3d 671 (9th Cir. 2014). The Northern Cheyenne Tribal Court convicted Brynt, a Native American, of misdemeanor crimes of domestic violence. These convictions were without counsel and were accompanied with a prison sentence. The Sixth Amendment provides that indigent defendants in state and federal criminal proceedings – but not tribal proceedings - have a right to appointed counsel when a term of imprisonment is imposed. The Court found that while the tribal proceedings were lawful under the Constitution, the convictions under the tribal proceedings could not be used as predicate offenses in state or federal proceedings for they were without counsel as guaranteed by the sixth amendment. **Key Issue: Right to Counsel; Sixth Amendment**

United States v. Epps, 240 Fed. Appx. 247 (9th Cir. 2007). The court reviewed Epps' request that the indictment under 18 U.S.C. §922(g)(9) be dismissed on the basis that the guilty plea he entered for the predicate offense was not knowingly and intelligently entered. Epps asserted that because the guilty plea to the predicate offense had been withdrawn by the district court, his conviction no longer qualified as a misdemeanor crime of domestic violence. Assuming *arguendo*, the court stated that that a prior state misdemeanor domestic violence offense could serve as a predicate offense under §922(g)(9) only if the Defendant had "effective assistance of counsel" within the meaning of the Sixth Amendment, 18 U.S.C. § 921(a)(33)(B)(i)(I). Epps does not qualify for relief as provided in *Strickland v. Washington,* 466 U.S. 668 (1984). Epps has failed to provide evidence that he was prejudiced by his counsel's representation during domestic violence proceedings. Epps' argument that dismissal of his domestic violence conviction barred a §922(g)(9) conviction fails based on *Lewis v. United States,* 445 U.S. 55 (1980). Congress provided that a conviction that "has been expunged or set aside" may not serve as a predicate conviction for prosecution under §922(g)(9), but Epps' conviction was set aside after he was arrested for illegally possessing a firearm in violation of §922(g)(9). The Ninth Circuit affirmed the conviction of the district court**. Key Issue: Sixth Amendment, Withdraw of Predicate Offense.**

United States v. First, 731 F.3d 998 (9th Cir. 2013). The Fort Peck Tribal Court in Montana convicted First, a native American, for a misdemeanor crime of domestic violence in 2003. First appeared before the court without a lawyer and was not offered the assistance of a court-appointed lawyer. The Court sentenced First to thirty days in jail, "suspended for 120 days probation." In 2011, the government convicted First for a violation of 922(g)(9). First argued that because the predicate offense occurred in Tribal Court without the assistance of a lawyer, that the 922(g)(9) conviction violated the 6th Amendment. The 9th Circuit held that "a misdemeanor conviction obtained in tribal court may qualify as a predicate offense to a § 922(g)(9) prosecution so long as the defendant was provided whatever right to counsel existed in the underlying misdemeanor proceeding." The case was reversed and remanded because while First did not have a lawyer, the Tribal Court did not deny his right to counsel at any point in time. **Key Issue: Right to Counsel; Sixth Amendment; Fifth Amendment; Fourteenth Amendment Equal Protection Clause**

United States v. Hancock, 231 F.3d 557 (9th Cir. 2000). In 1994 and 1995, Gary Hancock was convicted of four state misdemeanor crimes of domestic violence against his wife, who later divorced him. In 1998, Hancock's ex-wife obtained a protection order against Hancock in Flagstaff, Arizona. The order specified

that Hancock was prohibited from possessing firearms. When Hancock was served with the protection order, a Flagstaff deputy sheriff told Hancock that he was required to turn over any firearms in his possession to the Flagstaff police by the end of the day. Hancock arranged for surrender of 12 firearms, which were later picked up police officers. The U.S. Attorney's office later indicted Hancock for violation of 922(g)(9). Hancock filed a motion to dismiss the indictment based on the unconstitutionality of the statute, arguing that it violates the due process and equal protection guarantees of the U.S. Constitution; the district court denied the motion. After conviction by a jury, Hancock appealed to the Ninth Circuit. The circuit court reviewed *de novo* the denial of the motion to dismiss. Hancock argued that the government was required to prove that he had actual knowledge of the requirements of (g)(9). The circuit court found this argument to be without merit and held that the requirement of "knowing" conduct refers to knowledge of the firearm possession, and not knowledge of the legal consequences of the possession. Hancock also argued that (g)(9) violates due process as applied to him, contending that his case falls within the exception to the rule that "ignorance of the law is no excuse," created by *Lambert v. California*, 355 U.S. 225 (1957). The Ninth Circuit distinguished *Lambert* because in that case, the conviction was for a failure to register as a convicted felon, and was "wholly passive," as opposed to this case, in which the Hancock knowingly possessed a firearm. Relying on the Sixth Circuit case of *United States v. Beavers, supra*, the circuit court found that, by owning firearms, Hancock "knowingly subjected himself to a host of state and federal regulations," and by committing the domestic violence offense, he removed himself from the class of ordinary and innocent citizens who would expect no special restrictions on the possession of a firearm. Additionally, Congress is not required to inform citizens individually of a change in the law. Hancock also argued that the statute violates equal protection, and that the court must apply the strict scrutiny standard of review, because the statute burdens his fundamental right to bear arms under the Second Amendment. The court disagreed, and, applying the rational basis standard of review, held that Congress could have rationally prohibited domestic violence misdemeanants from possession of firearms, and since the statute contains means for prohibited persons to regain the right to possess firearms (restoration of civil rights, expungement, pardon), the statute does not violate equal protection. **Key Issues: Knowledge Requirement; Due Process (notice); Equal Protection; Second Amendment.**

United States v. Jackson, No. 98-50764, 2000 U.S. App. LEXIS 4865 (9th Cir. March 21, 2000). Jackson appealed conviction under § 922(g)(9), and the Ninth Circuit affirmed. Jackson argued that the district court erred by failing to dismiss the 922(g)(9) charge because Jackson did not knowingly and intelligently waive his right to a jury trial in the underlying domestic violence offense because he did not authorize his attorney to enter a guilty plea. The 9th Circuit found, however, that the district court's finding was not clearly erroneous because the order memorializing the appearance at which the plea was taken reflects the state court's finding that Jackson had been fully advised of his constitutional rights. Moreover, when Jackson appeared in court two years later after being arrested on a bench warrant for failure to appear in connection with the conviction, Jackson signed a minute order reinstating his probation and did not contest his guilt. **Key Issue: Waiver of Right to Jury Trial.**

United States v. Lenihan, 488 F.3d 1175 (9th Cir. 2007). Lenihan appealed his conviction for possession of a firearm by a person convicted of a misdemeanor crime of domestic violence, pursuant to 18 U.S.C. § 922(g)(9). Lenihan argued that his guilty plea to the predicate misdemeanor was accepted in violation of his Sixth Amendment right to counsel. Lenihan further argued that he did not knowingly and intelligently waive his right to counsel because he was not told of the dangers and disadvantages of self-representation. Previously the Ninth Circuit Court of Appeals had afforded the Sixth Amendment, knowing and intelligent standard to misdemeanor crimes. See *United States v. Akins*, 276 F.3d 1141, 1147 (9th Cir. 2002). This would have warranted the invalidation of a conviction under 18 U.S.C. §922

(g)(9) if the guilty plea of the predicate crime was made uninformed of the dangers and disadvantages of self-representation. The U.S. Supreme Court has overruled *Akins* in *Iowa v. Tovar*, 541 U.S. 77, 81 (2004), ruling that a rigorous warning on waiver of counsel at pre-trial stages is not needed. Lenihan was warned at his initial appearance that conviction could limit his ability to lawfully possess a firearm. Due to this warning Lenihan failed to prove that he did not knowingly and intelligently waive counsel in the domestic violence proceeding. The argument that the conviction cannot stand because of failure to inform that one could be prosecuted for possession of a firearm, was a collateral consequence of the conviction and did not affect the constitutionality of the waiver. The conviction is affirmed. **Key Issue: Right to Counsel; Sixth Amendment.**

United States v. Norbriga, 474 F.3d 561 (9th Cir. 2006). The Petitioner appealed the district court's denial of his motion to dismiss his indictment under 18 U.S.C. §922(g)(9). The predicate offense was the Petitioner's conviction of Abuse of a Family or Household Member ("AFHM"), in violation of section 709-906(1) of the Hawaii Revised Statutes. Norbriga argued that the AFHM did not qualify as a MCDV due to statutory construction. The Petitioner further stated that neither the statute alone, nor with the ancillary court documents, prove the required relationship pursuant to 18 U.S.C. §921(a)(33)(A)(ii). The Ninth Circuit reexamined its holding in *United States v. Belless*, 338 F.3d 1063 (9th Cir. 2003). "[§ 922(g)(9)] does not require that the misdemeanor statute charge a domestic relationship as an element. It requires only that the misdemeanor have been committed against a person who was in one of the specified domestic relationships." *Belless* at 1066. Norbriga also contended that the AFHM does not contain the necessary use of force as an element required by §921(a)(33)(A)(ii). The statute does not necessarily require the violent use of force, but the record established that Norbriga pled guilty to a violent use of force and is precluded from this claim. However the Hawaii statute for physical abuse can also be satisfied with reckless, rather than intentional, use of force. This did not meet the federal standard. *See Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, at 1130, 1141 (9th Cir. Oct. 26, 2006). For this reason the Ninth Circuit dismissed the indictment. **Key Issues: Use of Force Requirement, Relationship Requirement.**

United States v. Rodriguez-DeHaro, 192 F.Supp. 2d 1031 (E.D. Cal. 2002). Rodriguez-DeHaro was charged with violating 18 U.S.C. §§ 922(a)(6) and 924(a)(2) for making a false statement on ATF Form 4473 (application to purchase a firearm) when he answered "No" to the question "have you ever been convicted in any court of a misdemeanor crime of domestic violence?" Rodriguez-DeHaro had been charged earlier in the year with a misdemeanor violation of a California law, battery against a person who is the parent of the defendant's child, or is the defendant's former spouse, fiancé, or dating partner. He ultimately had pled guilty to a lesser, included offense, simple battery. Rodriguez-DeHaro moved to dismiss the federal indictment, arguing that his conviction was not a misdemeanor crime of domestic violence as defined by federal law, that he did not have the requisite knowledge, and that the statute is unconstitutionally vague and overbroad. The district court rejected the first challenge, finding that the definition of MCDV in the federal statute does not require that the predicate offense include the "domestic status of the victim" as an element. The court also held that where, as here, the charge is for making a false statement on Form 4473 rather than for a violation of section 922(g)(9) itself, there is no need to consider the definition of MCDV in the federal law, because the form itself defines what an MCDV is for purposes of answering the question. The court also rejected the claim that a person completing the form would need technical legal knowledge to do so properly. As to Rodriguez-DeHaro's contention that he did not have the requisite knowledge to support a conviction, the court rejected that challenge by noting that the question of knowledge is one for trial and not amenable to adjudication as a matter of law. Finally, the court also rejected Rodriguez-DeHaro's vagueness/overbreadth argument, finding that that the statute sets forth the prohibited conduct in straightforward language capable of

being understood by a person of ordinary intelligence. It also noted that the problems Rodriguez-DeHaro alleged regarding the incorrect or misleading version of the law provided in Form 4473 would go to whether he had knowingly made a false statement, but were not relevant to whether the federal statute is unconstitutionally vague. **Key Issues: False or Fictitious Statement to Acquire a Firearm (§922(a)(6)); Required Elements of Misdemeanor Offense; Knowledge Requirement; Vagueness.**

United States v. Serrao, 301 F. Supp. 2d 1142 (D. Hawai'i 2004). Serrao was indicted for violating § 922(g)(9) based upon a 1995 predicate conviction for Assault in the Third Degree under Hawaii law. Serrao originally was charged with abuse of a family and household member, which was based upon his attack on his wife. The matter was transferred to another court, and the complaint orally amended to Assault in the Third Degree, to which Serrao pleaded no contest. Serrao moved to dismiss the indictment, arguing that the Assault in the Third Degree statute criminalizes conduct not involving the use of physical force, as required by § 922(g)(9), and that there was no record of the conduct that Serrao admitted to when he pled no contest. The federal district court agreed and dismissed the indictment. It found that force is not a required element of the third-degree assault offense, and that the record before the court did not demonstrate that Serrao had pled guilty to conduct that involved the use of physical force. The court also considered declarations made by the prosecutor in the state cases that the underlying conduct involved the assault on Serrao's wife and thus involved the use of physical force. The court declined to find that the declarations "clearly establish[ed]" that the prior offense involved physical force, although it found that it was likely that it did. **Key Issue: Required Elements of Misdemeanor Offense.**

United States v. Skuban, 175 F. Supp. 2d 1253 (D. Nev. 2001). Skuban was indicted for possession of a firearm in violation of section 922(g)(9). The predicate offense was a conviction under Nevada law for assaulting his mother. Skuban filed a motion to dismiss the indictment, alleging that a misdemeanor conviction for assaulting a parent is not a qualifying conviction under the federal law. The district court agreed, finding that the statute did not list such a relationship as one that triggers the prohibition, nor did it indicate that the list was exemplary, not exclusive. The court also found that a child-aggressor is not "similarly situated to a spouse, parent, or guardian." **Key Issue: Relationship Requirement**

United States v. Wilhelm, 65 Fed. Appx. 619 (9th Cir. 2003) (unpublished). Wilhelm appealed his § 922(g)(9) conviction on two grounds, both of which were summarily rejected by the Ninth Circuit based upon circuit precedent: That his conviction violated the Ex Post Facto Clause of the Constitution; and that the predicate misdemeanor crime did not satisfy the requirements of §§ 922(g)(9) and 921(a)(33)(A)(ii). **Key Issues: Ex Post Facto Clause; Required Elements of Misdemeanor Offense.**

Tenth Circuit (Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming)

King v. Wyoming Div. of Crim. Invest., 89 P.3d 341 (Wy. 2004). King's application for a concealed firearm permit was denied because he had been convicted of breach of peace for an incident in which he assaulted and threatened his estranged wife. King appealed the denial, arguing that the statute under which he had been convicted did not satisfy the requirements of the federal statute. Specifically, the Wyoming statute had as an element that the defendant use "violent actions," while the federal statute requires that the statute have as a required element "the use or attempted use of physical force." King argued that "violent actions" do not necessarily constitute the use of physical force." The appellate court disagreed, finding that the phrases "violent actions" and "physical force" are practically synonymous and have indistinguishable meanings. The court also noted that although it is possible to be convicted under a prong of the Wyoming breach of peace statute that does not involve "violent

actions," an investigation of the record showed that King was charged and pled guilty to a crime involving the "violent actions" prong. Further, the court cited a number of federal court cases in rejecting King's argument that the predicate crime must have as an element the existence of the relationship required by the federal law. **Key Issues: Use of Physical Force Requirement; Relationship Requirement.**

Salt Lake City v. Newman, 113 P.3d 1007 (Utah Ct. App. 2005). Under Utah law, a person can only appeal a criminal ruling after he has been convicted and sentenced. Newman applied for an exception to this law because he was accused of domestic-violence battery, and if convicted he would have lost his military job because of 922(g)(9), no matter if he were ultimately vindicated on appeal or not. The Court of Appeals of Utah ruled that although his claim might have merited an exception, the standard of review for "exceptions" is abuse of discretion, and the lower court did not abuse its discretion in denying Newman the special exception to Utah criminal procedure. **Key Issue: Appeals Procedure.**

State v. Garcia, 63 P.3d 1164 (N.M. Ct. App. 2002). Garcia was convicted of a domestic violence crime and appealed to state court, challenging the constitutionality of the federal punitive consequences of his conviction under 18 U.S.C. § 922(g)(9). The appellate court dismissed the appeal, holding *inter alia* that the district court could not reach the merits of the constitutional challenge without issuing a purely advisory opinion with no practical consequences on the case. **Key Issue: State Court Challenge to Constitutionality.**

United States v. Blosser, 235 F. Supp. 2d 1178 (D. Kan. 2002). Blosser was convicted of a § 922(g)(9) violation following a bench trial. Blosser also was charged with violating 18 U.S.C. § 922(a)(6), making a false or fictitious statement in connection with the acquisition of a firearm, based upon his "no" answer to the question on ATF Form 4473 about whether he had been convicted of a misdemeanor crime of domestic violence. The issue for the court was whether Blosser had "knowingly" made a false statement on the form. Blosser had argued that he believed he had only been convicted of simple battery against his biological daughter and that because he had appealed the decision, the conviction no longer existed. The court rejected Blosser's argument, finding that the knowingly standard could be satisfied by either: "1) A showing that defendant actually knew the statement was false, *or* 2) by proof that defendant made the statement with a deliberate disregard for whether it was true or false with a conscious purpose to avoid learning the truth." The court held that Blosser had knowingly lied on the form under the second of those two prongs. **Key Issue: Knowledge requirement; False or Fictitious Statement to Acquire a Firearm (§922(a)(6)).**

United States v. Boyd, 52 F. Supp. 2d 1233 (D. Kan. 1999). Boyd was convicted of two violations of § 922(g)(9). Count one charged that the defendant knowingly and intentionally received and possessed a .9mm semi-automatic pistol on May 30, 1998, after having been convicted on March 31, 1995, of a misdemeanor crime of domestic violence. Count two charged that the defendant knowingly and intentionally received and possessed a .380 caliber semi-automatic pistol on August 24, 1998, after having been convicted of the same misdemeanor crime of domestic violence. Boyd filed a motion to dismiss on the grounds that Congress exceeded its powers under the Commerce Clause in enacting the statute and that the statute violates the Ex Post Facto Clause. The district court denied the motion. The district court rejected the Commerce Clause argument, citing the 10th Circuit precedent of *United States v. Farnsworth* (92 F. 3d 1001 (10th Cir. 1996)), which has previously upheld other subsections of 922(g). Since the jurisdictional element contained in the statute applies to all nine subsections, the interstate commerce nexus test is met for § 922(g)(9). The court rejected Boyd's argument that § 922(g)(9) violates the Ex Post Facto Clause because this court and other courts have previously concluded that

because the illegal act in § 922(g)(9) is the possession of the firearm, not the misdemeanor domestic violence conviction, the illegal act was not completed until after § 922(g)(9) became effective. The court disagreed with the 2nd Amendment argument, as well, relying on Supreme Court precedent that arguably restricts this right to militia matters, and 10th Circuit precedent providing that the 2nd Amendment does not guarantee a right to keep an unregistered firearm that has not been shown to have any connection to the militia. The court rejected Boyd's Equal Protection argument that was successful in the first hearing of *Fraternal Order of Police v. United States*, 332 U.S. App. D.C. 49 (D.C. Cir. 1998). The remedy granted in that case was to hold § 925 unconstitutional insofar that it purported to withhold the public interest exception from those convicted of domestic violence misdemeanors. The district court disagreed that that remedy was applicable to this case. Moreover, Boyd did not even present an argument or evidence that the public interest exception should apply to his case. **Key Issues: Commerce Clause; Ex Post Facto Clause; 2nd Amendment; Equal Protection.**

United States v. Boyd, No. 99-3227, 2000 U.S. App. LEXIS 8238, 2000 Colo. J. C.A.R. 2200 (10th Cir. April 26, 2000) (unpublished). Boyd was convicted of violating § 922(g)(9) after having been convicted of a misdemeanor crime of domestic violence. Boyd appealed, arguing that § 922(g)(9) is unconstitutional because it violates the fair notice requirement of the Due Process clause of the 5th Amendment, and it constitutes an impermissible exercise of federal congressional power under the Commerce Clause. The court rejected the fair notice argument because Boyd "may not argue that his ignorance of the law renders his conviction a violation of due process." Additionally, the case does not implicate the narrow exception to this rule, because it is not a highly technical statute that has the danger of ensnaring individuals engaging in apparently innocent conduct. As for the Commerce Clause argument, the court rejected this, as well, relying on 10th Circuit precedent in *United States v. Bolton*, 68 F. 3d 396 (10th Cir. 1995). **Key Issues: Due Process (notice); Commerce Clause.**

United States v. Heckenliable, 446 F.3d 1048 (10th Cir. 2006). The issue raised in this appeal was whether the domestic relationship component of 18 U.S.C. §922(g)(9) needed to be an element of the predicate misdemeanor offense. The Petitioner challenged his conviction, arguing that his guilty plea was invalid because the district court misinformed him of the elements necessary to carry a conviction under § 922(g)(9). His prior conviction for simple assault under Utah Code Ann. § 76-5-102 did not qualify as a misdemeanor crime of domestic violence under §921(a)(33)(A), because the predicate misdemeanor offense did not have as an element a domestic relationship between the perpetrator and the victim. While the definition of a "misdemeanor crime of domestic violence" contained in § 921(a)(33)(A) is not perfect, the Tenth Circuit agreed with most sister circuits that neither the syntax, nor the grammar of the statute, required the predicate misdemeanor offense to have a domestic relationship element. The Tenth Circuit agreed with the First, Eighth, and Ninth Circuits that Congress's use of the singular noun "element" is indicative that the misdemeanor offense only required one element, namely, the use of force. The Tenth Circuit affirmed the district court's ruling. **Key Issue: Relationship Requirement.**

United States v. Liapis, 216 Fed. Appx. 776 (10th Cir. 2007). The Defendant appealed judgment following a conditional guilty plea at the district court level concerning drug charges and illegal possession of a firearm pursuant to 18 U.S.C. 922 (g)(9). At the district court level the Defendant had filed motions to suppress evidence and dismiss the counts related to unlawful firearm possession. These motions were denied, the Defendant reserved the right to appeal the denials. He asserted that the district court erred in denying his motion to dismiss two counts of the superseding indictment that charged him with a violation of 18 §922(g)(9). The Defendant argued that the crime of battery under Utah law does not require the prosecution to prove as an element of the offense that the Defendant was a current or former spouse, parent, guardian of the victim or shared a child with the victim pursuant to 18 U.S.C.

§921(a)(33)(A)(ii). This argument has been foreclosed by *United States v. Heckenliable*, 446 F.3d 1048 (10th Cir. 2006). "A 'misdemeanor crime of domestic violence' requires the domestic relationship element to be charged and proven as an element of a § 922(g)(9) violation, not as an element of the underlying misdemeanor." *Id*. at 1051 n.8. Key Issue: Relationship Requirement.

United States v. Pope, 613 F.3d 1255 (10th Cir. 2010). Defendant-appellant Mark Pope was charged with possession of a firearm after a misdemeanor of domestic violence in violation of 18 U.S.C. §922 (g)(9). Before trial Pope moved to have the indictment dismissed claiming that as applied to him §922 (g)(9) was a violation of his constitutional rights because he was a misdemeanant and was only in possession of the handgun in his home. Pope cited District of Columbia v. Heller, 554 U.S. 570 (S. Ct. 2008), as the basis for his argument. The State argued to the District Court that, as a general rule, in deciding a motion to dismiss only the facts in the indictment can be used to test the legal adequacy. The State further argued that the only exception which would allow outside facts to be considered requires exists when the facts at issue are agreed upon, the government has no objections to those facts, and when the motion can be decided as a matter of law. The District Court agreed with the State and denied Pope's motion to dismiss. Pope then pleaded guilty, but reserved his right to appeal. Pope on appeal, reasserted his constitutional arguments. The Appellate Court agreed with the State holding that the merits of the second amendment challenge could not be decided prior to trial. The Appellate Court further held that Pope's case specifically requires a trial because it implicates a question of law and the facts are contested. The Court affirmed the District Court and remanded for trial on the merits. Key Issues: Pre-Trial determination of Constitutionality of §922 (g)(9)

United States v. Rogers, 2004 U.S. App. LEXIS 11712 (10th Cir. June 15, 2004). Rogers was indicted by a federal grand jury for possession of a firearm while subject to a protection order, in violation of 18 U.S.C. § 922(g)(8), and following a misdemeanor conviction of domestic violence, in violation of 18 U.S.C. § 922 (g)(9). A magistrate found that there was "a serious risk that the defendant will endanger the safety of another person in the community" based on his outstanding domestic protective orders and detained Rogers under 18 U.S.C. §3142(f)(1) of the Bail Reform Act. Rogers filed an objection to the detention order, and the district court overruled his objection, agreeing with the magistrate's finding that he presented a danger to the community. Rogers appealed, arguing that his conviction did not fit within the "crime of violence" required by § 3142(f)(1). The court determined that possession of a firearm while subject to a domestic protection order and following a misdemeanor conviction of domestic violence "are felonies that by their very nature involve a substantial risk that physical force may be used against the person or property of another in the course of committing the offense," as set forth by 18 U.S.C. §3156(a)(4)(B)(defining "crime of violence").

The court found that convictions under § 922(g)(8) and (9) fit each of the elements of the definition in §3156(a)(4)(B). First, the crimes are felonies. Second, the court held that possession of a firearm while subject to a domestic protection order and following a misdemeanor conviction of domestic violence both involve a substantial risk, resulting from the nature of the offense, that physical force may be used against the person or property of another. The court found this to be particularly true in this case. Third, the court found that the possession of guns in violation of § 922(g)(8) and (9) increases the risk that individuals subject to a domestic protection order or convicted of a misdemeanor crime of domestic violence may engage in violent acts. That risk results from the nature of the offense. Fourth, the court determined that such a risk is "undoubtedly substantial," since the underlying actions leading to the prohibitions in § 922(g)(8) and (9) necessarily involve actual violence or credible threats of violence. Finally, the court held that the substantial risk of physical force created by the possession of a firearm in violation of § 922(g)(8) and (9) occurs "in the course of committing" the weapon-offense, since any

violent use of the firearm would have inevitably occurred in the course of the commission of the offense of illegal possession.

Thus, the court concluded that § 922(g)(8) and (9) are crimes of violence for the purpose of the Bail Reform Act, and the government was entitled to a detention hearing under 18 U.S.C. §3142(f)(1). **Key Issue: Pretrial Detention.**

United States v. Willbern, No. 99-10161-01-JTM, 2000 U.S. Dist. LEXIS 6462 (D. Kan. April 12, 2000). Willbern was convicted in 1993 of third degree battery of his girlfriend. He was subsequently found in possession of a shotgun in 1999, and was indicted for violation of § 922(g)(9). He filed a motion to dismiss, arguing that the statute violates the Commerce Clause, the 2nd Amendment, procedural and substantive due process, and the 10th Amendment. The Kansas District Court denied the motion to dismiss. The court rejected the Commerce Clause challenge because it contains the requisite jurisdictional element. The 2nd Amendment argument also failed because the 10th Circuit has consistently held that the 2nd Amendment does not guarantee a right to keep a firearm that does not have a reasonable relationship to a militia, and because every other circuit that has examined 2nd Amendment challenges to the statute has upheld it. Regarding the due process challenges, the court found that Willbern had sufficient notice of the statute's prohibition (an ATF officer visited his father's pawn shop and warned Willbern that he could not legally possess a firearm), but even absent notice, the general principle that ignorance of the law provides no excuse for its violation applies. The court also relied on *Meade, Bostic,* and *Spruill*, *supra*, when it concluded that the misdemeanor domestic violence conviction gave the defendant sufficient notice. The court also rejected the 10th Amendment argument; it necessarily failed because the court held that the statute was constitutionally enacted under the Commerce Clause. **Key Issues: Commerce Clause; 2nd Amendment; Due Process (notice); 10th Amendment.**

Ward v. Tomsick, 30 P.3d 824 (Colo. App. 2001). Ward, a Denver police officer, was convicted in 1994 of a municipal misdemeanor crime of domestic violence. Subsequently, in 1999, the Denver police department disqualified Ward from employment, after the Bureau of Alcohol, Tobacco, and Firearms issued an opinion stating that Ward could not possess a firearm under federal law. Ward appealed the police department's action, arguing that his assault was not an MCDV under 18 U.S.C. § 922(g)(9) and that he had not knowingly and intelligently waived his right to a jury trial as required under the federal law. The district court, and the appellate court in this decision, rejected both arguments. Regarding the nature of the assault conviction, the court held that although the assault statute could be violated in a non-violent fashion, the summons and complaint indicated that Ward had been charged with an assault that included the use of force and that the trial court had found that he had committed the act. The court noted, based on federal case law, that a review of the charging instrument and other relevant facts was permissible to determine the nature of the predicate offense. Regarding Ward's assertion regarding the jury trial waiver, the court found that Ward and his counsel had not filed the necessary jury demand and did not object at any point to the fact that the case why tried to the trial court. Hence, the court held that Ward knowingly and intelligently waived his right to a jury trial. **Key Issues: Use of Physical Force Requirement; Waiver of Right to Jury Trial.**

Woods v. City of Denver, 122 P.3d 1050 (Colo. App. 2005). A police officer was convicted of third-degree assault of a former co-habitant; consequently, he was unable to perform his duties as an officer because of 922(g)(9). He appeals, claiming that because he was not co-habitating at the time of the assault this excludes the victim from being similarly situated to a spouse. The court rules that once an intimate-partner relationship exists, a violent crime between the parties constitutes "domestic violence," no

matter if the relationship existed in the same way as before; therefore, the assault is a qualifying offense under 922(g)(9), and the lower court decision preventing him from possessing a firearm (and thus being a police officer) is affirmed. **Key Issue: Relationship Requirement; Similarly Situated to a Spouse Parameters.**

Woods v. Denver, 62 Fed. Appx. 286 (10th Cir. 2003) (unpublished). Woods, a former Denver police officer, was fired by the police department because of a 1995 conviction of third-degree assault against his girlfriend at the time of the incident. Denver officials had concluded that, in light of § 922(g)(9), Woods' conviction disqualified him from further employment with the police department. Woods filed suit in federal court asking for a declaratory judgment that he was not subject to § 922(g)(9). Specifically, he sought a declaration that his state law conviction was not a "misdemeanor crime of domestic violence" under the Lautenberg Amendment because, at the time of the predicate offense, he and the victim were not "in a relationship similarly situated to a spousal relationship." The district court granted summary judgment in favor of the defendants on all but one of Woods' claims, and it declined to exercise supplemental jurisdiction over the remaining claim. The court did, however, find that it could take jurisdiction over the request for a declaratory judgment to the extent that Woods sought an interpretation of the federal statute. The district court concluded that the phrase "similarly situated to a spouse" applies only to persons who are *currently* similarly situated to a spouse at the time of the underlying offense. However, since it declined to exercise supplemental jurisdiction over the remaining cause of action, the court noted that "whether [Woods] falls within the statute, under that construction, is a factual determination for the state court," and dismissed the case. On appeal, the Tenth Circuit held that the district court erred in affording the declaratory relief that Woods sought and ordered the district court to vacate the order. The Tenth Circuit found that construction of a federal statute, standing alone, is not a federal cause of action, nor does it confer federal question jurisdiction. **Key Issues: Relationship Requirement; Declaratory Relief.**

Eleventh Circuit **(Alabama, Florida, and Georgia).**

Hiley v. Barrett, 968 F. Supp. 1564 (N.D. Ga. 1997). William Hiley was employed as a deputy sheriff for Fulton County, Georgia since August 1990. In August 1995, Hiley pleaded "no contest" to a misdemeanor battery that involved a domestic violence charge, and was sentenced to a 12-month term of non-reporting probation. After passage of § 922(g)(9), Jacqueline Barrett, Sheriff of Fulton County, notified Hiley that he was dismissed for cause from his position. Hiley appealed his termination with the Fulton County Personnel Board, and commenced this action. Hiley sought preliminary and permanent injunctive relief enjoining enforcement of 922(g)(9) against any National Association of Government Employees member on the grounds that 922(g)(9) is unconstitutionally violates the Commerce Clause, the Equal Protection guarantee, the Ex Post Fact clause, the Bill of Attainder clause, and the Tenth Amendment. Regarding the Commerce Clause, Hiley asserted that Congress exceeded its authority under the Commerce Clause, relying on the Supreme Court's decision of United States v. Lopez, 514 U.S. 549 (1995). The 11th Circuit distinguished *Lopez*, because 922(g)(9) contains the requisite jurisdictional element that requires the government to demonstrate that the firearm was possessed "in or affecting commerce" or received after having "been shipped or transported in interstate or foreign commerce." Regarding the Equal Protection argument, Hiley asserted that the statute violates the Equal Protection Clause of the 14th Amendment by irrationally distinguishing between persons convicted of misdemeanor crimes of domestic violence and persons convicted of other types of misdemeanor crimes of violence; irrationally allowing felons, but not domestic violence misdemeanants, to possess a firearm once their civil rights have been restored; and discriminating against domestic violence misdemeanants who are law enforcement. The 11th Circuit rejected the equal protection argument using the rational basis

standard of review, holding: (1) Equal protection principles are not violated when legislative reform takes one step at a time and addresses one particular issue (e.g., misdemeanor domestic violence, as opposed to all violent misdemeanors); (2) the anomaly that may result because misdemeanants often do not lose their civil rights upon conviction and thus cannot have their civil rights restored that may result in many felons being able to possess firearms while misdemeanants may not be able to under the exemption, is merely the result of making access to the relief from disability dependent on the laws and policies of the states; (3) 922(g)(9) does not impermissibly discriminate against law enforcement merely because it has uneven effects upon a particular group (domestic violence misdemeanants who are law enforcement), is rationally based, and cannot be traced to a discriminatory purpose. Regarding the Ex Post Facto argument, the court rejected this, as well, because the activity prohibited by 922(g)(9) is possession of a firearm subsequent to enactment of the law, not the misdemeanor crime of domestic violence. The court rejected the Bill of Attainder argument, too, because 922(g)(9) not fall within the historical meaning of a "legislative punishment." As for the 10th Amendment argument, it failed because Congress did not exceed its powers under the Commerce Clause when it enacted the statute, and did not, therefore, exercise powers reserved to the states, in violation of the 10th Amendment. **Key Issues: Commerce Clause; Equal Protection; Ex Post Fact Clause; Bill of Attainder Clause; 10th Amendment.**

United States v. Griffith, 455 F.3d 1339 (11th Cir. 2006). Griffith, the Petitioner, appealed the denial of his motion to dismiss indictment on a 18 U.S.C.§922(g)(9) violation. The Petitioner contended that his Georgia simple battery conviction does not qualify as a predicate offense for §922(g)(9) purposes because its had neither "as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon," nor did it have as an element a qualifying domestic relationship. 18 U.S.C. §921(a)(33)(A). The Eleventh Circuit looked to the statute rather than the actual offense when determining if the crime qualifies as a MCDV. The Georgia simple battery statute provided: "A person commits the offense of simple battery when he or she: (1) Intentionally makes physical contact of an insulting or provoking nature with the person of another . . . ." Ga. Code Ann. § 16-5-23(a)(1). The question was whether the crime defined by that statute requires "as an element, the use or attempted use of physical force." If "physical contact of an insulting or provoking nature," as described in the Georgia statute, necessarily involves "physical force," a conviction in the courts of that state for simple battery would be enough to satisfy the physical force requirement of § 922(g)(9). The plain meaning of "physical force" is "[p]ower, violence, or pressure directed against a person" "consisting in a physical act." *See* Black's Law Dictionary 673 (8th ed. 1999); *U.S. v. Nason*, 269 F.3d 10, 16. The Georgia statute had as an element "physical contact of an insulting or provoking nature." Ga. Code Ann. § 16-5-23(a)(1). A person cannot make physical contact--particularly of an insulting or provoking nature--with another without exerting some level of physical force. *See U.S. v. Smith*, 171 F.3d 617, 621 n.2. The Eleventh Circuit, after exploring the statutory construction of §921(a)(33)(A), found that the Georgia statute had met the requirements for the physical force statutory element. The Court then addressed the relationship requirement. The Petitioner failed to raise this issue in the district court, review of this issue was a plain error analysis. There was no plain error. The Eleventh Circuit went on to remind the Petitioner that it ruled that a domestic relationship was not needed as a statutory element of the offense. *See U.S. v. Chavez*, 204 F.3d 1305 (11th Cir. 2000). **Key Issues: Physical Force Requirement.**

United States v. Pruitt, 300 Fed.Appx. 853 (11th Cir. 2008). Pruitt was convicted in the United States District Court for the Southern District of Alabama of possessing a firearm as a convicted felon and after having been convicted of a misdemeanor crime of domestic violence, and he appealed. Pruitt's soon to be ex-wife called 911 when he blocked the driveway in front of their home with his car so she was unable to get to work. During the 911 call, she stated that the defendant had a gun. The police officers were not able to get identifiable fingerprints on the gun that matched the defendant's, however the

court ruled that this isn't dispositive to show that the defendant was in possession of the gun. On appeal, Pruitt argues that the government produced insufficient evidence to convict him. The Court of Appeals realized that while the government's evidence in this case was not overwhelming it was sufficient for a reasonable jury to conclude beyond a reasonable doubt that Pruitt constructively possessed the gun. Therefore, the Court of Appeals affirmed defendant's conviction. **Key Issue: Possession/Ownership of Firearm, Evidentiary Challenges.**

United States v. White, 593 F.3d 1199 (11th Cir. 2010). White and three other people were stopped while sitting in a car by police officers that were responding to a noise complaint. The officer noticed that White had a gun. White was indicted for possession of a firearm by a person convicted of a misdemeanor crime of domestic violence, in violation of Section 922(g)(9). The District Court denied White's motion to suppress the evidence of the gun, as he argued that it violated his Fourth Amendment rights. However, the district court denied the motion because the gun was found after the police officers smelled marijuana emanating from the vehicle, which gave them a reasonable suspicion to pat White and the other fellow occupants down for officer safety. Also, the district court denied White's motion for a judgment of acquittal, and White was sentenced to 46 months in jail. White appeals, on the basis that his Fourth Amendment right was violated when evidence of the gun was not suppressed, and that his domestic violence charge was not a predicate offense to 922(g)(9), also White challenges the constitutionality of the statute. The Court of Appeals concluded that when looking at the totality of the circumstances the pat down conducted by the officers was reasonable, and thus the gun that was found on White during the pat down does not violate White's Fourth Amendment rights, thus, the Court of Appeals affirmed the district court's denial of White's motion to suppress the gun. Furthermore, the Court of Appeals affirmed the district court's decision to not acquit White because his underlying domestic violence offense is a predicate offense for purposes of 922(g)(9). The Court clarified that even though White's domestic violence charge was against his live-in girlfriend, this still satisfies the requirement in section 922(g)(9) that the offense was committed against a person with a specified domestic relationship. The victim was in a specified domestic relationship with White: she lived with him, was his "girlfriend," and the dispute was a "domestic" one. As to White's last issue on appeal regarding the constitutionality of the statute, the Court of appeals held that "§ 922(g)(9) is a presumptively lawful 'longstanding prohibition[ ] on the possession of firearms.' *Heller,* 128 S.Ct. at 2816-17. Given that *Heller* does not cast doubt on the constitutionality of § 922(g)(9), we affirm White's conviction.' **Key Issue: Fourth Amendment Rights, Second Amendment Constitutionality, Status of Victim Whether a Live-In Girlfriend satisfies existence of a domestic relationship.**

D.C. Circuit

Fraternal Order of Police v. United States, 173 F. 3d 898 (D.C. Cir. 1999). The Fraternal Order of Police challenged § 922(g)(9) and the amendment to § 925(a)(1) (which previously provided an exemption from firearm bans to states, departments, agencies or political subdivisions of states, and amended it to exclude those that qualify under § 922(g)(9) from the exemption) based on the equal protection element of the 5th Amendment's due process clause. The D.C. Circuit initially agreed, and held that the amendment fails the rational basis test because the ban is irrationally unequally applied to individuals convicted of felony domestic violence crimes and individuals convicted of misdemeanor crimes of domestic violence. *Fraternal Order of Police v. United States*, 322 U.S. App. D.C. 49, 152 F.3d 998 (D.C. Cir. 1998). The U.S. petitioned for rehearing, arguing that the FOP had not properly raised an argument based on the irrationality of the relative treatment of misdemeanants and felons, and furthermore, that the court incorrectly held the difference was irrational. On rehearing, the court reversed and held that the provisions withstand rational basis review. The court also rejected the FOP's other arguments that §

922(g)(9) violates due process, that Congress exceeded its power under the Commerce Clause in enacting the amendment, and that it violates the Tenth Amendment. **Key Issues: Equal Protection; Due Process (notice); Commerce Clause; 10th Amendment.**

United States v. Rivera, 24 Fed. Appx. 2 (D.C. Cir. 2001) (Unpublished Opinion). Rivera, who was convicted under section 922(g)(9), challenged the conviction on two grounds: That the statute violated the Commerce Clause and that it violated the Ex Post Facto Clause. The court summarily rejected both challenges, citing *Fraternal Order of Police*, *infra* and additional precedents. **Key Issue: Commerce Clause; Ex Post Facto Clause.**

Federal Circuit

Johnson v. United States, 130 S. Ct. 1265 (2010). The Court concluded that the term "force" contemplates strength or energy, violence, and pressure directed against a person – that is, a degree of power not satisfied by the merest touching. While acknowledging that – as the dissent contended – at common law "force" was a legal term of art satisfied by even the slightest touching, the Court reasoned that the meaning of a statute is ultimately determined by its context, as it declined to "'force term-of-art definitions into contexts where they plainly do not fit and produce nonsense.'" The Court deemed it clear that, in the context of a statutory definition of "violent felony," "physical force" means violent force. And although "misdemeanor" meant something close to "felony" at common law and gradually came to mean "minor offense," nothing in the text of the ACCA suggests that Congress meant to define "violent felony" with a term of art which defined a misdemeanor at common law. Key Issues: Force, Misdemeanor.

Puente v. Dep't of Homeland Sec., 187 Fed. Appx. 992 (2006). Puente, an officer with U.S. Customs and Border Protection, pled *nolo contendre* to a reduced misdemeanor offense. He received a deferred adjudication and was removed from his position at CBP. Because of a collective bargaining agreement, the dismissal was subject to a grievance proceeding. Puente claimed he was not convicted of a misdemeanor. The agency's actions were entirely dependent on Puente's "conviction" and his assumed prohibition from possessing a firearm. Puente's probation agreement allowed for him to carry a firearm, but he was still dismissed for cause. The arbitrator affirmed the CBP's decision to dismiss him. The Federal Circuit then reviewed the case, finding that Puente was wrongfully dismissed. The court reviewed the arbitrator's decision determining if the findings were arbitrary and capricious and/or obtained without following the procedures of law and/or unsupported by evidence. Puente argued that as a matter of law the arbitrator erred in uphold the dismissal by finding that he was convicted of a misdemeanor crime of domestic violence. He further argued that the record shows that he was not convicted and that CBP stipulated that he was not convicted of a MCDV. In response, CBP claimed that the arbitrator correctly upheld their dismissal based on conduct unbecoming of an officer. However, other reasons for removal indicate a disqualification based on the firearms prohibition. The CBP attempted to defend this reason by claiming that they no longer felt Puente was qualified to carry a firearm based on internal policies that would rest on a conviction of MCDV. The Federal Circuit rejected the second claim but upheld the first claim. Deferred adjudication did not result in a firearms prohibition. Because the decision overturned one of the findings, the case was remanded for re-determination of an appropriate penalty. **Key Issues: Effect of Deferred Adjudication.**

White v. Department of Justice, 328 F.3d 1361 (Fed. Cir. 2003). White, a former federal corrections officer, was removed from his position by the Department of Justice based upon his 2000 misdemeanor conviction for simple assault and his consequent disqualification from carrying firearms under §

922(g)(9). White challenged the conclusion of DOJ, and of the Merit Systems Protection Board, to which he administratively appealed, that his conviction was for a "misdemeanor crime of domestic violence" under 922(g)(9), since he was convicted only of simple assault after the original charge of domestic assault was reduced prior to his guilty plea. He also argued that his own factual circumstances did not warrant such a conclusion, since his relationship with the victim of the assault would not, under Virginia law, be considered common law marriage. The Board upheld the agency's decision because of clear evidence of the officer's job requirement to carry a firearm, of his spouse-like relationship with the woman, and of his misdemeanor assault conviction. The court of appeals found that 18 U.S.C.S. § 921(a)(33) required only that the use or attempted use of physical force (or the threatened use of a deadly weapon) was an element of the predicate misdemeanor offense, and the existence of a domestic relationship need not be an element. The officer's facial attack on § 921(a)(33) failed because the statute was not unconstitutionally vague simply because Virginia had two assault offenses, either of which fit the officer's conduct. The Board's decision was correct both because it was supported by substantial evidence and because it was "in accordance with law." The Board's decision was affirmed.
Key Issues: Required Elements of Misdemeanor Offense; Relationship Requirement; Vagueness.