

MEMORANDUM

SUBJECT: Effect of *US v. Nobriga* on 922(g)(9) prosecutions

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Prosecution of cases charging violations of Title 18, United States Code, Section 922(g)(9) – the prohibition against possession of a firearm by a person previously convicted of a misdemeanor crime of domestic violence (MCDV) ^[1] is used frequently by United States Attorney’s Offices as part of their Project Safe Neighborhoods and federal domestic violence initiatives. A recent Ninth Circuit decision may impact these prosecutions in the Ninth Circuit and may have repercussions in other Circuits as well. This memo will discuss the recent decision.

On December 29, 2006, the Ninth Circuit Court of Appeals in *United States v. Nobriga*, 474 F.3d 561, reversed the district court’s order denying the defendant’s pretrial motion to dismiss the indictment and remanded with instructions to dismiss the indictment filed by the U.S. Attorney’s office in Hawaii charging a violation of Section 922(g)(9). The defendant asserted two challenges to his indictment: 1) the failure of the underlying predicate offense to include the domestic relationship as a statutory element was fatal; and 2) the inclusion of reckless conduct in the predicate statute prevented its qualification as a MCDV. The first challenge was rejected, but the second challenge was upheld.

First, the *Nobriga* court concluded that “the domestic relationship element need not be an element of the predicate offense. Rather, it is an element of the federal offense under Section 922(g)(9) to be proven at trial.” *Id.* at 563. And, because the government “could have proven the necessary domestic relationship at trial, the mismatch between the Hawaii and federal domestic violence statutes is not a basis for invalidating the indictment.” *Id.* at 564.

Second, in addressing the qualification of the predicate MCDV, the *Nobriga* Court held that the Hawaii predicate was not a qualifying MCDV because the record did not establish that the conviction was for an offense involving the “violent use of force.”^[1] In support, the court cited the October 2006 en banc decision in *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir.),^[1] and concluded that because the Hawaii statute permits a conviction based on reckless conduct, it did not categorically involve the use of force. *Id.* at 564. (“Hawaii law recognizes that section 709-906(1)’s ‘physically abuse’ prong can be satisfied with a reckless, as opposed to intentional, use of force.”). And, the court then concluded that, “[b]ecause nothing in the record establishes that Nobriga acted with anything other than recklessness,” his prior conviction did not pass muster under the modified categorical approach. *Id.* at 565.

The *Nobriga* court left open a window to prove the qualifying nature of the prior conviction by offering judicially-noticeable documentation proving that the conviction in fact involved qualifying intentional conduct. The difficulties associated with obtaining the underlying record materials in cases involving prior *felony* convictions have been well-documented. This may prove to be a more difficult task in the Section 922(g)(9) context when the prior convictions involve prior *misdemeanors*. The difficulties may lie in the underlying court's status as a non-record court (which is the case in some jurisdictions), the divergent state policies and procedures regarding the maintenance and/or destruction of misdemeanor files, or the maintenance and/or destruction of tape recordings of misdemeanor proceedings.

However, the *Nobriga* standard may not be impossible to satisfy. For example, in many cases, the charging instrument may allege that the defendant assaulted his wife, *i.e.*, hit her in the face, indicating deliberate, intentional conduct, and not mere recklessness. See *Fernandez-Ruiz*, 466 F.3d at 1136 (Wardlaw, J., dissenting) ("Men do not beat their wives by accident."). But the courts of appeals, including the Ninth Circuit, have generally concluded that the charging instrument, by itself, is not sufficient to prove the qualifying nature of the conviction because it is only evidence of the crime that was charged, and the relevant inquiry for present purposes depends on the crime of conviction. See, *e.g.*, *United States v. Parker*, 5 F.3d 1322, 1327 (9th Cir. 1993). So, in cases where the charging instrument in conjunction with the judgment or some other documentation at the back-end of the prosecution supports the inference that the defendant was convicted based on deliberate, intentional conduct, prosecution may succeed.

This case does afford an opportunity for United States Attorney's Offices to continue outreach efforts and to educate our state and local counterparts to try and ensure (1) that the specific prong of conviction is included in the charging instrument; and (2) that the violative facts are included within the court record. These two steps should prevent a *Nobriga* challenge from succeeding.