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Domestic Violence and Firearms: A Deadly Combination

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Introduction

On September 22, 2010, a woman was shot to death by her husband in Richland County, South Carolina in front of her eighteen-year-old son. At the time, the husband was on bond pending a criminal hearing for an earlier domestic violence incident involving a firearm against his wife. The Court issued a protective order for the wife but the Sheriff's office had been unable to locate and serve the husband or seize his firearms.[2] This case illustrates the grave risk that armed abusers represent. While prosecutors may often think of the firearms charges as something tacked on to a case that can be negotiated away, in domestic violence cases, prosecutors must vigorously pursue these exact firearms violations to promote safety for victims of abuse.

Nearly two-thirds of all women killed by firearms were killed by an intimate partner. Firearms are the most frequently used weapons in intimate partner homicide, eclipsing all other weapons combined.[3] In 2005, 1182 women were reported murdered by an intimate partner -- more than 3 women each day[4] -- accounting for approximately 30 percent of all women murdered.[5] Additionally, the presence of a firearm in a home increases the risk of homicide for women by five times.[6] Because of startling statistics like these, Congress made several amendments to the Gun Control Act of 1968.[7] In 1994, the Gun Control Act was amended to prohibit anyone who is subject to a domestic violence protective order from possessing a firearm.[8] In 1996, Congress further passed the Gun Ban for Individuals Convicted of a Misdemeanor Crime of Domestic Violence, commonly referred to as the Lautenberg Amendment,[9] prohibiting anyone who has been convicted of a misdemeanor crime of domestic violence from possessing a firearm. In passing the Lautenberg Amendment, Congress recognized that "anyone who attempts or threatens violence against a loved one has demonstrated that he or she poses an unacceptable risk, and should be prohibited from possessing firearms."[10] The Lautenberg Amendment prevents individuals who have shown a propensity for domestic violence from obtaining a

firearm and enables federal prosecution of certain domestic violence offenders for weapons offenses where state criminal justice alternatives have failed.[11] Similar to this federal legislation, many states have also enacted laws that place restrictions upon or prohibit the possession of firearms by domestic violence offenders.[12] The federal law and most state laws create categories of prohibited persons, some examples of individuals who may not possess a firearm are: convicted felons,[13] persons with mental illnesses,[14] persons subject to a protective order,[15] persons convicted of a misdemeanor crime of domestic violence,[16] and persons illegally in possession of drugs.[17] The federal law and some states also prohibit possession of ammunition by prohibited persons. When employed and enforced, these provisions can be effective tools to increase the safety of women at risk for this violence.[18] This article will discuss some of the fundamentals of prosecuting the possession of firearms by prohibited persons generally, while focusing on issues involved in prosecuting domestic violence related firearms charges specifically, from both a state and federal perspective. The article will also examine the impact of the most recent United States Supreme Court firearms decisions on prosecuting domestic violence related firearms charges.

The Elements

In all possession of firearms by prohibited persons prosecutions, the defense will challenge the basic elements of the crime: whether the weapon is a firearm, whether the defendant was in fact in possession of the firearm, and whether the defendant is properly categorized as a prohibited person. In order to successfully prosecute charges of firearms possession by individuals prohibited from possessing firearms because they are domestic violence misdemeanants or are subject to protective orders, the government must first prove these basic elements, discussed in greater detail in the paragraphs below:

Is it a firearm? Most states and the federal government define a firearm as "any weapon...which will or is designed to or may readily be converted to expel a projectile by action of an explosion."[19] The federal definition of a firearm does not require proof that the firearm is operable.[20] In some states, however, operability of the weapon must be proved.[21] If the firearm is recovered, as a best practice, it should be sent to a lab for examination by a firearms expert, who can test the weapon and certify that it is operable. Operability also can be proved through the testimony of a police officer with some expertise in firearms or by having the firearm tested at the police department firing range, if it can be done so safely. In some instances where the firearm is not recovered or there is no scientific evidence or expert available to testify, the Court will accept circumstantial evidence that the firearm was real and operable. This can include witness statements describing the weapon, presence of ammunition, odor of gunpowder, or threats by the defendant to use the gun.[22] Proving that the weapon possessed was a firearm should not be a significant hurdle even where the firearm is not recovered. The Courts have been open to proof of this element through a variety of both direct and circumstantial evidence.

Was there possession? To prove possession of a firearm by a prohibited person, the government must also prove that the individual actually or constructively possessed the firearm. For *actual* possession the government must show that the weapon was on the defendant's person. *Constructive* possession requires that the defendant knew of the presence and character[23] of the firearm and was exercising dominion or control over the weapon.[24] A defendant who is not in actual possession of a firearm but exercises a measure of control over it, such as keeping a firearm under a bed or in a gun box in a closet, is legally in possession of the firearm. "Constructive possession exists if an individual knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons."[25] Dominion and control need not be exclusive, but each must be established by something more than "[m]ere proximity."[26] A firearm also may be constructively possessed solely or jointly with another or others.[27] Circumstantial evidence is critical in cases where the weapon is not on the defendant's person. Investigators should be encouraged to take photos of where and how a firearm was discovered. Often, inferences can be drawn from the position of a firearm recovered in an automobile, either under a seat or in a glove box. For weapons recovered in a room inside a residence, documents, bills, photographs, personal items, and clothing can determine who controlled the room or residence and who possessed or controlled the weapon. Additionally, investigators should submit firearms for fingerprint and DNA analysis, and trace[28] every firearm recovered. This evidence can prove actual possession or an inference of possession based upon actual ownership of the firearm. While finger-

print or DNA evidence on a recovered firearm may demonstrate actual possession at some point in time, additional evidence may be necessary to show that the possession occurred after the imposition of the prohibition. In addition to these basic elements, federal prosecutors must also prove that the firearm was "in and affecting interstate commerce" to establish federal jurisdiction over the case.[29]

Was the defendant a prohibited person? The government must also prove that the person who possessed the firearm, was in fact prohibited from such possession. In domestic violence cases the two primary prohibited persons are those convicted of a domestic violence misdemeanor and those subject to a domestic violence protective order. The Federal law, 18 USC 922 (g) (8) & (9), makes both a crime. Proof of this status is based on producing a certified copy of the court and establishing that the defendant on trial for unlawful possession of a firearm is that same defendant that was the subject of the protective order or criminal conviction. Misdemeanor convictions of domestic violence typically occur in state courts, which are often not courts of record. It is, therefore, important for prosecutors to obtain a certified copy of the defendant's conviction and examine it closely to make sure the language used in the document demonstrates that the offense was a qualifying domestic violence conviction. To qualify, the offense must have as an element the use or attempted use of physical force or the threatened use of a deadly weapon.[30] For federal prosecution, the force must be violent and intentional.[31] Because some state statutes list a series of acts in a single statute, the record of conviction must be explicit as to which theory or act the prosecution proceeded under, or at least describe the type of physical violence. For example, in Hawaii, the domestic abuse statute can be satisfied with an intentional use of force or a reckless use of force.[32] In *United States v. Nobriga*,[33] because the court record was silent as to which prong of the domestic abuse statute the defendant was convicted under, the court held that the predicate offense did not qualify as a misdemeanor conviction of domestic violence for purposes of 18 USC § 922(g)(9). In courts not of record, usually the document will be a standard warrant with some added language from the state code section on it. The Court may amend that language or may make notations on the conviction section as to the specific charge. But often just a series of boxes, such as "Guilty", are checked. It is incumbent on the prosecution to proactively charge these misdemeanor domestic violence cases with specificity to preserve the record for potential future prosecution, either at the state level or federally. The language on the court record should also include an accurate description of the act, thus demonstrating whether or not an intentional act of violence took place. The record of conviction should also clearly show that the defendant was not only charged with an intentional act of violence but was also convicted of an intentional act of violence.[34]

Additionally, as a best practice, it is important to make the domestic relationship clear on the face of the court document as well. A lack of specificity could affect future prosecution at the state level. In *United States v. Hayes*,[35] however, the court allowed prosecution under section 922(g)(9) where the prior conviction was silent as to the domestic relationship. The court held that the relationship was an element of the federal offense and did not need to be part of the underlying state conviction. The language of 18 U.S.C. § 921(a)(33)(A), defines a misdemeanor crime of domestic violence as an offense that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim." The court reasoned that because the word "element" is in the singular, it only modifies the language concerning physical force or deadly weapon and not the language concerning the domestic relationship.[36] This interpretation was consistent with the purpose of the law, to keep firearms out of the hands of domestic abusers, whether they were specifically charged under a domestic abuse statute or not.[37] Thus, the prosecution could prove the domestic relationship with extrinsic evidence, beyond what was stated in the underlying conviction. Additionally, the defendant must have been represented by an attorney -- or knowingly and intelligently waived representation -- and the defendant must have had a trial by jury or knowingly and intelligently waived that right. This information is typically listed on the record of conviction.

For a protective order to give rise to a federal firearm prohibition, the prosecution must demonstrate several things. First, the government must show that the order was issued after a hearing of which the defendant had actual notice and in which the defendant had an opportunity to participate. Ex parte preliminary protective orders would not qualify

under this standard for federal prosecution. In Virginia and California, however, preliminary protective orders issued after an ex parte hearing are included in their respective statutes prohibiting possession of a firearm and do qualify for prosecution for possession of firearms by prohibited persons at the state level.[38] Personal service of the hearing notice should always be requested to prove actual notice if the defendant fails to appear. If the defendant is present, the Court order should reflect this and provide the defendant an opportunity to be heard. For federal prosecution, the person must be subject to an order that "restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury."[39] In *United States v. Reese*,[40] the defendant had a protective order entered against him in Hawaii protecting his first wife. While he denied her allegations of abuse, Reese nonetheless agreed to the issuance of the protective order. The Court entered the order without hearing evidence or making a finding but prohibited Reese from "(a) threatening or physically abusing [his wife] or their minor children, (b) contacting [his wife] or their minor children, and (c) possessing, controlling, or transferring ownership of any firearm, ammunition, firearm permit or license"[41] The order had an effective life of fifty years. Thereafter, Reese remarried and moved to New Mexico. During an investigation of domestic abuse committed against his second wife, the police discovered the existence of the protective order and several firearms possessed by Reese. Reese was prosecuted and convicted federally and sought to challenge the conviction based on the adequacy of the underlying protective order. The court held that the order satisfied the requirements of the statute and a collateral attack on the order itself was impermissible in the federal prosecution. While the issuing court did not make a finding it did expressly prohibit Reese from physically abusing his wife and satisfied that prong of section 922(g)(8). The best way to avoid these challenges is to create an appropriate record and order from the issuing Court. Unfortunately, the prosecutor is often not a party to, or present at, these hearings and so the ability to create an adequate record for future prosecution is limited. It may be helpful for prosecutors, however, to meet with their Juvenile and Family Court judges and clerks to discuss creating a model order that includes appropriate language of protection, prohibits defendants from possessing firearms as part of the order and that puts defendants on notice that they may be subject to federal prosecution for possessing a firearm after being issued the protective order. These measures would enhance the ability to prosecute offenders at both the state and federal level in the future.

Other Tools

Many states have enacted additional laws to help increase the safety of victims by reducing perpetrators' access to firearms. California has many additional provisions such as prohibiting a person convicted of stalking from possessing a firearm,[42] requiring officers to seize firearms at the scene of a domestic violence complaint,[43] surrender or sell firearms within a specified period of time upon service of a protective order,[44] and the California Department of Justice is required to maintain a Prohibited Armed Persons File database.[45] This online database maintains information about all persons in California who are prohibited from purchasing or possessing firearms. Its access is limited to certain public and private entities such as police and prosecutors. These provisions can help keep firearms out of the hands of dangerous domestic abusers and increase victim safety. Awareness of all the tools afforded by state and federal criminal codes and partnering with the local United States Attorneys' Office can greatly increase the effective prosecution of these cases. United States Attorneys' Offices have a Project Safe Neighborhoods prosecutor who is tasked with firearms prosecution and a prosecutor who oversees the domestic violence caseload, each of whom may be able to help with these cases. The federal system sometimes can provide a pathway to conviction that the state system cannot and often the federal system will have tougher penalties for firearms offenses.

Heller and McDonald

The Supreme Court's recent landmark decisions that have broadly interpreted the U.S. Constitution's Second Amendment "right to keep and bear arms" have brought the constitutionality of the federal Lautenberg Amendment into question and may give rise to similar challenges of state and

local laws that prohibit the possession of firearms by individuals convicted of crimes of domestic violence.

In 2008, the Supreme Court in *District of Columbia v. Heller*[46] held that the Second Amendment protects an individual's right to possess a firearm in the home for self-defense. The *Heller* Court only addressed Second Amendment rights regarding federal firearm regulations because that case dealt with the District of Columbia's ban on handgun possession and the District of Columbia is not a state. *Heller* did not address whether these rights extended from federal enclaves to the states. In 2010, the Supreme Court clarified the application of the *Heller* rationale to the states in *McDonald v. Chicago*,[47] holding that an individual's right to keep and bear arms is incorporated by the Due Process Clause of the Fourteenth Amendment and applies to state laws and local ordinances as well. While these decisions do not appear to disturb the Lautenberg Amendment, prosecutors should be aware of the post-*Heller* Second Amendment challenges being brought by defendants attempting to appeal their federal convictions under 18 U.S.C. § 922(g)(9) and anticipate analogous state challenges that may be brought following the *McDonald* decision.

In *Heller*, the Court stated that the Second Amendment does not afford an unlimited right to "keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."[48] The Court went on to explain that its decision, "should not be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."[49] The Court noted that its list of "presumptively lawful" regulations was not exhaustive, but did not establish a standard of review under which firearm regulations should be evaluated.

Since *Heller*, several defendants have used that opinion to challenge previous convictions under 18 U.S.C. 922(g)(9), arguing that the law is unconstitutional. However, in all of these cases, courts have upheld the constitutionality of 18 U.S.C. § 922(g)(9), finding that this categorical exception is the kind of regulation that passes constitutional muster.[50] The courts have rejected these Second Amendment challenges to the law on the grounds it falls within the category of "presumptively lawful" regulations set forth in *Heller*.[51] For example, in *United States v. White*, the court held that, "[o]n its face, then, Heller did not disturb or implicate the constitutionality of section 922(g), and was not intended to open the door to a raft of Second Amendment challenges to section 922(g) convictions."[52]

So far, every federal court to hear a constitutional challenge to 18 U.S.C. § 922(g)(9) on these grounds has agreed, as evidenced by the recent decision in *United States v. Skoien,*[53] in which the court held that there is a substantial relationship between the law's goal of reducing domestic violence and a lifetime ban on firearm possession by domestic violence offenders.[54]

Although federal courts have upheld 18 U.S.C. § 922(g)(9), prosecutors must also look at how state courts will handle the issue of the constitutionality of state laws and local ordinances that prohibit domestic violence offenders from possessing firearms. Because *McDonald* is such a recent decision, state courts have not yet had the opportunity to hear many cases challenging the constitutionality of these laws under *McDonald*.[55] However, in *McDonald*, the Court reiterated its dicta supporting reasonable handgun regulation originally set forth in the *Heller* decision.[56] By doing so, the Court reiterated its intention to extend *Heller's* rationale to the states with the same firearm regulation exceptions to the Second Amendment. Because federal courts have interpreted the language in *Heller* to uphold 18 U.S.C. § 922(g)(8),[57] state courts are likely to interpret this reasonable regulation dicta to uphold state and local laws prohibiting domestic violence offenders' from possessing a firearm.

Conclusion

Given the dangerous combination of firearms and domestic violence it is critical to be aware of both state laws and federal laws when confronting these offenders. Possession of a firearm by a person convicted of a misdemeanor assault may seem to be a relatively minor charge on its face. But in the context of a domestic violence relationship, these seemingly insignificant cases can prevent deadly consequences so common in domestic violence cases. Every partner in the criminal justice system -- prosecutors, police, judges, and clerks -- should be aware of the danger these cases represent and should coordinate their responses to the increased threat posed by domestic violence abusers who have access to firearms. When a protective order is issued or served,

or when someone is convicted of a misdemeanor crime of domestic violence, inquiries about their access to firearms should be routine. Further, individuals who may no longer legally possess a firearm should be disarmed. Notice of the firearms prohibition should be provided to those affected and service of that notice should be documented. By creating an accurate record of charges and convictions through a proactive approach in misdemeanor courts, and by partnering with their United State Attorneys' Office, state and local prosecutors can help disarm dangerous individuals and hold violent offenders accountable thereby greatly enhancing victim safety.

(Endnotes)

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2 Gina Smith, *Sad Tale Marks Domestic Violence Walk,* THE STATE, Oct. 10, 2010, *available at* http://www.thestate.com/2010/10/10/1505800/i-hope-this-opens-everybodys-eyes.html.

3 Violence Policy Center, *When Men Murder Women: An Analysis of 2008 Homicide Data* (2010) *available at* http://www.vpc.org/studies/wmmw2010.pdf.

4 BUREAU OF JUSTICE STATISTICS, HOMICIDE TRENDS IN THE U.S.: INTIMATE HOMICIDE (1976-2005), http://bjs.ojp.usdoj.gov/content/homicide/tables/intweaptab.cfm.

5 BUREAU OF JUSTICE STATISTICS, HOMICIDE TRENDS IN THE U.S.: INTIMATE HOMICIDE (1976-2005), http://bjs.ojp.usdoj.gov/content/homicide/tables/intweaptab.cfm.

6 Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH 1089, 1092 (2003).

7 *See generally*, 18 U.S.C. §§ 921-931.

8 18 U.S.C. §922(g)(9).

9 18 U.S.C. §922(g)(9) is commonly referred to as the Lautenberg Amendment, after its sponsor, Senator Frank Lautenberg.

10 *See*, 142 CONG. REC. S11, 878, (daily ed. Sept. 30, 1996) (Statement of Sen. Lautenberg).

11 Announcement from the Criminal Division to the United States Attorneys' Offices upon the passage of 18 U.S.C. §922(g)(9), 1117 Criminal Resource Manual *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm01117.htm.

12 *See* LEGAL COMMUNITY AGAINST VIOLENCE, *REGULATING GUNS IN AMERICA: AN EVALUATION AND COMPARATIVE ANALYSIS OF FEDERAL, STATE AND SELECTED LOCAL GUN LAWS* (2008), *available at* http://www.lcav.org/publications-briefs/regulating_guns.asp (Providing a compilation of the state and local laws regulating the possession and purchase of firearms by individuals charged with and/or convicted of domestic violence offenses or subject to domestic violence protective orders. For example, Arizona, California, Colorado, Delaware, Illinois, Iowa, Minnesota, Montana, New Jersey, New York, Texas, Virginia, and Washington have statues that exceed the Federal Law in prohibiting misdemeanor domestic violence offenders from purchasing or possessing firearms and/or ammunition).

13 *See, e.g.* 18 U.S.C.A. § 922(g)(1)

14 *See, e.g.* 18 U.S.C.A. § 922(g)(4)

15 *See, e.g.* 18 U.S.C.A. § 922(g)(8)

16 *See, e.g.* 18 U.S.C.A. § 922(g)(9)

17 *See, e.g.* VA Code Ann. § 18.2-308.4 (2004).

18 Elizabeth R. Vigdor et al., *Do Laws Restricting Access to Firearms by Domestic Violence Offenders Prevent Intimate Partner Homicide?* 30 EVALUATION REV. 313, 332 (June 2006).

19 18 U.S.C. at § 921(a)(2) (2006).

20 *See* 18 U.S.C. § 921(a)(3) (2006) (Possession of a "frame or receiver" (i.e., the basic shell of a gun) qualifies as possession of a firearm. "Accordingly, because the definition of 'firearm' includes the frame, proof that the frame was 'in and affecting interstate commerce' would be sufficient for a conviction under this indictment." United States v. Broadnax, 601 F.3d 336 (5th Cir. 2010)); "We have recognized that, in order to convict, 'the gun must be real, but it need not be prove[d] to be loaded or operable.'" United States v. Taylor, 54 F.3d 967, 975 (1st Cir. 1995) (quoting United States v. Kirvan, 997 F.2d 963, 966 (1st Cir.1993), United States v. Ford, 548 F.3d 1 (1st Cir. 2008)).

21 In Ohio, for example, the state must not only demonstrate that the weapon is a firearm but also that it was operable or readily capable of being made operable. "In State v. Gaines , 46 Ohio St.3d 65, 545 N.E.2d 68 (1989), the Supreme Court of Ohio held that before a defendant can be convicted of a firearm specification pursuant to R.C. 2929.71(A), the state must prove beyond a reasonable doubt that the firearm was operable or could readily have been rendered operable at the time of the offense." State v. Koren, 100 Ohio App.3d 358, 654 N.E.2d 131 (1995).

22 State v. Dickess, 174 Ohio App.3d 658, 884 N.E.2d 92 (Ohio Ct. App. 2008).

23 "Establishing constructive possession requires proof "that the defendant was aware of both the *presence* and *character* of the [item] and that it was subject to his dominion and control." Powers v. Commonwealth, 227 Va. 474, 316 S.E.2d 739, 740 (1984). A person's ownership or occupancy of premises on which the subject item is found, proximity to the item, and statements or conduct concerning the location of the item are probative factors to be considered in determining whether the totality of the circumstances supports a finding of possession." Teal v. Angelone, 54 Fed.Appx. 776 (4th Cir. 2003) (quoting Archer v. Commonwealth, 26 Va.App. 1, 492 S.E.2d 826, 831-32 (1997)).

24 Atkins v. Commonwealth, 57 Va.App. 2, 698 S.E.2d 249 (Va. Ct. App. 2010).

25 United States v. Iafelice, 978 F.2d 92, 96 (3d Cir. 1992)(internal quotations omitted).

26 United States v. Introcaso, 506 F.3d 260, 270-71 (3d Cir. 2007).

27 United States v. Gunn, 369 F.3d 1229 (11th Cir. 2004).

28 "A firearms trace is conducted when a law enforcement agency recovers a firearm at a crime scene and requests information regarding its origin to develop investigative leads. That information is used to link a suspect to a firearm in a criminal investigation, to identify potential traffickers, and when sufficient comprehensive tracing is undertaken in a given community, to detect interstate, intrastate and international patterns regarding the sources and types of crime guns." Pursuant to the Gun Control Act of 1968, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) is the sole federal agency authorized to conduct

firearms tracing. The National Tracing Center [NTC] is authorized to trace a firearm for a law enforcement agency that is involved in a bona fide criminal investigation. Bureau of Alcohol, Tobacco, Firearms and Explosives, Fact Sheet: Etrace: Internet-Based Firearms Tracing and Analysis (2010), *available at* http://www.atf.gov/publications/factsheets/factsheet-etrace.html.

29 United States v. Broadnax, 601 F.3d 336 (5th Cir. 2010).

30 18 U.S.C. § 921(a)(33)(A)(ii) (2006).

31 United States v. Belless, 338 F.3d 1063 (9th Cir. 2003).

32 State v. Eastman, 81 Hawai'i 131, 139, 913 P.2d 57, 66 (1996).

33 United States v. Nobriga, 474 F.3d 561, 564 (9th Cir. 2006).

34 Memorandum from Margaret S. Groban, Executive Office of US Attorneys Office of Legal Programs and Policy on the Effect of United States v. Nobriga on 922(g)(9) prosecutions to the Department of Justice.

35 United States v. Hayes, 337 Fed.Appx. 285 (4th Cir. 2009).

36 *Id.*

37 *Id.*

38 CAL. CIV. PROC. CODE § 527.6(k) (2007), VA CODE § 18.2-308.1:4 (2004).

39 18 U.S.C. § 922(g)(8)(b-c).

40 United States v. Reese, 627 F.3d 792 (10th Cir. 2010).

41 *Id.*

42 CAL. PENAL CODE § 12021(c)(1) (2009).

43 CAL. FAM. CODE § 6389 (2007).

44 *Id*.

45 CAL. PENAL CODE § 12010(b) (2009).

46 District of Columbia v. Heller, 554 U.S. 570 (2008).

47 McDonald v. Chicago, 130 S.Ct. 3020 (2010).

48 *Heller*, 554 U.S. at 626.

49 *Id.*

50 *See, e.g.* United States v. Holbrook, 613 F.Supp.2d 745 (W.D. Va. 2009) (The Western District of Virginia found that, "the Heller opinion itself does not 'cast doubt' on the limitation on firearm possession set forth in § 922(g)(9), and [defendant] makes no other argument that her convictions are violative of the Second Amendment.»); United States v. Booker, 570 F.Supp.2d 161, 162 (D. Me. 2008) (The United States District Court in Maine concluded that, "persons who have been convicted of crimes of domestic violence must be added to the list of 'felons and the mentally ill' against whom the 'longstanding prohibitions on the possession of firearms' survive Second Amendment scrutiny."); United States v. Chester, 2010 U.S. App. LEXIS 3739 (4th Cir. Feb. 23, 2010) *vacated on reh'g by* United States v. Chester, No. 09-4084, 2010 5396069 (4th Cir. Dec. 30, 2010) (The Fourth Circuit found that the prohibition by Congress as embodied in Section 922(g)(9) of the possession of a firearm by a misdemeanant who has committed a crime of domestic violence is a lawful exercise by the government of its regulatory authority notwithstanding the Second Amendment.).

51 *See, e.g. Holbrook,* 613 F.Supp.2d 745, *Booker*, 570 F.Supp.2d 161 (finding that 18 U.S.C. **§** 922(g)(9) is constitutional because it falls into the category of exceptions set forth in *Heller*).

52 United States v. White, 593 F.3d 1199 (11th Cir. 2010).

53 United States v. Skoien, 614 F.3d 638 (7th Cir. 2010).

54 In 2009, the 7th Circuit had previously vacated Skoien's convictions for possessing a shotgun while on probation for domestic violence and remanded the case for additional hearings on the constitutionality of the law. United State v. Skoien, 587 F.3d 803 (7th Cir. 2009), *vacated by* United States v. Skoien, No. 08-37770, 2010 WL 126726 (7th Cir. Feb. 22, 2010), *reh'g granted en banc, Skoien*, 614 F.3d 638 (The 7th Circuit, ordered rehearing *en banc* and reinstated the defendant's convictions, holding that there was no need for remand).

55 At least two lawsuits challenging the constitutionality of state gun restriction laws have been filed since the *McDonald* decision. The Second Amendment Foundation (SAF) has filed a federal lawsuit against Westchester County, New York and its permit licensing officers, arguing that NY Penal Code § 400.00 (which requires that handgun carry permit applicants "demonstrate good cause for the issuance of a permit") violates the Second Amendment. *Complaint available at* http://saf.org/legal.action/ny.lawsuit/kachalsky_complaint.pdf. Additionally, the ACLU is petitioning the Broward Circuit Court to get an 85 year old man's guns back after they were seized by Broward County, Florida Sheriff's Office when the man threatened to kill himself. *See,* Linda Trischitta, *Robert Weinstein's Petition Hearing Postponed*, SUNSENTINEL.COM, http://blogs.sunsentinel.com/crime-and-safety/2010/07/19/robert-weinsteins-petition-hearing-postponed/.

56 *McDonald*, 130 S.Ct. 3020 (reiterating the dicta from the *Heller* decision that explains that the Second Amendment does not grant the right to "keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose," and that its decision, "should not be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Heller*, 554 U.S. at 626.).

57 *Reese*, 627 F.3d at 804.

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