

A Snapshot of the Gun Control Act

By Derek Andrew DeBrosse

Firearm regulations can have wide ranging implications on vast areas of the law. As attorneys, it is essential that we understand how firearm laws can affect our client's rights and liberties. In my experience there are two commonly raised issues that may have devastating consequences when a client is facing a conviction or plea to a criminal charge. Although firearm laws affect a multitude of disciplines, let's focus on the Gun Control Act as it relates to criminal defense.

MISDEMEANOR CRIMES

Domestic violence is an unfortunate fact of life in today's society. Numerous laws and regulations exist not only to protect the victim, but also to punish the guilty. It is also a sad fact that unscrupulous family members or significant others can abuse the system and deprive an innocent party of his or her right to keep and bear arms. Any time a claim of domestic violence is raised, firearms rights are jeopardized.

The Lautenberg Amendment (named after the law's sponsor Senator Frank Lautenberg) states that no person shall possess any firearm if they have been convicted of a misdemeanor crime of domestic violence in any court. This provision has been the subject of a great deal of litigation.

Much of that litigation deals with the definition of misdemeanor crime of domestic violence. The Supreme Court of the United States has held that a domestic relationship need not be a defining element of the offense in order for the disqualification to attach. In other words, a generic offense under Ohio law (such as assault) may be a disqualifying offense as long as a domestic relationship is present.

A gun owner wrongfully accused of domestic violence faces an uphill battle to protect his or her firearm rights. It is imperative that the attorney ascertain the client's goals with regards to their firearm

rights as soon as possible. Doing so will help the attorney to prioritize the client's needs and decide how to approach the client's defense. This area of the law is ever-changing as is evident in the 7th Circuit which has recently addressed the constitutionality of the Lautenberg Amendment in light of *D.C. v. Heller* where the United States Supreme Court held the Second Amendment protected an individual right as opposed to a collective right. The 7th circuit essentially set the stage for the determination of whether the Lautenberg Amendment is constitutional when applying strict scrutiny as the standard of review; an issue explicitly left to the lower courts in the *Heller* decision.

An attorney whose client is facing a possible misdemeanor offense of domestic violence should thoroughly evaluate all possible options. In particular the attorney should be fluent regarding the effect of a plea bargain on the client's Second Amendment rights if such a resolution appears possible.

FELONS IN POSSESSION

Criminal penalties in Ohio sometimes last well beyond the termination of a prison sentence or probation. If convicted of a crime punishable by imprisonment of more than one year, a convict may also lose his or her right to keep and bear arms. This is commonly referred to as the felon in possession disqualifier.

The Gun Control Act excludes convictions from this disqualifier if the conviction has been expunged, set aside, pardoned or if the convict has had his or her civil rights restored by court order. Regardless of these exceptions, what is commonly known as the unless clause may keep the disqualifier intact. The Gun Control Act states, "... unless such ... restoration ... expressly provides that the person may not ... possess ... firearms." It is up to each State to determine if their

convicted felons may be trusted with firearms.

With regards to rights restoration specifically, even if a convict successfully restores his or her rights at the state level, the federal government often declines to recognize that restoration. Under the ban-for-one, ban-for-all rule, if a state restoration restricts a convicted felon's right to own firearms in any manner the felon is considered not to have been truly restored to his or her firearm rights. In *Caron v U.S.*, 542 U.S. 308 (1998), the defendant was restored under Massachusetts law, which permitted him to possess long guns but not handguns. Because the defendant was prohibited from owning a handgun, the Court reasoned that he had not been fully restored to his rights on the state level and, therefore, was not exempt from the federal disability imposed by the Gun Control Act.

In Ohio, certain felons cannot be restored to their right to possess a category of somewhat unusual weaponry that includes, among other things, automatic weapons, suppressors, and explosives. The federal government contends that this provision triggers the unless clause. It is therefore illegal for an ex-felon to possess a firearm if he or she has had a rights restoration under R.C. 2923.14. It is important to note that certain felons may have other options besides a rights restoration petition.

As attorneys we must be aware of our responsibility to protect all of our clients' liberties – including their Second Amendment rights. The diligent lawyer must understand the potential consequences of a conviction or plea on a client's firearm rights, and should explain those risks to the client before committing to an often irreversible plea.



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