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FREQUENTLY ASKED QUESTIONS REGARDING FEDERAL FIREARMS PROHIBITIONS RESULTING FROM PROTECTION ORDERS, 18 U.S.C. §922 (g)(8), AND MISDEMEANOR CRIMES OF DOMESTIC VIOLENCE, 18 U.S.C. §922 (g)(9).

PROTECTION ORDERS

1. Respondent: This order doesn't say anything about guns or federal laws-how can the feds use it against me to take my guns away?

Judge: Our state's model protection orders do not provide any notice or explanation of the collateral federal consequences under the Gun Control Act. Is notice required under federal law?

ANSWER: A State Court is not required under federal law to provide notice of the existence or the consequences of violating the federal firearms prohibition imposed by the Gun Control Act, 18 U.S.C. §922(g)(8) resulting from the entry of a protection order. Section 922(g)(8) has withstood 5th Amendment challenges (due process/lack of notice). See, e.g.**, U.S. v. Emerson, 270 F.3d 203 (5th Cir. 2001); U.S. v. Meade, 175 F.3d 215 (1st Cir. 1999); U.S. v. Kafka, 222 F.3d 1129 (9th Cir. 2000); U.S. v. Reddick, 203 F.3d 767 (10th Cir. 2000); U.S. v. Baker, 197 F.3d 211 (6th Cir. 1999); U.S. v. Bostic, 168 F.3d 718 (4th Cir. 1999).**

2. Respondent: The Judge marked on the order that the Brady Act didn't apply to me-how can the feds use it?

Judge: I specifically determine in each case whether an individual should be subject to firearm forfeiture, if I rule an individual can safely retain his firearms, how can federal law supersede my authority?

ANSWER: The determination of whether a protection order subjects an individual to federal firearms prohibitions is one made solely with reference to the criteria expressed in 18 U.S.C. §922(g)(8), and is independent of and stands apart from state law. Nothing in the federal statute affects the applicability of state law or usurps a state court's jurisdiction under state law. Similarly, a state court does not have the authority to abrogate the federal Gun Control Act through findings that an individual may possess a firearm under state law. Section 922 (g)(8) does not require that an otherwise-qualified protection order contain findings restricting state or federal firearm possession. Likewise, an otherwise qualifying protection order does not fail simply because a state court rules, under state law, that an individual may possess firearms or is

silent as to firearm rights. Section 922(g)(8) has withstood repeated constitutional challenges citing both the Commerce Clause and the 10th Amendment (interference by the federal government in state civil proceedings). **See, e.g. U. S. v. Emerson, 270 F.3d 203 (5th Cir. 2001); U.S. v. Napier, 233 F.3d 394 (6th Cir. 2000); U.S. v. Jones, 231 F.3d 508 (9th Cir. 2000); U.S. v. Meade, 175 F.3d 215 (1st Cir. 1999); U.S. v. Wilson, 159 F.3d 280 (7th Cir. 1998).**

3. Respondent: The Judge said I could keep my rifles for hunting, but I just had to give the Sheriff my handguns until this thing is over. Why are the feds saying I can't buy a new hunting rifle?

Judge: I frequently allow respondents to keep their rifles and shotguns during hunting season.
Or: Our state law only prohibits possession of handguns during the life of a protection order.
Or: The title of the Brady Act is the Brady Handgun Violence Prevention Act, it only applies to handguns. What authority does the federal government have to extend this law to possession of long guns?

ANSWER: The federal Gun Control Act defines the term "firearm" to mean "any weapon (including a starter gun) which will or is designed to or may be readily converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; or any destructive device," 18 U.S.C. §921(a)(3). This definition includes both long guns (shotguns, rifles) and handguns. The "protection order" prohibition, 18 U.S.C. §922(g)(8) makes it unlawful "for any person" ....."to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate of foreign commerce." Consequently, while a state court may have the authority to permit possession of a particular type of firearm, while restricting possession of another type, or restrict the usage of a firearm to a particular time, place or purpose, federal law prohibits the possession of all types of firearms by an individual subject to a qualifying protection order under §922(g)(8). While the individual in the example above would not be subject to state prosecution for violation of a protection order resulting from the possession of a rifle, he would be subject to federal prosecution. Please note, the term "firearm" does not include an "antique firearm" which is defined by §921(a)(16)(A) as "any firearm...manufactured in or before 1898."

4. Respondent speak: I didn't have a hearing--- my attorney worked this order out with my ex-wife's attorney and the judge signed it in his office-how can the Feds take my guns away when the law says I have to have a hearing?

Judge: I frequently sign consent orders, it's efficient and non-confrontational. The federal law says the respondent has to provided a hearing, how could these orders subject someone to federal jurisdiction?
ANSWER: If the court has met with the parties or representatives of each party and is entering a stipulated or consent order based upon the representations made and agreed to by the parties, that generally constitutes a hearing, regardless of where the meeting took place or whether or not the proceedings were recorded or whether testimony was taken. The term "hearing" is not defined in the Gun Control Act, however, the term is generally interpreted as "an opportunity to be heard,

to present one's side of the case, or to be generally known or appreciated", U.S. v. Wilson, 159 F.3d 280 (7th Cir. 1998). If one party waived his/her appearance (even if that appearance would have been in the judge's chambers or office), the consent order would still subject the respondent to federal firearms disqualifications, if the order met the other criteria of §922(g)(8). **See, e.g., U.S. v. Banks, 339 F.3d 267 (E.D. Texas 2003); U.S. v. Calor, 340 F.3d 428 (E.D. Kentucky 2003).**

5. Respondent speak: I'm a police officer, my beat includes the county courthouse. My ex-wife just got a protection order against me. I went to the hearing and objected to it, but the judge entered it anyway and it says I can't assault, threaten, or harass her. I just tried to buy a gun the other day and got denied by the FBI. Am I going to lose my job too?

Judge: A family court judge issued a protection order against my security detail officer due to a domestic incident. If the order meets federal criteria under 18 U.S.C. §922(g)(8), must the county fire him because he can't possess a weapon?

ANSWER: Law enforcement officers and military personnel, are, in general, exempted from the firearm restrictions contained in 18 U.S.C. §§922(g)(1) through (g)(8) and (n) by another provision of the Gun Control Act, 18 U.S.C. §925(a)(1) when possessing a firearm WHILE ON DUTY. This is commonly referred to as the "Official Use Exception." Possession of a personal, non-service firearm or a service firearm while in off-duty status is still prohibited, unless under state law, a law enforcement officer is considered on-duty 24 hours a day and required to be armed at all times. Consequently, police officers subject to a protection order which qualifies under §922(g)(8), may lawfully possess his service firearm while on duty UNDER FEDERAL LAW. The officer may not, however, possess any personal firearms or ammunition. Please note: State law or the specific terms of the protection order might still prohibit possession of a service firearm and could trigger a dismissal or reassignment to desk duty, even though federal law does not mandate this course of action.

MISDEMEANOR CRIMES OF DOMESTIC VIOLENCE

1. Defendant: The prosecuting attorney and my lawyer worked out a deal where I plead guilty to plain old assault. The judge didn't even ask who the victim was. that statute doesn't have anything in it about "domestic" violence. Besides that, I didn't hit my wife, I hit my mistress and I only rented the apartment for us in my name so I'd have a place to keep all my things when I was in town-it was easier than meeting her at a hotel. How can the feds still take my guns?

Judge: I frequently accept pleas to statutes that do not have "domestic violence" as an element and do not have any "relationship" element, how can federal jurisdiction be triggered when the 18 U.S.C. §922 (g)(9) prohibition specifically states it applies only to those "convicted of a misdemeanor crime of domestic violence?"

ANSWER: The Gun Control Act, 18 U.S.C. §921 (a)(33), defines the term "misdemeanor crime of domestic violence" or "MCDV" as any state or federal misdemeanor 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." This definition includes all misdemeanors that involve the use or attempted use of physical force (e.g., simple assault, assault and battery, disorderly conduct, affray, offensive touching), if separate inquiry reveals that in fact the offense was committed by a federally defined party. This is true whether or not the convicting statute specifically defines or classifies the offense as a domestic violence misdemeanor and whether or not the convicting statute has a relationship element. The federal courts have uniformly held that the singular term "element" modifies the phrase "the use or attempted use of physical force or the threatened use of a deadly weapon". While §921(a)(33) requires proof of a domestic relationship, it requires the predicate misdemeanor to have only one element: the use or attempted use of physical force or the threatened use of a deadly weapon on the convicting statute and does not refer to the relationship requirement. **See e.g., U.S. v. Meade, 175 F.3d 215 (1st Cir. 1999); U.S. v. Smith, 171 F.3d 617 (8th Cir. 1999); U.S. v. Medicine Eagle, 266 F.Supp.2d 1039 (D. South Dakota, 2003); State v. Wahl, 839 A.2d 120 (N.J. Super. 2004); U.S. v. Nason, 2001 WL 123722 (D. Maine); U.S. v. Rodriguez-Deharo, 192 F.Supp2d 1031 (E.D. California 2002); U.S. v. Cuervo, 354 F. 3d 969 (8th Cir. 2004); Eibler v. U.S., 311 F. Supp 2d 618 (N.D. Ohio 2004);White v. Department of Justice, 328 F.3d 1361 (D.C. Cir. 2003); U.S. v. Costigan, 2000WL 898455(D. Maine 2000), aff'd 18 Fed. Appx. 2(1st cir. 2001).**

2. Defendant: This law wasn't even passed until 1996, I got convicted in 1994, how can the feds get me now? I've owned guns my whole life.

Judge: The Lautenberg Amendment was not passed until 1996, the permanent provisions of the Brady Act weren't in effect until November 30, 1998. Defendants convicted prior to those dates had no notice of federal consequences to their convictions, isn't this law unconstitutional as under an ex post facto analysis?

ANSWER: The federal courts have consistently held that §922(g)(9), or the "Lautenberg Amendment" applies to persons convicted of qualifying misdemeanors at any time, even if the conviction occurred prior to the law's effective date, September 30, 1996. "To fall within the ex post facto prohibition, a law must be retrospective–that is 'it must apply to events occurring before its enactment'–and it 'must disadvantage the offender affected by it' by altering the definition of criminal conduct or increasing the punishment for the crime." **Lynce v. Mathis, 519 U.S. 433, 117 S.Ct. 891 (1997).** The Lautenberg Amendment, however, only federally criminalizes possession of a firearm when that possession occurs after the effective date of the amendment, it is not enhancing the state consequences of a state conviction and thus is not violative of the Ex Post Facto Clause of the U.S. Constitution. **See, e.g., U.S. v. Smith, 171 F.3d 617 (8th Cir. 1999); U.S. v. Mitchell, 209 F.3d 319 (4th Cir. 2000); U.S. v. Boyd, 52 F.Supp.2d 1233 (D. Kan.1999); Hiley v. Barrett, 155 F.3d 1276 (11th Cir. 1998).**

3. Defendant: Nobody said anything to me at my plea hearing about gun rights or any federal law, doesn't the judge have to let me know what I'm facing?

Judge: I am a state court judge enforcing the laws of my jurisdiction, I wasn't even cognizant of the Gun Control Act, what obligation do I have to provide notice to a defendant of the federal

law? If I refuse to instruct a defendant about federal law or I specifically instruct him it does not apply, is he still subject to the federal firearm prohibitions?

ANSWER: A state court is not required by federal law to provide a defendant notice of the collateral federal consequences of a state court violation. The Lautenberg Amendment has withstood multiple 5th Amendment due process/notice challenges. If a defendant is federally charged with violating §922(g)(9), the federal government is not required to prove that the defendant knew possessing a firearm was illegal, the government must only prove that the defendant knowingly possessed a firearm. **See, e.g., U.S. v. Mitchell, 209 F.3d 319 (4th Cir. 2000), cert. denied, 121 S.Ct. 123 (2000); U.S. v. Beavers, 206 F.3d 760 (6th Cir.2000), cert. denied, 528 U.S. 1116 (2000); Gillespie v. City of Indianapolis, 185 F.3d 693 (7th Cir. 1999); U.S. v. Hutzell, 217 F.3d 966 (8th Cir. 2000); U.S. v. Hancock, 231 F.3d 557 (9th Cir. 2000); U.S. v. Boyd, No. 99-3227, 2000 U.S. App. LEXIS (10th Cir. 2000); Fraternal Order of Police v. U.S., 173 F.3d 898 (D.C. 1999) , cert. denied, 520 U.S. 1116 (1999); U.S. v. Pfeifer, 206 F.Supp2d 1002 (D. South Dakota 2002).**

4. Defendant: I have to carry a gun on the job, I work for a judge. Back in 1984, I plea bargained a charge down from felony assault to a misdemeanor. The victim was my wife, we've been divorced for years. If I'd pled guilty to a felony, the ATF's telling me I could keep my job, but I have to quit because of a misdemeanor? How can that be?

Judge: My bailiff has a pre-Brady conviction for a misdemeanor assault against his wife. Under state law, a felony conviction would have cost him his job, he's my most trusted employee. I specifically counseled him to take the plea agreement and avoid the felony. It was my understanding that law enforcement officers are exempted from the Gun Control Act, do I have to terminate his employment?

ANSWER: Law enforcement officers and military personnel are, in general, exempted from many of the restrictions of the federal firearms laws by 18 U.S.C. §925(a)(1) and are permitted to possess a firearm WHILE ON DUTY. This is known as the "official use exception" and excepts law enforcement officers from the federal firearm prohibitions found at §922(g)(1) through (8) and (n). Possession of a personal, non-service firearm or a service firearm in off-duty status is still prohibited (unless under state law, a law enforcement officer is considered on-duty 24 hours a day and required to be armed at all times). However, one of the provisions of the statue enacting §922(g)(9) [Lautenberg Amendment] specifically excluded §922(g)(9) from this exception. The exception provides:

> The provisions of this chapter , except for sections 922 (d)(9) and 922(g)(9).....shall not apply with respect to the possession... of any firearm or ammunition...issued for the use of, the United States or any department or agency thereof or of any State or any department, agency, or political subdivision.

Thus, as of September 30, 1996 (the effective date of the Lautenberg Amendment), any member of the armed forces or any police or other law enforcement officer who has a qualifying misdemeanor conviction is no longer able to possess a firearm, EVEN WHILE ON DUTY. The

anomalous situation exists that 18 U.S.C. §925 (a)(1) exempts law enforcement officers/military personnel from the firearm prohibition due to felony convictions, §922(g)(1). Thus, if a police officer is convicted of murdering his or her spouse, or has a protection order placed against him or her, he or she may, under federal law, still be able to possess a service revolver while on duty, whereas if the officer is convicted of a qualifying misdemeanor, he or she is prohibited from possessing any firearm or ammunition at any time. The MCDV provision has withstood 5th Amendment equal protection challenges. **See, e.g., Fraternal Order of Police v. U.S., 173 F.3d 898 (D.C. Cir. 1999), cert. denied 520 U.S.1116 (1999); Gillespie v. City of Indianapolis, 185 F.3d 693 (7th Cir. 1999), cert. denied, 120 S.Ct. 934 (2000); White v. Department of Justice, 328 F.3d 1361 (D.C. Cir. 2003). For relationship test, see, U.S. v. Cuervo, 354 F.3d 969 (S.D. Iowa 2002); U.S. v. Costigan, 2000 WL 898455 (D. Maine 2000); U.S. v. Medicine Eagle, 266 F.Supp 2d 1039 (D. South Dakota, 2003); Eibler v. U.S., 311 F.Supp.2d 618 (N.D. Ohio 2004); U.S. v. Shelton, 325 F.3d 553 (S.D. Texas 2003).**

5. Defendant: I got off probation for my domestic battery conviction, the judge gave me an order saying I can own guns now, why are the feds after me?

Judge: The Gun Control Act provides that the MCDV prohibitions do not apply if an individual has had his civil rights restored. Under state law, I routinely prohibit firearm ownership as a condition of probation. Upon termination of probation, I specifically restore firearm rights by order in order to assure the federal prohibitions are not triggered. This jurisdiction doesn't deprive misdemeanants of any other civil rights. Why isn't my order sufficient?

ANSWER: 18 U.S.C. §921(a)(33)(B)(ii) provides an exception to the application of the Lautenberg amendment "if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess or receive firearms." The core "civil rights" referred to are: the right to vote, the right to sit on a jury, and the right to hold public office. In most states, civil rights are not stripped from individuals convicted of a misdemeanor. However, the restoration exception of §921(a)(33) only applies to "civil rights" [that have been] restored if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense. If a jurisdiction does not deprive an individual of the three core civil rights, such rights cannot be restored and the individual remains convicted for purposes of the Gun Control Act, even though the individual's state firearm rights may have been restored. The Gun Control Act requires both the restoration of the three core civil rights and the restoration of state firearm rights. This provision has withstood equal protection challenges. **See e.g., U.S. v. Smith, 171 F.3d 617 (8th Cir. 1999); Hiley. v. Barrett, 968 F.Supp. 1564 (N.D. Georgia. 1997); Fraternal Order of Police v. U.S., 173 F.3d 898 (D.C. Cir. 1999), cert. denied, 520 U.S. 1116 (2000); U.S. v. Wegrzyn, 305 F.3d 593 (W.D. Michigan 2002); U.S. v. Jennings, 323 F.3d. 263 (D. South Carolina 2003).**

6. Defendant: My brother got convicted of murder, he got pardoned by the Governor once he got out of prison. ATF says he can have a gun. I pled guilty to a measly misdemeanor assault charge for shoving my live-in girlfriend, and the Governor's office doesn't give out pardons for misdemeanors. I can't get a gun and my brother can-how is this fair? He went to the state pen for 10 years, all I got was a $50.00 fine.

Judge: How can 18 U.S.C. §§922 (g)(9) and 921 (a) (33) withstand equal protection scrutiny when few state constitutions actually provide authority for misdemeanor pardons?

ANSWER: Please see Answer to Question Number 5. 18 U.S.C. §§ 922 (g)(9) and 921(a)(33) have withstood repeated equal protection challenges, **See, e.g., Fraternal Order of Police v. U.S., 173 F.3d 898 (D.C. Cir. 1999),cert. denied, 520 U.S. 1116 (2000); U.S. v. Smith, 171 F.3d 617 (8th Cir. 1999).** The provisions of the Gun Control Act are not rendered meaningless simply because a particular state does not provide a specific avenue of relief (restoration of rights, pardons, expunctions, set asides) recognized by §921(a)(33). The federal firearm prohibition regarding felony convictions, 18 U.S.C. §§922(g)(1) and 921 (a)(20), contains similar language. If under state law an individual is not eligible for a pardon or other relief or state law makes no provision for relieving a conviction (whether felony or misdemeanor), the conviction remains a conviction for Gun Control Act purposes.

PLEASE NOTE: FEDERAL FIREARM PROHIBITIONS APPLY TO FIREARMS (BOTH HANDGUNS AND LONG GUNS) AS WELL AS AMMUNITION.