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Firearms and Domestic Violence: A Primer for Judges

Darren Mitchell and Susan B. Carbon

Firearms and domestic violence are a deadly combination. As the examples on the following page show,¹ abusers who gain access to firearms pose a lethal threat both to those they have abused and to the wider community. Even where laws exist to disarm abusers and prevent them from purchasing new firearms, absent effective implementation of the laws—by judges, as well as by others in the civil and criminal justice system—survivors of domestic violence and the broader community continue to remain at risk of death or serious injury.

RESEARCH FINDINGS

The statistics regarding domestic violence in this country are startling. The United States Department of Justice and others have estimated that each year at least one million violent crimes are committed against persons by their current or former spouses or dating partners.² People of all ages and all gender, ethnic, cultural, and demographic backgrounds are abused, but statistically the largest number are young women between the ages of 16 and 24.³ Overall, the vast majority of victims of intimate partner violence are women.⁴

Studies and experience show that the time of leaving a relationship can be the most dangerous for a survivor, a phenomenon that is often referred to as “separation violence.” The act of separating—whether through divorce, by physical or legal separation, or by ending a dating relationship—often triggers an escalation of the violence.⁵ In fact, prior abuse and separation, or announced plans to separate, appear to be the biggest risk factors indicating that the abuser will seriously injure or kill the survivor.⁶

Judges need to understand this phenomenon because many survivors, in the course of separating from their abusers, seek recourse through the legal system; they may seek a protection order or call law enforcement personnel to initiate a criminal

prosecution. Because these acts of separation are intended to wrest control away from the abuser, they typically will be perceived as a significant threat, and the abuser will react by taking steps to re-exert control over the survivor. The abuser—even if there has been limited documented evidence of abuse in the relationship—may take extreme measures to reestablish control. In some instances, the abuser will choose homicide as the ultimate exercise of power over the victim.

If the abuser has access to a firearm, it is far more likely that homicide will indeed be the result. Research shows that family and intimate partner assaults involving firearms are 12 times more likely to result in death than those that do not involve firearms.⁷ Approximately two-thirds of the intimate partner homicides in this country are committed using guns.⁸

In cases in which the abuser’s use of a firearm does not result in death, the survivor instead may suffer a brutal, life-altering injury. A recent study of survivors of severe battering described such cases, including one in which the abuser “essentially shot off [the survivor’s] leg—what was left of it had to be amputated—as she pleaded for her life.”⁹

Abusers who kill their intimate partners also may injure or kill third parties. One study found that in 38 percent of homicides involving intimate partners the perpetrator kills more than one person; other victims include children, intervenors, and bystanders.¹⁰

JUDICIAL RESPONSE

Each year, judges across the country issue many thousands of civil protection orders. These orders, entered after the court has found evidence of abuse, are designed to protect the survivor from further acts of abuse, including assaults, threats, harassment, and destruction of property. As described more fully below, judges in most states are authorized to include in

Footnotes

1. Information from National Instant Criminal Background Check Program, Federal Bureau of Investigation.
2. See CALLIE M. REUNISON AND SARAH WELCHANS, U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, INTIMATE PARTNER VIOLENCE (May 2000), at 1; PATRICIA TJADEN AND NANCY THOENNES, NATIONAL INSTITUTE OF JUSTICE AND THE CENTERS FOR DISEASE CONTROL AND PREVENTION, EXTENT, NATURE & CONSEQUENCES OF INTIMATE PARTNER VIOLENCE (July 2000), at 10 [hereinafter *NIJ-CDC Report*].
3. See U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, INTIMATE PARTNER VIOLENCE AND AGE OF VICTIM, 1993-1999 (Oct. 2001), at 3. Data show, however, that women between the ages of 35 and 49 are the most vulnerable to homicide by their intimate partner. See *id.*
4. See *NIJ-CDC Report*, *supra* note 2, at 1.
5. In a study of domestic homicides in Florida, 65% of intimate homicide victims had physically separated from the perpetrator prior to their death. See Florida Governor’s Task Force on Domestic and Sexual Violence, Florida Mortality Review Project Report, at 44, table 7 (1997) [hereinafter *Florida Mortality Review Report*].
6. See Kathryn Ann Farr, *Battered Women Who Were “Being Killed and Survived It”: Straight Talk from Survivors*, 17 VIOLENCE & VICTIMS 267, 268 (2002) (citing additional studies) [hereinafter *Being Killed*].
7. See L.E. Saltzman et al., *Weapon Involvement and Injury Outcomes in Family and Intimate Assaults*, 267 J. AMER. MED. ASS’N. 3043 (1992); Johns Hopkins University, Center for Gun Policy and Research, *Factsheet: Firearm Injury and Death in the United States* (revised April 2002), available at http://www.jhsph.edu/bin/i/g/US_factsheet.pdf.
8. See U.S. Department of Justice, Bureau of Justice Statistics, *Homicide Trends in the U.S.*; “Intimate Homicide” (visited August 29, 2002), available at <http://www.ojp.usdoj.gov/bjs/homicide/intimates.htm>.
9. See Farr, *Being Killed*, *supra* note 6, at 277.
10. *Florida Mortality Review Report*, *supra* note 5, at 51, table 28.

THE RISKS ARE REAL

July 2001: A man attempting to purchase a gun fills out the required federal form so that the Federal Bureau of Investigation can complete a criminal background check. During the check, the FBI determines that the purchaser is subject to a protection order that may prohibit him from purchasing the gun under federal law. The records do not indicate, however, whether the required relationship between the purchaser and the protected person exists. Despite contacting the court that issued the protection order, the clerk of court's office, the sheriff's office, and the police department in the issuing jurisdiction, the FBI cannot obtain the necessary information within the requisite three-business-day period and the gun shop is able to sell the gun to the purchaser. One hour later, the purchaser uses the gun to murder the person who obtained the protection order, his former live-in girlfriend. The FBI learns too late that the transaction was illegal under federal law.

December 2001: On Christmas Day, a man murders his wife and 13-year-old daughter with a firearm. He was able to purchase the gun without a criminal background check because he possessed a concealed weapon permit that had been issued several years earlier by a state court. A few months before the murders, the very court that granted the permit had issued a protection order against the murderer and had arraigned him on domestic battery charges. The protection order disqualified the murderer from purchasing or possessing a firearm, but the court never revoked the concealed weapon permit and the protection order had not been entered into any registry. The murdered wife and daughter were the protected parties on the protection order.

January 2002: A man shoots and kills a law school dean and injures others. The killer had been arrested on charges of domestic battery in August 2001 and had been released without bail conditions restricting firearm possession. The gun used in the murder was found with the gun store tags intact.

their protection orders provisions that deny a respondent access to firearms. Additionally, some state laws authorize removal of firearms in misdemeanor cases of domestic violence, including at the time of bail, arraignment, or conviction.

Over the past decade, judges have received unprecedented training about domestic violence. Often missing from the curriculum, however, has been the issue of firearms, and how the surrender, return, or denial of firearms is related to domestic violence civil and criminal cases. The issue may be ignored because judges in jurisdictions without state law on the issue believe that it is federal law, and they needn't worry about that, or because judges have philosophical differences of opinion about the propriety or efficacy of state and federal laws on the subject. Whatever the reason, judges will be unable to fulfill their judicial responsibilities if they do not educate themselves about the various restrictions that Congress and state legislatures have enacted to limit certain defendants' access to firearms in order to promote public safety and prevent death

and severe injuries in domestic abuse cases.

The specific requirements regarding removal of firearms under state and federal law will be discussed in detail below. In some cases, removal is discretionary; in others, it is mandatory. It is crucial for judges to understand the circumstances under which state and federal laws provide that firearms *must* be removed. However, judges should also be sensitive to the rationale behind provisions for discretionary removal and ensure that, at the very least, they conduct an appropriate colloquy from the bench in the event firearms are *not* removed. Given the safety issues discussed above, survivors and the public at large may be at considerable risk if abusers retain access to firearms, even under circumstances where removal is discretionary. Consequently, the decision to allow an abuser to retain firearms should be made only after careful consideration of all the facts and circumstances of the particular case.

This article is intended to provide judges with an overview of the state and federal laws that address domestic violence and firearms. Because knowledge of the governing laws alone is insufficient to enable judges to take meaningful steps to safeguard survivors and the community, we also provide several examples of good judicial practices that can facilitate effective implementation and enforcement of the laws. We hope that judges around the country, irrespective of the unique features of their jurisdictions' laws, can integrate these prudent practices into their daily work.

THE APPLICABLE LAWS

Laws at both the state and federal levels prohibit abusers and stalkers from possessing firearms and ammunition. Many states have enacted laws that specifically authorize judges to prohibit firearm possession or to order seizure of illegally possessed firearms under certain circumstances, such as where an abuser used or threatened to use a firearm during an incident of abuse or where the abuser is subject to an active protection order. At the federal level, recently enacted provisions of the Gun Control Act, 18 U.S.C. § 921 et seq., prohibit firearm possession by abusers who are subject to an order of protection satisfying certain requirements or who have been convicted of a qualifying misdemeanor crime of domestic violence. These state and federal laws reflect a growing understanding and consensus among the voting public and their elected representatives that abusers present a heightened threat to survivors when they have access to a firearm.

In this section, we present an overview of the firearm prohibitions enforceable by judges under state law, followed by a discussion of the federal firearm laws relating to domestic violence. Then, before turning to an examination of the recommended judicial practices regarding firearm laws and domestic violence, we explore the sometimes confusing relationship between the state and federal firearm laws, as well as the roles and responsibilities of state court judges regarding their enforcement.

State Laws

Over the past several years, state legislatures throughout the country have enacted laws that restrict domestic violence perpetrators' access to firearms and ammunition. Not surprisingly, the states have taken a wide variety of approaches to the issue, some imposing mandatory prohibitions on certain

In many states, a firearm prohibition is a mandatory condition imposed on all defendants charged with a domestic violence crime.

offenders and others leaving the power to disarm offenders largely to the court's discretion. This section provides a brief overview of the types of firearm prohibitions that have been enacted by the states, including both those enforceable by civil-court judges and those enforceable by judges who hear criminal matters.

Civil System

In at least nine states, entry of a civil domestic violence protection order meeting certain criteria subjects the respondent to a *mandatory* prohibition on the possession of firearms.¹¹ For instance, Florida law prohibits possession of a firearm or ammunition by a person subject to a valid final protection order that enjoins that person from committing acts of domestic violence,¹² while New Hampshire law requires relinquishment of firearms and ammunition by a respondent if the court finds that the respondent represents a credible threat to the safety of the survivor.¹³ In states that have a mandatory prohibition, judges do not have any discretion over whether the prohibition applies; in some instances, however, a specific finding may be required to trigger the prohibition under state law.

A more common approach is to give judges issuing civil protection orders the discretion to include a provision prohibiting firearm possession within the order.¹⁴ In a few states, such provisions may be included in both temporary, *ex parte* protection orders and in final orders entered after the respondent has had an opportunity to be heard. Some states also authorize judges to include a prohibition against purchasing or otherwise acquiring a firearm for the duration of a protection order.¹⁵

Some states, recognizing that an abuser who possesses a license or permit to carry firearms may be able to circumvent a state or federal law firearm prohibition by evading a back-

ground check, authorize judges to order the respondent to surrender the permit or license for the duration of a protection order.¹⁶ For instance, under New York law the court is required to suspend any existing license possessed by the respondent and to order the respondent ineligible for such a license upon issuance of a protection order if the court finds that the conduct that led to issuance of the order involved the infliction of serious physical injury, the use or threatened use of a deadly weapon or dangerous instrument, or behavior constituting a violent felony.¹⁷

Some of the firearm prohibitions described above are subject to exceptions intended to allow law enforcement officers to possess firearms despite being subject to an order that would otherwise disqualify a respondent from possession. For instance, the mandatory firearm prohibition imposed by Wisconsin law against a person subject to a domestic violence restraining order does not apply to peace officers if they are required to possess a firearm while on or off duty.¹⁸ As discussed more fully below, one of the federal statutes that prohibits firearm possession is also subject to an exception for law enforcement officers and military personnel.

Criminal System

Judges hearing criminal matters in many states also have legal authority to deny domestic violence perpetrators access to firearms. Depending on the state, the prohibition may be imposed as a bail or other condition of release, or it may be included as a probation condition. In some states, a firearm prohibition is a mandatory condition imposed on all defendants charged with a domestic violence crime.¹⁹ In other states, a firearm prohibition is highly favored and must be imposed absent a special finding by the judge.²⁰ In still other states, a prohibition is required only if the judge makes certain findings regarding the likelihood that the defendant will use a firearm in further acts of violence.²¹

Upon conviction of a domestic violence crime, defendants in many states become subject to a firearm prohibition, although in some cases a firearm must have been used in the offense.²² In most cases, the prohibition is mandatory, but at least one state (Minnesota) makes the prohibition discre-

11. See CAL. FAM. CODE § 6389(a) (2002); DEL. CODE ANN. TIT. 11, § 1448(a) (2002); FLA. STAT. CH. 790.233 (2002); HAW. REV. STAT. § 134-7(2002); MD. CODE ANN., ART. 27, § 445(d)(2)(v) (2002); N.H. REV. STAT. § 173-B:5 (2002); VA. CODE ANN. § 18.2-308.1:4(A) (2002); W. VA. CODE § 61-7-7 (2002); WIS. STAT. § 813.12 (2002).

12. See FLA. STAT. CH. 790.233 (2002).

13. See N.H. REV. STAT. § 173-B:5 (2002).

14. See ALASKA STAT. § 18.66.100 (2002); ARIZ. REV. STAT. ANN. § 13-3602 (2002); 725 ILL. COMP. STAT. 5/112A-14(b)(14.5) (2002); IND. CODE ANN. § 34-26-5-9(c)(4) (2002); MD. FAM. LAW CODE ANN. § 4-506(d)(12) (2002); MICH. STAT. ANN. § 600.2950(1)(e) (2002); MONT. CODE ANN. § 40-15-201 (2002); N.J. REV. STAT. §§ 2C:25-28, 2C:25-29(16) (2002); OR. REV. STAT. § 30.866 (2002); 18 PA. CONS. STAT. ANN. § 6105(c)(6) (2002); TEX. FAM. CODE § 85.022(e) (2002); UTAH CODE ANN. § 30-6-4.2 (2002); W. VA. CODE § 48-27-403 (2002).

15. In states that do not explicitly authorize firearm removal as part of a protection order, judges may be able to use the "catch-all" relief

provision available in many protection order codes to order that the respondent not possess firearms for the duration of the order.

16. See MASS. GEN. LAWS ANN. CH. 209A, § 3C (2002); N.Y. FAM. CT. ACT § 842-a(1)-(2) (2002); 23 PA. CONS. STAT. § 6108(A)(7) (2002); TEX. GOV'T CODE ANN. § 411.187 (2002).

17. See N.Y. FAM. CT. ACT § 842-a(1)-(2) (2002).

18. See WIS. STAT. § 813.12(2002); see also TEX. FAM. CODE § 85.022 (2002).

19. See COLO. REV. STAT. ANN. § 18-1.3-204 (2002); FLA. STAT. CH. 790.065(c)(1) (2002); HAW. REV. STAT. § 806-11 (2002).

20. See CAL. PENAL. CODE § 646.93(c)(3) (2002); 725 ILL. COMP. STAT. 5/110-10 (5) (2002).

21. See N.Y. CRIM. PROC. LAW § 530.14(1)(b) (2002); N.D. CENT. CODE § 14-07.1-13 (2002).

22. See, e.g., DEL. CODE ANN. TIT. 11 § 1448(a) (2002); FLA. STAT. CH. 790.065 (2002); MD. CODE ANN. ART. 27, § 445 (2002); MONT. CODE ANN. § 45-5-206(7) (2002); TEX. P. CODE § 46.04(2)(b) (2002); W. VA. CODE § 61-7-7 (2002).

tionary and requires that the court make written findings to support an order not to possess firearms.²³

Federal Laws

Congress has also recognized the importance of restricting domestic violence abusers' access to firearms. In 1994, along with the passage of the original Violence Against Women Act (VAWA),²⁴ Congress enacted the first federal legislation to address this issue directly. The new law, which amended the Gun Control Act of 1968 and is codified at 18 U.S.C. section 922(g)(8), makes it a federal crime for a person who is subject to a qualifying protection order to possess a firearm or ammunition, or to ship or receive a firearm or ammunition in interstate or foreign commerce. To qualify under section 922(g)(8), a protection order must:

- (1) have been issued after a hearing of which the respondent received actual notice, and at which the respondent had an opportunity to participate;
- (2) restrain the respondent from harassing, stalking, or threatening an intimate partner of the respondent or child of such intimate partner or the respondent, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
- (3) either include a finding that the respondent represents a credible threat to the physical safety of such intimate partner or child or by its terms explicitly prohibit 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.²⁵

The federal law defines the term "intimate partner" for purposes of section 922(g)(8) as a spouse or former spouse of the respondent, a person who is a parent of the child of the respondent, or a person who cohabits or has cohabited with the respondent.²⁶

Provided that these requirements have been satisfied, mere possession of a firearm or ammunition will subject a defendant to prosecution under section 922(g)(8). The order itself need not prohibit possession of firearms, and the respondent need not have violated the order itself in any way. The federal law does, however, require that the possession be "knowing" to support a prosecution.²⁷ Section 922(g)(8) applies only for the duration of the qualifying protection order.

In addition to section 922(g)(8), the 1994 amendments to the Gun Control Act included 18 U.S.C. section 922(d)(8), which makes it a federal crime to sell or transfer a firearm or ammunition to a person knowing or having reasonable cause

to believe that the person is subject to a qualifying protection order. The same requirements discussed above in reference to section 922(g)(8) apply to protection orders under section 922(d)(8).²⁸ The intent behind section 922(d)(8) takes on special significance for state court judges when respondents petition a court for the return of guns that have been seized pursuant to state or federal law. If the court knows or has reasonable cause to believe that the respondent is subject to

an active protection order that satisfies section 922(d)(8) (as where a criminal court is petitioned for return of weapons but is aware of a qualifying protection order issued by a sister civil court), it should not return the firearms. As described more fully below, good judicial practice would be to search, prior to returning any firearms, all available records to determine whether a person is subject to a firearms disqualification under state or federal law.

A limited exception to sections 922(g)(8) and 922(d)(8) exists for law enforcement officers, armed forces personnel, and other local, state, and federal employees who are required to use weapons as part of their official duties. Under 18 U.S.C. section 925(a)(1), sometimes referred to as the "official-use exemption," the prohibitions in sections 922(g)(8) and 922(d)(8) do not apply to firearms that are received or possessed by such individuals for use in performing official duties on behalf of a federal, state, or local agency. Personal weapons, however, are not covered by the exemption.²⁹

In 1996, Congress enacted the second important amendment to the Gun Control Act related to domestic violence. Known as the "Lautenberg Amendment," the new law added persons who have been convicted of certain misdemeanor crimes of domestic violence to the list of those barred by the federal law from purchasing or possessing firearms and ammunition. The prohibition, found at 18 U.S.C. section 922(g)(9), has been particularly controversial because it applies to misdemeanors and does not include an official-use exemption for law enforcement and military personnel.

The "Lautenberg Amendment" . . . added persons who have been convicted of certain misdemeanor crimes of domestic violence to the list of those barred by the federal law from purchasing or possessing firearms

. . . .

23. See MINN. STAT. § 609.2242(3)(c) (2002).

24. The Violence Against Women Act of 1994, Pub. L. No. 103-322, Title IV, 108 Stat. 1902-55 (codified in scattered sections of 8 U.S.C., 18 U.S.C., and 42 U.S.C.).

25. See 18 U.S.C. § 922(g)(8)(A)-(C) (2002).

26. See 18 U.S.C. § 921(a)(32) (2002).

27. See 18 U.S.C. § 924(a)(2) (penalty imposed for "knowingly" violating section 922(g)(8)).

28. See 18 U.S.C. § 922(d)(8)(A)-(B).

29. See Letter from Stephen R. Rubenstein, Associate Chief Counsel,

Bureau of Alcohol, Tobacco and Firearms, U.S. Department of the Treasury, to Charles Higgenbotham, International Association of Chiefs of Police (Feb. 12, 2001) (on file with authors); see also National Instant Criminal Background Check Program, Federal Bureau of Investigation, *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), Presentation to the National Council of Juvenile and Family Court Judges, at 5 (July 16, 2002) [hereinafter *NICS Frequently Asked Questions*].

The federal firearms statutes related to domestic violence have withstood an onslaught of legal challenges in virtually every federal circuit.

Despite several court challenges, section 922(g)(9) has withstood judicial scrutiny and remains good law.

Which misdemeanor crimes qualify under section 922(g)(9)? The definition of a misdemeanor crime of domestic violence requires that the offense be a misdemeanor under federal or state law and have, as an element, the use or attempted use of physical force or the threatened use of a deadly weapon.³⁰

In addition, a misdemeanor conviction

qualifies only if one of the enumerated relationships exists between the perpetrator and the victim of the crime. Specifically, the perpetrator must be a current or former spouse, parent, or guardian of the victim; a person who shares a child in common with the victim; a person who is cohabiting or has cohabited with the victim as a spouse, parent, or guardian; or a person similarly situated to a spouse, parent, or guardian of the victim.³¹

The federal law also imposes two due-process-related requirements, namely that the perpetrator must have been represented by counsel (or have knowingly and intelligently waived that right) and that if the perpetrator was entitled to a jury trial, either the case was tried by a jury or the perpetrator knowingly and intelligently waived that right.³²

It is important to note that only a “conviction” triggers the section 922(g)(9) prohibition. The variety of state court practices employed to streamline the criminal judicial process can make it difficult to discern whether an adjudication is indeed a “conviction” as required by the federal law. The problem often arises where some form of delayed adjudication is available to state courts, as where an “adjournment in contemplation of dismissal” may be entered.³³ By regulation, the question of whether a qualifying “conviction” exists is made by reference to the governing *state* law: if the form of adjudication is considered a conviction under state law, it will qualify as a “conviction” and support prosecution under section 922(g)(9).³⁴ In many, if not most, circumstances, a delayed adjudication will not be considered a conviction under state law, so to the extent judges accept such pleas they should keep in mind that one of

the collateral consequences is that the federal firearm prohibition may not apply against the perpetrator.

Although section 922(g)(9) imposes a lifetime ban on firearm possession following a qualifying misdemeanor conviction, the statute does provide that firearm possession rights may be restored under limited circumstances. Specifically, the conviction must be “expunged or set aside” or it must be “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 offense).”³⁵

Federal courts have consistently held that section 922(g)(9) applies to misdemeanor convictions that occurred prior to the 1996 enactment of the Lautenberg Amendment. The courts have rejected challenges based upon the Ex Post Facto clause of the U.S. Constitution, ruling that so long as the illegal act of firearm possession occurs after the enactment date, the law does not retrospectively punish acts that were legal prior to the enactment date.³⁶

Unlike section 922(g)(8), section 922(g)(9) is not subject to the “official-use exemption” for law enforcement and military personnel.³⁷ Consequently, a law enforcement officer or member of the military who has been convicted of a qualifying misdemeanor crime of domestic violence is subject to a lifetime ban on firearm possession, including possession of official-duty weapons. Thus, departments may need to terminate or reassign officers who become subject to the ban.³⁸

As part of the Lautenberg Amendment, Congress also enacted 18 U.S.C. section 922(d)(9), which prohibits the sale or transfer of a firearm or ammunition to a person if the transferor knows or has reasonable cause to believe that the person has been convicted of a misdemeanor crime of domestic violence.³⁹ The definition of misdemeanor crime of domestic violence is the same as that which applies to section 922(g)(9).⁴⁰

Challenges to the Federal Firearm Laws

The federal firearm statutes related to domestic violence have withstood an onslaught of legal challenges in virtually every federal circuit. Defendants have sought to overturn their convictions using a plethora of legal theories, including several constitutional challenges. To date, the federal courts have rejected every such challenge, and the statutes remain on solid legal ground.

Defendants have repeatedly invoked the notice and due process requirements of the Fifth and Fourteenth Amendments

30. See 18 U.S.C. § 921(33)(A) (2002).

31. See *id.* That is not to say that the criminal offense must be named “domestic assault” or “spousal abuse,” or even that it have as an element the requisite relationship between the perpetrator and the victim; rather, to qualify under the federal law one of the enumerated relationships must have existed in fact. See, e.g., *United States v. Meade*, 175 F.3d 215, 218-221 (1st Cir. 1999).

32. See 18 U.S.C. § 921(33)(B)(i) (2002).

33. See N.Y. FAM. CT. ACT § 315.3(2002).

34. See 27 C.F.R. § 178.11.

35. 18 U.S.C. § 921(33)(B)(ii). In addition, if the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms, then the restriction against firearms possession continues. See *id.*

36. See, e.g., *United States v. Mitchell*, 209 F.3d 319, 322-23 (4th Cir. 2000), *cert. denied*, 531 U.S. 849 (2000).

37. See 18 U.S.C. § 925(a)(1) (specifically excluding sections 922(g)(9) and 922(d)(9)).

38. See John W. Magaw, Director, Bureau of Alcohol, Tobacco and Firearms, U.S. Department of the Treasury, “Open Letter to All State and Local Law Enforcement Officials” (visited August 20, 2002), available at <http://www.atf.treas.gov/firearms/domestic/opltrleo.htm>.

39. Therefore, a court should not authorize the return of a firearm to a person that the court knows or has reasonable cause to believe has been convicted of a qualifying misdemeanor crime of domestic violence.

40. See 18 U.S.C. § 921(33).

to attack the constitutionality of both 18 U.S.C. sections 922(g)(8) and (g)(9). Without exception, the federal courts have ruled that even if a defendant was unaware of the existence of the federal law, the “ignorance of the law is no excuse” doctrine governs.⁴¹ Thus, while it may be good judicial practice to advise defendants of these laws, such notice is not a requirement.

Defendants have also contended that the statutes are beyond Congress’s power under the Commerce Clause, a challenge that the courts have rejected because both sections 922(g)(8) and 922(g)(9) include a “jurisdictional element,” namely, the requirement that the firearm or ammunition must have been “shipped or transported in interstate or foreign commerce.”⁴² Likewise, Tenth Amendment challenges have failed because the federal courts have ruled that the statutes are federal criminal statutes that are to be implemented by federal authorities, not state authorities, and so they neither “commandeer” state governments into serving federal purposes nor implicate the states’ rights to regulate domestic relations.⁴³

The Second Amendment provided the basis for the most highly publicized challenge to the federal firearm statutes since their enactment. In 1998, Dr. Timothy Joe Emerson was indicted in a Texas federal district court for possession of firearms in violation of 18 U.S.C. section 922(g)(8).⁴⁴ Dr. Emerson had purchased a firearm while he was subject to a protection order issued by a Texas state court that prohibited him from harming or threatening to harm his wife or the couple’s four-year-old daughter. Dr. Emerson, who was arrested after he allegedly brandished the firearm in front of his wife and daughter, moved to dismiss the indictment, asserting among other things that section 922(g)(8) violates the Second Amendment. The district court granted the motion to dismiss, finding that the Second Amendment recognizes an individual right to own and possess firearms and concluding that section 922(g)(8) was unconstitutional because it criminalizes protected conduct based upon a state civil court order with no particularized findings.⁴⁵

The district court decision set the stage for the government’s appeal to the U.S. Court of Appeals for the Fifth Circuit. In a lengthy decision, two of the three judges on the panel that heard the appeal agreed with the district court that the Second Amendment confers on individuals the right to bear arms.⁴⁶ In so doing, the majority departed from the conclusion reached by

every other federal appellate court to decide the question.⁴⁷ The *Emerson* majority did, however, uphold the constitutionality of section 922(g)(8) as applied to Emerson, finding that the law is a sufficiently “limited, narrowly tailored specific exception or restriction” to the Second Amendment right.⁴⁸ Emerson subsequently appealed the decision to the U.S. Supreme Court, which denied certiorari on June 10, 2002.⁴⁹

In practice, the system is imperfect, and a disconcertingly large number of abusers have been able to obtain a firearm

...

The National Instant Criminal Background Check System (NICS)

In 1993, Congress enacted a new law intended to prevent prohibited persons from purchasing firearms from dealers. That law, the Brady Handgun Violence Prevention Act (Brady Act),⁵⁰ requires all federally licensed gun dealers to obtain a criminal background check of all purchasers before completing a sale. In most cases, the required background check is to be made using the National Instant Criminal Background Check System, or “NICS,” which comprises several computer databases managed by the Federal Bureau of Investigation.⁵¹ Among other things, the FBI search includes an examination of the federal database that contains information about state-court-issued protection orders (the National Crime Information Center Protection Order File) and state criminal history records. During the course of the background check, the FBI conducts a search to determine whether the sale of the firearm would violate any applicable state or federal laws.⁵² By statute, the FBI search is limited to three business days; if no state or federal prohibitions are uncovered within that period, the sale is allowed to proceed by default.⁵³

In theory, the NICS background check should prevent an abuser who is prohibited from possessing a firearm under state or federal law from buying one from a licensed gun dealer. In practice, the system is imperfect, and a disconcertingly large number of abusers have been able to obtain a firearm in violation of federal law because the FBI could not complete its investigation within three business days.⁵⁴ There are, however,

41. See, e.g., *United States v. Kafka*, 222 F.3d 1129, 1130-31 (9th Cir. 2000) (and cases cited therein); Mitchell, *supra* note 36, at 323-24 (and cases cited therein).

42. See, e.g., *United States v. Napier*, 233 F.3d 394, 399-402 (6th Cir. 2000) (and cases cited therein).

43. See, e.g., *United States v. Jones*, 231 F.3d 508, 515 (9th Cir. 2000); *United States v. Wilson*, 159 F.3d 280, 287-88 (7th Cir. 1998).

44. See *United States v. Emerson*, 270 F.3d 203, 211-12 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 2362 (June 10, 2002).

45. See *United States v. Emerson*, 46 F. Supp. 2d 598 (N.D. Tex. 1999).

46. See Emerson, *supra* note 44, at 218-260.

47. See, e.g., Napier, *supra* note 42, at 402-04 (and cases cited therein).

48. Emerson, *supra* note 44, at 260-64.

49. *Emerson v. United States*, 122 S. Ct. 2362 (2002).

50. The Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993).

51. See 28 C.F.R. pt. 25. FBI personnel do not perform all NICS background checks. In some states, a state or local law enforcement agency has been designated a “point of contact” (POC) and is responsible for conducting the check. See 28 C.F.R. §§ 25.2, 25.6(d).

52. See 28 C.F.R. § 25.6.

53. See 18 U.S.C. § 922(t)(1)(B)(ii).

54. See U.S. General Accounting Office, *Gun Control: Opportunities to Close Loopholes in the National Instant Criminal Background Check System* (GAO-02-653), at 17-23 (July 2002) [hereinafter *GAO Report*].

Confusion also arises over a state court judge's role in the enforcement of the 18 U.S.C. section 922(g)(8) prohibition

some practical steps that judges can and should take to improve the speed and accuracy of the FBI investigation. Doing so would significantly increase the likelihood that their protection orders and judgments of conviction will be enforced and that community and survivor safety will be

enhanced. These steps are discussed in detail below.

State Judges' Role with Respect to Federal Firearm Laws

What is the relationship between the federal and state firearm laws, and to what extent do state court judges play a role in the enforcement of the federal laws? Those questions are the source of considerable confusion among members of the bench and bar throughout the country.

Perhaps the most common misunderstanding about the relationship between the federal and state firearm prohibitions arises when the two sets of laws address similar situations but differ significantly in their approach. For instance, we have seen that under the federal Gun Control Act (18 U.S.C. § 922(g)(8)), a person subject to a domestic violence protection order meeting specific statutory criteria is not permitted to possess a firearm while the order is in effect. By contrast, many states impose such a ban only if the issuing court exercises its discretion to prohibit firearm possession as part of the order's terms and conditions. In such a state, the question arises whether a respondent legally can possess a firearm when the order does not include a state-law firearm prohibition yet otherwise satisfies the federal Gun Control Act requirements. In more formal legal terms, some judges wonder whether the federal law, under the Supremacy Clause of the U.S. Constitution, preempts or supercedes the state law.

In fact, this is neither a situation that triggers the Supremacy Clause nor one that enables the state court judge to abrogate the federal firearm laws. Rather, both sets of laws remain in full force and both apply to this situation. The respondent would not be subject to a state-law firearm prohibition, because the judge opted not to invoke her authority to prohibit gun possession, but the respondent nonetheless would be subject to federal prosecution under the federal gun law, because the federal prohibition is independent of state law. This analysis holds true for all of the federal firearm statutes discussed above.⁵⁵

Confusion also arises over a state court judge's role in the enforcement of the 18 U.S.C. section 922(g)(8) prohibition when it is a state court order of protection that triggers the federal law. Especially in states where the protection order form provides a space for the issuing judge to indicate whether the federal prohibitions apply, some judges misunderstand their role. For

instance, some judges are under the misimpression that they can "over-ride" the operation of 18 U.S.C. section 922(g)(8) simply by not checking the appropriate space on a protection order form, or by including language in the order to the effect that the federal law does not apply against the respondent.

In fact, section 922(g)(8) does not rely upon state law definitions or standards to determine whether a person is prohibited from possessing a firearm. Rather, the question of whether a protection order issued by a state court triggers the section 922(g)(8) prohibition is determined solely by reference to the specific requirements of the federal statute. In practice, this means that the particular findings and terms of the order must be assessed against the federal requirements enumerated in section 922(g)(8), and inquiry must be made into whether the federal notice and hearing requirements were satisfied.

Thus, an otherwise qualifying protection order will still trigger the federal prohibition even if the issuing judge rules that the respondent is entitled to possess a firearm under state law, or if the judge fails to note on the order that the federal prohibition would apply (for example, by failing to mark a box on the form that indicates application of the federal prohibition). Simply put, state court judges do not determine the applicability of the federal law.⁵⁶

All of this is not to say, however, that the actions of state court judges do not profoundly affect the operation of the federal law. In fact, the nature of the conduct proscribed by the order or of the findings of fact included therein determines whether the federal law applies. For instance, by ensuring that their orders hew to the specific requirements of section 922(g)(8) (that is, that they contain the requisite findings or prohibitory language or both), judges can facilitate subsequent enforcement of the federal firearm laws. In addition, judges can promote the deterrent effect of the federal law by providing the respondent with both written and oral notice that they will be in violation of section 922(g)(8) if they possess or purchase a firearm while the protection order is in effect. By indicating on the order the relationship between the parties as well as the order's compliance with the due process requirements of section 922(g)(8), judges can also make it clear that a protection order triggers the federal prohibition. Other practical steps that state court judges can take to facilitate enforcement of section 922(g)(8) and the other federal laws are described in further detail below.

Full Faith and Credit and Firearm Prohibitions in Protection Orders

The Violence Against Women Act of 1994 included provisions requiring the interjurisdictional enforcement of protection orders. Codified at 18 U.S.C. sections 2265 and 2266, these "full faith and credit" provisions of VAWA require states and Indian tribes to enforce protection orders issued in other jurisdictions as if they had been issued by the enforcing state or

55. See NICS Frequently Asked Questions, *supra* note 29, at 1-2.

56. In fact, when FBI personnel conduct the NICS background check on a potential firearm purchaser and find that a protection order has been issued against the purchaser, they are required to perform an independent analysis to determine whether the order

triggers 18 U.S.C. § 922(g)(8) and do not rely upon state authorities' determinations. Personal communication with Fanny L. Haslebacher, Senior Attorney, National Instant Criminal Background Check Program, Federal Bureau of Investigation.

tribe, provided certain jurisdictional and due process requirements are met.⁵⁷ That mandate applies to firearm restrictions in protection orders and requires that such restrictions be enforced even if the enforcing jurisdiction does not authorize judges to include a firearm prohibition in a protection order.

Judges must be aware that violation of a firearm prohibition in an out-of-jurisdiction protection order can be the basis of a prosecution in the enforcing jurisdiction, using whatever enforcement mechanism is applied to violations of orders issued within that jurisdiction. Even if the protected party would not have been eligible for the order in the enforcing jurisdiction, and even if the duration of the order exceeds the maximum duration allowed for orders issued in the enforcing jurisdiction, VAWA mandates enforcement of the foreign order, including any firearm provisions.⁵⁸

EFFECTIVE JUDICIAL PRACTICE

Having a clear understanding of the law is essential to good judicial practice. It is also helpful to look at some specific examples that judges confront in courtrooms on a regular basis. The following are judicial practices that can help safeguard the community. By taking some simple steps in the courtroom and by encouraging clerks of court and other court personnel to ensure that relevant information is gathered and conveyed to the appropriate agencies, judges can do much to facilitate the effective operation of the state and federal laws described above. While we recognize that state law and procedures vary from jurisdiction to jurisdiction, the following should be of general applicability, regardless of a jurisdiction's idiosyncrasies.

Question the Parties About Firearms

Judges should take every opportunity to ask about the presence of firearms when issues of domestic violence are presented. All court forms that relate to civil and criminal domestic violence cases should have questions regarding the presence and possession of firearms. In the civil arena, such forms include applications for a civil protection order, ex parte and final protection order forms, requests for extension or renewal of an order, and requests to vacate or dismiss an order. In criminal cases, they include bail or condition-of-release orders, arraignment forms, and disposition orders. The court should inquire at each stage of the civil process whether the defendant owns or has access to firearms—an inquiry that should be made at both the ex parte hearing and at the hearing on the merits (final hearing). The petitioner may not know if the respondent has firearms, or may be aware of only some of the weapons. Therefore, judges should obtain from the respondent, under oath, a list of all firearms to help ensure that all are relinquished at the final hearing.

57. See 18 U.S.C. § 2265(a)-(b).

58. Specific questions regarding VAWA's full faith and credit provisions may be directed to the National Center on Full Faith and Credit at (800) 256-5883, ext. 2.

59. Recall that 18 U.S.C. § 922(g)(8) does not apply to ex parte protection orders because it requires that the order have been issued after a hearing of which the respondent received actual notice and

Such an inquiry is especially important at the final hearing if firearms were *not* removed at the ex parte stage, whether because state law does not permit removal at that stage, because the court did not so order, or because the defendant did not have any firearms at the time. To reassert control over the survivor or to seek revenge, a respondent subject to a protection order may attempt to acquire a firearm after being served with a protection order. If the temporary order did not include a prohibition against possession, the respondent may have legally obtained a firearm⁵⁹ and now may pose a significant threat to the survivor's safety.

Inquiry on the criminal side is equally important. At the bail hearing or arraignment, as well as upon a conviction, the court should inquire and have defendants state under oath those firearms that they own or have in their possession. This information will facilitate both the entry of a specific removal order and law enforcement's retrieval of the firearms. The court should remember that if the conviction is a qualifying misdemeanor crime of domestic violence under federal law, 18 U.S.C. section 922(g)(9) prohibits possession of firearms. If state law permits removal, the judge should order it; if not, the judge should notify defendants of the federal law and their responsibility to dispossess themselves of any firearms.

Understand the Nuances of "Possession"

As previously explained, under federal law and many state laws, an abuser may not, upon issuance of a civil protection order or conviction of a qualifying misdemeanor crime of domestic violence, "possess" firearms. Frequently abusers will report having "sold" their firearms to a friend or relative, coincidentally just at the time of the domestic violence incident. The court must determine whether this is a bona fide sale, and should request proof of the transaction. If it was a fraudulent transfer, further action may be warranted.

Another scenario is where the abuser transfers possession of firearms to friends or family members, feeling that this may help ensure retrieval at the end of the case. Such a scenario raises questions of "constructive possession."⁶⁰ If a respondent can ask for, or physically retrieve without barrier, any of the firearms transferred to a third party, such action may not constitute the requisite relinquishment. A respondent who has constructive possession of firearms has the opportunity to use them, which is an action expressly prohibited by law. A court

at which the respondent had an opportunity to participate.

60. See, e.g., *United States v. Quilling*, 261 F.3d 707, 712 (7th Cir. 2001) (defining "constructive possession" in a federal Gun Control Act case as existing when "a person . . . knowingly has the power and the intention at a given time to exercise dominion and control over an object, either directly, or through others," and affirming conviction based upon constructive, but not actual, possession).

Judges should take every opportunity to ask about the presence of firearms when issues of domestic violence are presented.

One effective monitoring mechanism used by some courts is to require that law enforcement provide an accounting . . . of all firearms removed

should order that all such firearms be truly relinquished, for instance, to a law enforcement agency.

A related scenario is presented when a respondent, who has been removed from the joint residence with the survivor, moves into his parents' home where access to firearms is available (whether they are the respondent's own weapons that he "sold" to them or

gave to them for safekeeping, or they are his parents' weapons). The court should consider ordering relinquishment of such weapons to law enforcement, especially if they are owned by the respondent.

Another possibility to consider under such circumstances is to have an arrangement with the federal authorities responsible for enforcing the federal firearm prohibitions, specifically the assistant United States Attorney assigned to domestic violence cases and agents of the Bureau of Alcohol, Tobacco and Firearms. They may send a letter to the respondent's relatives advising them of the federal laws that prohibit granting possession of firearms to those who are disqualified and warning them of the significant penalties attached to such a conviction. Of course, if the parents or others who have been asked to hold the firearms are present in the courtroom, the court may address them and so note in the record. In addition, it may be advisable to have them sign an acknowledgment of receipt of the court order, and include language to document that they were made aware of the federal prohibitions and the penalties that will attach if they allow the respondent access to the firearms.

Use All Available State and Federal Authority to Disarm Offenders

In addition to asking about the presence of firearms, judges should issue appropriate orders that will provide for the safety of the survivor. The court should utilize a risk assessment or "dangerousness" checklist of some type to determine the propriety of removing firearms if such removal is discretionary. The existence of prior protection orders, threats, firearms offenses, suicide attempts, and harm to pets are but a few of the factors that would suggest removal is appropriate, since all are indicia of potential serious violence. By the same token, in criminal cases such an assessment should be conducted at a hearing to set bail conditions, as well as at arraignment, and, if the defendant is convicted, as part of the dispositional order (whether incarceration, probation, parole, etc.).⁶¹ The court

should be careful to order relinquishment at all stages where it is mandatory under state law, including upon issuance of a protection order or upon conviction of a qualifying offense.

Build Accountability into the Process

Orders do not mean much, and judicial efforts to provide safety become moot, if an abuser is not made to follow a court order and, in the process, kills an intimate partner. In addition to issuing comprehensive orders, the court has a responsibility to ensure that orders are followed and that firearms are relinquished pursuant to whatever state process exists.

One effective monitoring mechanism used by some courts is to require that law enforcement provide an accounting to the court of all firearms removed, based upon the affidavit that the abuser signs in court. If an abuser refuses to relinquish the firearms, or if law enforcement is otherwise unable to obtain them, the court may, under appropriate circumstances, issue a search warrant for law enforcement to obtain the guns or a bench warrant for the defendant's arrest for failure to comply with the court order.

Provide Litigants with Notice of Federal Firearm Protections and Full Faith and Credit

No one wants surprises in this line of work, least of all survivors who may be unaware of the protections afforded or even abusers who may be unaware of the restrictions imposed. At all hearings that result in a state or federal firearm prohibition, the court should explain, on the record, all prohibitions that apply. Especially where only the federal prohibitions apply, providing oral and written notice is an important practice. While this may take a few extra minutes of court time, it offers the opportunity to clarify any questions the abuser may have, to create a record of "notice" to the abuser,⁶² and to send a message, in the presence of the survivor, that safety is a priority set by the court and the community. Perhaps most important, the court can also use this opportunity to help the survivor to understand that law enforcement or the prosecutor should contact federal authorities if there is a violation of the federal law.

In addition, the court should advise the parties that under 18 U.S.C. section 2265, VAWA's full faith and credit provision, the firearms restrictions will be enforced not only in their own jurisdiction, but across the country in all jurisdictions. Thus, possession of or attempts to purchase firearms in another jurisdiction will be thwarted, just as they will be in the issuing jurisdiction. Both survivors and abusers may be unaware that federal law mandates nationwide enforcement of protection orders and all of the restrictions therein.

Enter Court Orders into State and Federal Registries

To maximize enforcement of protection orders, it is imperative to enter them immediately into a state protection order registry, if one exists, and the federal registry maintained by the

61. In addition, judges considering whether to enter a deferred adjudication order (e.g., an adjournment in contemplation of dismissal) should conduct a dangerousness assessment and, if appropriate and permitted by state law, impose as a condition that the

defendant not possess firearms.

62. As explained above, however, notice of the federal firearm prohibitions is not necessary to support a conviction. See *supra* note 41 and accompanying text.

FBI (the National Crime Information Center (NCIC) Protection Order File). Some jurisdictions have an “automatic feed” mechanism so that a single entry will accomplish both. In some locations, court clerks enter the data directly from the court; in others, a different state agency is responsible for data entry. Whoever holds this responsibility should ensure that forms are completed appropriately so that the orders can be entered properly and accessed nationwide.

It is not uncommon for abusers to cross jurisdictional lines and violate protection orders or commit other offenses. If protection orders are not entered in registries, courts and law enforcement in the new jurisdiction may not be aware of the firearms prohibitions and may not mandate removal in appropriate circumstances (such as when a new victim seeks an order against the same individual, or the defendant attempts to purchase a weapon and the FBI or law enforcement in the new jurisdiction cannot locate the protection order in the federal registry).

To ensure that protection order information can be entered into the NCIC Protection Order File, the entering agency must have specific identifying information required by the federal database. Of particular importance is the respondent’s numeric identifier, which may be, among other things, a date of birth, Social Security number, or driver’s license number and expiration date. Some opportunities to capture this information arise at these points in the process: when completing a petition for a protection order, the survivor can also complete a defendant information sheet with descriptive information; upon service of a protection order, law enforcement can ask the respondent for proof of identity, including a driver’s license that would indicate a date of birth, or a Social Security card, or, at a minimum, officers can simply ask the respondent to state such information; and at the final hearing, the court can ask the respondent to provide the information prior to the commencement of the hearing.

Obtaining the numeric identifier will greatly facilitate entry of appropriate orders into the state and federal registries. This will not only provide enhanced protection to victims, but can also help to prevent any inappropriate arrests or detentions when identifying information is questionable.

Support the National Instant Criminal Background Check System by Ensuring that Your Court Is Responsive to FBI Requests for Information

The National Instant Criminal Background Check System (NICS) depends on timely, accurate information to prevent unlawful firearm purchases. Because the Brady Act allows the FBI (or an FBI-designated state agency in the case of “point of contact” states) only three business days to determine whether there is any reason why an individual should not be able to purchase a firearm, the relevant information needs to be in the NICS databases or readily available from the originating court in order for the system to be effective.

63. See GAO Report, *supra* note 54. Over the approximately the same three year period (from Nov. 30, 1998 to Oct. 7, 2001), the NICS background check blocked almost 200,000 gun purchases by persons who were legally prohibited from possessing a firearm. *Id.* at 19 (chart).

In addition to ensuring that the information from their protection orders is quickly and accurately entered into the NCIC Protection Order File, judges can facilitate NICS background checks by being responsive to requests from the FBI for information concerning their orders and final disposition records. Unfortunately, this is not always the case. The General Accounting Office’s recent study of the NICS system’s first three years of operation, from November 1998 to October 2001, revealed that 95% of the checks were completed within the three business days allotted.⁶³ The other 5% is troubling, however, because it represents permitted purchases by thousands of people who were prohibited by state or federal law from buying a firearm. In fact, the GAO found that nearly 3,000 domestic abusers were able to purchase firearms simply because the FBI was unable to complete the background check within the time allotted.⁶⁴

When the FBI later discovers that a sale should not have been authorized, the agency asks agents from the Bureau of Alcohol, Tobacco and Firearms to retrieve the firearm. That procedure, sometimes called a “delayed denial” retrieval, presents enhanced risks for the law enforcement officers who must take back guns from an individual who has already “legally” acquired them.

Significantly, the GAO also found that while 14% of the almost 200,000 blocked purchases were stopped because the purchaser had been convicted of a misdemeanor domestic violence crime, that prohibition accounted for 26% of the delayed denial retrievals.⁶⁵ As the GAO noted, this difference is “disproportionately large” and the unlawful purchases present considerable risk to public safety.⁶⁶

What exactly is causing this problem? Simply put, the FBI’s lack of timely access to complete and accurate information concerning the purchaser’s criminal history is to blame. Clearly, the FBI’s ability to perform Brady checks within the three-day period is impeded when jurisdictions do not enter their orders into the NCIC Protection Order File, do not update criminal history information as it becomes available, or, even less excusably, refuse or delay in responding to the FBI’s requests for clarifying information. Each missing piece of information means additional personnel time devoted to tracking it down from the relevant jurisdiction. Far worse, when the necessary information is not found quickly enough, a purchase may be allowed by default and, as occurred in the July 2001 case described at the beginning of this article, the abuser may use the firearm to kill the victim. Timely entry of such

64. See *id.* at 19 (chart).

65. See *id.* at 18.

66. See *id.*

Clearly, the FBI’s ability to perform Brady checks within the three-day period is impeded when jurisdictions do not enter their orders into the NCIC

A simple and effective procedure to prevent the return of firearms to disqualified individuals has been implemented in New Hampshire.

data is an important element in promoting public safety, especially for an at-risk population. Judges should take all steps necessary to ensure that all relevant information regarding their orders and criminal case dispositions is readily available to the NICS system and that their courthouses are responsive to FBI requests.

Develop a Safe Returns Process

When an abuser petitions for return of firearms because a civil protection order expires or is dismissed at the request of the petitioner, or because a qualifying misdemeanor domestic violence conviction has been expunged, the court should take all reasonable steps to ensure that it does not authorize return of the firearms to a person who may nonetheless be disqualified. A typical example is where a civil protection order expires after its one-year duration and the survivor, after being notified, decides not to apply for an extension. On the basis of these facts alone, it would appear appropriate to authorize the return. However, the same respondent may be subject to a protection order issued by another court in the same state (potentially even the same court) or in another state, protecting a *different* victim. Or the abuser may have previously been convicted of a misdemeanor crime of domestic violence (not expunged) that triggered a lifetime disqualification from possessing a firearm.

The disqualifications follow and flow with the individual abuser, not the case. Thus, it is essential that the court perform a search to determine whether there is any other pending case or cause that would impose a state or federal firearm prohibition on the abuser. It is not enough simply to examine the pending case. By so limiting its search, the court may inadvertently issue an order instructing a police department to return a gun to an individual who is legally prohibited from possessing one.

In addition, by providing notice to the survivor that the abuser has petitioned for a return of firearms, the court may be able to obtain supplementary information from the survivor that will assist in determining whether the abuser is a disqualified person. Of course, notice to survivors will also enable them to take steps, if necessary, to plan for their own and their children's safety in light of the fact that the abuser will soon regain legal access to firearms.

A simple and effective procedure to prevent the return of firearms to disqualified individuals has been implemented in New Hampshire. The state statute on protection from abuse requires the court to conduct a hearing, with notice to the vic-

tim, the defendant, and the relevant law enforcement agency, before any firearms can be returned.⁶⁷ The courts and the New Hampshire Department of Safety have developed a process in which the defendant completes a motion and affidavit for return of firearms, tracking the information from the federal form used for the Brady background check. The Department of Safety runs a records check to determine whether there is any reason the firearms should not be returned to the defendant, including the existence of a disqualifying protection order, a disqualifying misdemeanor conviction, or any other disqualifying factor (such as a drug conviction). If such a reason is found, the defendant is given the opportunity to rebut the evidence at a hearing. If no reason is found, the court issues an order authorizing the return. The victim is aware of the petition for return of firearms by virtue of having received notice.

This simple process is a good example of collaboration between agencies and branches of government to promote public safety. The New Hampshire Attorney General, the state coalition against domestic violence, and the state legislature all recognized the inherent value in such collaboration and worked together to implement it.

Facilitate the Revocation of Firearm Permits

The GAO's recent report on the NICS program identified a threat to survivor and community safety posed by state firearm-permit programs. Twenty-six states issue so-called "conceal carry" permits that exempt the permit holder from a NICS background check when he or she purchases a firearm.⁶⁸ In 16 of those states, *all* such permit holders are exempt from background checks.⁶⁹ Although states have procedures for the revocation of permits when the holder loses eligibility, for instance, if the holder is convicted of a misdemeanor crime of domestic violence or becomes subject to a protection order, there appears to be very little effort to assure that permits are in fact surrendered. In its study, the GAO visited six states that issue conceal carry permits and found that only two actively seek out permit holders to retrieve revoked permits. Only one of the states imposes a criminal penalty against those who do not surrender revoked permits.⁷⁰

Absent active monitoring of permit holders and swift recovery of revoked permits, a person with an invalid permit may nonetheless be able to use it to evade a background check and purchase a gun. In fact, that is exactly what happened in the Christmas Day 2001 slayings described in the first section of this article.

Judges can facilitate revocation and recovery of conceal carry permits by ensuring that their orders are transmitted to the permit authority—be it a court, law enforcement, or another agency—by entering them into a statewide registry or by other means. If the court itself is the permit authority, as was the case in the Christmas Day murders, judges should

67. See N.H. REV. STAT. ANN § 173-B:5(X).

68. See GAO Report, *supra* note 54, at 12.

69. See *id.*

70. See *id.*

ensure that a system is put in place to actively monitor permit holders for potential disqualifying events, including convictions and the entry of protection orders against them. One possible monitoring method described in the GAO report involves electronic comparison of permit holders' names against state criminal records databases.⁷¹ If authorized by state law, judges should issue orders requiring permit holders to surrender revoked permits and use bench warrants to authorize law enforcement to arrest those who fail to comply.

CONCLUSION

Although the phrase may sound trite, domestic violence and firearms truly can be a lethal combination, endangering adult and child survivors of abuse as well as the community at large. This is not to say that every abuser who owns or possesses firearms will use them to threaten, kill, or injure others. Indeed, most do not. However, the firearm prohibitions enacted by Congress and the states were designed to be prophylactic, to prevent harm and promote safety under circumstances in which reasonable restrictions on firearms possession are warranted.

State and federal laws concerning firearm relinquishment for an individual who is subject to a protection order or has been convicted of certain classes of misdemeanor crimes are often complex. We hope this article has helped to clarify the elements and scope of the federal laws and their relationship to the analogous state laws. We also hope judges reading this article will have learned some useful strategies that they can incorporate into their daily practice to facilitate compliance with and enforcement of their orders of protection, as well as to help ensure effective operation of the applicable state and federal firearms laws.



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71. See *id.* at 13.