

Firearms Cases: Building an Arsenal for the Defense

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Introduction. It has only been in recent years that Congress has recognized there is a connection between the availability of firearms and violent crime. Such evidence would seem to justify tighter controls on the accessibility of firearms. However, strong lobbying efforts by firearms manufacturers and owners have prevented stringent regulation of firearms sales generally. Instead, the focus of most legislation has been increased punishment for criminals who use or possess firearms.

Unlike illegal drugs, from which citizens are protected -- even to the point that they may be incarcerated for personal use -- firearms are fairly easy to legally obtain. The government has done little to slow the flow of legal weapons. It is usually when a prohibited person, a prohibited firearm, or a prohibited use, is involved that law enforcement steps in. Then the response is extremely punitive.

The alleged justification for harsh punishment is that it deters future crime. Deterrence is a misnomer. What the laws actually do is incapacitate. Deterrence and incapacitation are different criminal justice objectives. Deterrence seeks to affect the actions of others in society. Incapacitation seeks to affect the person imprisoned. Criminal defense lawyers practicing in federal court know that defendants rarely have any idea about their potential sentence until after they are charged. Few are deterred, but many are incapacitated.

The criminal justice system actually promotes ignorance of potential sentences. Habitual criminals are often trained, by previous encounters with state laws, that mere firearm possession is not so serious. They have no expectation that they are also subject to federal laws with much greater sentences.

The focus of this article is to provide substantive law to someone preparing to defend a firearms case in federal court. A comprehensive review would be a lengthy treatise. This is merely to point lawyers in the right direction.

Prohibited Persons. Some persons are prohibited by federal law from possessing any firearms at all. These include: felons, fugitives, drug users, adjudicated mental defectives, illegal aliens, dishonorably discharged former military, former U.S. citizens, subjects of restraining orders, domestic violence offenders (18 U.S.C. §922 (g) (1) - (9)), and those under indictment (n).

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It is unlawful for any of those categories of persons:

...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 or foreign commerce. *Id.*²

Some categories are prosecuted more than others. I have never represented anyone charged with possessing a firearm after they renounced their U.S. citizenship. I have represented many convicted felons.

In East Texas, where I first became an Assistant Federal Public Defender, there were counties populated by many probationers and parolees who owned and used firearms. It is difficult to convince a man from the rural South that just because he had done time for burglary 20 years ago, he has to give up his deer rifle. Agents of the Bureau of Alcohol, Tobacco, and Firearms (ATF), would merely ask local sheriffs about who had recently been arrested with a firearm. Few sophisticated investigative techniques were necessary.

The first aspect of defending someone charged as a prohibited person is to determine whether the prohibited status can be proven. Someone's citizenship status, criminal record, or military history are elements that must be proven beyond a reasonable doubt. *See United States v. Green*, 175 F.3d 822 (10th Cir.), *cert. denied*, 120 S.Ct. 132 (1999) (Government failed to prove prior conviction beyond a reasonable doubt); *See also United States v. Gilliam*, 167 F.3d 628 (D.C. Cir. 1999). However, in some cases, the proof is so obvious that a defendant risks drawing too much attention to that fact by contesting it.

In *Old Chief v. United States*, 519 U.S. 172 (1997), the defendant had a prior felony conviction that he preferred not to disclose to the jury. He offered to stipulate that he had been convicted of a crime punishable by more than one year in prison. The prosecutor refused. The Supreme Court held that under those circumstances, the prejudice of describing the conviction outweighed its probative value. Therefore, if your client has a particularly ugly prior, that is easily proven, *Old Chief* may keep it from the jury.

If the facts regarding prohibited status are not so damaging, there are cases where contesting them can be productive. A defendant who has not lost his right to possess firearms has a defense to being a felon in possession of a firearm. *United States v. Indelicato*, 97 F.3d 627 (1st Cir.), *cert. denied*, 117 S.Ct. 1013 (1997); *See also United States v. Willis*, 106 F.3d 966 (11th Cir. 1997) (Under Florida law, nolo contendere plea was not prior conviction for felon in possession).

Some states will restore a felon's civil rights, including the right to possess firearms. *See United States v. Norman*, 129 F.3d 1393 (10th Cir. 1997) (State restored right to possess firearms); *See also United States v. Dahler*, 143 F.3d 1084 (7th Cir. 1998). The restoration of the

² Under (n), mere possession is insufficient. The defendant must receive the firearm.

right to possess firearms, by the state of conviction, is a defense to a federal charge of being a felon in possession of a firearm. 18 U.S.C. §921 (a) (20). However, many states will not remove the disability under any circumstances. Most states require that the defendant formally petition for the restoration of rights. A pardon or an expungement are also exceptions absolving prior felons. *Id.*

In some cases, the defendant's lack of knowledge about his prohibited status may be a defense. For instance, a defendant may not have known he was under indictment when receiving the firearm. *United States v. Hayden*, 64 F.3d 126 (3rd Cir. 1995). A defendant held as an accessory, may not have known that his partner was a felon. *United States v. Graves*, 143 F.3d 1185 (9th Cir. 1998). However, when your client wants to argue that he did not know his own prior felonies prohibited him from possessing firearms, refer him to the old adage about ignorance not being a defense. *See United States v. Langley*, 62 F.3d 602 (4th Cir. 1994).

Possession or transfer of a firearm by a prohibited person generally has a maximum punishment of ten years imprisonment. 18 U.S.C. §924 (a) (1). The significant exception is the Armed Career Criminal Act (ACCA). 18 U.S.C. §924 (e). This applies only to someone convicted as a felon in possession of a firearm, who additionally has three prior "violent felony" and/or "serious drug offense" convictions. The definitions of these terms are important, and are not to be confused with the similarly sounding "Career Offender" provisions of the sentencing guidelines. U.S.S.G. §4B1.1. Neither, §4B1.1, nor the "Three Strikes" provisions (18 U.S.C. §3559 (c)), apply to prohibited persons charged with possession of a firearm.

It is crucial to remember when doing legal research that these three enhancements have different requirements and definitions. A case defining a "crime of violence" under the guidelines' career offender enhancement, may neither be controlling nor persuasive as to the ACCA.³

When the ACCA applies, the minimum punishment is fifteen years imprisonment. 18 U.S.C. §924 (e). Prior convictions under the ACCA must occur before the felon in possession charge. *United States v. Richardson*, 166 F.3d 1360 (11th Cir. 1999); *United States v. Murphy*, 107 F.3d 1199 (6th Cir. 1997). The priors must be from separate transactions. *United States v. McElyea*, 158 F.3d 1016 (9th Cir. 1999). The sentencing guidelines proportionately raise the defendant's offense level and criminal history. U.S.S.G. §4B1.4. No notice to the defendant is necessary. However, U.S.S.G. §5K2.1 may allow a court to depart down to the fifteen year minimum. *United States v. Sanders*, 97 F.3d 856 (6th Cir. 1996).

Prohibited Firearms. There are certain firearms that cannot be possessed without special registration with the federal government, and there are others that may not be possessed at all.

³ For example, burglary of a nondwelling is not a crime of violence under the guidelines. *United States v. Bennett*, 108 F.3d 1315 (10th Cir. 1997); *United States v. Hicks*, 122 F.3d 12 (7th Cir. 1997). In contrast, common law burglaries are covered under ACCA. *See Taylor v. United States*, 495 U.S. 575 (1990).

The requirement of registration is contained in 26 U.S.C. §5841 et seq. Cases prosecuted under this chapter, generally concern short-barreled shotguns and rifles, silencers or destructive devices. For instance, it is a crime merely to possess a shotgun with a barrel less than eighteen inches in length, not registered in the National Firearms Registration and Transfer Record. *Id.*

It is illegal for anyone to possess firearms with obliterated or altered serial numbers, stolen firearms or ammunition, machineguns, or any firearm designed to avoid detection by security devices. 18 U.S.C. §922 (j), (k), (o), (p). Certain semiautomatic firearms are also prohibited. (v).

It is not a defense to claim that the defendant did not know that a firearm was prohibited. It is a defense that the defendant did not know the firearm had a prohibited attribute. *United States v. Staples*, 511 U.S. 600 (1994).

For example, if a person took possession of a rifle without knowing that it was fully automatic, that lack of knowledge would be a defense. *United States v. Rogers*, 94 F.3d 1519 (11th Cir.), *cert. denied*, 118 S.Ct. 1179 (1998); *United States v. Spinner*, 152 F.3d 950 (D.C. Cir. 1998). It is the prohibited physical characteristic of the firearm of which the defendant must be ignorant, not the law making it a prohibited firearm. *United States v. Gergen*, 172 F.3d 719 (9th Cir. 1999) (Jury must decide whether defendant knew shotgun had been shortened); *United States v. Edwards*, 90 F.3d 199 (7th Cir. 1996).

Prohibited Use. Whether or not the defendant is a prohibited person, and whether or not the weapon is a prohibited firearm, there are some uses from which a firearm is prohibited. Apart from the underlying offense, it is a separate crime to use, carry or possess a firearm in furtherance of, during, and in relation to, a crime of violence or a drug trafficking crime. 18 U.S.C. §924 (c) (1) (A).

This statute was amended in 1998 to cure a defect. In *Bailey v. United States*, 516 U.S. 137 (1995) the Supreme Court found that the previous statute's language criminalizing mere possession was overly broad. Many cases were reversed because the government had only shown passive use of a firearm, unrelated to the underlying drug trafficking charge.

When researching cases on sufficiency of possession, remember that while many of the old reversals may still be helpful, the statutory language has changed. However, the definition of carrying was not changed. See *United States v. Sanders*, 157 F.3d 302 (5th Cir. 1999); *United States v. Mount*, 161 F.3d 675 (11th Cir. 1999) (Insufficient evidence of carrying).

Congress reacted by not only tightening the wording, but increasing the penalties. Before, using or carrying a firearm under §924 (c) required a five year sentence, consecutive to any other. A second or subsequent conviction was twenty years.

Under the current statute, a single firearm carries a consecutive sentence of "not less

than” five years. If that firearm was brandished the punishment is not less than seven years, and if it was discharged the sentence shall not be less than 10 years. Short-barreled firearms and semiautomatic assault weapons also start at a minimum 10 years. A machinegun, silencer or destructive device begin at minimum, consecutive 30-year sentences. Subsequent convictions for the five, seven and 10-year minimums start at 25, and those normally 30 then become life.

The sentencing guidelines have not yet been amended to account for the “not less than” language. Section 2K2.4 simply says, “the term of imprisonment is that required by statute.” This fails to explain when a court can or should sentence someone above the minimum, and by how much. Under these circumstances, the appropriate response by defense counsel should be that any sentence over the minimum is an upward departure, and must be justified as such.

Multiple 924 (c) convictions, even in a single proceeding, are counted and will cause the second conviction to raise the minimums to the 25 and life categories. *Deal v. United States*, 508 U.S. 129 (1993). However, each conviction under the statute must be based upon separate predicate offenses (i.e., distinct crimes of violence or controlled substance offenses). *United States v. Anderson*, 59 F.3d 1323 (D.C. Cir.), cert. denied, 516 U.S. 999 (1995); *United States v. Stephens*, 118 F.3d 479 (6th Cir. 1997); *United States v. Atcheson*, 94 F.3d 1237 (9th Cir.), cert. denied, 117 S.Ct. 1096 (1997).

Most other cases involving illegal firearm use are sentenced pursuant to U.S.S.G. §2K2.1. That section has upward adjustments for prohibited persons, prohibited firearms, offense conduct, and prior convictions for crimes of violence or controlled substance offenses, in calculating the base offense level. There is even a downward adjustment for possessing firearms for lawful sporting purposes or collection. *United States v. Moit*, 100 F.3d 605 (8th Cir. 1996) (Qualified for sporting purpose or collection reduction).

Using a firearm in connection with another felony requires an upward adjustment or a cross reference to the other offense. However, the act of stealing a firearm, and simultaneously possessing it, is not using it in connection with another felony. *United States v. McDonald*, 165 F.3d 1032 (6th Cir. 1999). The mere possibility that another offense could have been charged is not sufficient evidence that the firearm was used in connection with another offense. *United States v. Sanders*, 97 F.3d 856 (6th Cir. 1996).

Some other offenses listed in Chapter Two (Offense Conduct) of the sentencing guidelines, contain upward adjustments if a firearm was used in connection with the offense. These include offenses not normally associated with using a firearm, such as fraud §2F1.1 (b) (6). None of these increases, including those under §2K2.1, can be applied when the defendant is also getting a consecutive §924 (c) sentence for the same conduct. *United States v. Knobloch*, 131 F.3d 366 (3rd Cir. 1997).

Sometimes, without notice, a sentence that would appear to be covered by §2K2.1, is actually under the authority of §4B1.1 (Career Offender). This occurs when a defendant, who is

at least 18 years old, is charged with a crime of violence⁴ or controlled substance offense, and that defendant has two prior convictions that meet either of those definitions. The priors must be less than 15 years old. *United States v. Covington*, 133 F.3d 639 (8th Cir. 1998). Then both the defendant's base offense level and criminal history category increase dramatically.

The most serious potential enhancement is the Three Strikes law. 18 U.S.C. §3559 (c). Its mandatory life sentence should be no surprise as there are specific notice and pleading requirements prior to trial or plea. The charged offense must be a serious violent felony and the other two strikes must be the same, or a drug offense punishable by a 10-year minimum ("serious drug offense"). The type of firearm use that qualifies as a serious violent felony is similar to the elements of 18 U.S.C. §924 (c). *See United States v. Gottlieb*, 140 F.3d 865 (10th Cir. 1998).

Conclusion. There are many ways your clients may be punished for possessing or using a firearm in federal court. Some are substantive offenses. Others are punishment enhancements. Many of these severe punishments require no notice to you or your client before you plead guilty. It is understandable for your client to be dazed by these punitive measures. You do not have that luxury.

⁴ Most cases involving the element of using a firearm are crimes of violence. However, possession of a firearm by a felon is specifically excluded as a crime of violence. §4B1.2, Application Note 1.