



## **RESTORING THE RIGHT TO POSSESS FIREARMS**

This office receives frequent inquiries regarding restoring one's right to possess firearms after those rights are lost due to a criminal conviction, mental health evaluation or commitment, the issuance of a protective order, or by other means. This memorandum summarizes the law regarding whether a criminal conviction (or convictions) or other governmental restriction suffered in the past prohibits someone from owning firearms, and, if so, whether the restriction(s) can be cleared from a person's records so that they could once again legally own or possess firearms.

Due to increased regulation of the possession of firearms and the expansion of the types of convictions (increasingly relatively minor) and other proceedings that result in a firearms possession prohibition, an increasing number of individuals are finding themselves subject to firearm restrictions -- often well after a conviction is suffered. Because of our experience in this area and our positive relationship with several self defense civil rights organizations, we have been referred a large number of inquiries on this subject matter in recent years. We are now one of only a very few firms that have developed this practice area.

In attempting to assist our clients, we discovered that the rehabilitation of criminal records is a very arcane and narrow legal specialty. While much of the work involves law and motion practice and court appearances, some of the "fact gathering" work does not necessarily require a legal background. In attempting to provide good value to our clients, and to assist our clients in the most cost effective manner possible, we have developed a system that streamlines the evaluation of the chances of success in each case and provides our clients with options in deciding whether to proceed and how much work they would like us to perform on their behalf. This letter and the enclosed forms, will facilitate the process and provide you with background on the system and the court review process.

### **I. BACKGROUND ON PROHIBITED CATEGORIES**

Historically, the vast majority of people that were legally prohibited from possessing firearms were prohibited because of a felony convictions or commitment as a mental patient. Significantly, the events which trigger a firearm possession disability differ under state and federal law. A remedy that may restore one's rights under state law may not work to restore one's rights under federal law, and visa versa.

Before 1991 in California, only felony convictions, along with a very few misdemeanor convictions, resulted in a firearm prohibition. (This pre-1991 California law only applied to handguns, but convicted felons were still prohibited from possession of any firearm under federal law). The California prohibition was permanent unless a full pardon was granted by the Governor, or a felony conviction was reduced to misdemeanor by the court. Then, on January 1, 1991, thousands of California gun owners with certain misdemeanor convictions found themselves prohibited from owning a gun for 10 years. Many of these old misdemeanor convictions, such as simple assault or battery, did not even involve firearms. Since 1991, the list of misdemeanor convictions which result in this ten year ban on firearms possession has been continuously expanded. Some misdemeanors involve violence, others do not (for example, unlawful sale or negligent discharge of firearms).

Throughout the country, including California, a person convicted of a misdemeanor domestic violence offense (California Penal Code section 273.5) is forever prohibited from possessing firearms under Federal law. This is due to the "Lautenberg Amendment," which became effective on September 30, 1996. Under 18 U.S.C.A. §922(g)(8),(9) a person convicted of a misdemeanor domestic violence offense is prohibited from possessing firearms for life, unless the conviction has been "expunged," "set aside," or the person has had their

civil rights restored. Unfortunately there is no California law that will completely "expunge," "set aside," or "restore" a person's civil rights. However, this does not preclude non-statutory relief.

Today in California, even persons who have never been convicted of any crime, nor been committed as mental patients, may nonetheless find themselves legally prohibited from owning a gun. This results primarily from recent new laws affecting individuals subject to a restraining order, or with only limited contact with the mental health system.

## **II. DETERMINING FIREARM ELIGIBILITY**

Often, clients are uncertain of whether a previous conviction prohibits them from owning a firearm. To answer this question, first review the list of categories that prohibit a person from possessing a gun. The list is on the DOJ website, [www.caag.state.ca.us/firearms/index.html](http://www.caag.state.ca.us/firearms/index.html) or [www.caag.state.ca.us/firearms/forms/pdf/sb950frm1107.pdf](http://www.caag.state.ca.us/firearms/forms/pdf/sb950frm1107.pdf).

If you are still uncertain if you can possess firearms, then you can have a "Personal Firearms Eligibility Check" done by the California Department of Justice to determine whether or not you may own and possess a firearm. The DOJ will review its files and tell you if you are prohibited according to their records (which aren't always accurate). Copies of the PFEC forms are contained in the package we send out to potential clients, or from the DOJ at [www.caag.state.ca.us/firearms/forms/pdf/pfecapp.pdf](http://www.caag.state.ca.us/firearms/forms/pdf/pfecapp.pdf).

We strongly caution against filling out the paperwork to buy a firearm if you are uncertain of your status. These retail dealer forms are signed under penalty of perjury, and require you to state that you are not prohibited from owning a firearm. Answering falsely is itself a crime.

If you possess firearms and then learn that you are a "prohibited person," you are committing a felony by continuing to possess them. To avoid prosecution you should immediately legally transfer possession of the firearms to an individual who is not prohibited from possessing them. Forms and information about this is also contained in this package. We can assist with this as well if necessary.

## **III. GENERAL PRINCIPLES OF RECORD CLEARANCE**

Whether your right to possess a firearm can be restored depends on the reason you are prohibited from possessing one. Often, criminal convictions result in a firearms prohibition. But firearm restrictions may also be imposed through administrative tribunals, restraining order and injunction proceedings (usually associated with divorce or domestic disturbances), or through mental health care providers.

### **1. Criminal Convictions**

Criminal convictions commonly result in a firearm prohibition being imposed. A criminal conviction may be suffered in state or federal court.

Typically, federal convictions are difficult to clear, primarily due to the lack of federally authorized funding for the Bureau of Alcohol, Tobacco, and Firearms to process restoration of firearm rights applications. The case law on this subject is rapidly evolving as appeals progress through the court system.

By contrast, California state court convictions can sometimes be cleared. The court review process involves a combination of legal and equitable considerations, and often involves law and motion practice, extraordinary writ filings, and multiple court appearances.

Please note, what is typically called "expungement" (i.e. a conviction set-aside under Penal Code §§1203.4 or §§1203.4a) does not restore your right to own a gun. Depending upon the nature of your conviction and whether you are eligible, you may need to obtain relief by means of a pardon, a 17b motion, or a Penal Code §§12021(c)(3) petition.

Generally, if you have a straight felony conviction (that is, the statute can only be charged as a felony, not as either a misdemeanor or a felony) the record clearance process is more difficult. It may even be necessary to pursue a full pardon from the Governor's office to restore your gun rights. Even the Governor cannot restore

gun rights if the felony involved the use of a dangerous weapon. Pursuing a pardon is a lengthy process, but it can be accomplished in cases where the person seeking the pardon has led an exemplary life since the conviction.

If you were convicted of an offense which could of been charged as either a misdemeanor or a felony (called a "wobbler"), you were not sentenced to state prison, and have successfully completed probation, we may be able to reduce the offense from a felony to a misdemeanor and restore your right to own a gun via a Penal Code section 17(b) motion.

If you were convicted of a misdemeanor or offense which carries a ten year prohibition, there are ways to regain your right to possess prior to the expiration of the ten years.

In some instances, including misdemeanor domestic violence convictions, a person may no longer suffer a restriction imposed by the State of California, however, a person may be subject to a Federal lifetime restriction. These cases pose further problems as the Federal government and the Department of Justice do not currently recognize standard California methods of firearm rights restoration.

Criminal convictions suffered in other state courts present unique problems. Often, an attorney from the state where the conviction was entered will need to clear the record there before the California firearm disability can be eliminated.

## **2. Mental Health Evaluations or Commitments**

If you were taken in for a mental health evaluation and can't own firearms pursuant to that procedure, we may be able to restore your rights through a separate mental health hearing and help you get back any firearms that were seized.

Section 5150 provides for detention and a 72-hour mental health evaluation of a person considered a danger to himself/herself or others. A 72-hour hold will result in a loss of firearm rights in California for 5 years. Once a facility under a section 5150 hold, if you receive a 5151 evaluation and are admitted under 5151 and 5152, you cannot possess firearms for five years under the provisions of Welfare and Institutions code section 8103 in California and under Federal law for life.

To terminate the five-year period early you must file a petition to restore your rights under section 8103. In order to do this, you should be examined by a psychiatrist or psychologist. Assuming favorable findings, at the hearing on your petition the psychiatrist or psychologist can provide expert testimony that you are a person likely to use firearms in a safe and lawful manner.

If you are taken into custody under section 5150, any firearms you owned or possessed may be seized. You will receive a request for forfeiture within thirty days from your release. It is imperative that you respond to this petition within thirty days or you will forfeit your rights to the firearms. We can help you try to get your firearms back by responding to the petition and representing you in a hearing in court.

In 2007, the Federal Government passed the NICS (National instant Check System) Improvement Act (NIA). The NIA revised the reporting and recording requirements for mental health cases resulting in firearm prohibitions. The act also provided funding for states who complied with the requirements. Additionally, the act allotted money to encourage states to adopt firearms possession rights restoration procedures, and provided that if those procedures met federal standards and were satisfactorily completed, the state restoration would also serve to restore firearm possession rights under federal law. Previously, there had been no way to have the federal disability lifted after a mental health commitment. The ATF and FBI are currently reviewing the procedure as to how firearm rights are restored under California law to determine whether they satisfy federal NIA requirements. Since California has some of the most comprehensive procedures in the country for having rights restored after a mental health commitment, we expect that California's rights restoration procedures will be approved. Once the procedure is approved the process to reinstate federal firearm rights in California can proceed. We are monitoring this process and can hold your file until the approval is issued if this is appropriate for your situation.

### **3. Restraining Orders and Injunctions**

In California, being the subject of certain restraining orders results in a firearm disability, and frequently a court Order to dispose of one's firearms within 24 hours. Also, under Federal law, being the subject of a restraining order obtained by an intimate partner prohibits possession of firearms. To restore your rights before the Order expires, the restraining order must be terminated or modified by the court.

### **4. Probation Conditions**

Often courts impose "weapons conditions" as a condition of probation in a criminal case. This typically prohibits the possession or ownership of any dangerous or deadly weapons, usually for three years. This is a form of injunction, and the probation order must be modified (or expire) before a firearm can be possessed. Sometimes, modifications can be inserted to allow the possession of firearms for specific purposes, such as hunting, sport shooting, and self-defense.

### **5. DOJ Record Keeping Errors**

The California Department of Justice database of criminal records and other firearm prohibitions is often in error. Unfortunately, DOJ's errors are not corrected by local law enforcement or even the courts. Failure to forward the proper records from a court to the DOJ, or simple clerical errors, sometimes result in a person being improperly classified as subject to a firearm restriction. We have had great success in getting the documentation through the DOJ bureaucracy and correcting these records.

### **6. Other Prohibitions**

Other specific prohibitions on firearms ownership require various other procedures.

## **IV. OBTAINING THE RECORD FOR REVIEW**

We have no interest in pursuing a right restoration in court without a reasonable likelihood of success. Before we can ascertain whether or not a criminal record can be cleared so that firearms can once again be possessed, we must determine the exact nature of the criminal conviction(s) suffered, or other procedure that resulted in a firearm disability. To do this, the official records must be obtained from the state and/or federal governmental agencies and/or the hospital(s) maintaining the records.

With a federal court conviction, the records with the Federal Bureau of Investigation and the U.S. Courts must be obtained. You can get your record from the FBI by sending a letter asking for it, along with your full name, address, date and place of birth, a set of fingerprints, and a check for \$17.00 payable to the Treasury of the United States. Address this to: FBI, Identification Division, Attn: FOIA, Washington, D.C. 20537-9700. For Court records ask the clerk at the courthouse where your conviction took place.

With a state court conviction, records must be obtained from the California Department of Justice, as well as the local courthouse where the case was heard. Call (916) 227-3822 for information and forms. The state courthouse where your case was heard will have the records on your criminal case available through the court clerk's office, or will know where the records are being stored. Contact the clerk's office and ask for a copy of the "docket sheet" in your case. That docket sheet should reflect each time you were in court, and what happened at each court appearance. That docket sheet will also show exactly which criminal statute you were convicted of violating.

For health care records, the treating facility's records must be obtained. Contact the facility for guidance on their procedures. An authorization to release medical records form may be needed for this office to obtain the records if you encounter difficulty.

We need these documents before we can proceed to evaluate your case. Once these records are obtained we can then evaluate the likelihood of succeeding in having the criminal conviction cleared.

## **V. EVALUATION OF RECORDS**

Once we have the necessary information from the relevant agencies and courts, we can evaluate the possibility of, and the degree of complexity involved in restoring your rights, and can better predict the costs involved. Our fee for assisting you in performing this record search, obtaining and assembling these records, examining these records, and evaluating the possibility of having your record cleared is \$500.00.

**VI. COURT AND ADMINISTRATIVE PROCEEDINGS**

If we determine that the chances of successfully restoring your rights are reasonable, and provided you agree, we can begin the process of seeking judicial review and an Order restoring your rights. Our fees for these procedures vary based on the complexity of the issues, whether a special motion or writ needs to be filed, the number of appearances required in court, the nature of the underlining conviction(s), and the specific facts of each case. Most often, we are able to resolve these record clearance matters for a total \$5,500.00 fee (which includes the \$500.00 fee for the initial review and obtaining the records). Please remember, there is no guarantee that your rights will be restored. We will advise you of what we think your chances are, and will decline to proceed on your behalf if we don't think you have a reasonable chance of prevailing.

**VII. CONCLUSION**

Please review all the materials we have sent you before contacting the office again with questions. Once you have completed the questionnaire included with this package and returned it to our office, we will be happy to answer any questions you may have.